

Charbonnet v Bronx Stage & Film

2010 NY Slip Op 30012(U)

January 4, 2010

Supreme Court, New York County

Docket Number: 110492/07

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 110492/2007
CHARBONNET, MARK
 VS.
BRONX STAGE
 SEQUENCE NUMBER : 001
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE 12/07/09
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED

JAN 07 2010

Cross-Motion: Yes No

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendant Bronx Stage & Film and the Bank Street Theater, d/b/a The Peccadillo Theater Company and Sports and Special Risk Event, for an order granting summary judgment dismissing plaintiff's Complaint is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry within twenty days of entry upon plaintiff.

This constitutes the decision and order of the Court.

Dated: 1/4/2010


HON. CAROL EDMEAD, J.S.C.

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: PART 35

-----X
MARK CHARBONNET,

Index No. 110492/07

Plaintiff,

DECISION/ORDER

-against-

BRONX STAGE & FILM and THE BANK STREET
THEATER, d/b/a THE PECCADILLO THEATER
COMPANY and SPORTS AND SPECIAL RISK EVENT,

Defendants.

FILED
JAN 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
EDMEAD, J.S.C.

MEMORANDUM DECISION

In this personal injury action, plaintiff Mark Charbonnet ("Plaintiff") alleges that he tripped and fell over a "separate level" inside the premises of the Bank Street Theater, then located at 155 Bank Street, New York, New York (the "Theater").

Defendants Bronx Stage & Film ("Bronx Stage & Film), the Bank Street Theater, d/b/a The Peccadillo Theater Company (the "Peccadillo Theater") and Sports and Special Risk Event¹ (collectively "Defendants") now move for summary judgment dismissing Plaintiff's complaint.

Factual Background

In support of summary judgment, Defendants submit the following deposition testimony and affidavit:

¹ Sports and Special Risk Event is the insurance company for the Peccadillo Theater Company (Deposition of Kevin Kennedy, pp. 19-20).

Plaintiff's Deposition

On September 25, 2004, plaintiff arrived at the Theater to see a play (p. 9). During intermission, Plaintiff proceeded to the men's room (p.12). During this time, the lights to the theater were on, but by the time he had exited the men's room to return to his seat, intermission was over and the lights in the Theater were off; no overhead lights were on in the Theater, on the walls, on the floor or on the steps (pp. 13, 15). The only lights turned on were those on the stage (p.14). As Plaintiff was turning from the first row into the second row, he tripped over one of the "separate levels" (pp.16-17). There was no glow-in-the-dark illuminated strip on the edge of the platform and there were no lights running along the side of the seats in the theater (p.17). When the lights came on at the end of the performance, Plaintiff saw that the area over which he tripped was not one step, but that there were separate levels and he tripped over one of those "separate levels" (p.16).

Kevin Kennedy's Deposition

Kevin Kennedy ("Kennedy") is the managing director at the Peccadillo Theater Company, a not-for-profit arts and theater organization, which is not affiliated with the Bronx Stage & Film (pp. 7, 8, 13). At the time of the accident, the Peccadillo Theater Company rented the Theater pursuant to a lease with the owner of the building, Westbeth Housing and Development Corporation (pp. 19-20). In September 2004, Bronx Stage & Film rented the Theater from the Peccadillo Theater Company pursuant to a licensing agreement for the production of a play (pp. 14, 24). The Peccadillo Theater Company had no part in the production of the play (p.14).

The risers are platforms to which the seating was bolted (p. 29). There were more than two platforms where the seats were bolted and every platform was at a different height (p. 30).

Kennedy believed that the platforms were about two or three inches from each other but was unsure because he never measured them (p. 59). There were no lighting fixtures located on the floor of the aisles (p. 38). During the performance, the "houselights" are turned off, but the Theater is not entirely dark due to the stage lighting (pp. 38-39). There was glow-in-the-dark tape where there was a change of height in the floor, backstage, on columns and in the aisle as one walked from platform to platform (p. 47). At least once a week, Kennedy checked to ensure that the tape was in place (p. 48). Dan Wackerman ("Wackerman"), the artistic director of Peccadillo Theater Company, probably inspected the tape on the edge of the raised platforms daily (p. 49). The glow-in-the-dark tape lasted between two to six months and Kennedy or Wackerman would replace the tape themselves (p. 49). Sometimes rental companies would replace the tape (p. 50). Kennedy does not recall the condition of the glow tape in September 2004 (p. 51). Kennedy and Wackerman inspected the surfaces where the glow-in-the-dark tape was located to ensure it was working properly before a performance (p. 51). If someone needed to use the bathroom an usher would escort them back to their seat with a flashlight (p. 54). Kennedy does not know if Bronx Stage & Film used the same procedure (p. 54). He is not aware of anyone complaining of lack of lighting at the aisle next to the seats or that the glow tape was not working properly (p. 54).

Affidavit of Danny Rodriguez

Danny Rodriguez ("Rodriguez") was working as an usher at the time of Plaintiff's accident, and observed Plaintiff's fall (p. 1). Rodriguez recalled that the houselights were on due to the intermission (p. 1). When Plaintiff was about one or two feet away from Rodriguez, plaintiff fell forward "while stepping downwards on a small step from a higher portion of the floor in the aisle to a lower portion of the floor in the aisle" (p. 2). The "step" in the aisle was

about 1/4 to 1/2 of an inch high (p. 2). Glow-in-the-dark tape was used on the edges of the platforms to show a height difference (p. 2). The two platforms where the Plaintiff fell appeared to be smooth and there was no liquid or debris on either level (p. 2).

Based on the above, Defendants argue that they cannot be held liable for trivial defects that do not constitute a trap or nuisance where a pedestrian could merely stub his or her toes, or trip. Defendants assert that the "separate level" in the aisle over which Plaintiff tripped was approximately 1/4 to 1 inch in height and therefore constituted a "trivial defect" where no action against the Defendants can be maintained.

In opposition, Plaintiff argues that there are issues of fact that preclude summary judgment. Plaintiff argues that Defendants' reliance on the affidavit of Rodriguez is insufficient to support Defendants' contention that the 1/4 inch-high step constitutes a trivial defect. The issue of whether a dangerous or defective condition exists on property depends on the facts of each case and presents a question for the jury. Plaintiff testified that at the time of his accident, the intermission had ended and the houselights were off and the only light in the theater at that time came from the stage and there were no glow-in-the-dark strips on the edges. However, Rodriguez attested that the accident happened during intermission and the house lights were on. Further, based on Plaintiff's passport and driver's license, Plaintiff is bald and 6'1"; thus, Rodriguez's description of the Plaintiff is inaccurate. Further, the photographs marked at Defendants' deposition demonstrate that the height differential between the steps was more than 1/4 to 1/2 of an inch as stated in Rodriguez's affidavit. Rodriguez is not a credible witness and his testimony should not be credited.

Plaintiff also submits the affidavit of Janio Marrero ("Marrero"), the facilities manager for the Cherry Lane Theater (p. 1), which leased the 155 Bank Street Theater on January 1, 2009

(p. 1). On that date, Marrero toured the building as renovations were to taking place in the area where the audience sits (p. 1). The seats were on risers made from wooden platforms (p.1). There were no lights on the edges or electrical wiring but glow tape was used on the edges (p.1). There was no lighting on the floor (p. 2). The height differential between the risers and platforms were inconsistent as well as the depth of the platforms (p. 2). There was no handrail along the risers to prevent chairs from falling off (p. 2).

Plaintiff further argues that even assuming there are no issues of fact, case law holds that a height differential in a slip and fall case must be considered with other factors.

In reply, Defendants contend that both the Defendants and Plaintiff agree that the issue of whether a dangerous or defective condition exists on property depends on particular facts and circumstances of each case and presents a question of fact for the jury. Differences of under an inch have been held to be *de minimis*. Also, that Rodriguez's description of the Plaintiff was "imprecise" does not mean that the Court should disregard his testimony that the height of the step was 1/4 to 1/2 inch. The Court should disregard the photographs presented by the Plaintiff as they were taken on August 5, 2009 and do not fairly and accurately depict the Theater as it was in 2004. According to Kennedy's deposition, the photographs do not show the fixed seating that existed in September 2004. In addition, Marrero's description of the Theater should be disregarded because his description was based on an inspection done in January 1, 2009. Thus, summary judgment should be granted in favor of the Defendants since the trivial defect that existed is not actionable.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §

3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390 [U] [Sup Ct New York County, 2003]). Thus, the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad, supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbiner*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). The opponent “must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist” and “the issue must be shown to be real, not

feigned since a sham or frivolous issue will not preclude summary relief” (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

Actionable Defect

Deciding whether a dangerous or defective condition exists on a premises and is actionable “‘depends on the peculiar facts and circumstances of each case’ and is generally a question of fact for the jury” (*Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). “‘The court must examine all of the facts presented ‘including the width, depth, elevation, irregularity, and appearance of the defect along with the time, place and circumstances of the injury’” (*Ochoa v Walton Mgmt., LLC*, 19 Misc 3d 1131 [Bronx County 2008]; *Ryan v KRT Property Holdings, LLC*, 45 AD3d 663 [2d Dept 2007]; *Trincere* at 977 [“Not every injury allegedly caused by an elevated brick or slab need be submitted to a jury”]). Case law holds that “[t]he owner of a public passageway may not be cast in damages for negligent maintenance by reason of trivial defects on a walkway, not constituting a trap or nuisance, as a consequence of which a pedestrian might merely stumble, stub his toes, or trip over a raised projection” (*Morales v Riverbay Corp.*, 226 AD2d 271, 641 NYS2d 276 [1st Dept 1996]). A height differential alone is insufficient to establish the existence of a dangerous or defective condition for which the property owner could be held liable (*see Morales; Gaud v Markham*, 307 AD2d 845, 764 NYS2d 241 [1st Dept 2003] [stating “the height differential of less than an inch between the defective area and the rest of the landing-was trivial, and plaintiff has not presented any evidence to show that such defect presented a significant hazard, notwithstanding its minimal dimension, by reason of location, adverse weather or lighting conditions, or other circumstances giving it the characteristics of a trap or snare]).

When deciding if a trivial defect exists the court, however, should consider "whether other conditions exist such as weather, location, or adverse lighting, which make an otherwise trivial defect an actionable hazard" (*Ochoa; Guad v Markham*, 307 AD2d 845 [1st Dept 2003]). Thus, where there is a height differential coupled with other factors, courts have held that whether a particular condition is trivial is an issue to be decided by a jury (*Cela v Goodyear Tire & Rubber Co.*, 286 AD2d 640 [1st Dept 2001] [Although less than an inch deep, the defect, apparently an irregular zig-zag-like depression, between a foot and two feet in length, with sharp rather than gradual edges, is of sufficient magnitude to raise a jury issue]; *Argenio v Metropolitan Transportation Auth.*, 277 AD2d 165 [1st Dept 2000] [stating that "The location of the depression in a heavily traveled pedestrian walkway renders observation of the defect less likely"]; *Young v City of New York*, 260 AD2d 383 [1st Dept 1998]; *Rivera v 2300 X-tra Wholesalers, Inc.*, 239 AD2d 268 [1st Dept 1997] [stating that it could not be said that the metal plate over which plaintiff tripped which was no more than one-half inch higher than the floor had "none of the characteristics of a trap or a snare"]; *McKenzie v Crossroads Arena, LLC*, 291 AD2d 860 [4th Dept 2002]). In *McKenzie*, the court denied defendant's motion for summary judgment which sought dismissal on grounds that plaintiff tripped over a *de minimis* defect, namely a three quarter height difference between concrete slabs on the sidewalk. The Court concluded that insofar as the height difference was abrupt as opposed to gradual *and that said defect was located in a dimly lit area* on a misty night, whether this otherwise trivial defect was a hazard was a question of fact to be determined by a jury (*see also, Schneider v Associated Prudential Theatres, Inc.*, 277 AD 1046, 100 NYS2d 1010 [2d Dept 1950] [affirming jury verdict in plaintiff's favor where plaintiff fell in a movie theater; that the illumination in passageway was 'very dim'; plaintiff could not see the carpet or the floor; no usher was there at

the time; plaintiff that she proceeded some 20 or 25 feet beside a railing until she came to an aisle leading to the seats; it was too dark to see a step if one was there; that she walked five or six steps down the aisle and suddenly fell on the first of a series of steps in the aisle, which were not shown to be defective or unusual in construction or location]).

Viewing the evidence submitted by the Defendants in the light most favorable to the Plaintiff, Defendants have failed to establish entitlement to summary judgment. While Kennedy testified that there was glow-in-the-dark tape in the aisle, and Rodriguez testified that the alleged fall occurred during the intermission when the house lights were on, Plaintiff testified that at the time of his accident, the intermission had ended and the houselights were off; no overhead lights were on in the Theater, on the walls, on the floor or on the steps, and the only light in the Theater at that time came from the stage. Further, Plaintiff stated that there was no glow-in-the-dark strips on the edge of the platform and there were no lights running along the side of the seats in the Theater (p.17). It was not until the lights came on at the end of the performance that Plaintiff was able to see the area over which he tripped (p.16). This testimony of a poorly or dimly lit area, coupled with the evidence indicating that the height differential was between 1/4 to 1/2 an inch, raises an issue of fact as to whether there existed a trap or nuisance at the Premises which caused Plaintiff's injuries (*Herrera v City of New York*, 262 AD2d 120 [1st Dept 1999][even a trivial defect can sometimes have the characteristics of a snare or a trap]).

Therefore, having failed to establish that the Plaintiff's alleged accident was due to a mere height differential of less than one inch, Defendants are not entitled to summary judgment.

Conclusion

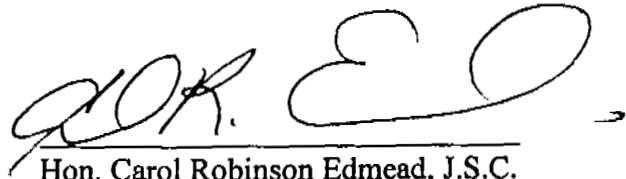
Based on the foregoing, it is hereby

ORDERED that the motion of defendant Bronx Stage & Film and the Bank Street Theater, d/b/a The Peccadillo Theater Company and Sports and Special Risk Event, for an order granting summary judgment dismissing plaintiff's Complaint is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry within twenty days of entry on plaintiff.

This constitutes the decision and order of the Court.

Dated: January 4, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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