SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** IAS MOTION 14

Justice

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ROSALYN AVIGAD

Plaintiff,

- v -

LINCOLN CENTER FOR THE PERFORMING ARTS, INC.,

Defendant.

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INDEX NO. 160220/2017

MOTION DATE 12/10/2019, 12/10/2019, 12/10/2019

MOTION SEQ. NO. 003 005 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for STRIKE PLEADINGS and SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 158

were read on this motion to/for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 159, 160, 163, 164

were read on this motion to/for DISCOVERY.

Upon the foregoing documents, the motions are determined as follows:

Plaintiffs move pursuant to CPLR §3126 to, among other things, strike Defendant's answer based upon Defendant's failure to comply with this Court's July 16, 2019 order. In addition, Plaintiffs move for an award of their attorneys' fees and costs associated with making this motion pursuant to the Uniform Rules of the Trial Courts §130-1.1(a). In opposition, Design claims to have been responsive to the outstanding discovery demands and, overall, has acted in good faith.

CPLR §3126 gives this Court wide discretion to regulate disclosure and penalize recalcitrant parties. Here, although Plaintiff demonstrated that Defendant belatedly complied with the certain demands and Court's orders relating to discovery and that other responses were not archetypical, it does not evince a willful pattern of neglect of its discovery obligations that would justify striking the answer or other similar drastic remedy (*see De Socio v 136 E. 56th St. Owners, Inc.*, 74 AD3d 606, 608 [1st Dept 2010]; *see also Viruet v Mount Sinai Med. Ctr. Inc.*, 143 AD3d 558 [1st Dept 2016]; *Banner v New York City Hous. Auth.*, 73 AD3d 502 [1st Dept 2010]). Accordingly, the branch of Plaintiffs' motion to strike Defendant's answer is denied. Similarly, the request for an award of attorney's fees and costs is denied as unwarranted.

By the other branch of its motion, Plaintiff moves for summary judgment on the issue of liability. The proponent of a summary judgment motion must show *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact on a particular issue (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Once the movant makes a *prima facie* showing, the burden shifts to the party opposing the motion to produce evidentiary proof sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

"[A] plaintiff may be awarded summary judgment on the issue of a defendant's negligence where 'there is no conflict at all in the evidence' and 'the defendant's conduct fell far below any permissible standard of due care'" (*Davis v Commack Hotel*, 174 AD3d 501 [2nd Dept 2019], *citing* Andre v Pomeroy, 35 NY2d 361, 364-65 [1974]). Here, Plaintiff was required to establish *prima facie* proof of each element of its negligence cause of action, specifically "the [P]laintiff . . . must prove: (1) that the premises were not reasonably safe; (2) that the [D]efendant . . . was negligent in not keeping the premises in a reasonably safe condition; and (3) that . . . [D]efendant's negligence in allowing the unsafe condition to exist was a substantial factor in causing [Plaintiff's] injury" (PJI 2:90; *Basso v Miller*, 40 NY2d 233 [1976]; *Tatom v Andrews Intl., Inc.*, ____AD3d____, 2019 NY Slip Op 09052 [2nd Dept 2019]; *Davis v Commack Hotel, LLC*, supra at 502). Proof of the absence of Plaintiff's comparative fault is not necessary to obtain partial summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]).

Here, Plaintiff's case is premised on the theory that Defendant's premises were inadequately illuminated at the time of the accident. Property owners do not have a "generalized one-size-fits-all duty" to keep their premises illuminated "during all hours of darkness" (*Peralta v Henriquez*, 100 NY2d 139, 145 [2003]; *see also Miller v. Consolidated Rail Corp.*, 9 NY3d 973 [2007]). However, "[a] landowner whose property is open to the public is charged with the duty of providing safe means of ingress and egress, which includes a duty to provide adequate lighting" (*Shirman v New York City Tr. Auth.*, 264 AD2d 832, 833 [2nd Dept 1999]) and "providing outside lighting may be a reasonable response by a private landowner who knows or should have known that someone visiting the property will confront a hazard that would be reasonably avoided by illumination" (*Yacoub v 1540 Wallco, Inc.*, 104 AD3d 408 [1st Dept 2013]). Consequently, in a case such as this, a plaintiff must establish that "defendants knew or should have known that the existing lighting was adequate given the use and design of the [premises]" (*id*; *see also Yacoub v 1540 Wallco, Inc.*, supra).

Plaintiff claims that on January 3, 2015 at approximately 6:30 p.m. she was walking at Lincoln Center heading to a show at Avery Fisher Hall when she fell into the Paul Milstein Pool and was injured. In support of her motion, Plaintiff submits two eight paragraph affidavits from herself and an alleged witness, Aviva Sharony-Levy, where the alleged events are cursorily recounted. Also proffered, was an affidavit from Joseph Schmitt, a licensed professional

engineer, and a report he prepared and incorporated by reference into his affidavit. Further submitted was a report of prior incident of a person falling into the pool as well as an invoice from and deposition transcript of an employee of a non-party company engaged by Defendant to perform lighting work in the plaza.

Although Plaintiff proffered proof that she fell on property owned by Defendant and the fall was the cause of her injuries, she failed to demonstrate that the plaza was not adequately illuminated under the circumstances and that Defendant knew of, should have known of or created that condition. The conclusions and opinions contained in the report of Plaintiff's expert were speculative or not sufficiently supported as required (*see generally Romano v Stanley,* 90 N.Y.2d 444, 451-452 [1997]). The photographs Schmitt relied upon were not authenticated, his inspection of the premises occurred two years after the accident, the time of day of his visit was not noted and the only evidence of any law, rule code or accepted industry practice or standard Defendant allegedly violated was inadequately cited as "Current NYC Public Plaza Design Standards as per NYC Planning" (*see Diaz v N.Y. Downtown Hosp.*, 99 NY2d 542, 545 [2002]). Further, Schmitt failed to indicate what evidence he relied upon to substantiate the insufficiency of the illumination existing at the time of the accident (*see Burgos v Montemurro Enters. LLC*, 102 AD3d 629 [1st Dept 2013]; *Gilson v. Metro. Opera*, 15 AD3d 55 [1st Dept 2005]).

Accordingly, the branch of Plaintiff's motion for summary judgment on the issue of liability is denied.

In support of its motion for summary judgment dismissing Plaintiff's complaint, Defendant was required to demonstrate, *prima facie*, that one or more of the essential elements of Plaintiff's negligence claim are negated as a matter of law (*see eg Poon v Nisanov,* 162 AD3d 804 [2nd Dept 2018]; *Nunez v Chase Manhattan Bank,* 155 AD3d 641 [2nd Dept 2017]). Contrary to Defendant's arguments, its motion does little more than point to gaps in Plaintiff's proof adduced in discovery and inadequacies in Plaintiff's expert report (*see eg Ricci v. A.O. Smith Water Products*, 143 AD3d 516 [1st Dept 2016]; *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575 [1st Dept 2016]). Likewise, Defendant proffers no affirmative proof that the plaza was adequately illuminated on the day of the accident and absent same, its claim the pool was not a dangerous condition since it was open and obvious fails (*see Baron v 305-323 E. Shore Rd. Corp.*, 121 AD3d 826 [2nd Dept 2014]); *Conneally v Diocese of Rockville Ctr.,* 116 AD3d 905 [2nd Dept 2014]).

Accordingly, Defendant's motion for summary judgment dismissing Plaintiff's complaint is denied.

Defendant also moves by order to show cause for an order: compelling Plaintiff to provide trial authorizations, imposing costs and sanctions against Plaintiff's counsel, striking Plaintiff's supplemental bill of particulars dated November 8, 2019, staying the trial of this action and vacating the note of issue and directing supplemental disclosure.

The branch of the motion to provide trial authorizations is denied as moot as Plaintiff demonstrated on the return date of the motion that the authorizations were provided.

The branch of the motion to strike Plaintiff's supplemental bill of particulars dated November 8, 2019 is denied as a comparison of the original and supplemental bills of particulars revealed that Plaintiff alleged no new injury, but merely alleged "the continuing consequences of [a] previously identified injury" (*Anderson v Ariel Servs., Inc.*, 93 AD3d 525 [1st Dept 2012]). As the time of this decision, the pleading was also served more than thirty days prior to trial (CPLR §3043) and Defendant has not demonstrated prejudice as the result of the amendment.

Nevertheless, as this matter is only on the trial calendar because this court granted Plaintiff a trial preference by order dated August 21, 2019, the branch of Defendant's motion for additional discovery is granted to the extent that Plaintiff shall provide updated medical authorizations and appear for a further defense medical exam. Defendant shall notice said exam within 14 days of e-filing of this decision and order and Plaintiff shall appear for said exam no later than 30 days thereafter.

The remaining branches of Defendant's motion are denied.

1/27/2020
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III J.S.C.

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