

Baranker v Lincoln Ctr. for the Performing Arts

2014 NY Slip Op 30103(U)

January 8, 2014

Sup Ct, New York County

Docket Number: 107562/2011

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PRESENT: _____
Justice

PART 5

Index Number : 107562/2011
BARANKER, JANE

INDEX NO. _____

vs
LINCOLN CENTER FOR PERFORMING

MOTION DATE _____

Sequence Number : 002
DISMISS

MOTION SEQ. NO. _____

calc # 6

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING ~~ORDER~~ ORDER

FILED

JAN 13 2014

NEW YORK
CLERK'S OFFICE

Dated: 1-8-14

[Signature]
HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED
- 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

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 5

-----X
JANE BARANKER,

Plaintiff,

- against -

DECISION/ORDER
Index No. 107562/2011
Seq. No. 002

LINCOLN CENTER FOR THE PERFORMING ARTS,
INC., THE CITY OF NEW YORK, THE JULLIARD
SCHOOL, JOHN DOE,

Defendants.

-----X
HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR§2219, OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

FILED

PAPERS NUMBERED
JAN 13 2014

NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	NEW YORK COUNTY CLERK'S OFFICE	..1-2(Ex A-J)..
ORDER TO SHOW CAUSE AND AFFIDAVIT.....	
AFFIRMATIONS IN OPPOSITION.....		...3,4(Ex A)...
REPLYING AFFIRMATION.....	5.....
OTHER.....	

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants Lincoln Center for the Performing Arts (Lincoln Center) and the City of New York (the City) move jointly for summary judgment dismissing the personal injury complaint.

For the reasons set forth below, the motion is **granted**.

Factual Background

On April 14, 2010, plaintiff Jane Baranker was on her way to attend a free concert at Alice Tully Hall, which is part of Lincoln Center. The concert was part of an ongoing series offered on Wednesday at one o'clock. Students attending defendant Julliard School (Julliard)

play at the concerts.

Lincoln Center submits a surveillance video that shows plaintiff's accident, which the court has viewed. The DVD shows that the approach to Alice Tully Hall consists of steps going downward to a plaza and from the plaza to the doors of the hall. Plaintiff can be seen coming down the steps and walking on the plaza towards the hall. A man with a bundle on his back walks rapidly in her direction. He bumps into her knocking her to the ground. He stops very briefly then leaves. While plaintiff is on the ground, a man whom she identifies as a security guard comes over and stands next to her.

Plaintiff subsequently managed to move to a seat on a ledge and the security guard called an ambulance. At the hospital, plaintiff was diagnosed with a fractured knee and an injured wrist. Plaintiff testified that the man who bumped into her was young, about 18 or 20, and that he carried an instrument case on his back. After she fell, she asked him where he was going and he said "I'm on in 5 minutes" (Plaintiff's Deposition Transcript at 46). Plaintiff testified that she asked the security guard if he saw the accident and the security guard said, "It happens all the time" (*id.* at 42). Plaintiff learned the name of the security guard.

While plaintiff was waiting for the ambulance, two young men entered into conversation with her. Each carried a musical instrument in a case. One of them told her that his friend wanted to know how she was and that the friend was too scared to come over and ask her. The young man said that he had come from performing at the concert, that his friend was part of the concert, and that they had completed their performances. Neither young man would tell plaintiff the name of their friend. Plaintiff asserts that the foregoing is evidence that the person who bumped into her was a Julliard student who performed at the concert that she planned to attend.

Plaintiff and a Julliard representative have been deposed. By order dated September 25, 2012, Lincoln Center was ordered to produce the security guard for deposition. By order dated February 19, 2013, Lincoln Center and the City were ordered to produce representatives for deposition. Plaintiff's attorney alleges that defendants refused to produce the security officer or anyone else. However, the said guard was deposed pursuant to an order of this Court and provided no new information. Additionally, this Court ordered Julliard to provided the plaintiff with the names of the performers at the concert in order to allow plaintiff to locate the alleged defendant tortfeasor. Finally, pursuant to a motion to dismiss, this Court dismissed the action against Julliard, in that Julliard had no control over the plaza area. That area was exclusively in the control of Lincoln Center and the City, which make the within motion.

Contentions of the Parties

The defendants assert that they are entitled to summary judgment based on their lack of any duty to plaintiff.

Plaintiff asserts that defendants' motion should be denied. Plaintiff relies on the allegations in her bill of particulars, including that the plaza was in a dangerous and defective condition, that defendants failed in their duties to supervise and control the crowd on the plaza, to provide a safe means of egress and ingress for pedestrians, to provide a separate area for performers to enter the concert hall so they would not collide with pedestrians, and to erect barricades or somehow arrange the plaza space so as to prevent collisions. The plaintiff further asserts that defendants knew or should have known that Julliard students performing in concerts regularly traversed the area in front of the hall at excessive rates of speed while carrying heavy or

bulky instruments and collided with members of the public.

Conclusions of Law:

Landowners who operate places of public assembly, such as theaters, are “charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress” (*Peralta v Henriquez*, 100 NY2d 139, 143 [2003] [internal quotation marks and citation omitted]). A landowner must keep “his property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Basso v Miller*, 40 NY2d 233, 241 [1976]).

The existence of a duty is determined by the court as a matter of law. If the court decides that there is a duty, then it is for the jury to determine if the defendant breached the duty (*Tagle v Jakob*, 97 NY2d 165, 168 [2001]). When analyzing the scope of duty, the courts ask whether the relationship between the injured party and the party allegedly liable gives rise to a duty of care, whether the injured person was within the zone of foreseeable harm, and whether the accident was due to a reasonably foreseeable risk (*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). Questions touching on public policy are also considered, with courts taking into account “the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability” (*Gilson v Metropolitan Opera*, 5 NY3d 574, 576-577 [2005] [internal quotation marks and citation omitted]).

Defendants rely on *Gilson* for the contention that they had no duty to protect plaintiff

from other pedestrians on the plaza. The *Gilson* case concerned patrons at the opera. After the performance began, the plaintiff rose from her seat to allow a patron to pass her on his way to his seat in the same row. The patron, who suffered from Parkinson's disease, lost his balance and fell on plaintiff. Plaintiff claimed that the opera had a duty to escort the patron to his seat because of his obvious infirmity. The Court of Appeals agreed with the opera that the duty proposed by plaintiff "would place undue burden on theater owners beyond the limits of the duty to maintain their premises in reasonably safe condition" and "would significantly enlarge the duty of theater owners to their patrons" (*id.* at 577). The court declined to issue a ruling that would make theaters responsible for escorting every patron to his or her seat, even if the patron was disabled.

Defendants assert that they had no duty to prevent plaintiff's particular accident. They argue that a contrary determination would render them and other landowners responsible for every pedestrian accident on their premises. As *Gilson* shows, the existence of a duty depends on the particular circumstances of an incident (*see Di Ponzio*, 89 NY2d at 583). *Gilson* is highly fact specific, as are the other cases cited by defendants to show lack of duty (*see Matter of New York City Asbestos Litig.*, 5 NY3d 486 [2005]; *Peralta*, 100 NY2d 139; *D'Amico v Christie*, 71 NY2d 76 [1987]). Plaintiff alleges that this case can be distinguished from *Gilson* because the alleged tortfeasor is a third party with whom defendants may have had a relationship. Plaintiff alleges that she was knocked down by a Julliard student who came to defendants' premises to perform.

In general, a landowner has no duty to control the conduct of persons on its premises;

such a duty may come into existence when the landlord has the opportunity to control the persons and a reasonable awareness of the need for such control (*Lazar v TJX Cos.*, 1 AD3d 319, 319 [2d Dept 2003]). To be liable for the negligent conduct of a third party, the landowner must have both the authority and the ability to control that party's actions (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]); *D'Amico*, 71 NY2d *supra* at 88; *Mojica v Gannett Co., Inc.*, 71 AD3d 963, 965 [2d Dept 2010]). The landowner and the third party must have a relationship "that encompasses [the landowner's] actual control of the third person's actions" (*Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 233 [2001]). Master and servant, parent and child, and common carriers and passengers are examples of such relationships (*id.*). In such instances, the defendant's liability arises from the fact that its relationship with the tortfeasor puts the defendant in the best position to prevent the harm to the plaintiff (*id.*). Unlimited or insurer-like liability need not be a concern "because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship" (*id.*). Liability may also rest upon the relationship between the defendant and the person exposed to harm where the defendant is required to protect the other person (*Pulka v Edelman*, 40 NY2d 781, 783 [1976]).

In this case, plaintiff alleges a relationship between the defendants and the third party, alleged tortfeasor, by dint of his alleged status at Julliard and his alleged performances on Julliard's premises. Plaintiff is a person who was allegedly injured by that third party on defendant City and Lincoln Center's premises. Plaintiff alleges that the third party was not just any pedestrian and the accident was not off-premises. Together, the status of the purported tortfeasor and defendants' duty to protect those on their premises, which plaintiff would have this

Court impose, would raise the possibility that defendants had a duty to protect against this particular accident.

However, the Court believes that adopting such a duty to protect goes too far. Although plaintiff alleges that the tortfeasor was a Julliard student who was rushing to perform at the concert, this is surmise, at best. Plaintiff has been unable, after several EBTs, to substantiate this fact. Additionally, even if the alleged tortfeasor was proven to be a student at Julliard, there was still no reason to assume the foreseeability of such an accident. While people may collide with one another while going about their daily tasks, the fact that they do so does not give rise to a duty on the part of the landowner to warn them not to do so in a certain area. It is axiomatic that people need not be told to avoid colliding with one another because one of them may be injured. The matter herein is even more distant, in that, while the alleged tortfeasor may have been performing at Julliard, the plaza area is under the exclusive control of Lincoln Center and the City.

First, the Court notes that, although plaintiff in her bill of particulars alleges that the plaza was in a dangerous and defective condition, she has submitted no evidence of such condition.

Next, plaintiff argues that a duty to protect her arose from defendants' failure to provide proper crowd control. However, it is clear from the video that such a claim cannot be substantiated in this matter. The video shows that there was no crowd on the plaza and plaintiff admitted as much during her deposition. Where a plaintiff's negligence claim is premised on the theory that his or her injuries were caused by overcrowding and inadequate crowd control, the plaintiff must establish that he or she "was unable to find a place of safety or that his free

movement was restricted due to the alleged overcrowded conditions” (*Benanti v Port Auth. of N.Y. & N.J.*, 176 AD2d 549, 549 [1st Dept 1991]; *see also Hsieh v New York City Tr. Auth.*, 216 AD2d 531, 531 [2d Dept 1995]). No such claim can exist in this case.

As was stated in *Gilson (supra at 576-577)*, “[i]n any negligence action, the threshold issue before the Court is whether the defendant owed a legally recognized duty to the plaintiff... we make this determination ‘by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer like liability, disproportionate risk and reparation allocation and public policies affecting the expansion or limitation of new channels of liability’ *Matter of New York City Abestos Litig* (5 NY3d 486, 493 [2005])”. The Court therein noted its “reluctance to extend the duty of care such that a defendant may become liable for the failure to control the conduct of others” and such that “the specter of limitless liability is not present.” (*id.* At 494 [internal quotation marks omitted]).

Such a specter would surely loom over this matter, were the Court to find a duty herein on the part of the defendants. It is clear that it was no action or inaction on the part of the defendants which gave rise to plaintiff’s injury, but rather it was the negligent conduct on the part of the tortfeasor, by either failing to observe where he was going or by failing to avoid colliding with the plaintiff, that caused plaintiff’s injury. Although the Court, by means of twenty-twenty hindsight, might discern some measures which defendants could have taken to prevent plaintiff’s injury, the injury was not reasonably foreseeable. Landowners are not responsible for prognosticating every foreseeable injury and taking precautions to avoid them. They must only take actions to prevent those injuries reasonably foreseeable. *See DiPonzio v Riordan, supra at*

583.

As in *Pulka, supra*, defendants here show that they lacked the ability or opportunity to control the purportedly tortious conduct (*id.* at 784 [the garage had no reasonable opportunity to make cars driving out of its premises proceed carefully and no duty to control the conduct of those cars for the protection of off-premises pedestrians]). The court cannot state, as a matter of law, that defendants had a duty to plaintiff in regard to this particular accident (*see Hillen v Queens Long Is. Med. Group, P.C.*, 57 AD3d 946, 947 [2d Dept 2008] [defendant showed that it did not have the ability and opportunity to control the child that bumped into plaintiff and that it had no awareness of the need to control the child]; *Grimaldi v Manhattan Arms Hotel, Inc.*, 39 AD3d 298, 299 [1st Dept 2007] [assuming that the hotel was subject to certain duties, it was not liable to plaintiff because there was no evidence that the hotel had reason to believe that the tenant would attempt to dislodge the air conditioning unit which fell on plaintiff]; *Lazar*, 1 AD3d *supra* at 319 [defendant proved that it had no duty to protect plaintiff against a child who jumped on her, as the child's actions were unforeseeable; defendant also proved that it did not assume the duty to control or supervise the child]; *Lazarus v Skouras Theatres Corp.*, 11 AD2d 680, 680 [1st Dept 1960], *affd* 10 NY2d 846 [1961] [complaint against defendant dismissed, since plaintiff did not show that supervision in the lobby was inadequate, that the lobby was dangerously crowded, or that "all reasonable protective measures that could have been provided by defendant" would have prevented plaintiff and another patron from bumping heads]).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the within motion for summary judgment by defendants Lincoln Center for the Performing Arts and the City of New York is granted and the complaint and any cross claims are hereby severed and dismissed as against said defendants, and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Defendant City shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158. Any compliance conferences currently scheduled are hereby cancelled; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: January 8, 2014

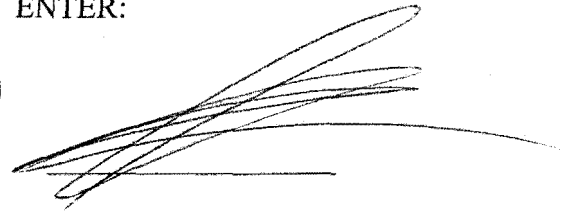
ENTER:

JAN 08 2014

FILED

JAN 13 2014

**NEW YORK
COUNTY CLERK'S OFFICE**



Hon. Kathryn E. Freed
J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT