Oguma v Hardwell Acquisitions LLC
2016 NY Slip Op 31383(U)
July 15, 2016
Supreme Court, New York County
Docket Number: 153625/2012
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
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MASAKO OGUMA,

Plaintiff,

-against-

HARDWELL ACQUISITIONS LLC, BERNSTEIN MANAGEMENT CORP., VENUS CONSTRUCTION LTD., EVEREST SCAFFOLDING INC.,

Defendants.
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Index No. 153625/2012
Motion Seq. 001

DECISION & ORDER

KELLY O'NEILL LEVY, J.:

Plaintiff Masako Oguma moves for partial summary judgment on the issue of liability against defendants Venus Construction Ltd. (Venus) and Everest Scaffolding Inc. (Everest) in this personal injury matter.[1] Venus and Everest oppose the motion.

The complaint alleges that Ms. Oguma sustained personal injuries on June 11, 2010 as she was exiting her workplace at 350 Seventh Avenue in Manhattan ("Premises"). As Ms. Oguma left the main entrance of the Premises at approximately 5:00 p.m., she was struck by a wooden block that fell from scaffolding constructed and maintained by defendants Venus and Everest. The wooden block that allegedly caused the injury was one of several that had been placed to mitigate rattling of the laminate sheeting in the scaffold which had disturbed residents in the area. Neither Ms. Oguma nor the defendants know what was directly responsible for causing the block to fall; however all acknowledge that the defendants were dismantling the

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[1] This action was discontinued as against defendants Hardwell Acquisitions LLC and Bernstein Management Corp. by stipulation dated October 13, 2015.

scaffolding at the time of the incident. After being struck by the block, Ms. Oguma was assisted by her colleagues and went to Mt. Sinai Hospital, where she was diagnosed with head and neck injuries.

Venus owner, Joseph Koniarz, testified that he witnessed the accident. Mr. Koniarz stated at his examination before trial that he witnessed "water" and "one piece of wood" strike the "lady" in "the shoulder." He claimed that an "orange cone" under the scaffolding and a "flag man" directing pedestrian traffic were present at the time of the incident. Mr. Koniarz also stated that Ms. Oguma was verbally warned to move out of the way. The foreman in charge of the crew dismantling the scaffolding, Juan Nunez ("Nunez"), corroborated Mr. Koniarz's claims during his EBT. Ms. Oguma disputes that she was adequately warned to move out of the way before the injury occurred.

Plaintiff has moved for partial summary judgment arguing that she has made a prima facie showing of negligence on the issue of liability under the doctrine of *res ipsa loquitor* and due to defendants' failure to inspect the scaffolding at issue. The defendants oppose the motion.

Discussion

"[T]he 'proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.'" *Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp.*, 70 A.D.3d 508, 510 (1st Dep't 2010), *quoting Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once the proponent of the motion meets this requirement, "the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 152 (1st Dep't 2012), *citing Alvarez v. Prospect*

Hosp., 68 N.Y.2d 320, 324 (1986). If there is a genuine issue of material fact or contrary inferences can be reasonably drawn from undisputed facts, the motion must be denied. *See Hammond v. State of N.Y.*, 157 A.D.2d 391, 393 (1st Dep't 1990).

As a preliminary matter, the court finds that the motion was timely filed within 120 days of the filing of the Note of Issue pursuant to CPLR 3212(a) and in accordance with this part's rules.[2] *See* CPLR § 3212(a). CPLR 3212 provides that

> Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than on hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Here, the Note of Issue was filed on July 17, 2015 and plaintiff's motion for summary judgment was filed approximately 90 days thereafter.

The defendant contends that the 60-day deadline set forth in the Preliminary Conference Order was still in effect at the time the motion was filed. However, the rule of this part is that summary judgment motions must be filed within 120 days after the filing of the NOI. Therefore, notwithstanding the 60-day deadline imposed in the preliminary conference order issued before this matter was administratively transferred to this court, the motion for summary judgment is considered timely.

Plaintiff argues that she is entitled to partial summary judgment pursuant to the doctrine of res ipsa loquitor. For a plaintiff to establish a prima facie case of negligence pursuant to the doctrine of res ipsa loquitur, he must establish that:

> (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; (3) it must not have been due to any voluntary action or contribution on the party of the plaintiff.

[2] Part 19 Rules are available at http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf.

Dermatossian v. New York City Transit Auth., 67 N.Y.2d 219, 226 (1986) (internal quotations omitted). If a plaintiff can establish all three elements of the doctrine of res ipsa loquitur, an inference of negligence is permitted but not compelled. *See Crockett v. Mid-City Mgmt. Corp.*, 27 A.D.3d 611, 612 (2d Dep't 2006).

The incident at issue is of a kind that ordinarily does not occur in the absence of someone's negligence. The doctrine of res ipsa loquitur "relieves a plaintiff from the burden of producing direct evidence of negligence, but it does not relieve a plaintiff from the burden of proof that the person charged with negligence was at fault." *Foltis, Inc. v. City of New York*, 287 N.Y. 108, 115 (1941). Here, there is substantial circumstantial evidence of the defendants' negligence. The defendants admitted that they saw a woman get hit with a wooden block that fell from the scaffolding, that the wooden block was not part of the approved designs by the city, that they failed to inspect the scaffolding on the day of the injury, and that they were dismantling the scaffolding when the injury occurred. Their only explanation about the cause of the incident that raises an issue as to negligence is speculation about a "coffee cup sized" amount of water that Mr. Koniarz observed falling on plaintiff along with the block. An inference of negligence is appropriate even when "[t]here was no testimony from either party as to the cause of the descent [of the falling material at issue]... and no showing of any prior actual or constructive notice to [the] defendant, of any defect." *Dittiger v. Isal Realty Corp.*, 290 N.Y. 492, 49 N.E.2d 890 (1943). A plaintiff winning summary judgment occurs "only in the rarest of res ipsa loquitor 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 v. Rais Const. Co.*, 7 N.Y.3d 203, 209 (2006).

There is little question that the instrumentality that caused this incident was within the exclusive control of the defendant. The defendants attempt to attribute the injury to the water Koniarz claimed he saw running down from the scaffolding at the time of the injury, over which they did not have exclusive control. While Koniarz mentioned having observed water coming down from the scaffolding, it does not present evidence that it was more likely than not that the stream of water was responsible for the incident. In *Dermatossian v. New York City Transit Authority*, the court stated that "the courts do not 'generally apply this requirement as it is literally stated' ... or as a fixed, mechanical or rigid rule ..." 67 N.Y.2d 219, 227 (1986)(quoting 2 Harper and James, Torts § 19.7, at 1086). Rather, the court stated that the purpose of the exclusivity requirement of *res ipsa loquitur* is to ensure that it is more likely than not that the defendants caused the accident. *See id.* at 227-28. Here, the defendants were exclusively responsible for erecting, maintaining, and disassembling the scaffolding. The defendants also acknowledge witnessing a block hit the plaintiff, and that they were in the process of disassembling the scaffolding when the incident occurred. The defendants have raised little doubt that the instrumentality that caused the incident was in their exclusive control.

While the plaintiff has met her burden of proof for the first two elements of the doctrine of res ipsa loquitur, she has failed to meet the third as there is a genuine issue of material fact regarding the plaintiff's contribution to the incident. The plaintiff alleges that even if she were found partially at fault for the incident, such fault would not be a bar to summary judgment. *See Tselebis v. Ryder Truck Rental, Inc.*, 72 A.D.3d 198, 201 (1st Dep't 2011) (concluding that a plaintiff's culpable conduct does not bar recovery in an action of personal injury). However, in *Thoma v. Ronai*, the Court of Appeals held that summary judgment is improper when there remains a triable issue of fact as to plaintiff's comparative negligence. *Thoma*, 82 N.Y.2d 736,

737 (1993). The recent trend in the First Department has been to follow the approach in *Thoma* rather than the approach in *Tselebis*. *See Maniscalo v. New York City Transit Auth.*, 95 A.D.3d 510, 511 (1st Dep't 2012) (holding that *Tselebis* is inconsistent with *Thoma v. Ronai*); *see also Calcano v. Rodriguez*, 936 N.Y.S.2d 185, 187 (1st Dep't 2012).

In *Balbuena v. New York Stock Exchange, Inc.*, the court held that a defendant was liable for injuries arising from the dismantling of scaffolding when there was no evidence of any warning signs, and no evidence the plaintiff knew of any potential dangers. 49 A.D.3d 374, 375-76 (1st Dep't 2008). However, in the current dispute, both sides have acknowledged that there was an orange cone underneath the scaffolding at the time of the alleged incident. Additionally, Koniarz and Nunez both testified at their examinations before trial that they attempted to warn the plaintiff to move out of the way prior to the incident, and that a flag man was present at the time of the incident. The only evidence plaintiff has provided to dispute the allegations of her own comparative negligence is to discredit such claims as speculation. Accordingly, the defendants have raised several triable issues of fact regarding the plaintiff's comparative fault, rendering summary judgment inappropriate here. *See Mead v. OTA Hotel Owner LP*, 76 A.D.3d 470, 471 (1st Dep't 2010)(issues of fact as to comparative fault precluded summary judgment); *see also Baker v. City of Elmira*, 271 A.D.2d 906, 909 (3d Dep't)(contradictory witness testimony is sufficient to raise a triable issue of fact).

Plaintiff further argues that defendants' failure to comply with the New York City Building Code supports her motion. The court has long "recognized a distinction between State statutes on the one hand, and local ordinances or administrative rules on the other, for purposes of establishing negligence." *Elliot v. City of New York*, 95 N.Y.2d 730, 734 (2001). A violation of a state statute, which imposes a specific duty to act, constitutes negligence per se. *See Long v.*

Forest-Fehlhaber, 55 N.Y.2d 154, 160 (1982). By contrast, violations of local ordinances or municipal codes are only evidence of negligence, and do not constitute a prima facie showing of liability against the violating party. *See Elliot*, 95 N.Y.2d at 734-37; *see also Major v. Waverly & Ogden, Inc.*, 165 N.E.2d 181 (1960) (stating that elevating the violation of a municipal ordinance to negligence per se would undermine the common law). Accordingly, summary judgment on the issue of liability due to the defendants' alleged violation of the NYC Building Code is unwarranted.

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied.

This constitutes the decision and order of the court.

ENTER:

Dated: July 15, 2015

Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY