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

PRESENT: HON. JUDITH J. GISCHE J.S.C. *Justice* PART ____

Index Number : 106945/2006
KIRK, LEE
VS.
BED, BATH & BEYOND
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. ____
MOTION DATE ____
MOTION SEQ. NO. ____
MOTION CAL. NO. ____

this motion to/for ____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... ____
Answering Affidavits — Exhibits ____
Replying Affidavits ____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
JUL 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/21/08

HON. JUDITH J. GISCHE J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LEE KIRK,

Plaintiff,

-against-

BED, BATH & BEYOND, INC.,

Defendant.

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Decision/Order
Index No. 106945/06
Seq. No. : 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf n/m § 3212 w/ PL affirm, LK affid, exhs	1
Def RGM affirm in opp, exhs	2
Pltf reply affirm (PL)	3

Upon the foregoing papers, the decision and order of the court is as follows:

In plaintiff's sole cause of action, she alleges that the defendant was negligent in the ownership, operation, management, maintenance and control of a retail store located at 620 6th Avenue, New York, New York (the "store"), causing her to sustain injuries when a metal door frame suddenly fell and struck her.

Plaintiff moves for partial summary judgment on liability. Defendant opposes the motion in its entirety.

Issue has been joined and the motion was made within the time provided under the CPLR. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004). The court's decision follows.

Arguments presented

Plaintiff states in her affidavit that she is "an actress, lately active mainly in television commercials." On May 20, 2005, Plaintiff contends that while she was walking in the store, the metal door frame of an open doorway suddenly fell and struck her. Douglas Rydzewski ("Rydzewski"), who at the time of the accident had been defendant's Operations Manager, created a "Customer Incident Investigation Report" which corroborates plaintiff's story. The doorway was located at the bridal registry. At the time of the accident, plaintiff was sixty-nine years old. Plaintiff claims that she did not touch the doorway or the frame when the accident happened, nor did anyone else. Plaintiff does not know the reason why the door frame fell, but plaintiff argues that the doctrine of *res ipsa loquitur* applies to this case. Plaintiff maintains that the door frame would not ordinarily fall on a customer in the absence of negligence. Plaintiff states that the door frame was exclusively in the defendant's control. Finally, plaintiff argues that she did nothing to contribute to the happening of the accident.

Defendant argues that assuming that the accident occurred as plaintiff alleges, the issue of liability is nonetheless a question of fact for a jury to decide. Defendant states that *res ipsa loquitor* "functions to create the inference of negligence from which a jury may, but is not required to, draw a permissible inference of negligence." Defendant claims that it has rebutted the inference of negligence in two ways. First, it neither had actual or constructive notice of the alleged condition, i.e. that the metal frame was loose. At his deposition, Rydzewski testified as follows. The bridal registry was constructed five years before the accident. Rydzewski stated that at all times before the accident, there were no prior incidents where the door frame came off and

defendant never received any complaints from other customers regarding same. Rydzewski also stated that had the door frame been loose, it would have been repaired by an independent contractor, and not by one of defendant's employees.

Defendant also argues that summary judgment is not warranted because it did not have supervision or control over the independent contractor, Metcon Construction Management LLC ("Metcon"), which constructed and installed the bridal registry and the subject molding. Defendant cites Goodwin v. Comcast Corp, 42 AD3d 322, for the theory that a principal is not liable for the acts of an independent contractor.

Discussion

A movant seeking summary judgment in its favor 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 evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 NY2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v. City of New York, 49 NY2d 557 (1980).

To find the theory of *res ipsa loquitur* applicable: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff (Corcoran v. Banner Super Mkt., 19 NY2d 425, 430 [1967]). However, this doctrine does not shift the burden of proof to the defendant because it does not create

a conclusive presumption of negligence. Rather, when *res ipsa loquitur* applies, a *prima facie* case of negligence is made and the jury may, but is not required to, draw an inference of negligence when the defendant adduces no evidence tending to negate the propriety of the inference (Dermatossian v. New York City Transit Authority, 67 NY2d 219 [1986]). Summary judgment may still be awarded on the doctrine of *res ipsa loquitur* where, upon establishing the inference of negligence, there are no facts are left for determination (Morejon v. Rais Const. Co., 7 NY3d 203, 212 [2006]; Dillenberger v. 74 Fifth Ave. Owners Corp., 155 AD2d 327 [1st Dept 1989]).

Here, plaintiff is entitled to summary judgment because she has established a *prima facie* case under the theory of *res ipsa loquitur* and the inference of negligence is inescapable. There is no dispute that the a door frame does not ordinarily fall in the absence of negligence. Defendant does not deny that it had exclusive control over the relevant areas for approximately five years before the accident. This is sufficient to establish a likelihood that the defendant is the negligent party (see Dermatossian v. New York City Transit Auth., *supra*; Corcoran v. Banner Super Market. Inc., 19 NY2d 425 [1967]). Nor is there any evidence that plaintiff contributed to the accident in any way.

Contrary to defendant's assertions, notice is not an issue in a *res ipsa loquitur* case (Mejia v. New York City Transit Authority, 291 AD2d 225 [1st Dept 2002]; Harmon v. U.S. Shoe Corp., 262 AD2d 1010 [4th Dept 1999]; see also Smith v. Moore, 227 AD2d 854 [3d Dept 1996]; Dillenberger, *supra*). In Dittiger v. Isal Realty Corporation, 290 NY 492 (1943), the Court of Appeals concluded that *res ipsa loquitur* was applicable in a case involving a falling ceiling in a vacant apartment, despite the fact

that "[t]here was no testimony from either party as to the cause of the descent of the plaster and no showing of any prior actual or constructive notice to defendant, of any defect" (id. at 494). In the more recent case of Mejia, *supra*, the Appellate Division, First Department, made it clear that a claim based on *res ipsa loquitur* could proceed in the absence of any proof of notice.

Rydzewski's testimony regarding the defendant's procedure by which it would repair a defective door frame is irrelevant, because there is no evidence that the door frame was ever repaired. Moreover, defendant's assertion that the door frame was installed five years prior to the accident by an independent contractor does not take away from the fact that the defendant exercised exclusive control over the door frame for five years (see Lukasinski v. First New Amsterdam Realty, LLC, 3 AD3d 302 [1st Dept 2004]; see also Mejia, *supra*). Exclusivity of control does not mean the possibility of other causes must be altogether eliminated, but only that the possibility of other causes must be so reduced that the greater probability lies at defendant's door (Roman v. Board of Educ. of City of New York, 9 AD3d 305 [2004]). Defendant has not offered any evidence to create any issue of fact on the exclusivity issue.

Defendant speculates that the negligence might be that of the independent contractor who originally installed the door frame five years earlier. However, defendant has not provided any facts from which a jury could conclude the claimed independent contractor was negligent. Nor has it refuted its exclusive control of the door frame since that the time it was originally built.

Accordingly, plaintiff's motion for summary judgment on liability is granted.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment on liability is granted.

The issue of plaintiff's damages is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Clerk in Trial Support so that this case can be scheduled for jury selection.

Any requested relief that has not been addressed herein has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 21, 2007

So Ordered:

Hon. Judith J. Gische, JSC