 

**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF BRONX** Part 24

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Kathy Zhuhui Qi,

Plaintiff,

Index No. 308470/2009

-against-

The City of New York, Wildlife Conservation Society, Hill International Inc., and M.A. Angeliades, Inc.,

Defendants.

**DECISION AND ORDER**

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The City of New York and Wildlife Conservation Society,

Plaintiff,

Third Party Action
Index No. 83695/2010

-against-

Hill International Inc., and M.A. Angeliades, Inc.,

Defendants.

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**Hon. Sharon A. M. Aarons:**

Defendants[1] Hill International Inc.(Hill) and M.A. Angeliades, Inc. (Angeliades) move for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against them. Plaintiff and defendant Wildlife Conservation Society (WCS)[2] submit written opposition. The motion is denied.

This personal injury action arises out of an accident which occurred on November 1, 2008,

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[1]A single motion has been filed jointly by both defendants, who are represented by the same counsel.

[2]The same counsel filed an answer and appeared for both WCS and the City of New York. The opposition papers filed herein, however, indicate that counsel is representing WCS only. The opposition is deemed to have been filed on behalf of both defendant WCS and defendant City of New York.

in the then newly-renovated lion house at the Bronx Zoo, when a wooden access panel installed in the ceiling fell from the ceiling from a height of approximately 8 feet, striking the plaintiff. Angeliades, as prime contractor for general construction work, and Hill, as construction manager, were responsible for the installation of the panel. The building had been renovated and opened to the public as the Madagascar Exhibit in June, 2008. Prior to the accident, no one had observed or reported any defect in the ceiling or access panel.

In support of the motion, defendants Hill and Angeliades submit the pleadings and bill of particulars; a Substantial Completion Letter dated July 29, 2009, indicating that the Lion House renovation was substantially completed on June 20, 2008, with various "punchlist" items remaining to be addressed and rectified; the contract dated October 25, 2004, between Hill and Angeliades; the unsigned, certified deposition of plaintiff; the unsigned, certified deposition of defendant WCS by Kenneth Hutchinson, together with a letter of transmittal dated April 26, 2012; the unsigned, certified deposition of defendant City of New York by George Tomosoiu, together with a letter of transmittal dated July 6, 2012; the signed, certified deposition of defendant Hill by Michael J. Brothers; the unsigned, certified deposition of defendant Angeliades by Richie Clarke, together with a letter of transmittal dated September 14, 2012.[3] The moving defendants maintain that the work performed by them was deemed complete by the defendant City of New York some 3 ½ months before the happening of the accident, and that there was no notice of any defect in the installation of the access panel or of the ceiling itself. Defendants rely on the deposition testimony of Kenneth

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[3]Pursuant to CPLR 3116 (a), the unsigned depositions which have been shown to have been served on the deponent may be used as if fully signed. The unsigned, certified deposition of the plaintiff has not been shown to have been served upon her, but may be considered as it has not been challenged as inaccurate. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v Berger*, 283 AD2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001]).

Hutchinson, the Director of Construction for WCS, who testified that the Madagascar Exhibit opened in June, 2008, and that there were no complaints or observations of any defects with respect to the ceiling panels. Mr. Hutchinson further testified that the access panel which fell provided access to mechanical equipment above the ceiling; the moving defendants characterize his testimony as indicating that WCS "routinely access[ed]" the access panel for regular maintenance. According to the moving defendants, they are not liable as a matter of law, as the construction work was inspected and accepted, and there were no complaints or notice of any defect, and thus under the "accepted work doctrine," work accepted by the owner relieves a contractor of liability for alleged defective conditions. They argue further that plaintiff's reliance on the doctrine of res ipsa loquitur with respect to the moving defendants is misplaced, as they were not in control of the instrumentality which caused the injury. Lastly, they argue that the third party complaint seeking indemnification fails, as the moving defendants were not negligent as a matter of law.

In opposition, defendant WCS submits the affidavit of Mr. Hutchinson, who was deposed on behalf of WCS, and the affidavit of Mr. John Duke, the WCS Director of Operations, who states that argues that the evidence shows that the moving defendants were in fact still working at the building on various "punchlist" items and roof leaks at the time of the accident, and thus their work had not been completed. WCS submits the affidavit of their deposed employee, Mr. Hutchinson, to refute the moving defendants' reliance on his testimony to opine that he suggested that WCS employees "routinely access[ed]" the access panel after installation and before the happening of the accident; his affidavit flatly states that no WCS employee used the panel between June 2008 and the time of the accident. The affidavit of Mr. Duke similarly states that no WCS employee used the access panel prior to the accident.

Plaintiff argues in opposition to the motion that the testimony of the various witnesses established that the 8 pound panel, measuring some two feet by two feet, should or could have been furnished with a safety chain or other device to prevent falling. Plaintiff maintains that the moving defendants failed to establish the absence of negligence on their part, and failed to establish that the access panel was installed in a safe and workmanlike manner. Plaintiff contends that the defendants may be liable in tort for breaching their contract with the defendant City of New York, as the moving defendants allegedly created a dangerous condition. Plaintiff argues, further, that the doctrine of res ipsa loquitur applies.

In reply, the moving defendants argue that there is no evidence that they were required under the relevant contract specifications to install chains or other fall-arresting devices on the installation panel. They maintain that as their work was inspected, and control of the building turned over to WCS, the doctrine of res ipsa loquitur does not apply. They further maintain that the affidavits of the WCS employees to the effect that no one used the access panel after the installation by the moving defendants is disingenuous, and based on mere surmise and speculation.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404.)

Res ipsa loquitur is a permitted inference that the trier of fact may accept or reject, based

upon the probative value of circumstantial evidence. (*Abbott v Page Airways*, 23 N.Y.2d 502, 297 N.Y.S.2d 713 [1969]; *Morejon v Rais Constr. Co.*, 7 N.Y.3d 203, 818 N.Y.S.2d 792 [2006].) The criteria which must exist for res ipsa loquitur to apply are: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be 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. (*Morejon v Rais Const. Co.*, 7 NY3d at 209; *see James v Wormuth*, 21 N.Y.3d 540, 974 N.Y.S.2d 308 [2013]).

Defendant argues, incorrectly, that the completion of the work and the acceptance of performance by the co-defendants City and WCS presents an absolute bar to maintenance of the present action. This is not the law. In *Inman v. Binghamton Housing Authority* (3 N.Y.2d 137, 164 N.Y.S.2d 699, 143 N.E.2d 895 [1957]), the Court of Appeals, borrowing from principles espoused in products liability law, held that an architects and the builder could be liable for injuries suffered by a child who fell from the porch where the injury was caused by latent defects; the complaint was properly dismissed as no latent defect was alleged. The requirement of a latent defect has since been abandoned. (*Roberts v. MacFarland Constr. Cos.*, 102 A.D.2d 981, 477 N.Y.S.2d 786 [3d Dept. 1984] [failure to allege latent defect is no longer considered to be fatal and does not mandate dismissal of the complaint].) The "modern rule" is that "a building or construction contractor is liable for injury or damage to a third person as a result of the condition of the work, even after completion of the work and its acceptance by the owner, where it is reasonably foreseeable that a third person would be injured as a result of the contractor's negligent performance of the work." (*Church v. Callanan Indus.*, 285 A.D.2d 16, 19 – 20, 729 N.Y.S.2d 545 [3d Dept. 2001].)

Similarly, in *Colonno v. Executive I Assocs.* (228 A.D.2d 859, 644 N.Y.S.2d 105 [3d Dept.

1996]), the plaintiff was injured when the heel of her shoe became caught in a crack in the concrete floor, which had been installed by the defendant contractor. The contractor argued that it could not be held liable for plaintiffs injuries since it never received either actual or constructive notice of the defective condition of the concrete floor. The Court affirmed judgment in favor of the plaintiff, stating:

> "We disagree. With the cause of action premised not upon inadequate maintenance but, rather, negligence in the initial construction of the floor, the principle emanating from strict products liability law (*see, Inman v Binghamton Hous. Auth.,* 3 NY2d 137, 144-145) now holds contractors to a "general standard of reasonable care for the protection of third persons who may be foreseeably endangered by the contractor's negligence even after acceptance of the work" (2B Warren's New York Negligence, Parties Negligent, Part 1, § 34.07 [2], at136). Accordingly, there was no need to establish [defendant contractor's] actual or constructive notice of the defect in order for the jury to impose liability upon it as the general contractor (see, Inman v Binghamton Hous. Auth., supra, at 144-145; Roberts v MacFarland Constr. Cos.,102 AD2d 981)." (Id at 860-861.)

(*See also, Robertson v. Amherst Paving, Inc.,* 302 A.D.2d 913, 755 N.Y.S.2d 350 [4th Dept. 2003] [plaintiff fell in her employer's parking lot, which the defendant paving company had resurfaced the prior year; in affirming the denial of defendant's motion for summary judgment, the Court held that a contractor is held to a general standard of reasonable care for the protection of third persons who may be foreseeably endangered by the contractor's negligence even after acceptance of the work].)

It has been held that "[a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow." (*Ryan v Feeney & Sheehan Bldg. Co.*, 239 N.Y. 43, 46, 145 NE 321 [1924].) A contractor that performs its work in accordance with contract plans may not be held liable unless those plans are "so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially

dangerous" (*West v City of Troy*, 231 A.D.2d 825, 826, 647 NYS2d 63 [3d Dept. 1996]).

As acceptance of the work does not preclude maintenance of this action, the issue is whether the defendants owed a duty to the plaintiff, and whether that duty was breached. The "modern rule" set forth above indicates that a duty of reasonable care applies. Other cases still appear to require a showing that the conduct of the contractor "launched an instrument of harm." (*See Luby v. Rotterdam Sq., L.P.*, 47 A.D.3d 1053, 850 N.Y.S.2d 252 [3d Dept. 2008] [construction of handicapped ramp in alleged violation of building codes, which was accepted by owner and approved by municipality 14 years earlier, did not launch and instrument of harm so as to render contractor liable to plaintiff pedestrian]; *Dennebaum v. Rotterdam Square, L.P.*, 6 A.D.3d 1045, 776 N.Y.S.2d 136 [3d Dept. 2004] [failure to use a particular type of joint in sidewalk construction, resulting in an uneven contour 13 years after construction, did not constitute the creation or exacerbation of a dangerous condition or the launching of a force or instrument of harm]). However, under either of these standards – ordinary negligence or "launching an instrument of harm" – issues of fact exist.

It is the moving defendants' burden to establish that they were not negligent in installing the panel, or that they did not launch an instrument of harm. They have not met this burden. In the present case, conspicuously absent from the record is any indication as to why the access panel fell. The cause of the accident is not clear, and the moving defendants have not established that they were free from negligence in the installation, and that the cause of the accident was attributable to cause other than their negligence. Moreover, it is certainly not clear if anyone opened or disturbed the access panel after the installation, and thus at best issues of fact remain as to whether WCS employees or other contractors accessed the panel after it had been installed, and in some manner

caused the panel to fail. Lastly, it is not clear whether proper practice, custom and procedure would have required that some type of safety device, whether a chain or otherwise, be installed in the panel, to prevent accidental falls, and whether, even if such a device was not specified in the plans and specifications the moving defendants relied upon, the defendants, in the exercise of ordinary care, should have been "on notice that the project, if completed according to the plans, [was] potentially dangerous" (*West v City of Troy*, *supra.*)

As the defendants have not met their initial burden, it is not necessary to address the permissible inference of negligence which arises under the doctrine of res ipsa loquitur.

Accordingly, the motion for summary judgment is denied in its entirety.

This constitute the Decision and Order of the Court.

Dated: September 2, 2014

SHARON A. M. AARONS, J.S.C.