Visone v Third & Twenty Eight LLC
2018 NY Slip Op 33150(U)
December 6, 2018
Supreme Court, New York County
Docket Number: 150978/2016
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE** **PART** **IAS MOTION 12EFM**

Justice

----------X

CHRISTOPHER VISONE,

Plaintiff,

- v -

THIRD & TWENTY EIGHT LLC, RBG VILLAGE LLC, individually and doing business as TAVERN ON THIRD and TAVERN ON THIRD,

Defendants.

----------X

INDEX NO. 150978/2016

MOTION DATE

MOTION SEQ. NO. 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this application for summary judgment

By notice of motion, defendants move pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On December 14, 2014, plaintiff attended Santa Con, an event held in lower Manhattan whereby costumed participants visit numerous bars. That night, plaintiff went to defendant Tavern, where he tripped and fell down a flight of stairs leading to a lower-level restroom area, sustaining serious injuries.

At his deposition, plaintiff testified as follows: He began the day at 1 p.m. by visiting his brother in lower Manhattan, and then went to a bar, where, for over three hours, he consumed three or four alcoholic beverages. He then returned to his brother's apartment where he drank at most one beer. At 10:00 p.m., plaintiff went to Tavern, and while at the bar, he consumed one acholic beverage. Sometime between midnight and 1:00 a.m., plaintiff descended a stairway

from the main level of the bar to a lower level where bathrooms were located, and tripped and fell. As a consequence, he was seriously injured and was in a coma for nearly three weeks. (NYSCEF 45).

At a deposition, the employee responsible for cleaning the stairs testified that when he used the stairway five minutes before the accident, it was "not wet," that he continually cleaned the stairs every ten to fifteen minutes, and that after he saw plaintiff lying at the base of the stairs, he immediately went upstairs to alert other employees. He stated that the stairs were not wet at the time. (NYSCEF 48).

The bartender testified at a deposition that the stairway to the lower floor "must be checked "all the time" and that when he saw plaintiff approach the stairway looking "shaky," he could not get to him in time to be of assistance. He had on prior occasions assisted intoxication patrons on the stairs. (NYSCEF 46).

One of plaintiff's friends who was with him that night testified that the stairway was wet, although she does not remember when she used it. (NYSCEF 51). Another friend testified that the bar had not been busy at the time. (NYSCEF 50).

Plaintiff's brother testified that plaintiff drank a small amount of alcohol throughout the day and had not consumed any illicit drugs. (NYSCEF 49).

The responding police officer testified that he saw plaintiff lying at the bottom of the stairway and that he had spoken with plaintiff's brother who appeared to be intoxicated. (NYSCEF 52).

II. CONTENTIONS

A. Defendants (NYSCEF 38-59)

Defendants assert that as plaintiff does not know what caused him to fall, he cannot demonstrate, *prima facie*, that they were negligent, and absent any complaint about the stairway, they cannot be held liable.

Defendants also contend that plaintiff's fall is as likely attributable to his intoxication as it is to any negligence on their part. They offer two expert reports containing the opinion that plaintiff's intoxication would have affected his ability to walk (NYSCEF 55, 58), and reference the testimony of one of the bar's employees, who states that the area was constantly cleaned, and that the steps were safe five minutes before he saw plaintiff on the ground. (NYSCEF 48).

B. Plaintiff (NYSCEF 61-66)

Plaintiff argues that his lack of memory of the accident does not preclude a finding of negligence, as it only lowers the standard of proof. Moreover, as defendants knew that many Santa Con participants would be attending the bar, they had a duty to secure the stairway, observing that the bar employed four security guards, one of whom was assigned to stand at the top of the stairway that day, whereas at the time of the accident, only one security guard was present and not positioned at the top of the stairway. In support, plaintiff submits the affidavit of a bar and restaurant management and safety expert, who opines that accepted bar safety practice requires supervision at the top of the stairway, and that even if defendants were not required to supervise the top of the stairway, they were required to monitor plaintiff's alcohol consumption and, if necessary, send him home.

According to plaintiff, the employee responsible for cleaning the stairway did not do so often enough, and that there should have been an employee dedicated solely to that task.

(NYSCEF 63). Moreover, despite knowing of plaintiff's intoxication, defendants did not monitor him, and when the bartender saw him approach the stairs, he did not assist him. In addition, plaintiff asserts that the condition of the stairway was dangerous, offering a photograph showing a lime, cups, and spilled liquid on the stairway and plaintiff lying at the bottom of the stairs. (NYSCEF 65).

Plaintiff contends that any arguments pertaining to intoxication ~~pertain~~ **relate** to comparative negligence, and that, given his lack of memory, there exist material questions of fact.

C. Reply (NYSCEF 67-71)

Defendants reassert that plaintiff fails to raise a question of fact regarding causation, observing that he does not deny having been intoxicated, and despite claiming to have no memory of the accident, he recalls talking with his brother and sending text messages to his girlfriend shortly before the accident. They reiterate their arguments about causation, deny having had a duty to place employees throughout the bar in the event that plaintiff was drunk, and observe that the alleged duty to follow patrons out of fear that they may fall down the stairway is impractical and overly broad. (NYSCEF 69). In any event, they maintain that they had an employee dedicated to cleaning the bar, including maintaining and periodically checking on the stairway.

According to defendants, plaintiff's expert does not create a material issue of fact as he neither visited the bar nor took measurements or photos of the stairway, and they observe that he contradicts himself by characterizing plaintiff as too drunk to be in the bar, but not too drunk to walk down the stairway safely absent any dangerous condition.

In addition, defendants note that no one has ever fallen on the stairway nor has evidence been offered that the stairway was defective. Thus, defendants claim that there is no actual or constructive notice as to any defects. They argue that the photograph of plaintiff lying on the floor should not be considered absent any indication as to when it was taken.

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie,* entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow,* 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad,* 64 NY2d at 853).

To establish a *prima facie* claim of negligence, a plaintiff must show duty owed, a breach, and proximate cause (*Kenney v City of New York,* 30 AD3d 261, 262 [1st Dept 2006]), and that defendants created the dangerous condition, or that they had actual or constructive notice of it (*Segretti v Shorenstein Co., E., L.P.*, 256 AD2d 234, 235 [1st Dept 1998]). An owner of premises has constructive notice of a defect on the premises when the defect is visible and exists for a sufficient period of time before the accident to permit defendants to discover and remedy it. (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986]).

Whether a defendant owes a plaintiff a duty constitutes a threshold question of law. (*On v BKO Exp. LLC*, 148 AD3d 50, 53 [1st Dept 2017], citing *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001]). Generally, providers of alcohol owe no duty to protect against the

consequences of one's own voluntary intoxication. (*Sheehy v Big Flats Cmty. Day, Inc.*, 73 NY2d 629, 636 [1989]). Although landowners have a duty to protect third parties on the premises from the misconduct of an intoxicated person (*see D'Amico v Christie*, 71 NY2d 76, 85 [1987] [duty to control conduct of third persons arises from obligation of landowner to keep premises free of known dangerous conditions, including intoxicated guests]), that duty does not require landowners to prevent intoxicated persons from harming themselves (*Sheehy*, 73 NY2d at 636; *Butler v New York City Transit Auth.*, 3 AD3d 301, 302 [1st Dept 2004] [bar did not owe duty to patron struck by subway due to voluntary intoxication]).

Here, given plaintiff's voluntary intoxication, defendants owed him no duty to ensure that he not trip and fall, and the opinion of plaintiff's expert that defendants should have monitored plaintiff is beyond his expertise. (*Colon v Rent-A-Ctr., Inc.*, 276 AD2d 58, 61 [1st Dept 2000] [expert witness may not opine on legal obligations under contract]).

Property owners also owe a duty of reasonable care to invitees to maintain their property in a safe condition. (*Maheshwari v City of New York*, 2 NY3d 288, 294 [2004]). This duty extends to defendants, requiring them to ensure that passageways and stairways are free from dangerous defects. However, that duty is imposed only if defendants had constructive or actual notice of the stairway's dangerous condition. (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Caicedo ex rel. Ferreira v Sanchez*, 116 AD3d 553, 554 [1st Dept 2014]).

The photograph showing debris at the bottom of the stairs is not probative of whether defendants had sufficient notice of its existence absent evidence that it existed long enough before the accident to permit them to clean it up. (*See Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010] [absence of evidence demonstrating how long condition existed prior to accident constitutes failure to establish constructive notice as matter of law]).

To the extent that plaintiff argues that the alleged condition of the stairway was recurring, it bears observing that in *Gloria v MGM Emerald Enterprises, Inc.*, where the plaintiff slipped on liquid on the dance floor of a nightclub and fractured her wrist, she testified that she had not noticed the condition of the floor before her accident, and the defendant offered evidence that an employee had cleaned up garbage and spills on the dance floor. (298 AD2d 355, 355-356 [2d Dept 2002]). The Court declined to find that recurring spills constituted constructive notice of each recurrence. (*Id.* at 356). Rather, absent any evidence that the dance floor was routinely unattended, spills such as the one on which the plaintiff slipped, "cannot be guarded against in advance and requires notice in order to be remedied." (*Id.*). Here too, defendant sufficiently demonstrates that its employee had inspected the stairway just five minutes before the accident. Absent a sufficient opportunity to discover the alleged dangerous condition, plaintiff does not raise an issue as to constructive notice.

Even if defendants had constructive notice of the debris on the stairway, there must be evidence that their negligence was the proximate cause of the accident. (*Hain v Jamison*, 28 NY3d 524, 528 [2016]). Generally, a plaintiff's lack of memory of the fall and inability to articulate why he or she tripped or slipped is fatal to a claim of negligence, because any finding of proximate cause would be based on speculation. (*O'Connor v Metro Mgmt. Dev., Inc.*, 130 AD3d 698, 699 [2d Dept 2015], quoting *Rivera v J. Nazzaro Partnership, LP*, 122 AD3d 826, 827 [2d Dept 2014], *lv denied* 26 NY3d 907 [201s5]).

Where, however, death or a loss of memory prevents a plaintiff from describing the occurrence giving rise to the injury in issue, a lesser burden of proof is assigned to him (*Noseworthy v City of New York*, 298 NY 76 [1948]; *Williams v Hooper*, 82 AD3d 448, 449–450 [1st Dept 2011]), unless his adversary also has no access to the facts of the case (*Wright v New*

York City Hous. Auth., 208 AD2d 327, 332 [1st Dept 1995]). Here, whereas plaintiff lacks memory of the accident, no one witnessed it and thus, the parties are equally ignorant of what caused plaintiff to fall. Consequently, plaintiff's burden of proof is not lessened.

Even if plaintiff is assigned a lesser burden of proof pursuant to *Noseworthy*, *supra*, he is not relieved of his burden of demonstrating a *prima facie* case (*Lynn v Lynn*, 216 AD2d 194, 195 [1st Dept 1995]), namely, that other possible causes of the accident are sufficiently remote to enable the trier of fact to reach a verdict based on logical inferences, not speculation (*McNally v Sabban*, 32 AD3d 340, 341 [1st Dept 2006], quoting *Lynn*, 216 AD2d at 195-96).

Defendants offer evidence sufficient to demonstrate, *prima facie*, that plaintiff 's intoxication may be found to be a principal cause of his injuries. (*See McNally*, 32 AD3d at 342 [rejecting argument that intoxication was only issue of comparative negligence because the plaintiff's intoxication could have been principal cause of harm]). Absent sufficient evidence of a duty on defendants' part, plaintiff fails to raise a triable issue of fact.

IV. CONCLUSION

For all of these reasons, it is hereby

ORDERED, that defendants' motion for summary judgment is granted and the complaint is dismissed in its entirety with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

12/6/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE