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

PRESENT: Sasalee Evans Justice PART 10

0114811/2003

TOKOLYI, GYONGYI
vs
MADISON SQUARE GARDEN

SEQ 1

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision.

FILED
DEC 29 2004
COUNTY CLERK'S OFFICE

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

Dated: 12/21/04

Sasalee Evans J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 10

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GYONGYI TOKOLYI and LASZLO TOKOLYI,

Plaintiffs,

Index No.114811/03

-against-

DECISION and ORDER

MADISON SQUARE GARDEN L.P., NEW YORK RANGERS HOCKEY CLUB, and NATIONAL HOCKEY LEAGUE ENTERPRISES, INC.,

Defendants.

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SARALEE EVANS, JSC

Recitation, as required by CPLR § 2219[a], of the papers considered in review of this motion by defendants for summary judgment dismissing the complaint.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits.	1
Plaintiff's Affirmation in Opposition and Exhibits	2
Reply Affirmation and Exhibits	3

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff sues for injuries she sustained when she was hit with a puck while watching a hockey game at Madison Square Garden (the Garden). Plaintiff was sitting in her seat in the seventh row behind the goal and behind a 12 foot high protective barrier when the puck left the ice and hit her in the face. Her nose was broken in three places, facial bones under her eye were fractured and she sustained a cut requiring 15 or more stitches.

Discovery in the case has been completed and defendants move for summary dismissal pursuant to CPLR §3212, alleging that plaintiff will be unable to establish *prima facie* evidence of negligence at trial. Plaintiff opposes the motion contending that the adequacy of the protection afforded to plaintiff presents a factual issue for determination by the jury. The facts on the

motion will be construed in the light most favorable to nonmovant. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980).

In support of the motion defendants urge that two cases are dispositive. One, *Stern v. Madison Square Garden Corp.*, 226 AD2d 444 (2nd Dept. 1996), determined under the circumstances of that case that as a matter of law, the protection afforded plaintiff by the Garden "satisfied [its'] duty of [reasonable] care...." In *Sheldon v. Madison Square Garden Corp.*, 249 AD2d 151 (1st Dept. 1998), the First Department granted summary judgment to Madison Square Garden, noting that in that case it was conceded that, "at the time of plaintiff's injury, all appropriate safety measures had been taken by Madison Square Garden...," citing the *Stern* decision. Defendants provide a transcript of an EBT taken in the *Stern* case in 1993 of the Building Operation Manager, who stated that since the date of the accident in *Stern* in 1991, the protective barriers between the rink and the spectators had been changed only to the extent that they were increased to afford more protection on the sides of the rink.

In opposition, plaintiff provides the affidavit of an engineer who opined, on the basis of the discovery in this case, that there was a high probability that the puck went over the 12 foot plexiglass at a high rate of speed, then fell and hit plaintiff in her seat below the top of the barrier. Plaintiff urges that there is an issue of fact as to whether defendants had a duty to provide better protection or to warn those sitting behind the highest barriers that they were nevertheless subject to being hit by a high speed puck.

Defendants reiterate that the *Stern* case forecloses any issue with respect to duty owed by the Garden to its' spectators. On Reply, defendants provide the record on appeal of that case to support their position that that court's ruling controls this case.

Review of the facts of *Stern* suggests, however, that it cannot be viewed as a sweeping

imprimatur of the Garden's safety measures. The plaintiff in *Stern* was hit after he left his seat behind the plexiglass barrier and approached the ice on the side where barriers are lower. He testified that he was a lifelong hockey fan who approached the players' bench during warm-up in hopes of being given a puck. The bench was located on the longer side of the rink where the plexiglass barriers drop to three feet above the boards. An usher then moved him out of the rinkside aisle and up some steps. While standing at a point higher than the barrier in front of him, he was hit with a puck.

In granting Madison Square Garden summary judgment, the appellate court in *Stern* held that, "the proprietor of the [sporting] facility need only provide screening or other safety devices for the area of the facility where the danger of injury to spectators is greatest, and that screening must provide adequate protection for as many spectators as may reasonably be expected to desire such seating..." *Stern v. Madison Square Garden, supra*, at 445 [emphasis added.] Plaintiff contends that it is the adequacy of that maximum protection behind the goals that is at issue here.

Here Ms. Tokolyi had never before attended a hockey game and did not purchase own her ticket or know in advance where she would be sitting. She arrived at the stadium with her husband and a friend, picked up the tickets and entered the arena five to ten minutes after the game had started. Plaintiff remained in her seat behind the boards and plexiglass barrier from the time of her entry until the puck hit her in the face. She did not see it leave the ice before it hit her.

Although defendant emphasizes that plaintiff did not ask to change her seat, there is no evidence that she had reason to do so or that there was better protected seating available. In *Sheldon*, plaintiff had conceded that all appropriate safety measures had been taken by Madison Square Garden. Here, plaintiff contends that the barriers affording the maximum protection in the

area of greatest danger behind the goals were are not high enough to afford adequate safety and were not supplemented by spectator nets above the plexiglass.

The law is clear that sporting facility proprietors are not insurers of their patrons. "[T]he fact that protective screens do not totally eliminate the inherent risk of spectator injury" does not foreclose the issue of whether such protection adequately fulfills the owner's duty of care. *Rosa* v. *County of Nassau,* 153 AD2d 618 (2d Dept. 1989). Although the First Department has ruled that Madison Square Garden met its' duty of care with respect to a spectator located outside the plexiglassed area, defendant has provided no evidence as to the adequacy of the plexiglass barriers behind the goals. Defendants' Director of Building Operations testified that he did not know if the height of the barriers is set according to any industry standard nor whether the seats in the section where plaintiff was seated are below the top of the barrier. He did not know the reason for the plexiglass panels but believed they were to protect the safety of the players and to keep the puck in play.

On a motion for summary judgment, it is movant's burden to set forth evidentiary facts that would entitle him to judgment as a matter of law. *Friends of Animals v. Asoc. Fur Manufacturers,* 46 NY2d 1065, 1067 (1979). It is "not plaintiff's burden in opposing the motion to demonstrate the negligence of defendants or the proximate cause of the accident; rather, it was defendants' burden, as movants, to establish the absence of creation of the dangerous condition . . . ." *Buckle v. Buhre Avenue Foods, Inc.*, 232 AD2d 269, 270 (1st Dept. 1996); *Wasserman v. City of New York,* 267 AD2d 151 (1st Dept. 1999).

Defendants would extract a ruling that the 12 foot barriers behind the goals are adequate as a matter of law from language in the *Stern* decision wherein the Court determined that no additional duty of care was raised when an usher told Stern to move out of the aisle next to the

lower plexiglass barrier and into a place of seemingly less protection. This Court cannot, however, read such a broad meaning into the Court's statement. In the absence of either controlling authority or expert testimony on the matter, this court cannot determine as a matter of law that defendants have met their duty of reasonable care with respect to plaintiff's safety. On this record, movant's papers are insufficient to support a grant of summary judgment with respect to Madison Square Garden.

With respect to the other two named defendants, the motion is granted. Defendants have demonstrated that the New York Rangers Hockey Club is a division of defendant Madison Square Garden, L.P. and not an independent entity, and that National Hockey League Enterprises, Inc., is not involved with the ownership or operation of Madison Square Garden.

For the foregoing reasons, it is

ORDERED that defendants' motion for summary judgment is granted only to the extent that the complaint is dismissed as against defendants New York Rangers Hockey Club and National Hockey League Enterprises, Inc., and the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that defendant's motion is denied with respect to defendant Madison Square Garden, L.P.

ENTER:

Dated: December 21, 2004
New York, N.Y.

Saralee Evans

Saralee Evans, J.S.C.