Stern v DMG World Media (USA) Inc.
2013 NY Slip Op 33404(U)
December 16, 2013
Supreme Court, New York County
Docket Number: 112119/10
Judge: Shlomo S. Hagler

[* 1]

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

PRESENT: Hon. Shlomo S. Hagler
Justice

PART: 17

TOVA STERN,

Plaintiff,

-against-

DMG WORLD MEDIA (USA) INC., GLM, LLC and NEW YORK CONVENTION CENTER OPERATING CORPORATION d/b/a THE JACOB JAVITS CONVENTION CENTER,

Defendants.

INDEX NO.: 112119/2010

MOTION SEQ. NO.: 003

DECISION and ORDER

Motion by Defendants DMG & GLM (George Little Management) for summary judgment dismissing the complaint and all cross-claims.

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Defendants DMG and GLM's Notice of Motion Pursuant to CPLR § 3212 for Summary Judgment Dismissing the Complaint	1
Affirmation of Defendants DMG and GLM's Counsel Steven D. Zecca, Esq., in Support of the Motion with Exhibits "A" through "DD"	2
Affirmation of Co-Defendant NYCCOC's Counsel Heidi M. Weiss, Esq. in Opposition to the Motion with Exhibits "A" through "C"	3
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Cross-Motion: ☐ No ☑ Yes **Number of Cross-Motions:** 1

Cross-Motion by Plaintiff for spoliation sanctions against GLM/George Little.

Upon the foregoing papers, it is hereby ordered that this Motion is granted to the extent set forth in the attached separate written Decision and Order, and the Cross-Motion is denied as set forth in the attached separate written Decision and Order.

Dated: December 16, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Check one:	☐ **Final Disposition**		☑ **Non-Final Disposition**	
Motion is:	☐ Granted	☐ Denied	☑ Granted in Part	☐ Other
Cross -Motion is:	☐ Granted	☑ Denied	☐ Granted in Part	☐ Other
Check if Appropriate:	☐ SETTLE ORDER		☐ SUBMIT ORDER	
	☐ DO NOT POST		☐ REFERENCE	

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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TOVA STERN,

Plaintiff,

-against-

DMG WORLD MEDIA (USA) INC., GLM, LLC and NEW YORK CONVENTION CENTER OPERATING CORPORATION d/b/a THE JACOB JAVITS CONVENTION CENTER,

Defendants.

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DMG EVENTS (USA) INC., s/h/a DMG WORLD MEDIA (USA) INC., and GEORGE LITTLE MANAGEMENT, LLC,

Third-Party Plaintiffs,

-against-

FREEMAN DECORATING SERVICES, INC., FREEMAN DECORATING CO., FREEMAN AUDIO VISUAL SOLUTIONS, INC. and STAGE RIGGING, INC.,

Third-Party Defendants.

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Index No.: 112119/10

Motion Seq. Nos. 003 and 004

DECISION AND ORDER

Third-Party Index No.: 590297/11

Shlomo S. Hagler, J.S.C.:

In a case involving a buyer for a clothing store who received an electrical shock at a trade show, defendants/third-party plaintiffs DMG Events (USA) Inc. ("DMG Events"), incorrectly shown here as DMG World Media (USA) Inc., and George Little Management, LLC ("George Little"), also shown here as GLM, LLC, move jointly, pursuant to CPLR 3212, for summary judgment dismissing all claims and cross-claims against them (motion seq. no. 003). Plaintiff Tova Stern ("plaintiff" or "Stern") cross-moves for spoliation sanctions against George Little. Separately, plaintiff moves for

spoliation sanctions against defendant New York Convention Center Operating Corporation d/b/a The Jacob Javits Convention Center ("the Javits Center") (motion seq. No. 004).

BACKGROUND

Plaintiff was injured on August 16, 2010, at the New York "International Gift Fair," when she received an electrical shock after touching a metal pole shared by two booths. Plaintiff described the incident at her deposition: "I was standing holding onto a pole and as soon as I put my hand on it, I have a jump and blacked out. I had an electric shock. My hand was burned (indicating). My ring broke" (Plaintiff's Examination Before Trial ["EBT"] at 27). The pole was installed by third-party defendants Freeman Decorating Services, Inc., Freeman Decorating Co., Freeman Audio Visual Solutions, Inc. and Stage Rigging, Inc., (collectively "Freeman defendants") and was part of a temporary booth installation that allowed exhibitors to show their wares.[1] Plaintiff alleges that the pole was electrified because of a frayed wire that was owned and installed by the Javits Center.

Michael Ruberry ("Ruberry"), a vice president at George Little, who came to the area where plaintiff was injured after the accident, testified that the pole was eight feet tall and that a "clamp-on," or "single gooseneck" light was affixed to the top of it (Ruberry EBT at 30-32). Ruberry also described the electrical wire that ran up the pole to the light as follows:

> "Q: And with respect to the wire, can you tell me, to the best of your knowledge, where the wire started and where it ran to or something – where you saw it?
>
> A: It was running up the upright and it was tied to the light fixture and the cord would have gone down to the ground and it would have been connected in some manner to an outlet that came from one of the ports.

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1. The third-party complaint against the Freeman defendants had been previously dismissed without prejudice in motion sequence number 002.

Q: Did you make any observations about the wiring attached to the light fixtures and running down the pole?

A: Yes, I saw that it was frayed.

Q: Just – when you use the description 'frayed,' can you please describe what you saw and where you saw it?

A: I looked up toward the – near the fixture and I saw the fact that there was some internal wiring that was visible and that was it.

Q: When you say 'internal wiring,' can you describe what you mean by that?

A: The cord had a tear in it and you can see the internal workings of this particular cord.

Q: And where physically on the wiring was the fraying . . . ?

A: It was below the light fixture because the light fixture was the highest point. It was probably at the seven-foot height, six-foot height, something like that?

(Ruberry EBT at 32-34).

Non-party Abrams Books occupied one of the booths adjacent to the electrified poll. Two Abrams Books' employees, Martha Malovany ("Malovany") and Sarah Carstens ("Carstens") were present at the booth and both testified that they also observed a nick or fray in the wire after the accident, but not beforehand (Malovany EBT at 15; Carsten's EBT at 27).

Ruberry, Malovany, and Carstens each testified that the frayed part of the wire was an inch or smaller (Ruberry EBT at 87-88; Malovany EBT at 16; Carstens EBT at 28). Ruberry testified that while he did a general walk through on the day of the fair, he did not notice any problems (Ruberry EBT 25-26). Meanwhile, the Javits Center's Michael Carey (Carey), an area foreman in charge of "all show related electrical work," testified that electricians employed by the Javits Center typically inspect the lights after taking them down from one show, and then again before putting them up for the next show (Carey EBT at 8, 32-35).

After plaintiff's accident, but before an ambulance was called to take her to the hospital, Carey directed one of his subordinates to throw away the wire involved in the incident, an act that is the basis of plaintiff's application for spoliation sanctions against the Javits Center and George Little:

> "Q: Did you observe the condition of the electrical wire which extended from the goose neck fixture down the pole to the floor to the power source?
>
> A: Well, I looked at it briefly and it looked fine. Like I said I rubbed my hands up and down the pole and it looked fine to me.
>
> Q: Did you do anything else at the time?
>
> A: Just to be safe from all parties that were there, you know, I mean if somebody said they got shocked, they got shocked, so I removed the light. I told one of the guys that was with me, just take the light down and throw it away, put a new one up, if that makes everybody happy."

(*id.* at 45).

Plaintiff filed her summons and complaint on September 14, 2010. The complaint seeks recovery from defendants for alleged injuries ranging from burns to possible brain damage, under a theory of negligence. Plaintiff also alleges in her complaint that she may rely on the doctrine of res ipsa loquitur.

Pursuant to a licensing agreement with the Javits Center, George Little staged the gift fair at a building owned by the Javits Center at 655 West 34th Street in Manhattan. DMG Events is George Little's parent company. DMG Events moves for summary judgment dismissing the complaint and all cross-claims against it, arguing that it had no duty to plaintiff or to the Javits Center. Plaintiff and the Javits Center do not oppose DMG Events' motion and that motion was granted on the record without opposition. George Little also argues that it does not owe a duty to plaintiff.

Section 1(A) of the licensing agreement between George Little and the Javits Center provides that:

> "Subject to the terms and conditions below, Licensor hereby gives to Licensee a License to use the facilities described in § 3 (the "Space") and a right of passage to the Space, through the outdoor areas maintained by the Center, through the loading dock, and through the entrance and lobby of the Center for the sole purpose of conducting an event, to be called NEW YORK INTERNATIONAL GIFT FAIR ("the Event"). Licensee agrees to use the Space for the Event and for no other purpose"

(Exhibit "Z" to Affirmation of Defendants'/Third-Party Plaintiffs' Counsel Steven Zecca in Support of the Motion for Summary Judgment of Defendants/Third-Party Plaintiffs DMG and George Little [Zecca Aff.]).

George Little argues that, as a licensee, it had no possessory interest in the premises, and thus, no duty to plaintiff. To underline this point, George Little refers to a provision of the licensing agreement entitled "License Only," which states: "Licensee shall have no right, title, estate or interest in the Center, its facilities or equipment" (*id.*, § 33). Furthermore, under the licensing agreement, the Javits Center was the exclusive provider of electrical power (*id.*, § 10B). George Little notes, citing to the deposition of Carey, the Javits Center foreman, that this general responsibility extended to the provision of lighting and electrical wiring involved in plaintiff's accident (Carey EBT at 48).

George Little also argues that it neither created nor had notice of the dangerous condition that caused plaintiff's accident. With respect to notice, George Little relies on the testimony of Ruberry, its vice president, who testified that he neither received any complaints about the lighting, nor notice any electrical problems on his walk-through on the morning of his accident (Ruberry EBT at 25, 75).

Plaintiff argues in opposition that summary judgment must be denied to George Little as there is a question of fact as to whether it had constructive notice of the frayed or nicked wire

involved in the accident. Specifically, plaintiff argues that, as several witnesses noticed a defect in the wire after the accident, it was clearly visible, and would have revealed itself to a visual inspection. As to the question of how long the nick in the wire existed, plaintiff argues that there is no indication in the record that the accident itself caused the defect, so it must have existed at the time it was installed. Thus, plaintiff argues the defect existed long enough to create an issue of fact as to whether George Little had constructive notice of it.

As to duty, plaintiff contends that George Little assumed, through Ruberry's walk-through, a duty to perform inspections of the electrical wiring. Plaintiff focuses on a portion of Ruberry's deposition testimony in which he describes George Little's business of producing trade shows:

> Q: When you say you "manage the event," what types of things do you consider managing the event?
>
> A: Well, we have a series of vendors who work with us and we, you know – we're creating basically, a village in the course of a week's time or so. And these things – people are assigned space. We have to make sure people are in the right space. We have to make sure that the lights are on in the building. We have to make sure that the people who have set up the event are setting up the event correctly. We have to make sure that our exhibitors get what they are supposed to receive as per our exhibit space agreements. Basically, we're looking to try to create an event that's as seamless as possible, you know. We're bringing buyers and sellers together and we are responsible for making it as seamless as possible"

(Ruberry EBT at 9).

Plaintiff implies that Ruberry's statement that "we have to make sure that the lights are on" has a technical meaning acknowledging that George Little had responsibility for electrical wiring at the gift fair. Plaintiff also argues that George Little was a spoliator of evidence because Ruberry failed to prevent the Javits Center from disposing of the wire involved in plaintiff's accident. As such, plaintiff argues that George Little's motion should be denied and that the court should sanction

George Little by striking its answer, or issuing an adverse inference charge at the time of trial, precluding it from eliciting testimony regarding notice.

Plaintiff also argues that the court should sanction the Javits Center by striking its answer, or bar it from presenting evidence at trial concerning the accident, and issue an adverse inference charge at the time of trial, barring it from eliciting testimony regarding notice.

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Initially, the branch of George Little and DMG Events' motion that seeks dismissal of all claims and cross-claims against DMG Events is unopposed by either plaintiff or the Javits Center. Thus, all claims and cross-claims against DMG Events are dismissed, as they have been abandoned (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]).

Negligence

In order to establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R.*

Co., 248 NY 339 [1928] [other citation omitted]). With respect to the question of duty, "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]). With respect to licensees, *Gibbs* held that a 24-hour licensing agreement at Madison Square Garden did not place a burden on defendant licensee toward plaintiff, as "[s]uch an agreement merely vests the licensee with authority to do a particular act or series of acts upon the licensor's land . . . [i]t does not give the licensee any possessory interest in the premises" (*id.*).

Here, George Little makes a *prima facie* showing that it did not have a duty to plaintiff by showing that it was only a licensee with no control over the electrical systems which the licensor, the Javits Center, controlled exclusively.[2] Thus, George Little has no duty with respect to the dangerous condition that caused plaintiff's accident. Plaintiff fails to raise any issues of fact as to whether George Little owed her a duty. Plaintiff's attempt to find a technical meaning in Ruberry's colloquial statement about turning the lights on fails to create an issue as to whether George Little had control over the electrical installations at the convention center.

Moreover, plaintiff fails to raise an issue as to whether any of the exceptions articulated in *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]), which would give rise to a duty, are implicated here. Plaintiff has not presented any evidence showing: (1) that she was injured by an "instrument of harm" launched by George Little; (2) that she detrimentally relied on the "continued performance" of George Little's duties; or (3) that George Little had "entirely displaced" the Javits

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2. The doctrine of res ipsa loc loquitur is plainly not applicable to plaintiff's negligence claim against George Little. "To apply res ipsa loquitur, a plaintiff must establish that: "(1) the accident [is] of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident [is] in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary action or contribution by plaintiff" (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 429 [1st Dept 2013]). Here, the evidence clearly shows that George Little did not have exclusive control over the light fixture involved in plaintiff's accident.

Center's duty to maintain the premises safely (*id.* at 140 [internal quotation marks and citations omitted]). As such, plaintiff fails to raise a question of fact as to whether George Little owed her a duty and the branch of George Little's motion that seeks dismissal of plaintiff's claims as against it is granted.

Indemnification

Defendant George Little moves to dismiss the Javits Center's cross-claims against it for both common-law and contractual indemnification. As the court stated in *Correia v Professional Data Mgt.* (259 AD2d 60, 65 [1st Dept]):

> "[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable by some obligation imposed by law . . . ."

(259 AD2d at 65).

Here, the record, as discussed above, makes clear that George Little was not negligent. As such, it cannot be liable for common-law negligence (*see also, McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]), and the branch of George Little's motion that seeks its dismissal is granted.

The Javits Center's second cross-claim for contractual indemnification is based on section 28 of the licensing agreement, which provides, in relevant part:

> "Licensee shall indemnify, hold harmless, and defend Licensor . . . from all losses, claims, liability, damage, actions, and judgments recovered from or asserted against Indemnitees . . . or expense (including, without limitation, attorneys' fees and their litigation expenses): for any injury to or death of any persons, and any loss of, through theft or otherwise, or damage to property arising in any way in connection with the use and enjoyment by the Licensee, or of any other person or of any other person or entity with the permission, express or implied, of Licensee, of the Space, equipment or of the Center; or arising out of the use of patented, trademarked or

> copyrighted materials, equipment, devices, processes or dramatic rights furnished to or used by Licensee, its exhibitors or other persons in connection with the Event or the use of the Space.
>
> "Such indemnification shall not be effective to the extent that damage or injury results from the sole negligence, gross negligence or willful misconduct of Indemnitee."

(Exhibit Z to Zecca Aff.)

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances' " (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]). With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that " '[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant' " (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]).

Here, the Javits Center is correct that summary judgment should be denied to George Little for the branch of its motion that seeks dismissal of the Javits Center's cross-claim for contractual indemnification since there has not yet been a finding of negligence against the Javits Center. Thus, it would be premature at this time to dismiss the Javits Center's contractual indemnification claim against George Little.

Spoliation

> "A party seeking sanctions based on the spoliation of evidence must demonstrate: (1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the [evidence was] destroyed with a 'culpable state

> of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. A 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence"

(*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 45 [1st Dept 2012]). *Voom* held that, in the context of electronic records, the obligation to preserve begins when "a party reasonably anticipates litigation" (*id.* at 41). This standard, however, has been applied to other types of evidence since *Voom* (*see e.g. Suazo v Linden Plaza Assoc., L.P.*, 102 AD3d 570, 571 [1st Dept 2013] [holding that an adverse inference charge was appropriate with respect to a destroyed surveillance video, as "defendants were 'on notice of a credible probability that [they would] become involved in litigation'"], quoting *Voom*, 93 AD3d at 43).

In a case where the plaintiff was injured by an electrical shock conducted from a light fixture to a scaffold, and the light fixture was subsequently destroyed, the court held that the party seeking sanctions was not entitled to them because, among other things, "the possibility that [the party moving for spoliation sanctions] may have taken the light cannot be excluded" (*O'Rourke v City of New York*, 35 Misc 3d 1232[A] [Sup Ct, Kings County 2012]).

Here, spoliation sanctions against George Little are inappropriate, as the Javits Center, rather than George Little, disposed of the light and the frayed wire. While plaintiff argues that Ruberry, George Little's vice president, should have prevented the Javits Center from disposing of the material, there is no evidence showing that Ruberry even knew that the Javits Center was going to destroy it. As such, plaintiff's cross-motion against George Little for spoliation is denied and plaintiff's complaint as against George Little is dismissed.

On the other hand, the Javits Center may be considered a spoliator, as they disposed of relevant evidence after plaintiff received an electrical shock, which placed the Javits Center in a position of reasonable anticipation of litigation. However, plaintiff is not entitled to the "extreme

sanction" of striking the Javits Center's answer because the frayed wire "[did] not constitute the sole source of the information and the sole means by which plaintiff can establish [her] case" (*Alleva v United Parcel Serv., Inc.*, 102 AD3d 573, 574 [1st Dept 2013]). While plaintiff contends that the absence of the wire deprives her of the opportunity to hire an expert to determine the nature of the defect and the duration of its existence prior to the accident, plaintiff has not, through the destruction of the wire, been denied an opportunity to establish her case. Plaintiff's own testimony, as well as that of Ruberry, Malovany, Carstens, and Carey allows her to make out a case that the Javits Center created the defect by affixing a nicked electrical wire to the pole plaintiff eventually touched, or that the Javits Center had constructive notice of the defect (*see generally Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

While plaintiff is not entitled to an order striking the Javits Center's answer, she is entitled to an adverse inference at trial with respect to its destruction of the wire (*see e.g. Hussain v Nowak*, 38 AD3d 1342, 1342 [4th Dept 2007] [holding that where defendants' insurance company destroyed a wire flag holder that had allegedly caused plaintiff's injuries, the trial court properly granted "the right to have Pattern Jury Instruction 1:77.1 read to the jury upon request" (internal quotation marks omitted), while refusing to strike defendants' answer]).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the joint motion of defendants DMG Events (USA) Inc., incorrectly shown here as DMG World Media (USA) Inc., and George Little Management, LLC, also shown here as GLM, LLC, is resolved as follows:

All claims and cross-claims against DMG Events (USA) Inc., incorrectly shown here as DMG World Media (USA) Inc., are dismissed;

The branch of the motion seeking summary judgment dismissing plaintiff's complaint as against George Little Management, LLC, also shown here as GLM, LLC, is granted;

The branch of the motion seeking dismissal of the cross-claim of defendant New York Convention Center Operating Corporation, d/b/a The Jacob Javits Convention Center, for common-law indemnification against George Little Management, LLC, also shown here as GLM, LLC, is granted, but the branch of the motion seeking dismissal of the cross-claim of New York Convention Center Operating Corporation, d/b/a The Jacob Javits Convention Center, for contractual indemnification claim against George Little Management, LLC, also shown here as GLM, LLC, is denied;

and it is further

ORDERED that plaintiff's cross-claim for spoliation sanctions against defendant George Little Management, LLC, also shown here as GLM, LLC is denied; and it is further

ORDERED that plaintiff's motion for spoliation sanctions against defendant New York Convention Center Operating Corporation, d/b/a The Jacob Javits Convention Center, is granted to the extent that plaintiff is entitled to an adverse inference jury instruction with regard to the electrical wire that said defendant disposed of before the commencement of this action.

The foregoing constitutes the decision and order of this Court.

ENTER:

Dated: December 16, 2013
New York, New York

Hon. Shlomo S. Hagler, J.S.C.

Shlomo Hagler
J.S.C.