

Porteous v J-Tek Group, Inc.
2014 NY Slip Op 30440(U)
February 24, 2014
Supreme Court, New York County
Docket Number: 112579/11
Judge: Doris Ling-Cohan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 112579/2011
PORTEOUS, ESLEY
vs.
J-TEK GROUP
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 112579/11
MOTION DATE _____
MOTION SEQ. NO. 003

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
 Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 12
 Answering Affidavits — Exhibits _____ No(s). 3
 Replying Affidavits _____ No(s). 4

Upon the foregoing papers, it is ordered that this motion ~~is~~ be by defendant for Summary judgment is decided in accordance with the attached memorandum decision.

FILED
FEB 26 2014
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/26/14 JUSTICE DORIS LING-COHAN, J.S.C.

1. CHECK ONE: CASE-DISPOSED NON-FINAL DISPOSITION
 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36**

ESLEY PORTEOUS,
Plaintiff,

-against-

J-TEK GROUP, INC., SIX SIGMA USA, INC.
and 449 WASHINGTON LLC,
Defendants,

INDEX NUMBER 112579/2011
Motion Sequence 003
DECISION & ORDER

DORIS LING-COHAN, J.:

In this personal injury action, defendants J-Tek Group, Inc. (J-Tek), Six Sigma USA, Inc. (Six Sigma) and 449 Washington LLC move for summary judgment dismissing the complaint in its entirety.

Factual Background

Plaintiff was injured on the morning of September 20, 2011, when a piece of wood fell on his head while he was walking in front of a construction site at 449 Washington Street, New York County, a five-story building owned by 449 Washington LLC. Six Sigma was the general contractor on the construction project at the location, which planned to add two stories to the building. On its letterhead, Six Sigma is identified as "a J-Tek group company."¹ Rosenstock affirmation, exhibit J3.

¹In an undated letter, 449 Washington LLC asked the New York City Department of Buildings to transfer the building permit for its construction project from J-Tek to Six Sigma. Rosenstock affirmation, exhibit J5. A copy of a work permit, issued September 14, 2011 to J-Tek, is provided by plaintiff. De Caro affirmation, exhibit K. No one provides a copy of an amended or replacement building permit, as requested in the undated letter. The construction contract, a standard form provided by the American Institute of Architects, was executed by 449 Washington LLC, as owner, and Six Sigma USA, Inc., as contractor. Rosenstock affirmation, exhibit J1.

Discussion

Plaintiff was deposed and testified that he was walking on Washington Street with Ariel Mizrahi (Mizrahi), who had hired him to inspect a building nearby, when “[s]uddenly I just feel a hit and I grabbed my head.” Rosenstock affirmation, exhibit I (Porteous tr) at 71. Plaintiff stated that Mizrahi saw two men on the building above and “a piece of plank that fell and struck me on the head.” *Id.* Plaintiff testified that he was dizzy as a result of the blow and had trouble standing up immediately thereafter. *Id.* at 73. He was removed by ambulance, which he summoned by calling 911. *Id.* at 75. He remembered “severe pain,” but many other details escaped him. *Id.* at 78. He said that he was bleeding from a cut on his head, but no stitches were provided in the emergency room. *Id.* at 84. He was given a prescription for ibuprofen. *Id.* at 93.

Abbas Gizman (“Abbas”), a part owner of 449 Washington LLC and manager of the property, was deposed and testified that, on the day of the incident, the building was entirely vacant. Rosenstock affirmation, exhibit J (Abbas tr) at 13. It had just been acquired by 449 Washington LLC, which planned to convert the premises into residential condominiums. *Id.* at 14. While he understood that “Six Sigma is a J-Tek Group company,” he believes that he contracted with Six Sigma for the construction work. *Id.* at 32.

Abbas said that he went to the building when he received a telephone call from a Six Sigma manager about a claimed injury. *Id.* at 40-41. He spoke to plaintiff, who was seated inside an ambulance, who told him that “a piece of stick struck me as I was walking by here.” *Id.* at 52. Plaintiff was holding the piece of wood as they spoke. *Id.* at 53. Abbas saw no other witnesses there. *Id.* at 56. When Abbas asked the on-site construction manager what had happened, he heard the same account as plaintiff’s. *Id.* at 53. The construction manager told him that no one was working on the roof, and, when he went up himself, he said that he saw no loose

debris or building material on the roof. *Id.* at 53-54.

Abbas testified that there was no scaffolding in place around the building at the time of the incident, nor netting to catch debris. He said that he also visited the construction site between the time that 449 Washington LLC purchased the property and the day of the incident, although he could not recall details. *Id.* at 41. His visit(s) was based on curiosity. *Id.* at 41-42. He claims that he left the rest to Six Sigma. "I hired a contractor that was going to be responsible for that work." *Id.* at 37. "I hired Six Sigma because Mr. Lee has been in business in the City for more than a decade at that time doing construction work, interior and exterior. My mandate to them was to do this work according to all professional standards." *Id.* at 48.

Abbas identified several photographs of the building showing a wooden railing on a balcony or setback on the fifth floor, although he was unable to state that they were a fair and accurate depiction of the building as it existed on the day of the incident.² *Id.* at 57-60. He testified that the wooden railing was scheduled to be removed in the construction project. *Id.* at 58. When shown a piece of wood, Abbas was unable to identify it as the piece of wood that plaintiff claimed hit him. *Id.* at 61. He also could not say that it was the same or similar to the wood in the balcony railing. *Id.* at 61-62. The railing has since been removed.

Jason Lee, president of Six Sigma and J-Tek, was deposed and testified that J-Tek does not have any interest in Six Sigma; he is the sole owner of both. Rosenstock affirmation, exhibit K (Lee tr) at 5. Lee indicated that Six Sigma, not J-Tek, had a contract with 449 Washington LLC for the construction work. *Id.* at 6. At the time of the incident, Six Sigma's work was allegedly limited to the building's interior. *Id.* at 22. No other contractors were at the job site at the time. *Id.* at 31. He testified that no barriers or detours were in place to control pedestrian

²These photographs, among others, are found at Rosenstock affirmation, exhibit J8.

traffic in front of the building. *Id.* at 45.

Lee was unable to identify the origins of a piece of wood shown him. *Id.* at 15. He was called to the job site by an employee telling him that someone was claiming to have been hurt there. *Id.* at 18. When Lee arrived, plaintiff had already left in an ambulance. With his construction manager, Lee went to the balcony on the fifth floor and to the roof of the building. He said that they found nothing. *Id.* at 20.

Plaintiff submits a signed and sworn affidavit by Mizrahi, his companion at the time of the incident. De Caro affirmation, exhibit A. Mizrahi states that he “observed a piece of wood fall from above and strike Esley Porteous on the head.” *Id.*, ¶ 3. Mizrahi said that he “immediately looked up at the roof area of the building located at 449 Washington Street,” where he saw two construction workers “using sledge hammers and [who] were breaking apart the wooden railing and appurtenances at or near the perimeter of the roof. *Id.*, ¶ 4. He further claims that he “observed large sections of broken pieces of wood that were hanging from the perimeter of the roof.” *Id.*

Plaintiff submits the signed and sworn affidavit of Denise P. Beckaert (Beckaert), a licensed architect. De Caro affirmation, exhibit B. She states that she reviewed a variety of documents and materials pertaining to this action, including testimony transcripts, photographs, Department of Building filings, and “[t]he subject piece of wood that struck Esley Porteous.” *Id.*, ¶ 6 (b). She says that she compared that piece of wood “to wood members revealed in the video and photographs of 449 Washington Street.” *Id.*, ¶ 11. She claims that the physical piece of wood “was similar in color and dimensions to the wood in the video/photographs. Additionally, the subject wood was splintered, indicative of having been broken” *Id.* Beckaert concludes that “the subject piece of wood I observed, and that fell on Porteous, is consistent with having

originated from the exterior wood framing members from the roof setback/terraces of 449 Washington.” *Id.*, ¶ 14.

Plaintiff submits a signed and sworn affidavit from Richard J. Westergard (Westergard), a professional meteorologist, with about 100 pages attached of meteorological data, including readings from weather stations at Central Park, LaGuardia Airport and Newark Liberty Airport, on the date of the incident. De Caro affirmation, exhibit C. He states that he also examined the subject piece of wood and photographs and maps of the neighborhood. Westergard concludes that “it would be impossible for the wind, given its direction and speed, to transport the piece of wood” from a nearby building to the construction site, “and strike plaintiff on the head.” *Id.* at 4.

Plaintiff submits a signed and sworn affidavit from Brian D. Greenwald, M.D. (Dr. Greenwald), who has treated plaintiff from shortly after the incident to the present. De Caro affirmation, exhibit D. Dr. Greenwald states that his review of plaintiff’s emergency room records satisfies him that they “are consistent with being struck in the head by the falling piece of wood depicted on the photographs that I viewed.” *Id.*, ¶ 8. When Dr. Greenwald first examined plaintiff, on October 17, 2011, he “found a noticeable irregularity in the right temporoparietal region of his scalp . . . [that] is consistent with being struck in the head by the falling piece of wood depicted on the photographs that I viewed.” *Id.*, ¶ 9.

“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 of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002). In “determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility”. *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dept 1992), citing *Assaf v. Ropog Cab Corp.*, 153 AD2d 520, 521 (1st Dept 1989).

To establish a prima facie case of negligence, “a plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence.” *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246, 249 (1st Dept), *affd* 64 NY2d 670 (1984). “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.” *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986).

According to Lee, as stated in his affidavit supporting defendants’ motion, “Six Sigma concedes it is the only defendant who might be held liable for plaintiff’s alleged injuries”. Lee *aff.*, ¶ 7. Six Sigman had “complete control of all phases and aspects of the construction undertaken at the Premises.” *Id.*, ¶ 6. There is no evidence that Abbas’ (449 Washington LLC’s property manager and part owner’s) visits to the construction site constituted anything more than curiosity about the progress of events. 449 Washington LLC did nothing to create a hazardous condition at the construction site. Mizrahi describes seeing construction workers with sledgehammers demolishing wooden structures atop the building just moments after plaintiff

claimed to have been hit. Assuming that wooden structures on the building were being demolished on the morning of September 20, 2011 in a reckless manner, the owner would not have had notice of this transitory condition.

Defendants' summary judgment motion, therefore granted as to defendant 449 Washington LLC and the complaint shall be dismissed as against it. *Lopez v Dagan*, 98 AD3d 436, 438 (1st Dept 2012) ("the owners established prima facie entitlement to summary judgment on plaintiff's common-law negligence claim by proffering evidence that they neither created the accident-causing condition, nor had prior notice, actual or constructive, of it" [citations omitted]).

J-Tek's connections to this action are minimal at best and insufficient to establish liability as to such defendant. Lee acknowledges his ownership of both J-Tek and Six Sigma, and Six Sigma's stationary carries the important-sounding designation of being "a J-Tek group company." However, there is no allegation that J-Tek had any operative involvement with 449 Washington LLC's construction project. Significantly, the construction contract was executed by 449 Washington LLC and Six Sigma. There is no factual basis to a belief that J-Tek's actions or inactions contributed to plaintiff's injuries. Defendants' summary judgment motion is therefore, granted as to defendant J-Tek and the complaint is dismissed as against such defendant.

Lee ultimately disclaims any responsibility for the incident on the part of Six Sigma. "I never observed any debris being jettisoned from the upper floors of the building nor did I have any reason to believe this would have taken place." Lee aff, ¶ 8. Further, he says that, when he was called to the scene, he inspected the balconies on the fifth and sixth floors. "The fifth floor front balcony did have a pre-existing railing which was made partly from wood. This railing was intact and I observed no loose debris on the balcony. Likewise there was nothing amiss on the sixth floor balcony." *Id.*, ¶ 9. It is undisputed that the balconies were removed after the incident.

Lee describes the area as “densely developed[, where] . . . there are many owners and developers engaged in construction projects[,] . . . located close to the Hudson River and is famously prone to high winds and sudden gusts which constantly blow debris into the air.” *Id.*, ¶ 11. These allegations by Lee, however, are purely conclusory, without any evidentiary support, and insufficient to support the granting of summary judgment. See *Winegrad v. New York Univ. Med. Center*, 64 NY2d 851 (1985). The court notes that, in its reply papers, defendants have supplied an expert affidavit, to allegedly discredit the opinions of plaintiff’s expert, however, new/additional submissions first offered in reply papers are not persuasive. See *Brown v. The AP & ASBP Holding Co., Inc.*, 22 AD3d 416 (1st Dept 2005); *Ritt v. Lenox Hill Hosp.*, 182 AD2d 560 (1st Dept 1992). Moreover, it is for a jury to determine credibility and/or the weight of such evidence, not for the court on a motion for summary judgment. Thus, that portion of defendants’ motion for summary judgment of dismissal as to Six Sigma should be denied on such basis alone.

Additionally, plaintiff correctly argues that the doctrine of *res ipsa loquitur* may be considered by this court in viewing plaintiff’s opposition to defendants’ motion for summary judgment. Plaintiff argues that *Morejon v Rais Constr. Co.*, 7 NY3d 203 (2006), offers valuable instruction in this regard. The *Morejon* plaintiff was allegedly hit in the head by a roll of roofing material that fell from the roof of a building where he was making a delivery. Defendants claimed that they had stopped working on the site three days before the incident. The Court stated that, occasionally, “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.” *Morejon*, 7 NY3d at 205. 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.” *Id.* at 205-206.

“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). The circumstances underlying this action meet these criteria. While it will be up to a jury to decide whether the piece of wood actually originated from a high floor of 449 Washington Street so as to have been within Six Sigma’s exclusive control, no party suggests that a wooden board flying through the air is a natural and unpreventable event. The construction site was exclusively under Six Sigmas’s control, and plaintiff merely had the bad fortune to be walking by.

Applying the doctrine of *res ipsa loquitur* does not determine the outcome of this action. “The rule has the effect of creating a *prima facie* case of negligence sufficient for submission to the jury, and the jury may – but is not required to – draw the permissible inference.”

Dermatossian v New York City Tr. Auth., 67 NY2d 219, 226 (1986). However, summary judgment may not be granted when material issues of fact remain in dispute, which is the usual result of proceeding on a theory of *res ipsa loquitur*. Defendants’ summary judgment motion, therefore, for the dismissal of the complaint as against Six Sigma shall be denied.

Accordingly, it is

ORDERED that that part of defendants’ motion for summary judgment dismissing the complaint as against J-Tek Group, Inc. is granted, and the complaint is severed and dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that that part of defendants' motion for summary judgment dismissing the complaint as against 449 Washington LLC is granted, and the complaint is severed and dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that that part of defendants' motion for summary judgment dismissing the complaint as against Six Sigma USA, Inc. is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that within 30 days of entry of this order, defendant J-Tek shall serve a copy upon all parties, with notice of entry.

DATED: February 27, 2014



Doris Ling-Cohan, J.S.C.

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