SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS **PART** 57TR

Justice

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ALICE SCOTT,

Plaintiff,

- v -

LYCEUM THEATRE CORPORATION, THE SHUBERT ORGANIZATION, INC,

Defendant.

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INDEX NO. 162057/2019

MOTION DATE 08/12/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

LYCEUM THEATRE CORPORATION, THE SHUBERT ORGANIZATION, INC

Plaintiff,

-against-

BROADWAY CHILL LLC

Defendant.

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Third-Party
Index No. 595400/2020

The following e-filed documents, listed by NYSCEF document number (Motion 003) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the Plaintiff on June 26, 2019, when she fell on a stairway located in the backstage the Lyceum Theatre located at 149 West 45th Street, New York, New York. The Theatre is owned by Lyceum Theatre Corporation (Lyceum), and leased to The Shubert Organization, Inc.(Shubert). Shubert enters into agreements with different production companies to operate Broadway Shows

at the Lyceum Theatre, such as the one in question in this case, Broadway Chill LLC (Broadway), which produced the Broadway show called Be More Chill. Plaintiff was an employee of Broadway Chill at the time of the incident.

PENDING MOTION

On June 22, 2022, Lyceum and Shubert (collectively "Defendants") moved for summary judgment dismissing the complaint and for an order against Broadway for contractual indemnification and related relief. On August 12, 2022, the motion was marked submitted and the court reserved decision.

For the reasons stated below, Defendants' motion for summary judgment as against Plaintiff is only granted to the extent of dismissing the cause of action predicated on building code violations and is otherwise denied. Defendants' motion for summary judgment on its contractual indemnification claim is also denied.

ALLEGED FACTS

Plaintiff was in the course of her employment as a wardrobe worker on June 26, 2019, when she sustained a fall while descending the backstage stairway from the first-floor dressing rooms down to the basement level. Plaintiff was going down to the basement where there were washers and dryers. There is no elevator or any other direct access between the basement and the backstage dressing rooms other than the backstage stairway.

The backstage stairway contains winder stair treads which turn at each turn junction. The winder stair treads are wedge shaped with diminishing depth, down to nearly zero where they intersect a newell post. In addition, the stairway contains one handrail on the inside narrow side of the stairway, which handrail has a discontinuance at each turn junction, resulting in an elevation differential of the two handrails which meet at the corner newel post. The upper

handrail ends at an interior newel post, and then a new lower handrail begins from the same newel post, but at a lower and more forward location. Since the only handrail is on the narrow inside portion of the stairway, anyone walking down the stairs using the handrail is guided at the turn junction to the narrowest winder step with the least depth.

The stairs have been in the same condition for at least the last 30 years.

As Plaintiff was on the turn junction and intending to step onto the first or second of the angled winder stair treads, her right foot slipped off the nosing of the stair tread, which stair tread she alleges had insufficient depth to hold her foot. Plaintiff lost her balance, and her right hand, which had just come off the upper handrail which had ended, was not yet able to grasp onto the lower handrail, which was both in a forward and lower position. Plaintiff alleges that at the turn junction, there was no accessible or safely reachable handrail.

As Plaintiff was losing her balance, she reached with her right hand to hold onto a handrail, but since the lower handrail was too far lower down, and forward to where she was, she was unable to grasp it. Plaintiff was also unable to grasp onto the upper handrail, which at that location, was behind her, and higher up. Plaintiff fell onto her buttocks and sustained injuries.

Plaintiff alleges that had there been a handrail on the left side, going down the stairway, it would have offered a much safer option to descend the stairway. Plaintiff alleges she would have used that handrail, because it would have led her to the wide side of the steps going around the turns, which have much more depth to place her feet. Plaintiff further alleges such a handrail would be continuous handrail and would have afforded her the ability to hold on to the handrail for the entire time as she walked either up or down the stairway.

The staircase where Plaintiff's accident occurred is called the Backstage Stairs. Defendants believe that the Backstage Stairway was original from 1903 but are not certain of

this.

Shubert regularly maintains the Backstage Stairs, such as vacuuming, mopping and cleaning the stairs, and if there is or would be any disrepair, it would be handled by the Shubert Facilities Department. In his 25-30 years of working for Shubert, Keith Marston (Marston) inspected and went on the Backstage Stairs at the Lyceum Theatre regularly, and such inspections were done in the ordinary course of business. His inspections and walkthroughs of the Backstage Stairs would more often during the times that a show would be running at the Lyceum but would also take place during the times that no show would be running.

If there was any repair work needed to the Backstage Stairway, it would fall under Marston's job title and description of the Facilities Dept at The Shubert Organization, including any maintenance and repair of the stairs, the tread, and the handrails.

The Backstage Stairs were accessed by the Show personnel and employees and by Marston and other Shubert personnel. During the show, Be More Chill, Broadway is responsible during operation hours to keep the Backstage Stairs clear of objects that would hinder egress or ingress.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient

to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324).

"[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Since summary judgment deprives the litigant of her day in court, it is considered a drastic remedy which should be employed only where there is no doubt as to the absence of triable issues. *Andre v. Pomeroy*, 35 N.Y.2d 361. The Court's role in a summary judgment motion is issue finding rather than issue resolving. *Amatulli v. Delhi Construction Corp*., 77 N.Y.2d 525; *Cohen v. Herbal Concepts, Inc*., 100 A.D.2d 175.

Defendants have established the right to Summary Judgment as to the Claim that the Staircase Violated the Building Codes Specified in the Pleadings

Plaintiff alleges the following New York Building Code and Administrative Codes were violated: §27-127; §27-128; and §27-375. These are from the 1968 NYC Administrative Code. Also alleged is Fire Code §1012 regarding handrails without reference to any more specific year or city or state code description.

The determination of whether the staircase falls under any Code provision is one for the Court. *Robbins v. County of Broome*, 87 N.Y.2d 831, 834 (1995). The question of whether the

Administrative Code requires a staircase to have a particular type of handrail or treads and risers is one of law, not of fact. *Gaston v. New York City Hous. Auth.*, 258 A.D.2d 220, 224 (1st Dept. 1999).

At the outset, NY Fire Code 1012 was not applicable. Both parties acknowledge this in the motion papers submitted to the court, including Plaintiff's expert.

Since these steps were access stairs, the handrail at issue was not subject to any statutory code since it is not part of any egress system.

§27-127 and §27-128 have been repealed as of 2008 and are not specific enough to be considered statutory violations. §27-375 is not applicable as the subject staircase is it is an access stair case not subject to any statute. As noted by Defendant's engineer, Stan Pitera, P.E., the staircase, which is completely within the demised premises and is in the backstage area and only goes from the basement to the floors above, is an "access staircase" and was not required to meet the requirements for an interior stair.

The Court of Appeals has held:

> The Appellate Division properly concluded that section 27–325(f) is inapplicable. That code provision applies to "interior stairs," which are defined as "stair[s] within a building, that serve[ ] as a required exit" (Administrative Code § 27–232). By all accounts, the stairs from where plaintiff fell did not serve as an "exit" as defined by the Administrative Code *(see id.),* but rather as a means of walking from the first floor to the basement. Therefore, Supreme Court erred in denying the City's motion to dismiss the section 205–a claim to the extent it was premised on the City's alleged violation of section 27–375(f).

Cusumano v. City of New York, 15 N.Y.3d 319, 324 (2010).

The staircase at issue was not opened to the public. It provided access only to production and theatre personnel to go between the basement and dressing rooms on the second and third floor. It does not serve as an exit from the building's interior to "an open exterior space" *Gaston v. NYC Hous. Auth*, 258 A.D.2d 220, 224 (1st Dept. 1999); *see also Chester v. Museum of*

Modern Art, 180 A.D.3d 562 (1st Dept. 2020); *Hernandez v. Callen*, 134 A.D.3d 654 (1st Dept. 2015); *Katz v. Blank Rome Tenzer Greenblatt*, 100 A.D.3d 407 (1st Dept. 2012); *Gibbs v. 3220 Netherland Owners Corp*., 99 A.D.3d 621 (1st Dept. 2012); *Remes v 513 W. 26th Realty, LLC*, 73 A.D.3d 665 (1st Dept. 2010).

Defendants have established, through the expert affidavit of Stan Pitera, P.E., that the staircase at issue was code compliant and did not violate the code sections identified by the plaintiff in his Bill of Particulars.

Plaintiff has failed to raise any issue of fact, since Plaintiff has failed to identify any specific applicable code, regulation or industry standards that were violated. *Boatwright v. New York City Tr. Auth*., 304 A.D.2d 421 (1st Dept. 2003).

Plaintiff's opposition includes an affidavit from Scott Silberman, P.E. alleging contrary to the Bill of Particulars that Building Codes starting all the way back in 1901 up until the present are applicable. The affidavit of Mr. Silberman offers no authoritative support for his opinion that the staircase is an "interior stair" under any Code, nor has Plaintiff moved to amend her Bill of Particulars.

A Bill of Particulars is intended to amplify the pleading, limit the proof and prevent surprise at the trial (*State of New York v Horsemen's Benevolent & Protective Assn*., 34 AD2d 769, 770). Where the complaint affirmatively alleges the violation of particular laws then the bill of particulars must specify the statutes or ordinances claimed to have been violated (*Brady v Benedictine Hosp*., 74 AD2d 937; *Miller v Perillo*, 71 AD2d 389; *Calabrese v Caldwell Dev. Corp*., 63 AD2d 834; *Whirl Knits v Adler Business Machs*., 54 AD2d 760).

The NYC Building Code for 2008 allows for existing buildings to generally be exempt from the provisions of the current Code unless there is a substantial change in use and provides

for the optional use of the 1968 Building Code: "Where the estimated cost of such alteration in any twelve-month period exceeds fifty percent of the cost of replacement of the building or where there is a change in the main use or dominant occupancy of the building." See 2008 NYC BC §28-102.4; §27-103; *see also West 58th Street Coalition, Inc. v. City of New York*, 188 A.D.3d 1 (1st Dept. 2020);*Wyckoff v. Jujamcyn Theaters*, 11 A.D.3D 319 (1st Dept. 2004). Plaintiff failed to meet this 50% test as Mr. Silberman failed to show that any renovation could have allowed the staircase to fall under the 2008 building Code requiring handrails and no winders.

Since the Building Code provisions requiring handrails and uniform riser heights and tread widths only apply to "interior stairs", all statutory claims against Defendants are dismissed. *Jean–Baptiste v. 153 Manhattan Ave. Housing Development Fund Corp*., 124 A.D.3d 476 (1st Dept. 2015); *Kittay v. Moskowitz*, 95 A.D.3d 451 (1st Dept. 2012) lv denied, 20 N.Y.3d 859 (2013).

Notwithstanding the foregoing, the statutes discussed in the expert affidavits may be applicable and relevant on the issue of safety standards generally.

Defendants Fail to Establish Entitlement to Judgment As A Matter of Law on Plaintiff's Cause of Action for Negligence

The elements for a cause of action for negligence are the existence of a duty on the part of Defendants to Plaintiff, the breach of that duty, and that the breach of said duty was a proximate cause of an injury to the plaintiff. *Akins v. Glens Falls City School District*, 53 N.Y.2d 325 (1981). A property owner has a duty to maintain the premises in a reasonably safe condition in view of the circumstances *Basso v. Miller*, 40 N.Y.2d 233 (1976).

The existence of an alleged dangerous condition, in and of itself, does not give rise to a cause of action in negligence. *Mercer v. City of New York*, 223 A.D.2d 688 (2nd Dept 1996),

aff'd, 88 N.Y.2d 955 (1996). Defendants must have either created the condition or had actual or constructive knowledge of same and a reasonable time within which to correct it *id*; *see also Klor v. Am. Airlines*, 305 A.D. 2d 550 (2nd Dept 2003).

Defendants' expert Stan E. Pitera's does not opine that the subject stairway, including the winder steps, and handrail configuration was a safe, reasonable, and non-dangerous condition. Plaintiff's expert does opine that the subject stairway was dangerous and unsafe, both with respect to the winder stairway and tread, and the handrail deficiencies existing at the accident location.

In *Carter v State*, 119 A.D.3d 1198, a case with similar facts, plaintiff fell down stairs and as she reached for a handrail, the handrail was not in reach, since the handrail did not begin until the third step down. The court held that defendant did not meet its *prima facie* burden of demonstrating that the lack of a handrail extending to the top of the stairs did not cause or contribute to claimant's fall. Similarly, here Defendants do not meet their initial burden because they have not produced evidence that the lack of a reasonably accessible handrail did not contribute to Plaintiff's fall. Even if the fall was precipitated by a misstep, given Plaintiff's testimony that she reached out to try to stop her fall, there is an issue of fact as to whether the absence of a safe handrail at that turn junction was a proximate cause of the injury. *Antonia v Srour*, 69 A.D.3d 666.

In *Jackson v Fenton*, 38 A.D.3d 495, plaintiff fell because of a worn tread on a winder stairway and the absence of a handrail on one side of the winder stairway. The court held that defendants failed to establish that the staircase was not in a hazardous condition.

Where the nature of the alleged dangerous condition, in this case the winder step treads with diminishing depth, along with the discontinuance in the handrail causing an elevation

differential and lack of a reasonably accessible handrail at the turn junction, has been present and "open and obvious" to the owner, and has been observed and inspected, constructive notice is a question of fact, which Defendants have not eliminated. *Timmins v Benjamin*, 77 A.D.3d 1254; *Ennis-Short v Ostapeck*, 68 A.D.3d 1399. To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it. *Russo v. Hamill*, 123 A.D.3d 792; *Bravo v 564 Seneca Ave. Corp*., 83 A.D.3d 633; *Gordon v. American Museum of Natural History*, 67 N.Y.2d 837; and *Schnell v. Fitzgerald*, 95 A.D.3d 1295.

Here the alleged condition at issue had been used for a number of years by, and was readily visible to Defendants, thus Defendants have failed to demonstrate, as a matter of law, they did not have constructive notice of the alleged dangerous condition (*Page v State*, 72 A.D.3d 1456).

Ennis-Short, *supra*, is another case with similar facts as the case at bar. Plaintiff fell down a staircase owned by defendant, and plaintiff claimed that the staircase and handrail created a dangerous condition. The staircase had existed in the same configuration for the entire 20 years that defendant owned the building. The court found that summary judgment was properly denied as there was a question of fact as to whether the defendant had constructive notice.

New York courts have consistently held that were a plaintiff testified that she attempted to reach for a handrail that was not there, or not reasonable accessible, in order to stop her fall, she has created a triable issue of fact regarding whether a defective or absent handrail proximately caused her injuries. *See Antonia v Srour*, 69 A.D.3d 666; *Carter v Palmer, supra*;

Asaro v Montalvo, 26 A.D.3d 306; *Boudreau-Grillo v Ramirez*, 74 A.D.3d 1265; *Viscusi v Fenner,* 10 A.D.3d 361; *Cruz v Lormet*, 7 A.D.3d 660.

Plaintiff's expert opines that a second, continuous handrail should have been placed on the wide side of the staircase, and that the absence of such a handrail was a dangerous departure from good and accepted safety practices in the industry. This theory has been held sufficient to find questions of fact as to whether a handrail configuration on a stairway is dangerous. *Gold v 35 East Associates*, 136 A.D.3d 453.

Based on the foregoing, Defendants motion to dismiss the cause of action for negligence is denied.

Defendants Were Not Out-Of-Possession Landlords

The out-of-possession-landlord-law, under *Guzman v Haven Plaza*, 69 N.Y.2d 559 is not applicable in this case, since neither Lyceum nor Shubert is an out of possession landlord, and Broadway is not a net lessee. At all times, it is admitted that Defendants had the obligation and responsibility for structural repairs and maintenance of the steps and handrails.

As Marston testified, and as evidenced in the Production Agreement, during the Show Be More Chill, the Show is responsible during operation hours only to keep the Backstage Stairs clear of objects that would hinder egress or ingress such as transient condition. All structural repairs, such as to handrails, stairs, treads, painting of stair nosing is the responsibility of the Shubert and Lyceum.

The Agreement attached to moving papers is a Production Agreement, and neither a lease, nor a net lease. Broadway is not responsible for the operation, maintenance, and structural repairs of the subject stairway, including handrails, steps and all other components. Marston acknowledges that such responsibility is with Defendants.

Moreover, Defendants' argument that the winders and handrail configuration were open and obvious does not negate the defendants' duty to maintain its premises in a reasonably safe condition, but rather raises an issue of fact concerning the plaintiff's comparative negligence. *Cupo v Karfunkel*, 1 A.D.3d 48; *Chambers v Maury Povich*, 285 A.D.2d 440.

Defendants Motion for Summary Judgment on The Contractual Indemnification Claim is Granted

Defendants' motion for summary judgment on its contractual indemnity claim is premised on their position that they were not negligent. Defendants argue "(i)n this case, in the absence of any independent acts of negligence on the part of Shubert and Lyceum, Shubert and Lyceum is entitled to contractual indemnification from Broadway Chill *Pyfrom v. Tishman Construction Co*., 267 A.D.2d 6 (1st Dept. 1999)" (Def Memo of Law NYSCEF Doc 103).

As set forth above, whether Defendants were negligent remains an issue of fact for trial.

Based on the foregoing, Defendants' motion for summary judgment on the contractual indemnity claim is denied.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that Defendants' motion for summary judgment is granted only to the extent of dismissing the cause of action based on breach of building codes and administrative codes cited in the pleadings and is otherwise denied; and it is further

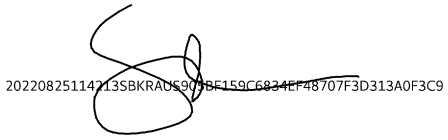
ORDERED that, within 20 days from entry of this order, Defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

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



8/25/2022
DATE

SABRINA KRAUS, J.S.C.

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