

Gaines v Loews Cineplex Theatres, Inc.

2007 NY Slip Op 30952(U)

April 27, 2007

Supreme Court, New York County

Docket Number: 0117940/2004

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: WALTER B. TULLOCH

PART _____

Index Number : 117940/2004

GAINES, CARL

vs

LOEWS CINEPLEX THEATRES INC.

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH COMPACTUAL MEMORANDUM DECISION

FILED

APR 27 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/22/07

WALTER B. TULLOCH J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 15

-----X

CARL GAINES and ROBYN GAINES

Plaintiffs,

DECISION AND ORDER

v.

Index. No. 117940/04

LOEWS CINEPLEX THEATRES, INC., individually
and d/b/a LOEWS CINEPLEX 34TH STREET, and
LOEWS 34TH STREET SHOWPLACE CINEMAS, INC.,
Individually and d/b/a LOEWS CINEPLEX 34TH STREET

Defendants.

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-----X

TOLUB, WALTER, J.S.C.

Defendants in this personal injury action, Thirty Fourth Street Cinemas, Inc. i/s/h/a Loews Cineplex Theatres, Inc., individually and d/b/a Loews Cineplex 34th Street, and Loews 34th Street Showplace Cinemas, Inc., individually and d/b/a Loews Cineplex 34th Street (collectively "defendants" or "Loews") move pursuant to CPLR 3211(a)(7) or, alternatively, pursuant to CPLR 3212 for summary judgment dismissing the complaint.¹

Plaintiffs, Carl and Robyn Gaines (hereafter "Carl" and/or "Robyn"), claim that, on May 21, 2004, while attending a movie at defendants' theater, Carl was assaulted and injured by an unknown third person who was also a patron in the theater. The facts leading up to the assault are not in dispute. Carl and Robyn, who were husband and wife at the time of the incident, went to defendants' theater to see the movie "Troy" and, about an hour after the movie began they

¹ Because issue has been joined in this matter, discovery is complete and the note of issue has been filed, the court analyzes this motion for summary judgment pursuant to CPLR 3212.

became embroiled in an angry verbal exchange with the couple sitting to Robyn's left. Carl and Robyn claim that the couple was talking and interfering with their ability to enjoy the movie. The verbal exchange escalated until, according to Plaintiffs, the unknown male jumped at Carl and unsuccessfully attempted to strike him. Carl then used his feet to push the unknown male into the next row. Thereafter, the unknown male struck Carl in the face, who fell and injured his shoulder.

According to Carl's testimony at his deposition, the fall occurred two to three minutes after the theater manager and another theater employee arrived at the scene of the altercation and after Carl told the manager and employee that he had been attacked. (Capobianco Aff., Ex. E, p. 27, ll. 10-18) Carl further testified that the theater employees just stood in the row of seats in front of the alleged attacker and did nothing to intercede or prevent the ultimately successful blow. (Capobianco Aff., Ex. E, p.30, ll 9-16) Carl stated that after the assault, he told the theater manager that he wanted the police and an ambulance and that he and Robyn left the auditorium with the manager and, another theater employee informed them that the police and an ambulance were on the way. (Capobianco Aff., Ex. E, p. 41, ll. 1-17)

Robyn's testimony regarding the argument and subsequent assault is substantially similar to Carl's version of the events. (Capobianco Aff, Ex. F)

However, at his deposition, the theater manager, Andre Levy ("Levy") described a very different set of facts. Levy testified that neither he, nor any other theater employee witnessed the argument or the assault. Levy claims that a theater patron came out of the theater and told him that there was a fight going on inside the auditorium. He contends that he instructed another employee to call security (Capobianco Aff. Ex. G , p. 59 ll. 12-19) and then he entered the theater to investigate. Levy testified that as he entered, the alleged assailant passed him leaving the

theater and then Carl approached him and told him that he had just been punched in the face by the person leaving the theater. (Capobianco Aff., Ex. G, p. 54, ll. 11-22) Levy testified that he attempted to follow the alleged assailant but that he was unable to stop him before he left the theater and that, when he returned to the theater area, he found Carl and Robyn at the guest services desk in the lobby. Shortly thereafter security and two other managers arrived at guest services. Levy further testified that Carl then described the alleged incident and that Levy filled out an incident report. (Capobianco Aff., Ex. G., pp. 68-72)

The complaint, as amplified by the bill of particulars, alleges that the defendants were negligent in that they failed, inter alia, to adequately respond to the alleged incident by failing to remove the belligerent patron; stop the movie; call the police and/or protect Carl by providing proper security and that Carl was injured as a result of that negligence. The complaint also contains a loss of consortium claim on Robyn's behalf.

ARGUMENTS

In support of the motion for summary judgment, defendants argue that they are not liable for Carl's injuries because the sudden physical assault by the third party was not foreseeable because Carl and Robin did not notify anyone at the theater about the belligerent patrons before the assault and that none of the theater employees knew about the altercation until it was over. They also argue that the plaintiffs initiated the verbal exchange and there is no evidence regarding the unknown assailant's propensity for violence or that there was a history of violence at the theater. Moreover, they argue that they are not responsible for the injuries Carl may have sustained while he was engaged in mutual combat.

In opposition, plaintiffs argue that there is a question of fact as to whether defendants breached their common law duty to take minimal precautions to protect Carl from the foreseeable

second assault by the unknown male. Plaintiff's claim that Levy and security arrived on the scene after the unknown male's first attack but before the second attack and since Carl told the theater employees that the unknown male had already attempted to assault him, defendant's had reasonable cause to anticipate and to take steps to prevent further violence.

DISCUSSION

A motion for summary judgment must be granted if, upon all the papers and proof submitted, the cause of action in issue has no merit. CPLR 3212(b). Once the movant has made a *prima facie* showing of entitlement to summary judgment, the opposing party must lay bare its proof and demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Without such evidence the motion will be granted. (*Friends of Animals, Inc. v. Associated Fur Manufacturers, Inc.*, 46 N.Y.2d 1065 [1979])

To establish a *prima facie* case of negligence, a plaintiff must establish the existence of a duty owed by the defendant to the plaintiff and that a breach of that duty was a proximate cause of plaintiff's injury. (*Vetrone v. Ha Di, Corp.*, 22 AD.3d 835 [2nd Dept 2005]).

As to defendants' duty under the facts at issue here, it is well settled that "[l]andowners in general have a duty to act in a reasonable manner to prevent harm to those on their property." (*D'Amico v. Christie*, 71 N.Y.2d 76, 85 [1987]) Specifically, "they have a duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control. (*Id* at 85)

In *Nallen v. Helmsley Spear, Inc.*, 50 N.Y.2d 507,519 (1980), the Court of Appeals stated:

Of course, a possessor of land, whether he be a landowner or a leaseholder, is not an insurer of a visitor's safety. Thus, even when there is an extensive history of criminal conduct on the premises, the possessor can not be held to a duty to take protective measures unless it is shown that he either knows or has reason to know from past experience 'that there is a likelihood of conduct on the part of third persons *** which is likely to endanger the safety of the visitor'. Only if such conditions are met may the possessor of land be obliged to 'take precautions *** and to provide a reasonably sufficient number of servants to afford a reasonable protection.'

(Restatement, Torts 2d, Section 344)

If one accepts the testimony of theater manager Levy, that Defendants no knowledge of the alleged assault until it was over and the unknown assailant was leaving the theater, then the Defendants have made a prima facie showing that they are entitled to judgment as a matter of law. Moreover, according to Carl's testimony, before the attempted assault, the plaintiffs did not complain about the unknown assailant's unruly behavior or take any other action to make defendants aware that the unknown assailant may have had dangerous propensities. (*See, e.g.*, *Elkady v. Very, Ltd.*, 8 A.D.3d 197 [1st Dept 2004])


However, plaintiffs have raised a material factual issue as to whether defendants knew or should have known that there was a likelihood of conduct on the part of the unknown assailant that presented a danger to Carl because, according to plaintiffs' version of events, theater manager Levy, and a security guard arrived on the scene during the altercation, and took no action to prevent the unknown assailant, who they knew had been belligerent and had already tried to assault Carl, from landing the blow that resulted in Carl's physical injury. (*See, e.g.* *Mahase v. Manhattan & Bronx Surface Transit*, 3 A.D.3d 410 [1st Dept. 2004]). There are

therefore issues of fact which preclude summary judgment.

Accordingly, it is ORDERED that defendants motion for summary judgment is denied, and the parties are directed to appear for a pre-trial conference on May 18, 2007 at 11:00 a.m in room 335 at 60 Centre Street.

The decision constitutes the order of the court.

DATE 4/22/07



WALTER B. TOLUB, J.S.C.

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