Hamel v Park Ave. Armory
2020 NY Slip Op 33895(U)
November 20, 2020
Supreme Court, New York County
Docket Number: 450647/2018
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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VERONICA HAMEL, Index No. 450647/2018

Plaintiff

- against - DECISION AND ORDER

PARK AVENUE ARMORY, SEVENTH REGIMENT ARMORY CONSERVANCY, INC., CITY OF NEW YORK, OLD VIC THEATRE, STEWART LAING, MIMI JORDAN SHERIN, MCLAREN ENGINEERING GROUP, ELITE PRODUCTION CONSULT, LIGHTING SYNDICATE LLC, KEVIN BYRNE ARCHITECTS, P.C., OLD VIC THEATRE COMPANY (THE CUT) LIMITED, and HUDSON SCENINC STUDIO,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained April 14, 2017, when she fell while crossing and descending from a rotating stage on premises owned by defendant City of New York and leased to defendant Park Avenue Armory, Seventh Regiment Armory Conservancy, Inc., as she was proceeding to her seat for a theatrical performance there. Defendant McLaren Engineering Group provided construction consulting services, defendant Elite Production Consult installed seating, a

preparatory stage, and drapes, defendant Lighting Syndicate provided lighting, sound, carpentry, and props, and defendant Hudson Scenic Studio provided scenery for the play that plaintiff attended. The court (Frank, J.) dismissed the complaint and all cross-claims against the City in an order dated December 19, 2019. In a stipulation ordered March 19, 2020, plaintiff, Lighting Syndicate, and Hudson Scenic Studio discontinued their claims or cross-claims against defendant Old Vic Theatre Company (The Cut) Limited, which licensed the play. Defendants Laing, Sherin, and Kevin Byrne Architects, P.C., have not appeared.

Lighting Syndicate moves for summary judgment dismissing the complaint and all cross-claims against Lighting Syndicate, C.P.L.R. § 3212(b), and for sanctions against plaintiff. C.P.L.R. § 8303-a; 22 N.Y.C.R.R. § 130-1.1. Elite Production Consult cross-moves for summary judgment dismissing the complaint and all cross-claims against Elite Production Consult. C.P.L.R. § 3212(b). The parties stipulated on the record August 26, 2020, that all the photographs in the record, on which plaintiff's expert engineer based his opinion, were authenticated and admissible for purposes of the motion and cross-motion.

II. ELITE PRODUCTION CONSULT'S CROSS-MOTION FOR SUMMARY JUDGMENT

A. Permissibility

As set forth above, Elite Production Consult cross-moves against Lighting Syndicate's motion for summary judgment motion and seeks summary judgment dismissing the complaint and all cross-claims against Elite Production Consult. Lighting Syndicate's motion seeks relief that includes dismissal of Elite Production Consult's cross-claims for implied indemnification and contribution, based on Lighting Syndicate's negligence, and for breach of a contract against Lighting Syndicate.

C.P.L.R. § 2215's provision that a "party may serve upon the moving party a notice of cross-motion demanding relief" refers to relief against the moving party and thus does not allow a cross-motion as a vehicle for relief against a non-moving party. Puello v. Georges Units, LLC, 146 A.D.3d 561, 561 (1st Dep't 2017); Hennessey-Diaz v. City of New York, 146 A.D.3d 419, 420 (1st Dep't 2017); Asiedu v. Lieberman, 142 A.D.3d 858, 858 (1st Dep't 2016); Genger v. Genger, 120 A.D.3d 1102, 1103 (1st Dep't 2014). Although C.P.L.R. § 2215(b) provides that the "relief need not be responsive to that demanded by the moving party" and thus may relate to distinct claims or defenses, a cross-motion still must demand relief against the moving party.

Elite Production Consult's cross-motion against Lighting Syndicate's motion is permissible only to the extent that it seeks summary judgment dismissing Lighting Syndicate's cross-claims against Elite Production Consult for implied indemnification and contribution, because Lighting Syndicate is the moving party.

B. Merits

Lighting Syndicate may obtain implied indemnification against Elite Production Consult only if Lighting Syndicate establishes that its negligence did not contribute to plaintiff's injury and that Elite Production Consult's negligence did contribute. McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 378 (2011); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 479-80 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 10 (1st Dep't 2012). Elite Production Consult supports its cross-motion with the deposition testimony by Mark Mina, Elite Production Consult's Chief Executive Officer, that the only tasks for which Elite Production Consult was responsible in the production at the Park Avenue Armory were installing the bleacher seats, the preparatory stage, and the perimeter drapes. According to Mina, Elite Production Consult's only responsibility regarding the rotating stage was to dismantle it after the

production concluded; Elite Production Consult was not responsible for installing the rotating stage, its handrails, or the surrounding floor.

Lighting Syndicate does not present any opposition to Elite Production Consult's motion seeking dismissal of Lighting Syndicate's implied indemnification and contribution claims. Co-defendants' witnesses denied knowledge of Elite Production Consult or its function regarding the production. This record demonstrates that Elite Production Consult's actions or omissions did not contribute to plaintiff's injury and thus warrants dismissal of Lighting Syndicate's implied indemnification and contribution claims against Elite Production Consult. Astrakan v. City of New York, 184 A.D.3d 444, 445 (1st Dep't 2020); Higgins v. TST 375 Hudson, L.L.C., 179 A.D.3d 508, 511 (1st Dep't 2020); Canty v. 133 E. 79th St., LLC, 167 A.D.3d 548, 549 (1st Dep't 2018).

III. LIGHTING SYNDICATE'S MOTION FOR SUMMARY JUDGMENT

Lighting Syndicate contends first that, as a contractor, it is not liable because it was entitled to rely on the plans and specifications that were part of its contract and merely carried them out. Rosenbaum, Rosenfeld & Sonnenblick, LLP v. Excalibur Group NA, LLC, 146 A.D.3d 489, 490 (1st Dep't 2017); Coakley v.

City of New York, 270 A.D.2d 150, 150 (1st Dep't 2000). Yet Lighting Syndicate fails to support its conclusion with any evidentiary facts showing that Lighting Syndicate complied with the plans and specifications for the rotating stage, flooring, and lighting that Lighting Syndicate installed.

Jacob Heinrichs, a co-owner of Lighting Syndicate, lacked personal knowledge of Lighting Syndicate's operations on the evening of plaintiff's injury and thus could not testify at his deposition regarding what Lighting Syndicate did on that evening or leading up to it or that Lighting Syndicate did in fact comply with the contractual plans and specifications, to meet its initial burden. Barrett v. Aero Snow Removal Corp., 167 A.D.3d 519, 520-21 (1st Dep't 2018). Nor does Lighting Syndicate present evidence of the plans and specifications to allow a determination whether Lighting Syndicate complied with them, see Benjamin v. City of New York, 178 A.D.3d 557, 558 (1st Dep't 2019), or whether they were so flawed as to give Lighting Syndicate notice that they would cause injury. See Coakley v. City of New York, 270 A.D.2d at 150.

While Lighting Syndicate repeatedly contends that no evidence shows Lighting Syndicate received notice of any defective design in the rotating stage, the stairs, or the

flooring, Lighting Syndicate, upon its motion for summary judgment, bears the burden to show Lighting Syndicate lacked that notice, a showing not made through Heinrich or any other evidence. Rajkumar v. Budd Contr. Corp., 125 A.D.3d 446, 446-47 (1st Dep't 2015). See Hill v. Manhattan N. Mgt., 164 A.D.3d 1187, 1187 (1st Dep't 2018); Socorro v. New York Presbyt. Weill Cornell Med. Ctr., 160 A.D.3d 544, 544 (1st Dep't 2015); Sada v. August Wilson Theater, 140 A.D.3d 574, 574 (1st Dep't 2016); Dylan P. v. Webster Place Assoc., L.P., 132 A.D.3d 537, 538 (1st Dep't 2015). In fact, the evidence reveals that Park Avenue Armory was aware of patrons stumbling as they proceeded via the rotating stage and steps descending from it to their seats and that Park Avenue Armory therefore requested pre-show lighting to be increased. The evidence also reveals that nine Lighting Syndicate employees were at the Armory on the evening of plaintiff's injury, raising the inference that similar numbers were there for prior performances, operating the rotating stage and focussing and controlling the lighting on the stage before the performances. Lighting Syndicate fails to explain how, if Park Avenue Armory knew of potentially unsafe conditions, Lighting Syndicate, given its involvement, would not have been equally aware.

Lighting Syndicate further maintains that it owed no duty to plaintiff under its contract with Park Avenue Armory, which, aside from the plans and specifications, was an oral contract. Nevertheless, as a contractor providing services to Park Avenue Armory, Lighting Syndicate is liable to plaintiff for its negligence or other culpable conduct in performing the contract, when its breach of a contractual duty caused plaintiff's injury under any of the following sets of circumstances. (1) Lighting Syndicate displaced Park Avenue Armory's duty to maintain its premises in a safe condition. (2) Plaintiff detrimentally relied on Lighting Syndicate's performance of the contract. (3) Lighting Syndicate launched the "instrument of harm" that caused plaintiff's injury. Stiver v. Good & Fair Carting & Moving, Inc., 9 N.Y.3d 253, 257 (2007); Church v. Callanan Indus., 99 N.Y.2d 104, 111 (2002); Espinal v. Melville Snow Contrs., 98 N.Y.2d 136, 140 (2002); Stimmel v. Osherow, 133 A.D.3d 483, 485 (1st Dep't 2015).

The evidence of Lighting Syndicate's limited role in installing the rotating stage, the adjacent flooring, and the lighting and in operating it during performances adequately demonstrates that Lighting Syndicate did not completely displace Park Avenue Armory's duty to maintain the premises. Salomon v.

United States Tennis Assn., 181 A.D.3d 446, 446 (1st Dep't 2020); Sotarriba v. 346 W. 17th St. LLC, 179 A.D.3d 599, 602 (1st Dep't 2020). Plaintiff's testimony that she was unfamiliar with Lighting Syndicate also establishes her lack of reliance on the contract between Lighting Syndicate and Park Avenue Armory.

Nevertheless, Lighting Syndicate does not dispute that it did install the rotating stage, flooring, and lighting for the production, as confirmed by several witnesses' deposition testimony. As discussed above, on the evening of plaintiff's injury, nine Lighting Syndicate employees were at the theatre, including the light board operator, operating the rotating stage from which plaintiff was descending when she fell, and focussing and controlling the lighting on the stage that patrons were crossing to descend to their seats before the performance. No evidence establishes that the lighting levels enabled patrons to observe the steps descending from the rotating stage to the floor on the patrons' route to their seats. This evidence, considered with plaintiff's testimony that she fell due to an optical illusion created by the similar dark coloring of the rotating stage, the steps, and the flooring, precludes a determination that Lighting Syndicate did not launch a force or instrument of harm. Orea v. NH Hotels USA, Inc., ___ A.D.3d ___, 2020 WL

5949077, at *1 (1st Dep't Oct. 8, 2020); Moran v. 2085 LLC, 185 A.D.3d 424, 425 (1st Dep't 2020); Rivera v. 11 W. 42 Realty Invs., L.L.C., 176 A.D.3d at 588; Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 455 (1st Dep't 2018).

Even if Lighting Syndicate met its initial burden, plaintiff's expert, Michael Leshner P.E., attests that the black coloring of the stage and steps rendered the steps inconspicuous and created a potential optical confusion. Disregarding Leshner's inadmissible opinion regarding violations of the New York City Building Code, Morris v. Pavarini Constr., 9 N.Y.3d 47, 51 (2007); Buchholz v. Trump 767 Fifth, 5 N.Y.3d 1, 7 (2005); Lopez v. Chan, 102 A.D.3d 625, 626 (1st Dep't 2013); McCoy v. Metropolitan Transp. Auth., 53 A.D.3d 457, 459 (1st Dep't 2008), his affidavit still raises factual issues whether Lighting Syndicate launched an instrument of harm. Benitez v. City of New York, 160 A.D.3d 445, 445 (1st Dep't 2018).

Finally, Lighting Syndicate presents no support for summary judgment dismissing any of co-defendants' cross-claims for implied and contractual indemnification, contribution, and breach of a contract to procure insurance to meet Lighting Syndicate's burden to obtain summary judgment dismissing those cross-claims. Linhart v. Rojas, 154 A.D.3d 440, 440 (1st Dep't 2017); Chapman

v. City of New York, 139 A.D.3d 507, 507-508 (1st Dep't 2016); Lee v. New York City Tr. Auth., 138 A.D.3d 579, 579 (1st Dep't 2016); Jones v. 550 Realty Hgts., LLC, 89 A.D.3d 609, 609 (1st Dep't 2011). McLaren Engineering, however, stipulated on the record August 26, 2020, to the dismissal of McLaren Engineering's cross-claims against Lighting Syndicate. Since the court otherwise denies Lighting Syndicate's motion, leaving plaintiff's claims against Lighting Syndicate viable, the court also denies Lighting Syndicate's motion for sanctions against plaintiff. Korangy v. Malone, 161 A.D.3d 645, 646 (1st Dep't 2018); Curtis v. Tabak Is Tribeca, LLC, 144 A.D.3d 509, 510 (1st Dep't 2016); Gordon Group Invs., LLC v. Kugler 127 A.D.3d 592, 594 (1st Dep't 2015); Daval-Ogden, LLC v. Highbridge House Ogden, LLC, 103 A.D.3d 422, 423 (1st Dep't 2013).

IV. CONCLUSION

For the reasons explained above, the court grants defendant Elite Production Consult's cross-motion for summary judgment only to the extent of dismissing defendant Lighting Syndicate LLC's implied indemnification and contribution cross-claims against Elite Production Consult, but otherwise denies its motion. C.P.L.R. § 3212(b) and (e). The court grants defendant Lighting Syndicate LLC's motion for summary judgment only to the extent of

dismissing defendant McLaren Engineering Group's cross-claims against Lighting Syndicate, but otherwise denies its motion for summary judgment and for sanctions. C.P.L.R. §§ 3212(b), 8303-a; 22 N.Y.C.R.R. § 130-1.1. This decision constitutes the court's order and judgment. The Clerk shall enter a judgment accordingly.

DATED: November 20, 2020

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C