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SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-1714-05T31714-05T3

BERNADINE FOGLER,

Plaintiff-Respondent,

V.

WHITE DIAMOND RESTAURANT

and KCSM CORPORATION,

Defendants-Appellants.

Submitted October 16, 2006 - Decided November 1, 2006

Before Judges S.L. Reisner and Seltzer.

On appeal from the Superior Court of New Jersey, Law
Division, Union County,

L-3779-03.

Methfessel & Werbel, attorneys for appellants (Lori Brown
Sternback, on the brief).

Fricke & Solomon, attorneys for respondent (Richard M.
Fricke, on the brief).

PER CURIAM

In this slip-and-fall case, defendant, White Diamond Restaurant, appeals from a jury verdict in favor of plaintiff, Bernadine Fogler, awarding her a net verdict of \$90,000, and finding White Diamond 25% liable for the accident. We affirm.

These are the most pertinent facts. As she was exiting the restaurant, plaintiff fell due to a step-down just outside the restaurant's front door. Photographs of the step-down reveal a readily visible two to three inch difference in elevation between the level of the door and the adjacent front walkway. There were no signs inside the restaurant warning exiting patrons to "step down" or otherwise alerting them to this immediate difference in elevation between the door and the walkway.

At trial, plaintiff's expert was permitted to testify that the step-down violated the 1993 Building Officials and Code Enforcement of America (BOCA) Building Subcode Â§ 1017.1.1, applicable when the building was constructed in 1994, which requires that floor surfaces on both sides of a door be at the same elevation. He testified that the purpose of the provision is to prevent people from slipping or losing their balance as they exit. He also testified that the step-down was inconsistent with the building plans for the structure. During cross-examination, he admitted that the Town of Clark had issued a temporary certificate of occupancy for the building in 1995, indicating by its terms that the building was in compliance with the New Jersey Uniform Construction Code. However, on re-direct examination he indicated that he had frequently encountered situations where a building inspector had issued a certificate of occupancy for a structure "when the work was not in compliance with the applicable code."

The trial judge precluded defendant from presenting expert testimony contradicting plaintiff's expert, because she concluded that the defense expert's interpretation of the BOCA Code was wrong as a matter of law.

Stanley Constantine, who owns the property through a corporation, KCSM, was permitted to testify that KCSM had received several temporary certificates of occupancy (CO) for the building as well as a final CO. He indicated that he relied on them, and these documents were admitted in evidence. Defendant's counsel referred to the CO's in her summation as well, arguing that her clients had a right to rely on them in assuming that their building was safe and that they had no notice of a defect.

The applicable section of the BOCA Code provides as follows:

The floor surface on both sides of a door shall be at the same elevation. The floor surface over which the door swings shall be at the same elevation as the floor level at the threshold and shall extend from the door in the closed position a distance equal to the door width.

[BOCA Code Â§ 1017.1.1.]

This portion of Â§ 1017.1.1 also contains an exception, which we quote in full:

Exception: This requirement shall not apply to:

1. Exterior doors, as provided for in Section 1005.6, which are not on an accessible route.
2. Variations in elevation due to differences in finish materials, but not more than 1/2 inch (13 mm).

[Ibid. (emphasis added).]

As in the trial court, defendant contends on appeal that the term "accessible route" refers to a route with a handicapped-accessible door and, hence, that the requirement that both sides of the exit be level does not apply to exterior doors that are not handicapped accessible. Since the restaurant had another entrance door that was handicapped accessible, defendant contends that only that door was required to meet the standard of Â§ 1017.1.1. We disagree.

As plaintiff's expert explained at the trial, and as the judge correctly concluded, the exception only applies to exterior doors "as provided for in Section 1005.6." That section, in turn, requires ramps to be used "where the difference in elevation is less than 12 inches." It is undisputed that the door in question did not have a ramp. The only exception to the ramp requirement in Â§ 1005.6 refers to a limited set of building types (Use Groups F, H, R and S), which are permitted to have a "maximum step height of 8 inches . . . at exterior doors not required to be accessible." Ibid. It is undisputed that defendant's restaurant falls into Use Group A3. Hence the exceptions in Â§ 1017.1.1, for exterior doors pursuant to 1005.6, do not apply to an exterior doorway in a restaurant, unless there is a ramp. Consequently, the trial judge properly precluded defendant's

expert from testifying to a contrary legal interpretation.

Defendant also contends that the trial court should have considered the issuance of the temporary and permanent CO's in deciding whether there was a BOCA Code violation, and should have allowed the defense expert to testify about that issue. We reject this contention. Defendant's interpretation of the BOCA Code was wrong as a matter of law, and the fact that the Town of Clark issued a certificate of occupancy for the structure had no bearing on the proper interpretation of the Code. Moreover, defendant was properly permitted to present testimony designed to show that defendant relied on the CO's in assuming that the premises were safe and hence did not have notice of the defect. Apparently, the jury was unconvinced.

Affirmed.



Fogler's \$100,000 award was reduced to reflect the jury's allocation to her of 10% fault. As the result of a pretrial order, White Diamond, the lessee, must pay the entire net award, because it is required to defend and indemnify the co-defendant lessor, KCSM Corporation, which was found 65% liable. KCSM is not appealing the verdict.

The parties stipulated that pursuant to the New Jersey Uniform Construction Code, the 1993 BOCA Code was adopted as the standard for construction in New Jersey. See wwWare/wwWare version 1.0.3

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