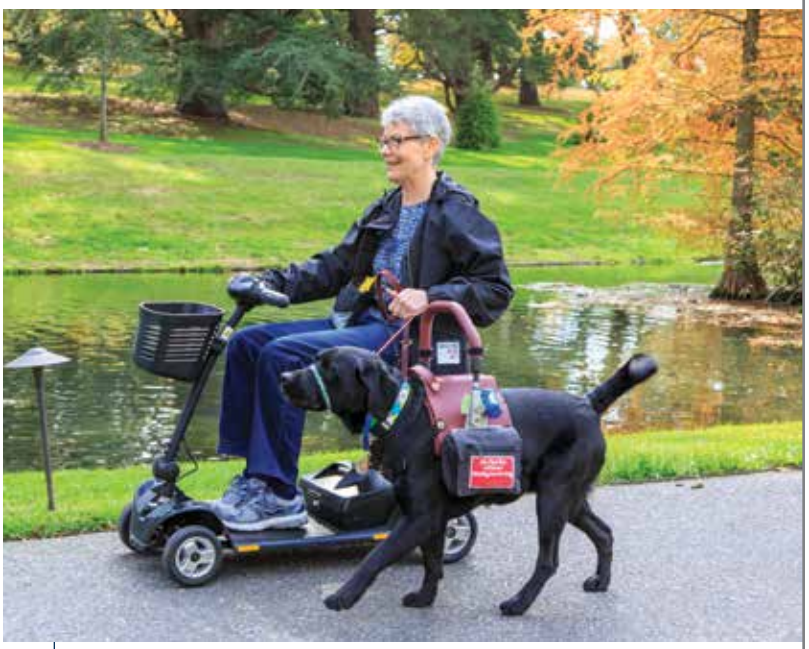
LEGAL INSIGHTS

A Publication of Havkins Rosenfeld Ritzert & Varriale, LLP

Going to the Dogs: Keeping Your Liability on a Leash

By Carla Varriale



People with disabilities have the right to use (and do use) the same facilities and services as individuals without disabilities. That premise is not a confusing one. However, the questions of what types of facilities are considered "places of public accommodation" pursuant to the anti-discrimination laws and the types of reasonable accommodations that are required by federal, state and local laws often prove confusing to premises owners. The overarching objective of the anti-discrimination laws is to permit people with disabilities to fully participate in everyday life and that includes the right to equal use and enjoyment in housing, transportation and goods and services offered at places of public accommodation. The focus of this article is on a topic that inspires confusion to premises owners and operators in light of these laws: the requirement that "places of public accommodation" must allow "service animals" on the premises in order to assist disabled patrons with particular tasks that are related to their disability. It is against the law to discriminate against a person who is availing themselves (or trying to) of a place of public accommodation because that person is accompanied by a guide dog, hearing dog or service animal (and a "service animal," to make matters more confusing, is defined depending on the federal, state, city or local laws that are applied).

What Is a Place of "Public Accommodation"?

Places of public accommodation are broadly defined (and include a private entity that owns, leases or operates a place of public accommodation). In New York, an owner, lessor, lessee or operator of a "place of public accommodation" is subject to the following laws: federal (the Americans with Disabilities Act or "the ADA"), state (the New York State Human Rights Law) and city (the New York City Human Rights Law found in the New York City Administrative Code Sections 8-102(4) and (18) and 8-107.4 and 8-107.155). There are also local laws in Westchester and Nassau counties, for example, that should be consulted as applicable in order to assess what laws apply to the premises in question. Generally speaking, the term "public accommodation" encompasses pools, restaurants, gyms, hotels, schools, theaters, stores and sports facilities. In short, the statutes cover most commercial premises where the public is a business invitee.

Not All Animals Are Equal: "Service" Versus "Support" or "Therapy"

As an initial matter, not all animals are equal under the laws.[1] The types of animals that are encompassed within the law can vary depending on whether federal, state or local law is applied, particularly if within New York City (which views the federal and state laws as a "floor" and not "ceiling" for

1. The ADA, for example, contemplates dogs and even miniature horses as service animals.

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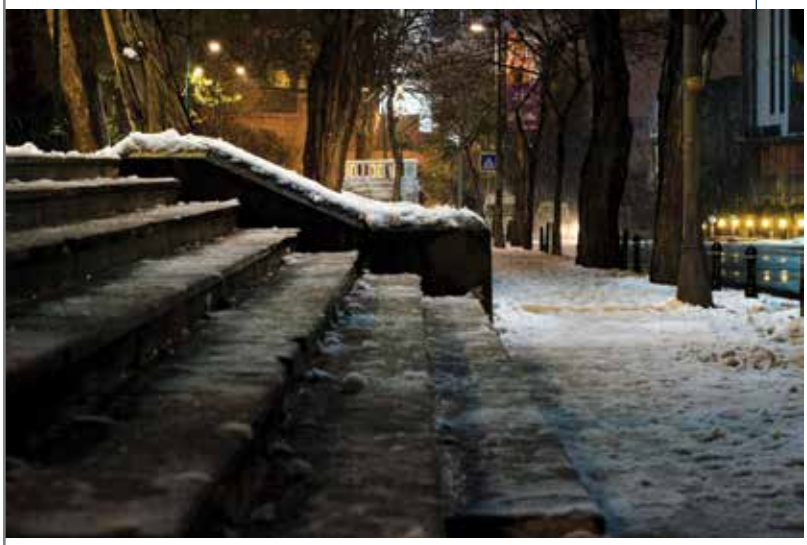
Court of Appeals Rules Out-of-Possession Landlords May Be Liable for Sidewalk Snow-and-Ice Conditions, Resolving Appellate Split

By Shawn Schatzle

Since its enactment in 2003, section 7-210 of the Administrative Code of the City of New York has been utilized by plaintiffs seeking to recover damages arising out of allegedly hazardous sidewalk conditions. The statute imposes liability on adjacent property owners not only for the "negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags," but also for "the negligent failure to remove snow, ice, dirt or other material." It does not, however, apply to certain residential property owners in possession. The duty owed by property owners who are subject to the statute has repeatedly been deemed to be nondelegable. *See Zorin v. City of New York*, 137 A.D.3d 1116, 28 N.Y.S.3d 116 (2d Dep't 2016); *Cook v. Consolidated Edison Co. of NY, Inc*., 51 A.D.3d 447, 859 N.Y.S.2d 117 (1st Dep't 2008).

With regard to out-of-possession property owners specifically, the statute has been deemed to impose a duty on them to maintain structural sidewalk conditions that may create a tripping hazard, such as raised flags. *See, e.g., James v. Blackmon*, 58 A.D.3d 808, 872 N.Y.S.2d 179 (2d Dep't 2008). However, until recently, when it came to transient sidewalk conditions that could create slipping hazards, such as snow and ice, there were potentially viable arguments on both sides as to whether out-of-possession landlords could be held liable.

On one hand, the statute specifically allows for liability based on an owner's "negligent failure to remove snow [and] ice," and the duties it imposes have been deemed nondelegable.



On the other hand, it would not seem to make practical sense to impose liability for a transient condition on a party that does not occupy or control the day-to-day management of a property. Indeed, it has been held that "a person who chooses to take possession and control of property is fairly charged with the responsibility of maintaining it and should expect to be held responsible for any defects." *Butler v. Rafferty*, 100 N.Y.2d 265, 762 N.Y.S.2d 567 (2003).

With these arguments in mind, the appellate courts had split on this issue. The Appellate Division, First Department has held that section 7-210 generally cannot serve to impose liability on an out-of-possession landlord that has transferred the duty to maintain sidewalk snow and ice to a tenant in a lease agreement. *See Bing v. 296 Third Ave. Group, L.P*., 94 A.D.3d 413 (1st Dep't 2012); *Fuentes-Gil*; *Cepeda v. KRF Realty LLC*, 148 A.D.3d 512 (1st Dep't 2017).

Last year, in *Polomski v. Deluca*, 161 A.D.3d 1116, 77 N.Y.S.3d 697 (2d Dep't 2018), the Appellate Division, Second Department implied that it disagreed with the First Department, finding that the statute imposed responsibility on an owner "for the condition of the sidewalk adjacent to its property, despite the fact that it had a snow removal contract with another party." However, the *Polomski* decision was unclear as to whether the owner was out-of-possession, thereby leaving room for the Second Department to still adopt the First Department's rule.

In a recent decision, *Branciforte v. 2248 Thirty First St., LLC*, 2019 N.Y. App. Div. LEXIS 2904, 2019 N.Y. Slip Op 02845 (2d Dep't 2019), the Second Department clarified its position and declined to follow the First Department. It affirmatively held that section 7-210 "impose[d] a nondelegable duty on [an adjacent property owner] the sidewalk abutting [its] premises" in an action involving an alleged slip-and-fall on snow and ice. Before enactment of the statute, the Second Department held that out-of-possession landlords could not be liable for sidewalk snow-and-ice conditions. *See Scott v. Bergstol*, 11 A.D.3d 525, 782 N.Y.S.2d 793 (2d Dep't 2004).

The Court of Appeals, however, has recently resolved this appellate split, adopting the conclusion of the Second Department. In a decision rendered on October 24, 2019 in the matter of *Xiang Fu He v. Troon Management, Inc., et al.,* it reversed a First Department ruling and

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Defining the "Workplace" in Sexual Harassment Actions

By Maria Scalici

In the context of the *#MeToo* movement and the modern economy, it is imperative that employers be aware that employees may be entitled to protection from sexual harassment beyond the physical bounds of the workspace. The courts have often looked at activities outside of the typical office environment in sexual harassment actions against employers. If the harassing activity can be shown to be related to the employment relationship, even if it took place beyond the physical workplace or normal work hours, it could be grounds for a sexual harassment claim.

For example, in *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 2003 U.S. Dist. LEXIS 2225 (S.D.N.Y. 2003), a female employee alleged she was sexually harassed by a manager while attending a funeral reception for a co-worker's relative. The plaintiff allegedly reported the conduct to her employer, but no action was taken against the manager. A federal district court in New York, in applying Second Circuit precedent, found that the employer could be held liable for sexual harassment under the hostile work environment theory, extending the work environment to the funeral reception because the employee attended the reception as a result of her employment relationship. In reaching its determination, the court held as follows:

> [I]n other words, to allow a harasser to pick and choose the venue for his assaults so as to not account for those that occur physically outside the workplace. The employment relationship cannot be so finely and facilely parsed. It comprises multiple dimensions of time and place that cannot be mechanically confined within the precise clockwork and four walls of the office. The proper focus of sexual harassment jurisprudence is not on any particular point in time or coordinate location that rigidly affixes the employment relationship, but on the manifest conduct associated with it, on whether the employer has created a hostile or abusive "work environment," or a "workplace" where sexual offenses occur and are sufficiently severe or pervasive to alter the victim's terms and conditions of employment wherever the employment relationship reasonably carries. . . . [A]s a practical matter an employment relationship and the employee's corresponding status, while generally commencing and grounded in what constitutes the office or plant, often carries beyond the workstation's physical bounds and regular hours. . . . In fact, employees travel and transact business while "on the road" or "in the field." They may also interact outside the office at business-related meals and social events.

See id. at 350-351.

Other jurisdictions have reached similar conclusions. For example, in New Hampshire, an employer may face liability for sexual harassment which an employee is subjected to after hours and outside the workplace setting. In *McGuinn-Rowe v. Foster's Daily Democrat,* 1997 U.S. Dist. LEXIS 24439 (U.S. Dist. Ct. N.H. 1997), a female employee alleged that a male management-level employee leaned against her at a bar and rubbed himself against her. The employer argued it could not be held liable because the conduct occurred "away from the workplace" and outside of the normal working hours. The court, however, held that the incident at the bar was relevant to the issue of whether the employee experienced a hostile work environment, regardless of whether the harassment occurred on or off work premises.

Elsewhere, it has been held that calls, texts, emails and even social media posts or messages by employees may constitute unlawful workplace harassment, even if the conduct occurs away from the workplace premises, on personal devices or during nonwork hours. In *EEOC v. Fry's Elecs., Inc.,* 2012 U.S. Dist. LEXIS 80677, 2012 WL 2115299 (U.S. Dist. Ct. W.D. Wa. 2012), the Equal Employment Opportunity Commission alleged that a manager sexually harassed an employee when he texted her sexually explicit messages, among other circumstances. The court held that these actions were relevant to the employee's sexual harassment claim.

Employers therefore must be cognizant of the fact that activity which takes place outside of the office could serve as a basis for imposing liability for sexual harassment. So long as the activity reasonably relates to the employment relationship, it should not be disregarded merely because it took place outside of the workspace or on a personal device.

Contact

Maria Scalici: 646-619-8637 or Maria.Scalici@hrrvlaw.com

Venue Liability 101: The Duty Owed to Guests and Patrons

By Shawn Green

Energetic fans attend games at sports stadiums, and music venues encounter enthusiastic guests hoping to sing and dance. When thousands of people enter a venue to attend an event, it is a significant task to oversee crowds in an attempt to create a safe environment that avoids accidents and injuries. While it may be impossible to avoid all accidents, anticipating the behavior of guests and patrons may help minimize or avoid liability.

In *Basso v. Miller*, 40 N.Y.2d 233, 352 N.E.2d 868 (1976), New York's Court of Appeals abolished any distinctions between trespassers, licensees and invitees. It held that New York landowners and occupiers owe a duty of reasonable care to maintain a property in a safe condition, under all of the circumstances. Subsequently, in *Burgos v. Aqueduct Realty Corp.,* 92 N.Y.2d 544, 706 N.E.2d 1163 (1998), the state's highest court clarified the duty owed for injuries arising out of the criminal acts of third parties. Although owners or occupants may have a common law duty to minimize foreseeable dangers on their property, liability may only be imposed where negligent conduct in failing to minimize foreseeable dangers is a proximate cause of the injury.

The standard venue operator or event organizer must meet in order to comply with its duty to minimize foreseeable dangers, however, is not uniform to all events; it will based on the foreseeable dangers of the event in question. There are a multitude of factors that may be relevant in the analysis of the duty owed, including the type of event, the anticipated crowd size, the crowd capacity, the available of alcohol, the age range of the patrons and prior criminal acts in the area or at prior similar events, among others. Therefore, those charged with operating a particular event must be prepared for the particular risks associated with the event, and take reasonable measures to address those risks. It is key to be aware of the type of occurrences that are likely to occur and provide security or other protection that is adequate under the circumstances.

As an example, in *Maheshwari v. City of New York*, 307 A.D.2d 797, 763 N.Y.S. 2d 287 (2004), New York's Court of Appeals addressed issues of foreseeability and proximate cause in the context of a venue operator's duty to provide adequate security at the 1996 installment of the annual Lollapalooza festival, which was held on Randall's Island. A violent assault occurred in one of the surrounding parking areas and the injured guest sued various defendants, including the venue owner or organizer. The court held that the defendants were not liable for the assault because reasonable security measures had been taken and that the assault on the plaintiff was not a foreseeable result of an alleged security breach, under the circumstances. It specifically pointed to a lack of prior similar incidents at prior installments of the event. This decision is instructive on a venue owner's duty of care owed to guests. It reenforces the idea that venue owners are NOT the insurers of a visitor's safety.

In *Rotz v. City of New York*, 143 A.D.2d 301, 532 N.Y.S.2d 245 (1st Dep't 1988), however, the Appellate Division, First Department analyzed the dangers that should have been reasonably anticipated at a free Diana Ross concert at Manhattan's Central Park in 1983. The plaintiff was standing in a crowd where patrons were "jammed in like sardines" when a commotion erupted and he was injured in a subsequent stampede. The contract with the event organizer specifically mentioned the possibility of "civil commotion" and "riots." The court noted that the event owner and operator was obligated "to provide an adequate degree of general supervision of the crowd invited by exercising reasonable care against foreseeable dangers under the circumstances prevailing." In applying this standard, it held that there were questions of fact as to whether adequate crowd control measures had been in place. The court specifically highlighted the contract language as evidence of advance knowledge of the defendants as to the particular risks to be anticipated at the event.

In *Vetrone v. Ha Di Corp*., 22 A.D.3d 835, 803 N.Y.S.2d 156, (2nd Dep't 2005), the injured plaintiff had been hired by a restaurant owner and party organizer to provide security at a New Year's Eve party and to deny entry to ticket holders once the restaurant reached capacity. The owner and organizer sold tickets to more people than the restaurant could hold, and also admitted nonticket holders. A ticket holder who was denied entry by the plaintiff after capacity was reached became violent and assaulted the plaintiff. In analyzing a trial court's decision to grant summary judgment to the restaurant owner, the Appellate Division, Second Department reversed largely based on a foreseeability analysis. The court determined that it was foreseeable that ticket holders who were refused entry might become unruly and violent. It held that the plaintiff "reasonably had the right to expect that [the defendants] . . . would not so overbook the event as to require him, acting virtually alone, to face a large crowd of angry ticket holders who paid to attend the party, but were unexpectedly and rudely denied entry and told to go home."

Together, these three decisions illustrate the manner in which a venue owner's or operator's duty stems from the foreseeable actions of the anticipated guests and the associated risks of the event. The scope of the duty generally hinges on

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New York's Appellate Court Determines that Plaintiff Assumed the Risk of Injury Associated with the Presence of Breakaway Bases

By Carla Varriale

At the start of this year's baseball season and the start of recreational leagues, New York's Appellate Division, Second Department held that the doctrine of primary assumption of risk barred a personal injury action arising out of a baseball player's collision with a stationary base. The plaintiff, an experienced recreational baseball player who was playing in a tournament at the time of the alleged accident, slipped on artificial turf as he was running to second base. He struck the second base bag with the inner portion of his left foot and sustained severe personal injuries including a fractured fibula. Prior to the accident, the defendants had resurfaced the playing field, which was made of artificial turf, and installed stationary bases instead of breakaway bases. The plaintiffs alleged, among other things, that the defendants were negligent in failing to warn players of the use of stationary bases instead of breakaway bases.

The Appellate Division, Second Department held that the doctrine of assumption of the risk defeated the plaintiff's negligence action. It affirmed the summary judgment initially rendered in favor of the defendants. The Court noted that, as the operators of the premises where the baseball tournament was held, the defendants did not owe a duty of care to the plaintiff because he had an appreciation of the nature of the risks and, notwithstanding that awareness, he voluntarily assumed the risk of injury. The plaintiff was sixteen years old at the time of the alleged accident and an admittedly experienced baseball player. The plaintiff's deposition testimony that he was aware of the rigidity of the bases before the accident was an admission that proved fatal to his negligence action against the defendants. Moreover, there was no proof that the defendants unreasonably increased the alleged dangers beyond the usual dangers inherent in the sport at the time of the alleged accident by using stationary bases instead of breakaway bases. The judgment below was affirmed in the defendants' favor.

The case, *Gonch v. Baseball Heaven, Inc., et al* (2019 Slip Op 03030), was decided on April 24, 2019.

Contact

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

HRRV IN THE NEWS

Carla Varriale

Carla Varriale was a featured speaker at the 2019 annual meeting of the Professional Liability Defense Federation as part of a panel addressing "Interrupting Racial & Gender Bias in the Legal Profession" (Chicago, September 27, 2019).

Carla Varriale was a panel member on "Sexual Abuse and Bullying in Sport: Balancing the Rights of Accused and Accusers," at the 2019 annual meeting of the American Bar Association Sports Law Committee (Vancouver, March 2019).

Steven H. Rosenfeld

Steven H. Rosenfeld was a panel member on "High Hopes—A Look at Current Themes in Cannabis" at the 2019 conference of the North American Contingency Association (NACA) (Myrtle Beach, May 15, 2019).

Steven H. Rosenfeld was a panel member on "Alcohol Liability" at the 2019 annual conference of the Intermediaries and Reinsurance Underwriters Association (IRUA) (Fort Lauderdale, April 3, 2019).

Venue Liability 101: The Duty Owed to Guests and Patrons

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whether a venue owner or operator knew or had reason to know—based on past experience, common sense or other factors—that there was a likelihood of certain risks which were likely to endanger the safety of patrons. As a result, a venue owner or operator should make efforts to determine the foreseeable risks that may arise and cause injury to a guest. Reasonable measures should then be taken to address those risks. Doing so may not completely negate the possibility of injury to patrons, but it may serve to significantly minimize the risk of injury—and potentially eliminate any liability.

Contact

Shawn Green: 646-747-5130 or Shawn.Green@hrrvlaw.com

Going to the Dogs: Keeping Your Liability on a Leash

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protection, and typically offers greater protection to people with disabilities). The location of the premises and the accommodation sought is an important factor. There is an important distinction between a "service animal" versus an "emotional support" or a "comfort" animal.[2]

A service animal, simply put, is a working animal that has been trained to do work or to perform tasks for an individual with a disability and the tasks must be directly related to the individual's disability. There is no requirement that the animal wear a particular collar or vest (in fact, that is not dispositive of anything, other than the owner's ability to purchase such a collar or leash).[3] There is no certificate or paperwork that is required to identify the animal as a service animal (and, as discussed below, the owner or operator of the premises cannot request the same be produced before permitting the animal on the premises). Service animals are animals that have been trained to assist with a specific disability.[4]

Animals that a person finds comforting or use for companionship are not "service" animals, and there is no legal requirement to accommodate a "comfort" or "emotional support" animal in a place of public accommodation. Rather, the question of permitting a therapy animal into the premises may present a customer service and management issue and a judgment call on the part of the establishment, but federal, state and local laws on the subject should be consulted in order to avoid a complaint.

Some federal courts have ruled that dogs that calm their companions during post-traumatic stress disorder (PTSD) episodes are not service animals. *Riley v. Bd. Of Comm'rs*, 2017 U.S. Dist. LEXIS 153737 at 17 (N.D. Indiana 2017) (citing 28 C.F.R. 104); *Lerma v. California Exposition and State Fair Police,* 2:12-cv-1363, 2014 U.S. Dist. LEXIS 285 (E.D. Cal. 2014); *Rose v. Springfield-Green Cnty. Health Dep't*, 668 F. Supp.2d 1206 (W.D. Mo. 2009) (internal citations omitted). In fact, the *Riley* court went even further and found that, despite the plaintiff claiming to suffer from seizures, loss of balance and mobility issues, because there is nothing to support a finding of a relationship between those issues and the plaintiff's purported PTSD, the dog's purported ability to assist in these issues did not qualify it as a service animal under the ADA. *Riley,* at 16-17. Specifically, the ADA makes a clear distinction between "service animals" and "emotional support animals." Service animals are trained to help their companions with specific jobs and are covered under the ADA. Emotional support dogs, on the other hand, are not covered under the ADA. *Revised ADA Regulations Implementing Title II and Title III (2010)*. To be a service dog, the animal must take a specific action to help with panic/anxiety attacks. If the dog's mere presence provides comfort, it is not considered a service animal under the ADA. *Id.* Therefore, depending on which law applies, a trained service animal is accorded different treatment than "comfort" or "support" animals.

Two Permissible Questions

There are two permissible avenues of inquiry that do not run afoul of the discrimination laws for the owner or operator of a place of public accommodation to rely upon. They are: (1) whether the animal is required because of a disability[5] and (2) what work the animal is trained to perform. Service animals are trained to assist with an array of functions, including assisting with navigation, stability or balance; carrying and retrieving items; seizure assistance; and alerting their owner to sounds or allergens, according to a New York attorney general's recent brochure. In other words, the service animal's "work" does not have to be related to mobility issues. *See also Revised ADA Regulations Implementing Title II and Title III (2010)*. No other questions are permitted, including questions regarding the nature of the patron's alleged disability, the animal's certification or lack thereof or a request that the animal demonstrate its training. Even dogs trained at home to perform certain tasks have been held to be service animals. *See Vaughn v. Rent-A-Center, Inc.,* 2009 U.S. Dist. LEXIS 20747 (S.D. Ohio, 2009).

Keeping Liability on a Leash: Some Practical Suggestions

Simply put, the best way to "keep your liability on a leash" is to know what is required of you (keeping in mind that the federal law provides a baseline and that New York State and New York City and local laws can, and often do, provide even

2. As noted above, places of public accommodation within New York City should be mindful that the city's Human Rights Law does not define or provide limitations concerning service animals. Rather, it puts the burden on the entity seeking to exclude the service animal to prove that the person using one could not benefit from its use, or that the animal would meet the City of New York Human Rights Law's high "undue hardship test." See NYC Administrative Code § 8-102 (18).

3. New York's governor has signed a bill into law to punish people who "knowingly affix to any dog any false or improper tag identifying the dog as a guide, service, therapy or hearing dog." See https://legislation.nysenate.gov/pdf/bills/2017/S6565. New York joined states such as New Jersey, New Mexico, Virginia and Maine to punish and deter abuse.

4. To further complicate matters, the disability may not be readily apparent and the types of disability contemplated under the law can be intellectual or psychiatric and, therefore, may not be readily apparent to the owner or operator of a place of public accommodation.

5. This is not to be confused with asking the patron seeking an accommodation to describe or confirm his or her purported disability. This line of inquiry is not permitted.

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greater protection to the disabled patron seeking an accommodation). There is no substitute for education and legal advice.[6] There are also numerous websites, including government websites, that offer a wealth of information and guidance so that you do not run afoul of legal requirements.

Also, educate your employees about what is expected of them with respect to service (and other) animals. Compliance training is also available for a fee but can assist in both avoiding and defending a potential action. Educate your customers or patrons as well. Many places of public accommodation post the law or a policy and what it entails on websites and appropriate signage.[7]

A good rule of thumb to keep in mind is that, generally, service animals are allowed where the public is allowed. You are required to permit such an animal on the premises of a place of public accommodation, even if there is a "No Pets" policy because service animals are not considered pets. The service animal's entry on the premises cannot be conditioned upon charging a fee. There is no requirement that the service animal receive its own "accommodation" at the premises, such as food or water, or toileting facilities, and it does not need to be permitted to remain on the premises if it is a danger and poses a threat to the health or safety of other patrons. A muzzle is not required; however, under New York law, a service dog must be "controlled" on a leash or in a harness. *See* N.Y. Civil Rights Law 47-b(4). The control of the service animal is the responsibility of its owner, not the owner or manager of the premises.

A discrimination complaint is a legal and a customer service issue, and it can carry significant fines and liabilities, especially if a pattern or practice of discrimination is found. The ADA, the state and city Human Rights Laws, and applicable local laws provide remedies, and depending on the applicable law, injunctive relief, compensatory and punitive damages and an award of attorney's fees to the complainant are within the array of potential remedies available to a person who has been discriminated against. It's a liability issue for premises owners and operators that should be muzzled through education and careful consideration of the legal requirements.

Contact

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

6. See http://www.ada.gov for ADA compliance information and informal guidance about its regulations. The New York State Attorney General also provides guidance on its website. See https://ag.ny.gov/sites/default/files/service_animals_brochure for resources and information.

7. For example, some sports and entertainment venues post the service dog policy on the website and at the premises and invite patrons to communicate with guest services personnel regarding accommodations needed before they visit the facility.

Court of Appeals Rules that Out-of-Possession Landlords May Be Liable for Sidewalk Snow-and-Ice Conditions, Resolving Appellate Split

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determined that section 7-210 "could not be clearer" in imposing a duty to maintain snow-and-ice sidewalk conditions on out-of-possession property owners. The Court of Appeals therefore held that "section 7-210 abrogates the common law, imposes a nondelegable duty of care and shifts liability from the City to out-of-possession owners . . . [for] the negligent failure to remove snow and ice." To be clear, such owners "are not strictly liable for personal injuries resulting from incidents on abutting sidewalks because section 7-210 adopts a duty and standard of care that accords with traditional tort principles of negligence and causation."

As a result, the mere fact that a property owner lacks possession and has transferred snow-and-ice responsibility to a tenant will be insufficient to establish its entitlement to summary judgment. An out-of-possession owner can still secure indemnification from a tenant in a lease agreement for snow-and-ice conditions. This holding, however, makes doing so all the more important. If an owner enters into a lease agreement with a tenant that contains standard indemnification and insurance procurement language, in addition to transferring snow-and-ice responsibility to the tenant, the owner (or owner's insurer) could face financial consequences if the tenant fails to procure the necessary insurance. It is therefore in the interests of property owners throughout New York City to ensure that their lease agreements not only contain the requisite language, but to also ensure that their tenants have obtained the appropriate insurance.

Contact

Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Altercation at Bar Found to Be Sudden and Unforeseeable Resulting in Dismissal of Negligent Security Claim

Martinelli v. Dublin Deck, Inc.
Supreme Court, Suffolk County
Index No. 16-605137
June 10, 2019

Plaintiff claimed that on June 14, 2015, at approximately 1:00 a.m., he was suddenly and unexpectedly assaulted by an unidentified and unknown patron on the premises of a bar owned and operated by Dublin Deck, Inc. The plaintiff testified that security was already intervening in the situation, in which he himself threw the first punch, when he was suddenly struck in the face with a sharp object by an unrelated patron. Yet, he asserted both negligent security and negligent hiring claims, and despite the plain evidence to the contrary—most notably, Dublin Deck's security footage—argued these alleged inadequacies proximately caused his injures.

The Court granted summary judgment to Dublin Deck and its outside security contractor, holding, *inter alia*, that Dublin Deck established a *prima facie* case of entitlement to summary judgment in its favor, finding that Dublin Deck had an adequate number of trained security personnel present on hand and that the physical altercation that resulted in the plaintiff's injuries "was a sudden and unforeseeable event that could not have been anticipated or prevented by the provision of greater security measures."

The Court also held that Dublin Deck "established that the security contractor did not respond to any altercation involving the plaintiff or his friend (as plaintiff alleged) occurring prior to that during which the plaintiff was injured, nor were any complaints relating thereto made to security personnel. The Court went on to hold that "plaintiff's testimony established that the security contractor's employees responded nearly instantaneously to the physical altercation involving him and the multiple other individuals, bringing it to a halt within seconds."

Lastly, the Court disregarded the opinions of the plaintiff's purported expert, who the Court noted failed to qualify as an expert, and that even if he were qualified to give an expert opinion, his report fails to raise a triable issue. The Court properly found the opinions as "wholly speculative and conclusory."

Contact

Steven H. Rosenfeld represented Dublin Deck, Inc.

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

Assault Case Dismissed Against Nightclub Based on Independent Contractor Doctrine

Yossef v. Central Lounge
Supreme Court, Kings County
Index No. 10482/2015
April 3, 2019

Plaintiff was a patron at a nightclub owned and operated by Taste Associates Corp. He alleged that while at the nightclub, a security guard—who he specifically identified by name and who was employed by a security company with which the club owner contracted—assaulted him and that the assault resulted in significant injury. The plaintiff commenced suit against the club owner and the security company alleging, among other things that each was vicariously liable for the actions of the guard.

Justice Pamela Fisher granted HRRV's motion for summary judgment holding that the evidence (specifically uncontradicted testimony) established that the security company was an independent security guard contractor hired by the club owner to provide security. As such, the club owner was not liable for the intentionally tortious conduct of the guard.

First, the Court noted that the security company's deposition witness testified unequivocally that both the security company was the guard's employer and that the security company was a private security firm unaffiliated with the club owner beyond the fact that the club owner contracted with the security company to provide security guard services. Moreover, the security company witness testified that its guards would use their discretion regarding patrons, especially with respect to removing intoxicated patrons (which both defendants argued the plaintiff was). The witness further testified that the club owner never imposed guidelines on the security company or its employees regarding security duties or removal of patrons. This testimony established that the club owner did not control the security company employees with respect to security, and since "control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for the purposes of tort liability" (*Calandrino v. Town of Babylon*, 95 A.D. 3d 1054, 1055 [2012]), the club owner was thus not liable for the guard's acts.

Contact

Steven H. Rosenfeld represented Taste Associates Corp. and Simon & Simon Equities, LLC.

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Multiple Preclusion Orders Result in Granting of Summary Judgment in Favor of Defendants

Potter v. Music Hall of Williamsburg, LLC
Supreme Court, Kings County
Index No. 503197/2013
December 18, 2018

Plaintiff claimed that she sustained personal injuries while attending a concert at the Music Hall of Williamsburg on August 5, 2012 when an unidentified female dancer, affiliated with the musical artist performing at the time, jumped off the stage into the audience, striking the plaintiff.

This case had an extremely tortured procedural history, including at least six orders directing the plaintiff to provide essentially the same discovery, which culminated in a March 16, 2018 preclusion order noting that the plaintiff would be precluded from testifying or offering any affidavit in support of or opposition to a dispositive motion should long-outstanding discovery not be provided within 30 days. On April 16, 2018, the preclusion order, initially conditional, became absolute because of the plaintiff's undisputed failure, in the interim, to comply with its terms. Of note is that the plaintiff also failed to seek review of the preclusion order within the five-day limit set forth by CPLR 3104.

By a memorialization order dated April 30, 2018, the Court held that, based on the preclusion order, the plaintiff was precluded from testifying at trial or offering any affidavit in opposition to any dispositive motion. By order, dated June 7, 2018, the Court denied the plaintiff's motion to vacate the preclusion order.

On behalf of defendants Music Hall of Williamsburg, LLC and The Bowery Presents LLC, HRRV filed a motion for summary judgment, citing among other things, the fact that plaintiff was precluded from testifying at trial and offering any affirmation in opposition to a dispositive motion as well as the plaintiff's appreciation and assumption of the risk of being injured in a collision with a stage diver, having frequently attended concerts prior to the subject incident but nevertheless electing to place herself in close proximity to stage diving activity.

The Court granted summary judgment to all defendants without actually addressing substantive arguments, relying entirely on the preclusion and memorialization orders. The Court's decision detailed the procedural history of the preclusion order and noted that the conditional preclusion order became absolute upon the plaintiff's failure to timely comply with that order and failure to timely move to vacate that order. As a result of the preclusion, the Court determined that the defendants established their *prima facie* entitlement to judgment as a matter of law that plaintiff is precluded from testifying at trial or offering any affidavit in opposition to the motion, which prevents plaintiff from ever establishing negligence against the defendants.

The decision also indicated that the plaintiff was precluded from relying on an affidavit of her ex-boyfriend's affidavit, submitted in opposition, not only because of the preclusion order, but also because the plaintiff failed to disclose his last-known address until the submission of his affidavit in opposition to the motion. The Court also denied the plaintiff's motion to vacate, as the plaintiff failed to timely seek to vacate the preclusion order. The Court noted that the plaintiff showed no reason to excuse her multiple failures to comply with discovery and the Court's orders throughout the litigation and that the plaintiff was now unable to successfully oppose the summary judgment motions by virtue of her and/or her counsel's failure to comply.

Contact

Lori F. Graybow and Steven H. Rosenfeld represented Music Hall of Williamsburg, LLC and The Bowery Presents LLC.

Lori F. Graybow: 914-290-6341 or lori.graybow@hrrvlaw.com

Steven H. Rosenfeld: 646-747-5105 or steven.rosenfeld@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Plaintiff's Injury Claim Arising from Motor Vehicle Accident Dismissed for Failing to Meet the "Serious Injury" Threshold

Halych v. Ournell Ari Fuhon and Jax Specials, LLC
Supreme Court, New York County
Index No. 161353/15
July 24, 2019

HRRV recently secured summary judgment in favor of Ari Queenelle Fulton and Jax Specials, LLC in an action arising from a motor vehicle accident.

The plaintiff was allegedly injured on September 24, 2015 at or near the intersection of 24th Street and Second Avenue in Manhattan. He alleged that he sustained various "serious injuries" as defined in section 5102 of the Insurance Law of the State of New York.

At the close of discovery, HRRV moved for summary judgment on behalf of the defendants. HRRV argued that the plaintiff's injuries did not meet the serious injury threshold as he did not seek immediate medical treatment after the accident, missed only four days of work and exhibited full range of motion during a post-accident examination with a physician. HRRV further argued that the plaintiff's injuries were pre-existing and that they had resolved.

Justice Lynn Kotler determined that the defendants, through HRRV, had met their burden as the movants for summary judgment and established that the plaintiff did not sustain a serious injury as defined by the Insurance Law. As a result, the action was dismissed.

Contact

Carla Varriale, Lindsay Kaplow, and Bryan Feldman represented Ari Queenelle Fulton and Jax Specials, LLC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Lindsay Kaplow: 646-747-5126 or lindsay.kaplow@hrrvlaw.com

Bryan Feldman: 646-747-5133 or bryan.feldman@hrrvlaw.com

Injury at Wedding Reception Serves as Reminder that the Mere Happening of an Accident Does Not Constitute Negligence

Kleiner v. Crystal Ball Group, Inc.
Supreme Court, Queens County
Index No. 711908/2016
June 21, 2019

A guest at a wedding reception held at Terrace on the Park, Sheryl Kleiner, alleged that she was injured when a waitress, Yanelis Rodriguez, backed into her while resetting a table. Both the plaintiff and her daughter testified that the plaintiff had stood up from her seat just a few seconds prior to the incident. The plaintiff claimed that Rodriguez breached her duty of care as "an experienced waitress" by failing to ascertain whether anyone was behind her before stepping away from an adjacent table into an area where it would be "foreseeable" that guests would be. HRRV filed a motion for summary judgment on behalf of both Crystal Ball Group, Inc., the owner of the venue, and Rodriguez on the basis that the waitress's actions—stepping backwards while folding napkins at a table—did not constitute negligence, as there was no breach of duty.

Judge Robert Caloras granted HRRV's motion in its entirety and dismissed the plaintiff's complaint. In granting the motion, Justice Caloras recited a defendant's burden of proof on a summary judgment motion and the elements of a negligence cause of action. He then went on to hold that "the defendants demonstrated their *prima facie* entitlement to judgment as a matter of law" as the evidence submitted showed that no duty of care to the plaintiff was breached. The Court further held that "the plaintiff failed to raise a triable issue of fact as to Ms. Rodriguez failed to exercise reasonable care in the performance of her duties as an employee of [the venue]."

Contact

Gail L. Ritzert and Thomas E. Fogarty represented Crystal Ball Group, Inc. and Yanelis Rodriguez.

Gail L. Ritzert: 516-620-1710 or gail.ritzert@hrrvlaw.com

Thomas E. Fogarty: 516-620-1688 or tom.fogarty@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Baseball Spectator Allegedly Trampled by Fans Pursuing a Souvenir Baseball Strikes Out in Negligence Action

Fodera v. Citi Field
Supreme Court, Queens County
Index No. 704701/2016
May 23, 2019

Justice Ulysses B. Leverett of the Supreme Court, Queens County granted summary judgment in a negligence action involving a spectator who was exiting Citi Field during a baseball game when a group of spectators allegedly trampled her in their pursuit of a souvenir baseball. The plaintiff claimed to have sustained personal injuries requiring surgery and sued multiple defendants, alleging that the unidentified patrons' behavior was foreseeable and that the defendants were negligent in failing to provide sufficient security staff or ushers to prevent the accident. HRRV represented the defendants and ultimately moved for summary judgment.

Judge Leverett ultimately held that the defendants demonstrated that they did not owe her a duty of care under the circumstances, in part because the plaintiff was a spectator who chose to occupy unprotected seats at the stadium, despite the fact that a protected area was provided behind home plate. Absent a duty of care owed, the negligence action against the defendants failed as a matter of law, according to the judge. This determination was based on the legal doctrine commonly known as "the Baseball Rule," set forth by New York's Court of Appeals in *Akins v. Glens Falls School Dist*., 53 N.Y.2d 325 (1981) and affirmed in later decisions, such as *Hayman v. Pettit*, 9 N.Y.3d 324 (2007), which related to a spectators outside of a stadium.

The defendants also submitted evidence that 67 foul balls and two home runs had entered the stands during the eight innings that the plaintiff remained at the game before the alleged accident. The defendants also provided evidence of warnings and instructions to "remain alert," among others, on the back of the plaintiff's ticket and set forth in announcements made prior to and during the baseball game. Therefore, although the plaintiff claimed she was a "novice" spectator and not aware that spectators could pursue a baseball in the manner at issue, the judge held that the defendants demonstrated that the plaintiff could not establish a duty of care existed based upon the doctrine of assumption of risk.

In addition, the defendants submitted the expert opinion of noted security and crowd control expert, William D. Squires, who analyzed the relevant facts and opined that number and deployment of security personnel at the game was more than reasonable, especially considering that the security plan was based on an anticipated crowd size that was significantly larger than the size of the crowd actually present at the stadium that day. The evidence also established that the defendants were never put on notice of the danger of a trampling incident because there were no prior complaints or similar accidents involving that sort of spectator conduct. Therefore, even if a duty of care existed, Judge Leverett held that reasonable security protocols were in place and, therefore, that the defendants did not breach any potential duty of care.

Judge Leverett ultimately held that the defendants demonstrated that they did not owe [the plaintiff] a duty of care under the circumstances, in part because the plaintiff was a spectator who chose to occupy unprotected seats at the stadium.

Contact

Carla Varriale and Shawn Green represented Citi Field, Sterling Mets, L.P., Sterling Mets Front Office, LLC, Sterling Mets Operations, LLC, and Queens Ballpark Company, LLC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Shawn Green: 646-747-5130 or shawn.green@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Sexual Assault Claim Dismissed

Leakey v. The Setai Spa
Supreme Court, New York County
Index No. 151298/2014
May 15, 2019

HRRV won dismissal of an action against the owners and operators of a well-known spa, which sought damages as a result of an alleged sexual assault during a massage.

Plaintiff asserted four causes of action: (1) negligence against all defendants; (2) negligent hiring and supervision; (3) breach of contract; and (4) intentional infliction of emotional distress. Plaintiff also sued the masseuse individually and asserted claims for negligence and intentional infliction of emotional distress, but did not appear in the action.

Justice Paul A. Goetz granted summary judgment on behalf of the spa defendants and denied the plaintiff's cross-motion for summary judgment on her claims. He determined that the spa defendants could not be held vicariously liable for the masseuse's actions because his actions constituted impermissible sexual misconduct that were not committed in furtherance of the spa defendants' business or within the scope of his employment. Indeed, the spa defendants demonstrated that sort of conduct was prohibited and that an express prohibition was memorialized in the spa's employee handbook. In support of their motion, the spa defendants produced the masseuse's signed acknowledgment of this policy. Consequently, upon a review of the evidence, the Court concluded that the masseuse departed from his duties for purely personal motives and that his actions could not be attributed to the spa defendants under the theory of *respondeat superior*.

Plaintiff's negligent hiring and supervision claims were also dismissed because the masseuse was licensed and there was no evidence that the spa defendants knew or should have known that he had a propensity for sexual assault or the type of conduct that caused the plaintiff's alleged injuries, either prior to or during his employment.

Notably, in support of this cause of action, the plaintiff proffered the affidavit and expert opinion of Ben E. Benjamin, a purported expert in the areas of hiring, training and supervision of massage therapists. The affidavit, however, was rejected by the Court because it was not in proper form and because it did not cite any specific statutes or codes. Instead, he cited conclusory "standards" without showing that they are binding on the spa defendants. The expert affidavit was also rejected by the Court because his conclusions about proximate cause were based on pure speculation and conjecture (e.g., he opined that the alleged sexual assault would have not have occurred if the massage room was equipped with a "panic button" or if the plaintiff was advised that she could wear underwear during the massage). The Court determined that Benjamin's purported expert opinion was unreliable.

Consequently, upon a review of the evidence, the Court concluded that the masseuse departed from his duties for purely personal motives and that his actions could not be attributed to the spa defendants under the theory of *respondeat superior.*

The third cause of action for breach of contract was also dismissed as a matter of law because the agreement signed by the plaintiff did not contain any express warranties regarding the safety of the spa or the screening and training of its employees.

Finally, the fourth cause of action for infliction of emotional distress was dismissed because the spa defendants could not be held vicariously liable for the masseuse's conduct as a matter of law.

Upon dismissing the plaintiff's action, the Court also granted the spa defendants' costs and disbursements.

Contact

Carla Varriale and Michelle L. Bochner represented the spa defendants.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Michelle Bochner: 646-747-6782 or michelle.bochner@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Dram Shop and Negligent Security Claims Arising Out of Incident at Restaurant and Music Venue Dismissed

Enowitz v. TSE Group, LLC, et al
Supreme Court, New York County
Index No. 155720/2016
March 1, 2019

Marla Enowitz was allegedly injured on November 24, 2015 while attending a George Clinton and Parliament Funkadelic concert at BB King Blues Club & Grill in Manhattan with her then-boyfriend, Lowell Sidney. Toward the end of the concert, an unknown male patron, John Doe, suddenly collapsed and fell onto Enowitz, allegedly causing her to sustain an ankle injury. She subsequently filed suit against the operator of the BB King venue, TSE Group, LLC, asserting a violation of New York's General Obligations Law § 11-101, commonly known as the Dram Shop Act. She claimed that John Doe had been improperly served alcohol when he was visibly intoxicated, and that his intoxication was a proximate cause of the accident. She also alleged that inadequate security measures were in place and that her accident would not have occurred if such measures had been in place.

Representing TSE, HRRV moved, at the close of discovery, for summary judgment on the issue of liability. Enowitz's counsel cross-moved for spoliation sanctions, based on the alleged spoliation of an incident report that purportedly would have set forth John Doe's identity and security video footage from the night of the incident. In granting the motion and denying the cross-motion, Judge Margaret Chan effectively adopted HRRV's arguments.

Judge Chan held that testimony from then-boyfriend Sidney and the venue's manager, both of whom observed John Doe shortly following the accident, was sufficient to establish that John Doe was not visibly intoxicated at any relevant time and therefore dismissed the Dram Shop claim against TSE. The judge determined that Enowitz's contention that John Doe smelled like alcohol was insufficient to establish otherwise, as the mere fact that he spilled his drink at the time of the accident was not relevant to his purported visible intoxication. The judge also held that the negligent security cause of action was subject to dismissal, in part because the incident was spontaneous and not foreseeable. In light of dismissal of Enowitz's claims, Judge Chan denied the cross-motion as moot.

Contact

Carla Varriale and Shawn Schatzle represented TSE Group, LLC.
Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com
Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

Suspension Against Athlete Overturned in SafeSport Arbitration

U.S. Center for SafeSport Arbitration Proceeding
2018

By way of an arbitration proceeding before a tripartite panel, HRRV overturned a suspension issued against an athlete arising from an alleged sexual assault.

The adult male athlete, a confidential John Doe, was accused of nonconsensual sexual content by an adult female athlete, a confidential Jane Doe. A sexual encounter occurred between the two, following a night where both consumed multiple alcoholic beverages after a sporting event. Following an investigation, the U.S. Center for SafeSport determined that John Doe engaged in nonconsensual sexual activity and issued a substantial suspension.

HRRV was then retained to represent John Doe for purposes of pursuing an appeal. Due to SafeSport's protocols, the appeal was conducted by way of an arbitration proceeding. Prior to the arbitration, HRRV retained an expert to offer an opinion relating to the effect of alcohol on memory, among other related issues.

Following an evidentiary hearing—which involved testimony from fact witnesses and the expert, the introduction of relevant documents, and arguments from HRRV and SafeSport—the tripartite panel ultimately reversed SafeSport's findings against John Doe. Applying a preponderance of evidence standard to the evidence, the panel agreed with HRRV and concluded that SafeSport had not proven that John Doe engaged in nonconsensual sexual conduct with the adult female athlete.

Contact

Carla Varriale and Shawn Schatzle represented John Doe.
Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com
Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Lease Shifting of Snow-and-Ice Removal Obligation Results in Summary Judgment for Building Owner

Perez v. Cantor
Supreme Court, Westchester County
Index No. 59417/2016
October 15, 2018

Plaintiff claimed she slipped and fell on snow and ice on the sidewalk in front of a deli located inside of a Yonkers, New York building owned by HRRV's client. Notably, the accident occurred after a blizzard in which 20 inches of snow had been deposited in the two days before the accident. The Court ruled that the defendant made its *prima facie* showing of entitlement to summary judgment by showing that the lease agreement with the third-party defendant tenant put the obligation for snow-and-ice removal on the tenant, and that the building owner did not independently cause or create the condition. Notwithstanding a Yonkers City Code provision which puts the duty of clearing sidewalks on the landowner, the Court noted that duty to be delegable via the lease provision, especially where, as here, the defendant was an out-of-possession landlord.

Contact

HRRV represented Robert Cantor.

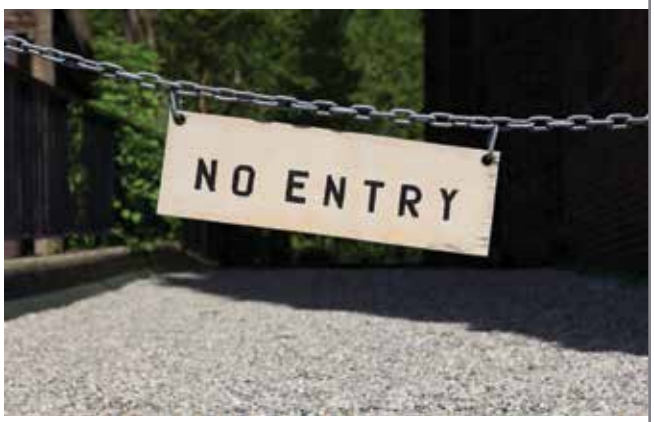
Chain Stretched Across the Driveway to a Parking Lot Deemed to Be an Open and Obvious Condition that Was Not Inherently Dangerous as a Matter of Law

Sneed v. Fulton Park Four Associates, L.P.
Supreme Court, Kings County
Index No. 13116/2015
September 26, 2018

Judge Paul Wooten granted HRRV's motion for summary judgment in an action involving personal injuries allegedly sustained by a plaintiff who tripped over a chain tied to two posts stretching across the driveway of a parking lot, in order to cordon off access to the lot.

Lee Sneed was allegedly injured on August 24, 2015 while walking from a subway exit to a bus stop on his way home from work. He cut through a parking lot to reach the bus stop and tripped over the aforementioned chain while doing so. He subsequently filed suit against various entities, including the property owner and a contractor that had been retained to repave the lot in the weeks prior to the accident. He alleged that the chain was a hazardous, trap-like condition.

HRRV represented the property owner and related defendants. Following discovery, including party depositions, HRRV moved for summary judgment, seeking dismissal primarily on the basis that the chain was open and obvious and not inherently dangerous as a matter of law. Sneed's counsel opposed the motion, in part, in reliance upon the affidavit of an expert engineer.



Judge Wooten held the chain was an open and obvious and not inherently dangerous condition as a matter of law. He noted that it was a clear and sunny day, and that the evidence—including photographs—revealed that the chain would have been readily apparent to anyone walking through the lot. He also determined that the opinions of Sneed's expert were speculative and not supported by sufficient evidence.

Contact

Carla Varriale and Shawn Schatzle represented Fulton Park Four Associates L.P., Vertices Holdings LLC and Abraham J. Hoffman.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

HRRV DECISIONS OF INTEREST

Summary Judgment Granted in Wrongful Death Case Arising Out of Patron Fall from Escalator

Narainasami v. City of New York
Supreme Court, Queens County
Index No. 15788/2009
August 23, 2018

HRRV obtained summary judgment on behalf of Sterling Mets, L.P. (Sterling), Queens Ballpark Company, L.L.C. (QBC) , Sterling Equities, L.L.C. (Equities) and the City of New York (the City) in a wrongful death case arising out of a tragic fall from an upper deck escalator at Shea Stadium (the Stadium).

Plaintiffs' decedent fell from a stationary escalator when it allegedly malfunctioned and suddenly jerked, thereby propelling him over the handrail of the escalator and onto an escalator located two floors below. He sustained fatal injuries, and his autopsy confirmed that he had a blood alcohol content of 0.16%.

His estate commenced an action and alleged a panoply of claims relating to the security, maintenance, design, manufacture, inspection and repair of the escalators and the Stadium.

After discovery and depositions, including depositions of numerous nonparty witnesses, the New York City Police Department detectives who investigated the accident and the New York City Department of Buildings inspector who confirmed that the subject escalator was functioning without issue before and immediately after the alleged accident, all defendants moved for summary judgment. Summary judgment was granted on behalf of all defendants because plaintiffs failed to adduce sufficient proof to support each and every cause of action.

Specifically with regard to Sterling and the City (QBC and Equities established as a matter of law that they did not own, occupy, possess, control or put to a special use the subject escalator and that they did not have any rights or obligations to maintain that property or the subject escalator), the Supreme Court, Queens County established that the escalator was not defective or an unreasonably foreseeable hazard. Likewise, the defendants demonstrated through expert evidence, that the alleged accident could not have happened as the plaintiffs alleged. The various escalator industry standards and Building Code violations alleged by the plaintiffs pertaining to the subject escalator were similarly defeated and shown to be either irrelevant or inapplicable.

Further plaintiffs' claims that Sterling was negligent due to a putative failure to enforce its policy of barricading escalators in the seventh inning of a baseball game so that patrons leave the Stadium via ramps were rejected by the Court. The Court cited to a line of cases holding that the violation of a company's internal rules is not negligence in and of itself and that where, as here, when an internal policy exceeded the standard of reasonable care, that policy cannot serve as a basis for imposing liability.

Contact

Carla Varriale represented Sterling, QBC, the City, Equities and QBC.

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

Summary Judgment Granted to Building Owner Based on Con Edison Duty to Maintain Area Around Gas Cover

Blanco v. Zipporah Associates
Supreme Court, Bronx County
Index No. 305190/11
July 20, 2018

Plaintiff alleged that he fell on a sidewalk abutting the property of HRRV's client and possibly because of a defect surrounding a gas cover. It was claimed that the defendant as the abutting landowner had concurrent responsibility for the alleged defect, even though Con Edison admitted to ownership of the gas cover and a duty to maintain the area around the gas cover.

Justice Ruiz reviewed the Rules and Regulations of the City of New York which address underground street covers. She concluded that it was Con Edison's duty alone to maintain the area within 12 inches around the perimeter, and then found that there was no question of fact with regard to the location of the defect which the plaintiff claimed caught his foot, which was within that perimeter. The Court concluded that there could not be concurrent liability, and both the plaintiff's complaint and the cross-claims against HRRV's client were dismissed.

Contact

HRRV represented Zipporah Associates.

HRRV DECISIONS OF INTEREST

Single-step Riser Held to be Open and Obvious and Not Inherently Dangerous

Kernell v. The Five Dwarfs Inc.
Supreme Court, Suffolk County
Index No. 16-9696
August 27, 2019

Plaintiff alleged that she tripped and fell while descending a single-step riser located within the interior of a bar and live music venue owned and operated by the defendants. The defendants moved for summary judgment on the ground that the step riser was open and obvious and not inherently dangerous, and that the building code provisions they were alleged to have breached were inapplicable because the premises had been designated as a historic building and, as such, was exempt from the aforementioned provisions. The defendants further asserted that the plaintiff's view of the step riser was not obscured by any alleged optical confusion on the night of the accident, as the step was painted white and illuminated by overhead and dome lights, and plaintiff, who had been to the premises and utilized the step on numerous other occasions without incident, was familiar with its existence.

The Court held that the defendants did, in fact, establish their *prima fascia* entitlement to summary judgment by submitting evidence (which the plaintiff was unsuccessful in attempting to controvert) that the single-step riser in question was open and obvious and, as a matter of law, not inherently dangerous. Significantly, defendants submitted numerous photographs which were authenticated by the venue's general manager and employees to be accurate depictions of the step riser at the time of the plaintiff's accident. They showed it to be painted white and illuminated by a waist-level dome light installed at a nearby wall. The photographs also showed that signs warning in bold capital letters—"STEP"—were present on both sides of the walls adjacent to the step riser. In addition to confirming the existence of the safety features at the time of the alleged accident, the general manager, the security officer and the bartender on duty testified to the presence of overhead lights that illuminated the general area of the club where the step riser was located.

The Court noted that while a finding that a condition is open and obvious does not ordinarily preclude liability on the part of landowners for dangerous conditions on the property, and oftentimes merely raises an issue of plaintiff's comparative negligence, liability is completely negated where the condition complained of is both open and obvious and, as a matter of law, not inherently dangerous. Single-step risers that are open and obvious and otherwise free of defects generally are not regarded as inherently dangerous, and landlords have no duty to protect or warn against their use.

The Court relied heavily on code research and the findings of the defense engineering expert and gave no credit to, and, in fact, criticized the submissions of the plaintiff's liability expert.

Contact

Shawn Schatzle and Carla Varriale represented the defendants.

Shawn Schatzle: 646-747-5124 or shawn.schatzle@hrrvlaw.com

Carla Varriale: 646-747-5115 or carla.varriale@hrrvlaw.com

HAVKINS ROSENFELD RITZERT & VARRIALE, LLP
HRRV
COUNSELORS AT LAW

1 Battery Park Plaza
6th Floor
New York, New York 10004
212-488-1598
212-564-0203 Facsimile

114 Old Country Road
Suite 300
Mineola, New York 11501
516-620-1700
516-746-0833 Facsimile

www.hrrvlaw.com