

Scansarole v Madison Square Garden, L.P.
2005 NY Slip Op 30388(U)
May 12, 2005
Supreme Court, New York County
Docket Number: 123651/02
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Lisa Scansarole,

Plaintiff,

-against-

Madison Square Garden, L.P. and
Madison Square Garden Center, Inc.

Defendant.

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DECISION/ORDER

Index No.: 123651/02

Seq. No.: 001

Present:

Hon. Judith J. Gische

J.S.C.

Jaclyn Daly,

Plaintiff,

-against-

Madison Square Garden L.P. and
Madison Square Garden Center, Inc.,

Defendant.

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Index No.: 126866/02

Seq. No.: 001

Action No. 2

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def's Notice of Motion (# 123651/02) w/affirm (RET), exhs.	1
Pl's Notice of Cross-Motion w/affirm (WPH), exhs.	2
Def's Reply Affirm (RET) w/exhs.	3
Pl's Reply Affirm (WPH) w/exhs.	4
Def's Notice of Motion (# 126866/02) w/affirm (RET), exhs.	5
Pl's Affirm (TAT) in Op w/exhs.	6
Pl's Notice of Cross-Motion w/affirm (TAT), exhs.	7
Def's Reply affirm (RET) w/exhs.	8
Pl's Reply affirm (TAT) w/exh.	9

Gische, J.

Upon the foregoing papers, the decision and order of the court is as follows:

The above captioned cases were consolidated for discovery and trial, as per so-ordered stipulation dated March 12, 2004. Both cases seek damages for personal injuries allegedly sustained by plaintiffs on April 19, 2002 at 4 Penn Plaza in New York County ("4 Penn Plaza") at approximately 2:30 a.m.

Defendants Madison Square Garden L.P. and Madison Square Garden Center Inc. [collectively "MSG"] own 4 Penn Plaza. They separately move for summary judgment against each plaintiff (CPLR 3212). MSG asserts that because neither plaintiff can establish her prima facie case against MSG, each of their complaints should be dismissed.

Issue has been joined in both actions. The summary judgment motions were originally brought within the 120 days allowed by CPLR 3212(a). See: Brill v. City of New York, 2 NY3rd 648 (2004).

Each plaintiff is represented by separate counsel. They have separately cross moved for virtually identical relief. Each seeks to strike MSG's answer as a spoliation sanction (CPLR 3126 [3]). Alternatively, plaintiffs seek to preclude MSG from asserting comparative and/or contributory negligence as a defense (CPLR 3126 [1]). They also seek an order precluding MSG from arguing that (n)either plaintiff had physical contact with the glass/window that injured them.

At all times herein the "Scansarole action" shall refer to action #1 bearing the index number 123651/02, and the "Daly action" shall refer to action #2 bearing the index number 126866/02. Because of the common issues of law and fact, the motions are consolidated for decision herein.

Discussion

The plaintiffs claim to have sustained injuries at 4 Penn Plaza on April 19, 2002

when they fell through a glass panel that exploded and shattered. The glass was part of the facade at 4 Penn Plaza, more than 60 inches in length and was placed within inches of the pavement. Ms. Scansorole fell backward through the shattered glass. Ms. Daly, in an attempt to keep Ms. Scansorole from falling, reached to grab her shirt or hair and consequently fell forward through the exploded glass.

Plaintiff Scansarole sustained the most serious injuries, one of which resulted in her right leg being surgically amputated below the knee while she was in the hospital. She now walks with the aid of a prosthetic device. Plaintiff Daly sustained various injuries including a laceration to the neck that resulted in numerous stitches.

Ms. Scansarole has no present recollection of what occurred when the accident happened. Part of her cross motion is for the application of the so-called "Noseworthy" doctrine which relaxes the standards of proof in certain cases where the plaintiff cannot recall how they were injured. Noseworthy v. City of New York, 298 NY 76 (1948). MSG does not challenge Ms. Scansarole's amnesia claims.

Ms. Daly recalls certain details about the accident and contends that Ms. Scansarole was directly in front of the glass with her back to it when it shattered, Ms. Daly testified at her EBT that the heel of Ms. Scansarole's shoe was hooked onto the ledge just below the glass panel. Ms. Daly further testified she was facing her friend, at arm's distance, when the glass shattered. Ms. Daly has testified she herself was not touching the window at the time of the accident, but that Ms. Scansarole's back was to the glass.

An Amtrak police officer (Officer Renner) recorded in his report that the plaintiffs were leaning on the glass when it exploded. The source of the information in his report appears to have been Ms. Daly who was interviewed shortly after the accident.

Plaintiffs argue that there was surveillance camera in the immediate area of the accident and that images were recorded contemporaneously therewith. They further contend that the images would have provided a wealth of information about what happened on April 19, 2002 - had portions of it not been lost or destroyed through MSG's negligence. Plaintiffs argue that this is spoliation of evidence, and that MSG should be sanctioned as provided under CPLR 3126, by striking their answer. As alternative relief, they seek to preclude the use of the surveillance tape images in their entirety and the resolution of certain claims and defenses against MSG.

1. Summary Judgment

As the movant seeking summary judgment, defendant MSG has the initial burden of setting forth evidentiary facts to demonstrate its entitlement to judgment in its favor as a matter of law, without the need for a trial. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if they meet this burden does the burden then shift to party opposes the motion (here, plaintiffs) to establish the existence of material issues of fact through evidentiary proof in admissible form, that would require a trial of the action. Zuckerman v. City of New York, *supra*. Where, however, the proponent fails to make out its prima facie case for summary judgment, then the motion must be denied, regardless of the sufficiency the opposing papers. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). For the reasons that follow, the court holds that MSG has not sustained its burden on these motions for summary judgment against each plaintiff, and they must each be denied.

On this motion MSG maintains that the plaintiffs cannot prove their negligence claims. In particular, it claims that plaintiffs cannot prove that a defective condition existed, that MSG either created or had actual or constructive notice that an unsafe

condition existed, and/or that any defective condition in the glass was a proximate cause of plaintiffs' injuries.

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1st dept 2001). This common law duty is tempered by requiring a plaintiff to establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 AD2d 134 (1st dept. 2000). To constitute constructive notice a defect must be visible and apparent and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedy it. Pappalardo, supra. Where, however, there are statutory violations, there is no need to separately establish notice. Pappalardo, supra. In order to prevail against a landowner a plaintiff is also required to prove that the negligent condition was a proximate cause of the injuries sustained. Lynn v. Lynn, 216 AD2d 194 (1st dept, 1995).

Defendant's motion turns largely on what it perceives as the inadequacy of plaintiffs' proof of negligence. In being the proponent of summary judgment, however, defendant has a responsibility to put forth its evidence that would entitle it to judgment as a matter of law. In a negligence case, this burden is not met, where as here, defendant fails to put in its own proof showing an absence of negligence. Liptort v. Theater at Madison Square Garden, 281 AD2d 398 (2nd dept. 2001); Wilson v. Proctors Theater, 223 AD2d 826 (3rd dept. 1996). Here there is no proof offered by defendant in its motion in chief that the glass wall was safe. While there is an expert report in defendant's reply, this does not satisfy the requirements of summary judgment.

In any event, the expert reports offered by each of the parties on these motions only highlight the fact that there are disputed issues of fact.

The building was built and opened in 1965. The applicable building code, therefore, is the 1938 code. There seems to be no dispute that the glass was 1/4 inch thick and that it was not safety glazed. The experts each agree that in 1968 the amended building code required that future construction of similar glass panels were to use safety glass.

The experts disagree about whether the glass panel in question was a window or a glass wall. Depending and based upon each expert's characterization of the glass structure, each expert reaches a different conclusion about which 1938 code provisions is applicable. Defendant claims that the glass is a window subject to sub-article 7 of the 1938 Code regarding the protection of exterior openings. Plaintiffs' expert indicates that the glass is really a wall subject to sub-article 8 of the 1938 Code which pertains to the protection of wall and partition openings. Plaintiffs' expert further opines that the glass wall did not comply with the applicable code provisions. Such provisions would, among other things, have required that the glass wall be placed against substantial, rigid, incombustible surfaces.

The issue regarding the actual nature of the glass structure and consequently which code provision applies is one of fact. It precludes the granting of summary judgment in this case.

Plaintiffs' expert also expresses the opinion that at the time the subject premises were being constructed, there were discussions in the building and architectural community about the necessity of using safety glass and/or the use of thicker glass panels for structures such as the glass panel in this case. He also opines that it was

standard practice in the building industry for owners to voluntarily come into compliance with the 1968 building Code after 1968 by erecting barriers, putting up railings or otherwise using protective measures to prevent individuals from coming into contact with glass panels that was in the public reach.

These additional claims do not concern a violation of the applicable building code and thus, are in the nature of common law negligence claims. As such, a finding of negligence requires either that defendant created the condition or had actual or constructive notice of the condition. Although defendant claims that plaintiff cannot prove any actual or constructive notice to defendant of an unsafe condition, the record is devoid of any proof from defendant denying notice. The affirmation of defendant's attorney denying notice in a conclusory manner is not sufficient. While, at trial, plaintiff will have to prove notice, on a defendant's motion for summary judgment the burden is on the defendant to prove lack of notice. Moreira v. City of New York, 4 AD3d 311 (1st dept. 200); Guck v. Palozzi, 269 AD2d 777 (4th dept. 2000). Defendant has not met this burden.

Notwithstanding that plaintiff Scansarole does not recall whether she was leaning against the glass, there is enough circumstantial evidence from which a trier of fact could reasonably conclude that she did so lean. Ms. Daly testified about the proximity of the parties, particularly Scansarole to the glass panel, and that Ms. Scansarole's heel was hooked onto the metal frame of the panel. These facts, without anything more, are sufficient to defeat defendant's claim that plaintiffs have no proof either of them had contact with the glass at the time of the accident. There is also the additional evidence of the Amtrak Officer's notes. Whether such notes are otherwise admissible remains an issue for the trial judge. Regardless of their admissibility, an issue of fact remains.

The court also finds that there is sufficient evidence in the record to raise an issue of fact about whether defendants failure to follow the applicable code provisions and/or industry practice was the proximate cause of the injuries. The deviations from code or industry practice clearly bear a relationship to limiting glass breakage. The fact that plaintiffs' injuries were the result of glass breakage is sufficient to defeat defendant's motion.

MSG claims that there was a superseding or intervening event that caused the glass to shatter, such as a drive by shooting, and that such intervening or superseding event was the proximate cause of the plaintiffs' injuries. MSG solely relies, however, on something that Ms. Daly repeated at the EBT to establish this theory. Ms. Daly testified that an officer told her, that a "bum" in the area told him that a car had drove by and an occupant of the car shot at the two women. This testimony is clearly inadmissible double hearsay. There is otherwise not a scintilla of evidence supporting a conclusion of a drive by shooting and there is no indication anyone investigated these facts or that the vagrant was identified, let alone deposed.

MSG also raises the possibility that Ms. Daly may have shoved Ms. Scansarole into the glass during horseplay. While some images on a surveillance tape may support such a conclusion, it is not enough to require a summary judgment determination in defendant's favor. At most, it raises issues about contributory negligence.

In view of the reasons set forth above, MSG's motions for summary judgment must be denied.

The court reaches such conclusion without deciding whether, as plaintiffs contend, the "Noseworthy" doctrine should be applied to the facts of this case.

Noseworthy v. City of New York, *supra*. This lower standard of proof is generally applied when a plaintiff cannot vigorously oppose a motion for summary judgment, for example, because of his or her own impaired recollection about the events leading to her injury. Jose v. Richards, 307 AD2d 279 (2nd Dept 2003). Since defendant has not met its initial burden on its motions for summary judgment to establish a prima facie case, the burden has not shifted to plaintiffs to produce proof establishing the existence of a triable issue of fact. This is without prejudice to plaintiffs raising the Noseworthy issue as may be appropriate at trial.

2. Spoliation

On the cross motions plaintiffs maintain that spoliation sanctions should be imposed because MSG gave them a VHS tape that did not contain the same images captured by their surveillance cameras on April 19, 2002. Plaintiffs maintain that whether this was deliberate or not, MSG's answer should be stricken because they had valuable information about the accident that they either withheld or destroyed.

MSG readily admits that some of the images captured by their surveillance camera on a CD-ROM were not copied onto the VHS format tape they gave the plaintiffs in response to discovery demands. They explain, however, through various affidavits that this was a mistake and they have now provided the missing images, curing any wrong that they may have done. They further explain that this happened as a result of technical glitch inherent in transferring digital images to tape and was entirely inadvertent.

Other images of what happened immediately after the accident (when the Amtrak Officer responded to the scene) have been admittedly destroyed and are no longer available. MSG admits that those images were overwritten by other (unrelated)

surveillance images. Mr. Nadal, who is employed by MSG as their director of building security, has testified that he was instructed to save images only up to a certain point, and the destroyed images were of events that took place after that point. MSG claims the loss of these images was was inadvertent and/or unintentional.

Attorney Tarshis, the lawyer representing MSG avers that “[n]o images captured before the incident were lost or subject to spoliation. Those images have all been preserved. There were never any images captured by Madison Square Garden of the accident itself”. Plaintiffs however will never see the destroyed images and can neither confirm or deny defendant’s representations. On the other hand there seems to be no dispute that the cameras were not angled in a way that images of the accident itself could not have been captured.

Where crucial items of evidence involved in an accident are disposed of before the adversarial party has a chance to examine them, the court can impose certain restrictions on the party’s ability to use the evidence destroyed, even striking the answer, even where the offending party did not act in bad faith, or the loss is only inadvertent. Kirkland v. New York City Housing Authority et al., 236 AD2d 170 (1st Dept. 1997); Squitieri v. City of New York, 248 AD2d 201 (1st Dept. 1998); Marro v. St. Vincent’s Hospital et al., 294 AD2d 341 (2nd Dept 2002).

The circumstances of this case require that the court grant limited spoliation sanctions as to the post-accident images that MSG destroyed, even if the loss was unintentional, inadvertent, and/or simply a mistake. The court precludes defendant from otherwise introducing any evidence about the content of the now unavailable tapes. The court, however, declines to strike MSG’s pleadings because the nature of

the now unavailable images did not involve the actual accident. Striking MSG's pleading under the circumstances would be too extreme. Iannucci v. Rose, 8 AD3d 437 (2nd dept. 2004).

As to the pre-accident images that were produced, albeit late, the court finds it dispositive that they were not lost or destroyed. While not minimizing the fact that they were produced late, and resulted in a great deal of confusion, they do exist. Thus, the spoliation sanctions available to address the extreme situation of where evidence is lost forever, are not applicable. Kirkland v. New York City Housing Authority et al., *supra*; Squitieri v. City of New York, *supra*; Marro v. St. Vincent's Hospital et al., *supra*.

As to the lost and destroyed images (post accident), MSG is hereby precluded from offering into evidence at trial any testimony, evidence, admissions, affidavits, etc. pertaining to those images. As to the pre-accident images (e.g. the images of a "push"), MSG will not be precluded from using them, or other related evidence.

A different issue raised by plaintiffs is whether the images they have received from MSG are now complete. Plaintiffs express a general uneasiness that the surveillance images are possibly 'corrupt,' incomplete, or otherwise suspect. No expert analysis of the images has been provided to the court and plaintiffs' general skepticism is not a sufficient basis to bar the use of all the images captured by the surveillance. This is without prejudice to plaintiffs seeking such other and further relief as may be warranted upon a showing that the images have been corrupted and/or altered and/or truncated. The court is not making any finding at this time about whether the images MSG has provided the plaintiffs are authentic or complete.

The court also denies plaintiffs' cross motions to preclude MSG from claiming a

defense of comparative and/or contributory negligence. The underpinnings of such relief is that MSG lost or withheld evidence. Having addressed these already (above) and imposed spoliation sanctions as appropriate, there is no basis for such further orders of preclusion.

The court also denies plaintiffs' cross motions to preclude MSG from claiming that neither plaintiff was in direct contact (e.g. leaning, etc) on the glass when it broke. This is a factual dispute that will have to be decided at trial by the trier of fact.

Conclusion

Defendants Madison Square Garden, L.P. and Madison Square Garden Center, Inc. ("MSG") motions for summary judgment dismissing each plaintiff's complaint is denied.

Each plaintiff's cross motion is granted in part, and partly denied, for each and every reason articulated in this decision and order.

The cases are restored to their rightful place on the trial calendar.

Any relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the Decision and Order of the Court.

Dated: New York, New York
May 12, 2005

FILED

So Ordered: MAY 17 2005

NEW YORK
COUNTY CLERK'S OFFICE
J.S.C.

HON. JUDITH J. GISCHE