[* 1]

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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 102998/2003
COLLAZO, ANA
VS.
MADISON SQUARE GARDEN, L.P.,
SEQUENCE NUMBER : # 002
SUMMARY JUDGMENT

INDEX NO. 102998-03
MOTION DATE 12/17/07
MOTION SEQ. NO. #002
MOTION CAL. NO.

d on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5
Replying Affidavits	6-7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum decision and order.

FILED
MAR 13 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 3/12/08

JANE S. SOLOMON J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

----------x

ANA COLLAZO,

Plaintiff, Index No.: 102998/03

- against -

MADISON SQUARE GARDEN, L.P., CABLEVISION, INC. and C.S.C. HOLDINGS, INC.,

Defendants.

----------x

JANE SOLOMON, J:

In this personal injury action, defendants Madison Square Garden, L.P. (MSG), Cablevision Systems Corporation s/h/a Cablevision, Inc. (Cablevision) and C.S.C. Holdings, Inc. (CSC), move for an order, pursuant to CPLR 3212, for summary judgment dismissing the complaint dated February 20, 2003 (the Complaint), on the ground that plaintiff, Ana Collazo, fails to establish a prima facie case of negligence against defendants, as plaintiff's alleged injuries resulted from actions by an employee of MSG's licensee, Feld Entertainment, Inc. d/b/a Ringling Bros.-Barnum & Bailey Circus (Ringling Bros.). For the following reasons, defendants' motion is granted.

Background

The Accident

Plaintiff alleges that on April 3, 2002, she, her daughter-in-law and two children, entered Madison Square Garden to attend Ringling Bros.'s circus (the Circus) when she tripped over a handcart. At the time of the accident, plaintiff was in the lobby of the MSG building, on her way to be seated for the performance. Plaintiff testified that she did not see the handcart until after she fell, and never saw the person who was maneuvering it.

According to the Incident Report dated April 3, 2002, Ringling Bros. employee, Manuel De La Cruz, was standing with the handcart in a stationary position waiting for an elevator when plaintiff tripped and fell.

Plaintiff's daughter-in-law, Hilda Quiroz, avers that she witnessed the accident, and saw "a hand truck suddenly appeared from behind a pillar. An elevator was to [their] right and the man pushing the hand truck was going towards the elevator. He had moved the hand truck toward the elevator when the door opened" (Quiroz Aff., annexed as Ex. A to Aff. in Opposition of Charles Berkman, Esq.). Quiroz also states that, due the volume of people entering the lobby, and the location of a pillar, their view was obstructed. According to Quiroz, there were several MSG employees, namely, ushers and security guards, nearby at the time of the accident.

As a result of the accident, plaintiff allegedly sustained a torn rotator cuff, multiple disc herniations and bulges, as well as other injuries.

License Agreement between MSG and Ringling Bros.

On March 8, 2001, MSG and Ringling Bros. amended and extended a pre-existing license agreement, dated March 14, 1997 (see License Agreement, Affirmation in Support, Exhibit H). The License Agreement applied to the annual presentations of the Circus at Madison Square Garden for the Spring of 2002 through to the Spring of 2006. According to the terms of the License Agreement, MSG granted Ringling Bros. "the exclusive right to sell all novelties and souvenirs which it regularly sells at Circus performances . . . in the Arena . . . and in the outside Mall near the entrance to the Building during each Engagement" (License Agreement, ¶ 7 [a]). In addition, Ringling Bros. was required to "provide its own souvenir and novelty stands and equipment for Circus Concession Personnel and MSG employees" (License Agreement, ¶ 7 [c]).

Further, to the extent that MSG employees were retained to work in concessions, they were to work under the direction of Ringling Bros (id.).

Discussion

In order to grant summary judgment, there must be no material or triable issues of fact presented (Ayotte v Gervasio, 81 NY2d 1062 [1993]; Esteva v City of New York, 30 AD3d 212 [1st Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action "succinctly to warrant the court as a matter of law in directing judgment" (CPLR 3212; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Esteva, 30 AD3d 212). Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (Zuckerman, 49 NY2d 560, 562). Summary judgment may only be granted if there is no triable issue of fact presented (id.).

To establish a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury (Kenney v City of New York, 30 AD3d 261, 262 [1st Dept 2006], citing Palsgraf v. Long Is. R.R. Co., 248 NY 339 [1928]; see also Wayburn v Madison Land Ltd. Partnership, 282 AD2d 301, 302 [1st Dept 2001]). "A prima facie case of negligence must be based on something more than conjecture; 'mere speculation regarding causation is inadequate to sustain the cause of action'" (Mandel v 370 Lexington Ave., LLC, 32 AD3d 302, 303 [1st Dept 2006], citing Segretti v Shorenstein Co., E., 256 AD2d 234, 235 [1998]).

Defendants contend that it owed no duty to protect plaintiff from the conduct of its licensee. "As a general rule, the owner of premises owes no duty to control the conduct of a tenant for the benefit of third parties ..." (Aronson v Hyatt Intl. Corp., 202 AD2d 153, 154 [1st Dept 1994] [internal quotation marks and citation omitted]). "Here no landlord-tenant relationship existed, because no interest in real property was transferred, rather [Ringling Bros. was a] licensee, possessing only the privilege or permission for entry and possession for a specific purpose" (Chiumento v State of New York, 5 Misc 3d 918, 922 [Ct Cl 2004] [internal citation omitted]). However, the court agrees with Chiumento that a licensor's duty to a third party is analogous to that of a landlord concerning liability to third parties (id.).

In this case, "the focus of inquiry should be whether defendants had control of Ringling Bros.'s personnel, as 'the injury suffered by plaintiff had nothing to do with [MSG's] possession, maintenance or control over that area, nor with any hazard or physical defect in the property'" (Smith v 2J Mgt. Co., Inc., 211 AD2d 418, 419 [1st Dept 1995] [internal quotation marks and citation omitted]). Based on the terms of the License Agreement, Ringling Bros. had exclusive control over the concessions, its employees and its equipment. As in Smith, the injury complained of herein was a "direct result of unforeseeable acts by personnel not under [the licensor's] control" (see id., citing, Cavanaugh v Knights of Columbus Council 4360, 142 AD2d 202 [3rd Dept 1988]). "Whatever authority [MSG] retained over the common areas of the premises had nothing to do with the hiring and supervision of employees by [Ringling Bros.]" (Smith, 211 AD2d at 419). Plaintiff presents no evidence to the contrary and therefore, fails to meet her burden of establishing an issue of fact in this regard.

Even if the court were to hold that MSG was in a position to maintain control over

Ringling Bros.'s employees, plaintiff does not raise an issue of fact concerning a breach of duty by defendants. "In a premises liability case, the plaintiff must plead and prove that the defendant either created or had actual or constructive notice of the dangerous condition" (Ramos v Castega-20 Vesey Street, LLC, 25 AD3d 773, 775 [2d Dept 2006], citing Gordon v American Museum of Natural History, 67 NY2d 836, 837 [1986], O'Callaghan v Great Atl. & Pac. Tea Co., 294 AD2d 416 [2d Dept 2002]; see also Branham v Loews Orpheum Cinemas, Inc., 31 AD3d 319, 322 [1st Dept 2006], aff'd 8 NY3d 931 [2007]). Here, plaintiff alleges that defendants caused a dangerous condition by failing to stop a Ringling Bros. employee from creating a tripping hazard in a crowded area of MSG's lobby.

"When a plaintiff's negligence claim is premised on the theory that her injuries were caused by overcrowding and inadequate crowd control, the plaintiff must establish that '[she] was unable to find a place of safety or that [her] free movement was restricted due to the alleged overcrowding conditions'" (Greenberg v Sterling Doubleday Enters., L.P., 240 AD2d 702, 703 [2d Dept 1997], citing Palmieri v Ringling Bros. & Barnum & Bailey Combined Shows, Inc., 237 AD2d 589 [2d Dept 1997] [other citation omitted]). Plaintiff provides no evidence that her injuries were caused by overcrowding.

Moreover, plaintiff fails to raise a question of fact concerning whether defendants had actual or constructive notice. "To constitute constructive notice of a dangerous condition, the defect or condition must be 'visible and apparent, and ... must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it'" (Gibbs v Port Auth. of New York, 17 AD3d 252, 255 [1st Dept 2005], quoting Gordon, 67 NY2d at 837). Constructive notice may be demonstrated "by evidence of a recurring dangerous condition in the

area of the accident that was routinely left unaddressed by the landlord" (Uhlich v Canada Dry Bottling Co. of New York, 305 AD2d 107, 107 [1st Dept 2003] [internal quotation marks and citation omitted]). "Mere notice of a general or unrelated problem is not enough; the particular defect that caused the damage must have been apparent" (Hayes v Riverbend Housing Co., Inc., 40 AD3d 500, 500 [1st Dept 2007], comparing Gordon, 67 NY2d at 838 with Chianese v Meier, 98 NY2d 270 [2002]).

There is nothing in the record to show that defendants had notice that a Ringling Bros. employee was operating a handcart in such a way to cause a dangerous condition. Plaintiff herself admits that she did not see the handcart until after the fall and that she never saw the person operating the handcart either before or after the incident. To the extent that plaintiff relies on the affidavit of Quiroz, the court finds that the self-serving affidavit "can only be considered to have been tailored to avoid the consequences of plaintiff's ... testimony, [and therefore, is] insufficient to raise a triable issue of fact to defeat defendant[s'] motion for summary judgment" (Phillips v Bronx Lebanon Hosp., 268 AD2d 318, 320 [1st Dept 2000]; see also Perez v Bronx Park South Assocs., 285 AD2d 402, 404 [1st Dept 2001]). Moreover, the handcart is an object that is open and obvious, and as such, no duty to warn would be imposed on defendants (see Tarrazi v 2025 Richmond Ave. Assocs., Inc., 260 AD2d 468, 469 [2d Dept 1999] ["no duty to warn against a condition that can be readily observed by the reasonable use of the senses. The situation is then a warning in itself"] [internal quotation marks and citations omitted]).

Based on the foregoing, defendants' motion for summary is granted. Accordingly, it hereby is

ORDERED that the motion by defendants Madison Square Garden, L.P., Cablevision

Systems Corporation s/h/a Cablevision, Inc. and C.S.C. Holdings, Inc. for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it further is

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 12, 2008

ENTER:

J.S.C.

JANE S. SOLOMON