SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 17

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KATHERINE LINDSKOG, DECISION AND ORDER

Plaintiff, Index No. 160024/2016

- against -

LIVE NATION ENTERTAINMENT, INC., LIVE NATION WORLDWIDE, INC., JOHN DOE CORPORATION 1, JOHN DOE CORPORATION 2,

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C:

In this personal injury action, defendants Live Nation Entertainment, Inc. and Live Nation Worldwide, Inc. (LNW) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. Plaintiff Katherine Lindskog opposes the motion and cross-moves, pursuant to CPLR 2001 and 3025, for leave to serve a supplemental bill of particulars and to amend the caption.

Background

Plaintiff commenced this action to recover damages for personal injuries sustained on July 25, 2013 while she was attending a concert at Jones Beach Theater (the Theater) in Jones State Beach Park (the Park) in Wantagh, New York. Plaintiff had purchased a ticket for seat 2, row MM in Section 12L (NY St Cts Elec Filing [NYSCEF] Doc No. 22, Marsha J. Quinche [Quinche] affirmation, exhibit F, plaintiff 3/16/15 tr at 31). Plaintiff testified that she and her friends arrived at the Theater between 8:30 p.m. and 9 p.m. and made their way up an exterior staircase (*id.* at 31 at 38). She and Nell LeBlanc (LeBlanc) then entered a walkway above sections 14R and 16 in the interior of the Theater (*id.* at 44-45). At that time, the main act had just taken the stage, and the "house lights" were dimmed (*id.*). The concrete steps leading down to their seats measured three to three and one-half feet wide with a yellow strip painted across the edge of each step (*id.* at 48).

Plaintiff testified that she stepped down onto the first step from the walkway with her right foot and brought her left foot down onto the same step because "[t]hey were long steps" (*id.* at 46). When she stepped down onto the next step with her left foot, "[it] slid out from under [her]" (*id.* at 46). Plaintiff stated, "I felt an unevenness underneath my foot … [and] I later learned that the stair was broken, but I felt that something was wrong with the stair, and my foot slipped into the crack … at the very end of the stair, near the yellow strip" (*id.* at 48). The heel of her left foot slid into a crack running across the lip of the second step (*id.* at 49-50). She stated that she did not see the crack before the accident because "[t]ere were no lights" (*id.* at 50). In addition, "the stairs weren't the same length" (NYSCEF Doc No. 22, plaintiff 10/4/18 tr at 72). It was misty and drizzly that day (NYSCEF Doc No. 22, plaintiff 3/16/15 tr at 35). However, her feet were not wet as she had just stepped out from beneath an awning (*id.*). She explained that "this part of the stadium was actually under the above part, so I don't think that the steps were wet, but it was a nasty day out" (NYSCEF Doc No. 22, plaintiff 10/4/18 tr at 17). Plaintiff confirmed that water did not cause her to slip, and that there was no debris or foreign substance on the step that caused her to slip (*id.*).

LeBlanc testified that "[i]t was raining, and it was dark when we were walking down the stairs … to our seats" (NYSCEF Doc No. 40, Christopher M. Glass [Glass] affirmation, exhibit A [LeBlanc tr] at 16). It had "just finished raining so the ground was wet, very wet" and [i]t was dark out. It was nighttime at this point, and the stairs when we were walking down, we couldn't really see. It was kind of dark walking down to our seats" (*id.* at 17). The lights in the Theater were not on so "just the stage … was lit up" (*id.*). LeBlanc testified that she was walking in front of plaintiff and did not see her fall (*id.* at 18-19). LeBlanc added, "I don't know why she fell. Maybe she didn't – it was dark so she didn't see, and it was also raining … [and] [t]he stairs going

down are long, a quick step and then long, so maybe she didn't see a step while she was walking down" (*id.* at 19-20). LeBlanc believed there was "dim lighting under the chairs going down the aisle" and assumed they were on at the time of the accident (*id.* at 32).

Adam Citron (Citron) testified that he had worked as the Theater's general manager for 10 or 12 years and as its director of operations for the previous six years (NYSCEF Doc No. 25, Quinche affirmation, exhibit I at 7). His duties include overseeing the departments that service the Theater (*id.* at 8-9). Subcontractors performed that work in 2013, but LNW employees now provide those services (*id.* at 10). The New York State Office of Parks, Recreation and Historic Preservation (Parks) owns the Theater (*id.* at 12). Parks had licensed the Theater to Beach Concerts, Inc., SFX Entertainment, Inc. (SFX) and Clear Channel Entertainment before LNW assumed the license, with Citron's employment carrying over to each successive licensee, as well (*id.* at 13-15).

Citron described the Theater as an outdoor venue with 14,000 to 15,000 seats (NYSCEF Doc No. 25 at 33). Stepped aisles led to seats in the Theater's upper section (*id.* at 34 and 44). A strip of safety paint covered the nose of each step, and LNW repainted the strips as they deteriorated, though it kept no written records of the work (*id.* at 37-38 and 46). Overhead lighting illuminated some sections of the stepped aisles, and downward-pointing lights affixed to the stanchions of the seats immediately adjacent to the aisle provided additional lighting (*id.* at 35-36). Citron believed that the overhang of the mezzanine covered a portion of the stepped aisle between sections 14L and 14R through row VV (*id.* at 39 and 43). He could not recall if there was a railing at that location (*id.* at 37).

Citron testified that LNW was responsible for performing routine maintenance at the Theater (NYSCEF Doc No. 25 at 18-19). LNW retained an engineering firm to perform routine

inspections of the Theater during the off season, with the firm presenting the results in an inspection report listing the areas in need of repair in order of priority (*id.* at 25-28). Citron further testified that major alterations, such as plumbing infrastructure and underground utilities, required approval from Parks (*id.* at 31). Citron did not know which entity would pay for major repairs to the stepped aisles (*id.* at 31). The Theater did undergo renovations after Hurricane Sandy from the "water line and down, i.e, carpentry and painting," though only the concrete stairways in the orchestra level were affected (*id.* at 21-22).

With regard to plaintiff's accident, Citron testified that he did not know when he first learned of it, did not know of or speak to any witnesses or employees, and could not recall whether LNW ever conducted an investigation (NYSCEF Doc No. 25 at 49-50). He stated that he had not received any complaints about the stepped aisle between sections 14L and 14R prior to July 25, 2013 and could not recall any prior claims or lawsuits concerning that specific area (*id.* at 48).

Kevin Connelly (Connelly), a Parks employee, testified that he assumed the role of park director for the Park in 2016 after having served as the Park's assistant director for 13 years (NYSCEF Doc No. 24, affirmation, exhibit at 6-7). As the director, Connelly oversees the overall operation at the Park (*id.* at 8-9). He explained that the lower section of the Theater was built in the 1960s, with other sections added to or renovated in 1991 and 1997 to 1998 (*id.* at 14-15). Connelly did not know if the concrete stairs between Sections 14L, 14R and 16 were part of the renovation work in 1997 to 1998 (*id.* at 16). Overhead "house lighting" illuminated the Theater for events held after sunset, and those lights were dimmed and turned off for performances (*id.* at 23-24). Downward-facing shielded lights beneath the armrests of the chairs immediately adjacent to the stairs provided additional lighting (*id.* at 25).

Connelly stated that Parks licensed the operation of a Theater to an outside entity (*id.* at 28-29). Parks had no role in performing repairs, such as fixing broken seats, at the Theater, though Connelly helped facilitate repairs of utilities services (*id.* at 31-32). As for major capital repairs, the regional engineering department at Parks had to review and approve what repairs were appropriate, and "from there, there's an approval process for funding of those projects" (*id.* at 33). Connelly stated that replacing and rebuilding the stepped aisles or installing a middle rail in the aisles constituted capital projects, but painting trip lines on the steps was the operator's responsibility (*id.* at 34-35). He added that the Theater operator was also responsible for the costs of completing capital improvements (*id.* at 35 and 43).

A copy of Concession License No. X000381 dated February 28, 2000 between Parks, Beach Concerts, Inc. as "licensee" and SFX Entertainment, Inc. as "guarantor" for the "Jones Beach Marine Theatre" reads, in part, that the "Licensee shall be solely responsible for (and shall perform, keep and maintain) the year 'round repair, maintenance and replacement (capital or otherwise) and operation of the Licensed Premises as defined herein, on a turnkey basis, including payment for 100% of all maintenance and operating costs including utilities and refuse removal" (NYSCEF Doc No. 41, exhibit B at 7 [Section 5 (a)]). Parks retained responsibility for the repair and maintenance of the utility systems and parking areas (*id.* at 7-8 [Section 5 (b)]).

Procedural History

Plaintiff commenced this action by filing a summons and complaint pleading a single cause of action for negligence against defendants [1] (NYSCEF Doc No. 18, exhibit B at 1). In a verified bill of particulars dated August 8, 2018, plaintiff claims that defendants were negligent in allowing a hazardous condition to exist at the Theater by failing to furnish a handrail; provide adequate

[1] Plaintiff executed a stipulation of conditional dismissal of an action she had initiated against Parks in the Court of Claims (NYSCEF Doc No. 17, Quinche affirmation, exhibit A at 1-2).

lighting; provide visual cues between the landing and the tread nosings; and, adequately inspect the walkways or stairways at the Theater, among other allegations (NYSCEF Doc No. 20, Quinche affirmation, exhibit D, ¶ 7). Plaintiff claims violations of New York State Industrial Code §§ 36-2.3 and 36-2.6; Rule 16, Part 16 of Title 12 of the New York State Industrial Code; New York State Uniform Fire Prevention and Building Code (Uniform Code) §§ 764.1b and 765.4; Part 763 of the Uniform Code; New York State Property Maintenance Code (Property Maintenance Code) §§ 106, 107, 301 and 306; Chapter 4 of the Property Maintenance Code; The American National Standards Institute (ANSI) A.12-1973, A117.1, A1264.2 and Z53.1; ASTM F1637-09 and F1637; and OSHA 1926.203 (6) (*id.*, ¶ 8). Plaintiff has since discontinued her action against defendant Live Nation Entertainment, Inc. (NYSCEF Doc No. 2), and has not moved to substitute any entity for the "John Doe" corporations. Thus, the balance of this decision addresses LNW, only.

Discussion

A. LNW's Motion for Summary Judgment

LNW moves for summary judgment on the grounds that none of the alleged violations of the various sections, codes or ordinances caused plaintiff's injury, and that plaintiff cannot show LNW had actual or constructive notice of a hazardous condition. LNW tenders an affidavit from its expert engineer, Scott E. Derector, P.E. (Derector) in support. Derector avers that he reviewed the International Fire Code Commentary/2009 and Sections 1028.11, 1028.11.1, 1028.11.2, 1028.11.3 and 1028.13, which discuss assembly walking surfaces, treads, risers, tread contrasting marking stripes and handrails, respectively (NYSCEF Doc No. 28, Quinche affirmation, exhibit L [Derector aff], ¶ 5). He submits that under the commentary, theaters and auditoriums are constructed with sloping or stepped floors to accommodate viewing (*id.*). For that reason, stepped aisles such as the subject stepped aisle at the Theater do not operate as a "conventional stairway

that served as a vertical egress" (*id.*). Instead, "the subject area was required to be a series of treads and risers, which conformed to the depth requirement and did not need to be ramped" and did not require a handrail because the stepped aisle was not an aisle ramp or aisle stair (*id.*).

Derector submits that the Theater was opened in 1952 (NYSCEF Doc No. 28, ¶ 2). Under Uniform Code § 1231.3a, which came into effect in 1984, "existing buildings were permitted to continue unless a retroactive change was specifically required by the provisions of the code," and, therefore, the Uniform Code is inapplicable because the aisle had not been repaired before the accident (NYSCEF Doc No. 28, ¶¶ 6-7). Derector avers that the aisle conformed to Industrial Code (12 NYCRR) § 36-2.3 (q) (relating to aisles) (*id.*, ¶ 8). Furthermore, he submits that the artificial lighting conformed to Industrial Code (12 NYCRR) § 36-2.6 (Electric lighting, wiring and equipment) (*id.*). Regarding Property Maintenance Code § 306 (*see* 19 NYCRR § 1226.2),[2] Derector opines that a handrail was not required because the stepped aisle is not intended to be a flight of stairs (*id.*, ¶ 9). He states that "the area was well maintained and not unsafe," and therefore there was no violation of Property Maintenance Code §§ 106, 107 and 301 (*id.*). Derector also states that ANSI A121-1973 (discussing floors, wall openings, railings and toeboards), ASTM F1637 (practices for safe walking surfaces) and ANSI Z53.1 (color markings for physical hazards) are voluntary standards that are not applicable in New York (*id.*, ¶¶ 10-11). As to ANSI A1264.2 (slip resistant surfaces) and OSHA 1926.203 (signs, signals and barricades), Derector avers these provisions apply to employees, not patrons (*id.*, ¶ 10).

Lastly, Derector inspected the stepped aisle on April 26, 2017 (NYSCEF Doc No. 28, ¶ 2), and found it to be in "good condition" (*id.*, ¶ 12). He states that the "minor chip" along the nosing

[2] It appears that the Property Maintenance Code is part of the Uniform Code (*see* 19 NYCRR § 1219.2 [a] [7] [stating that "2020 PMCNYS. The publication entitled "2020 Property Maintenance Code of New York State" (publication date: November 2019), published by the International Code Council, Inc. The 2020 PMCNYS is incorporated by reference in Part 1226 of this Title"]).

of the second tread from the top of the stepped aisle measured three-eighths inch, and "in my opinion ... did not create any inordinate danger to persons traversing the stepped aisles in a reasonable manner" (*id.*). Derector concludes that, "based upon a reasonable degree of engineering certainty that the subject stepped aisle was properly maintained in the condition that it was constructed and violated no known applicable code, standard or ordinance" (*id.*, ¶ 13).

Plaintiff, in opposition, proffers an affidavit from her engineering expert, William Marletta, Ph.D, CSP (Marletta), who opines that "the conditions are ripe for a slip and fall occurrence ... when the surface conditions encountered are different than expected, (i.e. non-uniform risers; non-uniform treads, surface irregularity, low lighting, etc.)" (NYSCEF Doc No. 42, Glass affirmation, exhibit C [Marletta aff], ¶ 15). At an on-site inspection of the subject stairway on August 17, 2016, Marletta observed that the height of each landing, riser and tread varied (*id.*, ¶¶ 9-10) as did the slope of each landing, riser and tread (*id.*, ¶ 12). Solid walls and handrails had also been installed on either side (*id.*, ¶¶ 7-8).

Marletta states that the Theater qualifies as a "place of public assembly," as defined in Labor Law § 2 (12) (NYSCEF Doc No. 42, ¶ 22). Part 36 of the Industrial Code governs "Places of Public Assembly," and 12 NYCRR § 36-2 states that "Subpart 36-2 [shall] apply to ...to existing and new structures" (*id.*, ¶ 53). Marletta opines that the stairway's non-uniform risers and treads violate Industrial Code (12 NYCRR) § 36-2.3 (i) (4), which states that "treads shall be of uniform width and risers of uniform height" (*id.*, ¶ 31). He opines that the non-uniform treads and risers also violate Uniform Code § 765.4a-9m, which provides that "[t]reads shall be set level and true ... [and] [r]isers shall not vary more than 1/8 inch in height" (*id.*, ¶ 32), and Uniform Code § 765.3a-3, which states, in part, that steps in theaters "shall conform to the requirements for interior stairways in regard to treads and risers as set forth in Table IV-765" (*id.*, ¶ 33 [emphasis removed]).

He submits that visual cues should have been provided, such as markings in contrast colors in accordance with ANSI Z53.1-1979 and ANSI A117.1 (2009) (*id.*, ¶¶ 36-39); handrails in accordance with 12 NYCRR 36-2.3 (i) (6) (i) and (j) (4) (ii) (*id.*, ¶ 41); and, warning signs and barricades under ANSI A1264.2-2006 (*id.*, ¶ 71). In addition, Marletta opines that the failure to furnish a step light or adequate illumination is a violation of Industrial Code (12 NYCRR) §§ 36-2.6 (d) and (e), which require lighting at exits and aisles during public occupancy (*id.*, ¶ 54). Uniform Code §§ 765.3a-3, 1031.1a and 1031.1b, Property Maintenance Code § 402.2 and ASTM F1637-09 also mandate illumination (*id.*, ¶¶ 55 and 57-59). Marletta also rejects Derector's assertion that the 1984 version of the Uniform Code is inapplicable because his research revealed that significant renovations were made in 1991, 1997-1998 and 2012, thereby making the Uniform Code applicable (NYSCEF Doc No. 42, ¶ 45). The same logic applies to Property Maintenance Code § 306 because that section applies to existing structures (*id.*, ¶ 47). Marletta also opines that LNW failed to adequately inspect the Theater, in violation of ASNI A1264.2-2006 (*id.*, ¶ 64).

On a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252,

254 [1st Dept 2005], citing *Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 296 [1st Dept 1988], *lv denied, lv dismissed* 73 NY2d 783 [1988]). Thus, a landowner has a duty to maintain its 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] [internal quotation marks and citation omitted]). This duty extends to the proprietor of a place of public assembly who has "a nondelegable duty to provide the public with a reasonably safe premises" (*Gounarides v Yankee Stadium Corp.*, 2014 NY Slip Op 32634[U], *5 [Sup Ct, Bronx County 2014], *affd* 136 AD3d 440 [1st Dept 2016] [internal quotation marks and citation omitted]).

LNW admits it licensed the Theater (NYSCEF Doc No. 19, Quinche affirmation, exhibit C, ¶ 2). Because a license does not grant the licensee possession of a premises (*see American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994]), a licensee generally has no duty to maintain the premises in a reasonably safe condition (*see Gibbs*, 17 AD3d at 254). LNW, though, appears to concede that it was responsible for maintaining the Theater.

It is well settled that "[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 v 116 Lexington Ave., Inc.*, 92 AD3d 597, 598 [1st Dept 2012], *lv denied* 24 NY3d 907 [2014]). As applied here, LNW has failed to meet its prima facie burden as it has not dispelled all questions of material fact regarding its lack of constructive notice. Citron's testimony that there were no prior complaints about the stepped aisle suffices to establish LNW's lack of actual notice (*see Early v Hilton Hotels Corp.*, 73 AD3d 559, 561 [1st Dept 2010]), but LNW has produced no evidence of when the step was last inspected prior to the accident (*see Javier v New York City Hous. Auth.*, 161 AD3d 615, 615 [1st Dept 2018]). Plaintiff testified that

the heel of her left foot slipped into a crack at the edge of the step. LNW has not shown whether any of its employees or subcontractors had observed that condition prior to the accident.

LNW also maintains that the three-eighths inch chip is "minor," but "'there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth to be actionable'" (*Hutchinson v Sheridan Hill House Corp.*, 26 NY3d 66, 77 [2015], quoting *Trincere v County of Suffolk*, 90 NY2d 976, 977-978 [1997]). "[T]he issue of whether a dangerous or defective condition exists which is sufficiently hazardous to create liability is generally a question of fact, to be resolved by a jury, on the facts particular to the case" (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]). LNW has not presented any caselaw in support of its contention that the chip along the nosing did not create a danger, especially in view of the testimony from plaintiff and LeBlanc describing the lighting conditions at the time of the accident. Notably, Derector states that artificial lighting along the aisle seats illuminate the aisle, but the photographs submitted on the motion do not appear to depict any seats directly adjacent to the step on which plaintiff claims she fell (NYSCEF Doc 27, Quinche affirmation, exhibit K at 1).

Furthermore, a violation of an agency rule or local ordinance provides "some evidence … of [a] defendant's negligence" (*Bauer v Female Academy of the Sacred Heart*, 97 NY2d 445, 453 [2002] [internal quotation marks and citation omitted]; *Elliott v City of New York*, 95 NY2d 730, 735 [2001]), but it is not dispositive of the issue of a defendant's liability. Indeed, "the absence of a violation of a specific code or ordinance is not dispositive of a plaintiff's allegations based on common-law negligence principles" (*see Romero v Waterfront N.Y.*, 168 AD3d 1012, 1013 [2d Dept 2019], quoting *Alexis v Motel Oasis*, 143 AD3d 926, 927 [2d Dept 2016]). As explained above, LNW has not demonstrated its entitlement to summary judgment under common-law negligence principles. LNW, though, is entitled to dismissal of that portion of plaintiff's claim

predicated upon a violation of ANSI A1264.2 and OSHA 1926.203, as those sections apply to employees. Plaintiff, in opposition, does not address whether these sections are inapplicable to non-employees. Similarly, LNW is entitled to summary judgment dismissing that portion of the claim based on a violation of ANSI Z53.1, since the testimony establishes that a safety strip had been painted on the step. Marletta avers that he tested the contrast of the painted stripe and found that "it failed to be in adequate contrast" (NYSCEF Doc No. 42, ¶ 86). However, Marletta's statement lacks any probative value since his inspection took place three years after the accident, and he did not account for whether the stripe could have been repainted after the accident (*see Rios Cruz v Mall Props., Inc.*, 145 AD3d 463, 463 [1st Dept 2016]).

As to the remaining violations, Derector's affidavit is insufficient to establish that there was no violation of a rule or ordinance. An expert's report or affidavit must be grounded on facts in the record. "[B]are conclusory statements are … insufficient" (*Applewhite v Accuhealth, Inc.*, 81 AD3d 94, 99 [1st Dept 2010], *affd* 21 NY3d 420 [2013]; *Ocasio-Gary v Lawrence Hosp.*, 69 AD3d 403, 404 [1st Dept 2010] [finding that the expert's conclusory affidavit was insufficient to establish the defendant's entitlement to summary judgment]). Here, Derector opines that the various Uniform Code and Property Maintenance Code provisions are inapplicable, yet he does not recite what those provisions and standards actually state.[3] Additionally, Derector does not explain in detail why and how those standards are inapplicable to the facts alleged herein. He cites to the commentary to the 2009 International Fire Code, but does not explain why the 2009 commentary is applicable when the Theater was built well before the Uniform Code came into effect. Derector claims that the aisle had not been repaired prior to the accident, but he does not state the basis for this supposition. Importantly, Connelly could not recall if the renovation work

[3] Neither Derector nor Marletta expressly identify which version of the Property Maintenance Code applies.

completed in 1997 and 1998 affected the subject aisle. In addition, Derector does not state whether such work could have rendered the 1984 version of the Uniform Code applicable. Derector's statement that Property Maintenance Code §§ 106, 107 and 301 are inapplicable because the "area was well maintained and not unsafe" is entirely conclusory. Moreover, Derector submits that abiding by ANSI and ASTM standards is entirely voluntary, but a violation of an ANSI or ASTM standard can constitute evidence of negligence (*see Bradley v HWA 1290 III LLC*, 32 NY3d 1010, 1011 [2018]; *Belfiore v 304 Park Ave. S., LLC*, 2008 NY Slip Op 33117[U] [Sup Ct, NY County 2008]). Accordingly, LNW's motion for summary judgment is granted solely to the extent set forth above.

B. Plaintiff's Cross Motion to Amend the Caption

Plaintiff cross-moves to amend the caption to correct the spelling of her first name. Generally, leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is "palpably insufficient or patently devoid of merit" (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dept 2013] [internal quotation marks and citation omitted]). Plaintiff has demonstrated the merit to the cross motion by way of her averment that her name is spelled "Katharine," not "Katherine" (NYSCEF Doc No. 44, Glass affirmation, exhibit E [plaintiff aff], ¶ 2). This branch of the cross motion is granted, without opposition.

C. Plaintiff's Cross Motion for Leave to Serve a Supplemental Bill of Particulars

Plaintiff also cross-moves for leave to supplement her bill of particulars to plead additional violations of Industrial Code (12 NYCRR) §§ 36-1.4 and 36-2.1 and Uniform Code §§ 606.3 and 765.3a. Marletta explains that Industrial Code (12 NYCRR) § 36-2.1 reads, in part, "[t]he provisions of Subpart 36-2 apply to all structures containing or constituting places of public

assembly. They are applicable to existing and new structures unless otherwise herein specifically stated. Certain occupancies are subject to the special requirements of Subpart 36-3" (NYSCEF Doc No. 42, ¶ 40 [emphasis removed]). Industrial Code (12 NYCRR) § 36-1.4 includes a "theatre" in the definition for a "place of public assembly" (NYSCEF Doc No. 39, Glass affirmation, ¶ 46). Uniform Code § 606.3 defines the phrase "means of egress" to mean "a continuous and unobstructed way of exit travel from any point in a building or structure to a public way" and shall be comprised, in a part, of "the vertical and horizontal ways of travel" (NYSCEF Doc No. 42, ¶ 66). Uniform Code § 765.3a-3, discussing "Theaters," states:

> "Steps shall be provided in longitudinal aisles only when the slope of such aisles exceeds 1:10. Steps shall be the full width of such aisles, shall be illuminated, and shall conform to the requirements for interior stairways in regard to treads and risers as set forth in Table IV-765. Where, because of the slope, level surfaces other then [sic] treads are required such surfaces shall be not more than 24 inches in width"

(*id.*, ¶ 55 [emphasis removed]).

CPLR 3043 (c) grants the court discretion to grant "other, further or different particulars." The court may grant a motion for leave to supplement a bill of particulars where the opposing party fails to establish prejudice from the delay (*see DaSilva v C & E Ventures, Inc.*, 83 AD3d 551, 552 [1st Dept 2011]), particularly where the proposed amendment merely expounds upon the theory of liability set forth in the original bill of particulars and does not raise a new theory of liability (*see Napolitano v Gustavson*, — AD3d —, 2021 NY Slip Op 00238, *1 [1st Dept 2021]; *see also Scherrer v Time Equities, Inc.*, 27 AD3d 208, 209 [1st Dept 2006]). After reviewing plaintiff's original bill of particulars, the new code provisions do not raise a new theory of liability. Plaintiff had apprised LNW that she intended to rely on Part 36 of the Industrial Code, which pertains to places of public assembly such as theaters (NYSCEF Doc No. 20, ¶ 8). Additionally, she had

claimed in the original bill of particulars that LNW had failed to provide her "with safe and proper ingress and egress" (*id.*, ¶ 7). Uniform Code § 606.3 furnishes a definition for "means of egress," and Uniform Code § 765.3a-3 pertains to theater steps.

Accordingly, it is

ORDERED that the motion of defendant Live Nation Worldwide, Inc. for summary judgment dismissing the complaint is granted to the extent of dismissing so much of plaintiff's claim predicated upon alleged violations of ANSI A1264.2, ANSI Z53.1 and OSHA 1926.203, and the balance of the motion is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff Katharine Lindskog for leave to serve a supplemental bill of particulars and to amend the caption is granted; and it is further

ORDERED that the supplemental bill of particulars in the proposed form annexed to the cross-moving papers as Exhibit D (NYSCEF Doc No. 43) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the action shall bear the following caption:

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

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KATHARINE LINDSKOG,

Index No. 160024/2016

Plaintiff,

- against -

LIVE NATION ENTERTAINMENT, INC., LIVE NATION WORLDWIDE, INC., JOHN DOE CORPORATION 1, JOHN DOE CORPORATION 2,

Defendants.

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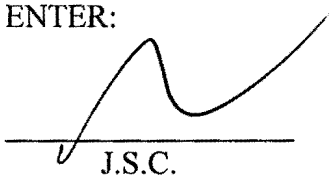
; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the new caption.

Dated: February 4, 2021

ENTER:



J.S.C.