ORIGINAL

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

ROBERT L. STEVENSON and SUSAN L. STEVENSON,

Plaintiffs,

-against-

DECISION and ORDER
RJI #45-1-2010-2008
Index # 2010-4688

SARATOGA PERFORMING ARTS CENTER, INC., THE AMERICAN CANCER SOCIETY, EASTERN DIVISION, INC., and AMERICAN CONCERT & ENTERTAINMENT SERVICES, INC.,

Defendants.

APPEARANCES

Law Office of Paul Pelagalli, PLLC
Attorneys for Plaintiffs
20 Prospect Street, Suite 212
Ballston Spa, New York 12020

Burke, Scolamiero, Mortati & Hurd, LLP
Attorneys for Saratoga Performing Arts Center, Inc.
7 Washington Square
P.O. Box 15085
Albany, New York 12212-5085

O'Connor, O'Connor, Bresee & First, PC
Attorneys for American Concert & Entertainment Services
20 Corporate Woods Blvd.
Albany, New York 12211

Law Office of Theresa J. Puleo
Attorneys for American Cancer Society
900 Watervliet-Shaker Road, Suite 210
Albany, New York 12205

ANN C. CROWELL, J.

The defendant, Saratoga Performing Arts Center, Inc. ("SPAC"), has requested an Order dismissing plaintiffs' complaint and any claims and cross-claims against it pursuant to CPLR §3212. The plaintiffs, Robert L. Stevenson and Susan L. Stevenson, and the defendant, American Concert & Entertainment Services, Inc. ("ACES"), have opposed the motion. Defendant American Cancer Society has not submitted any opposition or support.

This action in negligence arises out of an occurrence at the New York State-owned Hall of Springs ("premises") within the Saratoga State Park on April 29, 2010. SPAC leases the Hall of Springs from the state and, by way of operating agreement, provides Mazzone Management Group, Ltd[1]. ("Mazzone") with an exclusive license to operate/oversee events held within the Hall of Springs and to provide food service in connection therewith. The American Cancer Society contracted with Mazzone to cater an event on its behalf at the Hall of Springs on the date in question. The American Cancer Society contracted with defendant ACES to provide audio and visual services ("AV services") for the event.

The plaintiff, Robert L. Stevenson ("plaintiff"), was an employee of Mazzone. On April 29, 2010, his responsibilities included setting up tables and chairs according to a floor plan for the upcoming American Cancer Society event. While he was moving a stack of chairs he tripped and fell on wires that were loose on the floor and sustained an injury. The wires were owned and installed by ACES.

---

[1] A third-party action brought by SPAC against Mazzone has been discontinued.

Summary judgment should be granted only in the absence of any material or triable issue of fact. *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]. An entity that owns, leases or controls ("owner") a premises has a nondelegable duty to maintain the premises in a reasonably safe condition, free of defect. *Dumont v P.S. Griswold Co., Inc.*, 246 AD2d 879 [3d Dept 1998]. To establish liability against an owner, it is axiomatic that a plaintiff must prove that the owner either created or had notice of a dangerous condition which caused his or her accident. *Id.* The notice may be actual or constructive. To meet its burden on its motion for summary judgment, the defendant must establish that it "maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition." *Candelario v Watervliet Hous. Auth.*, 46 AD3d 1073, 1074 [3d Dept 2007].

SPAC met its initial burden of establishing as a matter of law that it did not create the alleged dangerous condition or have actual or constructive notice of it. It supported its motion with pretrial depositions of the following people: plaintiff; SPAC Chief Operating Officer Richard Greary; Mazzone Vice President of Operations Mark Delos; American Cancer Society employee Aimee N. Chauvot; ACES owner William C. Reinhardt; ACES engineer Aaron Kovacik; and ACES video tech Dennis Cruz. There is no direct or circumstantial evidence presented that SPAC created the dangerous condition. SPAC did not own the wire, lay the wire, tape the wire, direct the laying or taping of such or have any contact with ACES, who exclusively performed these tasks. SPAC did not supervise or inspect ACES' work and SPAC employees were not assigned to inspect or supervise the set up of the American Cancer Society event in general.

The plaintiff makes no claim that SPAC had actual notice of the alleged dangerous

condition. Additionally, constructive notice has not been established because there is no evidence regarding the length of time the condition was present. *Gordon v American Museum of Natural History*, 67 NY2d 836 [1986].

With regard to constructive notice, when a landlord out of possession reserves a right to enter on the premises for purposes of inspection and repair, such reservation may constitute a sufficient retention of control to permit a finding that the landlord had constructive notice of a defective condition on the premises. *Vanderlyn v Daly*, 97 AD3d 1053 [3d Dept 2012]. Plaintiff and defendant ACES assert SPAC did not divest itself of its interest in or control over the Hall of Springs by entering into an operating agreement with Mazzone. Assuming arguendo that SPAC retained sufficient control, the plaintiff must establish notice. To constitute constructive notice, a defect must be visible and apparent and must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *Gordon at* 836. Dismissal of an action is proper where there is no evidence as to the length of time that a dangerous condition was present at the property prior to the subject accident. *Dumont* at 879.

Plaintiff has failed to prove the alleged dangerous condition was present at the property long enough prior to plaintiff's fall to constitute constructive notice. In opposition, plaintiff submits no proof that SPAC had actual or constructive notice of the alleged condition or that there is a material question of fact to be resolved relative to notice. SPAC's motion for summary judgment dismissing the complaint of plaintiff and cross-claims of co-defendants American Cancer Society, Eastern Division, Inc. and American Concert & Entertainment Services, Inc. is granted.

Any relief not specifically granted is denied. No costs are awarded to any party. This decision shall constitute the order of the Court. The original papers shall be forwarded to the attorney for the defendant, SPAC, for filing and entry.

Dated: November 28, 2012
Ballston Spa, New York

ENTERED
Kathleen A Marchione
Saratoga County Clerk

ANN C. CROWELL, J.S.C.

SARATOGA COUNTY
CLERK'S OFFICE
BALLSTON SPA, NY

2012 DEC -6 PM 3:07

ENTERED

Papers received and considered:

Notice of Motion, dated August 3, 2012

Affirmation of Judith B. Aumand, Esq., affirmed August 3, 2012, with Exhibits A-N

Memordandum of Law, dated August 3, 2012

Affidavit in Opposition of Paul Pelagalli, Esq., sworn to September 18, 2012

Affidavit of Margaret E. Dunham, Esq., sworn to September 20, 2012, with Exhibit A

Reply Affirmation of Judith B. Aumand, Esq., affirmed September 27, 2012