

Joachim v AMC Multi-Cinema, Inc.

2014 NY Slip Op 31749(U)

July 2, 2014

Sup Ct, New York County

Docket Number: 101417/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

BRIGITTA JOACHIM,
Plaintiff,

-against-

AMC MULTI-CINEMA, INC., AMC EMPIRE 25 and
AMC ENTERTAINMENT, INC.,
Defendant .

INDEX NO. 101417/12
MOTION SEQ. NO. 004

The following papers were read on this motion by defendants for summary judgment.

FILED

PAPERS NUMBERED

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

JUL 08 2014

Answering Affidavits — Exhibits (Memo) _____

Reply Affidavits — Exhibits (Memo) _____

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

This is a negligence "trip-and-fall" action brought by Brigitta Joachim (plaintiff) against AMC Multi-Cinema, Inc., AMC Empire 25, and AMC Entertainment, Inc. (collectively, defendants) to recover damages for injuries allegedly sustained to her back and knees when she tripped and fell while exiting a movie screening. Plaintiff alleges that a raised rubber or metal strip separating the aisle seats from the theater stairs caused the fall. Before the Court is defendants' motion for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint. The parties have completed discovery and the Note of Issue has been filed.

BACKGROUND

This action arises out of an accident that occurred on November 12, 2009 when plaintiff tripped and fell in defendants' movie theater between approximately 8:30 and 9:00 PM (see Plaintiff Deposition [EBT], Affirmation [Aff.] in Support, exhibit D at p. 8-9; Bill of Particulars [BP], exhibit C, at 1). Plaintiff testified that she arrived at the theater located at 234 West 42nd

Street, New York, NY where she was meeting her friend, Lois Gordin (Gordin), for a pre-screening of the movie "2012" (see Plaintiff EBT at 9, 36). Upon entering the theater, plaintiff noticed that the lights were unusually dim and that she remarked about it with other patrons (*id.* at 14, 16). Plaintiff alleged that there might have been a problem with the theater lighting, although she did not raise the issue with any movie theater personnel (*id.* at 14). Plaintiff was unable to recall specific details about the lighting, such as whether the theater was lit by wall sconces or ceiling lights (*id.* at 18, 21, 22).

Plaintiff testified that she and Gordin arrived at their seats without issue and that she did not get up at any point during the movie (*id.* at 13, 26). Once the movie ended, but before the theater lights returned, plaintiff and Gordin arose from their seats (see Gordin EBT, Aff. in Support, exhibit G at 19-20). Plaintiff and Gordin proceeded to exit the theater by walking towards the same staircase which they ascended earlier (Plaintiff EBT at 25). When plaintiff reached the stairs, she claims that she tripped and fell forward onto the step due to a raised "light strip" located between the aisle and the stairs (*id.* at 27). Plaintiff alleges that the fall resulted in permanent injuries (*id.* at 35).

Plaintiff testified that an employee of the theater came to assist her after she fell, saying that "people trip here all the time" (Plaintiff EBT at 29), which Gordin corroborates in her testimony (Gordin EBT at 36). Plaintiff testified that she did not notice the raised strip at any time before she tripped over it (Plaintiff EBT at 33), although she was unable to recall whether she was looking at the floor as she approached the theater steps (*id.* at 28). Similarly, Gordin states that she saw plaintiff trip on a raised runner, which separated the cement aisle floor from the carpeted stairs, since it was not "glued all the way down" (Gordin EBT at 25).

Defendants' facility manager, Yasser Mendez (Mendez), testified to the general inspection and cleaning practices of the theater (Mendez EBT, Aff. in Support, exhibit F at 7-8).

Mendez's duties included daily facility checks and addressing any known issues by reporting them to the general manager (*id.* at 7-8). Mendez testified that he would perform walk-throughs of the theater's auditoriums "about once a week... usually on a Monday," inspecting for damage that may have occurred over the weekend (*id.* at 66-67). Aside from Mendez, no other AMC employee was responsible for performing weekly inspections of the auditoriums (*id.* at 72). The theater maintained a sub-contract with a cleaning company that provided basic janitorial services, like mopping and sweeping, each night after the theater closed (*id.* at 10-11). During the day, AMC employees were responsible for cleaning the theater of discarded food products between showings (*id.* at 11).

Mendez was further responsible for maintaining theater lighting, replacing light bulbs and light fixtures when needed, sometimes hiring an outside company to perform extensive repairs (*id.* at 12-13). Mendez asserted that the theater never maintained a light strip along the inner portion of the stairs (*id.* at 44) but that a rubber molding serves as a transition between the concrete aisle and carpeted steps (*id.* at 48). He was responsible for checking and replacing the rubber molding with glue when it became worn or loose (*id.* at 48-49). Mendez was unable to recall specific instances where the molding or lighting needed repairing around the date of the accident (*id.* at 49, 52). Mendez did not recall plaintiff's fall (*id.* at 20, 46), nor did he offer testimony as to whether the general cleaning and inspection routines were followed prior to the accident (*id.* at 67). He did not keep any logs recording his weekly inspections (*id.*).

Now before the Court is defendants' motion for summary judgment, pursuant to CPLR 3212, seeking dismissal of the complaint. In support of their motion defendants proffer that they are entitled to dismissal as plaintiff is unable to conclusively identify the defective condition causing her fall. Secondly, defendants contend that plaintiff is unable to show that the defendants created or had notice of the hazardous condition before the accident. Finally,

defendants assert that plaintiff is unable to show that inadequate lighting contributed to her fall. Plaintiff has responded in opposition to this motion, asserting that she consistently identified the raised strip as the cause of her fall and that the defendants failed to meet their prima facie entitlement to summary judgment on the issues of notice and adequate lighting. Defendants submit a reply.

In support of their summary judgment motion the defendants submit, *inter alia*, a verified BP; transcript of Plaintiff EBT; transcript Mendez EBT; transcript of Gordin EBT; and photographs of the theater in which plaintiff fell.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1984]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81[2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues of fact exist, not to determine the merits of any such issues (*see Sillman v*

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Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

The Court notes that in her complaint and BP plaintiff states, *inter alia*, that she relies on the doctrine of *res ipsa loquitur* to demonstrate defendants' negligence (see Aff. in Support, exhibit A at 11; exhibit C at 2). Defendants proffer in support of their motion that the doctrine of *res ipsa loquitur* is inapplicable to trip and fall cases. Plaintiff does not address this argument in her opposition papers, and thus, it is deemed abandoned (see *Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833 [2d Dept 2003]; *Musillo v Marist College*, 306 AD2d 782, 784 n [3d Dept 2003]). As such, defendants are entitled to dismissal of those parts of plaintiff's claim predicated on that theory.

Defendants proffer that they are entitled to summary judgment dismissing the complaint in its entirety, as a matter of law, because plaintiff is unable to conclusively identify the cause of her fall. Defendants' argument hinges on plaintiff's mistaken belief that she tripped over a "light strip" running between the stairs and the aisle, which does not exist in the theater. In opposition, plaintiff argues that she unequivocally and consistently identified the raised transition between the steps and aisle as the cause of her fall, and that her mistake as to whether the raised transition contained lights should not warrant dismissal.

A landowner has a duty to maintain its premises in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to third parties, the potential seriousness of the injury, and the burden of avoiding the risk (see *Basso v Miller*, 40 NY2d 233, 241 [1976] [internal quotation marks omitted]; *Perez v Bronx Park South Assoc.*, 285 AD2d 402,

403 [1st Dept 2001]). This duty applies equally to landowners and tenants operating places of public assembly, such as theaters, requiring them to provide the public with a reasonably safe premises, including safe means of ingress and egress (see *Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 322 [1st Dept 2006], *affd* 8 NY3d 931 [2007]; see also *Masillo v On Stage, Ltd.*, 83 AD3d 74, 79 [1st Dept 2011]). However, in order to recover damages for an alleged breach of this duty, the plaintiff must demonstrate that the defendant created or had actual or constructive notice of the hazardous condition that caused the plaintiff's injury (see *Branham*, 31 AD3d at 322).

In order to constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length or time prior to the accident to allow the defense to discover and remedy it (see *Perez*, 285 AD2d at 403). "To meet its initial burden on the issue of lack of constructive notice, the defendants must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (see *Levine v Amverserve Assn., Inc.*, 92 AD3d 728, 729 [2d Dept 2012], quoting *Birnbaum v New York Racing Assn., Inc.*, 57 AD3d 598, 598-599 [2d Dept 2008] [internal quotations marks omitted]). "Once a defendant establishes prima facie entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof" (*Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]). It is well settled, however, that "rank speculation is not a substitute for the evidentiary proof in admissible form that is required to establish the existence of a triable question of material fact" (*Castore v Tutto Bene Restaurant Inc.*, 77 AD3d 599, 599 [1st Dept 2010]).

Here, the facts do not compel a conclusion that plaintiff relies on mere speculation as to the cause of her accident, which would justify dismissal (*cf. Smith*, 50 AD3d at 501). The present case is distinguishable from *Smith v Costco Wholesale Corp.*, where the defendant was entitled to summary judgment as a matter of law because the plaintiff admitted that she

"assume[d]' and 'think[s]'" she fell because the floor was wet, although she was unable to recall how long the water was there nor able to identify any debris on the floor (*id.*) Further, in *Smith*, the defendant provided testimony that no problems were detected during an inspection prior to plaintiff's fall, and that no liquid was found on the restroom floor during the inspections after the accident (*see id.* at 500).

Here, plaintiff consistently attributed the cause of her fall to a strip separating the aisle from the theater steps. Indeed, Gordin, the non-party witness corroborates plaintiff's testimony in this respect. In addition, defendants' witness had no recollection of the accident or whether inspections of the theater were conducted before or after plaintiff's fall. Accordingly, this Court finds that her inability to recall whether the strip contained lights does not defeat her claim (*see Diaz v 1100 Wyatt LLC*, 99 AD3d 532, 532 [1st Dept 2012] ["Despite never seeing the crack or hole at the time of the accident, plaintiff attributed his fall to that condition. Thus, defendant did not sustain its burden of demonstrating... that the alleged sidewalk defect was not the cause of plaintiff's fall"]; *Tiles v City of New York*, 262 AD2d 174 [1st Dept 1999] [affirming denial of defendant's summary judgment motion despite plaintiff's inability to state with certainty the reason for his fall]).

Defendants further argue that they should be entitled to summary judgment since plaintiff has failed to set forth sufficient evidence establishing that inadequate lighting was the cause of her fall. In cases involving theater lighting, the First Department has recognized the tension inherent to properly operating a theater, to wit, the need to provide adequate light for patrons to move about but also sufficient darkness so patrons can enjoy the show (*see Masillo*, 83 AD3d at 80). However, the burden still remains on the defendant in a summary judgment motion to establish adequate lighting as a matter of law (*see Branham*, 31 AD3d at 322, *affd*, 8 NY3d 931 [2007]; *Masillo*, 83 AD3d at 79)

The First Department held in *Branham v Loews Orpheum Cinemas, Inc.*, which the Court of Appeals later affirmed, that the defendant was entitled to summary judgment on the issue of adequate lighting (*see Branham*, 31 AD3d at 322). The Court noted in *Branham* that the theater provided Building Department records, showing that the theater had never been issued a violation for inadequate lighting, and photographs of its aisle lighting during performances (*id.* at 321). Similarly, in *Masillo v On Stage, Ltd.*, the theater prevailed on a summary judgment motion when it provided photographic evidence of aisle lighting and expert testimony indicating that light conditions complied with building code requirements (*see Masillo*, 83 AD3d at 77-79).

The foregoing cases which granted defendant-theaters summary judgment on the issue of adequate lighting are sufficiently distinguishable from the present case to justify a different result. Unlike in *Branham* and *Masillo*, the defendants do not include any expert testimony, evidence of compliance with building code records, or photographs of the aisle lighting in darkened conditions (*see Aff. in Support*, exhibit H). Instead, defendants only provide pictures in support of their motion where all the theater lights, including the floodlights and wall sconces, are illuminated (*id.*). In the absence of such evidence, this Court finds that defendants have failed to establish as a matter of law that they provided adequate lighting during the movie.

Finally, defendants allege that even if plaintiff conclusively contributed her fall to the rubber transition molding, they are still entitled to summary judgment as a matter of law due to plaintiff's failure to establish that defendants created or had actual or constructive notice of the condition. Defendants failed to establish that they lacked constructive notice as the deposition testimony of Mendez, upon which they rely, only referred to general inspection and cleaning practices of the theater and did not provide evidence as to when the area in question was last inspected (*see Jackson v Manhattan Mall Eat LLC*, 111 AD3d 519 [1st Dept 2013] [affirming

denial of summary judgment when defendants only provided testimony as to general cleaning and inspection procedures without indicating when the grates on which plaintiff fell were last inspected, cleaned, or maintained] [internal citations omitted]; *Levine*, 92 AD3d at 729; *Birnbaum*, 57 AD3d at 599; *Kazimir v Cornyn*, 30 AD3d 380 [2d Dept 2006]; see also *Lorenzo v Plitt Theatres, Inc.*, 267 AD2d 54, 56 [1st Dept 1999]).

Thus, this Court finds that defendants have failed to meet their prima facie burden of establishing entitlement to summary judgment as a matter of law, demonstrating that they neither created nor had actual or constructive notice of any hazardous conditions prior to the accident. As such, the Court need not address the sufficiency of plaintiff's opposition papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Instead, triable issues of fact remain in the record as to whether the theater had notice of the defective condition. Defendants' motion for summary judgment is denied, except with respect to the aforementioned *res ipsa loquitur* theory on which plaintiff relies, which is considered abandoned.

CONCLUSION

For these reasons and upon the forgoing papers, it is,

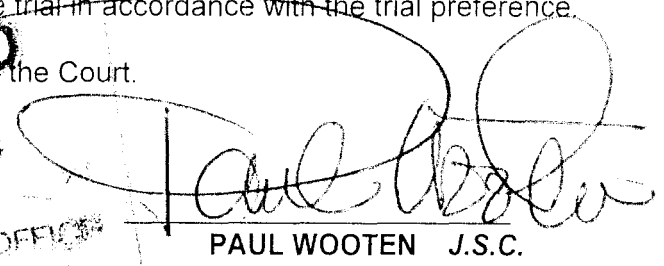
ORDERED that the motion by defendants for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint is denied except as to plaintiff's complaint based on the doctrine of *res ipsa loquitur*, which is dismissed; and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry upon the defendant and upon the General Clerk's Office, which is directed to place this matter back on the trial calendar in Part 40 for immediate trial in accordance with the trial preference.

This constitutes the Decision and Order of the Court.

Dated: 3/2/14

FILED
JUN 03 2014
NEW YORK
COUNTY CLERK'S OFFICE


PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
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