

Trantham v 12 First Ave. Rest. Corp.

2020 NY Slip Op 32074(U)

June 30, 2020

Supreme Court, New York County

Docket Number: 157905/2016

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

ERIC TRANTHAM,

Plaintiff,

- v -

12 FIRST AVENUE RESTAURANT CORP., D/B/A
ONE AND ONE, PAUL O'SULLIVAN, TERENCE
DUNNE,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 69-99
were read on this motion to/for summary judgment.

Defendant 12 First Avenue Restaurant Corp., d/b/a One and One, moves pursuant to
CPLR 3212 for an order granting it summary judgment dismissing the case. Plaintiff opposes.
The parties previously agreed to a stipulation of discontinuance as against the individual
plaintiffs. (NYSCEF 84).

I. UNDISPUTED FACTS

Defendant owns and operates the restaurant and bar in issue and is responsible for its
maintenance and repair.

On April 28, 2016, between 1 pm and 1:30 pm, plaintiff entered the restaurant/bar owned
and operated by defendant. In search of a restroom, he passed the bar section of the premises and
proceeded to the far left corner, where there was a locked handicap restroom. He then went to the
other side of the premises and upon passing under an archway which led into a hallway, he fell
down a staircase, injuring himself.

II. PLAINTIFF'S DEPOSITION (NYSCEF 75)

At his deposition dated February 20, 2018, plaintiff testified that as he went under the archway, he entered a hallway and did not see that there was staircase until he took "the first step and missed it." He did not know why he did not see the stairway.

By errata sheet, dated August 2, 2018 and appended to the transcript of his deposition testimony, plaintiff corrected page 101, line 24 as follows:

I could not see there was a stairway because after I went through the archway, the hallway was darker than the area of the restaurant. The hallway went to the left. I expected the hallway was going to continue and there were no signs that alerted me that there was a stairway going down or that the restrooms were down stairs. Also there was no handrail on the right side of the stairway that might have also alerted me that there was a stairway and that I could have grabbed on to [] stop my fall.

He explained that when testifying, he had thought that he was only to "mention things [he] had not mentioned before and [he] was not asked about the handrail." (NYSCEF 75).

III. CONTENTIONS

A. Defendant (NYSCEF 69-87)

Defendant argues, relying on plaintiff's testimony, that because plaintiff did not see the stairway until he took the first step, which he missed, he is unable to state the cause of his fall. Thus, it maintains, it is entitled to summary judgment. It also offers the affidavit of an engineering expert who opines, within a reasonable degree of engineering certainty based on plaintiff's bills of particulars, testimony with exhibits, and his inspection of the premises on September 27, 2019, that "there is no evidence that either the stairs or the handrail on the left-hand side descending the stairs or the lighting were defective or in violation of the building code" or that "the stair treads and risers, handrail finger clearance, or the lighting were defective." It is also his opinion that the building codes that plaintiff claims to have been violated do not apply. Based on these opinions, defendant asserts that it has demonstrated that no

dangerous condition existed with respect to the stairway.

In addressing the allegations set forth in plaintiff's errata sheet, the expert asserts that there is no evidence that his alleged fall was caused by the lack of slip guards and/or a slip resistance surface or that defendant "allow[ed] and permit[ed] the premises to be so arranged, configured and operated as to cause and permit a dangerous condition to exist on the premises: to wit: an obstructed limited and inadequate visibility of an open stairway."

Defendant, moreover, contends that plaintiff fails to establish that any of the alleged conditions caused his accident, thereby failing to establish proximate cause.

B. Plaintiff (NYSCEF 88-93)

In addition to his deposition testimony and errata sheet, by affidavit dated December 20, 2019, plaintiff alleges that upon reaching the archway, which had neon signs of a man and a woman above it as shown in photograph three of defendant's expert report, he "figured the restrooms were located in the hallway past this archway and [he] made a left turn and proceeded through the archway." Upon reaching the hallway, he continued, there was a large metal door that was open to his left, as depicted in photograph five of defendant's expert report, which he alleges fairly and accurately represents the position of the door as it existed that day. From that location, plaintiff denies having been able to see that there was a stairway going down.

(NYSCEF 96).

Plaintiff also states that before he reached the archway, there were ceiling light fixtures and large windows on his right, and as it was an early afternoon on a clear day in April, bright light came through them. However, the hallway had no windows and was dark. Plaintiff then saw that the hallway turned to the left and that after he followed it to the left, thinking that there was another hallway, he found that there was a stairway that went down to the basement. He

describes the stairway as “open at the top” with “no guards before you reached the top of the stairs going down” or any “signs of any kind that alerted [him] that instead of a hallway, there was a stairway.” (*Id.*).

Plaintiff continued to walk forward, and “because [he] could not see the stairway and did not know it was there, when [he] stepped forward, [his] foot missed the top step and [he] fell down to the bottom of the stairway suffering injuries to [his] wrist and head.” He claims that after the accident, upon seeing the site and the photographs taken by the parties that are annexed to the affidavits, he saw that the metal door extended beyond the hallway wall and that the top of the stairway was hidden behind a corner and recessed from the hallway. Also, due to the extension of the door, the handrail on the left side of the stairway was not visible to him before he fell. He contends that had there been a handrail on right side, he may have been able to see it from the hallway and that photographs six, seven, and eight of defendant’s expert’s report showing “Watch Your Step” signs were not there when he fell. (*Id.*).

Plaintiff thus argues that there exist factual issues as to defendant’s negligence arising from having created, allowed and/or maintained an “open, unguarded descending stairway” and “conditions that impeded timely and adequate view of the presence of said open, unguarded stairway.” He also asserts that defendant failed to warn him properly and timely of the existence of this “dangerous hazardous falling condition,” which was a substantial factor causing him serious personal injury. (NYSCEF 88).

C. Defendant’s reply (NYSCEF 97)

Defendant maintains that plaintiff’s affidavit, filed in response to the instant motion, should be disregarded as feigned, alleging that it “directly contradicts” his deposition testimony wherein he stated that he did not know why he did not see the stairway, whereas in his affidavit,

he stated why he did not see the stairway. Defendant also asks that the affirmation of plaintiff's counsel be disregarded to the extent he advances factual allegations concerning the layout of the premises and observes that plaintiff offers no expert evidence contradicting its expert's opinions that the premises conformed with any and all regulations.

IV. ANALYSIS

As plaintiff argues only that there is a triable issue of fact as to defendants' negligence, he concedes that defendants set forth a *prima facie* case. Defendants do not address plaintiff's errata sheet beyond their expert's opinion of its substance.

Plaintiff need not offer expert evidence in opposition to that offered by defendants, especially where, as here, a factfinder is capable of assessing, from a photograph offered by defendants (NYSCEF 81), whether the condition in issue is dangerous. (*Infante v Jerome Car Wash*, 52 AD3d 319, 320 [1st Dept 2008] [plaintiff under no obligation to rebut defendants' expert's conclusions with expert of her own, as expert testimony not required where question of whether unsafe condition exists is within ken of jurors]). That photograph depicts an open and partly obscured stairway situated soon after a leftward curve in the hallway. Coupled with plaintiff's testimony that the hallway was dark and that no signage alerted him in advance to the presence of the stairway, plaintiff raises a factual issue as to whether defendants were negligent in failing to provide a sufficient warning. (*See Sorrentini v Netta Realty Group*, 100 AD3d 484, 485 [1st Dept 2012] [denying summary judgment where photograph created issues of fact as to whether condition was open and obvious and whether there were adequate warnings]).

Although a consideration of plaintiff's affidavit is unnecessary to this result, it bears observing that absent any allegation that it cannot be reconciled with his errata sheet, the affidavit does not constitute "a self-serving allegation calculated to contradict an admission made

in the course of previous testimony” (*Clemente v 205 W. 103 Owners Corp.*, 180 AD3d 516, 517–18 [1st Dept 2020]; *Kalt v Ritman*, 21 AD3d 321, 323 [1st Dept 2005]). Allegations advanced by plaintiff’s counsel also need not be considered.

Accordingly, it is hereby

ORDERED, that defendants’ motion for summary judgment is denied in its entirety.

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6/30/2020

DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE