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

PRESENT: DEBRA A. JAMES Justice — PART 59

LIZDEN INDUSTRIES, INC.,

Plaintiff,

- v -

FRANCO BELLI PLUMBING AND HEATING AND SONS, INC., OKANAGA U.S.A. CO., LTD., and KAZUHIDE YAMAZAKI,

Defendants.

Index No.: 601420/06

Motion Date: 06/02/09

Motion Seq. No.: 01

Motion Cal. No.: 66

The following papers, numbered 1 to 6 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1 - 3
Answering Affidavits - Exhibits	4, 5
Replying Affidavits - Exhibits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

The court shall deny plaintiff's motion for summary judgment.

Plaintiff asserts that the doctrine of res ispa loquitor should apply to its claim thus allowing it the benefit of an inference that the defendants were negligent. It is true that court's have applied the doctrine to property damage caused by broken pipes. See George Foltis, Inc. v City of New York, 287 NY 108, 118 (1941) ("under the rule of res ipsa loquitur the plaintiff's proof that its property was damaged by a break in a

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

water main constructed and controlled by the city was sufficient to establish prima facie that the injury was due to negligence of the city"); Dillenberger v 74 Fifth Ave. Owners Corp., 155 AD2d 327 (1st Dept 1989) ("when water pipes in an adjacent common area burst . . . [t]he court properly granted summary judgment based on the doctrine of res ipsa loquitur which gave rise to a permissible inference of negligence which was not rebutted by evidentiary proof in admissible form").

In order to be claim the benefit of the res ipsa inference, "a plaintiff's proof [must] establish[] the following three conditions . . . First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff". Kambat v St. Francis Hosp., 89 NY2d 489, 494 (1997). In this case, plaintiff is unable to establish that the pipe and valves in question were under the exclusive control of the defendants.

Plaintiff's reliance upon Payon v Rudin, (254 AD2d 143, 146 [1st Dept 1998]) "applying res ipsa loquitur to accidents involving items exposed to significant public traffic, where the specific mechanism that malfunctioned was not handled by the general public" is misplaced based upon the facts presented here.

In Pavon, the Court found that a broken hinge caused plaintiff's injury and that the exclusive control of the tenant was established by the fact that the hinge was unreachable by the public. Id. In this case much like Reyes v Active Fire Sprinkler Corp., (267 AD2d 70 [1999]) "the record establishes that [the contractor] had been working on the pipe installation for several months, covering the period preceding and following the accident. Under these circumstances, [the owner] could not have had exclusive control over the pipe in question."

More importantly, there is no evidence in the record that the pipes, valves or other equipment at issue here were defective or malfunctioned unlike the cases relied upon by plaintiff. Thus the doctrine is unavailable. See Braun v Consolidated Edison Co. of New York, 31 AD2d 165, 170 (1st Dept 1968) (no showing that the cause of the accident was some act of the defendant).

In this case, the defendant Belli testified that the plumbing was in working order at the time its worker finished the day's repairs and opined that the likely cause of the water damage was an open valve. It is undisputed that defendant Belli was not at the building at the time of the water overflow. Similarly, neither of the other defendants were present at the time of the incident and there is no evidence that any piece of equipment or piping malfunctioned. Therefore, the evidence on

this motion is insufficient to support a prima facie application of res ispa in plaintiff's favor.

Similar reasoning applies to the separate motion of defendant Okanaga (Motion Seq. No. 2) for summary judgment. Even though Okanaga merely contracted for the work, it had control over areas of the building wherein the heat plumbing ran. The owner fails to meet its burden to establish that it is free of negligence as it has not been shown that the occurrence was not the result of faulty maintenance rather than the work of its contractor. Therefore, Okanaga's motion for summary judgment dismissing the claims against it and for indemnification shall be denied.

However, the court shall grant the motion for summary judgment dismissing the claims against individual defendant Kazuhide Yamazaki as he was not present at the time of the accident and has not been shown to have directed the work in his personal capacity.

Accordingly, it is

ORDERED that the motion is DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference in Part Mediation-2 on December 10, 2009 at 10:30 A.M. and if the case is not settled thereat, the parties are to attend a pre-trial conference in IAS

Part 59, Room 1254, 111 Centre Street, New York, NY 10013, on January 12, 2010 at 2:30 P.M. to set a trial date.

This is the decision and order of the court.

Dated: NOV 0 4 2009 ENTER:

J.S.C.

DEBRA A. JAMES