[* 1]

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

PRESENT: CAROL EDMEAD J.S.C. Justice

PART 35

Scarpa, Agostino

- v -

Port Authority

INDEX NO. 104924/04

MOTION DATE 9/12/08

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3025(b) and 3042(b), granting leave to amend the Bill of Particulars herein to assert the theory of *res ipsa loquitur*, and for an order pursuant to CPLR 3212, granting summary judgment against defendant Port Authority of New York and New Jersey, upon the same theory is granted on the issue of liability; and it is further

ORDERED that plaintiff shall appear in Part 40 for a trial on the issue of damages on December 15, 2008, 9:30 a.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon [illegible] within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
SEP 23 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/19/08

J.S.C.
CAROL EDMEAD

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

AGOSTINO SCARPA,

Plaintiff,

-against-

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant.

PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Third-Party Plaintiff,

-against-

A.G. LICHTENSTEIN ENGINEERING ASSOCIATES, P.C.,

Third-Party Defendant.

A.G. LICHTENSTEIN ENGINEERING ASSOCIATES, P.C.,

Second Third-Party Plaintiff.

-against-

RURAL & URBAN ENGINEERING ASSOCIATES, P.C., AI ENGINEER, INC., P.C.,

Second Third-Party Defendants.

Index No. 104924/04

DECISION/ORDER

Third-Party Index No. 590522/06

Second Third-Party Index No. 590805/06

EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff, Agostino Scarpa ("plaintiff"), moves for an order pursuant to CPLR 3025(b) and 3042(b), granting leave to amend the Bill of Particulars herein to assert the theory of *res ipsa loquitur*, and for an order pursuant to CPLR 3212, granting summary judgment against defendant Port Authority of New York and New Jersey (the "Port Authority"), upon the same theory.

Plaintiff's Contentions

Plaintiff claims that on April 30, 2003, at approximately 11:25 a.m., he was driving two passengers in his car, approaching the George Washington Bridge (the "Bridge"). After just passing the underpass to actually get on the Bridge, he was struck by concrete falling from the underside of a portion of the Bridge, resulting in personal injuries.

Plaintiff seeks to amend his Bill of Particulars to reflect the theory of *res ipsa loquitur*, arguing that it was not until depositions were recently completed that this theory could be stated specifically. Plaintiff argues that it cannot surprise or prejudice the defendant's to learn that he did not contribute to the concrete falling on him. Further, as the instrumentality was in the control of the defendant, there should be no surprise or prejudice in learning that defendant owned and maintained the Bridge. Finally, the peeling away of the concrete under the Bridge is readily understandable as a maintenance and inspection issue due to defendant's negligent failure to do either. Defendant cannot demonstrate prejudice, since defendant knew or should have known that the foregoing arguments would be made at the time of trial.

Further, summary judgment should be granted on this same theory. Plaintiff claims that *res ipsa loquitur* need not be pled if the elements of the claim are satisfied. Thus, even if the Court does not permit plaintiff to amend the Bill of Particulars to include such a claim, plaintiff may nonetheless rely upon such theory in light of the facts of this case. Plaintiff claims that defendant has a nondelegable duty to keep those portions of the Bridge under its exclusive control free from defects that present a hazard to those using the Bridge who would otherwise not be in a position to protect themselves from such hazards. Here, defendant's principal engineer, Robert T. Lee ("Mr. Lee"), inspected the underside of the "178th Street Ramp" on the day of the

accident, and found concrete missing from the underside of the ramp. Mr. Lee also stated that "water damage, age of the structure and freeze and thaw cycles" were contributing factors to the peeling of the concrete that fell and that he made no observations that day of any traumatic event that loosened the concrete. Defendant contends that the damage to the section of the concrete that fell went unnoticed by defendant in its biennial bridge inspections. Plaintiff also notes that the police officer employed by defendant who responded to the scene of the incident indicated on a report that "spalled and delaminated pieces of concrete fell from underside of Hudson Ramp #2, landing on Ramp Lower Expressway East and bouncing and falling down onto claimant's vehicle on Hudson Ramp #7."

Plaintiff maintains that bridges "properly constructed" does not fall without adequate cause. Further, there is no issue that the underside of the Bridge from which the concrete fell was within the exclusive control of the defendant, as it owned, operated and maintained the Bridge. Finally, plaintiff did not contribute in any way to the happening of the incident. Thus, summary judgment should be granted plaintiff on the theory of *res ipsa loquitur.*

Defendant's Opposition

Defendant contends that plaintiff already served a Verified Bill of Particulars, a Supplemental Verified Bill of Particulars, and a Second Supplemental Verified Bill of Particulars.

Further, plaintiff failed to establish the elements of *res ipsa locquitur* as a matter of law. There is no evidence that the fact that the concrete purportedly fell from the Bridge sufficiently establishes that defendant negligently maintained and inspected the Bridge. Further, there is no evidence to support defendant's contention that the damage to the section of the concrete that fell

went unnoticed by defendant in their biennial bridge inspections. Moreover, Mr. Lee testified that "It's hard to determine the exact cause" and that "[i]n general it's *probably* because water damage, age of the structure, freeze and thaw cycles." (Emphasis suppled). Mr. Lee testified that he had never been told what caused the concrete to fall from the underside of the ramp, and has never learned what caused the concrete to fall. Additionally, the police officer who arrived at the scene did not witness the incident and the report was not based on his personal observations. Further, plaintiff himself provided conflicting testimony as to the police response; at one point plaintiff stated that the police came on the scene five minutes later, but also stated that the police were approximately one hundred feet behind him.

Evidence also shows that defendant acted as a reasonable bridge owner, in that it performed biennial inspections of the bridge in 1999 and 2001. As part of the hands-on inspection the structural integrity of the concrete is tested by "sounding," which is a process by which the inspector taps the concrete covering with a hammer listening for potential hollow areas. Upon a suspicion of the possibility of unstable concrete, defendant will have it removed immediately. In any event, even when there are inspections, concrete may fall off without any prior visually detectable defect, as water may corrode the rebar which in turn expends and cracks the concrete, without any negligence attributable to defendant. Given that the concrete could have fallen without any negligence by the defendant, plaintiff is not entitled to summary judgment.

Plaintiff's Reply

Defendant claims no prejudice or surprise as the result of plaintiff's request to amend the Bill of Particulars to reflect a claim of *res ipsa loquitur,* and CPLR 3025(b) states that leave to

amend "shall be freely given." Moreover, should plaintiff's application for summary judgment not be granted at this time, plaintiff requests that it would be available at trial.

Plaintiff argues that defendant concedes two of the three elements of *res ipsa loquitur* in that no arguments are raised as to the incident being caused by an agency or instrumentality within the exclusive control of the defendant or that the incident was due to any voluntary action or contribution on the part of the plaintiff.

Plaintiff also contends that defendant failed to raise an issue of fact as to whether the accident was of a kind that does not occur in the absence of negligence. Due to defendant's admissions and their disposal of all the concrete material, which prevented plaintiff from ever specifically proving the act of negligence, there are no facts left for determination. Plaintiff is therefore limited to circumstantial evidence and *res ipsa loquitur*. Defendant's contention that the incident could have occurred in the absence of negligence is insufficient to defeat this motion.

Plaintiff maintains that defendant's contentions as to how the concrete may have become dislodged are composed of speculation which, devoid of evidentiary facts, are insufficient to defeat summary judgment.

Furthermore, defendant's characterization of the inspection lacks merit. Plaintiff contends that the area decayed over time and that this should and/or could have been noted by defendant. According to Mr. Lee, the inspection is completed visually with sounding only if "we feel that it's necessary." Defendant's claim that by having completed the bare minimum of an inspection every two years it is absolved of its ongoing responsibility to keep the bridge in good repair. As such, the inspection initially relies upon the visual acuity of the inspector, who may

have made an error.

Plaintiff also notes that the area where the concrete fell was not included in the biennial report from 2001. Defendant is aware of this fact, as they discontinued their third-party action against the engineers hired to perform the inspection of the area from which concrete fell. And, plaintiff contends that it is likely that the dangerous condition was overlooked and/or not recorded in the 2001 inspection. However, as defendant disposed of the fallen concrete and made no effort to determine the cause of the collapse, plaintiff cannot test this proposition.

Defendant prevented any discovery as to the cause of the concrete collapse. No attempt was taken by defendant to discover the cause of the concrete fall. And, the memorandum regarding this incident ultimately found 1,800 square feet of spalled concrete on the underside of the subject roadway with deboned and corroded reinforcing bars.

Analysis

It is well settled that leave to amend a pleading, including a bill of particulars, pursuant to CPLR 3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Cherebin v Empress Ambulance Service, Inc.*, 43 A.D.3d 364 [1st Dept. 2007]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st

Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

Furthermore, "[W]hen an amendment to a pleading or bill of particulars is sought at or on the eve of trial, judicial discretion in allowing such amendment should be discreet, circumspect, prudent and cautious" (*Lissak v Cerabona*, 10 A.D.3d 308, 781 N.Y.S.2d 337 [1st Dept 2004] *quoting Kassis v Teachers Ins. & Annuity Assn.*, 258 A.D.2d 271, 685 N.Y.S.2d 44 [1st Dept 1999] *see also Cseh v New York City Transit Authority,* 240 A.D.2d 270, 658 N.Y.S.2d 618 [1st Dept 1997] [where the amendment is sought after a long delay, and a statement of readiness has been filed]; *Symphonic Electronic Corp. v Audio Devices*, 24 A.D.2d 746, 263 N.Y.S.2d 676 [1965] *quoting Price v Brody*, 7 A.D.2d 204, 206, 181 N.Y.S.2d 661 [1959]).

At the outset, the Court notes that defendant failed to allege, and the record fails demonstrate, that the amendment plaintiff seeks at this juncture will result in any prejudice to the defendant. The Court notes that an amendment to one's pleading to conform the proof of *res ipsa* at the close of one's case has been permitted (*see Diovisalvo v Woodlawn Cemetery, Inc.*, 241 AD2d 348, 659, NYS2d 286 [1st Dept 1997]). Thus, "neither plaintiff's failure to specifically plead *res ipsa loquitur* . . . constitutes a bar to the invocation of *res ipsa loquitur* where the facts warrant its application" (*Ianotta v Tishman Speyer Properties, Inc.*, 46 AD3d 297, 852 NYS2d 27 [1st Dept 2007] *quoting Weeden v Armor El. Co.*, 97 AD2d 197, 201-202, 468 NYS2d 898 [2d Dept 1983]; *see also Abbott*, 23 NY2d at 512, 297 NYS2d 713 [a plaintiff generally cannot be precluded from relying on *res ipsa loquitur* once evidence of negligence has been introduced]). Therefore, the Court turns to whether the proposed claim under *res ipsa locquitur* has arguable merit.

In *Morejon v Rais Constr. Co.*, (7 NY3d 203, 818 NYS2d 792 [2006]) the Court of Appeals reiterated the criteria for *res ipsa loquitur*:

> "(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" (*Morejon*, 7 NY3d at 208).

Here, the record indicates, and it is undisputed that the Bridge was within the exclusive control of defendant and that the incident did not occur due to any voluntary action or contribution on the part of the plaintiff. At issue is whether the first element is satisfied, that is whether the incident is of a kind which ordinarily does not occur in the absence of someone's negligence.

With respect to the first element, this Court finds that the concrete of the type herein located under the underpass of the Bridge does not generally fall in the absence of negligence *e.g.*, the improper installation, maintenance or repair of the underpass of the Bridge (*see Mejia v New York City Transit Auth.*, 291 AD2d 225, 737 NYS2d 350 [1st Dept 2002] [where plaintiff was struck in the head when piece of ceiling in train station fell upon his head, "first" element was sufficiently established since "falling plaster from a ceiling has been held to be the sort of incident suitable for the application of the doctrine"]; *see also Torres v Cordice*, 11 Misc 3d 23, 812 NYS2d 731 [stairs and protective hand railings do not generally collapse and fall apart in the absence of negligence, *i.e.*, due to faulty maintenance or repair]; *Brisbon v Mount Sinai Hosp.*, 8 Misc 3d 47 [NY Sup. 2005] [stating that the "first" element of *res ipsa locquitur* was "clearly established"; a protective hand railing plaintiff was holding "gave way" and "came off"]; *Crawford v City of New York*, 53 AD3d 462 [1st Dept 2008] [stating that the "first" prong was

"clearly established" where the City of New York's street pole, of which two inspections by a maintenance company 30 days prior to the accident revealed "nothing unusual" or no "visibly broken parts," fell upon pedestrian's head]; *Pavon v Rudin*, 254 AD2d 143 [1st Dept 1998] [where door fell off the hinge and hit plaintiff's head, stating that first element of *res ipsa locquitur* was clearly established, as "[d]oors mounted on pivot hinges do not generally fall in the absence of negligence]).

Now, the Court turns to whether summary judgment in favor of plaintiff has been established.

Summary judgment on the issue of *res ipsa locquitur* is warranted. As the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714,

717 [1986]; *Zuckerman v City of New York*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 646, 765 NYS2d 326 [1st Dept 2003]).

The *res ipsa loquitur* doctrine permits "a jury to consider the circumstantial evidence and infer that the defendant was negligent in some unspecified way" and that the plaintiff's injury must have been caused by that negligence (*Morejon v Rais Constr. Co.*, 7 NY3d 203 [2006]). The doctrine:

> . . . does not create a *presumption* of negligence against the defendant. Rather, the circumstantial evidence allows but *does not require* the jury to infer that the defendant was negligent . . . [and that it] does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted (*Morejon v Rais Constr. Co.*, 7 NY3d 203 [2006]) (Emphasis Added)

Although only in the rarest of cases, plaintiff may rely exclusively on the doctrine of *res ipsa loquitur* for summary judgment or a directed verdict against defendant (*Morejon v Rais Constr. Co.*, 7 NY3d at 208). Viewed in the light of the notion that *res ipsa loquitur* stands for "nothing more that a brand of circumstantial evidence," a court may approach a motion for summary judgment by "simply evaluating the circumstantial evidence" (*Id.*). "If that evidence presents a question of fact as to the defendant's liability" . . . the case should go to trial. If the circumstantial evidence does not reach that level and present a question of fact, the defendant will prevail on the law. Alternatively, . . . the plaintiff should win summary judgment or a directed verdict in the exceptional case in which no facts are left for determination."

In light of the uncontested fact that the concrete fell from defendant's Bridge onto the plaintiff, who did not contribute in any way to this accident, and the uncontested fact that defendant owned and maintained the Bridge exclusively, plaintiff has established its entitlement to summary judgment on the issue of liability.

Defendant raises no issue that plaintiff was lawfully using the Bridge at the time of the accident and did not contribute to his accident. Defendant's opposition also does not challenge the allegation that they own, operate, and maintain the Bridge.

As to the first element, even accepting defendant's contention that water *may* get into the concrete and corrode the rebar, which expands causing the concrete to crack, and that the concrete may become dislodged without any prior visually detectable defect, such factors do not preclude a finding that "it is more likely than not" that the incident was caused by the negligence of *defendant*. And, nothing presented by defendant indicate that this incident was caused by someone or something else (*see e.g.*, *Lopez v Sears, Roebuck and Co.*, 187 Misc 2d 165, 721 NYS2d 481 [N.Y. Sup. 2001]; *cf. Tora v GVP AG*, 31 AD3d 341, 819 NYS2d 730 [1st Dept 2006 ["unusually strong gusts of wind" caused the shed to lift and injure plaintiff is sufficient to negate, at least for purposes of summary judgment, the first element of res ipsa . . . .]). Assuming every fact alleged by defendant as true for purposes of summary judgment, there is no indication, and defendant point to no external force of nature, other object, be it a person or instrumentality, or of any other kind, that may have caused the concrete to suddenly fall upon the plaintiff.

That the record fails to establish what exactly caused the concrete to fall, that is water damage, age of the structure, or freeze and thaw cycles, does not preclude the application of *res ipsa locquitur* (*Norton v Albany County Airport Auth.*, 52 AD3d 871, 859 NYS2d 296 [3d Dept 2008][Where accident's actual or specific cause is unknown, *res ipsa* permits plaintiff to draw inference of negligence through the accident's occurrence by considering circumstantial evidence of defendant's negligence]).

Conclusion

Therefore, it is hereby

ORDERED that the motion by plaintiff for an order pursuant to CPLR 3025(b) and 3042(b), granting leave to amend the Bill of Particulars herein to assert the theory of *res ipsa loquitur*, and for an order pursuant to CPLR 3212, granting summary judgment against defendant Port Authority of New York and New Jersey, upon the same theory is granted on the issue of liability; and it is further

ORDERED that plaintiff shall appear in Part 40 for a trial on the issue of damages on December 15, 2008, 9:30 a.m.; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: September 19, 2008

Hon. Carol Robinson Edmead, J.S.C.

CAROL EDMEAD
J.S.C.

FILED
SEP 23 2008
COUNTY CLERK'S OFFICE
NEW YORK