

Sada v August Wilson Theater
2015 NY Slip Op 31977(U)
October 23, 2015
Supreme Court, New York County
Docket Number: 152499/13
Judge: Jennifer G. Schechter
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

-----x
JOHN SADA,

Index No. 152499/13

Plaintiff,

-against-

AUGUST WILSON THEATER,
Defendant.

-----x
JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, defendant moves for summary judgment dismissing the complaint. The motion is denied.

Background

On January 25, 2013, plaintiff and his wife went to see "Jersey Boys" at the August Wilson Theater. It had snowed about an inch that day (Affirmation in Support [Sup Aff], Ex G, Sada Deposition [SD] Tr 18:6-20). After giving the usher his ticket, Mr. Sada noticed that the platform mat in the theater was wet and that the area around the mat was wet (SD Tr 43:14-16, 47:15-18).

During intermission, plaintiff wanted to step outside. As he was leaving, he noticed that the mat leading to the outside area of the theater was wet and told the usher "this mat is wet, you should do something about it. [The Usher] said, I will get right on it" (SD Tr 60:16-21, 65:18-22, 80:13-18). Within 15 minutes Mr. Sada re-entered the theater at a "normal pace" (SD Tr 75:11-14, 79:12-19). He then slipped and fell when taking a step off a wet mat onto the

marble floor immediately before the step in the theater lobby, injuring his right shoulder.

Mr. Sada subsequently commenced this action against the theater.

Defendant moves for summary judgment dismissing the action on the ground that it cannot be found liable for plaintiff's injuries because plaintiff cannot establish that defendant "created said condition or otherwise had notice of same or had sufficient time to remedy said condition" (Sup Aff at ¶ 22).

In support of its motion defendant relies on testimony from Andre Draughn, the usher on the night of the incident who witnessed the plaintiff's fall. Mr. Draughn recalled that he had cautioned plaintiff not to run after he observed him hurrying back into the theater at the end of intermission (Sup Aff, Ex H, Andre Draughn [AD] Dep Tr 37:23-25, 44:19-24, 45:17-20, 47:14-24). He testified that no one had complained to him about the floor being wet and that he believed it was mopped during intermission (AD Tr 80:2-15, 82:14-21, 87:11-21, 93:10-12).

Defendant also relies on testimony by Pedro Martinez, the porter on duty the night of the incident, and Anah Klate, the Associate Theater Manager, explaining the procedures for keeping the theater clean and dry.

Defendant urges that based on the evidence, at most it "had a general awareness that moisture might be tracked in due to the weather conditions [and that such] general awareness is insufficient to impute constructive notice of a particular dangerous condition" (Sup Aff at ¶ 23).

Plaintiff opposes the motion arguing that questions of fact remain as to whether defendant had notice of the wet floor and whether defendant caused a dangerous condition based on alleged building-code violations.

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact

that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Defendant urges that it did not create the alleged hazardous condition, have any notice of the condition and that in any event, it is not required to cover the floor with mats or provide an ongoing remedy when a slippery condition exists from moisture tracked inside from outside after a storm.

Even assuming that defendant met its initial burden of establishing entitlement to summary judgment, plaintiff sufficiently raises triable questions of fact (*Signorelli v Great Atlantic & Pacific Tea Co. Inc.*, 70 Ad3d 439 [1st Dept 2010]). Plaintiff testified that he specifically told the usher that the floor was wet and that despite this notice and 15 minutes outside, the condition was not remedied and the "wetness and other defects of the flooring . . . caused him to slip and then to fall . . ." (Affirmation in Opposition [Aff in Opp] at ¶ 17).

Additionally, plaintiff submits the affidavit of its expert engineer, Vincent A. Ettari, P.E., who opines that there were building code violations that might have caused or contributed to plaintiff's fall (Aff in Op, Ex 1). On reply, defendant submits its own expert's opinion, demonstrating that there are questions of fact here.

On this record, summary judgment must be denied.

Accordingly, it is

ORDERED that defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of the Court.

Dated: October 23, 2015



HON. JENNIFER G. SCHECTER