

**Abato v County of Nassau**

2008 NY Slip Op 31537(U)

May 20, 2008

Supreme Court, Nassau County

Docket Number: 5706-06/

Judge: Thomas P. Phelan

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**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. THOMAS P. PHELAN,**

**Justice.**

TRIAL/IAS PART 5  
NASSAU COUNTY

PATRICIA J. ABATO AND FRANK J. ABATO,

Plaintiffs,

ORIGINAL RETURN DATE: 4/14/08  
SUBMISSION DATE: 04/11/08  
INDEX NO. 5706/06

-against-

MOTION SEQUENCE #2

COUNTY OF NASSAU, THE COUNTY OF NASSAU AS THE OWNER AND OPERATOR OF THE NASSAU VETERANS MEMORIAL COLISEUM, CITY OF NEW YORK, CITY OF NEW YORK POLICE DEPARTMENT, THE NEW YORK CITY FIRE DEPARTMENT, "JOHN DOES #1 THROUGH #10, JOHN DOES #10 THROUGH #20, "JANE DOES #1 THROUGH #10, "JANE DOES #10 THROUGH #20," THE NAMES BEING FICTITIOUS, THE TRUE NAMES OF THE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFFS, ABC CORPORATIONS #1 THROUGH #10, THE NAMES BEING FICTITIOUS, THE TRUE NAME OF THE DEFENDANTS BEING UNKNOWN TO THE PLAINTIFFS AND SMG FORMERLY KNOWN AS SPECTACORE MANAGEMENT GROUP, AND LONG ISLAND INDUSTRIAL HOCKEY LEAGUE, INC.,

Defendants.

The following papers read on this motion:

Notice of Motion.....	1
Reply Affirmation.....	2
Memorandum of Law in Opposition.....	3

Defendants, County of Nassau, The County of Nassau as the Owner and Operator of the Nassau Veterans Memorial Coliseum, SMG formerly known as Spectacore Management Group, and Long Island Industrial Hockey League, Inc. (all collectively "SMG"), move, pursuant to CPLR 3212, seeking an order granting summary judgment dismissing plaintiff's complaint and any and all cross claims against them.

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It is well settled that on a motion for summary judgment movant must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the lack of any material issues of fact (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). If this initial burden is not met, the motion must be denied without regard to the sufficiency of opposing papers (*Id.*).

This action was brought by plaintiffs to recover damages for personal injuries allegedly sustained by the plaintiff, Patricia Abato, as a result of an accident which occurred on or about April 16, 2005, while Ms. Abato was attending a New York City Fire Department and New York City Police Department ("FDNY/NYPD") charity hockey game at the Nassau Veterans Memorial Coliseum. According to Ms. Abato's testimony, her injuries occurred when a T-shirt was thrown over the glass where her seat was (Def's Ex. G, p. 46). Ms. Abato was standing at the time, and, according to her testimony, "the next thing [she] knew, there was a whole bunch of kids on top of [her] (*Id.* p. 54).

Defendants SMG submitted the deposition transcript of Michael Rossidis on behalf of the Long Island Industrial Hockey League, which is no longer in existence, according to Mr. Rossidis' testimony. He testified that he was the manager/coordinator of the event, which has been held at the Coliseum for the past 13 to 15 years (Ex. C, p. 9), on behalf of the New York City Fire Fighters Hockey Team Incorporated, a not-for-profit organization (*Id.*, p. 11). Mr. Rossidis also testified that SMG was the entity responsible for security (*Id.*, p. 17).

It appears from the testimony of Mr. Rossidis that the New York Islanders contribute or volunteer their package for the event, which consists of shooting T-shirts into the stands. Mr. Rossidis testified that it was something that wasn't preplanned but that he "knew it was going to be done" (*Id.*, p. 26). According to Mr. Rossidis, "It just spices up our charity game. (*Id.*, p. 27). He further testified that: "There was really no understanding. It was something that was just done for years. It was something that you assumed was going to be done." (*Id.*, p. 28). Prior to this lawsuit, Mr. Rossidis did not know of any other injuries as a result of shirts being shot into the stands.

Also submitted was the deposition transcript of Rich Heinbockel, who was employed part time as a security supervisor at the Nassau Coliseum by SMG. Mr. Heinbockel also testified that at events involving hockey, generally between periods, promotional T-shirts would be thrown into the stands (Ex. H, p. 30). He also was unaware of any prior injuries as a result of T-shirts being thrown into the stands (*Id.*, p. 35) and stated that any such injuries would have been reported (*Id.*, p. 36).

According to the deposition transcript of plaintiff, Patricia J. Abato, she had never been to the coliseum before this event (Ex. G, p. 31). Mrs. Abato testified that she had never been to an event where T-shirts were thrown. The testimony further indicated that Mrs. Abato was told "to write a letter to the coliseum because this is happening too frequently" (*Id.*, p. 61). Mrs. Abato was unable to get a copy of the report.

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Plaintiff claims that defendants SMG were negligent, among other things, in their failure to supervise the spectators and restrain the crowd and in allowing the throwing of T-shirts into the stands. Defendants SMG submit that the allegations are unfounded and that plaintiffs cannot prove a *prima facie* case of negligence against them.

It is submitted that defendants SMG provided 53 security guards, 8 security supervisors and 2 security lieutenants at the event, all of which were adequately trained. Defendants SMG contend that they, therefore, have made a *prima facie* showing that plaintiffs' conclusory and unsubstantiated allegations that defendants failed to provide adequate security and safety measures are insufficient to raise a triable issue of fact. Plaintiff argues that the security personnel were not told when the T-shirt throwing would occur.

Defendants SMG also contend that plaintiffs failed to provide any proof that defendants had actual or constructive notice of any prior injuries occurring as a result of a T-shirt giveaway. Plaintiffs retort that no notice is required where, as here, defendants created the dangerous condition by "whipping the crowd into a frenzy, then casually tossing a T-shirt into a protected area" (Pl's Memo. of Law, p. 9). An issue of fact exists as to whether defendants SMG created the condition that caused the accident. (*See, Granera v. 32<sup>nd</sup> Street 99c Corp.*, 46 AD3d 750 [2d Dept. 2007]).

It is also alleged by defendants SMG that Ms. Abato assumed the risks inherent in attending a sporting event. Defendants SMG contend that the potential for injury caused by the sudden and unexpected movement of a large crowd was both open and notorious and reasonably foreseeable by plaintiff. Plaintiffs argue that Ms. Abato chose the most protected area in the arena, right behind the glass, and could not have expected to be trampled in her zone of safety behind the protective glass barrier. An issue of fact exists as to whether the T-shirt throwing was inherent to the sport or constituted increased risks over and above those normally associated with hockey. (*See, Sisino v. Island Motocross of New York, Inc.*, 41 AD3d 462 [2d Dept. 2007]).

Accordingly, the existence of triable issues of fact preclude the granting of summary judgment and defendants' SMG's motion is denied.

This decision constitutes the order of the court.

Dated: 5-20-08

HON THOMAS P. PHELAN

  
THOMAS P. PHELAN, J.S.C.

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**ENTERED**

MAY 23 2008

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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