

Barnaba v Madison Square Garden, L.P.

2013 NY Slip Op 31270(U)

June 13, 2013

Sup Ct, New York County

Docket Number: 102461/2008

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

GARY BARNABA and SHEILA BARNABA,

INDEX No. 102461/08

Plaintiffs,

MOTION DATE _____

-against-

MOTION SEQ. No. 002

MADISON SQUARE GARDEN, L.P., and
CABLEVISION SYSTEMS CORPORATION,

Defendants.

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2, 3

Replying Affidavits _____

CROSS-MOTION: _____ YES NO

FILED

JUN 18 2013

Upon the foregoing papers, it is ordered that this motion is:

COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH ATTACHED DECISION.

Dated: 6/13/13

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION _____ NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58**

GARY BARNABA and SHEILA BARNABA,
Plaintiffs,

-against-

MADISON SQUARE GARDEN, L.P., and
CABLEVISION SYSTEMS CORPORATION,
Defendants.

INDEX NO. 102461/2008
Motion Sequence 002
DECISION & ORDER

FILED

JUN 18 2013

**COUNTY CLERK'S OFFICE
NEW YORK**

DONNA MILLS, J.:

In this action for personal injuries, defendants Madison Square Garden, L.P. (MSG LP), and Cablevision Systems Corporation (Cablevision) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety.¹

Factual Background

Plaintiff Gary Barnaba (Barnaba) was allegedly injured on November 21, 2007, when he fell on a stationary escalator in Madison Square Garden (MSG), owned and operated by MSG LP, a division of Cablevision. Barnaba, 66-years old at the time, was leaving the premises at the conclusion of a basketball game. This action commenced on February 13, 2008, with the complaint asserting causes of action for negligence and loss of consortium. Tarshis affirmation, exhibit B (Complaint).

Discussion

Plaintiffs' verified bill of particulars states that "the failure of the defendants in permitting the overcrowding on the non-working escalators and/or in not supervising and limiting such overcrowding created an unusually dangerous condition which was the sole and

¹The court grants leave to make this motion beyond the 120-day limit of CPLR 3212 (a), because of the delays experienced by the parties in earlier motion practice.

substantial proximate cause of plaintiff, Gary Barnaba's injuries and that the defendants had actual and/or constructive notice thereof." Tarshis affirmation, exhibit A, ¶ 5. The dangerous condition arose from "failing to adhere to safe and reasonable standards of crowd management," and "in permitting and allowing plaintiff and other spectators to utilize an unsafe and uneven staircase." *Id.* Additionally, plaintiffs claim that defendants failed "to adequately maintain safe, dry, and/or the escalator free from spilled alcohol, soda, and/or water." *Id.* Defendants claim that they did not create the dangerous or defective condition which allegedly resulted in Barnaba's injuries, and that plaintiffs have not established that a dangerous crowd condition existed.

Barnaba was deposed on November 23, 2010. Tarshis affirmation, exhibit F (G. Barnaba Transcript). He testified that, at the time of the incident, he weighed about 300 pounds and stood 5'9" tall. *Id.* at 34. He was wearing his bifocal eyeglasses then, as he usually did. *Id.* at 53. He had had his right hip replaced several years prior to the incident.² *Id.* at 64. He saw a doctor about pain in his other hip in early 2007, but was advised that he did not need another hip replacement. *Id.* at 68-69. He said that he had been to MSG for collegiate basketball games "[i]n excess of 20" times in the five years prior to the incident. *Id.* at 35. Barnaba's wife attended the game with him on November 21, 2007. However, he stated that she was in front of him and did not witness the accident. *Id.* at 50. They were not accompanied by anyone that they knew. *Id.* at 50, 54. He said that "Mrs. Roberts" (later identified as Toni Roberts by Barnaba's wife), the mother of a Syracuse University athlete, told him that she witnessed the accident, in conversation within the next year. *Id.* at 45-46.

²Barnaba's testimony is unclear on this. At one point, he responded that the surgery was more than two years prior to the incident (*id.* at 64), while later he said that he used a cane after the surgery until eight years before the incident (*id.* at 66-67).

Barnaba estimated that MSG was about three-quarters filled during the second of two games on the program, the one he came to watch. *Id.* at 58. He recalled that most people stayed until the end of the game. *Id.* He got up shortly after the game ended, and “walked with a crowd . . . [which was n]ot tightly packed.” *Id.* at 59, 60. He stopped in the men’s room, and then proceeded to the escalator. He did not see any staircases or elevators on the way to the escalator, but he acknowledged not looking for them. *Id.* at 63-64. The crowd got “heavier” as he approached the escalator, with people also descending from higher floors. *Id.* at 77. He had to go through a doorway to reach the escalator, and the path became more crowded as he approached it. *Id.* at 85-86. No one touched him, or bumped into him as he neared the escalator. *Id.* at 88. Barnaba said that he saw no MSG personnel, ushers or security, in the space between the doorway and the escalator, although he had seen uniformed MSG personnel throughout the evening. *Id.* at 88, 181-182.

He did not remember whether there was any debris, litter or spilled liquids in the hallway or on the steps of the escalator. *Id.* at 178. As he approached the escalator, the crowd was “[r]owdy,” making “celebratory noise.” *Id.* at 179. However, this was no different or unusual than he experienced after other athletic contests. *Id.* at 179-180. The escalator was “still,” unmoving when he got there. *Id.* at 90. Barnaba saw about a dozen people ahead of him as he stepped onto the escalator, with his wife immediately in front of him. *Id.* at 92. He said that he started walking down the center of the escalator holding onto the handrail on each side of him. *Id.* at 93. He testified that he did this ordinarily for “[s]ecurity,” when two handrails are accessible on an escalator or staircase. *Id.* at 93-94. When he was about halfway down the escalator, ten steps or so, he “felt something hit my right shoulder with some force. And it pitched me forward.” *Id.* at 97. Before that, nothing, or no one, bumped or jostled him. *Id.* at

98. He did not know what hit him, but he was told by others, strangers to him, not appearing to be MSG employees, that “someone tried to get by me in a rush.” *Id.* at 97-98. He had no recollection of his fall after being hit; “I mean I was on the very bottom [of the escalator] when I woke up.” Baranba said that he was briefly unconscious. *Id.* at 104. He stated that he began to feel pain shortly thereafter. *Id.* at 106.

He was removed from MSG by ambulance, and taken to the emergency room at Bellevue Hospital. *Id.* at 108-112. He stayed there about six hours. He did not remember whether Bellevue gave him any prescription to be filled, but he testified that, once he got home, he took Aleve, stayed in bed and applied ice to his left side. *Id.* at 120-122. He went to a local doctor after the long Thanksgiving holiday weekend.

Plaintiff Sheila Barnaba (the Wife) testified on November 23, 2010. Tarshis affirmation, exhibit G (S. Barnaba Transcript). She sat through Barnaba’s deposition and offered only a few corrections to what she heard when she began her deposition. She said that she had accompanied him to MSG about 20 times in the five years before the incident. *Id.* at 12. She recalled that they used escalators that were not moving when exiting MSG several times before without incident. *Id.* at 13. She said that they never used an elevator or stairs to leave MSG. *Id.* at 14. She was not aware of the stairs, and would not use an elevator because of claustrophobia. *Id.* at 14-15.

The Wife said that Mrs. Roberts told her, minutes after the incident, that she saw Barnaba pushed down. *Id.* at 16. In the excitement, the Wife got no other information from Mrs. Roberts. *Id.* at 16-17. The Wife said that “people told me he was pushed,” but was unable to identify them other than Mrs. Roberts. *Id.* at 19. She was in front of her husband and did not see the incident. *Id.* at 39. She did not know how far behind he was. *Id.*

She stated that she held onto the right handrail as she walked, but took her hand off more

than halfway down. *Id.* at 37. The Wife said that the escalator was crowded as they walked down, although she did not come into contact with anyone. *Id.* at 35-36. She recalled that “two [people] at the very most” walked by her on the way down. *Id.* at 38. They did not interfere with her; she did not have to step aside to allow them to pass. *Id.* at 41. When her husband fell down, she testified that he hit her. *Id.* at 45. She heard nothing unusual before that. *Id.* at 47. She testified that the other people on the escalator were not rowdy or unruly. *Id.* at 48. The crowd at MSG that night generally was not rowdy. *Id.* at 62.

The Wife stated that no one from MSG came to the scene after Barnaba fell. *Id.* at 52. People continued coming down the escalator without anyone trying to direct the pedestrian traffic. *Id.* at 56. She did not know who called for emergency medical assistance.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

To establish a prima facie case of negligence, “a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence.” *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st

Dept), *affd* 64 NY2d 670 (1984). Actual notice arises when the defendant “create[s] or exacerbate[s] the conditions that caused plaintiff’s accident . . .” *Blair v Richards*, 63 AD3d 610, 610 (1st Dept 2009). “To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant’s employees to discover and remedy it.” *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

The granting of defendants’ motion for summary judgment is warranted by plaintiffs’ testimony. “[P]laintiffs’ negligence claim – premised upon an overcrowding theory – is insufficiently asserted inasmuch as plaintiff has failed to show he was unable to find a place of safety or that his free movement was restricted due to the alleged overcrowded conditions.” *Benanti v Port Auth. of N.Y. & N.J.*, 176 AD2d 549, 549 (1st Dept 1991). Barnaba was walking down the escalator unimpeded and unbothered by the crowd leaving the premises. Nothing about the circumstances differed from his many prior visits to MSG. He experienced no difficulties until something (presumably someone) hit him from behind. This event was not related to defendants’ conduct in providing egress to the plaintiff or the other patrons.

A premises owner has been granted summary judgment dismissing a complaint when

“[t]he plaintiff was bumped from behind by an unknown third party and fell at the defendant’s book store approximately 45 minutes before a book signing event. The plaintiff contends that the defendant was negligent in managing the crowd at the book signing. . . . There is no evidence that the plaintiff’s freedom of movement was unduly restricted by the crowd or that the crowd was unruly and unmanageable to the extent necessary to impose liability on the defendant.”

Ganapolsky v Barnes & Noble, 297 AD2d 702, 702 (2d Dept 2002); *see also DeMarco v Ouellette*, 2005 WL 2170557, *7, 2005 US Dist LEXIS 19790, *22-23 (SD NY 2005) (“The Court also notes [in dismissing the complaint] that plaintiff has not alleged that she was injured

because the Club was overcrowded; rather, she alleges that her injury was caused by an unruly patron”).

The verified bill of particulars claims that the unmoving escalator represented an unsafe and uneven staircase, and plaintiffs provide an affidavit from Jacob (Jake) Pauls, a Certified Professional Ergonomist, to the effect “that the Defendants created a foreseeable dangerous condition by disabling the escalator and operating it in a non-standard way, i.e., stopped regardless of the size of the crowd.” Pauls aff, ¶ 34. However, New York law does not support the argument that unmoving escalators are inherently dangerous. *Adamo v National R.R. Passenger Corp.*, 71 AD3d 557, 558 (1st Dept 2010) (Complaint dismissed because “the injured plaintiff, who had an unobstructed view of the steps, must have been aware that the escalator was stationary but discerned nothing else unusual about it; that she also must have been cognizant of the configuration of the escalator, including its height differentials in the steps near the exit point because she had traveled on them on many occasions; and that her trip and fall was not caused by any defect in either the handrail or the step over which she tripped”); *Schurr v Port Auth. of N.Y. & N.J.*, 307 AD2d 837, 838 (1st Dept 2003) (“The record, however, contains no evidence warranting the inference that the stopped escalator posed a reasonably foreseeable hazard to those who, like plaintiff, used it in the manner of a staircase to reach the next floor. . . . Moreover, there was no showing that the escalator was defective or that its use by pedestrians while stopped violated applicable safety codes or specific building code provisions”).

Also, plaintiffs never assert any actual flaw or defect in the escalator, or in its use as a staircase as the cause of Barnaba’s injuries. He testified that “something hit my right shoulder with some force. And it pitched me forward.” Both plaintiffs allegedly heard from unidentified witnesses that someone tried to get by Barnaba in a rush and pushed him. This comports with

Barnaba's testimony that he held both handrails as he walked down the escalator, which would have blocked the path to anyone behind him. Accepting for the sake of argument the truthfulness of the comments from the unidentified witnesses, the condition of the escalator is further removed as a causal factor in the incident.

Finally, plaintiffs offered no testimony or other evidence as to the presence of spilled liquids or any other foreign material on the escalator steps, or even argue that any foreign material caused Barnaba's fall.

Plaintiffs offer no factual allegations that would permit a factfinder to attribute liability to the defendants, either because of the creation, exacerbation or tolerance of a hazardous condition. Whoever or whatever knocked Barnaba down was not in any legally sufficient way connected to the defendants.

Accordingly, it is

ORDERED that defendants Madison Square Garden, L.P., and Cablevision Systems Corporation's motion, pursuant to CPLR 3212, for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

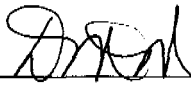
DATED: June 13, 2013

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