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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 1973CV00614

DENISE I. WHITELAW,
Plaintiff,

vs.

LIVE NATION WORLD WIDE INC., and another,[1]
Defendant.

MEMORANDUM OF DECISION AND ORDER ON DEFENDANT LIVE NATION WORLDWIDE INC.'S MOTION FOR SUMMARY JUDGMENT

This case arises out of an incident in which the plaintiff, Denise I. Whitelaw, fell as she left a concert venue. Specifically, she alleges that she was injured when she tripped over the metal foot of a temporary barrier. In the Complaint, the plaintiff alleged negligence against both defendants, Live Nation World Wide Inc. ("Live Nation" or defendant) and DLC Corporation. On December 21, 2020, this court dismissed DLC Corporation from suit for failure of service of process. Now before the court is Live Nation's motion for summary judgment on the grounds that the plaintiff has no reasonable expectation of proving the essential elements of her claim as she does not know the cause of her fall and has not identified any witness who could testify credibly as to causation. For the reasons that follow, the defendant's motion for summary judgment is **ALLOWED**.

BACKGROUND

The following is derived from the Joint Index of Exhibits, including the plaintiff's deposition, Claire Messier's deposition, the Complaint, and the affidavit of Attorney Carolyn Miller.

On July 12, 2016, the plaintiff attended a concert at the Xfinity Center. As she was leaving, she walked toward a temporary crowd-control barrier. She described the barrier as metal with

[1] DLC Corporation.

"feet on the bottom of them to keep them . . . held up." Exhibit A, pages 41–42. She had previously seen these types of barriers at amusement parks. *Id.*

The barrier remained on her right side as she walked toward it on an angle. Her friend, Ms. Messier, walked next to her on her left side.

As the plaintiff walked, she suddenly was "spinning in the air and sitting on [her] rear end looking in the other direction . . . back where [she] had come from. [She] wasn't even sure what [she] did." *Id.* at page 51. She stated further, "I tripped on the foot of the the [sic] barrier, which was sticking up in the air, and [Ms. Messier] is the one that noticed that." *Id.* at page 50.[2]

When asked whether, at the time of her fall, if she had known what tripped her, she stated, "No. It just happened so fast. I was in the dark and [had] fallen. I had no idea what I had even done." *Id.* When asked whether she felt her foot come into contact with anything, she stated, "It happened so fast, to be honest with you, I don't recall." *Id.* When asked whether it was "just [her] assumption that [she] tripped over the leg of the barrier," she stated, "Right. When [Ms. Messier] looked, it was right there." *Id.* She later reiterated that she did not recall her foot coming into contact with the barrier. *Id.* at page 52.

The plaintiff does not know who erected the barrier. *Id.* at page 60.

The plaintiff identified Ms. Messier as the only person who saw her fall. *Id.* at pages 88–89. She stated, "I assume she was right behind me, so I'm guessing she saw me fall." *Id.* at 89.

Ms. Messier testified to the following, regarding the incident: "Well, we were walking along, and all of a sudden she fell down, and I turned around immediately and saw her sitting on the ground. But right by the side of her, maybe [a] foot or two back, was what I thought she tripped on." Exhibit B, page 12. It was crowded in the area and she walked about "shoulder-length" from the plaintiff. *Id.* at page 13. She did not actually see the plaintiff fall. *Id.* She stated, "I just looked down immediately, and I said what did you trip on, what did—how did you fall. And I looked over and saw a piece of metal sticking up from the ground or sticking out from the gate, and it was

[2] The plaintiff testified that the foot sat "[a]t least an inch to an inch and a half . . . maybe even [two inches]" above the pavement. *Id.*

not flush with the ground. It was the support from the gate." *Id.* at 14.[3] When asked whether Ms. Messier asked the plaintiff if she tripped over the metal barrier, she stated, "Yeah, I think when I mentioned it, she said, I don't know, I probably did. You know, she was just dumbfounded, because she was immediately in pain and hit the ground."

The Complaint alleges that Live Nation is a California Corporation that is "in the business of promoting rock concerts at various venues across the United States." It further alleges that DLC Corporation is a Massachusetts Corporation that "own real estate located at 885 So. Main St., Mansfield, Massachusetts 02048 . . . rented to Live Nation on or about July 12, 2016."

According to the affidavit of Carolyn M. Miller, defendant Live Nation's counsel, the plaintiff did not serve any written discovery on the defendant or provide notice for any depositions in this case.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper where no genuine issues of material fact exist and where the summary judgment record entitles the moving party to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Cassesso* v. *Commissioner of Corr.*, 390 Mass. 419, 422 (1983). The moving party bears the burden of affirmatively demonstrating that no genuine issue of material fact exists for any relevant issue and that the moving party is entitled to judgment as a matter of law. *Pederson* v. *Time, Inc.*, 404 Mass. 14, 17 (1989). The moving party may satisfy this burden by submitting evidence negating an essential element of the non-moving party's case or by demonstrating that the non-moving party has no reasonable expectation of proving an essential element of its case at trial. See *Flesner* v. *Technical Commc'ns Corp.*, 410 Mass. 805, 809 (1991). Once this burden is satisfied, the party opposing summary judgment must allege specific facts establishing the existence of a genuine issue of material fact in order to escape summary judgment. See *Kourouvacilis* v. *General Motors Corp.*, 410 Mass. 706, 711 (1991). While the court views the evidence in the

[3] Ms. Messier estimated that the metal foot was "[a]bout a half inch" above the pavement. *Id.* at 15.

light most favorable to the non-moving party, it does not weigh the evidence, determine witness credibility, or make its own findings of fact. *Attorney Gen.* v. *Bailey*, 386 Mass. 367, 370–371 (1982).

B. Analysis

A plaintiff asserting a negligence claim bears the burden of proving that: (1) the defendant owed the plaintiff a duty of care; (2) the defendant breached that duty of care; (3) the plaintiff suffered harm; and (4) said harm was caused by the defendant's breach of the duty of care. See *Jupin* v. *Kask*, 447 Mass. 141, 146 (2006). "[A] judge may decide the issue as matter of law when no rational view of the evidence permits a finding of negligence." *Roderick* v. *Brandy Hill Co.*, 36 Mass. App. Ct. 948, 949 (1994), citing *Mullins* v. *Pine Manor College*, 389 Mass. 47, 56 (1983). Here, the defendant is entitled to summary judgement as, based on the record, the plaintiff cannot meet her burden of proof with regard to causation.

In order to prove causation, the plaintiff must show that the defendant's alleged negligent acts were a direct and proximate cause of her injury. See *Davis* v. *Westwood Group*, 420 Mass. 739, 742–743 (1995). The plaintiff need not "eliminate all possibility that the defendant's conduct was not a cause"; instead, the plaintiff must introduce sufficient evidence upon which a reasonable person could "conclude that it is more probable that the event was caused by the defendant than that it was not." *Carey* v. *General Motors Corp.*, 377 Mass. 736, 740 (1979). See also *Alholm* v. *Wareham*, 371 Mass. 621, 627 (1976) (inferences must sound in "probabilities rather than possibilities" and not "from the realm of mere speculation and conjecture"). However, where "[t]he evidence goes no [further] than to show an unexplained fall," summary judgment is appropriate. *Connolly* v. *Boston Elevated Ry. Co.*, 309 Mass. 177, 179 (1941) (plaintiff who "just fell" could not recover where no evidence established cause of fall).

Here, the "plaintiff must identify the hazardous condition that caused [her] to [fall], prove that it was present prior to [her] injury, and demonstrate that the defendant either caused the substance to be there, had actual knowledge of its existence, or had a reasonable opportunity to discovery and remedy it." *Thorell* v. *ADAP, Inc.*, 58 Mass. App. Ct. 334, 337 (2003). The defendant

argues that the plaintiff failed to demonstrate that any defect or dangerous condition at the premises caused her to fall. The court agrees.[4]

"As causation is an essential element of a negligence claim, if such evidence is not forthcoming, the plaintiff will be unable to make out her case." *Goin* v. *Anna Realty Corp.*, 69 Mass. App. Ct. 1110, 2007 WL 1946552 at *1–2 (Rule 1:28) (2007), citing *Glidden* v. *Maglio*, 430 Mass. 694, 696–697 (2000) (where "'assumed' that a nail was sticking up [was] the only explanation for her fall," this "possibility" was "insufficient to show that there was a probability, as opposed to a possibility, that any negligence by the defendant in failing to remedy any problem with the stair treads caused her fall"). Here, the plaintiff—who does not recall her foot catching on the barrier—assumed her fall was due to her tripping over the barrier. "Assumptions are not a substitute for evidence," and a "possible explanation is not a probable one." *Gomez* v. *Stop & Shop Supermkt. Co.*, 670 F.3d 395, 398 (1st Cir. 2012). See also *Hunt* v. *Attleboro Ice Co.*, 343 Mass. 775, 775 (1961) (affirming directed verdict where plaintiff "suddenly fell" and then saw hose nearby on pavement).

The plaintiff, as "the opposing party [to summary judgment,] cannot rest on [her] . . . pleadings and mere assertions of disputed facts to defeat the motion." *LaLonde* v. *Eissner*, 405 Mass. 207, 209 (1989). The court is mindful that "questions of causation, proximate and intervening, present issues for the jury to decide." *Solimene* v. *B. Grauel & Co., K.G.*, 399 Mass. 790, 794 (1987). However, without more than her mere speculation that she tripped on the foot of a metal barrier that the defendant allegedly controlled, she has failed to sustain her burden to defeat the defendant's motion.

[4] Further, the record contains no evidence claiming that the metal foot's failure to lie flush with the pavement constituted a defect or hazardous condition or that Live Nation owned, or even rented, the property. Moreover, the record contains no evidence that Live Nation or its agents installed or controlled the barrier. In her Complaint, the plaintiff alleges that DLC Corporation—who has been dismissed from suit—owns the property and that the defendant rented it. Beyond her allegation, the record contains no evidence on these issues. Discovery is now closed, and the plaintiff did not serve any written discovery requests on the defendant or provide notice for any depositions to gather such crucial facts. With nothing in the record on these essential elements of the plaintiff's claim, she has no reasonable expectation of proving her claim.

ORDER

For the foregoing reasons it is hereby **ORDERED** that the defendant's motion for summary judgment is **ALLOWED**. Accordingly, judgment shall enter in favor of defendant Live Nation World Wide Inc.

Merita A. Hopkins
Justice of the Superior Court

DATED: MAY 10, 2021