Nicaj v Bethel Woods Ctr. for the Arts, Inc.
2019 NY Slip Op 32402(U)
August 6, 2019
Supreme Court, New York County
Docket Number: 161998/15
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

KRISTINA NICAJ

INDEX NO. 161998/15

MOT. DATE

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MOT. SEQ. NO. 002

BETHEL WOODS CENTER FOR THE ARTS, INC. et al.

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	NYSCEF DOC No(s). 60-81
Notice of Cross-Motion/Answering Affidavits — Exhibits	NYSCEF DOC No(s). 83-92
Replying Affidavits	NYSCEF DOC No(s). 98-100
Interim Order dated 6/19/19	NYSCEF DOC No(s). 101
DVD-Rom (hard copy)	DOC No(s). not efiled

In this personal injury action, plaintiff seeks to recover for injuries she sustained when she tripped and fell due to a tire depression/rut at an outdoor music festival. Defendants move for summary judgment. Plaintiff opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion is denied.

Many of the relevant facts are in dispute. It is undisputed that on May 24, 2014, plaintiff attended a music festival located at Bethel Woods Convention Center in Bethel Woods, New York (the "Bethel Woods grounds"). Plaintiff testified that sometime around 10:30pm, she "fell into a dry tire rut that was on the main pathway" as she headed towards the main stage at the festival. The tire rut was several inches deep and about a foot wide. Plaintiff described the area where she fell as dark. After the accident, plaintiff was taken to a tent where she was seen by a doctor who told her that her ankle was fractured. Plaintiff was thereafter transported by ambulance to Catskills Hospital.

According to plaintiff, she did not recall reading any terms or conditions when she purchased her ticket online. She further stated that she did not know if there was a box to check off regarding the terms of purchase. Plaintiff also testified that she had never seen a document entitled "Wristband Terms of Use"

Defendants argue that they are entitled to summary judgment because plaintiff cannot establish that they created the tire depression nor that they had notice of it. Similarly, defendants argue that plaintiff cannot establish that they provided inadequate lighting or that they had notice of it. Defendants also rely on a release and waiver which they claim plaintiff signed when she purchased her ticket to the festival.

Dated: 8/6/19

HON. LYNN R. KOTLER, J.S.C.

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

Meanwhile, plaintiff contends that there are triable issues of fact as to whether trucks or similar vehicles were permitted on the festival grounds and whether defendants provided adequate lighting. As for the waiver and release, plaintiff argues that it is void under GOL § 5-326, defendant has failed to establish that plaintiff agreed to it and that it is otherwise unenforceable.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court agrees with defendants that they have established as a matter of law that they neither created the tire depression in which plaintiff fell nor did they have notice of it. Scott Dennison, defendant SFX's Director of Risk and Crowd Services, testified that he inspected the entire grounds before anyone was allowed into the festival on the date of plaintiff's accident and any safety hazard would be corrected. Specifically, Dennison, who himself inspected the grounds for three hours every morning, maintained that a depression one inch deep or more would have been filled in. In light of this testimony, along with the fact that defendants have established that trucks were not permitted inside the festival grounds, along with defendants' testimony about operations at the festival, defendants have demonstrated that they did not have either actual or constructive notice of the condition.

In turn, however, plaintiff has raised a triable issue of fact on the issue of whether defendants created the dangerous condition. The sworn affidavit of Simone Delfino, one of plaintiff's friends who attended the music festival on the date of plaintiff's accident, provides in relevant part:

> The pathways at the Festival were not in the best condition. I saw different vehicles around the Festival being used for things like garbage removal and equipment transport. The vehicles created tire marks in the paths and grounds.

Further, plaintiff has submitted videos of the festival which she claims "are fair and accurate representations of the [music festival]". These videos depict, *inter alia*, golf cart-like vehicles traversing the Bethel Woods grounds. These videos and Delfino's claims contradict defendant's testimony on the issue of whether vehicles were permitted on the festival grounds after Dennison performed his inspection. Further, it is undisputed that it rained the morning of plaintiff's accident, thereby giving rise to the possibility that the vehicles could have left tire depressions while traversing the Bethel Woods grounds.

Contrary to defense counsel's contention, it is unavailing that the videos "depict pristine grounds with clear pathways, and lighting…", insofar as the videos buttress plaintiff's theory as to how the tire depression was formed and help to give rise to a triable issue of fact as to whether the defendants caused or created same. On this record, a reasonable fact-finder could conclude that defendants created the dangerous condition which caused plaintiff's accident.

As for the issue of adequate lighting, assuming *arguendo* that defendants had met their burden through their own witnesses' testimony about lighting conditions at the Bethel Woods grounds, plaintiff's expert, Thomas H. Burtness, P.E, opinion that "[t]he [d]efendants failed to plan, design, document, implement, or test a reasonable lighting infrastructure that would meet their contractual duty to "assure the safety and ease of vision of all persons" raises a triable issue of fact. Specifically, Burtness states

that "the lighting infrastructure was minimal, unplanned, haphazard, ill-conceived, and dangerous." The court disagrees with defense counsel that Burtness' claims are speculative or conclusory. Rather, the court finds that his affidavit is sufficient to survive summary judgment.

Finally, defendants argue that plaintiff's claims are nonetheless barred by the release contained in the "Terms and Conditions of Use," incidental as part of plaintiff's ticket purchase. The pertinent language of the General Terms and Conditions states as follows:

> The purchase and/or use of this ticket shall constitute the unconditional acceptance to be bound by any and all of the terms and conditions of this agreement
> ...
>
> VI. You assume all risk or danger incidental to the attraction whether occurring prior to, during, or subsequent to, the attraction
> ...
>
> X. You understand that your use of the ticket is contingent upon your voluntary assumption of all risk and danger incidental to your presence at the event, whether occurring prior, during or after the event, including any acts or omissions of SFX
>
> XI. You agree to indemnify, save and hold harmless the venue, SFX...from any and all injuries, demands, suits, and/or claims.

The language in the release is unambiguous and unequivocal and clearly sets forth that plaintiff assumed all risks incidental to the Bethel Woods grounds. Plaintiff argues that GOL §5-326 applies here. That statutes states:

> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Meanwhile, defendants contend that GOL §5-326 does not apply because the ticket was paid directly to SFX and not Bethel Woods, the owner of the premises. Defendants further argue that the Bethel Woods grounds are not a place of amusement or recreation or similar establishment. The court disagrees on both points. First, the statute plainly provides that a release in favor of an operator, such as SFX, would be void and unenforceable if it was obtained in connection with the purchase of a ticket, the fee for which was paid directly to SFX. Indeed, this reading is constituent with the undisputed legislative intent behind the statute, that unsuspecting patrons not be precluded from bringing a legitimate claim against an owner or operator based upon the fine print on the back of a ticket, or in a text box on a computer screen that plaintiff checked off, as is the case here.

On the second point, defendants cannot cite any caselaw for the proposition that the Bethel Woods grounds, a place where a music festival was held, is not a place of recreation or a similar establishment within the meaning of GOL § 5-326. This court rejects defendants argument as a matter of common sense and statutory interpretation, for even if the Bethel Woods grounds are not a place of recreation, they are similar enough to fall within the ambit of the statute.

Therefore, pursuant to GOL § 5-326, the release is unenforceable. In light of this result, the court declines to consider the parties' remaining arguments about the release.

Accordingly, it is hereby **ORDERED** that defendants' motion is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 8/6/19
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.