Tyz v First St. Holding Co., Inc.
2010 NY Slip Op 34031(U)
January 5, 2010
Supreme Court, Queens County
Docket Number: 5709/2008
Judge: Marguerite A. Grays
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2008/5709 ORDER SIGNED (Page 1 of 4)

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

JEAN TYZ, Plaintiff,	Index Number 5709 2008
- against -	Motion Date October 6, 2008
FIRST STREET HOLDING COMPANY, INC., and ELEANOR RIGBY'S,	Motions Cal. Numbers 32
Defendants.	Motion Seq. No. 1

2009 JAN 15 A 10: 24
QUEENS COUNTY CLERKS OFFICE FILED

The following papers numbered 1 to 10 read on this motion by First Street Holding Company, Inc., and Eleanor Rigby's for summary judgment in their favor dismissing the complaint pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-7
Reply Affidavits	8-10

Upon the foregoing papers it is ordered that the motion is granted.

Plaintiff in this negligence action seeks damages for personal injuries sustained on November 17, 2007, when she tripped and fell on a booth step/platform at defendants' restaurant in Mineola, New York. Plaintiff was a patron in the restaurant when she tripped and fell over a step at the booth where she was seated. Defendants move to dismiss the complaint on the ground that there was no dangerous condition; that they did not create or

have actual or constructive notice of the alleged defect upon which plaintiff fell and, alternatively, that the condition was open and obvious and not inherently dangerous as a matter of law. Plaintiff opposes the motion.

Plaintiff testified at her examination before trial as follows: The accident occurred at approximately 8:00 P.M. Upon her arrival at the restaurant approximately two hours prior, she and her party were taken immediately to the second to the last booth at the back of the restaurant. She described the booth as having two bench seats on both sides and seating for four adults. Upon entering the seating area, plaintiff testified, she had to step up one step to get into the booth. Plaintiff described this step as being approximately four to six inches in height, and stated that she did not have any difficulty seeing the step as she was going into the booth. Plaintiff was in the elevated booth for approximately two hours before she left the booth. She described the lighting as "dim," however, she testified that she did not have any difficulty seeing the restaurant, the people she was dining with or the menu. Plaintiff did not make any complaints about the lighting conditions at the restaurant. When leaving, plaintiff testified, she placed her right foot directly on the floor; she was not aware that there was a step and thus her whole body went forward causing her to fall to the ground. Plaintiff stated that her feet did not slip on anything or catch onto any portion of the step; there was nothing on the step or anything sticking out of the step which caused her to fall; nor was the step loose. After her fall, plaintiff testified, she looked at the area and "realized there was a step."

The owner and president of the restaurant testified that the riser of the step is approximately eight inches high; that the step is carpeted with a commercial blue carpet and the flooring below the carpet is yellow. A photograph depicting how the area appeared on the date in question was submitted as evidence. Since owning the restaurant in 1999, the witness testified, there have been no complaints about the step in question; nor has the restaurant received any violations concerning the same. With respect to the lighting conditions, the witness testified that there is a light over every booth as well as a ceiling light in the vicinity of the booths.

Discussion

It is well established that landowners who hold their property open to the public have a general duty to maintain it in a reasonably safe condition so as to prevent the occurrence of foreseeable injuries (*see*, *Nallan v Helmsley-Spear Inc.*, 50 NY2d 507 [1980]; *Basso v Miller*, 40 NY2d 233 [1976]; *cf.*, *O'Connor v State of New York*, 70 NY2d 914 [1980]). Encompassed within this duty is the duty to warn of potential dangerous conditions existing thereon, be they natural or artificial (*see*, *Basso v Miller*, *supra;* Restatement [Second] of Torts § 342). This duty extends, however, only to those conditions that are not readily observable; the landowner owes no duty to warn of conditions that are in plain view, easily

discoverable "by those employing the reasonable use of their senses" (*Tarricone v State of New York*, 175 AD2d 308, 309, *lv denied* 78 NY2d 862 [1991]), for in such instances the condition is a warning in itself (*see, id.; Schiller v F.W. Woolworth Co.*, 51 AD2d 784, 785, *appeal dismissed* 39 NY2d 901 [1976]).

Here, defendants established their entitlement to summary judgment by submitting evidence demonstrating that the alleged defect, a height differential between the booth plaintiff was seated in and the yellow-colored floorway, was readily observable by the reasonable use of the injured plaintiff's senses, and was not inherently dangerous (see *Errett v Great Neck Park Dist.*, 40 AD3d 1029 [2007]; *Capozzi v Huhne*, 14 AD3d 474 [2005]; *D'Angelo v DeLucia*, 283 AD2d 385 [2001]). Moreover, there is no evidence that the plaintiff misstepped as the result of inadequate illumination (*see Leib v Silo Rest., Inc.*, 26 AD3d 359 [2006]; *Curran v Esposito*, 308 AD2d 428 [2003]; *Gordon v New York City Tr. Auth.*, 267 AD2d 201 [1999]).

Plaintiff's opposition papers fail to raise a triable issue of fact. Plaintiff initially argues that the raised platform or riser at issue was never authorized by the Village of Mineola, as a 1974 Plan for a proposed interior alteration did not authorize or approve a raised platform or riser at the location. In response, defendants submit that the floor plans; plumbing riser and diagram did not contain any dimensions for width, height or depth along the booth area and was merely an overall floor plan not intended to show dimensions of any type. Furthermore, correspondence from the Incorporated Village of Mineola dated after the 1974 Plan establishes that defendants' restaurant was in conformity with all zoning, fire and building codes. Significantly, defendants submit that the restaurant was inspected by the Village of Mineola on August 7, 2000, and it was declared that "no violations were found." Specifically, no violations were recorded regarding the elevation change between the floor and the booth platform prior to the date of the accident. A copy of the report was submitted as evidence.

Plaintiff submitted the report of licensed engineer Richard Berkenfeld purportedly to establish that the step to the elevated booth coupled with the lighting conditions constituted a dangerous condition because it was allegedly not in compliance with the cited building codes. The court notes that the codes cited by plaintiff are not applicable to the facts at hand. For example, plaintiff relies upon section 765 entitled "Exits" of Uniform Fire Prevention and Building Code. This section provides for safe escape "from the building in case of emergency" from the interior of the building or structure to a street or other legal open spaces at grade level connected to the street. This section clearly pertains to exit stairways "that lead to an outside exit doorway," and is inapplicable under the instant facts.

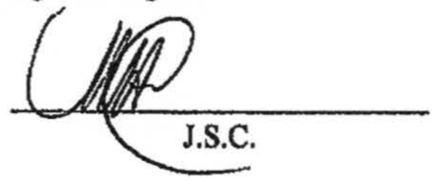
Berkenfeld also cites to the American Society for Testing and Materials Standard F1637-02, entitled Standard Practice for Safe Walking Conditions. First, it is noted that this document has not been adopted by the Incorporated Village of Mineola and is, therefor, not applicable to the underlying facts. Furthermore, however, Berkenfeld notes that section 7.2.2 states that in situations where short flight stair or single stair transition exists and cannot be avoided, obvious visual cues shall be provided to facilitate improved step identification. Obvious visual cues can include handrails, delineating nosing edging, warning signs, contrast in surface colors and accent lighting. The photograph of the subject area depicts the wood floor of the dining room which is yellow in color and the platform on which the booths are located which is finished with blue carpeting. Also artificial illumination was provided by an incandescent light fixture directly above the booth. As such, obvious cues did exist, in conformity with Industry standards, to improve the safety and perception of the subject single step transition/riser. Notwithstanding the above, the Industry standards do not prohibit the existence of a single step riser. It merely mandates the use of visual cues, such as accent lighting and contrast surface colors, to facilitate and improve perception and step identification. These measures were taken in the instant case.

In sum, defendants submit that plaintiff acknowledged through her deposition testimony that she did not look toward the ground as she was leaving the booth and as a result was not aware that there was a step, suggesting her own inattentiveness may have caused her to fall and not any inherent danger in the step itself.

Accordingly, defendants' motion for summary judgment is granted.

Dated: JAN 05 2010

J.S.C.



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