

Dresdner v Cablevision Sys. Corp.
2015 NY Slip Op 31730(U)
August 10, 2015
Supreme Court, Bronx County
Docket Number: 305910/2011
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

FANNY DRESDNER,

INDEX NUMBER: 305910/2011

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

**CABLEVISION SYSTEMS CORPORATION,
CENTRAL PLAZA ASSOCIATES, LLC and
CCG HOLDINGS, INC.,**

Defendants.

The following papers numbered 1 to 3,

Read on this Defendants' Motion for Summary Judgment

On Calendar of 4/6/15

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendants' motion for summary judgment is granted for the reasons set forth herein.

The within action involves plaintiff's claim that she was seriously injured when she tripped and fell in defendants' movie theater on November 13, 2010. Plaintiff claims that she fell as she walked down the steps to her seat due to defendants' failure to provide adequate lighting and/or a handrail in the theater. Defendants move for summary judgment arguing that they did not beach an duty of care to the plaintiff or to the public in general. Defendants contend that although the movie was already playing at the time of plaintiff's accident, the stairs were clearly visible due to lights embedded in the steps, ambient lighting from the moving screen, exit aisle lighting from the back of the theater and dimmed overhead lighting.

Plaintiff testified at her deposition that that she went to the Clearview Theater to see a movie and had never been to that theater before the date of the accident. When plaintiff entered the auditorium, the movie had already begun and was playing on the screen. Plaintiff testified that she did not see any lighting in the area immediately after passing through the entrance door of the auditorium. She testified that "it was very dark. I couldn't see anything." The overhead house lights were not on at the time she entered the auditorium. The only light was coming from the screen which was projecting the movie which plaintiff claimed "was not enough to illuminate anything." Plaintiff did not see any lights on the staircase she intended to descend to reach the aisle seats and did not see embedded lights on the edge of the step of the staircase at the time of the accident. Plaintiff testified that there was no glow-in-the-dark tape around the edge of the steps or the staircase. Plaintiff could not see whether the auditorium was crowded or sparsely filled with moviegoers because it was "very dark". Plaintiff testified that as she descended the stairs, she looked down and reached out to hold on to a handrail but there was no handrail. She tried to hold on to the side of the seats as she walked, but they were too low and she could not hold them. Plaintiff testified that she was caused to fall on the third step of the staircase she was attempting to descend to reach the aisle seating and testified that "I was putting one foot in front of the other because I couldn't gauge where the next step was." Plaintiff testified that "... as I was putting one foot in front of the other, the first step was a narrow step, the second step was narrow, as well, so I expected the third step to be also narrow, but it wasn't it was much wider and longer. So I totally lost my balance and twisted my ankle and fell backward." "...there was a big difference between the first two sets of - - the first two steps and the third step. It was in depth, it was twice or three times the depth of the first steps." After plaintiff fell backwards onto the staircase, she cried out in pain and a moviegoer approached her.

Non-party witness Steven Kushnick, the moviegoer who went to plaintiff's assistance, testified at a deposition that he recalled the accident. He arrived early to the theater, entered and was seated in the aisle seats in the middle of the auditorium. Mr. Kushnick did not have any difficulty observing the steps on the staircase and navigating down the staircase to reach the aisle seats when he first entered the auditorium because the overhead house lights had not been dimmed or turned off since the movie had not started. As Mr. Kushnick walked down the steps, he saw lighting around the edges of the stairs and he was able to tell there were steps because of the lighting. While the previews to the movie played, the overhead lights were on, but as the movie began, the lights "cut out entirely" and "it was dark in the theater." However, the lights that were along the edge

of the stairs stayed on when the movie started. Additionally, the movie on the projection screen cast a certain amount of ambient lighting back into the auditorium. Mr. Kushnick did not know whether there was a wall fixture in the back wall of the theater that provided additional lighting. He testified that "I don't know if there was a specific lighting for that particular walkway... versus the rest of the theater." When he first heard plaintiff cry out in pain, she was to the right of where he was sitting, on his same aisle. Plaintiff had come down approximately 10 steps to the area where she fell. Mr. Kushnick did not see whether the steps of the staircase were uniform at the location of plaintiff's fall and he did not know whether the steps were of different dimensions. As he was helping plaintiff out of the theater, the lights were still low and he was able to see the steps as he helped walk her out of the auditorium. Mr. Kushnick testified that he had no trouble finding the exit. Mr. Kushnick also testified that when he was with plaintiff in the auditorium, an employee of the theater came over and plaintiff and the employee had a conversation where she explained that she twisted her ankle. When Mr. Kushnick returned into the auditorium after helping plaintiff out, he returned to his seat and he was able to see the steps as he was walking down to his seat. He had no difficulty whatsoever getting to his seat. Mr. Kushnick described the lights on the stairs as not being a uniform strip, but "kind of like a Christmas light where it was on, on a dark space, on, then a dark space." He did not look to see whether any of those lights were out. He testified that it was a fair statement that if there were some lights out on the date of the incident on the stair treads he may not have noticed.

Raymond Ocana, the theater manager for defendants, testified at his deposition that on the date of plaintiff's accident, he arrived at the theater at about 5:00 p.m. From the time he arrived until the time of the accident, he did not perform any inspections of the auditorium where the accident occurred. A walk-through would have been performed by the opening manager who would have opened the theater in the morning. The walk-through included checking the lighting in the movie auditoriums. The manager would set the lights at the maximum level and would check to see if there were any bulbs out. In the auditoriums, there were overhead ceiling lights and step lights on the floor. Additionally, there were aisle lights at the back of the auditorium and wall sconces, as well as ambient light from the movie screen projection. The step lights are at the edge of each step and it is a strip of yellow lights called Tivoli lights. The step lights are checked each day during the walk-through. Mr. Ocana testified that the lights in the auditorium were automated and work in conjunction with the movie projector, with a cue that alerts the lights to "go down" when the movie starts, to a lower level rather than

the highest level. Then there is another cue at the end of the movie trailers that brings it to the movie lighting level, with another cue at the beginning of the credits that bring the lights back up to the mid-level and at the end of the movie the lights go back to the highest level. However, the step lights are always on and are not automated. With respect to the steps, each landing where there are seats have larger steps, then there are smaller steps leading to those landings. Mr. Ocana was notified that someone had fallen in Auditorium 4 and his assistant manager went to the auditorium first while he went upstairs to bring up the lights so he could see what was going on in the auditorium. He also called 911. Mr. Ocana testified that he spoke to plaintiff who told him that she did not see a step. He inspected the stairs after the movie ended and his inspection revealed that the step lights were on.

The court's function on this motion for summary judgment is issue finding rather than issue determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*. The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a “...reasonably safe condition, considering all of the circumstances including the purposes of the person’s presence and the likelihood of injury...” Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the owner created, or had actual or constructive notice of the dangerous or defective condition. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986); Garcia v. Delgado Travel Agency, Inc., 771 N.Y.S.2d 646 (1st Dept. 2004). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Id. Landowners and tenants who operate places of public assembly, such as theaters, are similarly “charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress”. Peralta v. Henriquez, 100 N.Y.2d 139, (2003); Gallagher v. St. Raymond's Roman Catholic Church, 21 N.Y.2d 554 (1968).

In the instant matter, the motion for summary judgment must be granted. Contrary to the plaintiff’s contention, defendants established its prima facie entitlement to judgment as a matter of law by demonstrating, through competent evidence, that the lighting in the area of the accident was adequate. There is no evidence, other than the plaintiff’s self-serving statements, that the auditorium was completely dark and the steps were not illuminated at the time of plaintiff’s accident. Defendants have presented evidence that at the time of plaintiff’s accident, the stairs were visible due to lights embedded in the steps, ambient lighting from the moving screen and exit aisle lighting from the back of the theater. The independent eye witness, Mr. Kushnick’s, testified unequivocally that the lights along the edge of the stairs, the Tivoli lights, stayed on after the movie started and were on at the time of plaintiff’s fall. Additionally, as the movie projected on the screen, it cast an additional amount of ambient lighting back into the auditorium. Moreover, as he was helping plaintiff out of the theater after her fall, he described the lights in the auditorium as still low, but he was able to see the steps as he walked with her and he had no trouble whatsoever finding the exit. He heard plaintiff tell the defendants’ employee that she twisted her ankle, however, he did not hear any reference to the lighting. When Mr. Kushnick returned into the auditorium after helping plaintiff out, he returned to his seat and he was able to see the steps as he was walking down to his seat. He had no difficulty whatsoever getting to his seat. Plaintiff’s accident happened on the same aisle where he was seated and he describes the area of plaintiff’s fall as being

sufficiently lit enabling one to see the steps.

A theater owner breaches a duty to its patrons in the operation of the lighting when it creates a dangerous state of darkness. Masillo v. On Stage, Ltd., 921 N.Y.S.2d 20 (1st Dept. 2011). When determining whether a theater owner maintained its premises in a reasonably safe condition with regard to operation of the lighting, consideration must be given to both sides of the tension inherent to the proper operation of a theater, that is, the need for sufficient light for patrons to move around, and sufficient darkness for patrons to see the performance comfortably. Id. As noted by the First Department in Gilson v. Metropolitan Opera, 788 N.Y.S.2d 342 (1st Dept. 2005), there is a necessity for lights being turned down so patrons may enjoy a showing at a theater. “Were we to now impose on the Metropolitan Opera a duty to escort into his or her seat any audience member not seated once the house lights were down, based upon the relied-upon guideline, we would, in effect, be punishing it for attempting to ensure an exceptional level of courtesy to the audience and the performers. Such a ruling could also lead to a new and heightened standard of care for all theatrical venues in which audience members sometimes take their seats after the house lights are turned down, such as movie theaters, concert halls and other arenas.”

In the instant matter, the evidence shows that there was no dangerous state of darkness. Consistent with Mr. Kushnick’s testimony that the step lights were working at the time of plaintiff’s fall and one could see where one was walking, Mr. Ocana inspected the step lights after the movie ended and found them to be working. Mr. Ocana’s testimony is consistent with the incident report he prepared within 24 hours after the accident wherein he provides that the “[f]loor is in good condition”. Mr. Ocana’s testimony established that the step lights were always on including while the movies played. Additionally, his testimony that plaintiff told him that she fell because “she could not see a step” is also consistent with the statement he attributes to her in his incident report. The report also correctly provides that there was an eyewitness to the accident, albeit his last name was misspelled.

In Masillo, the First Department held that the theater did not proximately cause injuries that patron suffered from fall from on the stairs by suddenly turning the lights off before the performance, reasoning that since the strips of lights on stairs were functioning, the patron of theater should have expected that lights in theater would be turned off before show began, common law authority did not prescribe procedure of flashing or dimming lights before going off, and preventing the house lights from being turned off until everyone was

seated would have amounted to prescription of conduct exceeding duty of reasonable care. In Branham v. Loews Orpheum Cinemas, Inc., 8 N.Y.3d 931 (2007), the plaintiff was injured when returning to her seat from the restroom mid-movie, she tripped over a boy who was sitting in the aisle of the theater. The theater showed that wall sconces were dimmed during the movie but that the aisle lighting remained on, illuminating a path to the front row. Similarly to this case, plaintiff submitted her testimony that she saw no lights in the theater. According to plaintiff, it was very dark in the theater at the time she left and when she returned. She did not observe any lights along the floor of the center aisle, nor did she see any lighted exit signs or lights on the theater walls. The Court of Appeals found that plaintiff failed to raise a triable issue of fact whether the lighting in the theater was inadequate. In Joachim v. AMC Multi-Cinema, Inc., --- N.Y.S.3d ---- 2015 WL 3497622 (1st Dept. 2015), the First Department denied summary judgment on the grounds that it could not be shown that the auditorium was adequately lit, much less whether inadequate lighting was a proximate cause of plaintiff's fall. In that case, the Court noted that although the facilities manager averred in his affidavit that annexed photographs reflected the lighting conditions in the auditorium on the date of plaintiff's accident, at his deposition, one year earlier, he testified that he was not present at the theater at the time of the accident and had no independent recollection of the accident. Unlike the fact is Joachim, in the instant matter, Mr. Ocana, the theater manager, was present at the time of the accident and conducted an inspection of the accident location which he memorialized in his incident report.

Accordingly, the motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and order of this Court.

Dated: 8/10/15



Hon. Alison Y. Tuitt