Padernacht v Madison Sq. Garden, L.P.
2013 NY Slip Op 33721(U)
October 17, 2013
Supreme Court, Bronx County
Docket Number: 303497/2009
Judge: Lucindo Suarez
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NEW YORK SUPREME COURT - COUNTY OF BRONX

Mot. Seq. 02

PART 19

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

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PADERNACHT, PAMELA

- against -

MADISON SQUARE GARDEN, L.P.

----------X

Index Nº. **303497/2009**

Hon. **LUCINDO SUAREZ**,

Justice.

The following papers numbered 1 to **6** read on this motion, **REARGUE / RENEW / RESETTLE**, Noticed on **July 3, 2013** and duly submitted as No. **55** on the Motion Calendar of **July 18, 2013**

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1, 2, 3	
Answering Affidavit and Exhibits	4, 5	
Replying Affidavit and Exhibits	6	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers, the application of defendant for leave to renew and/or reargue the decision and order of the undersigned dated May 9, 2013 denying its motion for summary judgment is granted, in accordance with the annexed decision and order.

OCT 2 1 2013

Dated: **10/17/2013**

Hon. _____
LUCINDO SUAREZ, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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PAMELA PADERNACHT,

Plaintiff,

- against -

MADISON SQUARE GARDEN, L.P.,

Defendant.

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DECISION AND ORDER

Index No. 303497/2009

PRESENT: Hon. Lucindo Suarez

Upon defendant's notice of motion dated June 6, 2013 and the affirmation and exhibits submitted in support thereof; plaintiff's affirmation in opposition dated June 25, 2013 and the exhibits submitted therewith; defendant's affirmation in reply dated July 17, 2013; and due deliberation; the court finds:

In this action stemming from a trip and all on stairs in a theater, defendant theater owner moves to renew and reargue the decision and order of the undersigned dated May 9, 2013 which denied its motion for summary judgment. The prior decision found that defendant's expert's conclusion that defendant provided sufficient levels of artificial illumination to enable persons to clearly recognize and perceive the configuration, including the change in elevation, of the aisle on which plaintiff tripped during a theatrical performance was conclusory, because, as is relevant here, defendant's expert did not disclose any basis for his assertion that his test was conducted at the same lighting level as the performance attended by plaintiff.

Defendant claims that on the basis of *Masillo v. On Stage, Ltd.*, 83 A.D.3d 74, 921 N.Y.S.2d 20 (1st Dep't 2011), allegedly identical to the present case, wherein the Appellate Division, First Department affirmed the granting of summary judgment to defendant theater, the court here should

likewise have granted summary judgment. In *Masillo*, plaintiff claimed to have tripped and fallen on a step when the house lights dimmed unexpectedly. The theater's witness testified that lights across the steps automatically illuminated when the house lights were turned off. The defendant production company's witness testified that the lighting was never completely dark because of the lights on the stairs. Photographs exchanged in discovery depicted these lights. Significantly, and in contrast to the present action, plaintiff testified that she noticed the illuminated strips of lights after she fell. In contrast to the present action, where defendant's expert claimed to have conducted his tests at the particular lighting level present during the subject performance, but where this lighting level was never established, defendant's expert in *Masillo* measured the lighting at the location of plaintiff's fall "at the upper and lower limits of performance lighting, during both morning and evening performances" and found that all levels complied with or exceeded generally accepted standards for theatrical lighting. Accordingly, the expert established a lack of negligent lighting at the lowest extremes of possible lighting configurations.

Unlike the plaintiff here, the plaintiff in *Masillo* abandoned the theory of negligent lighting levels and instead argued that the lights were negligently operated, being turned off before all patrons were seated. The court found that such conduct would exceed the duty of reasonable care and that it any event there was "ample," *id.* at 80, 921 N.Y.S.2d at 24, evidence that the end result of the alleged negligent operation of the lights was not inadequate lighting, because the theater established *prima facie*, given the collective testimony, photographs and expert affidavit, "that it provided the public with a reasonably safe premises insofar as its lighting was concerned," *id.* at 79, 921 N.Y.S.2d at 23, and plaintiff "presented no evidence to controvert the conclusions of the theater's expert, and produced no expert of her own," *id.*

Here, plaintiff testified that there were no lights illuminating the stairs. While defendant's

witness testified that, during the performance, the lights illuminating the stairs would have been on, as would be lights over the horizontal aisles (plaintiff tripped two stairs away from a horizontal aisle), neither of defendant's witnesses established the lighting level during the performance, significant because, in response to plaintiff's notice to admit, defendant stated it "cannot verify whether house lights were at 1/4 level or 1/2 level during the Sesame Street Live show." Accordingly, defendant's expert's statement that his tests were conducted at the same lighting level present during plaintiff's accident was without disclosed basis and was therefore conclusory. Contrary to defendant's suggestion, the mere fact that defendant's expert conducted his examination during a performance of the same show that plaintiff was attending at the time of her accident does not *a fortiori* establish that the lighting levels were identical or even similar. Regardless of whether defendant established that lighting was present and operable, it did not establish that the lighting was adequate. To find otherwise would require impermissible speculation; thus, defendant failed to present a *prima facie* case of entitlement to summary judgment on this basis. The court did not overlook or misapprehend the import of *Masillo* or defendant's expert's affidavit.

Defendant argues alternatively that the court disregarded plaintiff's testimony that she was looking straight ahead at the performance on the stage at the time of her accident and did not know what caused her fall, thus purportedly establishing that inadequate lighting was not a proximate cause of the accident. *See Webb v. Salvation Army*, 83 A.D.3d 1453, 920 N.Y.S.2d 562 (4th Dep't 2011); *Reyes v. La Ronda Cocktail Lounge*, 27 A.D.3d 397, 812 N.Y.S.2d 503 (1st Dep't 2006). Indeed, where a plaintiff testified that she was looking straight ahead at the time of her fall and did not see the alleged defect, the court held that "no matter what the lighting condition, it was not a proximate cause of her fall." *Outlaw v. Citibank, N.A.*, 35 A.D.3d 564, 565, 826 N.Y.S.2d 642, 645 (2d Dep't 2006).

Although plaintiff testified that she "didn't see," and not specifically that she was "not looking" at the steps, *see Langer v. 116 Lexington Ave., Inc.*, 92 A.D.3d 597, 939 N.Y.S.2d 370 (1st Dep't 2012), she testified that two seconds prior to the accident, she was looking at the stage, and was able to identify the cast character that she observed there. Although plaintiff argues that this does not establish where plaintiff was looking at the exact moment of her fall, testimony that plaintiff was looking straight ahead immediately prior to the accident will suffice, particularly where plaintiff does not know what caused her fall. *See Kaplan v. Great Neck Donuts, Inc.*, 68 A.D.3d 931, 892 N.Y.S.2d 425 (2d Dep't 2009), *leave denied*, 14 N.Y.3d 708, 926 N.E.2d 1236, 900 N.Y.S.2d 730 (2010). Thus, of particular significance is the following testimony on page 76 of the transcript of plaintiff's deposition:

Q: As you sit here today, do you know what caused you to fall?

A: No, I don't. No, I don't.

The deposition continued to other topics, at which point the following occurred at pages 80-82:

Q: Is that the same Mrs. Johnson who scheduled this trip?

A: Yes, it is. Can I go back and . . .

Q: Do you want to talk to your attorney first?

A: Yes.

Q: Why don't you speak to your attorney first before you go back and redo anything.

Ms. Tarshis:[1] We'll take a two minute break, five minute break.

(Whereupon a brief recess was taken.)

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[1] Ms. Tarshis represented defendant; Mr. Hecht represented plaintiff.

Mr. Hecht: There was earlier a question about what caused you to fall, ma'am. Did you have anything you needed to correct or add to that?

The witness: Yes, I did. It was very dark when I was descending those stairs, so . . .

Mr. Hecht: Is that what you're saying what caused you to fall?

The witness: That's probably what caused me to fall. I did not see . . .

Mr. Hecht: Is that what caused you to fall?

The witness: Yes.

Ms. Tarshis: I'm going to object. I'm letting her correct it but, you know, let's not get carried away.

Mr. Hecht: The fact of the matter is that the testimony is very clear. And I just want the record to be clear on this particular point.

Ms. Tarshis: Do you have more?

Mr. Hecht: I want it to be clear. What was the reason you fell?

Ms. Tarshis: I'm going to object. I let you do it once, and you asked her and she said it was very dark "and that is probably what caused me to fall." Now you're going to ask the same question again?

Mr. Hecht: Fair enough. Go ahead.

Plaintiff's counsel, obviously dissatisfied with the ambivalence of plaintiff's prior answer, then interjected one page later:

Q: When you got to the medical facility, did anybody ask you what happened?

A: Yes.

Q: Who asked you?

Ms. Tarshis: Off the record.

(Whereupon a discussion was held off the record.)

Ms. Tarshis: Over objection, counsel is going to ask the question again.

Mr. Hecht: Do you know what caused you to fall?

The witness: It was very dark . . .

Mr. Hecht: Is that why you fell?

The witness: That's why I fell.

Ms. Tarshis: Motion to strike.

"A defendant moving for summary judgment has the initial burden of showing that it did not create a dangerous condition, or have actual or constructive notice of a dangerous condition." *Langer*, 92 A.D.3d at 598, 939 N.Y.S.2d at 372. A movant cannot succeed on a motion for summary judgment merely by pointing to gaps in the opponent's proof; the movant must affirmatively demonstrate the absence of triable issues of fact. *See e.g. Alvarez v. 21st Century Renovations Ltd.*, 66 A.D.3d 524, 887 N.Y.S.2d 64 (1st Dep't 2009). However, "a defendant can make its *prima facie* showing of entitlement to judgment as a matter of law by establishing that the plaintiff cannot identify the cause of his or her fall without engaging in speculation." *Ash v. City of New York*, 2013 N.Y. App. Div. LEXIS 5808, at *2-*3 (2d Dep't Sept. 18, 2013); *Racines v. Lebowitz*, 105 A.D.3d 934, 963 N.Y.S.2d 348 (2d Dep't 2013).

Here, plaintiff initially testified that she did not know what caused her fall, and such a lack of knowledge is fatal to the cause of action. *See Belousov v. Warnock*, __ A.D.3d __, 971 N.Y.S.2d 54 (2d Dep't 2013). Plaintiff eventually mentioned lighting, but only after consulting with her attorney. *See Zavala v. KRCM Realty Co., Inc.*, 2010 N.Y. Misc. LEXIS 4207 (Sup Ct Nassau County Aug. 24, 2010). Even then, however, she stated only that lighting "probably" caused her fall. Such testimony is speculative and insufficient to establish plaintiff's claim. *See People v. Brantley*, 186 A.D.2d 1036, 588 N.Y.S.2d 475 (4th Dep't 1992), *appeal denied*, 81 N.Y.2d 785, 610

N.E.2d 404, 594 N.Y.S.2d 731 (1993); *Yarmush v. Boston Props. Ltd. Partnership*, 2011 N.Y. Misc. LEXIS 3514 (Sup Ct N.Y. County June 9, 2011). The remainder of plaintiff's testimony on the point appears to be the product of her attorney's suggestion and goading, rather than the benign guidance of a legal advisor. *See Fernandez v. Laret*, 43 A.D.3d 347, 841 N.Y.S.2d 78 (1st Dep't 2007).

Where, on a motion for summary judgment, purported issues of fact are feigned rather than genuine, it is not improper for the court to resolve questions of credibility. *See American Realty Co. v. 64 B Venture*, 176 A.D.2d 226, 574 N.Y.S.2d 344 (1st Dep't 1991). Thus, plaintiff's testimony was insufficient to raise a question of fact as to whether lighting proximately caused her accident. *See Iwelu v. New York City Tr. Auth.*, 90 A.D.3d 712, 934 N.Y.S.2d 229 (2d Dep't 2011). Plaintiff's affidavit submitted in opposition to the summary judgment motion appeared carefully tailored to avoid the consequences of her earlier deposition testimony. *See Perez v. Abbey Assoc. Corp.*, 103 A.D.3d 573, 960 N.Y.S.2d 42 (1st Dep't 2013).

As to plaintiff's suggestion that defendant has not addressed potential causes of the accident other than lighting, plaintiff testified, even in the face of repeated questioning by her own attorney, to no cause of her fall other than lighting. It is to be noted that plaintiff's opposition here failed to directly address defendant's argument regarding plaintiff's testimony that she did not know what caused her to fall.

Defendant furthermore moves for renewal of the prior determination because its reply affirmation, deemed untimely, was not considered. The reply affirmation was served by mail one day prior to the return date of the motion. Inasmuch as the service of reply papers by mail is not subject to the addition of five days pursuant to CPLR 2103(b)(2), *see* 163 Siegel's Prac. Rev. 7 (July 2005), the reply papers were in fact timely served, *see Ryan v. Cortlandt*, 134 A.D.2d 420, 521

N.Y.S.2d 43 (2d Dep't 1987). Renewal is available to correct procedural error, *see Ramos v. Dekhtyar*, 301 A.D.2d 428, 753 N.Y.S.2d 489 (1st Dep't 2003), and is therefore granted here.

Accordingly, it is

ORDERED, that defendant's motion to reargue the decision and order of the undersigned dated May 9, 2013 is granted; and it is further

ORDERED, that defendant's motion to renew the decision and order of the undersigned dated May 9, 2013 is granted; and it is further

ORDERED, that upon such renewal and reargument, defendant's motion for summary judgment is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Madison Square Garden, L.P. dismissing the complaint.

This constitutes the decision and order of the court.

Dated: October 17, 2013

Lucindo Suarez, J.S.C.