SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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RUBY WACHTEL and BRADLEY WACHTEL,

Plaintiffs,

-against-

ALVIN NEDERLANDER ASSOCIATES, INC., ROSE NEDERLANDER ASSOCIATES, INC., NEDERLANDER WORLDWIDE THEATRE MANAGEMENT, LLC,

Defendants.

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IAS Part 8
Index No. 600864/2019
Motion Seq. Nos. 001-002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law submitted by the parties, have been reviewed in preparing this Decision and Order:

Plaintiffs' Notice of Motion, Affirmation & Exhibits.....1
Defendants' Affirmation in Opposition & Exhibits.....2
Plaintiffs' Reply Affirmation & Exhibits.....3
Defendants' Notice of Cross-Motion & Exhibits.....4
Plaintiffs' Affirmation in Opposition & Exhibits.....5

In this action, plaintiff Ruby Wachtel seeks damages for injuries she sustained when she slipped and fell on a metal grate located in the sidewalk adjacent to the Nederlander Theatre located at 208 West 41st Street, New York, New York. Ruby's husband, Bradley Wachtel, asserts a derivative claim for loss of services. Plaintiffs now move for summary judgment pursuant to CPLR 3212 as against defendant Rose Nederlander Associates, Inc. and to sever the action against the remaining defendants. Defendants Alvin Nederlander

Associates, Inc., Rose Nederlander Associates, Inc. and Nederlander Organization, Inc. (the "moving defendants") cross-move for summary judgment pursuant to CPLR 3212. [1]

BACKGROUND

Most, if not all, of the pertinent facts in this case are uncontroverted. In September 2018, Wachtel went to a performance of Pretty Woman at the Nederlander Theatre (hereinafter the "theatre"). It was raining on the date of the incident and the ground was wet. The defendants set up barricades from the theater's exit door that extended perpendicular to the public sidewalk. Based on the positioning of the barricades, patrons exiting the theatre were required to walk towards the street before making a right or left (east/west) onto the sidewalk. Patrons could not walk east or west on the cement portion of the sidewalk until they first traversed a metal grate. When Wachtel exited the theatre, she slipped and fell while walking upon the metal grate, which she described as "wet" and "slippery."

LEGAL ANALYSIS

Wachtel contends that Rose was negligent in obstructing the cement portion of the sidewalk and placing barriers that funnelled patrons to a less safe area of the sidewalk – a portion covered with a wet metal grate.

Conversely, the moving defendants argue that: 1) no dangerous condition was created by their use of barricades; 2) they cannot be held liable for the subject accident as they do not control or maintain the metal grate that Wachtel slipped on – the City of New York does; and 3) even if defendants had a duty to maintain the metal grate, wetness resulting from rain is insufficient to establish a dangerous condition.

On a motion for summary judgment the proponent must tender sufficient evidence to demonstrate the absence of any material issues of fact in order to set forth a *prima facie* showing that it is entitled to judgment as a matter of law. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72, 81 (2003). Where the movant fails to meet its initial burden the motion for

[1] Rose Nederlander Associates, Inc. admits in its Answer that it owns and operates the Nederlander Theatre. The connection of the other named defendants with the property is unclear from the papers submitted.

summary judgment should be denied. *U.S. Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014).

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980); *Friends of Animals, Inc. v. Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065 (1979); *Werner v. Nelkin*, 206 A.D.2d 422 (2d Dept. 1994).

As a general rule, a landowner will not be liable to a pedestrian injured by a defect in a public sidewalk abutting the landowner's premises unless "the landowner created the defective condition or caused the defect to occur because of some special use...." *Bloch v. Potter*, 204 A.D.2d 672 (2d Dept. 1994), *quoting Surowiec v. City of New York*, 139 A.D.2d 727 (2d Dept. 1988); *see also Maya v. Town of Hempstead*, 127 A.D.3d 1146 (2d Dept. 2015). Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the facts and circumstances of each case and is generally a question of fact for the jury. *Ress v. Incorporated Vil. of Hempstead*, 276 A.D.2d 681 (2d Dept. 2000).

Based on the record before the court, summary judgment is not appropriate to any of the movants. The moving defendants are correct that as private landowners they generally cannot be held liable for defects in the metal grate on a public sidewalk, but liability can be imputed where they make special use of that sidewalk. The moving defendants do not deny that they placed the barricades on the sidewalk; nor do they explain their legal basis to do so. The moving defendants miss the point of plaintiff's argument: she is not claiming that the defendants are responsible for the condition of the grate. Instead, she asserts that defendants are negligent by placing barricades on a public sidewalk that required her to walk on the wet, slippery grate.

Here, there appears to be no dispute that moving defendants created the alleged dangerous condition: the barricades. *Cf., Byrd v. Hughes*, 188 A.D.3d 975 (2d Dept. 2020); *Hunter v. City of New York et. al.*, 23 A.D.3d 223 (1st Dept. 2005). A genuine issue of

material fact exists as to whether the barricades created a dangerous condition by narrowing the public sidewalk and blocking access to the cement portion of the sidewalk. Further, questions remain as to whether the placement of the barricades proximately caused Wachtel's fall and whether it was foreseeable that someone might be injured. *Id.*; *see also Coulton v. City of New York*, 29 A.D.3d 301 (1st Dept. 2006); *Gogarty v. Hay Kit Ho*, 28 A.D.3d 607 (2d Dept. 2006).

As a result, plaintiffs' motion and defendants' cross-motion for summary judgment are denied.

All other requested relief, not specifically addressed herein, is hereby denied.

This constitutes the Decision and Order of this court.

Dated: February 5, 2021
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED
Feb 16 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE