Bonilla v Cinema World Prods., Inc.
2020 NY Slip Op 31234(U)
April 17, 2020
Supreme Court, Kings County
Docket Number: 522679/2017
Judge: Debra Silber

At an IAS Term, Part 9 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 17th day of April, 2020.

P R E S E N T:

HON. DEBRA SILBER,
Justice.

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JESSICA BONILLA,

Plaintiff,

- against-

CINEMA WORLD PRODUCTS, INC., FACTUAL PRODUCTIONS, INC. and PICROW STREAMING, INC.,

Defendants.

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DECISION/ORDER

Index No. 522679/2017

MOT. SEQ. 3, 4, 5

The following e-filed papers read herein:	NYSEF #:		
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	44-50	52-68, 89	70-88
Opposing Affidavits (Affirmations)	95-96	92, 95-96	95-96
Reply Affidavits (Affirmations)	100		98

Upon the foregoing papers in this personal injury action, defendant Factual Productions, Inc. (Factual) moves in motion sequence (mot. seq.) three for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the amended complaint and all cross claims[1] asserted against it.

[1] Factual requests dismissal of all cross claims in its affirmation in support, but not in its notice of motion.

Defendant Picrow Streaming, Inc. (Picrow) moves in mot. seq. four for an order, pursuant to CPLR 3212, granting it summary judgment dismissing the amended complaint and all cross claims asserted against it.

Defendant Cinema World Products, Inc. (CWP) moves in mot. seq. five for an order, pursuant to CPLR 3212 (b), granting it summary judgment dismissing the amended complaint and all cross claims asserted against it.

Background

The Trip and Fall Accident

On June 27, 2017, at approximately 6:45 p.m., Jessica Bonilla (Bonilla), a pedestrian, was injured when she tripped and fell on the sidewalk adjacent to the commercial property at 220 Dupont Street in Brooklyn, New York (Cinema World Property).

At her deposition, Bonilla testified that on the date of her accident, she left CrossFit, a fitness gym just down the block from the Cinema World Property, at approximately 6:15 p.m., to go for a run. Bonilla testified that, as she ran on the sidewalk past the Cinema World Property on Dupont Street, she observed a cable guard (which she said was a "dark color") and knowingly stepped over it as she went on her way, without incident. Bonilla further testified that, as she was running back to the CrossFit, going in the opposite direction on the same side of Dupont Street, she saw the cable guard again, and intended to run over it again, but her foot got caught on it, and she tripped and fell and sustained injuries.

After falling, Bonilla observed that the wires covered by the cable guard ran to a trailer that was parked on Dupont Street in front of the Cinema World Property. According to Bonilla's verified bill of particulars, she allegedly "tripped on wires which led from the 'Studio B' garage entrance to a vehicle parked on the street in front of the . . . property and facility [which] were placed perpendicular to the pedestrian traffic."

Bonilla testified that three individuals offered her assistance after her fall: (1) Vincent Schicci, a "freelancer" for the production company, who emerged from the trailer when she fell; (2) Patricia Guignard (Guignard), who identified herself as the "studio manager"; and (3) Scott Buckler.

The Instant Action

On January 19, 2018, Bonilla commenced this personal injury action against CWP by filing a summons and a verified complaint. Bonilla subsequently amended her complaint to add Factual and Picrow as defendants. The amended complaint alleges that defendants owned, operated, maintained and/or leased the Cinema World Property and "utilized/permitted vehicles adjacent to [the Cinema World Property] to run wiring, cables and/or equipment between 220 Dupont and the vehicles located at or near said location" (amended complaint at ¶¶ 23, 32 and 41). The amended complaint further alleges that Bonilla's accident was due to defendants' negligence, and that Bonilla sustained serious injuries "as a result of the dangerous, hazardous and trap-like conditions of the [Cinema World Property]" (*id.* at ¶ 43).

Factual answered the amended complaint, denied the material allegations therein and asserted affirmative defenses, including that "[a]ny and all risks, hazards, defects and damages alleged are of an open, obvious and apparent nature and inherent and known or should have been known to the plaintiff . . ." (Factual answer at ¶ 8). Factual also asserted cross claims against CWP and Picrow for contribution and indemnification.

Picrow answered the amended complaint, denied the material allegations therein and asserted various affirmative defenses. Picrow also asserted cross claims against CWP and Factual for contribution, contractual indemnification and for additional insured insurance coverage.

CWP answered the amended complaint, denied the material allegations therein and asserted several affirmative defenses, including that "[a]ll risks and danger of loss or damages connected with the situation alleged . . . were . . . obvious and apparent and were known by Plaintiff . . ." (CWP answer at ¶31).

After issue was joined, discovery ensued. Bonilla, on March 18, 2019, filed a note of issue and certificate of readiness indicating that discovery was complete.

Defendants' Summary Judgment Motions

Factual, on May 16, 2019, moved for summary judgment dismissing the amended complaint and all cross claims asserted agasint it on the ground that "[t]he alleged condition was open and obvious thereby barring the plaintiff's action as a matter of law." Factual relies on Bonilla's deposition testimony, which "sets forth that in broad daylight, during a jog, she saw and safely stepped over a safety cable guard" and "[u]pon her return

run minutes later, she saw it again but, this time, failed to lift her foot enough and fell." According to Factual, Bonilla's "own testimony admits that the subject cable guard over which she allegedly tripped . . . was open and obvious because it was clearly visible." Importantly, Factual notes that "[n]o party or non-party has acknowledged placing the wire and guard[]" across the sidewalk in front of the Cinema World Property, but "regardless of who placed those items, plaintiff's action is barred as a matter of law and must be dismissed."

Picrow, on May 17, 2019, moved for summary judgment dismissing the amended complaint and the cross claims asserted against it on the ground that it owed no duty to Bonilla "because it did not cause a hazardous condition, nor did it have notice of same." Picrow relies on the deposition testimony of Guignard, Factual's "studio manager," who testified that the trailer (from which the cables ran across the sidewalk) was being used by Factual on the date of Bonilla's trip and fall accident. According to Guignard, Factual rented Studio A at the Cinema World Property from CWP. Picrow submits a copy of its contract with Cinema World Studios, which reflects that it rented Studio B at the Cinema World Property on the date of Bonilla's accident. Electra Lang, an executive producer for Picrow, testified that, on the date of Bonilla's accident, Picrow was not using a generator or any cables outside Studio B or on the sidewalk on Dupont Street.

CWP, on May 17, 2019, moved for summary judgment dismissing the amended complaint and all cross claims asserted against it on the ground that Bonilla admitted that she "assumed an open and obvious risk that was not inherently dangerous (a cover the

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intended use of which was to protect people from tripping on the cables underneath it) when she knowingly attempted to run over the cable cover not one time but two times." CWP argues that "[a]s a person who admittedly saw and knowingly ran over the cable cover just minutes before seeing it again and knowingly attempting to run over it a second time, . . . Plaintiff's actions negated any duty of care owed to her as a matter of law[,]" pursuant to the doctrine of assumption of the risk.

Bonilla's Opposition

Bonilla, in opposition, argues that "there is a question of fact as to whose cables were running across the sidewalk at the time of the accident[,]" since "[e]ach defendant is arguing that the cables and wire guard belonged to the other defendant." Bonilla contends that there is conflicting deposition testimony regarding where the cables were running from (i.e., Studio A or Studio B). Bonilla asserts that "[w]ithout knowing whose wire guard [she] was caused to trip and fall over, defendants must not be granted summary judgment." Bonilla claims, in opposition to Picrow's motion, that there is an issue of fact as to whether or not Picrow created the hazardous condition because the cables at issue went from the trailer into Studio B at the Cinema World Property, the space Picrow had rented from CWP.

Bonilla further argues that defendants' motions must be denied because they have "failed to actually establish that the item [she] tripped over is inherently *safe* . . ." (emphasis added). Bonilla claims there is a question of fact as to whether the cable guard was inherently dangerous based on the deposition testimony of Joseph LaMantia

(LaMantia), who testified on behalf of CWP. LaMantia testified that one month before Bonilla's accident, he had warned individuals running on the street to be careful of the cables. Bonilla further contends that the fact that she saw the cable cover before she fell is "meaningless" because her foot got caught on it, and the cable cover was a "trap-like" condition.

Discussion

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should, thus, only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2005]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). "The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment, as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Manicone v City of New York*, 75 AD3d 535, 537 [2010], quoting *Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If it is determined that the movant has made a prima facie showing of entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [1989]).

"An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition . . . and must warn of any dangerous or defective condition of which it has actual or constructive notice" (*Fishelson v Kramer Properties, LLC*, 133

AD3d 706, 707 [2015]). However, the Second Department has held that an owner or tenant has no duty to protect or warn against a condition that is *both* open and obvious *and not inherently dangerous* (*see Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]; *see also Karpel v National Grid Generation, LLC*, 174 AD3d 695, 696-697 [2d Dept 2019] [holding that "to obtain summary judgment, a defendant must establish that a condition was both open and obvious and, as a matter of law, was not inherently dangerous"]; *Crosby v Southport, LLC*, 169 AD3d 637, 640 [2d Dept 2019]).

Regarding public sidewalks, the Second Department has held that "[a]n abutting owner or lessee will be liable to a pedestrian injured by a dangerous condition on a public sidewalk [unrelated to any condition of the sidewalk material in New York City] only when the owner or lessee . . . created the condition . . . because of a special use . . ." (*Maya v Town of Hempstead*, 127 AD3d 1146, 1147 [2015]; *see also Lahens v Town of Hempstead*, 132 AD3d 954, 955-956 [2015]). Running wires across a sidewalk to provide electricity for an activity at the property is a special use.

"Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury" (*Gorokhovskiy v NYU Hosps. Ctr.*, 150 AD3d 966, 967 [2017]; *see also Karpel*, 174 AD3d at 695).

Here, there is no dispute that either the owner and/or lessee(s) of the Cinema World Property made special use of the sidewalk abutting the Cinema World Property by laying cables and a cable cover across the public sidewalk, which would result in liability

for any unsafe condition caused by that use.[2] While Bonilla's deposition testimony establishes that the cable cover on the sidewalk in front of the Cinema World Property was open and obvious – since she admittedly observed the cable cover before she fell – there is a triable issue of fact as to whether the cable cover on the sidewalk was *also* an inherently dangerous condition.

Bonilla contends that her foot got caught because the cable cover was a "trap-like" condition which was inherently dangerous. LaMantia, who testified on behalf of CWP, testified that one month before Bonilla's accident he had warned individuals running on the sidewalk to be careful of the cables. Thus, CWP seemingly admits that the cable cover on the sidewalk presented a danger to pedestrians/runners, and that it was aware of it. There is nothing in the record to explain why CWP could not provide the companies who rented its studios with sufficient electricity so they would not need to supply it from a generator on a truck. In contrast, none of the defendants have established their prima facie entitlement to summary judgment, because they fail to present any evidence that the cable cover over which Bonilla tripped and fell on the sidewalk was not inherently dangerous.

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[2] The Second Department holdings in *Holdos v American Consumer Shows, Inc.* (91 AD3d 823, 823 [2012]), and *Gonzalez v New York Racing Assoc., Inc.*, (69 AD3d 673 [2010]), are inapposite because those cases did not involve a cable cover on a public sidewalk.

Contrary to defendants' argument that "[t]he alleged condition was open and obvious thereby barring the plaintiff's action as a matter of law," the legal standard to succeed on a summary judgment motion in the Second Department, since 2003 when that court issued its decision in *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003] is, if an owner or tenant wants to prove that it had no duty to protect or warn, the owner or tenant must prove that the condition was both open and obvious and not inherently dangerous.

With regard to CWP's argument that plaintiff's action is barred by the doctrine of assumption of the risk, as jogging brings her activity under the rubric of the doctrine, defendant is similarly in error. As the Court of Appeals recently explained[3], "extension of the doctrine to cases involving persons injured while traversing streets and sidewalks would create an unwarranted diminution of the general duty of landowners--both public and private--to maintain their premises in a reasonably safe condition. As we explained in an earlier case, assumption of the risk "does not exculpate a landowner from liability for ordinary negligence in maintaining a premises" (Sykes, 94 NY2d at 913). The exception would swallow the general rule of comparative fault if sidewalk defects or dangerous premises conditions were deemed "inherent" risks assumed by non-pedestrians who sustain injuries, whether they be joggers, runners, bicyclists or rollerbladers" [internal citations omitted].

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[3] Custodi v Town of Amherst, 20 NY3d 83, 89 [2012]

In conclusion, whether the cable cover which was run across the public sidewalk in front of the Cinema World Property was an inherently dangerous condition is a question of fact for the jury.

There is also a question of fact regarding which of the defendants placed the cables and the cable cover across the sidewalk in front of the Cinema World Property. Guignard, the studio manager for Factual, testified that: (1) the trailer (which the cables came from and ran across the sidewalk) was used by Factual on the date of Bonilla's trip and fall accident, and (2) Factual was using Studio A. However, Bonilla's verified bill of particulars alleges that she "tripped on wires which led from the 'Studio B' garage entrance to a vehicle parked on the street . . ." Although Picrow was renting Studio B at the Cinema World Property on the date of Bonilla's accident, Picrow's executive producer testified that Picrow was not using cables outside Studio B or on the sidewalk in front of the Cinema World Property. Thus, there is conflicting evidence in the record regarding which defendant placed the cables and the cable cover across the sidewalk on the date of plaintiff's accident, which presents an issue of fact that precludes summary judgment on behalf of any of the moving defendants.

Accordingly, it is

ORDERED that Factual's motion in mot. seq. three for summary judgment dismissing the amended complaint and all cross claims asserted against it is denied; and it is further

ORDERED that Picrow's motion in mot. seq. four for summary judgment dismissing the amended complaint and all cross claims asserted against it is denied; and it is further

ORDERED that CWP's motion in mot. seq. five for summary judgment dismissing the amended complaint and all cross claims asserted against it is denied.

This constitutes the decision and order of the court.

E N T E R,

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Hon. Debra Silber, J. S. C.