

Murray v Madison Sq. Garden Co.

2023 NY Slip Op 32126(U)

June 26, 2023

Supreme Court, New York County

Docket Number: Index No. 156336/2019

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

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ERIC MURRAY,

Plaintiff,

- v -

THE MADISON SQUARE GARDEN COMPANY, MSGN
HOLDINGS, L.P., MSG ENTERTAINMENT HOLDINGS,
LLP, MSG ARENA LLC

Defendant.

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INDEX NO. 156336/2019

MOTION DATE 06/14/2023

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for

SUMMARY JUDGMENT

BACKGROUND

Plaintiff slipped and fell on liquid at Madison Square Garden (“MSG”) on December 28, 2018, on the Concourse near sections 223/224, while attending a concert. The entire sequence of events, from the time the spill occurred to the time that plaintiff slipped and fell, occurred in less than one minute.

Defendant now moves for summary judgment and dismissal of the action. On June 14th, 2023, the motion was marked submitted and the court reserved decision.

For the reasons stated below, the motion is granted, and the action is dismissed.

ALLEGED FACTS

Plaintiff attended a Phish concert at MSG on December 28, 2018. He arrived at MSG at 7:30 p.m. He had a beer at dinner prior to the concert and had a vodka soda when he arrived at MSG. He was sitting in Section 224.

Plaintiff left his seat and walked down the stairs to the Concourse, then he walked 5-10 steps on the Concourse, where he slipped in liquid and fell. He was carrying jackets at the time and was wearing sneakers. The accident occurred around 11:00 p.m. Plaintiff did not see a wet area before he fell and did not see liquid on the floor before he fell. He was looking straight ahead, looking for oncoming pedestrian traffic. Plaintiff saw the man who was putting napkins on the floor before he fell but did not realize the man was cleaning spilt liquid. He first noticed the liquid when he felt the liquid under his foot and his right foot was slipping.

MSG's protocol regarding spills is that, when an employee is on the Concourse and sees a spill, they are block it off, stand on it or clean it up. The employee can stop and stand over the spill. Then, call base/dispatch to have them send a cleaning person to clean the spill. In such event, the employee is to direct visitors away from the spill, either by placing their arms out to stop people from walking in the spill or by placing a stanchion, wet floor sign, or a garbage can to cover the spill and block the area. Employees can also opt to clean the spill, whichever is quickest.

The incident was captured on video which shows at 11:08:24, a man spills a drink in the video, and then tells David Spence (Spence), a Food and Beverage employee about the spill. At 11:08:48, Spence walks over to the spill and begins cleaning the spill with napkins. Spence is seen cleaning a portion of the spill with napkins when Plaintiff falls at 11:09:01. Spence testified at his deposition that he had not placed napkins on the entire spill because he didn't have time.

The parties also submit opposing expert affidavits as to whether the floor at MSG was sufficiently slip resistant.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Zuckerman v. City of New York*, 49 N 2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez*, 68 NY2d at 324). “[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion” (*People v Grasso*, 50 AD3d 535, 544 [1st Dept 2008]).

Defendant in moving for summary judgment in this slip and fall action is required to make a *prima facie* showing affirmatively establishing that it did not cause the condition and that it did not have actual notice of its existence for a sufficient length of time to remedy it. See *McMullin v Martin’s Food of South Burlington, Inc.* 122 AD3d 1103 (3rd Dept, 2014); *Gordon v. Am. Museum of Natural History*, 67 NY2d 836 (1986); *Rodriguez v. 705–7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 (1st Dept 2010); *Branham v. Loews Orpheum Cinemas*, 31 A.D3d 319 (1st Dept 2006). In this case it is uncontested that while MSG did not create the condition it had actual notice of the condition.

Once a defendant has actual notice of a dangerous condition, the defendant has a reasonable time to correct or warn of its existence. In cases, factually similar to the case at bar,

the actions were dismissed because clean up began immediately and was ongoing at the time of the accident and the courts held as a matter of law defendant did not have a reasonable opportunity to remedy the hazard. *See Scherer v. Golub Corp.*, 101 AD3d 1286 (3d Dept 2012); *Randall v Montefiore Med. Ctr.* 7 AD3d 464, (1st Dept, 2004); *Stasiak v. Sears, Roebuck & Co.*, 281 AD2d 533 (2d Dept 2001); *Randall v Montefiore Medical Center* 7 AD3d 464 (1st Dept 2004); *Williams v Hannaford Bros. Co.* 274 AD2d 649 (3rd Dept 2000).

The court also agrees with defendant that under these circumstances there was no duty to warn. Spence asserts he made verbal warnings to the passersby as he was cleaning, although Plaintiff testified he did not hear any such warning. Given the very short time frame involved, it's not clear what more Spence could have done in terms of warning. Moreover, Plaintiff acknowledged that he saw Spence on the floor before he fell but testified he did not see what Spence was doing. Based on the foregoing "... there was no duty on the part of the defendant to warn the plaintiff of the hazard because it constituted an open and obvious condition which the plaintiff could easily have observed by employing the reasonable use of his senses *Stasiak v. Sears, Roebuck & Co.*, 281 AD2d 533, 534 (2001);" *see also Pinero v. Rite Aid of N.Y., Inc.*, 294 AD2d 251, (1st Dept 2002). A condition that is visible to one "reasonably using his or her senses" is open and obvious. *See Tagle v. Jakob*, 97 NY2d 165 (2001). In light of the foregoing, assuming *arguendo* the verbal warning was not provided or not heard by Plaintiff, there was no duty to issue any warning, as the spill condition and cleaning activities were open and obvious, and in fact Plaintiff acknowledged seeing Spence, who was in the process of cleaning the spill at the time.

The court finds that Defendant met its *prima facie* burden and that in response, Plaintiff failed to raise a material issue of fact.

Based upon the above rulings the court need not address the dueling expert affidavits. Assuming *arguendo* the material on the floor was inherently slippery, that by itself is not actionable negligence. *Cietek v Bountiful Bread of Stuyvesant Plaza, Inc.*, 74 AD3d 1628 (3d Dept 2010); *Sarmiento v C & E Associates*, 40 AD3d 524 (1st Dept 2007); *Waiters v Northern Trust Co. of New York*, 29 AD3d 325 (1st Dept 2006); *Bennett v New York City Transit Authority*, 4 AD3d 265 (1st Dept 2004), *aff'd*, 3 NY3d 745, (2004); *Duffy v Universal Maintenance Corp.*, 227 AD2d 238 (1st Dept 1996).

Finally, the second cause of action sounding in negligent supervision and training is also dismissed. Where an employee is acting within the scope of his employment, the employer is liable for the employee's negligence and no claim may proceed against the employer for negligent hiring, retention, supervision, or training. *See Talavera v. Arbit*, 18 A.D.3d 738 (2d Dept 2005). There is no genuine dispute that the MSG employees were acting within the scope of their employment. Moreover, Plaintiff did not oppose the portion of the motion seeking to dismiss this cause of action.

WHEREFORE it is hereby:

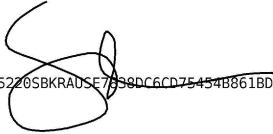
ORDERED that Defendant's motion for summary judgment is granted and the actions is dismissed; and it is further

ORDERED that, within 20 days from entry of this order, Defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.

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6/26/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE