

Katehis v Vital Theatre Co., Inc.

2022 NY Slip Op 34595(U)

December 19, 2022

Supreme Court, Queens County

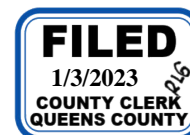
Docket Number: Index No. 717786/18

Judge: Darrell L. Gavrin

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NEW YORK SUPREME COURT - QUEENS COUNTY



Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

SPIRIDON N. KATEHIS,

Index No. 717786/18

Plaintiff,

Motion

Date April 12, 2022

- against-

Motion

VITAL THEATRE COMPANY, INC., ABS PARTNERS
REAL ESTATE LLC, BROADWAY PHOENIX CO.,
LLC, THE SECOND STAGE THEATRE INC., THE
WOMEN’S PROJECT AND PRODUCTIONS INC.
D/B/A WP THEATER, and THE OPERA OWNERS,
INC.,

Cal. No.

Motion

Seq. No. 5

Defendants.

The following e-filed papers read on this motion by defendants, Vital Theatre Company, Inc. and Second Stage Theatre, Inc., for an order pursuant to CPLR 2221(e), renewing their motion for an extension of time to file summary judgment, which resulted in this court’s order dated July 30, 2020 and entered on September 14, 2020, and upon such renewal, for an order granting summary judgment and dismissing plaintiff’s complaint and all cross-claims as against them.

Papers
Numbered

Notice of Motion – Affirmation – Exhibits.....	EF 209 – 245
Affirmation in Opposition – Exhibits by Plaintiff.....	EF 249 – 252
Affirmation in Opposition – Exhibits by Def. Opera.....	EF 253 – 256
Affirmation in Opposition by Defs. ABS and Broadway..	EF 257 – 258
Reply Affirmation – Exhibits.....	EF 259 – 262

Upon the foregoing papers it is ordered that the motion is determined as follows:

BACKGROUND

Plaintiff seeks damages for personal injuries sustained on March 12, 2018, while he was evaluating damage to an office ceiling, and allegedly tripped and fell on a carpeted

single-step riser at the premises, located at 2162 Broadway, Manhattan, New York. Defendant, Opera Owners, Inc. (Opera Owners) was the owner of the premises and defendant, Broadway Phoenix Co, LLC (Broadway Phoenix) leased the property from Opera Owners. Defendant, ABS Partners Real Estate LLC (ABS) oversaw some of the operations in the building and was the managing and leasing agent for Broadway Phoenix. Broadway Phoenix leased part of the premises to defendant, Second Stage Theatre, Inc., (Second Stage). Second Stage sublet office space to defendant, Vital Theatre Company, Inc. (Vital).

DISCUSSION

Motion to Renew

Pursuant to an order, dated July 30, 2020, this court denied, without prejudice, with leave to renew, the application of defendants, Vital and Second Stage (“defendants”) for an extension of time to move for summary judgment.

Defendants seek leave to renew their motion for an extension of time to move for summary judgment. Defendants have adequately demonstrated good cause for untimely filing the instant motion (*see Brill v City of New York*, 2 NY3d 648 [2004]). No opposition has been submitted as to the sought extension of time.

Defendants further move for an order granting summary judgment, dismissing plaintiff’s complaint and cross-claims against them.

Summary Judgment

On a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Alvarez*, 68 NY2d at 324). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman*, 49 NY2d at 562; *Alvarez*, 68 NY2d at 324). “While the ultimate burden of proof at trial will fall upon the plaintiff, a defendant seeking summary judgment bears the initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form” (*Calderon v 88-16 N. Blvd, LLC*, 135 AD3d 681, 682 [2d Dept 2016], quoting *Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]).

A. Open and Obvious Condition

Defendants contend that the single-step riser and lighting alleged to have caused plaintiff's injuries was open, obvious, and not inherently dangerous. Defendants further contend that plaintiff was aware that the subject single-step existed given that he had ascended it only minutes earlier, and that as a result, defendants had no duty to warn of a condition that plaintiff should have readily observed by the reasonable use of his senses.

“A landowner has a duty to exercise reasonable care in maintaining [its] property in a safe condition under all of the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property” (*Genefar v Great Neck Park District*, 156 AD3d 762, 763 [2d Dept 2017], quoting *Groom v Vil. of Sea Cliff*, 50 AD3d 1094, 1094 [2d Dept 2008]). A determination of whether a condition is open and obvious is fact specific, and usually a question for the trier of fact (*see Shermazanov v Amerihealth Med., P.C.*, 173 AD3d 796, 797 [2d Dept 2019]); *Gallardo v Gilbert*, 153 AD3d 791, 792 [2d Dept 2017]).

“While a possessor of real property has a duty to maintain that property in a reasonably safe condition” (*Williams v E & R Jamaica Food Corp.*, 202 AD3d 1028, 1029 [2d Dept 2022], quoting *Basso v Miller*, 40 NY2d 233, 241[1976]), “there is no duty to protect or warn against an open and obvious condition that, as a matter of law, is not inherently dangerous” (*Williams*, 202 AD3d at 1029, quoting *Robbins v 237 Ave. X, LLC*, 177 AD3d 799, 799 [2d Dept 2019]; *see Ramirez v Creative Linen House, Inc.*, 170 AD3d 913, 913 [2d Dept 2019]). Accordingly, to establish their prima facie entitlement to summary judgment, defendants must establish that the single-step riser was (1) open and obvious, and (2) not inherently dangerous (*see Surujnaraine v Val. Stream Cent. High Sch. Dist.*, 88 AD3d 866, 867 [2d Dept 2011]; *Pirie v Krasinski*, 18 AD3d 848, 849-850 [2d Dept 2005]). “A condition is open and obvious if it is readily observable by those employing the reasonable use of their senses, given the conditions at the time of the accident” (*Williams*, 202 AD3d at 1029, quoting *Robbins*, 177 AD3d at 799).

In the case at bar, defendants have established their entitlement to judgment as a matter of law (*see Pirie v Krasinski*, 18 AD3d 848, 848 [2d Dept 2005]). In support of their motion, defendants submit, among other things, deposition testimony of plaintiff, Vital, Second Stage, ABS/Broadway Phoenix¹, and Opera Owners. Defendants further submit a photograph of the single-step riser taken by plaintiff after the alleged accident; affidavit of a self-employed construction consultant, Martin Chinitz, who was at the subject premises on behalf of Broadway Phoenix and ABS; expert affidavit of Jeffrey Schwalje; and affidavit of Vital's producing artistic director, Stephen Sunderlin. Engineering expert, Schwalje averred that the steps were clear and visible; that the area appeared to be well lit

¹ ABS and Broadway Phoenix submitted the same witness for deposition, James Caseley.

by natural and artificial lighting; and that the subject area of the alleged accident met the requirements of the New York City Building Code. Further, defendants presented evidence that there was sufficient natural ambient lighting in the area in question so that the single step descending from the area was both open and obvious and did not constitute an inherently dangerous condition (*see Murray v Dockside 500 Mar., Inc.*, 32 AD3d 832, 833 [2d Dept 2006], citing *Cupo v Karfunkel*, 1 AD3d 48, 52 [2d Dept 2003]). Additionally, there is no evidence that the plaintiff mis-stepped as the result of inadequate illumination (*see Leib v Silo Rest., Inc.*, 26 AD3d 359, 360 [2d Dept 2006]).

In opposition, plaintiff raised a triable issue of fact. Plaintiff submits expert affidavit of safety consultant, William Marletta, and plaintiff's own deposition testimony. Plaintiff testified that the coloring of the carpet in the office area and below the step are similar, as the office was carpeted an "industrial gray with like lines in it." Plaintiff further testified that the appearance of the carpet "was consistent from the top of the stair, down the step, and into the hallway" and that the carpet "was a typical glued down carpet that may have shown some wear or stain." Plaintiff testified that "as [he] was leaving to go down at that opening, as this one here, without the door, it looked like it was straight, level, the floor. There was a whole step there, a big one without there being any signs or handle where you could hold on or something to warn you that is a big step." Plaintiff further testified that he did not observe the step until after his accident.

Marletta stated that during a visit to defendants' premises, he observed that there was a change in the carpeting between the day of plaintiff's accident and the day of his inspection; that the subject premises is classified as a public place of assembly and he cited to the Industrial Code Rule 36, Places of Public Assembly §2²; that the design of a single-step riser departs from "good and accepted and safe practice"; that the single-step riser is excessive and dangerous to pedestrian users at approximately nine and one-eighth inches; that the absence of a properly designed handrail system is contrary to good and accepted safe practice; that he observed that there was a handrail once present to the left of the descending single-step riser, however, there are now plastered-over holes instead; that there was a failure to maintain a safe floor surface for pedestrian use in conformance with good and accepted safe practice; and that there was lack of adequate warning signs. Marletta concluded that the single-step riser conditions were ripe for a trip and fall occurrence.

Therefore, triable issues of fact exist as to whether the single-step riser in the subject area was open and obvious, and whether there existed a dangerous or defective condition that proximately caused plaintiff's alleged accident.

² Industrial Code Rule 36, Places of Public Assembly § 2.3 (4) (iv) states that "no flight of less than three risers shall be used except to overcome difference in floor level elsewhere than in exitways."

Accordingly, the branch of defendants' motion for summary judgment on the ground that the alleged defect was open and obvious, is denied.

B. Repairs and Maintenance

Defendants further contend that they were not responsible for any structural repairs or alterations to the premises and they did not undertake any replacement or repair to the subject carpeting. "A tenant has a common-law duty to keep the premises it occupies in a reasonably safe condition, even when the landlord has explicitly agreed in the lease to maintain the premises" (*Gatto v Coinmach Corp.*, 172 AD3d 1176, 1177 [2d Dept 2019]). However, "a tenant's common-law duty to maintain premises in a reasonably safe condition is limited to those areas which it occupies and controls, or makes a special use" (*Arshinov v Gr 10-40, LLC*, 176 AD3d 1019, 1019 [2d Dept 2019]). "In general, a tenant would not reasonably expect to be liable for repairs that require the opening of walls, ceilings, or floors" (*Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 863 [2d Dept 2007]).

In the case at bar, defendants demonstrated, through the lease agreement and ABS/Broadway Phoenix's deposition, that they lacked the authority to alter the structural components of the subject premises, including the single-step riser, which plaintiff claims was the proximate causes of his fall (*see McDermott v Santos*, 171 AD3d 1158, 1159 [2d Dept 2019]). Specifically, the lease agreement provides that "[t]enant shall make no changes in or to the demised premises of any nature without [l]andlord's prior written consent". Therefore, defendants did not possess the requisite "control" over structural components of the subject premises (*see Arshinov*, 176 AD3d at 1019; *Knight v 177 W. 26 Realty, LLC*, 173 AD3d 846, 847 [2d Dept 2019] [Lessee not liable for dangerous conditions that fell within the purview of landlord's obligations]).

However, defendants failed to make a *prima facie* showing that they did not have the responsibility with regard to non-structural repairs and maintenance to those areas which they occupied and controlled, or made a special use (*see Arshinov*, 176 AD3d at 1019). Vital's witness testified that it was responsible for cosmetic maintenance and repairs of the office, including repair of the single-step riser, step nosing, posting warning signs for the single-step riser and lighting replacement in the office space. Furthermore, Second Stage's deposition witness, Samuel J. Bellinger testified that Vital was responsible for all non-structural repairs. In light of defendants' failure to make a *prima facie* showing, the burden did not shift to plaintiff and co-defendants, Opera Owners, ABS, and Broadway Phoenix to show that they were not responsible for non-structural or cosmetic repairs and maintenance to those areas which they occupied and controlled (*Arshinov*, 176 AD3d at 1019). Therefore, it is unnecessary to examine the sufficiency of plaintiff's or co-defendants' opposing papers on this issue (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]; *Alvarez*, 68 NY2d at 324).

Accordingly, the branch of defendants' motion for summary judgment as to their responsibility for repairs and maintenance, is denied.

C. Labor Law § 200

It is undisputed that plaintiff was injured during the course of his work. "Labor Law § 200 is a codification of the common-law duty of owners, contractors, and their agents to provide workers with a safe place to work" (*Doto v Astoria Energy II, LLC*, 129 AD3d 660, 663 [2d Dept 2015]; *see also Mendez v Vardaris Tech, Inc.*, 173 AD3d 1004, 1005 [2d Dept 2019]). "Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed" (*Torres v City of New York*, 127 AD3d 1163, 1165 [2d Dept 2015]). "To be held liable under Labor Law § 200 for injuries arising from the manner in which work is performed, a defendant must have the authority to exercise supervision and control over the work" (*Torres*, 127 AD3d at 1165). Where a plaintiff's injuries arise not from the manner in which the work was performed, but from a dangerous condition on the premises, a defendant may be held liable under Labor Law § 200 if it "had control over the work site and either created the dangerous condition or had actual or constructive notice of it" (*Mendez*, 173 AD3d at 1005, quoting *Doto*, 129 AD3d at 663).

The property owners may be held liable for a violation of Labor Law § 200 and common law negligence if they either created the dangerous condition or had actual or constructive notice of the dangerous condition that caused the accident (*see Nicoletti v Iracane*, 122 AD3d 811, 812 [2d Dept 2014]). "A defendant has constructive notice of a defect when it is visible and apparent and has existed for a sufficient length of time before the accident such that it could have been discovered and corrected" (*id.*).

In the case at bar, although defendants denied actual notice of the defective condition on the single-step riser where plaintiff allegedly tripped, and asserted that there was no proof that they had created a dangerous condition, they offered no evidence as to the condition of the single-step riser on the day in question, or as to when the riser had last been cleaned, inspected, or otherwise maintained (*see Hayden v 334 Dune Rd.*, 196 AD3d 634, 636 [2d Dept 2021]). Therefore, defendants failed to establish that they did not have constructive notice of the alleged dangerous condition precluding dismissal of plaintiff's cause of action under Labor Law § 200, and the burden did not shift to the plaintiff (*see Toalongo v Almarwa Ctr., Inc.*, 202 AD3d 1128, 1131 [2d Dept 2022]). It light of the foregoing, it is unnecessary to consider the sufficiency of the opposing papers on this issue (*id.*; *Alvarez*, 68 NY2d at 324).

Accordingly, the branch of defendants' motion for summary judgment, dismissing plaintiff's Labor Law § 200 cause of action, is denied.

D. Witness Credibility

“The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted, and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts” (*Lelekakis v Kamamis*, 41 AD3d 662, 664 [2d Dept 2007]). “Where credibility determinations are required, summary judgment must be denied” (*Bank of NY Mellon v Gordon*, 171 AD3d 197, 201 [2d Dept 2019]).

Defendants contend that plaintiff’s testimony is not credible because his testimony conflicts with the testimony of other witnesses. Defendants assert that other witnesses have testified that plaintiff entered the subject area ascending the single-step riser minutes before his alleged accident, however, plaintiff claims that he used a different entrance and only descended the single-step riser. In any event, the alleged conflict between plaintiff’s testimonial statements may raise an issue of credibility which cannot be resolved on a motion for summary judgment (*see Surdo v Albany Collision Supply, Inc.*, 8 AD3d 655, 655 [2d Dept 2004]).

Accordingly, the branch of the motion for summary judgment to dismiss the complaint based on plaintiff’s credibility, is denied.

E. Contractual Indemnification, Common Law Indemnification, Contribution and Failure to Procure Insurance

Defendants further move for dismissal of all cross claims against them, including contractual indemnification, common law indemnification, contribution, and failure to procure insurance. This branch of motion is opposed by co-defendants, ABS and Broadway Phoenix. “[T]he right to contractual indemnification depends upon the specific language of the contract” (*Cando v Ajay Gen. Contr. Co. Inc.*, 200 AD3d 750, 753 [2d Dept 2021]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the agreement and the surrounding facts and circumstances” (*Maltese v Metro. Transportation Auth.*, 179 AD3d 780, 784 [2d Dept 2020], quoting *Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491-92 [1989]).

In the case at bar, contrary to defendants’ assertion that no party has a contract with either defendant (Second Stage or Vital) providing for indemnification, the relevant section of the lease between Broadway Phoenix³ and Second Stage, to wit, the indemnification clause states in pertinent part:

“8. Landlord or its agents shall not be liable for any damage to [the]

³ Broadway Phoenix is successor to the original lessor, Next City Corporation.

property of Tenant or of others entrusted to employees of the building, ... nor for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Landlord. ... Tenant shall indemnify and save harmless Landlord against and from all liabilities, obligations, damages, penalties, claims, costs and expenses ... suffered or incurred as a result of any breach by Tenant, Tenant's agents, contractors, employees, invitees, or licensees, of any covenant or condition of this lease, or the carelessness, negligence of the Tenant, Tenant's agents, contractors, employees, invitees or licensees. Tenant's liability under this lease extends to the acts and omissions of any subtenant, and any agent, contractor, employee, invitee or licensee of any subtenant..."

According to the plain language of the lease, Broadway Phoenix is entitled to indemnification from Second Stage in the event plaintiff's injuries were caused by negligent acts or omissions of Second Stage or its subtenant. Here, defendants have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law as to whether plaintiff's alleged accident was caused due to defendants' negligence, and as a result, it cannot be determined whether the indemnification provision was properly triggered (*see Shaughnessy v Huntington Hosp. Assn*, 147 AD3d 994, 1000 [2d Dept 2017]).

Accordingly, the branch of the motion to dismiss the contractual indemnification cross claim is denied regardless of the sufficiency of the opposing papers.

ABS/Broadway Phoenix, however, addressed only the contractual indemnification cross claim and is silent on the common-law indemnification, contribution and failure to procure insurance cross claims. Accordingly, defendants are entitled to summary judgment, dismissing the common-law indemnification, contribution and failure to procure insurance cross claims against them as unopposed (*see Elam v Ryder Sys., Inc.*, 176 AD3d 675, 676 [2d Dept 2019]).

CONCLUSION

To conclude, the branch of defendants' motion for summary judgment on the issue of liability, is denied; the branch of the motion seeking to dismiss, pursuant to Labor Law § 200 insofar as asserted against them, is denied; the branch of the motion for summary judgment as to plaintiff's credibility, is denied; the branch of the motion to dismiss the contractual indemnification cross claim, is denied; and the branches of the motion to dismiss the cross claims for common-law indemnification, contribution and failure to procure insurance, are granted, without opposition.

A partial stipulation of discontinuance was filed on July 28, 2020 as to defendant The Women's Project and Productions Inc. d/b/a WP Theater only.

Therefore, the amended caption shall read as follows:

SPIRIDON N. KATEHIS,

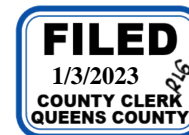
Index No. 717786/18

Plaintiff,

- against-

VITAL THEATRE COMPANY, INC., ABS PARTNERS
REAL ESTATE LLC, BROADWAY PHOENIX CO.,
LLC, THE SECOND STAGE THEATRE INC. and
THE OPERA OWNERS, INC.,

Defendants.



Movants shall serve a copy of this order upon all parties/counsel and the Clerk of Queens County within 30 days of entry. Upon receipt, the Clerk of Queens shall amend the caption of this action.

Any future motions shall contain the amended caption.

Dated: December 19, 2022



DARRELL L. GAVRIN, J.S.C.