

**Custini v Radio City Prods., LLC**

2009 NY Slip Op 31709(U)

July 27, 2009

Supreme Court, New York County

Docket Number: 604084/2006

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 604084/2006  
**CUSTINI, JOSEPHINE**  
vs.  
**RADIO CITY PRODUCTIONS**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

*attached memorandum*

*is decided per*

**FILED**

JUL 31 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 7/27/09

*EG*  
**EMILY JANE GOODMAN**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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 17

-----X  
JOSEPHINE CUSTINI,

Plaintiff,

-against-

Index. 604084

RADIO CITY PRODUCTIONS, LLC., RCPI  
LANDMARK PROPERTIES, L.L.C., TISHMAN  
SPEYER PROPERTIES, L.P., CABLEVISION  
SYSTEMS CORP. and MADISON SQUARE GARDEN,

Defendants.

-----X  
EMILY JANE GOODMAN, J.:

**FILED**  
JUL 31 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Defendants Radio City Productions, LLC. (RCP), Madison Square Garden, L.P. i/s/h/a above, Cablevision Systems Corporation i/s/h/a above (Cablevision), RCPI Landmark Properties, L.L.C. (Landmark), and Tishman Speyer Properties, L.P. (Tishman) move, pursuant to CPLR 3212, for an order granting summary judgment and dismissing the complaint.

In this personal injury action, plaintiff Josephine Custini (plaintiff or Ms. Custini) alleges that she was injured when, on November 2, 2005, she and her son Louis Custini (Mr. Custini) and his wife and son went to Radio City Music Hall to attend a show. It is undisputed that approximately 10 minutes after the audience was seated and the show was to begin, an announcement was made indicating that, because of the musician union's strike, the show was being postponed, and the audience was asked to leave. According to Ms. Custini and her son, the hall was very full, both in the orchestra, where they were seated, and upstairs.

Plaintiff and her son both testified that they remained in their seats for some minutes (Ms. Custini estimated five minutes, and her son estimated 20 minutes) to avoid the crowd; however, they decided not to wait any longer, because they had told Mr. Custini's wife and son, who had gone to the rest room, that they would meet them.

According to both plaintiff and her son, when they were proceeding up the aisle in the orchestra, people were not pushing and shoving, but when they reached the inner lobby, it was chaotic. They stated it was very crowded, and people were angry and yelling, trying to get their money back for \$10 bottles of water and other items they had purchased from the concession stand that they no longer needed, because the show had been postponed. Mr. Custini testified that the lobby was very congested and that his mother was in a "crossfire of the people leaving and the people trying to return purchases" to the concession stand. Deposition of Louis Custini, at 66.

When asked whether they could have moved out of the crowd to the safety of the walls, he indicated that "I guess you could have stepped to the side. You couldn't step back. That's for sure. I guess you could have worked your way over to a wall and stood there for a while. I don't know what good it would have done for you." *Id.* at 50. Mr. Custini also stated, however, "If you would have stopped motion, meaning stopped exiting out, there

would have been some risk of - or a better word conflict between people." *Id.* at 49.

According to Mr. Custini, he was about two people behind his mother and saw her being pushed in the crowd, then he lost sight of her head in front of him and heard her calling him. According to Ms. Custini's affidavit, while she was on the floor, her legs were trampled on by the rushing crowd and she couldn't get up by herself. When Mr. Custini reached his mother she was on the floor and he and another man helped her to her feet.

According to plaintiff, she only saw two ushers in the main lobby area, but they did nothing to control the crowd or to help her. Affidavit of Josephine Custini, ¶ 11. Mr. Custini testified that when they reached the doorway, he told a person he believed to be an usher that his mother had fallen and asked if there was anyone they could see, but the man replied that he didn't know where the manager was, and directed them to the door.

Defendants describe the show that Ms. Custini and her family planned to attend as a "newspaper" show - a show prior to the opening of the regular run, for which the public could obtain free tickets by clipping coupons in the Daily News or the New York Post and sending them in for free tickets. According to John Wynne, the vice president of house operations at Radio City Music Hall, though he couldn't give an exact number of people in the audience for the show, his recollection was that the house

was only approximately 60% full, and therefore, plaintiff could not establish that the Music Hall was overcrowded. However, the question that arises from the testimony of plaintiff and her son is not whether the Music Hall, as a whole, was overcrowded, but whether the area around the concession stand was dangerously overcrowded and chaotic as a result of defendant's decision to cancel the show when it did, and whether defendants failed to adequately control the people that were seeking to return their purchases to the concession stand or exit.

Wynne testified that, although they had been aware of negotiations with the musicians, no specific steps were taken in advance to prepare for a strike of the musicians, though there had been meetings throughout the week about the possibility of postponing the 8:30 P.M. show. There were, however, no discussions of postponing the 5:30 P.M. show that Ms. Custini and her son were attending. Wynne testified that he was informed that the 5:30 P.M. show would not go on while the people were being seated; however, they did not notify the audience that the show would not go on until everyone was seated. In contrast with the lack of planning for the possible cancellation of the 5:30 P.M. show, leaflets had been printed up to hand out to patrons arriving for the 8:30 P.M. show, and plans were made to distribute those leaflets on the street outside of Radio City and at nearby parking garages so they could stop people before they

parked their cars.

According to Wynne, the full security staff was present at the 5:30 P.M. show, but that not all of the staff was present in the food and beverage area because business is light in the concessions in a free show.

Citing *Lazarus v Skouras Theatres Corp.* (10 NY2d 846 [1961]), defendants argue that, in dismissing the plaintiff's complaint, the Court of Appeals noted that the defendant had "no reason to anticipate a large audience, and highest estimate, which was patently excessive, was that theater was filled to half of its capacity." According to defendants, in *Lazarus*, as here, "there was no demonstration that the lobby was dangerously crowded when a less than capacity crowd was exiting the premises." Defendants' Memorandum of Law, at 2.

It appears that the language quoted by, and relied upon by defendants is not part of the actual opinion of the Court of Appeals but is contained in the summary statement of the case drafted by the West reporter system, based on the opinion of the Appellate Division, First Department (*see Lazarus v Skouras Theatres Corp.*, 221 NYS2d 732 [1961]). However, the summary for the official reporter states that "records of the theatre indicated that 249 tickets had been sold [and that] the theatre had a seating capacity of 1,250" (*Lazarus v Skouras Theaters*, 10 NY2d 846 [1961]). The summary goes on to state that "[i]n the

Court of Appeals defendant argued that there was no reason to anticipate that people representing about 20% of the capacity of the theatre would become unruly; that the small crowd was not unruly." *Id.* Finally, the summary also states, "[a]n usher ... stated that she saw plaintiff fall and that there were about 30 people near plaintiff and that they were moving rapidly towards the exit doors but they were not pushing." *Id.* Although the summary in the New York Official Reports does not constitute the opinion of the Court of Appeals, the additional information contained in the former certainly suggests that the facts in *Lazarus*, and, therefore, the decision of the Court of Appeals affirming the dismissal of the complaint in that case, are distinguishable from this matter.

However, even absent the information contained in the summary in the New York Official Reports, the testimony here, describing the alleged overcrowding, the anger of patrons seeking to return their purchases, and the generally chaotic conditions in the area of the lobby where plaintiff fell suggest that the facts of *Lazarus* decision are distinguishable from those herein.

Relying on *Palmieri v Ringling Bros. and Barnum and Bailey Combined Shows Inc.* (237 AD2d 589 [2d Dept 1997]), defendants further argue that Ms. Custini was obliged to establish that she was unable to find a place of safety, and that in light of Mr. Custini's testimony that they could have moved sideways against

the wall, she failed to satisfy the *Palmieri* requirement. Defendants suggest that the facts in the two cases are "startlingly similar." Memorandum of Law, at 3. This court concludes, however, that the testimony of ms. Custini and her son suggests that there are significant differences between the facts of *Palmieri* and the facts in this case. There, the plaintiff testified that there were three or four steps separating her from her daughter when she was pushed, which suggests that the staircase was not tremendously crowded. The Court also noted that the plaintiff's daughter testified that although people had bumped into her as she was exiting the building, no one had pushed her hard enough for her to lose her balance. Under those circumstances, the Appellate Division concluded that the Supreme Court had "properly found that there is no evidence that the injured plaintiff's freedom of movement was unduly restricted, or that she was unable to find a place of safety." *Id.* at 590.

Here, in contrast, although Mr. Custini did speculate that "I guess you could have worked your way over to a wall and stood there for a while. I don't know what good it would have done for you." Louis Custini Dep. at 50. He also stated that "[i]f you would have stopped motion, meaning stopped exiting out, there would have been some risk of - or a better word conflict between people." *Id.* at 49. He described his mother as being in a "crossfire" of people who were leaving and those who were trying

to return purchases. *Id.* at 66. Mr. Custini further testified that although he didn't see any children falling or being trampled, that "[e]veryone was pushed and stumbling somewhat because of the force of the crowd trying to get out." *Id.* at 68. The testimony of Ms. Custini's son suggests significant factual differences from the situations in *Palmieri*. Although witnesses for the defendants estimate that the total crowd at Radio City for the 5:30 P.M. show was approximately 60%, rather than very full as plaintiff and her son testified, neither of defendants' witnesses testified concerning the conditions in the outer lobby at the time that Ms. Custini allegedly fell.

Defendants also contend that plaintiffs misstated what defendants consider critical facts concerning the presence or absence of security personnel. According to defendants, there were ushers at every exit and personnel directing patrons out of the doors. However, according to the testimony of Ms. Custini and her son, the problem was not at the doors, but in the vicinity of the concession stand, where audience members were angrily trying to return purchases.

Defendants also argue that plaintiff's affidavit submitted in opposition to the motion for summary judgment contradicted her deposition testimony. For example, defendant notes that in her affidavit, plaintiff stated that she was packed "like a sardine" near the concession stand, whereas in her deposition she stated

that it was "pretty crowded." That statement was in response to the question asking her to describe the crowding - "was it very crowded, medium, light?" Deposition of Josephine Custini, at 53. Ms. Custini responded, "pretty crowded." *Id.*

Defendants also contend that there are contradictions regarding the conditions around her when she was allegedly pushed, stating that, in her deposition she testified that the only time she was pushed or shoved was when she felt what seemed like a shoulder that caused her to fall. However, on one of the pages of deposition testimony cited by defendants, plaintiff described "everybody yelling for everybody else because people were missing people because everybody was pushing and shoving." *Id.* at 69.

Although there may be some variation in plaintiff's description of the events that occurred when she was allegedly pushed and was injured, those discrepancies are not so marked as to completely discredit her testimony and that of her son. Rather, they raise inconsistencies that may appropriately be addressed in cross-examination at trial.

Finally, defendants contend that because plaintiff failed to disclose the identity of her security management expert witness, Ira S. Somerson, prior to filing her note of issue, his affidavit is inadmissible in opposition to a motion for summary judgment. The court merely notes that it is not relying on Somerson's

affidavit in concluding that plaintiff has raised sufficient questions of fact regarding the situation in the area of the concession stand to defeat defendants' motion for summary judgment.

On a motion for summary judgment, the proponent must make a prima facie showing that it is entitled to judgment as a matter of law (see *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]). However, the party opposing summary judgment need only show that there are questions of fact sufficient to require a trial (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). This plaintiff has done. Therefore, that branch of defendants' motion for summary judgment seeking dismissal of plaintiff's allegations of overcrowding and defendants' negligence in containing the crowd is denied.

Defendants Landmark and Tishman also seek dismissal of the complaint as to them on the grounds that Landmark is an out-of-possession landlord and Tishman is Landmark's managing agent, and neither can be held liable for an allegedly unsafe condition brought about by the conduct of Landmark's tenant. Landmark and Tishman submit the lease between Landmark and RCP, which indicates that although Landmark, as landlord, has the responsibility to maintain the roof and exterior walls and windows of the building as well as the sidewalks, Landmark does not have the responsibility to maintain or make repairs to the

Music Hall. Lease between RCPI Trust and Radio City Productions LLC, Art. § 7.1 (b). Rather, those responsibilities are the tenant's (RCP). *Id.*, § 7.2 (b). Pursuant to the lease, Tishman is the landlord's agent. *Id.*, § 3.1.

Landmark and Tishman also rely on the testimony of Tishman employee, Josiah Brock, who, at the time of the alleged accident was an assistant property manager, for property including the Radio City Music Hall property. At the time, his responsibility was to make any necessary repairs to the building's roof. According to Brock, neither Landmark nor Tishman have an office within Radio City Music Hall, nor do they have any employees who work in the Music Hall.

An out-of-possession landlord is generally not liable in negligence with respect to the condition of the demised property (see *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 569 [1987]; *Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]; *Johnson v Urena Serv. Ctr.*, 227 AD2d 325, 326 [1st Dept], *lv denied* 88 NY2d 814 [1996]).<sup>1</sup> Although the question of liability of an out-of-possession landlord commonly arises in situations where a plaintiff is injured as a result of a condition at the

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<sup>1</sup>There are two exceptions: where the landlord "(1) is contractually obligated to make repairs or maintain the premises, or (2) has a contractual right to reenter, inspect and make needed repairs and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Vasquez*, 40 AD3d at 266 [emphasis supplied]; see also *Lane v Fisher Park Lane Co.*, 276 AD2d 136, 141 [1st Dept 2000]).

premises, the issue may also arise, as here, where the plaintiff is injured as a result of the conduct of its tenant and/or invitees to the property. Although liability may be imposed if the landowner knows that it "can and has the opportunity to control the conduct of others and is reasonably aware of the necessity for such control ... [a]s a general rule, the owner of [the] premises owes no duty to control the conduct of its tenants for the benefit of third persons.'" (*McCarthy v Handel*, 297 AD2d 444 [3d Dept 2002] [internal citation omitted]; see also *Sauer v Mannino*, 309 AD2d 1053, 1054 [3d Dept 2003] ["[A]n out-of-possession landlord will not be held responsible for unsafe conditions brought about through the act of its tenant" [internal quotation marks and citation omitted]).

In response, plaintiff cites *Canela v Foodway Supermarket* (188 AD2d 416 [1<sup>st</sup> Dept 1992]) for the proposition that an out-of-possession landlord may be liable to third parties if it has retained control over the property or is contractually obligated to make repairs or maintain the premises. As the lease indicates, however, here, the landlord is only responsible to maintain the roof and exterior walls of the building and the tenant is responsible for repairs to the Music Hall, and there is no evidence that Landmark has retained control of the property for other purposes.

Plaintiff also relies on *Smith v 2J Mgt. Co.* (211 AD2d 418

[1<sup>st</sup> Dept 1995]), stating that there may be an issue of whether the lessor had control over the area or personnel, but here, there is no indication that either Landmark or Tishman had such control. Plaintiff argues that Landmark and Tishman should remain as defendants because Brock was not aware of whether those companies had any relationship with Cablevision or Madison Square Garden, which are apparently in charge of house operations for Radio City Music Hall. See Depositions of John Wynne and Cedric Gibson who are employed by Cablevision and Madison Square Garden Entertainment, respectively. However, plaintiff's speculation about such a relationship is insufficient to overcome Landmark and Tishman's evidence regarding their respective statuses as out-of-possession owner and property manager (*see Zuckerman v City of New York*, 49 NY2d at 562 ("mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient")).

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants' RCPI Landmark Properties, L.L.C. and Tishman Speyer Properties, L.P. dismissing the complaint is granted, and the complaint is severed and dismissed as to RCPI Landmark Properties, L.L.C. and Tishman Speyer Properties, L.P., and the Clerk is directed to enter judgment in favor of those defendants; and it is further

ORDERED that the motion for summary judgment of the

remaining defendants is denied, and the remainder of the action shall continue.

This Constitutes the Decision and Order of the Court.

Dated: July 27, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**EMILY JANE GOODMAN**

**FILED**  
JUL 31 2009  
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