SUPREME COURT OF THE STATE OF NEW YORK **Index No. 101500/09**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 2**

AMY CLEGG

Plaintiff

against

YONG SUP KIM d/b/a GREENRIDGE LAUNDROMAT

Defendant

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for Summary Judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant's motion for summary judgment against the plaintiff is denied.

Facts

This action is based upon alleged negligence by the defendant, Yong Sup Kim (Mr. Kim). The plaintiff, Amy Clegg (Ms. Clegg), states a reliance upon a permissible inference of *res ipsa loquitur* to assert negligence. The defendant, Mr. Kim, does business as the Greenridge Laundromat and is the sole proprietor. The plaintiff was utilizing the Greenridge Laundromat on May 11, 2008 during the morning hours. At about 7:30 AM on that date, a sheet metal plate door that covers the lint screen of a dryer, fell upon the plaintiff's right foot causing immediate pain. The metal plate measures at least two feet square, but the actual size and weight are uncertain. Foot pain was an immediate result of the event. The distance from the dryer to the edge of a folding table proximate to which the plaintiff stood is about three feet.

At some point in time, because of pain in the right foot, Ms. Clegg visited a family practitioner, Dr. Aiden. Subsequently, the plaintiff saw an orthopedic surgeon, Dr. Suarez, for

this problem. X-rays were taken, a bone scan was performed, and an MRI of the foot was done. Ms. Clegg stated that no specific etiology for her foot pain was related to her by any doctor. Ms. Clegg found it necessary to temporarily take pain relievers for some time following her injury and she wore an elastic wrap on the foot. She went for physical therapy that was not prescribed by her physician. Ms. Clegg is obliged to wear shoes that cushions her foot. She states that she does not rely upon the injured foot while walking.

Immediately after her injury, Ms. Clegg failed to note any existing overt damage to the lint filter door or to the dryer at the time of injury. Mr. Kim asserts that the lint filter door can ordinarily only be opened with a key. Only Mr. Kim or his employees have access to the key. Mr. Kim noted that a clip or hook that is a latch attached to the lint filter door, and that is part of the locking mechanism of the lint filter door, was broken or missing upon his immediate inspection of the dryer and the lint filter after the plaintiff was injured. This latch engages the lock to secure the sheet metal plate lint filter door. Mr. Kim thereupon immediately closed the door to the lint filter. Mr. Kim and his employees have sole access to the key to the lint filter door. Mr Kim states he usually cleans the filter, but his employees may also clean the filter at times. Mr. Kim may make a daily, cursory visual inspection of the laundromat premises and exterior of his appliances, but did not do so on the date of plaintiff's injury. No lint filter door failed before this event. Mr. Kim speculated the latch may have broken because of rust.

Procedural History

Summons and complaint were filed on May 21, 2009 and issue was joined with service of an answer on July 29, 2009. A bill of particulars was served by the plaintiff on November 10, 2009. A motion for summary judgment was filed by the defendant on October 1, 2010.

Discussion

This is an action founded upon alleged negligence in maintaining a commercial dryer located in the Greenridge Laundromat which is a sole proprietorship of Mr. Kim. A motion was made for summary judgment to be awarded to the defendant. Under CPLR § 3212, a motion for

summary judgment requires that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party."[1] Notwithstanding facts presented by any party, "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact."[2] When the Appellate Division, Second Department evaluates for summary judgment, all evidence must be examined in the light most favorable to the non-moving party;[3] and the non-movant must be given the benefit of every favorable inference.[4] Thus, the defendant movant of a motion for summary judgment bears the burden of moving forward. Only then does the plaintiff opponent have a burden of presenting evidentiary proof in admissible form.

It is not always necessary for an opposing party to present facts to defeat a motion for summary judgment. When it appears "from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."[5] The Appellate Division, Second Department requires that when there are "...essential facts believed to exist peculiarly within the defendant's knowledge..." summary judgment may not be granted.[6] It is rare that *res ipsa loquitur* may be properly invoked by a motion for summary judgment.

The movant defendant states that the plaintiff failed to assert a *prima facie* case supported by

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[1]New York Civil Practice Law and Rules (CPLR) § 3212 (b).

[2]*Id.*

[3]*Nicklas v. Tedlen Realty* Corp., 305 AD 2d 385, 386 [2d Dept 2003].

[4]*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]; *Perez v. Exel Logistics, Inc.*, 278 AD 2d 213, 214 [2d Dept 2000]

[5]CPLR § 3212 (f).

[6] *Liotta v. Power Test Petroleum Distributors, Inc.*, 179 AD 2d 802 [2d Dept 1992].

admissible evidence. If the defendant can demonstrate the absence of a *prima facie* case in this motion for summary judgment, then the plaintiff would carry the shifted burden of rebutting the defendant. Further, the defendant claims he had no actual or constructive notice of the defect in the lint filter door. Here, a sheet metal plate door giving access to the dryer's lint screen fell on the plaintiff's foot. Immediately after the incident, the door was seen to be lacking a locking latch. The locking latch in question was inside the lint filter and accessible only by using a key.

"To establish a defendant's negligence, a plaintiff must show the existence of a duty, a breach of that duty, and that the breach was a proximate cause of the plaintiff's injury."[7] However, it has been long maintained that those who offer the use of an appliance to the public should inspect that appliance. "In determining what are safe appliances, it must be remembered that the care taken must be proportionate to the danger."[8] Indeed, defendant is "not required to furnish the newest, the safest, or the best appliance or one of a particular kind, they [are] at least required to furnish one reasonably safe and suitable for the use to which it was put ..."[9] Crucially, a defendant is "presumed to know any danger which a reasonable inspection may have shown ..."[10] Therefore, in an action based upon common negligence, the age of the dryer is not so significant as its adequacy for its task, but the defendant has a duty to perform an appropriate inspection of the equipment offered for use by others in order to discover defects.

Here, Mr. Kim states his usual inspection of the dryer was looking at the exterior of his appliances. His inspection was usually a visual and external inspection, not performed according to any schedule or involving anything more than responding to breakdowns after they occur. Although he could see the latches on the lint filter doors when he cleaned the lint filters, he does

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[7]*Solan v Great Neck Union Free School District*, 43 AD 3d 1035, 1036 [Second Dept 2007].

[8]*Welle v Celluloid Co.,* 175 NY 401, 405 [1903].

[9]*Adlam v Konvalinka*, 291 NY 40, 43 [1943].

[10]*Dellamorgia v Weinberg*, 278 AD 828 [Second Dept 1951].

not state that this is an inspection of a door latch. Mr. Kim says he did not note any existing problems when he last cleaned out the lint filter to the dryer in question. Although Mr. Kim hypothesized the latch may have broken because of rust, he did not state that he noted rust on inspection, but if even if he saw rust, Mr. Kim did no preventative maintenance. Conversely, he may have not actually inspected the latch prior to the latch breaking. The minimal care involved in actually evaluating the locking device for the lint filter latch is not disproportionate to the danger of the door inadvertently falling and causing injury. Here, the defendant does not assert that any preventative inspection of the dryer's locking components has ever been done. Hence, Mr. Kim had a duty to make at least minimal inspection of the devices he offered for public use, but he failed to make any meaningful inspections, and an injury resulted. Mr. Kim has a duty to inspect his appliances, there was a breach of that duty, and a consequential injury. The plaintiff has a valid action with a *prima facie* case for negligence not refuted or rebutted by the defendant in the motion for summary judgment.

Notwithstanding the presence of *prima facie* case against the defendant, the plaintiff has also asserted the principal of *res ipsa loquitur*. "[O]nly in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict. That would happen when the circumstantial proof is so convincing and the defendant's response is so weak that the inference of defendant's negligence is inescapable."[11] Here, the burden of proof at trial rests upon the shoulders of the plaintiff, and it is the defendant that requests a fact finder not be permitted a permissible inference of negligence against the defendant. Consequently, the threshold for this defendant to defeat a plaintiff's assertion of *res ipsa loquitur* is proportionately lower since the burden of proof by a preponderance of the evidence at trial falls upon the plaintiff. However, in a motion for summary judgement the burden of moving forward falls upon the movant, and here the defendant does not pass over the threshold.

"Under appropriate circumstances, the evidentiary doctrine of *res ipsa loquitur* may be

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[11]*Morejon v Rais Construction Co.*, 7 NY 3d 203, 208 [2006].

invoked to allow the factfinder to infer negligence from the mere happening of an event."[12] "The first prerequisite for the invocation of the doctrine of *res ipsa loquitur*, and the inference of negligence it permits, is that the injury-causing event be of a kind that ordinarily does not occur in the absence of negligence."[13] In addition, "a plaintiff must establish exclusive control of the defendant and, third, that no act or negligence on the plaintiff's part contributed to the happening of the event. Once the plaintiff satisfies the burden of proof on these three elements, the *res ipsa loquitur* doctrine permits the jury to infer negligence from the mere fact of the occurrence."[14]

Here, the defendant correctly states that the subsequent remedial repair of the lint door latch is inadmissible as evidence. However, the remedial repair is not an issue here. Further, the defendant correctly states that the subsequent repair is not definitive in establishing control of the premises. The defendant does not assert in his motion for summary judgment that the event could have taken place without negligence. Moreover, Mr. Kim is the owner of the dryer in question, and only he has the key to the lint filter door latch. If there are "items exposed to significant public traffic, where the specific mechanism that malfunctioned was not handled by the general public," the exclusive control required by the doctrine of *res ipsa loquitur* may be invoked.[15] The defendant does not assert that anyone other than Mr. Kim or his employees have a key to gain access to the inside of the lint filter, nor does the defendant assert that anyone else had actual access to the lint filter. Thus, it is not asserted that Mr. Kim lacks sole control of the access to the lint filter, and hence there is no assertion by the movant that anyone other Mr. Kim and his employees have access to the lint filter door locking latch. Further, the defendant does not assert that the failure of the latch to the lint filter door could be due to something other than an act of negligence. Finally, the defendant movant does not state that the plaintiff was a contributor to her injury. Consequently, the defendant has not borne the burden of the movant of

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[12]*States v Lourdes Hosp.,* 100 NY 2d 208, 211 [2003].

[13]*States v Lourdes Hosp.*, 100 NY 2d at 210.

[14]*States v Lourdes Hosp.*, 100 NY 2d at 211.

[15]*Pavon v Rudin*, 254 AD 2d 143, 146 [Second Dept 1998].

this motion for summary judgment, and has properly asserted that the doctrine of *res ipsa loquitur* may not be invoked. Therefore, even had the defendant demonstrated the absence of a *prima facie* case, the plaintiff would have been able to invoke the principal of *res ipsa loquitur* in order to present issues of fact requiring a factfinder and would have adequately carried the burden of rebutting the defendant's motion for summary judgment.

The defendant movant of this motion for summary judgment has not shown the lack of a *prima facie* case, nor has rebutted an argument invoking the doctrine of *res ipsa loquitur.*

Accordingly, it is hereby

ORDERED, that the motion for summary judgment made by the defendant Mr. Yong Sup Kim d/b/a Greenridge Laundromat is denied in the entirety; and it is further

ORDERED, that the parties return for a pre-trial conference at DCM Part 3, **130 Stuyvesant Place, Third Floor** on **Monday, January 24, 2011.**

ENTER,

DATED: December 10, 2010

Joseph J. Maltese
Justice of the Supreme Court