Rose v Via Alloro, Inc.
2013 NY Slip Op 33387(U)
December 6, 2013
Supreme Court, New York County
Docket Number: 102350/2010
Judge: Lucy Billings

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. PART 46
Justice

Index Number : 102350/2010
ROSE, BRUCE
VS.
VIA ALLORO
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). 2

Upon the foregoing papers, it is ordered that ~~this motion is~~ :

The court denies the motion by defendant Via Alloro, Inc., for summary judgment, pursuant to the accompanying decision. C.P.L.R. § 3212(b).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
DEC 26 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/6/13

Lucy Billings, J.S.C.

LUCY BILLINGS J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
----------x

BRUCE ROSE,

Plaintiff

- against -

VIA ALLORO, INC. d/b/a ANGELINA'S BY THE WATER a/k/a ANGELINA'S RISTORANTE, and 44 MAIN ST. RICHMOND, LLC,

Defendants

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Index No. 102350/2010

DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants to recover damages for personal injuries sustained October 3-4, 2009, in Richmond County, on premises that defendant 44 Main St. Richmond, LLC, owned and leased to defendant Via Alloro, Inc., which owned and operated a restaurant there. Plaintiff claims he was injured while descending a dimly lit staircase in the restaurant.

Defendants separately move for summary judgment dismissing plaintiff's complaint against each defendant. C.P.L.R. § 3212(b). 44 Main St. Richmond also seeks summary judgment dismissing Via Alloro's cross-claim for contribution and on a cross-claim against Via Alloro for indemnification. 44 Main St. Richmond's answer, however, does not include any cross-claim. Nevertheless, for the reasons explained below, the court grants 44 Main St. Richmond summary judgment dismissing plaintiff's claims and Via Alloro's cross-claim against 44 Main St. Richmond,

rendering any cross-claim by defendant owner academic. The court denies Via Alloro summary judgment dismissing plaintiff's claims against defendant tenant.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, defendants must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). If defendants satisfy this standard, the burden shifts to plaintiff to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the defendants' motions, the court construes the evidence in the light most favorable to plaintiff. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 37 (2004). If defendants fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in plaintiff's opposition. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

III. DEFENDANTS' LIABILITY

Plaintiff claims that, due to the dim lighting and the slippery surface on the stairs, in violation of the New York City Building Code, the heel of his left shoe caught the edge of a step, causing him to fall. Defendants deny that the stairs posed any hazardous condition or violated any code.

A. Legal Bases for Liability

A party occupying, operating, or in control of the premises in which the stairs were located owed a duty to plaintiff, who was lawfully on the premises, to maintain the stairs in a reasonably safe condition. Bucholz v. Trump 767 Fifth Ave., LLC, 5 N.Y.3d 1, 8 (2005); Alexander v. New York City Tr., 34 A.D.3d 312, 313 (1st Dep't 2006); DeMatteis v. Sears, Roebuck & Co., 11 A.D.3d 207, 208 (1st Dep't 2004); Longo v. Armor El. Co., 307 A.D.2d 848, 849 (1st Dep't 2003). To hold defendants liable for an unsafe condition on the stairs, plaintiff must demonstrate at trial that defendants created or received actual or constructive notice of the condition. Alexander v. New York City Tr., 34 A.D.3d at 313; Mandel v. 370 Lexington Ave., LLC, 32 A.D.3d 302, 303 (1st Dep't 2006); Mitchell v. City of New York, 29 A.D.3d 372, 374 (1st Dep't 2006). Thus defendants may demonstrate their entitlement to summary judgment by establishing the absence of their control over the condition or the absence of an unsafe condition. Wright v. Frawley Plaza Houses, Inc., 107 A.D.3d 449 (1st Dep't 2013); Rivera v Bilynn Realty Corp., 85 A.D.3d 518 (1st Dep't 2011); Delgado v. New York City Hous. Auth., 51 A.D.3d

570, 571 (1st Dep't 2008). See Berger v. 292 Pater Inc., 84 A.D.3d 461 (1st Dep't 2011).

Plaintiff claims that defendants violated New York City Administrative Code § 27-375(b), (e)(2), and (h). Section 27-375, governing interior stairs, is inapplicable because interior stairs are stairs within a building that serve as a required exit, N.Y.C. Admin. Code § 27-232, and the undisputed evidence establishes that the stairs on which plaintiff fell merely connected two floors. Lopez v. Chan, 102 A.D.3d 625, 626 (1st Dep't 2013); Kittay v. Moskowitz, 95 A.D.3d 451, 452 (1st Dep't 2012); Maksuti v. Best Italian Pizza, 27 A.D.3d 300 (1st Dep't 2006). Even if § 27-375 applied, any violation of § 27-375(b), which requires stairs to be 44 inches wide, and § 27-375(h), which requires non-skid surfaces on stairs, was not the proximate cause of plaintiff's injuries. Plaintiff testified that his heel caught on a step, not that his heel or any part of his foot slipped on a step, and did not attribute his fall to the stairs' narrow width. Nor did any other witness who observed the location of his fall testify that the steps were slippery or too narrow. See Robinson v. 156 Broadway Assoc., LLC, 99 A.D.3d 604, 605 (1st Dep't 2012); Rivera v. Bilynn Realty Corp., 85 A.D.3d 518; Ridolfi v. Williams, 49 A.D.3d 295, 296 (1st Dep't 2008); Sarmiento v. C & E Assoc., 40 A.D.3d 524, 527 (1st Dep't 2007).

Plaintiff also claims that the insufficient lighting violated Administrative Code § 27-381(a). This section, however, applies to a corridor, which is "an enclosed public passage

providing a means of access from rooms or spaces to an exit," N.Y.C. Admin. Code § 27-232, and to exits, which are "means of egress from the interior of a building to an open exterior space." Id.; Lopez v. Chan, 102 A.D.3d at 627; Maksuti v. Best Italian Pizza, 27 A.D.3d 300. See Gilson v. Metropolitan Opera, 15 A.D.3d 55, 59 (1st Dep't 2005), aff'd, 5 N.Y.3d 574 (2005); Foley v. City of New York, 43 A.D.3d 702, 704 (1st Dep't 2007). The restaurant's stairs do not fit either of these definitions.

B. Evidentiary Bases for Liability

Although plaintiff's claims of code violations fail, defendants fall short of showing the absence of a hazardous condition. Plaintiff slipping on steps does not constitute evidence that a hazardous condition caused the slipping, Sanders v. Morris Hgts. Mews Assoc., 69 A.D.3d 432 (1st Dep't 2010); Acunia v. New York City Dept. of Educ., 68 A.D.3d 631, 632 (1st Dep't 2009), but plaintiff attributed misplacing his foot and catching his heel on a step to the dim lighting on the staircase, which may demonstrate negligence by the party with control over that condition. Consi v. 531 Hudson St. Ltd. Liab. Co., 28 A.D.3d 370, 371 (1st Dep't 2006); Berroa v. Carney, 299 A.D.2d 302, 303 (1st Dep't 2002).

To demonstrate that the lighting on the staircase was adequate, defendants rely on a report by Jeffrey Schwalje P.E., Via Alloro's expert engineer. Plaintiff seeks to preclude this report because Via Alloro did not disclose the witness until after the note of issue was filed. C.P.L.R. § 3101(d)(1)(i) sets

no specific time, however, to respond to a request for disclosure of experts. Since plaintiff does not indicate any prejudice from the claimed late disclosure, it does not require the court to disregard the report. Baulieu v. Ardsley Assoc., L.P., 85 A.D.3d 554, 555 (1st Dep't 2011); Downes v. American Monument Co., 283 A.D.2d 256 (1st Dep't 2001); Jefferson v. Temco Servs. Indus., 272 A.D.2d 196 (1st Dep't 2000).

Schwalje inspected defendants' premises July 20 and 28, 2010, and based on the deposition testimony of Angelina Malerba, a co-owner of both Via Alloro and 44 Main St. Richmond, attested that the condition of the stairs where plaintiff fell had not changed since the restaurant opened in March 2008. Malerba's testimony, however, was only that "the way the restaurant looked," Aff. of David A. LoRe Ex. G, at 15, 19, and "the way the stairs looked, referring to the travertine on the stairs, remained unchanged and thus did not establish specifically that the staircase lighting remained unchanged. Id. at 22. See Salman v. L-Ray LLC, 93 A.D.3d 568, 569 (1st Dep't 2012). Second, Malerba never indicated the level of illumination when the restaurant opened. Third, having denied recollection of plaintiff's injury or an awareness of his injury even when it occurred, despite her presence at the restaurant on the evening he fell, she failed to indicate that she specifically recalled that evening, let alone the level of illumination on that evening. Fourth, she admitted that the lighting on the staircase was capable of being dimmed. Her testimony that the lights in

the restaurant are illuminated as high as possible, moreover, even if interpreted to mean that they were never dimmed, still does not establish the sufficiency of the lighting.

In sum, Schwalje's opinion is based on an inspection of the area plaintiff claims was in an unsafe condition, causing his injury, yet nothing in the record establishes that the area Schwalje inspected in July 2010 was in the same condition as when plaintiff was injured in October 2009. Absent this foundation, the court may not rely on an expert opinion based on that inspection. Gilson v. Metropolitan Opera, 15 A.D.3d 59, aff'd, 5 N.Y.3d 574; Pomahac v. TrizecHahn 1065 Ave. of Ams., LLC, 65 A.D.3d 462, 466 (1st Dep't 2009); Machado v. Clinton Hous. Dev. Co., Inc., 20 A.D.3d 307 (1st Dep't 2005); Budd v. Gotham House Owners Corp., 17 A.D.3d 122, 123 (1st Dep't 2005).

C. Via Alloro's Liability

Defendants thus have failed to eliminate factual issues regarding the inadequate lighting of the stairs to which plaintiff and other witnesses attested, referring specifically to the time when he fell. Therefore, as the restaurant with control over the lighting of the stairs, Via Alloro is not entitled to summary judgment dismissing plaintiff's claims. Rodriguez v. Board of Educ. of the City of N.Y., 107 A.D.3d 651, 652 (1st Dep't 2013); Berger v. 292 Pater Inc., 84 A.D.3d 461; Consi v. 531 Hudson St. Ltd. Liab. Co., 28 A.D.3d 370. See Salman v. L-Ray LLC, 93 A.D.3d at 569.

Nor has Via Alloro established the absence of other

conditions that may have contributed to the hazard and required a higher level of illumination. While Administrative Code § 27-375(e)(2), requiring stairs' treads to be of uniform width, is inapplicable to the stairs on which plaintiff fell, in low light, a lack of that uniformity as found by both plaintiff's and defendants' engineers, for example, may have contributed to the condition that caused plaintiff to catch his heel on the step. The court need not rely on the report of plaintiff's engineer, however, which also suffers from foundational deficiencies, nor on any of plaintiff's opposition, since Via Alloro fails to meet its initial burden. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d at 384.

D. 44 Main St. Richmond's Nonliability

Malerba testified without contradiction that Via Alloro was the corporation that owned the restaurant and that no businesses other than the restaurant operated at the premises when plaintiff was injured. As an owner of leased premises that was out of possession of the premises, 44 Main St. Richmond still may be liable for a condition on the premises that caused injury based on constructive notice of the condition. Even with constructive notice, however, the owner is subject to liability only if (1) the owner retained a right to re-enter the premises for inspection and repair, and (2) the condition was a structural defect that violated a statutory requirement. Guzman v. Haven Plaza Hous. Dev. Fund Co., 69 N.Y.2d 559, 566-67 (1987); Heim v. Trustees of Columbia Univ. in the City of N.Y., 81 A.D.3d 507

(1st Dep't 2011); Torres v. West St. Realty Co., 21 A.D.3d 718, 721 (1st Dep't 2005); Davis v. HHS Props. Corp., 1 A.D.3d 153, 154 (1st Dep't 2003). See Uhlich v. Canada Dry Bottling Co. of N.Y., 305 A.D.2d 107, 108 (1st Dep't 2003); Lopez v. 1372 Shakespeare Ave. Hous. Dev. Fund Corp., 299 A.D.2d 230, 231 (1st Dep't 2002).

As discussed above, none of the Administrative Code provisions plaintiff relies on applies to the stairs on which he fell. Nevertheless, assuming that those code provisions did apply and that 44 Main St. Richmond retained a right under the lease with Via Alloro to re-enter the leased premises, inadequate lighting and even inconsistent riser heights are not structural defects that establish the liability of an owner out of possession. Drotar v. 60 Sweet Thing, Inc., 106 A.D.3d 426, 427 (1st Dep't 2013); Kittay v. Moskowitz, 95 A.D.3d at 452; Bethea v. Weston House Hous. Dev. Fund Co., Inc., 70 A.D.3d 470, 471 (1st Dep't 2010); Peck v. 2-J, LLC, 56 A.D.3d 277, 278 (1st Dep't 2008). Although co-owner Malerba's regular presence at the restaurant may confer notice on 44 Main St. Richmond, notice without a structural defect or statutory violation is not a basis for liability.

An owner out of possession also may be liable for injuries caused by any dangerous condition that the owner created. Bleiberg v. City of New York, 43 A.D.3d 969, 971 (1st Dep't 2007); Negron v. Rodriguez & Rodriguez Stor. & Warehouse, Inc., 23 A.D.3d 159, 160 (1st Dep't 2005); Torres v. West St. Realty

Co., 21 A.D.3d at 721; Stickles v. Fuller, 9 A.D.3d 599, 600-601 (3d Dep't 2004). The unrebutted facts that 44 Main St. Richmond was out of possession, that the lighting was a changeable condition, and that any inconsistency in the risers' height was not in itself a dangerous condition, removes the owner from any position where it might affect the lighting so as to create a dangerous condition on the stairs. Also unrebutted is Malerba's deposition testimony and affidavit that the restaurant retained a contractor to perform major renovations in the building, including construction of the staircase and installation of the chandelier above the staircase. This evidence further supports the conclusion that only Via Alloro was responsible for the stairs and lighting, such that any hazard associated with the stairs or lighting was not created by the owner. Nieves v. Burnside Assoc., LLC, 59 A.D.3d 290 (1st Dep't 2009). See Whitney v. Valentin, 105 A.D.3d 519 (1st Dep't 2013); Delguidice v. Papanicolaou, 5 A.D.3d 236, 237 (1st Dep't 2004).

IV. CONCLUSION

For the above reasons, the court grants the motion by defendant 44 Main St. Richmond, LLC, for summary judgment dismissing plaintiff's complaint and the cross-claim by Via Alloro, Inc., against 44 Main St. Richmond. C.P.L.R. § 3212(b). As there is no basis for liability on 44 Main St. Richmond's part, the court denies as academic 44 Main St. Richmond's motion insofar is it seeks summary judgment on a cross-claim for indemnification. Eckardt v. Starr Bldg. Realty LLC, 106 A.D.3d

477, 478 (1st Dep't 2013). The court denies the motion by defendant Via Alloro, Inc., for summary judgment. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: December 6, 2013

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.