SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12

Justice

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DEBRA PHILLIPS,

Plaintiff,

- v -

THE SHUBERT ORGANIZATION, INC.,

Defendant.

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INDEX NO. 153338/2018

MOTION DATE

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46-69 were read on this motion for summary judgment.

By notice of motion, defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes and cross-moves for an order awarding her partial summary judgment on the issue of liability. Defendant opposes.

I. BACKGROUND

A. Shubert incident report (NYSCEF 66)

A Shubert incident report reflects, as pertinent here, that on April 25, 2017 at 9:10pm, during a show at the Belasco Theater located at 111 West 44th Street in Manhattan, plaintiff was injured after falling down two steps at the end of an aisle. Just prior thereto, plaintiff's husband had gone to the restroom and was not permitted to return to his seat during the show. Unaware of these circumstances, plaintiff left her seat to find her husband and, for the same reason, was also prohibited from returning to her seat. Just before the curtain call at the end of the show and concerned that the umbrella she had left at her seat would be taken, plaintiff "ran" down the aisle to retrieve it and fell down the two steps at the end of the aisle. The house lights were off for the

curtain call.

B. Plaintiff's deposition (NYSCEF 53)

At her deposition, plaintiff testified that on that evening, she knew that the show was to last approximately two hours and did not have an intermission. When she entered the theater, she saw no signs notifying that there was no intermission or that that those leaving their seats during the performance would not be permitted to return to their seats during the show. Plaintiff and her husband were seated in seats that were two and three seats from the far-left aisle in the left section of the orchestra, six rows from the stage. Plaintiff does not recall the path they initially took to reach their seats, but they arrived without incident. She had her purse, coat, and an umbrella with her.

Approximately an hour into the show, plaintiff's husband left to go to the bathroom, and after waiting some 15 to 20 minutes, plaintiff became worried, as he had not returned. She thus went to check on him, walking up the left aisle along the left wall of the orchestra toward the back of the theater. She has no recollection of the conditions of the aisle while she walked, including the presence of any steps or curtains. Once she reached the back of the theater, she saw her husband and he told her that he was not allowed to go back to his seat. Plaintiff then spoke with a nearby usher who told her that she could not go back to her seat until the show was over. While plaintiff had her coat and purse with her, she had left her umbrella at her seat, and after telling the usher that she was concerned that someone would trip on it, the usher told her that she could go back to her seat only when the show was over. Plaintiff and her husband remained in the back until she observed the audience applaud and the actors come to center stage, and she started to return down the aisle she had walked up earlier.

As plaintiff started back to her seat, the usher told her that she could not go back yet.

After observing to the usher that the play was over, plaintiff continued walking to her seat. While she could not recall the exact lighting conditions at that time, there was enough "ambient lighting" for her to be able to get back to her seat. Before she reached it, she observed that a curtain blocked her path. She moved the curtain and fell down some steps, although her foot had not caught on the curtain. Rather, the curtain obstructed view of the steps immediately behind it.

C. Deposition of plaintiff's husband (NYSCEF 54)

At his deposition, plaintiff's husband admitted that he did not witness plaintiff's accident. He described his actions consistently with plaintiff's testimony. While he recalled that the path to the back of the theater had an upward grade, he did not recall a curtain or steps. Beyond telling plaintiff that he had not been permitted to return to his seat, he recalled no other conversations with plaintiff or the usher. He finished watching the performance, and when the curtain call ended, he saw that plaintiff was gone. He went to their seats and found her on the ground. While he did not believe that the lights were on in the theater at the time, he described the stage as bright enough to light up the theater.

D. Theater manager's deposition (NYSCEF 55)

At her deposition, the Belasco theater manager at the time of plaintiff's accident testified that Shubert owns the theater, and that she was responsible for, *inter alia*, ensuring that patrons were seated, informing staff of any specific requirements for each performance, and communicating with the chief usher. There was no intermission for the performance plaintiff had attended and thus, those leaving their seats during the performance were asked to remain in the back of the theater until the end of the show. During the performance, the theater's aisles were illuminated and the houselights were off. A curtain in the stairwell would be drawn after the start of the performance to lower the intensity of the light in the back of the orchestra and to indicate

that patrons should not leave their seats.

After being alerted that someone had fallen, the manager arrived at the scene. The house lights were up, and plaintiff was on the ground. Given her location, the manager believed that plaintiff had fallen on the steps. After an ambulance took plaintiff away, the manager prepared the incident report which included a combination of her own observations and those conveyed to her by the usher. Before plaintiff's accident, she did not recall any other incidents in which someone had fallen on the steps.

E. Usher's deposition (NYSCEF 56)

At her deposition, the usher who had interacted with plaintiff and helped the theater manager complete the incident report testified that her job that day was to direct patrons to the correct usher, who would seat them. All patrons seated in the orchestra are escorted by an usher to their seat. Patrons who left their seat during the performance were not allowed to return until the end. While the house was blacked out at the end of the show, the usher told plaintiff several times that she was not permitted to return to her seat. Pushing the usher out of the way, plaintiff said that she needed to get her medication. The usher received no complaints about the steps or the area of plaintiff's accident and she has no knowledge about the curtain near the steps.

By summons and verified complaint dated April 12, 2018, plaintiff commenced this action, alleging that her injuries were the result of defendant's negligence. (NYSCEF 49).

II. CONTENTIONS

A. Defendant (NYSCEF 46-56)

Defendant denies owing plaintiff a duty, maintaining that she voluntarily assumed the risk of returning to her seat despite having been warned by the usher to wait until the end of the show. It argues that neither the steps nor the curtain caused plaintiff's fall. Rather, having rushed

to her seat to retrieve her umbrella, plaintiff was a contributing factor which resulted in her fall. Moreover, according to defendant, plaintiff cannot identify the cause of her accident without requiring speculation, and she failed to identify a defect that caused her fall, admitted that her foot did not catch on anything, and noticed no other issue with the area. In addition, defendant observes that there are no witnesses to her accident and that it is possible that her fall resulted from a misstep or loss of balance. By rushing back to her seat and not watching where she was going, plaintiff is alleged by defendant to be the sole proximate cause of her accident.

Defendant also argues that the steps were open and obvious and observes that plaintiff does not allege the lack of handrails, and that she admits in her bill of particulars that there were transition strips. It alleges that the evidence reflects that plaintiff was able to ascend the steps safely, that the sole means of accessing her seat, moments before her accident, and that she was able to see when she returned to her seat. Had plaintiff pulled the curtain back, the elevation would have been open and obvious. It contends that it lacked notice of any defective condition, as it received no complaints about the steps.

B. Plaintiff (NYSCEF 57-66)

Plaintiff argues that as owner of the premises where her accident occurred, defendant owed her a duty, and that although defendant had no duty to warn of open and obvious conditions, it was duty-bound to warn against known or obvious dangers and that it had reason to expect or anticipate that someone in her position would be distracted, distraught or forgetful given the circumstances and her concern for her husband and retrieving her umbrella.

According to plaintiff, defendant created a dangerous condition by drawing a curtain over the steps at the beginning of the performance, and observes that defendant does not mention the curtain, and there is no evidence demonstrating that the demarcations, handrail, lighting or

illumination strips were visible or that they were not obscured by the curtain. Plaintiff's awareness of the condition before her fall, she argues, is only evidence of comparative negligence and is insufficient to negate defendant's liability. She also contends that the circumstances do not warrant a finding that she assumed the risk of her injury as such a defense is limited to athletic and recreational activities and does not annul defendant's duty to maintain the premises safely. She also denies that the cause of her fall is speculative, as she identified the steps in the aisle which were obscured by the curtain as the cause of her fall.

Plaintiff asserts that having created an inherently dangerous condition by concealing a tripping hazard in an area necessary for egress or ingress, defendant, *per se*, violated its duty. She submits photographs of the area (NYSCEF 61), and which plaintiff contends reflect that defendant created a dangerous condition and failure to warn patrons of it, thereby entitling her to summary judgment.

C. Defendant's reply (NYSCEF 68)

Defendant denies the existence of a dangerous or defective condition and argues that plaintiff had successfully traversed the steps twice before. In any event, it again maintains that plaintiff was not aware of what caused her to fall. Defendant also alleges that there are no requirements as to curtains in theaters or warnings about patrons returning to their seats, and to the extent that plaintiff argues that she should have been warned of the prohibition against returning to her seat is immaterial as to the alleged dangerous condition. As plaintiff failed to heed the usher's warning about returning to her seat, defendant should be found to have owed her no duty. Observing that plaintiff provides no expert evidence about the curtain and the steps and as she fails to allege a code violation, defendant argues that the steps were not inherently dangerous. It denies that the photographs support awarding summary judgment, as they do not

depict the curtain at the time of the accident, and plaintiff was not shown the photographs attached to her motion. The incident report, defendant argues, also does not reflect what caused plaintiff's fall. Defendant reiterates its earlier contentions.

D. Plaintiff's reply (NYSCEF 69)

Plaintiff reiterates that her claim concerns defendant's negligence in drawing the curtain and obscuring the steps and contends that she need not offer an expert's opinion to be entitled to summary judgment, as she is not alleging a structural defect.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the "light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." (*O'Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

Landowners have a duty to maintain their 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." (*Musano v City of New York*, 182 AD3d 491, 491–92 [1st Dept 2020], citing *Basso v Miller*, 40 NY2d 233, 241 [1976]). Compliance with any applicable code provisions does not relieve a landowner of its common-law duty (*Kimen v False*

Alarm, Ltd., 69 AD3d 579, 580 [2d Dept 2010]). Moreover, theater owners, such as defendant, are "charged with the duty of providing the public with a reasonably safe premises, including a safe means of ingress and egress." (*Masillo v On Stage, Ltd.*, 83 AD3d 74, 79 [1st Dept 2011], quoting *Peralta v Henriquez*, 100 NY2d 139, 143 [2003]).

Although dismissal of a negligence claim is warranted where a plaintiff is unable to identify the cause of his or her fall (*Gold v 35 E. Assocs. LLC*, 136 AD3d 453, 453 [1st Dept 2016]), here, plaintiff sufficiently identifies the curtain which, having obscured her view of the steps, caused an inherently dangerous condition.

While landowners have no duty to warn of dangers that are open and obvious and can be seen by an "observer reasonably using his or her senses" (*Stadler v Lord & Taylor LLC*, 165 AD3d 500, 500 [1st Dept 2018], quoting *Tagle v Jakob*, 97 NY2d 165, 170 [2001]), they are liable for conditions that are inherently dangerous or constitute a "hidden trap" (*Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [1st Dept 2009], quoting *Schreiber v Philip & Morris Rest. Corp.*, 25 AD2d 262, 263 [1st Dept 1966], *affd* 19 NY2d 786 [1967]). While plaintiff denies that the lighting in the theater prevented her from seeing the condition that resulted in her accident, and although illumination strips appeared on each step, she claims there was only "ambient lighting" and that the curtain obstructed her view of the steps behind it. While the photographs submitted by plaintiff may demonstrate that the steps and illumination strips were visible when the curtain was drawn, they are not dispositive, as the exhibit numbers are obscured and she fails to connect each photograph with the deposition testimony. Moreover, it is unclear whether the lighting and the positioning of the curtain in the photographs accurately depicts the condition at the time of plaintiff's fall. An issue of fact thus exists as to whether the placement of the curtain in front of the steps constitutes an open and obvious condition or hidden trap. (*Liriano v Hobart Corp.*, 92

NY2d 232, 242 [1998] ["Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question"]).

That plaintiff ignored the usher's directions and went back to her seat does not preclude a finding of liability. (CPLR 1411 [contributory negligence or assumption of risk does not bar recovery]). Moreover, an assumption of risk has been "generally restricted [...] to particular athletic and recreative activities in recognition that such pursuits have 'enormous social value' even while they may 'involve significantly heightened risks'" (*Custodi v Town of Amherst*, 20 NY3d 83, 88 [2012], quoting *Trupia ex rel. Trupia v Lake George Cent. Sch. Dist.*, 14 NY3d 392, 395 [2010]). Defendant offers no authority for the proposition that the defense is applicable here.

Likewise, plaintiff's awareness of the curtain and steps before her fall does not preclude a finding of liability. (*See Farrugia v 1440 Broadway Assocs.*, 163 AD3d 452, 454–55 [1st Dept 2018] ["Plaintiff's awareness of a dangerous condition does not negate a duty to warn of the hazard, but only goes to the issue of comparative negligence"]; *see e.g. Lawson v Riverbay Corp.*, 64 AD3d 445, 446 [1st Dept 2009] [that plaintiff was aware of hazards and "had even warned her daughter to be careful of them, does not preclude a finding of liability."]).

To the extent that a dangerous condition existed, defendant fails to demonstrate a lack of notice thereof, as the theater manager testified that defendant's employees are responsible for closing the curtain in front of the steps, thereby creating the alleged hidden trap. (*See Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006] [to make out *prima facie* case on negligence, plaintiff must demonstrate that defendant created or had actual or constructive notice of hazardous condition]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied; it is further

ORDERED, that plaintiff's cross motion for summary judgment is denied.

3/23/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE