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

PRESENT: MARILYN SHAFER Justice PART 8

Index Number : 104978/2008
STEVENS, SUREEVA
VS.
LINCOLN CENTER
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n 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 decided pursuant to attached Decision

FILED
DEC 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/2/09

MARILYN SHAFER J.S.C.

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
NEW YORK COUNTY: IAS PART 8

SUREEVA STEVENS,

Plaintiff,

-against-

LINCOLN CENTER FOR THE PERFORMING ARTS, INC., RESTAURANT SERVICES, INC. and COMPASS GROUP USA, INC.,

Defendants.

INDEX NO. 104978/08

MOTION SEQ. NO. 001

SHAFER, J.:

In this trip and fall action, defendants Compass Group USA, Inc. and its wholly-owned subsidiary, Restaurant Service, Inc.[1] move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint. Defendant Lincoln Center for the Performing Arts, Inc. cross-moves, pursuant to CPLR 3212, for summary judgment (1) dismissing all claims as against it and (2) granting it judgment on its cross claims against Restaurant and Compass Group.

BACKGROUND

Plaintiff Sureeva Stevens alleges that on November 29, 2007, she tripped and fell at the premises known as Avery Fisher Hall, located at 140 West 65th Street, New York, New York.

On the date of the accident, Lincoln Center was the owner of the building. Pursuant to an agreement with Lincoln Center, Restaurant had concession rights to provide food and beverage services in the building, which included operating a restaurant, named Panevino, located in the

[1] By way of a so-ordered stipulation, entered on May 21, 2009, the name of defendant Restaurant Associates Corp. was corrected to Restaurant Services, Inc.

lobby of the building. The Agreement obligates the Restaurant, among other things, to (1) maintain "portions of the Premises at any time being used by Concessionaire" "in a clean, neat, orderly, and safe condition ...", and (2) obtain comprehensive general liability insurance. The Agreement also contains an indemnification clause. Restaurant obtained commercial general liability insurance, which was in effect on the day of the accident..

The windowless room of Panevino has two openings on two opposite sides, which are not blocked by doors or other barriers. The room is essentially always accessible to Lincoln Center's visitors. On the day of the accident, plaintiff attended a morning rehearsal concert in the building. During an intermission, between approximately 11 A.M. and 12 P.M., plaintiff decided to walk through the room of Panevino on her way to a lady's room, located in the lobby. At that hour, Panevino was not open for business, and plaintiff did not see any employee in the room. Plaintiff testified that she found Panevino's room to be "very cluttered" with "[t]ables and chairs ... very randomly spread out throughout the area," and plaintiff "was weaving in and out" among tables and chairs as she was making her way across the room.. She testified that there were "piles" of chairs in the room . The chairs had legs that "st[uck] out a little bit and [did not] come immediately under the chair" . The room was "darkish," although some natural light supposedly penetrated through the windows in the lobby.. Plaintiff "was looking" in a way that she "saw the ground" as well as "ahead of where [she] was walking"..

Plaintiff testified that her left foot caught in a leg of a chair and she fell on her right side, injuring her right hip.. Before she fell, nothing was blocking her view of the chair. It is undisputed that the chair in question was owned by and belonged to Restaurant.

In its answer to plaintiff's complaint, Lincoln Center asserted a cross claim against

Restaurant and Compass Group for indemnification from any judgment that plaintiff may recover against Lincoln Center, or, in the alternative, for apportionment of responsibility for the alleged occurrence for all or part of any judgment that plaintiff may recover against defendants..

Discovery was concluded, and Restaurant and Compass Group move, and Lincoln Center cross-moves, for summary judgment.

DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]o defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact" (*id.*, quoting CPLR 3212 [b] [internal quotation marks omitted]).

Timeliness of Lincoln Center's Cross Motion

Plaintiff filed a Note of Issue on May 7, 2009. By order entered on July 6, 2009, this court extended the deadline for the parties to file motions for summary judgment to July 13, 2009. By notice of motion dated July 13, 2009, Restaurant and Compass Group moved for summary judgment. By notice of cross motion dated July 22, 2009, Lincoln Center cross-moved for summary judgment. Plaintiff argues that Lincoln Center's cross motion is untimely and, hence, should be denied. Restaurant and Compass Group contend that that branch of Lincoln Center's cross motion that pertains to the issue of indemnification should be denied, because this issue was not raised in Restaurant and Compass Group's motion in chief.

A party that seeks to file an untimely cross motion must make a showing of "good cause" for the delay (*see e.g. Colon v City of New York*, 15 AD3d 173, 173 [1st Dept 2005]). "'[G]ood

cause' in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion--a satisfactory explanation for the untimeliness--rather than simply permitting meritorious, nonprejudicial filings, however tardy ..." (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Additionally, "an untimely ... cross motion for summary judgment may be considered by the court where ... a timely motion for summary judgment was made on nearly identical grounds" (*Grande v Peteroy*, 39 AD3d 590, 591-592 [2d Dept 2007]).

Lincoln Center claims that it did not timely move for summary judgment because it expected that Restaurant would assume its defense in this action, pursuant to the indemnification clause of the Agreement. Restaurant allegedly agreed to defend Lincoln Center in this action. It was also allegedly agreed "that Lincoln Center's right to defend would terminate if Restaurant succeeded in extricating itself from the case". However, as Restaurant contends, the terms of its defense had not been agreed upon and it was unreasonable for Lincoln Center to expect that Restaurant's attorneys would make a motion for summary judgment on Lincoln Center's behalf . Accordingly, Lincoln Center has failed to make a showing of "good cause" for its delay based on this argument.

At the same time, "the nearly identical nature of the grounds may provide the requisite good cause ... to review the untimely ... cross motion on the merits" (*Grande*, 39 AD3d at 592). Here, that branch of Lincoln Center's cross motion on the issue of liability is directly related to the issue of liability raised in Restaurant's motion, which is properly before the court. Therefore, so much of the cross motion as deals with liability is permissible. However, the issue of indemnification was not raised in Restaurant's motion and is not "nearly identical" to the issues in its motion . Accordingly, the court will consider only that branch of Lincoln Center's cross

motion that pertains to the issue of premises liability.

Liability

The first issue is which co-defendant may be liable for the accident. Lincoln Center contends that, on the date of the accident, it was an out-of-possession landlord with respect to the room of Panevino, a contention that Restaurant disputes. Courts consider which party exercised possession and control of premises in question in order to determine who bears responsibility for a tort that took place there (*see e.g. Butler v Rafferty*, 100 NY2d 265, 270 [2003]). "[A] person who chooses to take possession and control of property is fairly charged with the responsibility of maintaining it and should expect to be held responsible for any defects" (*id.*).

Here, the Agreement provides, in relevant part, that

> Lincoln Center ... at all times shall have the right to enter the Premises for any purpose including to (I) inspect the same, (ii) determine whether the Concessionaire is complying with all of its obligations hereunder, (iii) supply any service to be provided by Lincoln Center to the Concessionaire hereunder, and (iv) make repairs required of Lincoln Center ... Lincoln Center shall at all times have and retain keys with which to unlock all of the doors in or on the Premises ... and ... shall have the right to use any and all means ... to open said doors in an emergency in order to obtain entry to the Premises ...

. The Agreement obligated Restaurant to maintain the Premises "in a clean, neat, orderly, and safe condition ...". However, Lincoln Center retained the right to (1) inspect the Premises to ensure that Restaurant maintained the premises in a sanitary condition and (2) clean the Premises, at Restaurant's expense, if Lincoln Center was unsatisfied with the level of cleanliness. Restaurant was obligated to remove "all tables, chairs and other movable items from publicly accessible portions of the Premises ... in order to enable Lincoln Center personnel to perform the

following 'Heavy Cleaning': heavy-duty scrubbing of hard-surface floors ... and the maintenance of wall surfaces" . The Agreement required Restaurant to obtain Lincoln Center's approval in order to "replace items of furniture, fixtures and equipment ..." which Restaurant was obligated to keep "in a first class condition".

A witness for Lincoln Center testified that Lincoln Center performed maintenance and cleaning of Panevino . Lincoln Center's employees cleaned the floor of Panevino's room every night. Lincoln Center maintained control over the lights in Panevino's room; however, Restaurant could control the lights as well. Accordingly, as Restaurant argues, Lincoln Center retained a certain degree of control over Panevino's premises and, hence, may be held liable for the accident (*cf. Butler v Ruferty*, 100 NY2d at 270-271 [where defendant did not exercise possession or control over a part of a house, he was not liable for the accident that took place on the premises]). Additionally, even if Lincoln Center can be deemed an out-of-possession landlord, it would still be liable for negligence, because it was contractually obligated to make repairs and maintain the premises (*see e.g. Vasquez v The Rector*, 40 AD3d 265, 266 [1st Dept 2007]).

Nature of Duty

The next issue is whether Restaurant and Lincoln Center breached a duty to maintain Panevino's premises in a reasonably safe condition in view of all the circumstances (*see Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [1st Dept 2006], *affd* 8 NY3d 931 [2007]).

In her bill of particulars, plaintiff alleges that defendants failed to provide a "safe," "adequate" and "sufficient" space to traverse Panevino's premises by allowing too many chairs to

remain there "in an inappropriate configuration" and "too close to a bar," and by using "inadequate" and "inappropriate" chairs "whose [angled] legs restrict and reduce the space for walking". Plaintiff alleges that "[d]efendant(s) violated the applicable rules, laws, regulations, and statutes ... ".

At her deposition, plaintiff testified that, at the time of the accident, the lighting condition in Panevino was "darkish" and there was "not a lot of light" . Plaintiff further testified that her foot got caught on a chair, causing her to fall and sustain bodily injuries . Nothing was blocking plaintiff's view of the chair.

Preliminary, the court agrees with defendants that the chair in question, in and of itself, did not constitute an inherently dangerous condition (*see e.g. Thomas v Price-Mart Inc.*, 267 AD2d 374, 375 [2d Dept 1999]; 07/13/09 Kaye Aff., exhibit O).

> A landowner has a duty to maintain its property *in a reasonably safe condition* in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury and the burden of avoiding the risk. This duty applies with equal force to landowners and tenants who operate places of public assembly, such as theaters, and requires them to provide members of the public with reasonably safe premises, including safe means of ingress and egress

(*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d at 322 [internal citations omitted] [emphasis added]; *see also Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2004]). This duty may also include a duty to protect against, or warn of, dangerous conditions (*see e.g. Pinero v Rite Aid of N.Y.*, 294 AD2d 251, 252 [1st Dept], *affd* 99 NY2d 541 [2002]). However, there is no duty to "warn against conditions that are in plain view, open, obvious, and readily observable by those 'employing the reasonable use of their senses'" . At the same time,

"even if a hazard qualifies as 'open and obvious' as a matter of law, that characteristic merely eliminates the property owner's duty to warn of the hazard, but does not eliminate the broader duty to maintain the premises in a reasonably safe condition" (*Westbrook*, 5 AD3d at 70; *see also Lawson v Riverbay Corp.*, 64 AD3d 445, 446 [1st Dept 2009] [plaintiff's awareness of presence of cement blocks in her path and the fact that she "had even warned her daughter to be careful of them, does not preclude a finding of (property owner's) liability"]; *Mizell v Bright Servs., Inc.*, 38 AD3d 267, 267 [1st Dept 2007]).

Restaurant argues that it had no duty to warn plaintiff of an allegedly dangerous condition, because it was in plain view, open, obvious and readily observable by one employing reasonable use of one's senses. However, "[t]he issue of whether a dangerous condition is open and obvious is fact specific, and thus usually a question for the jury" (*Ruiz v Hart Elm Corp.*, 44 AD3d 842, 843 [2d Dept 2007]). Additionally, even if the condition in question can be considered open and obvious, the issue remains whether, on the day of the accident, Restaurant and Lincoln Center maintained the premises of Panevino in a reasonably safe condition.

Restaurant contends that it had no actual or constructive notice of the alleged dangerous condition. However, whether or not Restaurant had notice is irrelevant, because plaintiff alleges that Restaurant or Lincoln Center created the dangerous conditions, i.e., (1) the room of Panevino was "darkish" and there "was not a lot of light" and (2) the room was "very cluttered" with "[t]ables and chairs ... very randomly spread out throughout the area" (*id.* at 25-26; *see Westbrook*, 5 AD3d at 75). Therefore, Lincoln Center's argument that the condition could not have existed for more than 10 minutes prior to the accident, which is insufficient for notice purposes, is unavailing (*id.*). Accordingly, Restaurant and Lincoln Center must show that they

did not create the aforementioned conditions (*id.* at 71 ["(t)o be entitled to summary judgment," "a property owner (is) required to establish that it ... did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property"]).

With respect to lighting, Restaurant only refers to plaintiff's testimony that there was natural light coming in through a window in the lobby of the building. This, however, does not establish that there was sufficient lighting in the room of Panevino. Plaintiff testified that the day was "grayish," "dull," and the room did not have enough light. Moreover, Restaurant's witness testified that during morning rehearsals, Panevino was closed for business and "the bar lights weren't on, dining room lights weren't on so the areas weren't open and inviting". Lincoln Center's witness testified that the building's night lights were not usually turned on in the room of Panevino, and that, in the mornings, two of the three sources of light in the restaurant were sometimes on and sometimes off . Restaurant's witness testified that of the three sources of light in the room, two would be turned off, and one would be dimmed.. Most lights, she testified, were controlled by Lincoln Center.

Contrary to Restaurant's contention, the facts in *Reyes v La Ronda Cocktail Lounge* (27 AD3d 397 [1st Dept 2008]), can be distinguished from the case at bar. In *Reyes*, a patron of a cocktail lounge alleged that dim lighting contributed to her slip and fall. The *Reyes* Court observed that plaintiff's allegation is insufficient given that cocktail lounges are expected to be dimly lit. Unlike in *Reyes*, Restaurant's employees would actually turn on the lights when Panevino was open for business, and, at other times, they or Lincoln Center would dim the lights The room of Panevino is located in the middle of a lobby of a concert hall. The room is always accessible to the building's visitors, and plaintiff attended a rehearsal, open to the public, on the

day of the accident. Accordingly, Lincoln Center and Restaurant are expected to maintain the room of Panevino in a reasonably safe manner, which includes providing adequate lighting. Accordingly, Restaurant and Lincoln Center failed to establish that, on the day of the accident, the room of Panevino was sufficiently lit.

With respect to the placement of chairs, Restaurant relies on the testimony of its witness, who testifies that a porter usually comes in at 9 A.M. to set up the restaurant and takes the chairs down from the tables and sets them at the tables A manager would walk by Panevino and if it was not neat, the manager would direct a porter to neaten it up. She was not aware of any rules against allowing the public to enter and sit in the room of Panevino during morning rehearsals . She testified that previously, she had seen people sitting in Panevino when it was not open for service and, on such occasions, would ask them to leave.

However, Restaurant failed to demonstrate that, at the time of the accident, the tables and chairs at Panevino were arranged in a way that would provide sufficient room for Lincoln Center's visitors to walk through the restaurant. Accordingly, Lincoln Center and Restaurant failed to establish that they maintained the room of Panevino in a reasonably safe manner (*see Branham*, 31 AD3d at 322; *Westbrook*, 5 AD3d at 71).

Corridor

Plaintiff contends that the room of Panevino can be considered a "corridor" which defendants, pursuant to the Administrative Code of the City of New York (Administrative Code), section 27-369, were required to keep unobstructed. However, section 27-232 of the Administrative Code defines a "corridor" as "[a]n enclosed public passage providing a means of access from rooms or spaces to an exit." Clearly, Panevino's room did not provide a means of

access to an exit, since both of its ends open into the lobby of the building. Therefore, plaintiff cannot rely on this theory of liability.

Accordingly, Lincoln Center and Restaurant have failed to make a prima facie showing of entitlement to judgment as a matter of law. Although Compass Group moved for summary judgment, there is not discussion of its entitlement to this relief. Accordingly, its motion is denied as well.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that the motion of defendants Restaurant Services, Inc. and Compass Group USA, Inc. for summary judgment is denied; and it is further

ORDERED that the cross motion of defendant Lincoln Center for the Performing Arts, Inc. is denied.

Dated: 12/2/09

ENTER:

MARILYN SHAFER

J.S.C.