SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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MILDRED RIVERA, aka MILLIE RIVERS,

Plaintiff,

- v -

MICHELE HAWKINS-JONES, MOUNT PISGAH BAPTIST CHURCH, GEORGE HENRY MURRAY PREPARATORY ACADEMY

Defendant.

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INDEX NO. 154960/2018

MOTION DATE 04/11/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113

were read on this motion to/for SUMMARY JUDGMENT.

Defendants' motion for summary judgment is denied.

Background

This trip and fall case arises out of a play rehearsal that took place on December 16, 2015. Plaintiff was a volunteer in a church play held in the basement of Mount Pisgah Baptist Church (which is also the basement of George Henry Murray Preparatory Academy). Defendant Hawkins-Jones was the director of the play.

Plaintiff testified that she was rehearsing her scene that evening but initially refused to do so because the person playing her husband in the scene had not shown up (NYSCEF Doc. No. 99 at 68). She claimed that the director, defendant Hawkins-Jones, told her to do the scene anyway (*id.*). Plaintiff had rehearsed this scene a few times before, but on the night of her accident, there were more people on stage than in previous rehearsals (*id.* at 81). She testified that the actor playing Harriet Tubman put a prop gun to her face and then "I stepped back away from the gun. I

stepped back trying to get away from it, and she came after me, and that's when I fell" (*id*. at 96). She added that she "tripped over the actor that was behind me" (*id*. at 97), who was allegedly there at the direction of Hawkins-Jones.

According to plaintiff, the actor playing Harriet Tubman had never pointed the prop gun at her in prior rehearsals. Plaintiff's role was as a "slave capturer" and she was supposed to convince the other actors, playing enslaved people, to go to one side of the stage while the Harriet Tubman character tried to lead them towards freedom.

Defendants move for summary judgment dismissing this case on the ground that plaintiff assumed the risks associated with participating in the play and that she cannot show a proximate cause between the alleged defective or hazardous condition and her accident. They emphasize that plaintiff had participated in plays for five years and was involved with at least three productions put on by defendants. Defendants emphasize that plaintiff had specific experience at the location where the incident occurred.

They also claim that there were multiple intervening and superseding causes that prevent the Court from a finding that defendants proximately caused the accident. Defendants insist they had no notice of the dangerous condition that caused plaintiff's injuries.

In opposition, plaintiff contends that the assumption of risk does not apply here because a play rehearsal, unlike cases where this doctrine has been invoked, is not an inherently risky activity. She insists a play rehearsal has no risks that she assumed. Plaintiff emphasizes that the director permitted an actor to be placed near plaintiff and that is the cause of the fall; plaintiff claims that she did not accept that risk.

Plaintiff emphasizes that defendants did not offer an expert opinion but she attaches an affidavit from someone who is allegedly an expert in stage production. Ms. Chapman (the

purported expert) details her decades of experience in acting and stage production and she insists that it is the director's job to ensure that the blocking (the placement of the actors) is done in a safe way (NYSCEF Doc. No. 112, ¶ 34). She opines that defendant Hawkins-Jones "failed to ensure that all actors in the rehearsal scene knew exactly how they were supposed to move and where they were supposed to move. This was her duty and she breached that duty by failing to do so" (*id*. ¶ 37).

In reply, defendants insist that plaintiff assumed the risk of participating in the play and that she was aware of the risk of falling or colliding with a fellow actor. They also insist that plaintiff cannot meet her burden to show that defendants proximately cause the accident or meet the elements of negligence.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (id.). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to

delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*, Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], affd 99 NY2d 647, 760 NYS2d 96 [2003]).

As an initial matter, the Court must consider whether the doctrine of assumption of risk is applicable here. Certainly, defendants are correct that this doctrine has not been solely limited to sports and recreation, and has been invoked in the arts (*Lisok v Club Exit, Inc.*, 15 AD3d 630, 790 NYS2d 223 [2d Dept 2005] [finding that a dancer who slipped on confetti assumed the risk where she had danced on this slippery condition for about 30 minutes prior to the accident]; *LaFond v Star Time Dance & Performing Arts Ctr.*, 279 AD2d 509, 719 NYS2d 273 [2d Dept 2001] [finding that a tap dancer assumed the risk of dancing on a floor she admittedly knew was slippery and where she had taken weekly lessons for about 15 years]).

Here, the Court finds that there is an issue of fact about the assumption of risk because the specific way the rehearsal took place raises questions about plaintiff's expectations and knowledge of the associated risks. Plaintiff detailed the ways in which this rehearsal was different—the actor playing her husband was not there and for the first time in any rehearsal, the actor playing Harriet Tubman pointed a prop gun at her (NYSCEF Doc. No. 99 at 92). This was not part of the script although plaintiff testified that she thought this might happen because the actor playing her husband was not there (*id*. at 94). She explains that her husband in the play is armed and so it would make no sense in the play for the Harriet Tubman character to point a gun at her (*id*.). That obviously means that plaintiff did not have to react on a previous occasion to this action and so the Court cannot conclude she assumed any risks about what her character was

supposed to do. In other words, this is not a situation in which a character is supposed to jump and she complains on the fifteenth rehearsal that she didn't know the risks associated with jumping.

The Court observes that this was not the type of circumstance, such as the dancing cases cited above, where there is some inherent risk in the activity sufficient to award summary judgment dismissing the case. While defendants contend this was a scene that necessarily involved other actors, playing slaves, crawling, and moving around, that does not mean that plaintiff assumed the risk. As plaintiff's expert points out, a director's job is to ensure that scenes, particularly ones such as these with many actors moving about, are done safely. Actors are concentrating on performing—that is, they are not looking around for possible hazards while in the middle of a rehearsing a scene. And, according to plaintiff, the actor she tripped over was in that location behind her at the direction of the director, defendant Hawkins-Jones.

A fact finder might or might not determine that the director should have taken care to ensure the safety of the actors given that a key character in the scene was missing that evening. A fact finder must determine whether plaintiff should have been more careful as she backed away from the prop gun or whether defendants should have taken more steps to ensure that this type of incident did not occur.

Similarly, defendants' arguments that there were superseding or intervening causes does not compel the Court to dismiss this case. There is a material issue of fact as to the steps the director should have taken. That defendants allege it was unexpected that the Harriet Tubman character would point the prop gun at plaintiff is an argument to be raised before the fact finder. But the Court cannot conclude it breaks the chain of causation as a matter of law. There is no

dispute that this scene involved more than 20 actors moving and crawling around and plaintiff tripped over one of those actors after a gun was pointed at her.

Although not dispositive, the Court observes that defendants failed to offer an expert affidavit while plaintiff submitted a compelling expert affidavit that raised numerous issues of fact about the ideal way to run a rehearsal and what was done here. And the Court points out that defendants failed to submit a statement of material facts as required by the trial court rules which, in a case that is fact intensive, is a significant oversight.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied.

4/25/2023
DATE

ARLENE P. BLUTH, 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**