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

PRESENT: HON. CAROL EDMEAD PART 31

Justice

Index Number : 100429/2003

JOHNSON, LINDA C.

VS.

PAT REILLY

SEQUENCE NUMBER : 002

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**

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion of defendants Pat Reilly, Inc., the Molly Wee Pub, John Doe, a Fictitious Name of the Unidentified Owner of The Molly Wee Pub, Individually, and ABC, Inc., a Fictitious Name of an Unidentified Business Entity that may have been Performing Construction, Renovation, Maintenance, and/or Repair work at the Premises located at 402 Eighth Avenue, New York, New York for summary judgment, pursuant to CPLR §3212, dismissing the complaint of plaintiff Linda C. Johnson is granted with regard to plaintiff's theories of negligence based on actual and constructive notice; and it is further

ORDERED that the case shall proceed on a theory of *res ipsa loquitur* only; and it is further

ORDERED that defendants 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: 7/6/09

HON. CAROL EDMEAD 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

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

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LINDA C. JOHNSON,

Plaintiff,

-against-

PAT REILLY, INC., THE MOLLY WEE PUB, JOHN DOE, a Fictitious Name of the Unidentified Owner of The Molly Wee Pub, Individually, and ABC, INC., a Fictitious Name of an Unidentified Business Entity that may have been Performing Construction, Renovation, Maintenance, and/or Repair work at the Premises located at 402 Eighth Avenue, New York, New York,

Defendants.

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Index No. 100429/03

**DECISION/ORDER**



HON. CAROL ROBINSON EDMEAD, J.S.C.

**MEMORANDUM DECISION**

In this action, plaintiff Linda C. Johnson ("plaintiff") seeks to recover damages against defendants Pat Reilly, Inc., the Molly Wee Pub, John Doe, a Fictitious Name of the Unidentified Owner of The Molly Wee Pub, Individually, and ABC, Inc., a Fictitious Name of an Unidentified Business Entity that may have been Performing Construction, Renovation, Maintenance, and/or Repair work at the Premises located at 402 Eighth Avenue, New York, New York (collectively "defendants") for injuries she allegedly suffered from a slip and fall accident on the sidewalk in front of defendant's premises.

Defendants now move pursuant to CPLR §3212 for summary judgment dismissing plaintiff's Complaint.

*Background*[1]

Plaintiff alleges that on January 18, 2000, she was caused to fall on the sidewalk in front of and/or adjacent to defendant The Molly Wee Pub at 402 Eighth Avenue, New York, New York (the "premises") as a result of the sidewalk's wet, slippery, icy and slick condition. Plaintiff testified that as she was about a step away from the premises, a pipe above the door burst and poured water onto the sidewalk. According to plaintiff's deposition testimony, as soon as the water made contact with the ground, it froze, and she fell.

Patrick Reilly, an officer of The Molly Wee Pub ("Mr. Reilly"), testified that he was not present at the premises at the time of the incident. However, after being told that a pipe had burst, he arrived at the premises within 20 minutes. Mr. Reilly clarified that the said pipe was actually a sprinkler head located in the vestibule between the doors leading to the restaurant. Upon arriving at the premises, he saw a woman sitting on the ground. Mr. Reilly further testified that the pipe had never burst before the incident on January 18, 2000.

*Defendants' Motion*

Defendants argue that plaintiff failed to set forth any admissible evidence that establishes defendants' negligence. Specifically, plaintiff fails to allege that defendants had any notice, actual or constructive, of any defect at the premises. There is no evidence that defendants either created said condition or had actual notice of the same. In fact, plaintiff admitted that the water just started pouring out prior to her arriving in the area. Moreover, Mr. Reilly confirmed that he was unaware of any prior occurrences.

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[1]Information is taken from defendants' motion ("motion"), plaintiff's Verified Bill of Particulars ("plaintiff's BOP"), the August 30, 2007 deposition of plaintiff (the "Johnson EBT") and the August 30, 2007 deposition of defendant Pat Reilly (the "Reilly EBT").

Regarding constructive notice, absent further evidence, any conclusion that the condition existed more than mere moments before the accident, would be pure speculation, defendants argue. Here, as described by plaintiff, the defective condition, *i.e.* a busted pipe spraying water, arose mere seconds prior to her alleged fall. Moreover, Mr. Reilly testified that he was unaware of any prior occurrences. As the pipe bursting was a sudden unexpected act of which there was no prior notice, defendants have no liability to plaintiff, defendant argue.

Defendants further argue that they did not create the condition. To be legally responsible for creating a condition, there must be evidence that the defendant caused the condition to be created by its own affirmative act, defendants contend. There is no evidence of any affirmative action taken by defendants to create a defective condition. Here, simply the pipe burst.

*Plaintiff's Opposition*

First, plaintiff argues that defendants violated New York City Administrative Code §27-901(w) by placing a sprinkler in the vestibule ceiling in extremely close proximity to the front door when the temperature was below freezing. Further, the pipe was not protected by insulation or heat, in violation of city plumbing codes. John Clancy, host of the Molly Wee Pub ("Mr. Clancy"), confirmed that the sprinkler head was extremely close to the front door on the day of the accident (see "Clancy EBT," p. 19). In addition, Mr. Reilly testified that the temperature was below freezing that day (Reilly EBT, p. 23). The testimony of Mr. Reilly and Mr. Clancy make it clear that section 27-901(w) was violated.

Second, plaintiff argues that under the Multiple Dwelling Law §78, every multiple dwelling and part thereof in the city of New York must be kept in good repair, and the owner is responsible for compliance with such statute, notwithstanding that it has leased the entire

building. Further, the landlord has the duty to keep in good repair every part of a multiple dwelling, where the store is in fact a part of the dwelling. However, where the store, although part of a multiple dwelling, is a separate, self-contained unit with its own roof, water damage to the ceiling of the store over which there are no apartments is not related to maintenance of the building as a tenantable habitation for the health and safety of other tenants of the building, and the landlord is under no duty to repair damage to the store's ceiling, plaintiff argues. Plaintiff argues that as a reasonable landlord knowing that the temperature was cold and it had snowed, Mr. Reilly had a duty to keep the sidewalk free of an icy, wet, slippery and hazardous condition. In short, defendants had a duty to maintain the sidewalks in front of and adjacent to the premises for ingress and egress by pedestrians. Further, a reasonable landlord would have blocked or coned off the area after learning of the wet, slippery and icy condition. Defendants breached their duty of care as reasonable owners and tenants by failing to maintain the sidewalks for egress and ingress. Also, defendants breached their duty of care under Multiple Dwelling Law §78 by not maintaining, insulating and keeping the sprinkler head from leaking. Defendants breached their duty as a reasonable owner and tenant to maintain the sidewalks in front of and adjacent to the premises, and this breach proximately caused plaintiff's injuries.

Third, plaintiff argues that defendants are guilty of negligence under the doctrine of *res ipsa loquitur*. The busted leaking water sprinkler was in the exclusive control of the defendants. Plaintiff's injuries are such that do not happen if one uses proper care. Hence, defendants created an unreasonable risk of harm that resulted in severe and permanent injury, and as such defendants' motion should be denied, plaintiff argues.

*Defendants' Reply*

Defendants argue that plaintiff concedes that there was no notice on the part of the defendants, as this was an unexpected and instantaneous bursting of the sprinkler head. Plaintiff admits that she did not see the water spraying out of the premises until she was a step away. Further, she testified that the water on the sidewalk immediately turned to ice. Clearly, based on plaintiff's testimony, there was no time for defendants to warn or barricade the area, as the water instantaneously turned to ice as it hit the sidewalk. There are no questions of fact because there is no evidence that defendants had actual or constructive notice of any defect. Accordingly, plaintiff cannot sustain her burden on this negligence claim.

Defendants also argue that the codes to which plaintiff refers do not apply to the premises because the building was built prior to 1940 and renovated prior to 1968 (see the "Certificate of Occupancy"). Said Certificate is dated August 19, 1965 and confirms that the sprinkler system was approved by the fire department on August 9, 1939. Since Administrative Code §27-901(w) and the NYC Plumbing codes were established subsequent to 1968, they are inapplicable to the premises, defendants contend.

Even if the codes were established prior to 1968, they are still not applicable, because they apply to plumbing and gas piping, defendants argue. Here, a sprinkler head broke, not piping (Reilly EBT, p. 15). The same was located in the vestibule area between the two doors going into the restaurant. Further, even if the piping connected to the sprinkler head broke, the code in question applies only to gas and plumbing pipes, not sprinkler pipes. Finally, the alleged code violations were never set forth in plaintiff's Bill of Particulars or Supplemental Bill of Particulars, defendants contend.

With regard to whether a particular statute or code applies, the same is always a question of law for the court to resolve, defendants contend. Here, plaintiff has not set forth any expert opinion or testimony that alleges the sections of the Administrative or Plumbing codes are applicable.

Plaintiff's only opposition is that defendants violated Multiple Dwelling Law §78. However, said section only sets forth a general standard of care and is not in itself negligence. Regardless, plaintiff has failed to set forth any allegation or evidence that the defendants' premises were in disrepair.

Additionally, plaintiff's own testimony confirms that there was no time for defendant to block or cone off the area after learning of the icy condition, as plaintiff fell immediately after the sprinkler head broke. Premises liability is by no means predicated solely on ownership. Liability for a dangerous condition on or within a property is instead predicated upon occupancy, ownership, control or special use of the premises at issue. Further, no liability can be found absent proof that defendant created or had actual or constructive notice of the dangerous condition.

Finally, defendants argue that *res ipsa loquitur* is inapplicable to the case at bar. Such an allegation was not set forth in plaintiff's Bill of Particulars. Further, plaintiff failed to demonstrate, among other things, that the event does not typically occur absent negligence. An exploding sprinkler head or pipe is not negligence *per se*. And, since the sprinkler head was exposed and open to the public (*i.e.* in the vestibule area between the doors), plaintiff failed to demonstrate that defendants had exclusive control over the sprinkler head.

*Analysis*

*Summary Judgment*

To obtain summary judgment, the movant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR §3212 [b]). 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 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR §3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, 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* at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347 [1st Dept 1998]).

Under New York law, a landowner must exercise reasonable care to maintain its premises in a safe condition in view of the circumstances, accounting for the possibility of injury to others, the seriousness of such injury, and the burden of avoiding such risk (see *Basso v Miller*, 40 NY2d 233, 241 [1976]). In order for plaintiff to make out a *prima facie* case of negligence in cases involving dangerous conditions present on property, a plaintiff must "demonstrate either that the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it" (*Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006], *citing Leo v Mt. St. Michael Academy*, 272 AD2d 145, 146 [1st Dept 2000]). "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 defendant's employees to discover and remedy it" (*Mitchell v City of New York* at 374, *citing Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Here, defendants have established as a matter of law that they neither created the dangerous, icy and slippery condition that caused the accident, nor did they have actual or constructive notice of said condition. First, the record establishes that defendants had no actual notice of any dangerous condition at the premises prior to the accident. Plaintiff testified that the bursting of the water pipe was sudden and immediate. "As soon as I walked, the water pipes bursted," she said (Johnson EBT, p. 18, lines 8-9). Plaintiff further testified: "As soon as I walked, [the water coming out of the pipe] froze" (Johnson EBT, p. 19, lines 17-20). Later during the deposition, plaintiff was given an opportunity to clarify her answer:

> Q. You're saying the water came out of the pipe within a step in front of you and froze as soon as it made contact with the ground?
> A. That's right.
> (*Id.*, p. 23, lines 22-25; p. 24, line 2)

Plaintiff did not witness any water coming out of the pipe before she approached the premises; instead the water came out of the pipe "within a step in front of" her (Johnson EBT, p. 22, lines 20-21). Mr. Reilly testified that he arrived at the premises 20 minutes after being told that the pipe had burst (Reilly EBT, p. 24, lines 3-5). He further testified that at no time prior to January 18, 2000 had the pipe burst (Reilly EBT, p. 22, lines 8-13).

Second, the record contains sufficient evidence that defendants had no constructive notice of a dangerous condition at the premises prior to the accident. According to plaintiff's testimony, the icy condition did not exist for a sufficient length of time prior to the accident to permit defendants' employees to discover and remedy it *(Mitchell v City of New York* at 374). After being asked how much time elapsed from the time she saw the water until the time she fell, plaintiff testified, "I just walked, the water came and I fell,"(Johnson EBT, p. 26, lines 23-24). Plaintiff could not even estimate the number of seconds that elapsed between her awareness of

the defective condition and her fall (*id*).

Finally, the record does not establish that defendants created the hazardous condition. In her opposition, plaintiff alleges that defendants violated New York City Administrative Code §27-901(W), New York City Plumbing Code §305.6 and Multiple Dwelling Law §78. However, plaintiff fails to provide any admissible evidence, such as an expert's affidavit, that such codes and statute apply herein, or that defendants violated the same. As explained by *Reed v Piran Realty Corp.*, 30 AD3d 319, 320 [1st Dept 2006], *lv to appeal denied* 8 NY3d 801 [2007]), speculative and conclusory allegations are insufficient to raise an issue of fact to defeat a summary judgment motion.

> While plaintiff's evidence need not positively exclude every possible cause of his fall other than the alleged staircase defects, it must be sufficient to permit a finding of proximate cause based on logical inferences, not speculation (Schneider v. Kings Highway Hosp. Ctr., 67 N.Y.2d 743, 744, 500 N.Y.S.2d 95, 490 N.E.2d 1221 [1986] ). No reasonable inferences as to causation can be drawn from plaintiff's expert's opinion that the staircase violated several provisions of the New York City Administrative Code, creating an unsafe condition, in the absence of any evidence connecting the alleged violations to plaintiff's fall.
> (*Id* at 320).

In opposition, plaintiff failed to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Zuckerman v City of New York*). Accordingly, plaintiff failed to demonstrate that material triable issues of fact exist as to defendants' negligence.

*Res Ipsa Loquitur*

It is well settled that "[i]n order to submit a case to a trier of fact on the theory of *res ipsa loquitur*, a plaintiff must establish the event to be (1) of a kind that ordinarily does not occur in the absence of someone's negligence, (2) caused by an agency or instrumentality within the

exclusive control of the defendant, and (3) not due to any voluntary action or contribution on the part of the plaintiff" (*Crawford v City of New York*, 53 AD3d 462, 464 [1st Dept 2008], *citing Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430 [1967]). Further, as a rule of evidence, *res ipsa loquitur* only "creates a permissible inference of negligence, not a rebuttable presumption" (*Shinshine Corp. v Kinney System, Inc.*, 173 AD2d 293, 294 [1st Dept 1991], *citing George Foltis, Inc. v City of New York*, 287 NY 108 [1st Dept 1941]). Finally, the rule can be applied "even when more than one defendant is in a position to exercise exclusive control" (*DiPilato v H. Park Cent. Hotel, L.L.C.*, 17 AD3d 191 [1st Dept 2005]).

Here, the record contains sufficient evidence that would give rise to a permissible inference of negligence on part of defendants under *res ipsa loquitur*. First, it is clear from the record that plaintiff did nothing to cause the pipe to burst, thus satisfying the third prong of the test.

Second, while defendants claim that they did not have exclusive control over the sprinkler head because "it was exposed and open to the public" and "the public had access to the same" (reply, ¶ 14), defendants fail to offer any proof that any third parties had access to the sprinkler head or pipe at the premises, or that the sprinkler head or pipe was not in their exclusive control (*Hisen v 754 Fifth Ave. Assocs., L.P.*, 23 Misc 3d 1114, 2009 NY Slip Op 50773 [U] [Sup Ct New York County 2009] [use of the instrumentality by persons other than defendants' employees, or the instrumentality's location on a public street, did not preclude a determination that exclusive control was present for res ipsa loquitur purposes]). "'Exclusivity, as it applies to res ipsa loquitur, is a relative term. It does not require the elimination of all other possible causes of the incident,' or that a defendant had 'sole physical access to the instrumentality causing the

injury,' but 'simply a rational basis for concluding that it is more likely than not that the injury was caused by [the] defendant's negligence'" (*Hisen, citing Crawford* at 464). "'Nor does the doctrine require sole physical access to the instrumentality causing the injury, which can be applied in situations where more than one defendant can exercise exclusive control'" (*Crawford* at 464-465, *quoting Banca Di Roma v Mutual of America Life Ins. Co., Inc.*, 17 AD3d 119, 121 [1st Dept 2005]). "Control of the internal workings of an object satisfies the 'exclusive control' element" (*id, citing Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297 [1st Dept 2007]; *cf. Reyes v Active Fire Sprinkler Corp.*, 267 AD2d 70 [1st Dept 1999] [finding no exclusive control over the pipe in question where fire sprinkler installation company had been working on pipe]). Proof that third parties had access to an object "generally destroys the premise, and the owner's negligence cannot be inferred . . . unless there is sufficient evidence that the third parties probably did nothing to cause the injury" (*De Witt Props., Inc. v City of New York*, 44 NY2d 417, 426 [1978]). Here, defendants' mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to support their claim that they did not have exclusive control over the instrumentality that allegedly caused plaintiff's injury.

Finally, according to First Department caselaw, the bursting of a water pipe is considered a type of event that ordinarily does not occur in the absence of someone's negligence. In a case in which a steam pipe burst in the storage area of a defendant's building, the First Department held that the evidence was "sufficient to establish liability under the doctrine of res ipsa loquitur" (*Swain v 383 West Broadway Corp.*, 216 AD2d 38 [1st Dept 1995], *citing Dillenberger v 74 Fifth Ave. Owners Corp.*, 547 NYS2d 296, 297 [1st Dept 1989] and *Payless Discount Centers, Inc. v 25-29 North Broadway Corp.*, 83 AD2d 960 [2d Dept 1981]). In *Dillenberger*, a case in

which a plaintiff lessee sought recovery for damage after water pipes in adjacent common area burst, the First Department held that the summary judgment under *res ipsa loquitur* was proper on the ground that the "proprietary lease requires defendant to maintain, operate and repair the plumbing, heating and sprinkler systems and to maintain the common areas in good repair" (*Dillenberger* at 297). Similarly, in holding that *res ipsa loquitur* should have been applied in the case where a sprinkler system collapsed causing a flood, the Court in *Payless* held: "Sprinkler pipes do not ordinarily break if they are properly installed and maintained . . . . The sole responsibility for the installation and maintenance of the sprinkler system rested with the defendant and the mere fact that part of the system was within Payless' store does not preclude the inference that the break probably was caused by the defendant's neglect" (*Payless* at 961, *citing De Witt Props., Inc.* at 427).

In *Shinshine Corp. v Kinney System, Inc.*, the Court held that "both collapsed ceilings (*see, Dittiger v Isal Realty Corp.*, 290 NY 492) and water main breaks (*see, De Witt Props. v City of New York*, 44 NY2d 417, 426; *Rindler & Weiler v Blockton Realty Corp.*, 205 Misc 355) have been held to be the sort of events suitable for res ipsa loquitur treatment" (*Shinshine Corp.* at 294). As explained in *De Witt Props., Inc.*:

> When the exact cause of the injury is unknown the doctrine of res ipsa loquitur permits the jury to infer negligence if the injury is the type which does not ordinarily occur without the neglect of some duty owed to the plaintiff and the defendant is in exclusive possession and control of the instrumentality . . . . . The doctrine has been applied to water main breaks (*George Foltis, Inc. v. City of New York, supra* ; Res Ipsa Loquitur Water Damage, Ann., 11 A.L.R.2d 1179) and this type of event has frequently been cited as a typical example of a case where the doctrine is commonly applicable (see, e.g., 2 Harper and James, Torts, p. 1082; Prosser, Torts ([2d Dept ed.), s 42, p. 202; Restatement, Torts [2d Dept, s 328D, illustration 6). *The theory is that water mains do not ordinarily break if they are properly installed and maintained, and that any break in the main was probably caused by the owner's neglect of its duty, since the owner is generally in exclusive possession and control (George Foltis, Inc. v. City of New York,*