Hacohen v Trustees of Masonic Hall
2007 NY Slip Op 33998(U)
December 11, 2007
Supreme Court, New York County
Docket Number: 0117300/2004
Judge: Barbara Kapnick
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SCANNED ON 12/13/2007

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

PRESENT: BARBARA R. KAPNICK J.S.C.

PART 12

Index Number : 117300/2004
HACOHEN, ARIEL M.
vs
TRUSTEES OF MASONIC HALL
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 117300/04

MOTION DATE

MOTION SEQ. NO. 001

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 and cross-motions are decided in accordance with the accompanying memorandum decision.

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

FILED
DEC 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/11/07

BARBARA R. KAPNICK J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12
---------------------------------------X
ARIEL M. HACOHEN,

Plaintiff,

DECISION/ORDER
Index No. 117300/04
Motion Seq. No. 001

-against-

TRUSTEES OF MASONIC HALL, COMVISION, INC., d/b/a PC LEARN a/k/a NYC SEMINAR AND CONFERENCE CENTER and HARVARD MAINTENANCE, INC.,

Defendants.

FILED
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NEW YORK
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BARBARA R. KAPNICK, J.:

In this action, plaintiff Ariel M. HaCohen seeks to recover damages for personal injuries he sustained on November 3, 2003 while pushing and pulling a flat-bed cart loaded with supplies and equipment for plaintiff's booth at a trade show for the International Association for Counter-Terrorism and Security Professionals. The trade show was being held at the Masonic Hall at 71 West 23rd Street in Manhattan. Plaintiff was allegedly attempting to lift and/or tug the wheels of the cart over a slight height differential between a ramp and a doorsill, when he felt shooting pain through his back.

Plaintiff alleges that: (a) one of the corner wheels of the cart was stuck, causing the cart to wobble; (b) the ramp was defective because it had an improper incline, an improper landing

and a height differential between the ramp and the doorsill ; and (c) there was inadequate lighting.

Defendant Trustees of Masonic Hall ("Masonic Hall") is the owner of the building, and was the owner of the cart and ramp in question.

The trade show which plaintiff was attending was held in a portion of the building leased to defendant Comvision, Inc. d/b/a Learn a/k/a NYC Seminar and Conference Center ("Comvision").

Defendant Harvard Maintenance, Inc. ("Harvard") was the cleaning contractor for the building.

Defendant Masonic Hall now moves for summary judgment dismissing plaintiff's Amended Complaint and all cross-claims against it.

Defendant Harvard cross-moves for summary judgment dismissing plaintiff's Amended Complaint and all cross-claims against it.

Plaintiff opposes defendants' motion and cross-motion, and cross-moves for an order pursuant to CPLR § 3126 striking defendant

Masonic Hall's Answer due to its alleged spoliation of the subject wagon and ramp.

Defendant Comvision also cross-moves for summary judgment dismissing plaintiff's Amended Complaint and all cross-claims against it.

Spoliation

Plaintiff argues that this Court should strike defendant Masonic Hall's Answer on the ground that the subject wagon and ramp were destroyed after this lawsuit was commenced and prior to the scheduled inspection of the equipment by plaintiff's expert.

Specifically, plaintiff argues that it is prejudiced by the destruction of the equipment because its expert can now only estimate as to certain measurements, and defendant will not concede that: a) the defect was more than *de minimus*; b) a vertical lip shown in the photographs was three inches high; and c) that the ramp sagged even without a load.

"Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has

an opportunity to inspect them." Kirkland v. New York City Housing Authority, 236 A.D.2d 170, 173 (1st Dep't 1997).

However, defendant Masonic Hall argues that spoliation sanctions are not appropriate in this case because plaintiff cannot show that he is unduly prejudiced and/or unable to prosecute his action as a result of the destruction of this evidence since plaintiff and his expert are in possession of several detailed photographs of the ramp which were taken almost immediately after the accident. See, Rodriguez v. 551 Realty LLC, 35 A.D.3d 221 (1st Dep't 2006).

In addition, defendant argues that it was impossible to identify which cart plaintiff was using at the time of his accident because plaintiff failed to immediately notify anyone of the incident.[1]

Under the circumstances presented and based on the papers submitted and the oral argument held on the record on February 7, 2007, "it cannot be said that a spoliation sanction is 'necessary as a matter of elementary fairness' (citation omitted)" Diaz v. Rose, 40 A.D.3d 429, 430 (1st Dep't 2007).

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[1] According to defendant Masonic Hall, there are numerous carts in use in the building.

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Accordingly, plaintiff's cross-motion to strike defendant Masonic Hall's Answer is denied.

Defendant Masonic Hall's Motion for Summary Judgment

Defendant Masonic Hall argues that it is entitled to summary judgment on the grounds that: (i) the height differential between the ramp and the doorsill was too insignificant and/or trivial to constitute an actionable defect; (ii) even if the condition of the ramp was not trivial as a matter of law, the defective condition was 'open and obvious'; (iii) plaintiff's accident was not reasonably foreseeable;[2] and (iv) plaintiff voluntarily assumed the risk of injury by lifting the cart over the lip of the doorsill.

Plaintiff has annexed an Affidavit from his expert, Peter Pomeranz, P.E., who is of the opinion that "[t]he installation of a temporary ramp with a step at the top of the ramp that deformed under load created an unsafe condition for anyone attempting to wheel a wagon or any dolly up the ramp", and constituted a "tripping hazard" in violation of sections 26-228, 27-127 and 27-128 of the New York City Building Code ("the Code").

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[2] Defendant Masonic Hall argues, inter alia, that: (i) if plaintiff needed a cart to transport his materials, he should have brought his own instead of relying on the cart voluntarily provided by the building owner; (ii) plaintiff could have left the cart near the doorway and carried his supplies to the seminar from there; and (iii) it could not have been anticipated that plaintiff would attempt to lift the edge of the cart himself.

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Mr. Pomeranz further estimates the difference in level between the top of the ramp and the "platform/threshold/landing" to be between ½ inch and ¾ inch up to and including 1 inch, in violation of section 27-377(3) of the Code, and that the slope of the ramp constituted a violation of section 27-377(5) of the Code.

Finally, Mr. Pomeranz concludes "with a reasonable degree of engineering certainty that the ½ inch to 1 inch step at the top of the ramp would make it difficult, if not impossible, to push the wagon over the top of the ramp and through the doorway", and that "the installation of too steep a ramp, which was inadequately sized, supported and constructed, proximately caused Plaintiff's injuries."

Whether an alleged "defect is sufficiently hazardous to impose liability is generally a question for a jury to resolve on the particular facts of each case (citation omitted). There is no '"minimal dimension" test or per se rule that a defect must be of a certain minimum height or depth in order to be actionable (citation omitted)'" Tineo v. Parkchester South Condominium, 304 A.D.2d 383 (1st Dep't 2003).

Likewise, although the owner of a property has no duty to warn a visitor of a hazard or dangerous condition which is 'open and obvious', "the question of whether a condition is open and obvious is generally a jury question, and a court should only determine

that a risk was open and obvious as a matter of law when the established facts compel such a conclusion (citations omitted)." Juoniene v. H.R.H. Construction Corp., 6 A.D.3d 199, 200 (1st Dep't 2004). No such conclusion is mandated by the facts presented herein.

Accordingly, this Court finds that there are issues of fact which preclude the granting of defendant Masonic Hall's motion for summary judgment.

Defendant Harvard's Cross-Motion for Summary Judgment

Defendant Harvard cross-moves for summary judgment on the grounds, inter alia, that: (i) Harvard owed no duty of care to the plaintiff, because it did not own or control the subject premises, never owned any cart or trolley as plaintiff described he was using at the time of his accident, never owned and/or inspected and/or repaired the subject ramp which was placed at the location of plaintiff's accident before Harvard ever began working at the building, and had no obligation to inspect, repair and/or maintain the ramp; and (ii) there is no evidence that Harvard either created and/or had actual or constructive notice of the alleged dangerous condition.

Plaintiff opposes the motion on the ground that there is an issue of fact as to whether one of Harvard's employees provided him

with a cart which he knew or should have known was defective in that it had a dead wheel. Plaintiff testified that the individual who loaned him the cart was named "Peter" and was wearing a Masonic Hall uniform. Harold Wissing, who is employed by Harvard as the building manager, testified that the individual was most likely a porter named Peter Chiofole, an employee of Harvard.

According to plaintiff, "Peter" improperly refused to call Comvision to send people to assist him in transporting his equipment to the room where the conference was to be held.

Harvard argues in reply that the plaintiff has not provided any definitive evidence that the individual who provided him with the cart was, in fact, employed by defendant Harvard and/or that said individual knew the cart was defective.

Moreover, plaintiff's expert identified the allegedly defective ramp, as opposed to the cart, as the proximate cause of plaintiff's accident, and there is no evidence that defendant Harvard had any connection to the ramp. Nor has plaintiff established that defendant Harvard owed an independent duty to plaintiff. Accordingly, the cross-motion by defendant Harvard for summary judgment is granted.

Defendant Comvision's Cross-Motion

Finally, defendant Comvision cross-moves for summary judgment dismissing plaintiff's Amended Complaint and all cross-claims against it on the ground that it was in no way connected to the cart or ramp in question.

Plaintiff opposes defendant Comvision's motion on the ground that he was denied permission and assistance by Comvision's event coordinator to move his equipment into the building and exhibition hall prior to the conference.

However, plaintiff admits that Harvard's employee declined to call anyone from Comvision to assist him in transporting his equipment. Moreover, plaintiff has established no breach by defendant Comvision of a duty owed to plaintiff.

Accordingly, defendant Comvision's cross-motion for summary judgment is granted.

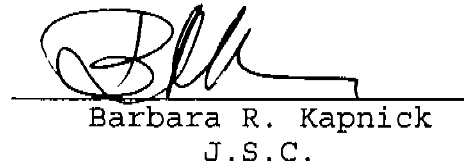
The Clerk may enter judgment dismissing plaintiff's Complaint and all cross-claims against defendants Harvard and Comvision with prejudice and without costs or disbursements.

Plaintiff's claims against defendant Masonic Hall are severed and continued.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on January 9, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: December 11, 2007



Barbara R. Kapnick
J.S.C.

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