

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

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KATHLEEN CLANCY, :  
 :  
 Plaintiff, : By: PRICE, J.  
 :  
 - against - : INDEX NO. 18714/01  
 :  
 STERLING DOUBLEDAY ENTERPRISES, LP :  
 d/b/a NEW YORK METS BASEBALL CLUB, : Dated: March 16, 2004  
 INC., HARRY M. STEVENS MAINTENANCE :  
 SERVICES, INC. and ARAMARK SERVICES, :  
 INC., and HARRY M. STEVENS, INC., :  
 :  
 Defendants. :  
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APPEARANCES:

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ARNOLD N. PRICE IA Part 6  
Justice

	x	Index Number <u>18714</u> 2001
KATHLEEN CLANCY		Motion Dates <u>January 13,</u> 2004
- against -		Motion Cal. Numbers <u>9 &amp; 10</u>
STERLING DOUBLEDAY ENTERPRISES, L.P., etc., et al.	x	

The following papers numbered 1 to 17 read on these separate motions by defendant Sterling Doubleday Enterprises, L.P. d/b/a New York Mets Baseball Club, Inc. (hereinafter "Sterling") for summary judgment in its favor dismissing plaintiff's complaint and all cross claims against it or for summary judgment in its favor and against defendants Harry M. Stevens Maintenance Services, Inc. (hereinafter "HMSMSI"), Aramark Services, Inc. (hereinafter "Aramark"), and Harry M. Stevens, Inc. (hereinafter "Stevens") on its cross claims for indemnification and by defendants HMSMSI, Aramark, and Stevens for summary judgment in their favor.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1 - 9
Answering Affidavits - Exhibits.....	10 - 12
Reply Affidavits.....	13 - 17

Upon the foregoing papers it is ordered that the motions are consolidated and determined as follows:

In this action, plaintiff seeks damages for personal injuries allegedly sustained on August 12, 2000, at approximately 11:00 P.M., when she slipped and fell on mustard on a stairway at Shea Stadium, which is leased by defendant Sterling. According to plaintiff, the mustard condition was created by two unidentified males who obtained a commercial-sized container of mustard and dumped it on the lap of a female patron seated near the subject stairway. Plaintiff and non-party witnesses, Donald Clancy, her father, and Daniel McDonough, her boyfriend, testified that

thereafter stadium personnel appeared, including ushers, security, police, and an individual with a broom and dustpan. They also testified that they did not observe any of these persons attempt to clean the mustard spill. Approximately an hour and a half later, when plaintiff attempted to descend the subject stairway, she slipped and fell on the mustard, which she and the non-party witnesses testified was on several of the steps of the stairway.

A landowner has a duty to maintain its premises in a reasonably safe condition (see, Basso v Miller, 40 NY2d 233) and to warn of a dangerous condition which is not readily observable with the reasonable use of one's senses. (See, Tagle v Jakob, 97 NY2d 165.) Apart from the duty to warn of dangerous conditions on the premises, a landowner also has a concomitant duty to keep its property in a reasonably safe condition for those who use it. (See, DiVietro v Gould Palisades, Corp., \_\_\_ AD3d \_\_\_, 771 NYS2d 527; see also, Cupo v Karfunkel, 1 AD3d 48; Tulovic v Chase Manhattan Bank, N.A., 309 AD2d 923.) The fact that a dangerous condition on property is open and obvious, while relieving the landowner of the duty to warn, will not relieve the landowner of its burden of demonstrating that he or she exercised reasonable care under the circumstances to remedy the dangerous condition and to make the property safe, based on factors such as the likelihood of injury to those entering the property and the burden of avoiding the risk. (See, Cupo v Karfunkel, supra; see also, MacDonald v City of Schenectady, 308 AD2d 125; Soich v Farone, 307 AD2d 658.)

In this case, defendant Sterling failed to meet its burden of demonstrating its entitlement to summary judgment as a matter of law. (See generally, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851.) While there was not duty to warn plaintiff of the open and obvious hazard posed by the mustard on the stairway, an issue of fact exists concerning whether defendant Sterling breached its general duty of care to maintain its premises in a reasonably safe condition. (See, DiVietro v Gould Palisades, Corp., supra; see also, Cupo v Karfunkel, supra; Tulovic v Chase Manhattan Bank, N.A., supra.) The fact that the condition was open and obvious merely creates an issue as to plaintiff's comparative negligence. (See, Picarello v Zilberman, 309 AD2d 912; see also, Cupo v Karfunkel, supra; Tulovic v Chase Manhattan Bank, N.A., supra.)

An issue of fact also exists concerning whether defendant Sterling had constructive notice of the alleged dangerous condition. (See, Gordon v American Museum of Natural History, 67 NY2d 836; see also, Fundaro v City of New York, 272 AD2d 516; Giambrone v New York Yankees, 181 AD2d 547.) Moreover, the testimony of plaintiff and the non-party witnesses regarding

stadium personnel at the scene immediately after the mustard spill raises an issue of fact as to whether defendant Sterling had actual notice of the alleged dangerous condition.

In light of the foregoing, the part of defendant Sterling's motion seeking summary judgment in its favor dismissing plaintiff's complaint as against it is denied.

The part of the motion of defendants HMSMSI, Aramark, and Stevens for summary judgment in defendants HMSMSI's and Aramark's favor is denied inasmuch as issues of fact exist concerning whether there was a breach of the general duty of care to maintain the premises in a reasonably safe condition (see, Cupo v Karfunkel, supra) and whether defendants HMSMSI and Aramark had actual or constructive notice of the alleged dangerous condition. (See, Gordon v American Museum of Natural History, supra.)

The part of the motion of defendants HMSMSI, Aramark, and Stevens for summary judgment in defendant Stevens' favor is granted. Said defendants presented competent evidence establishing defendant Stevens' entitlement to summary judgment as a matter of law. This evidence established that defendant Stevens did not create or have actual or constructive notice of the alleged dangerous condition. This evidence also established that defendant Stevens did not breach any duty to plaintiff. Plaintiff, in opposition to this part of the motion, failed to raise any triable issues of fact. In addition, defendant Sterling's claim that an issue of fact exists concerning whether defendant Stevens created the alleged condition by providing the subject mustard is speculative and without merit.

Accordingly, plaintiff's complaint and all cross claims against defendant Stevens are dismissed. In light of this determination, the part of defendant Sterling's motion seeking summary judgment in its favor and against defendant Stevens on its cross claim for indemnification is denied as moot.

The part of the motion of defendants HMSMSI, Aramark, and Stevens for summary judgment in defendants HMSMSI's and Aramark's favor dismissing defendant Sterling's cross claims for indemnification against them is denied as issues of fact exist concerning whether defendants HMSMSI and Aramark adequately performed their contractual obligations to defendant Sterling, or were negligent in any duty owed to defendant Sterling. (See, Engel v Eichler, 290 AD2d 477; see also, Boskey v Gazza Properties, Inc., 248 AD2d 344; McBride v Stewart's Ice Cream Co., 262 AD2d 776.)

The part of defendant Sterling's motion seeking summary judgment in its favor and against defendants HMSMSI and Aramark on its cross claims for indemnification is denied as premature.

Dated: March 16, 2004

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J.S.C.