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

PRESENT: PART 5

Index Number : 103295/2008
OKLADEK, MADELEINE
VS
CITY OF NEW YORK
Sequence Number : 001
DISMISS

INDEX NO. 103295/08
MOTION DATE 3/22/11
MOTION SEQ. NO. 001
MOTION CAL. NO. 89

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
MAY 31 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/26/11

BARBARA JAFFE J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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 5

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MADELEINE OKLADEK,

Plaintiff,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, LINCOLN CENTER FOR THE PERFORMING ARTS, INC., LINCOLN CENTER ASSOCIATION, INC., LINCOLN CENTER DEVELOPMENT PROJECT, INC., and LINCOLN CENTER CONSTITUENT DEVELOPMENT PROJECT, INC.,

Defendants.

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Index No.: 103295/08

Motion Date: 3/22/11
Motion Seq. No.: 001
Motion Cal. No.: 89

DECISION AND ORDER

BARBARA JAFFE, J.S.C.:

For plaintiff:
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The Law Firm of Allen L. Rothenberg
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212-563-0100

For defendants:
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Michael A. Cardozo
Corporation Counsel
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By notice of motion dated August 31, 2010, defendants move pursuant to CPLR 3211(a)(7) and/or CPLR 3212 for an order dismissing plaintiff's claims against them. Plaintiff opposes.

I. BACKGROUND

Damrosch Park, part of the Lincoln Center Campus in Manhattan, contains black marble benches and trees, and the area is used for outdoor concerts and other Lincoln Center programs. (Affirmation of Jessica Wisniewski, dated Aug. 31, 2010 [Wisniewski Aff.], Exh. E). On August 8, 2007, at approximately 9:30 p.m., an individual reported to the Lincoln Center for the

Performing Arts, Inc. Security Department that he "had injured himself . . . on one of the marble benches . . . ." (*Id.*, Exh. K). Then, on August 14, 2007, at approximately 9:20 p.m., plaintiff allegedly walked into and tripped over a bench in the park, sustaining physical injuries. (*Id.*, Exhs. D, K). An incident report filed by the Lincoln Center Security Department reflects that plaintiff stated that she had tripped over a park bench. (*Id.*, Exh. K).

Plaintiff served a notice of claim and a summons and complaint on City on October 31, 2007 and March 12, 2008, respectively, asserting claims for negligent design, installation, and maintenance of the benches, negligent failure to light the area adequately, negligent failure to erect warning signs or barricades, and *res ipsa loquitur*. (*Id.*, Exhs. A, B). City joined issue with service of its answer on March 25, 2008. (*Id.*, Exh. C).

On November 28, 2007, plaintiff was examined pursuant to General Municipal Law § 50-h, testifying that the lighting on the night of the incident was "very poor [and] very dark" and that she "didn't even realize [she] had tripped. All of a sudden, [she] felt a funny feeling in [her] head, and the next thing [she] knew, [she] was on the ground . . . ." (*Id.*, Exh. D). She also testified that she had been in the park at night once before and that the lighting was poor at that time, as well. (*Id.*).

At a deposition held on March 11, 2010, Michael Powers, Director of Operations for Lincoln Center, testified that he could not recall when the lights in the park were last tested or checked for proper illumination or whether the lights were on at the time of plaintiff's accident. (*Id.*, Exh. E). He also testified that the lighting in the park is "adequate" and that it comes from floodlights throughout the trees, lights in raised planter boxes around the benches, and street lamp-like park lamps, all of which operate on a timer. (*Id.*). In addition, he stated that he can see

the benches at night even when these lights are not on and that one of plaintiff's photographs of the park at night, which was taken seven months after the accident, seemed darker than usual, as none of the floodlights in the trees appeared to be on. (*Id.*).

At a deposition held on May 14, 2010, Joseph Platia, foreman of the Electrical Department at Lincoln Center, testified that the lights in Damrosch Park are on 24 hours a day, 7 days a week, that he did not know when the lights were last inspected, and, like Powers, that the park seemed darker in the nighttime photograph than it usually does. (*Id.*, Exh. F). Mary Small, supervisor for the New York City Department of Parks and Recreation, on the other hand, testified that the lights in the park are illuminated only at night, that she inspects them for defective "day burning," and that she had never seen lights in the trees. (*Id.*, Exh. G). She admitted, however, that she only works during the day and that she has only been to the park at night for recreation. (*Id.*). Like Powers and Platia, Small testified that she could not recall the last time the lights were checked for proper illumination. (*Id.*).

On November 23, 2010 and November 24, 2010, respectively, Irene Mantel and David Goodman, eyewitnesses to plaintiff's accident, executed affidavits in which both state that they saw plaintiff "vaulting over" one of the park benches. (Affirmation of Bradley S. Hames, Esq. in Opposition, dated Dec. 23, 2010 [Hames Aff.], Exhs. 1, 2). They also state that plaintiff's photographs of the park at night depict the park as it existed on the night of the accident. (*Id.*).

II. CONTENTIONS

Defendants maintain that the benches in the park do not constitute a dangerous condition, and that, in any event, they cannot be held liable for the condition, as they neither created nor had notice of it. Rather, they contend that the condition was open and obvious and thus there was no

duty to warn. (*Id.*). They also assert that plaintiff was the sole proximate cause of her injury, observing that her 50-h testimony contains no reference to a bench and constitutes the sole evidence of inadequate lighting, and they deny that negligence may be inferred from plaintiff's accident. (*Id.*).

In opposition, plaintiff claims the bench constitutes a dangerous condition that is neither open nor obvious and denies that she was the sole proximate cause of her accident, as two eyewitnesses attest that they saw her "vaulting" over the bench, and a safety expert opines that the bench's short height and inadequate lighting contributed to her accident. (Hames Aff., Exhs. 1, 2, 8). Further, plaintiff asserts that she has submitted evidence establishing that defendants breached their duty to light the park adequately, relying on photographs taken approximately seven months after the accident, the deposition testimony of Powers, Platia, and Small, and her expert affidavit. (*Id.*).

III. ANALYSIS

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of plaintiff's opposition papers. (*Winegrad*, 64 NY2d 851, 853). And, "as a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense." (*Mennerich v Esposito*, 4 AD3d 399, 400 [2d Dept 2004], *quoting George Larkin Trucking Co. v Lisbon Tire Mart, Inc.*, 185 AD2d

614, 615 [4th Dept 1992]). Rather, a defendant moving for summary judgment must negate, *prima facie*, an essential element of the plaintiff's cause of action. (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2005]).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562).

A. Existence of a defective condition

To establish a *prima facie* case of negligence, a plaintiff must show a duty owed, a breach thereof, and an injury proximately caused thereby. (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). When a plaintiff alleges that a dangerous condition exists on premises, a duty arises from ownership, occupancy, control, or special use of the premises (*Jackson v Bd. of Educ. of N.Y.*, 30 AD3d 57, 60 [1st Dept 2006]), and whether a dangerous condition exists "depends on the particular circumstances of each case and is generally a question of fact for the jury" (*Shalamayeva v Park 83rd Street Corp.*, 32 AD3d 387, 388 [2d Dept 2006]).

Here, there is no dispute that defendants had a duty to maintain the park in a reasonably safe manner, as they owned, occupied, and controlled it. Although Powers testified that he could see the benches even when the lights in the park are off, his testimony alone does not demonstrate that the bench and/or the lighting do not constitute dangerous conditions, as plaintiff has presented evidence demonstrating that the bench's short height and the lighting caused her injuries. Both plaintiff's expert and the two eyewitnesses state that the park was poorly illuminated, and the photographs of the park at night, which plaintiff and the eyewitnesses claim

depict the park as it existed on the night of the accident, show that the tree lights were not on when the photograph was taken. (*See Ruiz v 195 Prop Assocs.*, 245 AD2d 224, 224 [1st Dept 1997] [photographs taken several years after incident admissible on motion for summary judgment where plaintiff submitted affidavit proving that photographs showed condition as it existed on date of accident]). Thus, there exists a material issue of fact as to whether the bench and/or the lighting in the park constitute dangerous conditions. (*See Fasano v Green-Wood Cemetery*, 21 AD3d 446, 446 [2d Dept 2005] [affirming denial of summary judgment where defendant failed to demonstrate that condition was trivial and non-actionable and plaintiff's testimony, photographs, and surrounding circumstances showed that material issues of fact existed]).

B. Notice of defective condition

In moving for summary judgment, a premises owner must also show that it neither created nor had actual or constructive notice of a dangerous condition. (*Early v Hilton Hotels Corp.*, 73 AD3d 559, 560-61 [1st Dept 2010]). A premises owner satisfies its burden of showing that it had no actual notice of the dangerous condition by providing statements based upon personal knowledge that the condition did not exist before the accident. (*De La Cruz v Lettera Sign & Elec. Co.*, 77 AD3d 566, 566 [1st Dept 2010]). Moreover, evidence of a recurring dangerous condition on the premises shows that a premises owner had actual notice of the condition. (*Chianese v Miller*, 98 NY2d 270, 278 [2002]; *Uhlich v Canada Dry Bottling Co.*, 305 AD2d 107, 107 [1st Dept 2003]; *O'Connor-Miele v Barhit & Holzinger, Inc.*, 234 AD2d 106, 107 [1st Dept 1996]).

In denying that they had actual notice of the allegedly defective condition of the bench

and/or lighting in the park, defendants have not presented a statement based on personal knowledge as to the condition of the park on the night of the accident, arguing that as the bench bears no indicia of a defect, no knowledge could be obtained as to a defect.

While there is no defect apparent on the surface of the bench, the alleged defect is the bench itself and its presence in an unlit or insufficiently lit area, and given the fact that someone injured himself on a park bench just six days before plaintiff's accident and plaintiff's testimony that the park had been poorly lit during her previous nighttime visit, defendants have failed to demonstrate that they did not have actual notice.

A premises owner has constructive notice of a condition when it is "visible and apparent and [has] exist[ed] for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it." (*Rosa v Food Dynasty*, 207 AD2d 1031, 1032 [1st Dept 2003]). On a motion for summary judgment, a premises owner satisfies its burden as to constructive notice by providing a statement based on personal knowledge that the condition was not discovered upon regular maintenance and inspection before the accident or that the defect would not have been discovered on inspection. (*Dorsey v Les San Culottes*, 43 AD3d 261, 261 [1st Dept 2007]).

Absent any statement based on personal knowledge as to the last time the benches and park lights were inspected, defendants have failed to show that they did not have constructive notice of the defect. (*See Moser v BP/CG Ctr. I, LLC*, 56 AD3d 323, 324 [1st Dept 2008] [defendant failed to demonstrate that it did not have constructive notice as it failed to provide evidence of "their activities on the date of the accident, including evidence indicating the last time the staircase was inspected or maintained before plaintiff fell"]; *cf Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-01 [1st Dept 2008] [defendant satisfied its burden of

showing that it did not have constructive notice of dangerous floor condition as it provided evidence of inspections conducted prior to plaintiff's slip and fall]).

C. Proximate cause

Proximate cause is ordinarily a question to be determined by the fact finder when varying inferences may be drawn. (*Mirand v City of New York*, 84 NY2d 44, 51 [1994]). However, when a plaintiff fails to identify the cause of her fall, dismissal of her claim is mandated, as "the trier of fact would be required to base a finding of proximate cause upon nothing more than speculation." (*Cherry v. Daytop Vil., Inc.*, 41 AD3d 130, 131 [1st Dept 2007]).

Here, although plaintiff did not identify the cause of her fall in her section 50-h testimony, varying inferences as to the proximate cause of her fall may be drawn based on other evidence in the record. Both eyewitnesses state that they saw plaintiff "vaulting" over the bench, and the incident report reflects that plaintiff stated that she had tripped over a park bench. Based on this evidence, a fact finder may infer, without speculating, that plaintiff tripped over the dark marble bench while walking, rather than by fainting onto or losing her balance near the bench, and that defendants' negligence in designing and/or positioning the bench in the park and in failing to light the park adequately proximately caused her fall. (*Cf Oettinger v Amerada Hess Corp.*, 15 AD3d 638, 639 [2d Dept 2005] [no proximate cause existed where plaintiff, who was allegedly injured while stepping over a case of beer, testified that he "was not certain about much" and that he did not know whether it was a case of beer or something else, and store employee stated that there was no case of beer at accident site]).

D. Open and obvious nature of dangerous condition and duty to warn

Generally, a premises owner has no duty to warn of an open and obvious danger. (*Tagle v*

Jakob, 97 NY2d 165, 169 [2001]). "Whether an asserted hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted." (*Shah v Mercy Med. Ctr.*, 71 AD3d 1120, 1120 [2d Dept 2010]). Therefore, "[w]hile the issue of whether a hazard is . . . open and obvious is generally fact-specific and thus a jury question, a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion and may do so on the basis of clear and undisputed evidence." (*Tagle*, 97 NY2d at 169).

Here, the evidence is conflicting as to whether the benches in the park were open and obvious when plaintiff fell. Although Powers testified that he can see the benches at night even when the park lights are off, plaintiff, the two eyewitnesses, and plaintiff's expert maintain that the park was poorly lit on the night in question and that the benches were not obvious. Accordingly, material issues of fact exist as to whether the benches were an open and obvious danger and therefore whether defendants had no duty to warn.

D. *Res ipsa loquitur*

When the actual, specific cause of an injury is unknown, the fact finder may "infer negligence from the circumstances of the occurrence." (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]). In order to prove same, a plaintiff must show that: (1) the occurrence was "of a kind that ordinarily does not occur in the absence of someone's negligence"; (2) the agency or instrumentality involved in the occurrence was within the "exclusive control" of the defendants; and (3) the occurrence was not due to voluntary action on the part of the plaintiff. (*Id.*). "[A] plaintiff need not conclusively eliminate the possibility of all other causes of the injury. It is

enough that the evidence supporting the three conditions afford a rational basis for concluding that 'it is more likely than not' that the injury was caused by a defendant's negligence." (*Id.*).

A trip and fall may occur absent negligence (*Meza v 509 Owners LLC*, 2011 NY Slip Op 1576, *2 [1st Dept 2011]), and here, where the premises are open to the public, there is no evidence that the premises, benches and lighting were within defendants' exclusive control (*see Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 [1987] [plaintiff, who was allegedly injured on a subway escalator, could not invoke *res ipsa loquitur* as the escalator was used by more than 10,000 people weekly, and she failed to show it was more likely than not that premises owner caused defect]; *Zimbler v Resnick 72nd Street Assoc.*, 79 AD3d 620, 621 [1st Dept 2010] [plaintiff, who was allegedly injured after a sliding glass door fell on her as she opened it, could not invoke *res ipsa loquitur* as the door was in a heavily trafficked area open to public]). Consequently, defendants' negligence may not be inferred from plaintiff's accident.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion for summary judgment is denied as to plaintiff's negligence claims, and it is further

ORDERED, that defendants' motion for summary judgment is granted as to plaintiff's claim under *res ipsa loquitur*, and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 26, 2011
New York, New York