

Wilbourn v Wasserstein Enter., LLC

2014 NY Slip Op 30473(U)

February 28, 2014

Sup Ct, New York County

Docket Number: 108346/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **JUSTICE DORIS LING-COHAN**
Justice

PART 31

Index Number : 108346/2011
WILBOURN, CAROLE
vs.
WASSERSTEIN ENTERPRISES L.L.C.
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s) 1, 2
Answering Affidavits — Exhibits _____ No(s) 3, 4
Replying Affidavits _____ No(s) 5, 6

Upon the foregoing papers, it is ordered that this motion is for summary judgment by
defendants Wasserstein Enterprises LLC and
CKK Events LLC is denied in accordance
with the attached memorandum decision.

FILED

MAR 03 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/27/14

[Signature], J.S.C.
JUSTICE DORIS LING-COHAN

- 1. CHECK ONE CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE MOTION IS GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
CAROLE WILBOURN,

Plaintiff,

Index No.: 108346/11
DECISION/ORDER

-against-

Motion Seq. No.: 001 & 002

WASSERSTEIN ENTERPRISES, LLC, CCK
EVENTS, LLC, GES, INC., GLOBAL EXPERIENCE
SPECIALISTS, INC. and GES EXPOSITION
SERVICES, INC.,

Defendants.

-----X
CCK EVENTS, LLC,

Third-Party Plaintiff,

-against-

Third-Party Index No.:
108346/11

GES, INC., GLOBAL EXPERIENCE
SPECIALISTS, INC. and GES EXPOSITION
SERVICES, INC.,

Third-Party Defendants.

-----X
HON. DORIS LING-COHAN, J.S.C.:

FILED
MAR 08 2014
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury/negligence action, defendants move to dismiss the complaint
(motion sequence numbers 001 and 002). For the following reasons, both motions are denied.

BACKGROUND

On May 21, 2011, plaintiff Carole Wilbourn (Wilbourn) was injured when she tripped
and fell over a partition between booths at an event in which she was participating called "the
New York City Pet Show," which was being held at the Metropolitan Pavilion (the building),
located at 125 West 18th St. in the County, City and State of New York. See Notice of Motion
(motion sequence number 001), Exhibit G (amended complaint), ¶¶ 5, 18-20, 40. Defendant

Wasserstein Enterprises, LLC (Wasserstein) owns the building. *Id.*, ¶ 5. Wasserstein contracted with defendant/third-party plaintiff CCK Events, LLC (CCK) to hold the event at the building; however, the parties have not produced a copy of any written agreement between Wasserstein and CCK. CCK contracted with defendant/third-party defendant Global Experience Specialists, Inc. (f/k/a GES Exposition Services, Inc., i/s/h/a “GES, Inc., Global Experience Specialists, Inc. and GES Exposition Services, Inc.”) (GES) to construct booths and other temporary facilities at the building for the event. *Id.*; Exh. N, McNeil Affirmation, ¶ 16. This contract (the GES contract) was in the form of a proposal that GES submitted to CCK, and that the parties each signed on May 25 and May 11, 2011, respectively. *Id.*; Exhibit N.

Wilbourn is self-employed as a “cat therapist” (i.e., one who performs diagnostic and therapeutic services for cats and their owners) and a practitioner of Japanese “Reiki” therapy (a form of massage therapy). *See* Notice of Motion (motion sequence number 001), McNeil Affirmation, ¶ 35. On October 27, 2010, Wilbourn executed an “official participation contract” with CCK (the Wilbourn contract), in order to make a presentation at the New York City Pet Show. *Id.*; Exhibit O. The Wilbourn contract states, in pertinent part, as follows:

“On behalf of [CCK] and the NYC Pet Show, we are pleased to invite you, Carol[e] Wilbourn, to participate as one of our featured stage talent.

Terms of Participation:

- 30-40 minute demonstration on the main stage on Saturday, May 21st at a TBD
- Two additional passes to the event
- Photo and bio on www.nycpetshow.com
- Book signing opportunity (if applicable)
- Payment of \$200.00 for your seminar.

By signing below, you agree to participate in the “NYC Pet Show” based on the terms outlined above. You also agree to allow [CCK] to use your name and

* 4]

likeness as a participant on all marketing materials. The staff of [CCK] will work with you to determine any special needs. In addition by signing below it is understood that you will guarantee that you will present at the date and time mutually agreed to and outlined above.”

Id. At her deposition, Wilbourn stated that, after she had made her presentation, she was approached by a woman working at the pet show and told that she could use an exhibition booth that had become vacant. *Id.*; Exhibit J, at 33, 35-36. Wilbourn then stated that she noted that the booths were separated by metal partitions, and that the booth she was given had a table in the center of it and a chair behind the table and to the left of it next to a partition. *Id.* at 38-43, 50-52. Wilbourn further stated that she initially entered the booth to place her literature on the table, then left and later returned to perform Reiki on a client who had come in and sat on the chair behind the table with her dog at her feet. *Id.* at 38-39, 43-44. Wilbourn next stated that she entered the booth on the left hand side, and attempted to walk around and behind the chair on the left hand side too, but tripped and fell on “something protruding from the bottom of the partition, a steel kind of thing.” *Id.* at 44-45. She specifically stated that the heel of her left shoe became caught in the protrusion, which resulted in her falling to the ground and sustaining injuries. *Id.* at 45-46, 48. Wilbourn stated that the protrusion was not hidden or covered, but that “I didn’t look at it [i.e., the support bracing] until after I fell.” *Id.* at 49.

CCK was deposed by one of its general managers, Mike Fiorentino (Fiorentino), who stated that CCK contracted with GES to design and build the exhibition facilities for the New York City Pet Show. *See* Notice of Motion (motion sequence number 001), Exhibit K, at 13-15. Fiorentino was uncertain whether GES employed or merely contracted with the workers who physically built the booths, but stated that CCK had input into the design and dimensions of the

booths. *Id.* at 17-22. Fiorentino also stated that CCK had four or five of its own employees at the New York City Pet Show. *Id.* at 24. With respect to the booths, Fiorentino stated that they were ten feet by ten feet, contained tables and chairs and were separated by partitions. *Id.* at 25-27. With respect to the partitions, Fiorentino stated that they were three and a half feet tall and had “support bracing” at the bottom which extended out a certain distance along the floor. *Id.* at 55-57. Finally, with respect to Wilbourn, Fiorentino acknowledged that a CCK employee, Colleen Boyden, had secured his authorization to move Wilbourn into the booth where she was injured. *Id.* at 62-65.

GES was deposed by one of its account managers, Keith Cotton (Cotton), who stated that CCK provided GES with the floor plan of the pet show, and that GES actually assembled and furnished the show’s booths in accordance with the terms of the GES contract. *See* Notice of Motiion (motion sequence number 001), Exhibit M, at 21-25. Regarding the support bracing, Cotton also stated that it was metal and extended approximately 12 inches to the left and the right sides of the floor below the front partitions of each booth, and that there was no support bracing on the backs of each booth because the partitions were secured to the wall itself in another manner. *Id.* at 29-32. Cotton also stated that GES had three or four employees at the New York Pet Show to provide service and/or maintenance for the booths and the furniture in them. *Id.* at 13, 32-34, 60-61. The relevant portions of the GES contract provide as follows:

“Booth Package: GES will provide 8 x 10 or 10 x 10 GEM hardwall booths with shared backwall constructed of FIT system or pipe and drape inclusive of all labor for setup and dismantle. The booth package will consist of the following per exhibitor. A one-hundred (100) booth minimum applies. (2) 6" by 24" skirted tables, (2) chairs, (1) wastebasket and (1) 11" by 17" booth ID sign.

* 6]

Exhibition and Event Agreement: This agreement is between [GES] and [CCK] (hereafter referred to as "the Client") and upon signature by both parties shall be final as to the NYC Pet Show and governed under the laws of Nevada and the jurisdiction of Clark County, Nevada.

12. Independent Contractor: The parties shall be and act as independent contractors and under no circumstances shall this Agreement be construed as one for agency, partnership, joint venture or employment between the parties. Nothing in this Agreement shall be deemed to create, in either party, the right or authority to incur any obligation on behalf of the other party, or to bind the other party in any way.

17. Promise to Protect: Subject to Section 18, each party agrees to indemnify and hold the other party harmless from any and all claims, demands, costs and expenses, including reasonable attorney's fees for the defense thereof, arising from the indemnifying party's, or its employee's, agent's or representative's wrongful or negligent act or omission in or about the Venue(s). In case of any action or proceeding brought against either party by reason of any such claim, upon notice from such party, the indemnifying party covenants to defend such action or proceeding (by counsel reasonably satisfactory to the other party), unless such action or proceeding alleges the joint or concurrent wrongful or negligent act or omission of both parties. This Section 17 shall survive termination of this Agreement."

See Notice of Motion (motion sequence number 001), Exhibit N.

Wilbourn initially commenced by serving and filing a summons and complaint against Wasserstein and CCK and Wasserstein filed answers. *See* Notice of Motion (motion sequence number 001), Exhibit C, Exhibit D. Thereafter, CCK commenced a third-party action against the GES defendants, by serving a summons and complaint that set forth one cause of action for contribution and/or indemnification. *Id.*; Exhibit E. The GES defendants filed an answer to this complaint that included a cross claim for contribution. *Id.*; Exhibit F. Wilbourn served a

supplemental summons and complaint that names all of the instant defendants and sets forth one cause of action for negligence. *Id.*; Exhibit G. The GES defendants filed an answer to plaintiff's supplemental complaint, that sets forth a cross claim against Wasserstein and CCK for common-law and contractual indemnification. *Id.*; Exhibit H. Wasserstein and CCK filed a joint answer to the plaintiff's supplemental complaint that includes cross claims against GES for contractual indemnification and breach of contract. *Id.* Now before the court are the respective motions of Wasserstein and CCK (motion sequence number 001) and GES (motion sequence number 002) for summary judgment to dismiss the supplemental complaint and all of the cross claims asserted.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1st Dept 2003). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). The court's role is "issue-finding, rather than issue-determination". *Sillman v Twentieth*

Century-Fox Film Corp., 3 NY2d 395, 404 (1957) (internal quotations omitted). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Wasserstein's and CCK's Motion

In their motion, Wasserstein and CCK argue that they cannot be held liable for negligence, as a matter of law, because the support bracing that Wilbourn tripped on was “open obvious and not inherently dangerous.” *See* Notice of Motion (motion sequence number 001), McNeil Affirmation, ¶ 54. The court disagrees.

To establish their entitlement to summary judgment, *defendants have the burden to demonstrate as a matter of law* that they maintained the subject property in a reasonably safe condition and neither created the alleged dangerous or defective condition which posed a foreseeable risk of injury, nor had actual or constructive notice thereof. *Stryker v. D'Agostino Supermarkets Inc.*, 88 AD3d 584 (1st Dept 2011); *Westbrook v. WR Activities-Cabrera Markets*, 5 AD3d 69 (1st Dept 2004). If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger, however, it does not abate the duty to maintain the premise in a reasonably safe condition. *See Juoniene v. HRH Construction Corp.*, 6 AD3d 199 (1st Dept 2004); *Garrido v. City of New York*, 9 AD3d 267 (1st Dept 2004). Additionally, the issue of whether a dangerous condition is open and obvious is fact-specific, and generally a question for a jury. *See Juoniene v. HRH Construction Corp.*, 6 AD3d at 200; *Shah v. Mercy Med. Ctr.*, 71 AD3d 1120 (1st Dept 2010). “There is no bright line test for determining

what is open and obvious. The test is whether ‘any observer reasonably using his or her senses would see’ the condition” *Centeno v. Regine’s Originals, Inc.*, 5 AD3d 210, 211 (1st Dept 2004); *see also Pinto v Selinger Ice Cream Corp.*, 47 AD3d 496, 497 (1st Dept 2008). Moreover, “[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” . *Villano v Strathmore Terrace Homeowners Ass’n*, 76 AD3d 1061, 1062 (2d Dept 2010)(citations omitted).

Here, significantly, Wasserstein and CCK failed to demonstrate, as a matter of law, that the subject premises was in a reasonably safe condition. The “duty to maintain [a] premises in a reasonably safe condition is analytically distinct from the duty to warn, and that liability may be premised on a breach of the duty to maintain [a] reasonably safe condition...even where the obviousness of the risk negates any duty to warn”. *Cohen v. Shopwell, Inc., Inc.*, 309 AD2d 560, 562 (1st Dept 2003); *see also Garrido v. City of New York*, 9 AD3d 267, 268 (1st Dept 2004); *Westbrook v. WR Activities-Cabrera Mkts.*, 5 AD3d 69, 73 (1st Dept 2004)(Summary judgment denied where defendant offered no evidence on the question of whether it maintained the subject supermarket in a reasonably safe condition). Instead, Wasserstein and CCK merely argue that the photographs introduced at the previous depositions show that the support bracing on which Wilbourn tripped “was not isolated or hidden, but in plain sight”, and, therefore, open and obvious, precluding a finding of liability as to them. *See* Notice of Motion (motion sequence number 001), McNeil Affirmation, ¶ 58. While it is not disputed that the 12-inch metal support bracing bars which plaintiff fell on, were not covered or otherwise difficult to see, Wilbourn testified that “when I walked into the booth, I didn’t look at it [i.e., the support bracing] ... I

didn't look at it until after I fell." *Id.*; Exhibit J at 49. This testimony may show that Wilbourn was "unwary" and "distracted", at the time of her fall, creates an issue of fact as to whether the support bracing may have been "rendered a trap," which issue is not disposable on a motion for summary judgment. *Villano v Strathmore Terrace Homeowners Ass'n*, 76 AD3d 1061, 1062 (2d Dept 2010); *see also Centeno v. Regine's Originals, Inc.*, 5 AD3d 210 (1st Dept 2004)(issues of fact as to whether allegedly dangerous condition in store was open and obvious to plaintiff store customer, who tripped on base of a garment rack); *Nunez v. Wah Kok Rlty Corp.*, 110 AD3d 560 (1st Dept 2013)(triable issues of fact as to whether a large, spreading Christmas tree which plaintiff tripped on was open and obvious). As such, Wasserstein's and CCK's motion for summary judgment are denied.

GES's Motion

GES's motion seeks the same relief as Wasserstein's and CCK's motion and raises substantially the same arguments. Accordingly, for the same reasons as were stated above, the court denies GES's motion.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

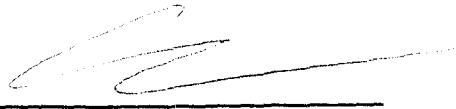
ORDERED that the motion, pursuant to CPLR 3212, of defendants Wasserstein Enterprises, LLC and CCK Events, LLC (motion sequence number 001) is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant Global Experience Specialists, Inc. f/k/a GES Exposition Services, Inc. i/s/h/a GES, Inc., Global Exposition

Services, Inc., Global Experience Specialists, Inc. and GES Exposition Services, Inc. (motion sequence number 002) is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties, with notice of entry.

Dated: New York, New York
February 8, 2014



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\wilbourn wasserstein new original.wpd

FILED
MAR 08 2014
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