

<b>McNeelege v One Bryant Park LLC</b>
2021 NY Slip Op 32231(U)
November 10, 2021
Supreme Court, New York County
Docket Number: Index No. 153038/2017
Judge: Erika M. Edwards
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ERIKA EDWARDS PART 11**

*Justice*

-----X

HUGH MCNEELEGE,

Plaintiff,

- v -

ONE BRYANT PARK LLC and ROUNDABOUT THEATRE  
COMPANY, INC. d/b/a THE STEPHEN SONDHEIM  
THEATRE,

Defendants.

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INDEX NO. 153038/2017

MOTION DATE 11/30/2020,  
04/01/2021

MOTION SEQ. NO. 001, 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 55, 56, 57, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 88, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 124, 125

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 87, 89, 90, 91, 92, 93, 121, 123, 126, 127, 128, 129, 130, 131

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, a video of the incident and the applicable case law, the court denies Defendant Roundabout Theatre Company, Inc. d/b/a The Stephen Sondheim Theatre’s (“Roundabout”) motion for summary judgment dismissal of Plaintiff Hugh McNeelege’s (“Plaintiff”) complaint and all cross-claims against it (Motion Sequence No. 001), the court denies Defendant One Bryant Park LLC’s (“One Bryant Park”) motion for partial summary judgment dismissal of Plaintiff’s complaint (Motion Sequence No. 002) and the court denies One Bryant Park’s cross-motion for summary judgment on its contractual indemnity cross-claim, including attorney’s fees, costs and expenses as against Roundabout.

Plaintiff brought this personal injury action against Defendants One Bryant Park and Roundabout (collectively, “Defendants”) for injuries he allegedly sustained on July 8, 2016,

when he tripped and fell while exiting a theater operated by Roundabout and owned by One Bryant Park. Plaintiff alleges in substance that he fell as he stepped down onto an uneven, sloped sidewalk, which varied in height from 2.5 to 4.5 inches, while holding the door and looking back as he exited the theater in a crowd of people. Plaintiff further alleges that he was looking back to make sure that the door did not close on anyone walking behind him and there were people walking in front of Plaintiff so he did not see the step. Plaintiff further alleges that the step and slope created a defective and dangerous condition and that Defendants had actual and constructive notice of the defect since it existed for at least ten years and there were at least five prior similar incidents of people falling at said location.

Roundabout moves under motion sequence 001 for summary judgment dismissal of Plaintiff's complaint and all cross-claims against it. One Bryant Park moves for summary judgment dismissal of Plaintiff's complaint against it and cross-moves for partial summary judgment in its favor on its cross-claims against Roundabout for contractual indemnity, including attorney's fees, costs and expenses.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*,

22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5<sup>th</sup> ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

In an action for negligence, a plaintiff must prove that the defendant owed him a duty to use reasonable care, that the defendant breached that duty and that the plaintiff's injuries were caused by such breach (*Akins v Glens Falls City School Dist.*, 53 NY2d 325, 333 [1981]). A motion for summary judgment may be properly granted when a defendant demonstrates that it did not create or have actual or constructive notice of an alleged defective condition which allegedly caused plaintiff's fall (*Rodriguez v New York City Tr. Auth.*, 118 AD3d 618 [1<sup>st</sup> Dept 2014]).

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 defendants' employees to discover and remedy it to correct or warn about its existence (*Lewis v Metro. Transp. Auth.*, 64 NY2d 670, 670 [1984]; *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, the court finds that One Bryant Park's motion and cross-motion are untimely and that One Bryant Park failed to provide a sufficient basis to explain the delay in filing both motions. Therefore, the court denies both the motion and cross-motion on this basis. However, even if they were timely filed and the court were to consider them substantively, then the court would deny both motions on their merits for the reasons set forth herein. Additionally, the court considered all expert affidavits.

The court denies all motions and cross-motions and finds that neither Defendant met its burden of demonstrating its entitlement to summary judgment in their favor as a matter of law and that questions of fact exist to be determined by the trier of fact.

Such questions of fact which prevent dismissal of Plaintiff's complaint include, but are not necessarily limited to, whether the step was open and obvious and not inherently dangerous, whether Defendants had actual and/or constructive notice of the alleged defect, whether Plaintiff's actions of looking back while walking forward was the sole cause of his accident, whether the alleged defective condition was a substantial factor in causing Plaintiff's fall and whether Defendants breached a duty owed to Plaintiff.

As to One Bryant Park's cross-motion, the court finds that material questions of fact remain, including, but not necessarily limited to, whether Plaintiff's alleged dangerous condition arose out of Roundabout's use and occupancy of the premises for which Roundabout would be responsible for maintaining in a reasonably safe condition and which required Roundabout to indemnify One Bryant Park under the terms of the lease, or whether it was a significant structural or design defect which was contrary to a specific statutory safety provision for which One Bryant Park was responsible for maintaining in a reasonably safe condition.

As such, the court denies the motions and cross-motion.

The court considered all remaining arguments and denies all requests for relief not specifically granted herein.

Therefore, it is hereby

ORDERED that the court denies Defendant Roundabout Theatre Company, Inc. d/b/a The Stephen Sondheim Theatre's motion for summary judgment (Motion Sequence No. 001); and it is further

ORDERED that the court denies Defendant One Bryant Park LLC's motion for summary judgment dismissal of Plaintiff's complaint (Motion Sequence No. 002) and its cross-motion for partial summary judgment on its contractual indemnity cross-claim.

This constitutes the decision and order of the court.

11/10/2021

DATE

  
ERIKA EDWARDS, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: