Grant v Metropolitan
2018 NY Slip Op 31824(U)
August 1, 2018
Supreme Court, New York County
Docket Number: 150603/16
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC
Justice

PART 47

Grant

-v-

Metropolitan

INDEX NO. 150603/16

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause – Affidavits – Exhibits ____ No(s). 1

Answering Affidavits – Exhibits ____ No(s). 2

Replying Affidavits ____ No(s). 3

In this personal injury trip and fall action, defendants move for summary judgment pursuant to C.P.L.R. § 3212 seeking dismissal of the complaint. On February 28, 2015, plaintiff Dov Grant attended an opera at the Metropolitan Opera House located at Lincoln Center in Manhattan. During the first intermission, he descended the stairs and allegedly tripped over the legs of a patron who was sitting in the aisle with his legs outstretched and suffered injuries (*Verified Complaint dated September 30, 2015*, ¶ 16). Plaintiff alleges negligence on the part of Lincoln Center for the Performing Arts ["Lincoln Center"], the owner of the opera house, and Metropolitan Opera Association, Inc. ["The Met"], the lessee and operator of the opera house, in failing to prevent the existence of a dangerous condition (*id.*, ¶ 17).

The Met argues that it cannot be held liable for plaintiff's injuries because the act of the patron sticking his leg out into the aisle and causing plaintiff to fall was an independent, intervening act that was not a normal or foreseeable consequence of defendant's alleged negligence. It is well-established that "[w]here the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed. In such a case, liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*Derdiarian v. Felix Contr. Corp.*, 51 N.Y.2d 308, 315 [1980]; *see also De'L.A. v. City of New York*, 158 A.D.3d 30, 36 [1st Dep't 2017). Since questions regarding what is foreseeable or not "may be the subject of varying inferences . . . these issues generally are for the fact finder to resolve" (*Derdiarian*, 51 N.Y.2d at 315). In this case, it cannot be said as a matter of law, that it was unforeseeable that a person sitting in the aisle of the theater would stick out his leg and cause another patron to trip and fall. Indeed, James Naples, House Manager at the Met, testified at his deposition that if an opera employee would see a patron sitting in an aisle of the theatre, the employee would ask the patron to get up to prevent another person from tripping over that person (*Beyrer Aff'm, Ex. J., p. 17-19*). Thus, the Met was clearly aware of the risks posed by a patron sitting in the aisle.

Dated: ____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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Upon the foregoing papers, it is ordered that this motion is

The Met cites to *Polye v. Nederlander Org.*, 131 A.D.3d 1031, 1032 [2d Dep't 2015] in support of its argument. In *Polye*, a patron of a Broadway show sat in the aisle of the theater during the entire show. At the conclusion of the show, plaintiff got up to leave the theater and attempted to go around the patron who was seated in the aisle. At that point, the patron in the aisle stood up and spread her coat open, causing plaintiff to fall down the aisle. The Second Department held that any negligence on the part of the defendant in allowing the patron to sit in the aisle was not the proximate cause of the accident (*Id. at 1031*). "[T]he patron's act of spreading her coat open in the aisle after the show ended was an independent, intervening act that was not a normal or foreseeable consequence of the situation created by the defendants' alleged negligence" (*Id. at 1031-32*).

Polye is distinguishable from the case at hand. In *Polye*, the act of standing up and spreading open a coat, thereby causing plaintiff to fall, "was not a normal or foreseeable consequence of the situation created by the defendants' alleged negligence" (*id.*). Here, by contrast, it cannot be said that it was unforeseeable that a person sitting in the aisle would stick out his leg and cause someone passing by to fall. A person sitting in an aisle can be expected to move his limbs and change positions, including sticking out his leg. Indeed, as mentioned above, Metropolitan was clearly aware of such risks as it had a policy in place to remove people sitting in the aisle. Thus, a reasonable jury can conclude that the patron's act of sticking out his leg was a foreseeable consequence of allowing the patron to sit in the aisle and summary judgment is inappropriate on this basis.

SUBMIT ORDER ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Dated: _____ _____, J.S.C.

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Upon the foregoing papers, it is ordered that this motion is

Next, the Met argues that it cannot be held liable for plaintiff's injuries because it did not create the allegedly dangerous condition that existed at the premises nor had actual or constructive notice thereof. It is well-established that "[a]n owner of land has a duty under the common law to maintain its premises in a reasonably safe condition" (*Kellman v. 45 Tiemann Assoc., Inc.*, 87 N.Y.2d 871, 872 [1995] [internal citations and quotations omitted]). "This duty applies with equal force to landowners and tenants who operate places of public assembly, such as theaters, and requires them to provide members of the public with reasonably safe premises, including safe means of ingress and egress" (*Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319, 322 [1st Dep't 2006]). "However, as a prerequisite for recovering damages, a plaintiff must establish that the landlord created or had either actual or constructive notice of the hazardous condition that precipitated the injury" (*Irizarry v. 15 Mosholu Four, LLC*, 24 A.D.3d 373, 373 [1st Dep't 2005]).

"To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837 [1986]). Here, there are several factors that could lead a jury to conclude that the Met had constructive notice of the dangerous condition at the premises. Honey Grant, plaintiff's wife who attended the performance with him, testified at her deposition that she noticed a patron in the aisle when she got up to use the restroom (*Beyrer Aff'm, Ex. I., p. 17*). Plaintiff testified at his deposition that he waited approximately 15 to 20 minutes after his wife left before getting up to use the restroom during intermission at which point the patron was still sitting in the aisle (*Beyrer Aff'm, Ex. H., p. 36*). Further, the lights were on during the intermission (*Beyrer Aff'm, Ex. H., p. 35*) and there were approximately six ushers stationed in the family circle area where the accident took place (*Beyrer Aff'm, Ex. J., p. 17*). Based on this evidence, a jury may conclude that that the patron was sitting in the aisle for at least 15-20 minutes before the incident and that one of the six ushers working in the area should have noticed him. Thus, there is an issue of fact as to whether the Met had constructive notice of the dangerous condition.

Dated: ____ ____, J.S.C.

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FOR THE FOLLOWING REASON(S): MOTION IS DECIDED IN ACCORDANCE WITH ANNEXED DECISION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Paul A. Goetz, JSC
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Upon the foregoing papers, it is ordered that this motion is

The Met cites to *Branham v. Loews Orpheum Cinemas, Inc.*, 31 A.D.3d 319 [1st Dep't 2006] in support of its argument that it did not have constructive notice. In *Branham*, plaintiff went to see a movie at the Loews Cinema in Manhattan (*id. at 319*). At one point during the movie, plaintiff left the theater to go to use the restroom, using the center aisle (*id.*). As she left the theater, she did not observe anyone in the aisle (*id.*). It was very dark in the theater when she left and when she returned (*id.*). Plaintiff testified at her deposition that she was gone from the theater for about seven or eight minutes (*id.*). When she returned to her seat, she tripped over a young boy who was sitting in the aisle and she sustained injuries (*id. at 320*). Plaintiff sued Loews, the operator of the theater, alleging that it was negligent in allowing a child to occupy the aisle and thereby create a dangerous condition (*id.*).

Lowes moved for summary judgment, arguing that it did not have constructive notice of the alleged dangerous condition of the boy sitting in the aisle (*id. at 321*). The First Department granted Lowes' motion, agreeing with Lowes that it did not have constructive notice of the condition (*id. at 323*). Plaintiff's testimony established that the boy was not sitting in the aisle for more than eight minutes before the accident occurred (*id.*). "This time line, supplied by plaintiff's own testimony, [negated] any inference that the boy was present for a sufficient period of time to permit an inference of constructive notice" (*id.*).

There are several factors that distinguish the case at hand from *Branham*. Unlike *Branham*, the evidence in this case shows that the patron may have been sitting in the aisle for at least 15-20 minutes before the accident occurred. Furthermore, unlike *Branham*, the theater was well-lit during the intermission and there were several ushers stationed in that area that could have the patron sitting in the aisle. Based on these factors, a jury could rationally conclude that the Met could have discovered the patron sitting in the aisle.

Dated: _____

_____, **J.S.C.**

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FOR THE FOLLOWING REASON(S): _____

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
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Upon the foregoing papers, it is ordered that this motion is

Finally, in support of its motion, the Met argues that it cannot be held liable for plaintiff's injuries because plaintiff admitted that he caused his own accident. To support this contention, moving defendants cite to a report prepared by Metropolitan Security Department after the accident which states that Mr. Grant said that he "missed a step and fell down the steps landing by Row B" (*Beyrer Aff'm, Ex. G.*). However, at his deposition, plaintiff testified that he fell because he tripped over the patron's leg (*Beyrer Aff'm, Ex. H., p. 40*). At a minimum, an issue of fact exists at to the cause of plaintiff's injuries and thus summary judgment must be denied.

With respect to the Lincoln Center, defendant argues that the Lincoln Center cannot be held liable for plaintiff's injuries because it is an out-of-possession landlord with no duty to plaintiff. "It is well settled that a landlord is not generally liable for negligence with respect to the condition of property after its transfer of possession and control to a tenant unless the landlord is either contractually obligated to make repairs or maintain the premises, or has a contractual right to reenter, inspect and make needed repairs at the tenant's expense, and liability is based on a significant structural or design defect that is contrary to a specific statutory safety provision" (*Malloy v. Friedland*, 77 A.D.3d 583, 583 [1st Dep't 2010] [internal citations and quotations omitted]).

Here, the Lincoln Center was not contractually obligated to make repairs to the premises. Pursuant to Article 8 of the lease between the Lincoln Center and the Met, the Met is obligated "to take good care of the Opera House and to keep the same in good order and condition, and to promptly make all necessary repairs thereto" (*Beyrer Aff'm, Ex. L., p. 32*). Although the NYC Building Code requires the aisles to be kept clear, the presence of a patron in the aisle is not a significant structural or design defect and thus cannot impose liability on an out-of-possession landlord such as the Lincoln Center (*See Varga v. North Realty Co.*, 123 A.D.3d 639, 640 [1st Dep't 2014]). Therefore, the Lincoln Center cannot be held liable for plaintiff's injuries.

Dated: _____

_____, **J.S.C.**

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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SUPREME COURT OF THE STATE OF NEW YORK
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Upon the foregoing papers, it is ordered that this motion is

Accordingly, it is

ORDERED that the Lincoln Center for the Performing Arts, Inc.'s motion for summary judgment is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED, that the action is severed and continued against the remaining defendant the Met; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall e-file a "Notice to County Clerk" form (form EF-22, available on NYSCEF) along with a copy of this order with notice of entry and upon such service, the Clerk is directed to mark the court's records to reflect the change in the caption.

Dated: 8/1/18

, J.S.C.
Hon. Paul A. Goetz, JSC

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