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

PRESENT: JANE S. SOLOMON PART 55

Index Number : 109088/2008

ALLA, TAIP

VS

KOREA INTERNATIONAL

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 12/14/09

MOTION SEQ. NO. _____

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 ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-8, 9

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided by the annexed memorandum decision and order.

NB 5/24/10 Pre Trial Conf.

FILED
APR 16 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/14/10

JANE S. SOLOMON J.S.C.

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

Check one: FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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TAIP ALLA,

Plaintiff,

-against-

Index No.: 109088/2008
DECISION and ORDER

KOREA INTERNATIONAL TRADE ASSOCIATION, INC., JONES LANG LASALLE OPERATIONS, INC., and HAHN KOOK CENTER (U.S.A.), INC.,

Defendants.

----------x

JANE S. SOLOMON, J.:

Plaintiff sues Defendants for damages for injuries suffered when the metal grill covering of an air conditioner fell from the front of the unit on to his head. Plaintiff moves for summary judgment as to liability on the ground of res ipsa loquitor. Defendants cross move for summary judgment on the ground that Plaintiff has not established that they breached a duty of care. The motions are decided as follows.

FACTS

Plaintiff, Taip Alla (Alla) was a janitor employed by non-party Pulitura Janitorial Services Corp. (Pulitura). He worked at 460 Park Avenue, in Manhattan, a building owned by Defendant Hahn Kook Center (U.S.A.) Inc. (Hahn), and managed by Defendant Jones Lang Lasalle Operations, Inc. (Jones).[1] On June

[1] While defendant Korea International Trade Association, Inc. joins Hahn and Jones in answering the motion and in filing the cross motion, its involvement in the present matter is unclear.

10, 2009, during his lunch break, Alla sat at a table in the janitors' locker/break room in the basement. While eating, a ten pound metal air conditioning grate detached from the wall mounted A/C unit, fell at least seven feet, and struck Alla on the head. This lawsuit, premised on res ipsa loquitor, followed.

DISCUSSION

The doctrine of res ipsa loquitor, a form of circumstantial evidence, creates a permissible inference of negligence that may be accepted or rejected by the fact finder (*Dermatossian v. New York City Transit Authority*, 67 NY2d 219, 226 [1986]). It allows the factfinder to infer negligence from the mere happening of an event where the plaintiff presents evidence (1) that the occurrence would not ordinarily occur in the absence of negligence, (2) that the injury was caused by an agent or instrumentality within the exclusive control of defendant, and (3) that no act or negligence on the plaintiff's part contributed to the happening of the event (see, *Morejon v. Rais Construction Co.*, 7 NY3d 203, 209 [2006]).

A. Defendants' Cross Motion

Defendants argue that summary judgment should be granted in their favor because they had no actual or constructive knowledge of any defective condition that caused the air conditioner grill to fall off. This argument is unavailing, as a claim premised on res ipsa can arise, even where there is no

showing of any prior actual or constructive notice to defendant of any defect (see, *Mejia v. New York City Transit Authority*, 291 AD2d 225, 226 [1st Dept, 2002], citing *Dittiger v. Isal Realty Corporation*, 290 NY 492 [1943]).

Defendants next argue that Alla has failed to establish res ipsa because he has failed to show that the locker/break room was under Defendants exclusive control. Defendants claim that the room was regularly utilized by at least eleven Pulitura employees (Defendants Affirmation in Opposition, ¶ 37), and, therefore, was not within their exclusive control.

It appears that Defendants ask the court to deny the res ipsa claim because there is a possibility that the janitorial staff, who are not alleged to have any maintenance responsibilities beyond that of cleaning the premises, had the opportunity to tamper with the air conditioning grill, high above their heads, thus removing it from Defendants' exclusive control. This argument also is unavailing because the exclusive control element of res ipsa "is not an absolutely rigid concept, but is subordinate to its general purpose, that of indicating that it was *probably* the defendant's negligence which caused the accident in question . . . . It is not necessary for plaintiff to rule out all other possible causes, only to show that they are less likely " (*Pavon v. Rudin*, 254 AD2d 143, 145 [1st Dept, 1998] [emphasis in original, internal quotation marks omitted]).

Defendants have not supplied any evidence that a Pulitura employee tampered with the air conditioning grill. Moreover, Joseph Considine, the property manager of the Building, testified in his EBT that in the fourteen years that he has worked there, no one had ever removed or done any maintenance work on the air conditioning grills (Considine Affidavit, attached to Motion, Ex. B), p.25). Therefore, it appears less likely that the hypothesized tampering/jostling of the air conditioner by a Pulitura employee caused the grate to fall, rather than the lack of maintenance (see, eg., *Nesbit v. NYCTA*, 170 AD2d 92 [1st Dept, 1991] [upholding res ipsa claim because lack of proper maintenance (rust) was more likely to cause chain to break off speeding train, rather than the act of a hypothetical train-riding vandal]). Accordingly, Defendants' cross motion for summary judgment is denied.

B. Plaintiff's Motion

A plaintiff should win summary judgment on a res ipsa claim only in the rarest of cases where "the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable" (*Morejon*, supra, 7 NY3d at 212 [2006]; see also *Tora v. GVP AG*, 31 AD3d 341 [1st dept, 2006][noting that eyewitness evidence of strong winds defeated summary judgment on res ipsa claim of falling sheet metal from a sidewalk shed]).

Defendants contend that over $800,000 was spent on building maintenance in 2007, and therefore an issue of fact exists regarding breach of the duty to maintain the premises. This allegation is insufficient to raise an issue of fact. In his EBT, Considine stated that in the fourteen years he worked at the Building no one had done any maintenance work on the grill. The allegation that Defendants spent money on general maintenance does not create an issue of fact regarding Defendants' alleged negligence in maintaining the grill.

Defendants also argue that they did not have exclusive control of the grill because there is no proof that they were required to maintain them. In support of this argument, Defendants rely solely on *Crawford v. City of New York,* 53 AD3d 462 [1st Dept, 2008]). In *Crawford,* a light pole on a city street corner fell and struck the plaintiff. The plaintiff sued the City of New York and Petrocelli, a company hired by the City to maintain city light poles. Petrocelli was under a duty to repair and maintain only those light poles that the City noted needed repairing, and the light pole that fell on Plaintiff had not been so noted. Based on this, the court held that Petrocelli had no duty to repair the light pole and was not negligent so that res ipsa did not apply. Crawford is inapposite to the case at bar. Here, Defendants--the building owner and the management company--have a duty to maintain the entirety of the building,

including the wall-mounted air conditioners and res ipsa applies to Alla's claim.

Accordingly, it hereby is

ORDERED that plaintiff's motion for partial summary judgment as to liability is granted; and it further is

ORDERED that Defendants' cross motion for summary judgment is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference on damages in Part 55, 60 Centre Street, Room 432, New York, NY, on May 24, 2010 at 2 PM.

Dated: April 14, 2010

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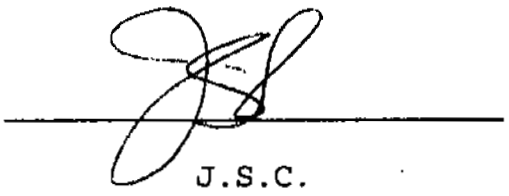

J.S.C.

JANE S. SOLOMON