Nikcevich v Town Sports Intl., Inc.
2017 NY Slip Op 31124(U)
May 23, 2017
Supreme Court, New York County
Docket Number: 150701/2013
Judge: Kelly A. O'Neill Levy

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19
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MISEL NIKCEVICH,

Plaintiff,

-against-

TOWN SPORTS INTERNATIONAL, INC., TOWN SPORTS INTERNATIONAL HOLDINGS, INC., NEW YORK SPORTS CLUB, INC., TOWN SPORTS INTERNATIONAL, INC. d/b/a NEW YORK SPORTS CLUB, TOWN SPORTS INTERNATIONAL HOLDINGS, INC. d/b/a NEW YORK SPORTS CLUB, and TSI BROADWAY, INC.,

Defendants.

Index No.150701/2013

Seq. No. 003

Decision and Order

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Kelly O'Neill Levy, J.:

Defendant Town Sports International Holdings, Inc. i/s/h/a Town Sports International, Inc., New York Sports Club, Inc., Town Sports International, Inc. d/b/a New York Sports Club, Town Sports International Holdings, Inc. d/b/a New York Sports Club, and TSI Broadway, Inc. (collectively, "TSI") moves, pursuant to CPLR 3211 and 3212, for an order granting summary judgment dismissing plaintiff Misel Nikcevich's complaint against it. Plaintiff opposes.

BACKGROUND

This action arises out of an incident that occurred on April 11, 2011, when Plaintiff, a member of the New York Sports Club, was swimming in a lap pool at a New York Sports Club facility located at 1601 Broadway in Manhattan. According to Plaintiff's deposition testimony, the swimming pool, which was rectangular, was divided into four lanes, and there were three submerged, circular lights on each side of the pool's outer lanes, as well as lights at the front of the

lanes. Plaintiff and Marcie Contrer, her friend and fellow New York Sports Club member, were swimming in an outer lane; Plaintiff was swimming closest to the wall. At approximately 6:10 p.m., Plaintiff was performing a front stroke when she swept her left arm forward and brushed her hand against the middle light fixture on the pool wall. Ms. Nikcevich alleges that in so doing, her finger[1] was cut by the glass light fixture, which was broken.

Plaintiff testified at her deposition that the subject light fixture had been "out" for at least two weeks prior to the incident and that while she did not see the light fixture cause her injury, she stated that she brushed against the light fixture, felt a shock and pain, and did not notice any other object that could have caused the injury. Her testimony is as follows (Nikcevich Tr. 32, 37, 43, 44):

Q. Can you describe what happened?

A. Certainly. I was swimming in a normal fashion, front stroke. Marcy [sic] was to my right. She was a little bit ahead of me as I was swimming. I moved my hand forward and I brushed something and I felt immediate shock in my body and pain. . . .

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Q. At any point, did you identify what you cut your hand on?

A. On the light in the middle of the pool.

Q. How did you determine that that's what caused this injury?

A. I was swimming past the light and I barely brushed it and there was nothing else there that would have cut me.

Q. Was there any glass in the pool?

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[1]Plaintiff's affidavit and affirmation in opposition describe the injury as to her left "first finger." However, Plaintiff's deposition testimony (Nikcevich Tr. 39), the New York Sports Club accident report, and TSI's affirmation in opposition all describe the injury as to her left "pinky finger." The parties have not raised any arguments in their papers concerning this particular discrepancy.

A. I don't know.

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Q. At some point did you go to the emergency room?

A. Much later in the evening . . . . So, [the general manager] walked us downstairs but while we were waiting for the elevator, he said, well maybe you broke the glass. Maybe you broke the light, and we both turned on him, that is not possible. There is no way. I barely touched it. I barely touched the wall. It's just – this is safety glass over a light. There's no way.

Q. Going back to the light, how did you identify it was the light that cut you?

A. Because that's what I was swimming past. There's nothing else.

Q. Is the wall – does the wall have any sharp edges on it?

A. No.

Q. Is the pool lined with any synthetic material?

A. I don't know what the pool is made off [sic]. All I know is there was a light there and I swam past it and brushed it and I cut myself.

Jason Deraveniere, the general manager of the New York Sports Club facility located at 1601 Broadway at the time of the incident, testified at his deposition that he checked the subject pool on a daily basis, including but not limited to, the lighting inside the pool. (Deraveniere Tr. 12). He also testified (*id.* at 16, 17, 18):

Q. Was that the first question, or you asked her how she was, things like there a [sic]?

A. It was the first question. "Are you okay?"

Q. Do you recall what she said?

A. Yes she said she was okay, but her finger, obviously, had a cut on it. I asked her how it happened, you know.

Q. And did she give you any indications?

A. Yeah. It was awhile ago, so – I believe she said something about a glass, that it got cut on a glass.

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Q. Do you have a recollection of her indicating that she suffered an injury when her hand came in contact with an underwater electronic lens?

A. I remember her saying it was a glass that was in the pool area. That's what I remember.

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Q. Do you recall her indicating that she came in contact with a lighting fixture?

A. Yes.

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Q. When she indicated that, what did you do, Mr. Deraveniere?

A. What I did, I took a look in the pool to see exactly what it was. I did remember seeing a light fixture that was broken in the pool, inside the pool, underneath the water. I did see some glass also on the floor in the bottom of the pool as well. That's pretty much what I saw.

Mr. Deraveniere also claims that Plaintiff's incident was his first indication that the light fixture was broken and that he had not been aware that the light was out for a period of time prior to the incident on April 11, 2011. (*id.* at 37-38).

Muhammed Derti, in his capacity as Regional Pool Manager for TSI, testified that his role was to oversee 27 swimming pools for TSI in the United States, including pools in New York. (Derti Tr. 17-18). Mr. Derti was familiar with the pool located at 1601 Broadway and stated that a pool technician visits that location twice a week to, among other things, inspect the pool and "make sure that all the lights in the pool are on." (*id.* at 21-22). He also stated that the subject New York

Sports Club had a pool manager, Jonathan Ortecho, who, among other things, checked all light fixtures. (*id.* at 23).

According to Mr. Derti, when a pool lighting issue arose, as a matter of course, the lifeguard on duty would immediately report that issue to the pool manager, who would immediately report the issue to Mr. Derti himself. (*id.* at 37). Mr. Derti would then arrange for a vendor and/or technician to rectify the lighting issue within a day or two. (*id.* at 38). He claims that he did not receive any complaints prior to the incident on April 11, 2011 that a light was "out," although he did receive reports in March that two lights were "dim." (*id.* at 40). Mr. Derti also testified that he was unaware of any complaints concerning any broken, dangerous, defective, or otherwise hazardous lights or light fixtures in the subject pool and that he would have no way of contesting or verifying a claim by a witness that a pool light had been "out, non-functioning, for a series of days" prior to the incident on April 11, 2011. (*id.* at 43, 45).

In her affidavit in opposition, Plaintiff states that while swimming, she "came in contact with a broken lens in a submerged lighting fixture" and cut her hand on the broken light fixture. She states she "dragged" her "left first finger across the broken lens suffering an amputation of the tip of" her finger. Plaintiff also claims that the light fixture which caused her injury was "out" and "provided no illumination" for at least a two-week period prior to the date of the incident.

Ms. Contrer, Plaintiff's friend who swam in the same lane as Plaintiff at the time of the incident, states in her affidavit that she observed over the course of a two-week period prior to the date of the incident that a submerged light fixture "was broken, and/or burnt out." She states that Plaintiff suffered an injury when "her left hand came in contact with the wall of the pool and more particularly with the light fixture in that wall." Ms. Contrer also claims that Plaintiff had advised pool management that she had "cut her finger on broken glass in the pool."

The accident report prepared by New York Sports Club states that on April 11, 2011, a member suffered a "cut/laceration" by a "sharp object" in the pool and that the "[m]ember was swimming and accidently cut her left pinky on the light frame inside the pool." See Ex. 3, Aff. in Opp. Additionally, New York Sports Club pool records indicate that the subject light fixture was an older model. See Ex. 4, Aff. in Opp.

ARGUMENTS

TSI contends that there was no evidence of a defect or dangerous condition at the time of, or prior to, Plaintiff's accident, nor was there actual or constructive notice of the same and thus Plaintiff is unable to establish a prima facie negligence claim. TSI argues that Plaintiff can only conjecture as to what caused her injury but cannot identify its cause because she did not actually see what caused her injury. Accordingly, any finding of TSI's negligence would be based upon pure speculation and thus would be impermissible. Moreover, Plaintiff herself may have broken the subject light fixture when she made contact with it thereby causing her own accident, for which TSI could not be liable.

Finally, TSI contends that Plaintiff assumed the risk of injury by participating in the activity of swimming thereby negating any duty on the part of TSI. In other words, by voluntarily participating in the recreational activity of swimming, Plaintiff consented to the risks of those injury-causing events which are known, apparent, or reasonably foreseeable consequences of participation, and her injury fell within this scope of injury-causing events.

In opposition, Plaintiff contends that TSI created the defective condition and had notice of the same. Plaintiff argues that the pool records demonstrate that TSI was aware that the subject light fixture was an older model in need of replacement. That it was not illuminated for at least a two-week period prior to the incident was a visible and apparent defect that existed for a sufficient

length of time to impute notice against TSI. In addition, Plaintiff argues that the cause of her injury is not speculative; rather she knew what caused her injury and reported it immediately. The accident report and testimony of Mr. Deraveniere establishes that there was broken glass from the light fixture in the pool and that it caused Plaintiff's injury.

Plaintiff also contends that her injury falls under the doctrine of res ipsa loquitor. Plaintiff argues that all three elements of the res ipsa doctrine are met: (1) Plaintiff's injury does not occur absent someone's negligence; (2) TSI was in complete control of the pool at all times; and (3) Plaintiff was swimming in accordance with pool rules and regulations and could not be found to have to have negligently contributed to her accident.

Finally, Plaintiff contends that she did not assume the risk of being injured by a defective light fixture by choosing to swim in TSI's pool. She further argues that she was not engaged in any sort of inherently dangerous sport and that sustaining an injury caused by a broken light fixture is not a risk inherent to the sport of swimming.

DISCUSSION

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding,

rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012).

The elements of a cause of action in negligence are (1) the existence of a duty; (2) a breach of this duty; and (3) injury as a result of the breach. *Rodriguez v. Budget Rent A Car Sys., Inc.*, 44 A.D.3d 216, 221 (1st Dep't 2007). It is a well-established principle that a property owner is under a duty to maintain its property in a reasonably safe condition in view of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk. *Zuk v. Great Atl. & Pac. Tea Co.*, 21 A.D.3d 275 (1st Dep't 2005); *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). When a property owner moves for summary judgment in a premises liability action, the property owner bears the initial burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective condition. *Sheehan v. J.J. Stevens & Co.*, 39 A.D.3d 622 (2d Dep't 2007). The court may find actual notice where the defendant either created the defective condition or was aware of its existence prior to the accident. *Atashi v. Fred-Doug 117 LLC*, 87 A.D.3d 455, 456 (1st Dep't 2011). To constitute constructive notice, the defective condition must be both visible and apparent and it must exist for a sufficient length of time prior to the accident to allow a property owner to discover and remedy it. *Gordon v. Am. Museum of Nat. History*, 67 N.Y.2d 836, 837 (1986).

TSI meets its initial burden of establishing that it neither created nor had actual or constructive notice of the allegedly defective light fixture. The testimony of Mr. Deraveniere that he checked the pool on a daily basis and did not observe a broken light fixture prior to the time of Plaintiff's accident coupled with the testimony of Mr. Derti that a pool technician and pool manager each checked the pool on a weekly basis and that he had not received any complaints relating to the

pool's lights being broken, dangerous, defective, or otherwise hazardous are sufficient to make a prima facie showing that TSI neither created nor had actual or constructive notice of the allegedly defective condition. *See Fernandez v. Festival Fun Parks, LLC*, 122 A.D.3d 794, 795 (2d Dep't 2014) ("In order to meet its burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the accident site was last cleaned or inspected prior to the plaintiff's fall") (internal quotation marks omitted); *Schreer v. Kips Bay Development Ltd. Partnership*, 2016 WL 1435647 (Sup. Ct., New York County 2016).

However, Plaintiff has offered sufficient evidence in opposition to raise a triable issue of fact as to whether TSI created or had actual or constructive notice of the allegedly defective light fixture, and whether the light fixture caused her injury. Both Plaintiff and Ms. Contrer stated that the subject light had been burnt out for at least two weeks prior to Plaintiff's accident. Further, while Plaintiff did not actually see the subject light fixture cut her finger, she nevertheless testified that she felt it cut her finger. She testified that she brushed against the light fixture and immediately felt a shock and pain. Her awareness of her surroundings, physical sensations, and repeated testimony that the subject light fixture caused her injury, along with records indicating the light fixture's older age and the deposition testimony and affidavits stating it was broken and not illuminated prior to the incident and that there was broken glass in the pool after the incident, are sufficient to raise triable issues of fact. *See Diaz v. 1100 Wyatt LLC*, 99 A.D.3d 532 (1st Dep't 2012) (affirming denial of defendant's motion for summary judgment dismissing the complaint where plaintiff testified that he tripped on a crack or hole in the sidewalk and "did not see the crack until he was shown a picture of the area, but he felt it with his foot when he fell"); *Clark v. Jay Realty Corp.*, 94 A.D.3d 635 (1st Dep't 2012) (affirming denial of defendant's motion for summary judgment where although legally

blind plaintiff "could not state with certainty what caused her fall, she testified that she fell after her right foot hit 'a raised area' and that the defect was '[a] curb-like raise'"); *see also Vucetic v. Macy's E., Inc.*, 17 Misc. 3d 1116(A), 851 N.Y.S.2d 67 (Sup. Ct., Richmond County 2007) ("explaining that proximate cause may nevertheless be inferred from the facts and circumstances surrounding the injury and the logical inferences to be drawn therefrom"); *Lacova v. Gershow Recycling Corp.*, 2015 WL 5459537 (Sup. Ct., Suffolk County 2015), 3 (finding that "a logical inference may be drawn to permit a finding of proximate cause based on more than speculation alone where a plaintiff who testified that he "did not see the object he stepped on," could describe what it felt like, along with testimony of "all parties concerning the debris which was typically on the premises").

Moreover, there is a question of fact as to whether Plaintiff caused the light fixture to break and expose broken glass. However, even assuming Plaintiff broke the light fixture, which this court finds is a question for the fact finder, the light fixture's age, its lack of illumination, and Plaintiff's testimony that she "barely brushed it" raise an issue of fact as to whether the light fixture was defective to have broken from such allegedly minimal contact. *See Bernstein v. Red Apple Supermarkets*, 227 A.D.2d 264, 265 (1st Dep't 1996) ("The question of whether or not a dangerous or defective condition exists depends on the peculiar facts and circumstances of each case and is a question of fact for the jury, and liability will result where the condition is found to be hazardous to pedestrians") (internal quotation marks omitted); *Rant v. Locust Valley High Sch.*, 123 A.D.3d 686, 687 (2d Dep't 2014) ("whether a certain condition qualifies as dangerous or defective is usually a question of fact for the jury to decide") (internal quotation marks omitted). Thus, there is also a question of fact as to whether Plaintiff negligently contributed to her accident and as such res ipsa loquitur would not apply. *See Pappalardo v. N.Y. Health & Racquet Club*, 279 A.D.2d 134, 143 (1st

Dep't 2000). Finally, the court finds TSI's arguments concerning Plaintiff's assumption of risk unavailing.

CONCLUSION AND ORDER

For the reasons stated above, the court finds that plaintiff has raised triable issues of fact as to whether TSI created the allegedly defective light fixture or had actual or constructive notice thereof. Accordingly, it is

ORDERED that Defendant Town Sports International Holdings, Inc. i/s/h/a Town Sports International, Inc., New York Sports Club, Inc., Town Sports International, Inc. d/b/a New York Sports Club, Town Sports International Holdings, Inc. d/b/a New York Sports Club, and TSI Broadway, Inc.'s motion for an order granting summary judgment dismissing the complaint is denied.

This constitutes the decision and order of the court.

DATED: May 23, 2017

ENTER:

Kelly O'Neill Levy

HON. KELLY O'NEILL LEVY J.S.C.