Acevedo v Madison Sq. Garden Co.
2021 NY Slip Op 30080(U)
January 7, 2021
Supreme Court, New York County
Docket Number: 157997/16
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CHRISTIAN ACEVEDO and JUDITH TEJEDA

INDEX NO. 157997/16

MOT. DATE

- v -

MOT. SEQ. NO. 3&4

THE MADISON SQUARE GARDEN COMPANY et al.

The following papers were read on this motion to/for SJ

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____

Replying Affidavits NYSCEF DOC No(s)._____

This is a personal injury action wherein plaintiff Christian Acevedo seeks to recover for injuries he sustained when he walked into an unmarked glass panel while attending a basketball game at Madison Square Garden in Manhattan (the "premises"). Insofar as is relevant to this motion, in a decision/order dated December 1, 2017, the court denied as premature a motion for summary judgment by the defendant The United States of America Basketball ("USA Basketball"). The court further held that "USA Basketball's argument premised upon GOL § 5-321 [wa]s also unavailing. GOL § 5-321 expressly applies to leases (as compared to the license agreement at issue here), an otherwise, USA Basketball has not demonstrated that plaintiff's accident was caused solely by the MSG defendant's negligence, such that GOL § 5-321 would apply."

Presently, there are two summary judgment motions pending. In motion sequence 3, USA Basketball again moves for summary judgment dismissing the complaint and all crossclaims together with costs and disbursements against the plaintiff. Plaintiffs oppose the motion. Defendants The Madison Square Garden Company ("MSG Co"), MSGN Holdings, LP f/k/a MSG Holdings L.P. ("MSG LP") and CSC Holdings, LLC i/s/h/a/ Cablevision 118-35 Queens Boulevard ("CSC" and together with MSG Co and MSG LP, "MSG") partially oppose the motion to the extent that USA Basketball seeks summary judgment on their crossclaims.

In motion sequence 4, MSG also moves for summary judgment dismissing the complaint and all crossclaims as well as declarations that USA Basketball is required to defend and indemnify MSG and that USA Basketball breached its contract to procure insurance as well as a hearing on damages. Plaintiffs opposes that motion as well, while USA Basketball partially opposes the request for relief against it.

Issue has been joined and the motions were timely brought. Therefore, summary judgment relief is available. In an interim order dated December 24, 2020, the court directed the parties to submit video of

Dated: 1/7/21

HON. LYNN R. KOTLER, 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**

the underlying incident that was annexed to the parties' motion papers via cloud sharing service. The parties complied with that order and the court has reviewed the video.

The relevant facts are not in dispute. Acevedo testified at his deposition that arrived at the premises on the date of the accident to attend a USA Basketball game. Before the accident, he was "wanded" by security and was then told to "go straight forward". He then took two steps straight ahead and walked into a 13-foot high fixed panel of glass, hitting his forehead. Acevedo explained:

> Q When you were taking those two steps, where were you looking?
> A Straight.
> Q What did you see?
> A An open area.
> …
> Q Did you see doors in the area to go in and out of Madison Square Garden before your accident happened?
> A No.
> Q Did you notice any open doors in the area where your accident happened before your accident happened? All I am asking you now is your observations before the accident. Did you notice doors that were open or ajar?
> A I can't remember.
> …
> Q Before you were wanded, did you see somebody getting wanded ahead of you? By wanded, I mean have the guard put the wand on you.
> A I don't remember.
> Q Did you see anybody proceed into Madison Square Garden before you on the day of the accident?
> A No.
> Q Did you see anybody coming out of Madison Square Garden before your accident happened on the date of the accident?
> A No.

Plaintiffs claim that the defendants were negligent by failing to mark the transparent glass panel which Acevedo struck. Plaintiffs submit the affidavit of Matthew A. Noviello, a professional engineer, who opines based on records and his observations of the panel that said panel violated the 1968 and 2008 NYC Building Codes (specifically part 47 and chapter 22 respectively) as well as Labor Law § 241-b and 2 RCNY §4-03.

USA Basketball produced Sean Ford, its Men's National Team Director, for a deposition in this matter. Ford testified as follows. In 2014, USA Basketball held two games at the premises. Prior to holding those games, USA Basketball entered into a License Agreement with MSG LP. The agreement provides in relevant part as follows:

> Licensor [MSG LP] hereby grants Licensee [USA Basketball] the license and privilege (the "License") on an exclusive basis, … to use the area designated as the Arena … including all back-of-house, public, non-public and other areas customarily licensed for events similar to the Events … within the Madison Square Garden Sports and Entertainment Complex, New York, New York … for the sole purpose of permitting Licensee to present two international basketball games featuring the United States Men's National Team (commonly known as "Team USA"), one against the national team from Puerto Rico, and the other against the national team from the Dominican Republic…
>
> 6. Indemnification.

> (a) Licensee hereby agrees to indemnify, defend and hold harmless The Madison Square Garden Company, MSG Holdings, L.P., their owners and partners and all of their respective parent, subsidiary and affiliated entities, whether direct or indirect, and all directors, officers, agents, employees, licensees, successors and assigns of any of the foregoing (collectively, the "Affiliates"), from and against any and all liabilities, losses, damages, judgments, settlement expenses, claims, costs and expenses whatsoever (including court costs, attorneys' fees and related disbursements, whether incurred by Licensor in actions involving third parties or in actions against Licensee for claims under this Agreement) (individually, a "Loss" and collectively, the "Losses") arising out of or in connection with (i) the breach by Licensee of any of its agreements or covenants under this Agreement, (ii) the untruth of any of its representations and warranties hereunder, (iii) the presentation of the Events, (iv) the Filming, as defined in Section 14 below, or (v) the use of the Building, or any part thereof, in connection with the presentation of the Events or any preparation for or move-in or move-out of the Events, including, but not limited to, areas utilized by guests attending the Events, box office areas, escalators, elevators, stairs, seating areas, lavatories, restaurant and concession areas and all areas and facilities utilized for ingress and egress of guests, provided, however, that Licensee shall have no obligation to indemnify Licensor to the extent that the Losses arise from the willful misconduct of Licensor or its employees or agents.

Ford testified that it was MSG's responsibility to admit patrons into the premises and to check them for security purposes. He further testified that USA Basketball did not employ any security personnel, including security to work at the entrance nor did it have any involvement in security procedures at the premises. Ford maintained that no one employed by USA Basketball was stationed in the area where patrons entered the premises during the event.

USA Basketball argues in support of its motion that “the alleged dangerous and defective condition that the plaintiff claims proximately caused his accident, the unmarked door and sidelight panels, could not have been reasonably foreseeable to warrant USA Basketball to be liable to the plaintiff or MSG.” USA Basketball has submitted the affidavit of Benjamin Leonardi, a registered architect, who opines that the applicable Building Codes did not require the marking of the glass panel which plaintiff struck.

MSG argues that in light of the 12/1/17 decision/order and plaintiff’s undisputed testimony that he was at the premises to attend a USA Basketball game, an event as defined by the License Agreement. MSG further contends that plaintiff's accident was not caused by a dangerous or defective condition in the glass panel which plaintiff struck.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court’s function on these motions is limited to “issue finding,” not “issue determination” (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

A property owner has a duty to keep the premises in a reasonably safe condition so as to prevent anybody lawfully on the premises from becoming injured (*Basso v Miller*, 40 NY2d 233, 239 [1976]). In order to prove defendant's negligence under a theory of premises liability, plaintiff must demonstrate that: (1) the premises were not reasonably safe; (2) defendant either created the dangerous condition which caused plaintiff's injuries or had actual or constructive notice of the condition and; (3) defendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing plaintiff's injury (*Schwartz v. Mittelman*, 220 AD2d 656 [2d Dept 1995]).

MSG has not demonstrated entitlement to summary judgment dismissing plaintiffs' complaint. The expert affidavit submitted by USA Basketball which MSG relies upon only creates a triable issue of fact as to whether the applicable Building Codes required the marking of the glass panel which plaintiff struck. Even if the building codes did not so require, a reasonable fact finder could conclude on this record that, given the security procedures employed at the time of plaintiff's accident, the glass panel in an area where open doors were located without any further markings or warnings constituted a dangerous condition. Therefore, MSG's motion for summary judgment dismissing plaintiffs' complaint must be denied.

USA Basketball was using the premises as a licensee. There is no caselaw defining the duty of care that a licensee owes to someone on the premises licensed which would support plaintiffs' claims against USA Basketball, as compared to caselaw defining the scope of the duty property owners owe to licensees. If a tenant "did not have a duty to mark the glass in accordance with the Labor Law or the Industrial Code", a mere licensee certainly cannot be said to have such a duty (*see Griffin v. State of New York*, 83 AD3d 1357 (3d Dept 2011). The question is whether the area where plaintiff's injury occurred falls within the area that USA Basketball licensed to use pursuant to the agreement. The agreement clearly states that USA Basketball accepted the privilege to use on an "exclusive" basis the "Arena [] including all back-of-house, public, non-public and other areas customarily licensed for events similar to the Events [] within the Madison Square Garden Sports and Entertainment Complex, New York, New York". Based on the clear, unequivocal terms of the agreement, USA Basketball was using the area when and where plaintiff's injury occurred. Using the premises does not transform USA Basketball into a possessor of the premises. Therefore, USA Basketball cannot be held liable to plaintiffs under ordinary premises liability principles.

Whether a defendant owes a duty of care to a plaintiff is a question of law to be determined by the court (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Generally, contractual obligations do not give rise to a duty of care in favor of third-parties. However, where a defendant, in failing to exercise reasonable care in the performance of his or her duties, "launches a force or instrument of harm", the defendant assumes a duty of care to third parties and may be held liable (*id.* [internal citations omitted]). Since USA Basketball has established that was not responsible for security, did not hire any security guards and otherwise had nothing to do with the area where plaintiff's accident occurred, USA Basketball is entitled to summary judgment dismissing plaintiffs' claims against it.

Finally, the court turns to USA Basketball and MSG's motions for summary judgment as to MSG's claims for contractual indemnification and breach of contract for failure to procure insurance. "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 also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

USA Basketball is entitled to contractual indemnification "from and against any and all liabilities, losses, damages, judgments, settlement expenses, claims, costs and expenses whatsoever (including court costs, attorneys' fees and related disbursements, … arising out of or in connection with … the use of the Building, or any part thereof, in connection with the presentation of the Events or any preparation

for or move-in or move-out of the Events, including, but not limited to, areas utilized by guests attending the Events, box office areas, escalators, elevators, stairs, seating areas, lavatories, restaurant and concession areas **and all areas and facilities utilized for ingress and egress of guests**, provided, however, that **Licensee shall have no obligation to indemnify Licensor to the extent that the Losses arise from the willful misconduct of Licensor or its employees or agents.**"

There is no dispute that plaintiff was injured at an area of ingress to the premises arising from and in connection with USA Basketball's use of the premises. However, since there are issues of fact as to MSG's security procedures and whether the glass panel met statutory requirements and/or was dangerous, MSG has not demonstrated freedom from negligence and is therefore not entitled to contractual indemnification (General Obligations Law § 5-322.1; *see Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]). MSG argues on reply that it did not need to provide an affidavit from the security guard present at the time of plaintiff's accident because same was never demanded. That argument fails to recognize that as the proponent of a motion for summary judgment, it is MSG's burden of proof to establish *prima facie* entitlement to such relief. Accordingly, both MSG and USA Basketball's motions for summary judgment as to the contractual indemnification claim are denied.

As to MSG's claim that USA Basketball breached its duty to procure insurance, the latter has provided a certificate of liability insurance issued to it which identifies a $1 million personal injury policy bearing policy number KK00003918300 (by National Casualty Company) which was in effect from September 30, 2013 through September 30, 2014. It also reflects an excess liability policy in the amount of $5 million bearing policy number XK00003918400 (by National Casualty Company) which excess policy was in effect from September 30, 2013 through September 30, 2014. Since there is no dispute that USA Basketball obtained the insurance it was required to under the License Agreement, USA Basketball's motion as to MSG's claim for breach of contract against it is also granted and MSG's respective motion on this claim is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that USA Basketball's motion is granted to the extent that plaintiffs' claims against it as well as MSG's cross-claim for breach of contract are severed and dismissed; and it is further

ORDERED that the balance of USA Basketball's motion as well as MSG's motion are denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 1/7/21
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.