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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Salliann Scarpulla Justice

PART 19

Index Number : 100949/2010
ARONICA, ROSELLA
vs.
MARCO POLO CATERERS
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the accompanying decision/order.

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

Dated: 7/8/13

_____, 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: CIVIL TERM: PART 19

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ROSELLA ARONICA,

Plaintiff,

Index No.: 100949/10
Submission Date: 3/6/13

- against-

MARCO POLO CATERERS D/B/A TOCQUEVILLE RESTAURANT AND WINE, AND KENSINGTON LOFT CORPORATION,

DECISION AND ORDER

Defendants.

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For Plaintiff:
Schlam Stone & Dolan LLP
26 Broadway, 19th Floor
New York, NY 10004

For Defendants:
Molod Spitz & DeSantis, P.C.
1430 Broadway, 21st Floor
New York, NY 10018

Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Aff in Opp 2
Reply 3

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for personal injuries, defendants Marco Polo Caterers d/b/a Tocqueville Restaurant and Wine ("Tocqueville"), and Kensington Loft Corporation ("Kensington") move for summary judgment dismissing the complaint.

On November 26, 2009, plaintiff Rosella Aronica ("Aronica") fell on the wood floor of the main dining room at Tocqueville Restaurant and Wine. She was with her son Frank Aronica and friend Patrick Brescia ("Brescia") at the time of her fall. Tocqueville

Restaurant and Wine was located at 1 East 15th Street, premises leased by Tocqueville from owner Kensington.

Aronica commenced this action seeking to recover damages for the injuries she sustained to her hip as a result of her fall. According to the allegations of the complaint and bill of particulars, Aronica, who was 88 years old at the time of the accident, slipped and fell because of dim lighting and an "abrupt" transition between the tile floor of the anteroom and the "slick dark wood floor" in the passageway of the restaurant.

Tocqueville and Kensington now move for summary judgment dismissing the complaint. In support of their motion, they refer to the examination before trial testimony of, *inter alia*, Aronica, her son, Brescia, and managing partner of Marco Polo Caterers Marco Moreira ("Moreira").

According to Moreira, who was present at the time of the accident, there was no liquid or foreign substance on the floor at the time of Aronica's fall. He explained that the flooring in the area of Aronica's fall was limestone and wood. The floors were cleaned daily. When the restaurant closed at night, the limestone and wood were swept and mopped. The floor was not treated with wax or any other cleaning agent. He explained that the lights in the restaurant were dimmed to create a mood and ambience. The lights were usually at a 40%-50% level of brightness. Moreira maintained that he never received any complaints about the floor being slippery or about the lighting.

Aronica, her son, and Brescia all testified that the lighting was dim at the time of the fall. According to Aronica, she slipped and fell when her right foot stepped onto the wooden flooring area. Brescia testified that "what happened was it was like stepping on a sheet of ice. Her feet just went right up in the air, and there was no way of catching her." He slipped on the floor as well, but did not fall.

In further support of the motion, Tocqueville and Kensington refer to the affidavit of professional engineer James Bernitt ("Bernitt"), who inspected the subject premises on October 15, 2012. He concluded that, based on his review of photographs and testimony, the flooring was in substantially the same condition as it was at the time of Aronica's accident. He performed certain tests on the subject floor and concluded that it was not a slipping hazard. During his inspection, restaurant employees adjusted the lighting to simulate the lighting conditions at the time of Aronica's accident. He explained that there is no minimum lighting requirement for the subject "occupiable room" pursuant to New York City Administrative Code Section 27-232. He concluded that the lighting was adequate for Aronica to have safely seen the flooring and was not in violation of any rules, statutes or codes.

Tocqueville and Kensington argue that they can not be held liable for Aronica's injuries because (1) according to Bernitt, the subject floor was not a slipping hazard, was not in violation of any rules, statutes or codes, and was adequately lit; (2) there were no prior complaints about the condition of the floor or the lighting; (3) there was no evidence

of any foreign slippery or slick substance on the floor; and (4) there was no evidence that Aronica was caused to fall due to any lack of lighting, dangerous lighting condition or any violation of the New York City Building Code lighting requirements. They further contend that Kensington is also entitled to summary judgment because it was an out of possession landlord whose lease agreement with Tocqueville placed the responsibility for care and maintenance of the premises only on Tocqueville.

In opposition, Aronica first argues that the defect in the flooring which caused her fall was not its slipperiness, but rather a gap between the floorboards. She refers to the affidavit of professional engineer Harold Krongelb ("Krongelb"), who inspected the subject premises on November 14, 2012. Krongelb explained that the wood flooring in the area of Aronica's fall was worn, and there were approximately 1/16 of an inch gaps between the floorboards. He explained that Aronica's fall occurred because her "shoe caught in a gap between the floorboards."

Aronica next argues that issues of fact exist as to whether the lighting was adequate at the time of her accident. According to Krongelb, the area where Aronica fell was a "means of egress" under the New York City Building Code, which had certain lighting requirements that were not met here.

Finally, Aronica provides that pursuant to the lease for the premises, Kensington maintained the right to reenter and make repairs to defects that violated the Building Code and therefore, it can be held liable even though it is an out of possession landlord.

In reply, Tocqueville and Kensington maintain that raising a new theory of liability at this point in the action is impermissible. At no prior time did Aronica ever maintain that she tripped on a gap in the flooring, rather, she has always alleged that she slipped on the floor.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

In order to subject a property owner to liability for a hazardous condition on its premises, a plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous condition that precipitated the injury. *Smith v. Costco Wholesale Corp.*, 50 A.D.3d 499 (1st Dept. 2008). A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence. *Giuffrida v. Metro North Commuter R.R. Co.*, 279 A.D.2d 403 (1st Dept. 2001).

Here, Tocqueville and Kensington have met their burden of establishing entitlement to judgment as a matter of law. According to Aronica, her son, and Brescia, Aronica slipped and fell on the wooden floor while walking in the restaurant. In her complaint and bill of particulars, she maintained that she was caused to fall because the lighting was dim and it was difficult to discern the shift from limestone to the slippery "slick dark wood floor." No evidence has been presented of any dangerous or defective condition on the floor itself. According to Moreira, who was present at the time of the fall, there was no wet or slippery substance on the floor. The floors were cleaned every night, but no wax or other cleaning agents were used. Neither Aronica, her son or Brecia provided that they observed any wet or slippery substance on the subject floor either before or after the fall. Bernitt tested the flooring itself and concluded that it did not constitute a slipping hazard. The mere fact that the floor may have been slippery is not sufficient to support a cause of action for negligence. *See Murphy v. Conner*, 84 N.Y.2d 969 (1994).

Further, although Aronica alleges that Tocqueville and Kensington were negligent in providing inadequate lighting, there is no evidence that the lighting was a proximate cause of her accident. Because there was no slippery substance on the floor, and, as explained by Bernitt, the floor itself did not provide a slipping hazard, there is no evidence that the dim lighting prevented Aronica from seeing any defect or dangerous

condition, because no defect or dangerous condition was present. There is no evidence that additional lighting could have prevented her fall.

Aronica fails to raise any triable issue of fact in opposition. Her new claim, that she fell due to a gap between the wooden planks, is unsupported by the evidence in the record. Neither she, her son, nor Brescia testified that she tripped and fell due to any gap between the floorboards, rather, they all clearly testified that she fell because she slipped. Any claim now that Aronica tripped on a gap in the wooden floorboards contradicts her examination before trial testimony as well as the testimony of her son and Brescia. Further, Aronica's expert's opinion affidavit has no probative value because Krongelb's conclusion, that Aronica tripped and fell on a gap between the floorboards, has no factual support in the record. *See Maldonado v. Su Jong Lee*, 278 A.D.2d 206 (2nd Dept. 2000).

Kensington is also entitled to summary judgment as an out of possession landlord. *See Babich v R.G.T. Rest. Corp.*, 75 A.D.3d 439 (1st Dept. 2010). Generally, an out-of-possession landlord may not be held liable for a third party's injuries on his premises unless he has notice of the defect and has consented to be responsible for maintenance or repair. *Manning v. New York Tel. Co.*, 157 A.D.2d 264 (1st Dept. 1990). However, constructive notice may be found where an out-of-possession landlord reserves a right under the terms of a lease to enter the premises for the purpose of inspection and maintenance or repair and a specific statutory violation exists. In such case, only a significant structural or design defect that is contrary to a specific statutory safety

provision will support imposition of liability against the landlord. *See Velazquez v. Tyler Graphics*, 214 A.D.2d 489 (1st Dept. 1995). Here, while Kensington is an out of possession landlord which reserved its right of entry, there is no evidence "that the "purported hazard constituted a structural or design defect that violated a specific statutory provision." *Stryker v. D'Agostino Supermarkets Inc.*, 88 A.D.3d 584, 585 (1st Dept. 2011).

In accordance with the foregoing, it is hereby

ORDERED that defendants Marco Polo Caterers d/b/a Tocqueville Restaurant and Wine and Kensington Loft Corporation's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
July 9, 2013

FILED
JUL 09 2013
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C.