Geller v Madison Sq. Garden, Inc.

2009 NY Slip Op 32170(U)

September 18, 2009

Supreme Court, New York County

Docket Number: 106407/06

Judge: Walter B. Tolub

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[* 1]
SCANNED ON 9/24/2009

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

PRESENT: WALTER B. TOLUB

PART 15

Index Number : 106407/2006
GELLER, THEODORE
VS
MADISON SQUARE GARDEN
Sequence Number : 004
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	

FILED
SEP 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 9/18/09

WALTER B. TOLUB 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 15

THEODORE GELLER,

Plaintiff,

-against-

MADISON SQUARE GARDEN INC., THE NEW YORK KNICKERBOCKERS INC., MSG EDEN CORPORATION, CABLE VISION OF NEW YORK, CLARIN SEATING and GREENWICH INDUSTRIES, L.P.,

Defendant.

Index No. 106407/06
Mtn. Seq. 004

WALTER B. TOLUB, J.:

This is Madison Square Garden, LP i/s/h/a Madison Square Garden, Inc., The New York Knickerbockers Inc., MSG Eden Corp and Cablevision of New York (collectively "MSG") motion for summary judgment dismissing the Complaint (CPLR §3212). Clarin Seating ("Clarin") and Greenwich Industries, LP ("Greenwich") cross-move for an order: (1) striking MSG's Answer for failing to preserve key evidence; (2) granting summary judgment on its claims for contribution and indemnification; (3) vacating the Note of Issue; and (4) scheduling a conference to resolve remaining discovery issues.

Facts

MSG owns and operates Madison Square Garden formally designated as One Penn Plaza, New York, NY, the world famous venue hosting a variety of sporting and entertainment events.

Clarin and Greenwich Industries are the designers and

manufacturers of folding chairs used at the Garden[1].

Plaintiff went to a Knicks exhibition game on October 18, 2005. Plaintiff brought this action claiming that while he was walking to his seat in Row D of Section 24 [floor seats], a defective portable folding chair cut his right leg. Plaintiff claims that he was injured as a result of either a manufacture or design defect and that MSG was negligent and failed to warn Plaintiff of the hazard.

In describing how the accident occurred, Plaintiff testified that the closest chair to the isle, where Plaintiff had to walk down to get to his seat, had its seat pan up and that he walked into a bar that sticks out to hold up the seat pan when brought down. Plaintiff described the metal bar as attached to the back of the seat and "starts as a straight line that curves upward to hold the seat" (Plaintiff's Tr. p.13, lns. 8-10).

At his deposition, Plaintiff testified that immediately after the accident an usher stated that she had reported the problem with the seat because this was not the first time such an incident had happened (Plaintiff EBT p. 22-24; Plaintiff Ex. A).

Jean Dubensky, an MSG Events Supervisor, went to the scene shortly after the accident happened (Dubensky Tr. 42-44). Ms.

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[1]Plaintiff commenced an action against the MGS defendants on May 10, 2006. Clarin and Greenwich were not parties to the that case. Plaintiff commenced a separate action in Nassau County Supreme Court against Clarin and Greenwich on February 6, 2009. On February 27, 2009, the actions were consolidated.

Dubensky saw Plaintiff and his injury and called the EMTs (Dubensky Tr. 45) Ms. Dubensky then inspected the chair Plaintiff told her he was injured on and did not observe anything wrong with it(Dubensky Tr. 46-49, 64-65, 72).

On or about April 28, 2009, Clarin and Greenwich served a notice to produce the chair that caused Plaintiff's injury (Clarin Greenwich Ex. E). However, MSG failed to preserve the chair and therefore did not produce it for inspection[2].

By this motion, MSG seeks to dismiss the Complaint arguing that it can not be held liable for negligence because the chair was not defective and that if there was a defect, they did not have notice of it.

Clarin and Greenwich argue that MSG's Answer should be stricken for failing to preserve the chair. Additionally, Clarin and Greenwich argue that MSG's motion for summary judgment should be denied as premature because they have not had the opportunity to conduct discovery.

<u>Discussion</u>

<u>MSG's Motion for Summary Judgment</u>

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to

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[2]It is unclear from any of the documents or deposition testimony when the chair was discarded.

judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]. A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law. This means that none of the material elements of the claim or defense are in dispute (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:180).

On defendant's motion for summary judgment, defendant may demonstrate the lack of several prima facie elements of plaintiff's case, however, to prevail, defendant only needs to demonstrate the absence of a single element (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:182). Once defendant presents evidence showing the absence of facts necessary to establish a prima facie case, the burden shifts to the plaintiff (Barr, Atlman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing] §37:190).

An owner or possessor of real property has the general duty to take reasonable measures to maintain the property in a reasonably safe condition (Kush v. Buffalo, 59 NY2d 26 [1983]). To be held liable for negligence in a premises liability case, a

defendant must either create the unsafe condition giving rise to the injury or have actual or constructive notice thereof and a reasonable time within which to remedy it (Boccaccino v. Our Lady of Pity R. C. Church, 18 AD2d 1055 [1st Dept 1963]; Freidah v. Hamlet Golf & Country Club, 272 AD2d 572 [2nd Dept 2000]).

Here, there is conflicting testimony about how long the condition existed, if it existed at all. MSG's witness, Jean Dubensky stated that her inspection of the chair did not indicate any deficiency or anything unusual (Dubensky Tr. 46-49, 64-65, 72). However, Ms. Dubensky saw Plaintiff's injury and even called for emergency medical services. Plaintiff testified that an usher stated this was not the first time such an incident had happened. As such, there remains a question of fact about any deficiency in the chair and, if there was such a deficiency, whether it existed for a sufficient duration as to impose a duty upon MSG. MSG's motion for summary judgment is therefore denied.

Clarin and Greenwich's Cross-Motion

Plaintiff did not commence an action against Clarin and Greenwich until February of 2009, over 2 years after the action was commenced against MSG and after the note of issue had been filed in that action. As such, Clarin and Greenwich have not had an opportunity to engage in meaningful discovery.

Additionally, it is clear that whatever Plaintiff's theory of liability is, a key piece of evidence is the chair Plaintiff

[* 7]

claims he was injured by.

Clarin and Greenwich seek to "strike MSG's Answer" arguing that MSG's failure to preserve the chair warrants sanctions for spoliation (Standard Fire Ins. Co. v. Federal Pacidic Elec. Co., 14 AD3d 213 [1st Dept 2004]; Kirklan v. NYC Housing Authority, 236 AD2d 170 [1st Dept 1997]). MSG argues that they had no duty to preserve a non-defective chair and that their actions were reasonable under the circumstances (Steuhl v. Home Therapy Equip., Inc., 23 AD3d 825 [3rd Dept 2005]).

Sanctions are appropriate where a litigant, whether intentionally or negligently, disposes of crucial items of evidence that is the subject of a lawsuit before the adversary had the opportunity to inspect them (Standard Fire Ins. Co. v. Federal Pacidic Elec. Co., 14 AD3d 213 [1st Dept 2004]). The sanction is appropriate even when the evidence is destroyed before the spoliator becomes a party, provided that it is reasonable to believe that the party was on notice that the evidence might be needed for future litigation (Id.)

Here, MSG was on notice of the incident and the severity of the injury. Ms. Dubensky saw Plaintiff shortly after he was injured, called for medical services, inspected the chair and filed an accident report. Although MSG should have recognized the elevated priority of preserving the evidence, it either destroyed or discarded the chair before it could be inspected by

any of the parties to this action. The inexcusable conduct of MSG in failing to preserve the critical evidence has fatally prejudiced Clarin and Greenwich in their defenses of this action (Healy v. Firestone Tire and Rubber Co., 212 AD2d 351 [1995] *revd. on other grounds* 87 NY2d 596; Kirkland v. NYCHA, 236 AD2d 170 [1997]). Without the chair it is difficult, if not impossible, for Clarin and Greenwich to prove the absence of a defect. Under these circumstances, as a matter of elementary fairness, summary judgment is granted on Clarin and Greenwich's cross-claims for contribution and indemnification.

Accordingly, it is

ORDERED that MSG's motion for summary judgment is denied; and it is further

ORDERED that Clarin and Greenwich are awarded summary judgment on their cross claims for contribution and indemnification from MSG; and it is further

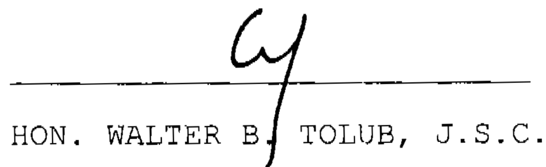
ORDERED that the Note of Issue is vacated; and it is further

ORDERED that Clarin and Greenwich be provided a full and fair opportunity to conduct discovery.

Counsel for the parties are directed to appear for a discovery conference on October 16, 2009 at 11:00 am in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 9/18/09



HON. WALTER B. TOLUB, J.S.C.

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