SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD LATIN** **PART** **46M**

Justice

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PAT TOTH-HURLEY,

Plaintiff,

- v -

ETHOS GALLERY 51 LLC,JOHN DOE

Defendant.

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INDEX NO. 158858/2018

MOTION DATE 03/20/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for JUDGMENT - SUMMARY.

In this negligence matter, plaintiff seeks damages for injuries she sustained when she was being seated by a server at the restaurant, Ethos Gallery 51 LLC ("defendant" or "the restaurant"). Plaintiff claims she was injured when attempting to sit down in a chair offered by a server but instead fell to the floor. Defendant moves for summary judgment, pursuant to CPLR 3212, on the grounds that plaintiff can only speculate as to what caused her accident.

On December 2, 2017, plaintiff was out to dinner with her husband and two friends at the restaurant. She was the last to be seated, and testified later as to the following:

> Q. Okay. Did you begin sitting down while you were watching him push the chair to you?
> A. Yes. I had my left hand down to feel the chair like I always do. And then I went to sit down, and it wasn't there. I don't know what happened to it

(plaintiff deposition, NY St Cts Electronic Filing [NYSCEF] Doc No. 20 at 131-132).

> …
> Q. And how far was the chair behind you when you went to sit when you last saw it?
> A. It was almost tucked under me.
> Q. Was the edge of the chair at all touching the back of your legs as you were going to sit?
> A. Yes.
> Q. You felt it?

A. I felt it. I felt it with my finger.
Q. Did you feel it with the back of your legs? In other words, were the back of your legs up against the chair when you went to sit?
A. It was being pushed towards me. So I was about to feel it.
Q. So it was still being pushed towards you as you were going to sit?
A. Yes
(*id*. at 144-145).

Plaintiff further stated that the chair remained upright but ended up "in the back of [my husband's] chair on the other table. It was like somebody kicked my chair" (*id*. at 139, 141-142).

Plaintiff's husband, Brit Hurley, also testified on her behalf. He stated, "I don't know if the chair was pulled, moved, hit, I don't think anything was done on purpose, but at the same time, when she went down, she fell..." (Hurley deposition, NYSCEF Doc No. 22 at 23). Hurley was questioned further and stated:

Q. Okay. Did you actually see your wife moving into position to sit into the chair
A. Yes.
Q. -- before the accident?
A. Yes.
Q. So did you see the chair where it was positioned behind her as she went to sit?
A. The chair was positioned behind her. Somebody had to get - it was pulled out. And my wife, whenever she sits, she always sits and puts her hand behind her like she's going sit down and touch a chair to know where - to know that it's there when she's going down. So she reaches back to sit down.
Q. Okay. […] When you saw the chair in a position behind her, was it in the position that would enable her to sit down and sit in the chair?
A. I believe so. Yes.
(*id*. at 24-25).

…

Q. So did you see your wife actually then start trying to position herself into the chair before the incident occurred?
A. Yes. Watch her putting her hand back and starting to sit down.
Q. And did you see what happened to the chair, if anything, as she went to sit down?
A. Literally, it wasn't there. And like I said, there was a few people behind her. I don't know if it was accidently pulled, moved, kicked, so I can't be sure what it was, but obviously, my wife is - knows how to stand up and sit down.
Q. So my question was; did you see the chair move at all before your wife sat?
A. I did not physically see the chair move.
(*id.* at 25-26).

Samoli Risteski, the manager of the restaurant at the time of the incident, witnessed the accident and testified on defendant's behalf. He stated, "[the server] was right behind her and he

was trying to be of service. So, while she was trying to sit down, he moved the chair so she can have more space to get comfortable. She did not saw [sic] that and she fell" (Risteski deposition, NYSCEF Doc No. 21 at 25-26).

Dorene Damato, plaintiff's friend who was seated across from plaintiff, states that she had a clear view of the accident and that [t]he waiter pulled the chair out as [plaintiff] went to sit down. [Plaintiff] missed the chair [and] fell back on her buttocks" (Damato aff, NYSCEF Doc No. 28 at 1).

DISCUSSION

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a prima facie showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). If an issue of fact exists, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8, 12 [1960], *rearg denied* 8 NY2d 934 [1960]). "[I]ssue-finding, rather than issue-determination" is the court's function on such an application (*Sillman v Twentieth Century-Fox Film Corp*. 3 NY2d 395, 404 [1957], *quoting Esteve v Abad*, 271 App Div 725, 727 [1st Dept 1947]).

All the evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *Medina-Ortiz v Seda*, 157 AD3d 499 [1st Dept 2018]). The motion should

be granted only if there is no rational process by which the jury could find for the plaintiff as against the moving defendant (*Harding v Noble Taxi Corp*., 182 AD2d 365 [1st Dept 1992]).

To establish a prima facie case of negligence in a premises liability claim, a plaintiff must "demonstrate that defendant either created the condition by its own affirmative act, was aware of a specific condition yet failed to correct it, or was aware of an ongoing and recurring unsafe condition which regularly went unaddressed" (*Kivlan v Dake Bros.,* 255 AD2d 782, 783 [3d Dept 1998]). A defendant who moves for summary judgment has the initial burden of demonstrating "that it neither created the alleged defective condition nor had actual or constructive notice of its existence" (*Kyte v Mid-Hudson Wendico*, 131 AD3d 452, 453 [2d Dept 2015]).

Defendant argues that because plaintiff cannot explain the reason for her fall and is unable to identify what caused her to fall, she cannot show that defendant's alleged negligence contributed to the accident. Defendant cites to *Smith v Wisch* (77 AD2d 619, 619-620 [2d Dept 1980][internal quotation marks and citation omitted]), wherein the complaint was dismissed against a defendant in a negligence action because the court found that there could be various possible causes of the accident "which may be as reasonably attributed to a condition for which no liability attaches as to one for which it does...." However, in *Smith*, there were no witnesses to the accident, and no one knew how the plaintiff came to fall or where he was located when he fell because he was alone at the time. In addition, plaintiff later died from his injuries, so he could not testify as to the circumstances that led to the fall. Here, not only are there multiple witnesses that state the server at the restaurant was pulling out plaintiff's chair for her to be seated, but she herself testifies as to the events that occurred immediately prior to and after her accident.

Contrary to defendant's contention, plaintiff's failure to identify the precise reason the chair was no longer beneath her is not fatal to her claim.

> "To carry the burden of proving a prima facie case, the plaintiff must generally show that the defendant's negligence was a substantial cause of the events which produced the injury. Plaintiff need not demonstrate, however, that the precise manner in which the accident happened, or the extent of injuries, was foreseeable"

(*Klapa v O & Y Liberty* Plaza Co, 218 AD2d 635, 636 [1st Dept 1995], quoting *Derdiarian v Felix Contr. Corp.,* 51 NY2d 308, 315 [1980]). What's more, defendant's motion must be denied because it cannot obtain summary judgment by pointing to gaps in plaintiff's proof but is required to tender evidence that it was not negligent (*Bryan v 250 Church Assoc., LLC,* 60 AD3d 578 [1st Dept 2009]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact.

Indeed, plaintiff's testimony raises triable issue of fact as to whether defendant's negligence was a substantial factor in causing her to fall, notwithstanding that at the time she fell plaintiff may not have known what occurred the "split second" between her beginning to sit down and her landing on the ground (NYSCEF Doc No. 20 at 139). Ultimately, defendant has failed to demonstrate that it did not cause or create the dangerous condition that caused plaintiff's injuries. Therefore, it is the province of the trier of fact to assess and determine the differing theories as to the cause of the accident.

Accordingly, because the defendant failed to satisfy its initial burden of establishing its prima facie entitlement to judgment as a matter of law, its motion should be denied without regard to the papers submitted in opposition (*see Winegrad,* 64 NY2d at 853). Nevertheless, even if the defendant had met their burden the plaintiff still raised issues of fact that would preclude summary judgment.

CONCLUSION

Accordingly, it is

ORDERED that defendant Ethos Gallery 51 LLC's motion for summary judgment (sequence number 001) is denied in its entirety.

This constitutes the decision and order of the Court.

9/12/2023
DATE

RICHARD LATIN, J.S.C.

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