Rosenblum v Paige Mgt. Group
2013 NY Slip Op 32358(U)
October 1, 2013
Supreme Court, New York County
Docket Number: 116380/2010
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Index Number : 116380/2010
ROSENBLUM, MARSHALL
vs
PAIGE MANAGEMENT GROUP
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 116380/10
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for Summary Judgment

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 10/1/13

J.S.C.
BARBARA JAFFE 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 : IAS PART 12

----------x

MARSHALL ROSENBLUM,

Plaintiff,

- against -

THE PAIGE MANAGEMENT GROUP, PAIGE MANAGEMENT AND CONSULTING, LLC, and DUNE SOUTHAMPTON,

Defendants.

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Index No. 116380/2010

Mot. seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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Dune Southampton (defendant) moves pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On the night of September 5, 2010, plaintiff and several of his friends patronized defendant nightclub in Southampton, New York. Plaintiff alleges that he cut his hand on a broken champagne bottle when reaching into an ice bucket. (NYSCEF 15).

At an examination before trial (EBT) held on February 29, 2012, plaintiff testified that that evening, several vodka bottles and approximately thirty champagne bottles were ordered to his table before the accident, although he drank only one vodka and soda. He described the champagne bottles as open and stacked in an ice bucket which was left on the table for customers to pour their own glasses, and that he was cut on the lip of a bottle, which was broken,

as if another bottle had hit it. (NYSCEF 15).

At an EBT held on April 24, 2012, Mackenzie Navarro, a server at the club, testified that it was the general practice to present and open bottles in front of patrons, and that bottles that could not fit on the table would be held at a service bar until room was available. She never saw an ice bucket containing more than three bottles, does not stack bottles because doing so could cause one to fall, and never witnessed a bottle break at the club. (NYSCEF 19).

At an EBT held on September 9, 2012, Tiffany Gallaty, plaintiff's server the night of the incident, testified that she received training on how to choose, open, and serve champagne, and that all bottles were intact upon service to plaintiff's table. When shown a photograph of the table following the incident, which shows eight or nine bottles in a bucket (NYSCEF 16), she characterized it as "typical" for a nightclub, but that the bucket seemed to contain too many bottles, although eight can fit into a bucket. She had never before heard of a patron injuring himself on a cracked bottle. (NYSCEF 17).

At an EBT held on September 9, 2012, Evan Schulman, who was with plaintiff the night of the incident, testified that he did not notice that any of the bottles were broken, nor did he take note of the bottle with the broken lip following plaintiff's injury. When shown the same photograph presented to Gallaty, he stated it portrayed a "minuscule scale" of what was on the table the time of the incident, but also stated two or three more bottles could fit into the bucket. (NYSCEF 18).

II. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

1. Contentions

Defendant argues that it fulfilled its duty to plaintiff when it delivered unbroken bottles to his table, and that there is no evidence it had notice of a defective or broken bottle that night.

(NYSCEF 9, 24). Plaintiff maintains that defendant had a duty to serve drinks safely, and that its service of many bottles onto a small table and even smaller ice bucket constituted the creation of a dangerous condition in that it was foreseeable that the bottle-necks could break if other bottles hit them. (NYSCEF 22).

2. Analysis

A party seeking summary judgment must demonstrate *prima facie*, that it is entitled to judgment as a matter of law, by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer admissible evidence to demonstrate the existence of factual issues that require a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853). A defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Trans. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]). Summary judgment should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable. (*Forrest*, 3 NY3d 314). Moreover, to sustain its burden, a movant cannot simply reveal gaps in its opponent's case, rather it must "affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d 614, 615 [4th Dept 1992]).

Negligence arises from a duty, a breach thereof, and an injury proximately caused thereby. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). An owner of property owes a duty to maintain the property in reasonably safe condition (*Basso v Miller*, 40 NY2d 233

[1976]), and will be held liable for injuries arising from dangerous conditions it created or otherwise had notice of (*Herman v State of New York*, 63 NY2d 822 [1984]; *Smith v Costco Wholesale Corp*, 50 AD3d 499, 500 [1st Dept 2008]). What constitutes a dangerous condition "depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury." (*Trincere v County of Suffolk*, 90 NY2d 976, 977[1997]). Therefore, in moving for summary judgment, a premises owner must make a *prima facie* showing that it neither created nor had notice of the dangerous condition. (*Early v Hilton Hotels Corp.*, 73 AD3d 559 [1st Dept 2010]).

Plaintiff does not allege that the champagne bottle was defective. Rather, he alleges that defendant's service of an unreasonable quantity of bottles in the ice bucket created a dangerous condition. Whether a dangerous condition exists is generally a question for the trier of fact (*see Thorn v Wilmorite, Inc.*, 281 AD2d 981 [4th Dept 2001] [triable issues existed regarding whether stacking of tables constituted dangerous condition]; *Argenio v Metropolitan Transp. Auth.*, 277 AD2d 165 [1st Dept 2000] [whether depression in floor constituted dangerous condition "raises factual questions and is not amenable to summary resolution"]; *Nin v Bernard*, 257 AD2d 417 [1st Dept 1999] [defect caused by missing tiles not sufficiently trivial to grant summary judgment in favor of defendant]), and defendant offers no authority for the proposition that such conduct does not constitute the creation of a dangerous condition as a matter of law. That defendant had no notice of any dangerous condition is immaterial as plaintiff claims defendant created the condition. (*See Cook v Rezende*, 32 NY2d 596, 599 [1973] ["usual questions of notice" irrelevant when defendant is alleged to have created defect]; *Ohanessian v Chase Manhattan Realty Leasing Corp.*, 193 AD2d 567 [1st Dept 1993] [same]); *see also* NY PJI 2:291 [instructing jury that its finding that defendant created unsafe condition will result in finding of negligence]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant Dune Southampton's motion for an order granting it summary judgment and dismissing the complaint against it is denied.

ENTER:

Barbara Jaffe, JSC

DATED: October 1, 2013
New York, New York