Amaya v Pueblo Viejo Rest. Inc.
2017 NY Slip Op 31304(U)
June 15, 2017
Supreme Court, Suffolk County
Docket Number: 12-36482
Judge: Peter H. Mayer

[* 1]

SHORT FORM ORDER

INDEX No. 12-36482
CAL. No. 16-00878OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 9-23-16
ADJ. DATE 12-7-16
Mot. Seq. # 002 - MG

---X

FRANCISCO AMAYA,

Plaintiff,

- against -

PUEBLO VIEJO RESTAURANT INC., CESAR DIAZ MOLINA, DOMINGOS CUNNA AND "JOHN DOE",

Defendants.

---X

KEEGAN KEEGAN ROSS & ROSNER
Attorney for Plaintiff
P.O. Box 918
147 North Ocean Avenue
Patchogue, New York 11772

MCCABE COLLINS MCGEOUGH & FOWLER
Attorney for Defendants Pueblo Viejo Restaurant Inc. and Cesar Diaz Molina
P.O. Box 9000
Carle Place, New York 11514

BURNS & NALLAN
Attorney for Defendant Domingos Cunna
225 Broad Hollow Road, Suite 410E
Melville, New York 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Domingos Cunna, dated August 12, 2016, and supporting papers; (2) Affirmation in Opposition by the defendants Pueblo Viejo Restaurant, Inc. and Cesar Diaz Molina, dated September 23, 2016, and supporting papers; (3) Affirmation in Opposition by the plaintiff, dated October 26, 2016, and supporting papers; (4) Reply Affirmation by the defendant Domingos Cunna, dated October 26, 2016 and supporting papers; (5) Reply Affirmation by the defendant Domingos Cunna, dated November 15, 2016 and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by the defendant Domingos Cunna for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against him is granted.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained when he was forcibly removed from the restaurant and bar owned and operated by the defendant Cesar Diaz Molina d/b/a Pueblo Viejo Restaurant, sued herein as Pueblo Viejo Restaurant, Inc. and Cesar Diaz Molina (Molina). It is undisputed that Molina owned and operated the restaurant and bar (the bar) on the date of this incident, that the defendant Domingos Cunha incorrectly sued herein as Domingos Cunna (Cunha) was the owner of the building in which the bar was located, and that Molina occupied the relevant portion of the building pursuant to a written lease. In his complaint, the plaintiff alleges, among other things, that one of Molina's employees threw him to the ground causing him to suffer serious injuries, that Molina and Cunha were negligent in the supervision, hiring and training of the employee, and that Molina and Cuha were negligent in "creating the conditions, setting and circumstances that resulted in the injuries complained of herein."

Cunha now moves for summary judgment on the ground that there are "no allegations, let alone evidence, of any negligence, fault, liability or wrongdoing on behalf of Mr. Cunha," and that there are no complaints of a dangerous condition at the premises or "arguments that anything to do with the condition of the premises either caused or contributed to the plaintiff's injuries." The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of his motion, Cunha submits the pleadings, and the transcripts of the deposition testimony of the parties. At his deposition, the plaintiff testified that he arrived at the bar with a friend at approximately 10:00 p.m. on the date of this incident, that two security guards or bouncers were stationed at the entrance, and that he was in the bar approximately 50 minutes to one hour before this incident. He stated that he met a girl at the bar, that he danced with her, and that he bought her a beer and one for himself. He indicated that his beer cost $5.00 and the girl's beer cost $40.00, that she then asked him to buy her another beer, and that he told her that he did not have any more money. The plaintiff further testified that the girl loudly and repeatedly demanded that he buy her another beer, that the two security guards heard the commotion, and that they grabbed him and opened the door to the bar and "pushed me out." He stated that he hit his head on the cement sidewalk, that he did not know "what happened, maybe I slipped or something," and that "if they did not push me hard, I wouldn't have fallen." He indicated that he did not notice any problem with the step at the entrance to the bar when he entered the premises, and that he was wearing sneakers that evening.

Molina testified that, in addition to being the owner of the bar, he was working as a waiter on the evening of this incident, that one of his security guards told him that "a guy had fallen outside," and that did not see the plaintiff's fall. He stated that this accident happened outside the only entrance door to the bar, and that said door abuts the parking lot for the premises. He indicated that he had not seen the

plaintiff in the bar prior to going outside, and that he smelled alcohol "on" the plaintiff, and observed that the plaintiff's eyes were red and he was slurring his speech when he saw the plaintiff lying on the sidewalk outside the entrance to the bar. Molina further testified that there is a security camera with a view of the entrance door to the bar, and that he viewed the footage from the camera the night of this incident. He stated that there is one step outside the subject doorway, and that, upon viewing the footage, he saw that his security guards prevented the plaintiff from entering the bar because he was drunk, and that the plaintiff "went down the steps and fell." He indicated that the girls dancing at the bar were his employees. Molina further testified that he did not see the plaintiff trip over anything when he viewed the video footage, that he did not see any bumps, cracks, or anything in the sidewalk, and that he never made any complaints to Cunha, his landlord, about the area where the plaintiff fell.

At his deposition, Cunha testified that he owns the premises, that the area occupied by the bar is leased by Pueblo Viejo, and that the tenant is responsible for the removal of snow from the sidewalk abutting the parking lot at the premises. He stated that he learned about the plaintiff's accident approximately eight months after it happened, and that the step up to the entrance door at the bar is approximately four inches high. He indicated that he was not certain who was responsible under the subject lease for the repair of the sidewalk abutting the parking lot.

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; *see also* ***Schindler v Ahearn***, 69 AD3d 837, 894 NYS2d 462 [2d Dept 2010]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]; ***Elliot v Long Is. Home, LTD***, 12 AD3d 481, 784 NYS2d 615 [2d Dept 2004]). In the absence of duty, there is no breach and without a breach there is no liability (***Pulka v Edelman***, *supra*; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]; ***Schindler v Ahearn***, *supra*). In addition, the determination whether a duty is owed by one member of society to another is a legal issue for the courts (***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 728 NYS2d 731 [2001]; ***Eiseman v State of New York***, 70 NY2d 175, 518 NYS2d 608 [1987]; ***De Angelis v Lutheran Med. Center***, 58 NY2d 1053, 462 NYS2d 626 [1983]; ***Miglino v Bally Total Fitness of Greater N.Y., Inc.***, *supra*).

Here, the plaintiff's complaint essentially consists of allegations that Cunha was negligent in the operations of the bar. The adduced evidence reveals that Cunha had no interest or ownership in the bar, and that he had no responsibility to oversee or supervise the operations or employees of Molina. A defendant's duty arises only when it has the opportunity to control the conduct of third persons and is reasonably aware of the need for such control (*see* ***Millan v AMF Bowling Centers, Inc.***, 38 AD3d 860, 833 NYS2d 173 [2d Dept 2007]). As an out of possession landlord, Cunha had no duty to control Molina's security guards. Thus, Cunha has established his prima facie entitlement to summary judgment dismissing the complaint as to the plaintiff's claims sounding in negligence.

In addition, to the extent that the plaintiff's complaint can even remotely be read to assert a cause of action for premises liability, Cunha has established his prima facie entitlement to summary judgment dismissing the complaint. To impose liability on a defendant for a slip and fall on an allegedly dangerous condition on its premises, there must be evidence that the dangerous condition existed, and that the defendant either created the condition or had actual or constructive notice of it and failed to

remedy it within a reasonable time (*see* ***Farren v Board of Edu. of City of New York***, 119 AD3d 518, 988 NYS2d 684 [2d Dept 2014]; ***Williams v SNS Realty of Long Is.***, 70 AD3d 1034, 895 NYS2d 528 [2d Dept 2010]). A plaintiff's inability to identify the cause of the fall is fatal to the action because a finding that the defendant's negligence, if any, proximately caused the plaintiff's injuries would be based on speculation (*see* ***Trapani v Yonkers Racing Corp.***, 124 AD3d 628, 1 NYS3d 299 [2d Dept 2015]; ***DiLorenzo v S.I.J. Realty Co., LLC***, 115 AD3d 701, 981 NYS2d 590 [2d Dept 2014]; ***Capasso v Capasso***, 84 AD3d 997, 923 NYS2d 199 [2d Dept 2011]). Where it is just as likely that some other factor, such as a misstep or a loss of balance, could have caused a slip and fall accident, any determination by the trier of fact as to causation would be based upon sheer conjecture (*see* ***Alabre v Kings Flatland Car Care Ctr.***, 84 AD3d 1286, 924 NYS2d 174 [2d Dept 2011]; ***Manning v 6638 18th Ave. Realty Corp.***, 28 AD3d 434, 814 NYS2d 178 [2d Dept 2006]).

Here, the plaintiff does not identify either the step at the entrance doorway or the sidewalk abutting the step as the cause of his fall. Instead, the plaintiff's claim is that the actions of the security guards were the cause of his fall, and he has failed to submit any evidence that a defective or dangerous condition existed in the step or sidewalk. In his answer, Molina asserts a single cross claim alleging that Cunha's negligence and/or breach of lease caused the plaintiff's injuries, and asserting claims for common-law indemnification, contribution, and indemnification pursuant to a hold harmless agreement. The adduced evidence, including a review of the subject the lease, reveals that Cunha has established his prima facie entitlement to summary judgment dismissing Molina's cross claims.

Cunha having established his prima facie entitlement to summary judgment dismissing the complaint and all cross claims against him, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the motion, the plaintiff submits the affirmation of his attorney, his affidavit, and photographs of the entrance to the bar. In his affidavit, the plaintiff swears that the photographs show "the somewhat irregular step" where he "was so negligently escorted" from the bar, and that the "owner of such an uncommon arrangement of a step" who is renting to a bar should not be allowed to say there is no issues of fact requiring a trial of this action.

In his affidavit, the plaintiff does not indicate how the "arrangement" of the step contributed to his injuries, whether and how that arrangement can be considered a dangerous or defective condition, or if he ever set foot on the step outside the entrance to the bar at the time of this incident. A party may not, through an affidavit submitted on summary judgment, contradict his or her own deposition testimony in order to feign an issue of fact (***Andrew T.B. v Brewster Cent. School Dist.***, 67 AD3d 837, 889 NYS2d 240 [2d Dept 2009]; ***Knox v United Christian Church of God, Inc.***, 65 AD3d 1017, 884 NYS2d 866 [2d Dept 2009]; ***Abramov v Miral Corp.***, 24 AD3d 397, 805 NYS2d 119 [2d Dept 2005]).

In addition, counsel for the plaintiff contends that the design and placement of the subject step "led to the plaintiff falling to the ground outside." The plaintiff fails to submit any admissible evidence, such as an expert's opinion, to substantiate counsel's conclusory statement. The affidavit of an attorney who has no personal knowledge of the facts, is insufficient to raise an issue of fact on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]).

In opposition to the motion, Molina submits the pleadings, the subject lease, certain photographs, and an unauthenticated copy of the police field report regarding this incident. The police field report relied on by Molina is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; ***Cover v Cohen***, 61 NY2d 261, 473 NYS2d 378 [1984]; ***Cheul Soo Kang v Violante***, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]). In any event, the facts in a police report are only admissible as to matters within the officer's own observations while carrying out his police duties (CPLR 4518[a]; ***Wynn v Motor Veh. Acc. Indem. Corp.***, 137 AD3d 779, 26 NYS3d 558 [2d Dept 2016]; ***Memenza v Cole***, 131 AD3d 1020, 16 NYS3d 287 [2d Dept 2015]). Thus, to the extent that Molina submits the field report as evidence concerning the manner in which, or where, this accident happened, it is inadmissible hearsay. Where there is no evidence that the critical information in a report came from the police officer's observation, or whether some other hearsay exception would render the statement admissible, it should not be considered (***Holliday v Hudson Armored Car & Courier Serv.***, 301 AD2d 392, 753 NYS2d 470 [1st Dept 2003]; ***Gagliano v Vaccaro***, 97 AD2d 430, 467 NYS2d 396 [2d Dept 1983]; ***Yeargans v Yeargans***, 24 AD2d 280, 265 NYS2d 562 [1st Dept 1965]).

In his affirmation in opposition to the motion, counsel for Molina contends that there is an issue of fact whether the plaintiff's accident occurred on the subject step, sidewalk, or parking lot of the premises, all of which were under the control of Cunha pursuant to the subject lease. Molina fails to submit any admissible evidence to indicate that a defective or dangerous condition existed at any of the enumerated locations on the premises, to cure the fatal defect in the plaintiff's cause of action aainst Cunha based on his inability to identify the cause of his fall other than the actions of Molina's employees, or to raise an issue of fact regarding any of his cross claims.

The contentions of the plaintiff and Molina that the condition of the step, sidewalk or parking lot at the premises was a substantial or contributing cause of the plaintiff's injuries is not supported by the adduced evidence. Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore***, *supra*). Accordingly, Cunha's motion for summary judgment dismissing the complaint and all cross claims against his is granted.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: June 15, 2017

PETER H. MAYER, J.S.C.