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

PRESENT : DONNA M. MILLS **PART 58**

Justice

KENNETH LEVIN and AVIVA LEVIN,

INDEX NO. 108182/11

Plaintiffs,

MOTION DATE

MOTION SEQ. NO. 001

-against-

MOTION CAL NO.

MERCEDES-BENZ MANHATTAN, INC.,

Defendant.

The following papers, numbered 1 to _____ were read on this motion for _____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits– Exhibits....	1, 2
Answering Affidavits– Exhibits	3, 4
Replying Affidavits	5, 6

CROSS-MOTION: ✓ YES _____ NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 1/14/14

J.S.C.

DONNA M. MILLS, J.S.C.

Check one: ____ FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 58

KENNETH LEVIN and AVIVA LEVIN,
Plaintiffs,

-against-

MERCEDES-BENZ MANHATTAN, INC.,
Defendant.

INDEX NO. 108182/2011
Motion Sequence 001
DECISION & ORDER

MERCEDES-BENZ MANHATTAN, INC.,
Third-Party Plaintiff,

-against-

RYTEC CORP. and WEST CONN OVERHEAD DOOR CO.,
Third-Party Defendants,

Third-Party Index No. 590791/2012

MERCEDES-BENZ MANHATTAN, INC.,
Second Third-Party Plaintiff,

-against-

DOORS, INC.,
Second Third-Party Defendant,

Second Third-Party Index No. 590624/2013

DONNA MILLS, J.:

In this personal injury action, plaintiffs Kenneth Levin (Levin) and Aviva Levin, husband and wife, move, pursuant to CPLR 3212, for partial summary judgment in their favor on the issue of liability. Additionally, second third-party defendant Doors, Inc. (Doors) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint against it.

Factual Background

Levin was injured, on August 30, 2010, when he was struck by a malfunctioning garage door on the premises of 536 West 41st Street, a service facility occupied by defendant Mercedes-Benz Manhattan, Inc. (Mercedes). The action commenced on July 15, 2011, with the complaint asserting causes of action for negligence, and loss of consortium, on behalf of the wife. Motion, exhibit A. Mercedes commenced a third-party action against Rytec Corp. (Rytec), manufacturer of the garage door at issue, and West Conn Overhead Door Co. (West Conn), installer of the garage door, on September 25, 2012, asserting causes of action for indemnification and contribution in the underlying action. *Id.*, exhibit B. On August 7, 2013, Mercedes also commenced a second third-party action against Doors, which was under contract to Mercedes to inspect, maintain and repair the garage door, asserting causes of action for indemnification and contribution in the underlying action. Cross Motion, exhibit C.

Discussion

Plaintiffs' Summary Judgment Motion on Liability

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). "If there is any doubt as to the existence of a triable issue, the motion should be denied." *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). "But only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary

judgment." *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

When Levin brought his automobile in for service, on August 30, 2010, he drove it to the entrance of the service area, put his transmission in "Park," exited the vehicle and stood near it, as instructed, he claims, by David James (James), a Mercedes employee. He was positioned under the open overhead garage door, talking to James, when it "suddenly came down, without warning, and struck my head and right shoulder, knocking me to the ground, causing me to sustain severe and permanent personal injuries." Levin aff at 2. Levin says that James, and other Mercedes employees, moved him into the waiting room.

Plaintiffs request summary judgment on liability on the basis of the doctrine of res ipsa loquitur. Where "a plaintiff to whom the defendant owes a duty of care is not in a position to prove directly what actually happened or that a specific act of the defendant was negligent . . . [then] under the doctrine of res ipsa loquitur, the law allows a jury to consider the circumstantial evidence and infer that the defendant was negligent in some unspecified way." *Morejon v Rais Constr. Co.*, 7 NY3d 203, 205-206 (2006).

> "The submission of a case to a jury on the theory of res ipsa loquitur is warranted when the plaintiff can establish the following elements: (1) the accident is of a type that does not occur in the absence of negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendant; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff."

Mejia v New York City Tr. Auth., 291 AD2d 225, 227 (1st Dept 2002).

Plaintiffs maintain that Levin's accident meets the basic criteria of res ipsa loquitur. The sudden closing of an overhead garage door should not occur in the absence of negligence. *Hutchings v Yuter*, 108 AD3d 416, 417 (1st Dept 2013) ("res ipsa loquitur applies in this action involving an accident that occurred, according to plaintiff's testimony, when a garage door suddenly fell and struck him on the head, since this is the type of event that does not normally

occur in the absence of negligence"); *Allen v Thompson Overhead Door Co.*, 3 AD3d 462 (2d Dept 2004) (res ipsa loquitur jury charge held to be appropriate where an overhead door suddenly fell on plaintiff's foot).

Plaintiffs also contend that the garage door was within the exclusive control of Mercedes. Levin asserts that he took no voluntary action that contributed to the event. However, res ipsa loquitur is essentially a rule of evidence; "application of the doctrine as a basis for awarding summary judgment is inappropriate." *Vaynberg v Provident Operating Corp.*, 269 AD2d 442, 442 (2d Dept 2000) (citations omitted). Yet, "the courts have granted summary judgment in certain res ipsa situations where the particular defendant totally failed to rebut the inescapable inference of negligence." *Horowitz v Kevah Konner, Inc.*, 67 AD2d 38, 41 (1st Dept 1979). The question here, then, is whether this action "is the rare case in which a plaintiff will be entitled to judgment as a matter of law on the ground that the prima facie proof is so convincing that the inference arising therefrom is inescapable if not rebutted by other evidence." *Crockett v Mid-City Mgt. Corp.*, 27 AD3d 611, 612 (2d Dept 2006).

Mercedes contends that plaintiffs' motion is premature, and that the doctrine of res ipsa loquitur may not be properly applied to the instant action. On October 2, 2013, when the motion for summary judgment on liability was filed, no depositions had yet been conducted. According to Mercedes, this resulted from the slowness of document discovery and the initiation of third-party actions. Therefore, in its view, "in light of the incomplete state of discovery, including the fact that no party had yet been deposed, the summary judgment motion was premature." *Wilson v Yemen Realty Corp.*, 74 AD3d 544, 545 (1st Dept 2010). The granting of summary judgment is not premature, however, where "there was only hope and speculation as to what additional discovery would uncover." *Lelekakis v Kamamis*, 4 AD3d 507, 508 (2d Dept 2004).

Defendants state that "the plaintiffs' own negligence and the negligence of the third-party defendants have not been ruled out as the proximate cause of the alleged incident." Bowen affirmation in opposition to plaintiffs' motion, ¶ 23. They submit the affidavit of Claude Robb (Robb), Mercedes facilities manager, to support this argument. *Id.*, exhibit F. Robb, who does not recount how long he has been at the Mercedes location, asserts that he knew of no incidents or complaints concerning the door suddenly falling down prior to Levin's accident. *Id.*, ¶¶ 5-6. Additionally, he denies that Mercedes had exclusive control of the overhead door, because, over the years, Rytec, West Conn and Doors had access to it for purposes of maintenance and repairs. Finally, Robb maintains that the area where Levin was standing when struck "is used for automobiles and customers are not to stand in the area." *Id.*, ¶ 9.

Mercedes's denial of exclusive control of the overhead door is unconvincing. It relies upon *Lizden Indus. Inc. v Franco Belli Plumbing and Heating and Sons, Inc.* (2009 NY Slip Op 32657 (U), 2009 WL 4009129, 2009 NY Misc LEXIS 5230 [Sup Ct, NY County 2009]), an unpublished opinion from a sister trial court, where the plaintiff's summary judgment motion based on res ipsa loquitur was denied. The court found that a water leak may have resulted from a valve left open, not a defect or malfunction of the plumbing equipment that the defendant worked on earlier. In the instant action, Mercedes does not suggest that Levin suffered harm from the otherwise benign operation of properly-functioning equipment.

Property owners have a duty to maintain their premises in a reasonably safe manner. *Acosta v Josco Realty Co., LLC*, 110 AD3d 461 (1st Dept 2013). Implicating third-party contractors does not absolve Mercedes, as property owner, of its responsibility to plaintiffs. "The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts." *Kleeman v*

Rheingold, 81 NY2d 270, 273 (1993). However, "[a]n exception to this general rule is the nondelegable duty exception, which is applicable where the party 'is under a duty to keep premises safe.'" *Backiel v Citibank*, 299 AD2d 504, 505 (2d Dept 2002), quoting *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 668 (1992); *Potthast v Metro-North R.R. Co.*, 400 F3d 143, 154 (2d Cir 2005) ("a defendant cannot disclaim responsibility by contracting out non-delegable duties, the introduction of independent contractors in lieu of employees does not change the calculus for evaluating res ipsa loquitur claims involving exclusive control"). While Mercedes is not denied the right to seek indemnification or contribution from its contractors because of their alleged negligence, its duty to plaintiffs is not eliminated or suspended as a result.

Finally, Mercedes offers no evidence about Levin's conduct that might compromise his propounding of res ipsa loquitur. Robb's statement, in itself, that customers were not to stand where Levin actually stood, an area generally traversed by automobiles, employees and customers, has no factual value. In sum, this is the rare case in which a plaintiff is entitled to judgment as a matter of law on the ground that the prima facie proof is so convincing that the inference arising from it inescapable. Mercedes has failed to provide evidence that the accident occurred in the absence of negligence; that it was caused by an instrumentality not within its exclusive control; or that it was due to any voluntary action or contribution by Levin. Plaintiffs' motion for summary judgment on liability, therefore, is granted.

Second Third-Party Defendant's Summary Judgment Cross Motion to Dismiss

The second third-party complaint claims that Mercedes and Doors had a contractual relationship, with Doors inspecting, maintaining and repairing the overhead door prior to August 30, 2010. Fred Rice (Rice), owner of Doors, provides an affidavit discussing his company's

work for Mercedes. Cross Motion, exhibit E (Rice aff). He explains that the Rytec door installed on Mercedes's premises is equipped with an electric eye, which signals the door to rise when the electric eye's beam of light is broken. According to Doors's service records,[1] the last time it worked on Mercedes's overhead door, prior to the incident, was February 1 and 2, 2010. Rice says that it replaced broken and worn straps on the counterweight door. These straps are "present in order to allow the door to be raised and lowered in an appropriate fashion." *Id.*, ¶ 11. He contends that they "do not control whether the door will open or close and only effects [sic] the manner in which it opens and closes." *Id.* He concludes that the "electric eye was working properly after my Company's Technician left the Premises." *Id.*, ¶ 10. Rice states that Doors never received any complaints about the overhead door subsequently.

Doors argues for dismissal of the second third-party complaint, because its work in February 2010 did not involve "the type of component parts which would have caused the accident as described by Plaintiff." Beyrer affirmation, ¶ 9. However, this is only supported by the affidavit of the company's owner, who does not claim to have inspected the overhead door at any time.

Mercedes opposes Doors's cross motion as premature. It describes Rice's affidavit as self-serving, and notes that he has not been disclosed as an expert, nor qualified as an expert pursuant to CPLR 3101 (d).[2] Mercedes has not had the opportunity to dispose anyone from Doors on the nature of the work performed on its overhead door. "It is well established that

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[1] While Rice states that he "attached hereto copies of various service calls, job work orders and invoices relating to work which was done in or about 2010 by my Company at the Premises," none are, in fact, attached. Rice aff, ¶ 8.

[2] Doors, in rebuttal, quotes *Zambotti v Reading* (162 AD2d 991, 992 [4th Dept 1990]): "Every affidavit submitted by a party is self-serving in the sense that it is submitted to serve the interests of that party." The affidavit describes Rice as "familiar with the work which was done and the nature of the work." Beyrer reply affirmation, ¶ 5.

where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied." *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 792-793 (2d Dept 1988); *see also* CPLR 3212 (f).

Doors does not settle disputed issues of material fact in its papers. It requires more than the general assurances of its owner to establish that it is free from liability in this instance. Doors's cross motion for summary judgment is denied.

Accordingly, it is

ORDERED that plaintiffs Kenneth Levin and Aviva Levin's motion, pursuant to CPLR 3212, for partial summary judgment in their favor on liability is granted; and it is further

ORDERED that an immediate trial on the issue of the amount of damages to which plaintiffs are entitled shall be had before the court; and it is further

ORDERED that plaintiffs shall, within 20 days from the entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the Trial Support Office (Room 158) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED that second third-party defendant Doors, Inc.'s cross motion, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint is denied, and that action shall continue.

FILED

JAN 23 2014

COUNTY CLERK'S OFFICE
NEW YORK

DATED: January 14, 2014

ENTER:

Donna M Mills

J.S.C.

DONNA M. MILLS, J.S.C.