Giardino v 32-42 Broadway LLC
2016 NY Slip Op 31870(U)
October 5, 2016
Supreme Court, New York County
Docket Number: 150414/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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ELAINE GIARDINO,

Plaintiff,

INDEX NO. 150414/12

-against-

32-42 BROADWAY LLC, 32-42 BROADWAY OWNER LLC, CAMMEBY'S MANAGEMENT COMPANY LLC, LITERACY ASSISTANCE CENTER, and ABC CORP., (name being fictitious and unknown).,

Defendants.

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JOAN A. MADDEN, J.:

In this action for damages for personal injuries, defendants 32-42 Broadway LLC ("32-42 Broadway"), 32-42 Broadway Owner LLC ("Broadway Owner") and Cammeby's Management Co, LLC ("Cammeby's") move for summary judgment dismissing the complaint and all cross-claims against them; leave to amend their answer to assert cross-claims against co-defendant Literacy Assistance Center ("Literacy") for contractual and common law indemnification, breach of contract and contribution; and if the amendment is granted, for summary judgment on their cross-claim against Literacy for contractual indemnification (motion seq. no. 004). In a separate motion, defendant Literacy moves for summary judgment dismissing the complaint and all cross-claims against it (motion seq. no. 005).[1] Plaintiff opposes both motions, and without making a formal cross-motion, asserts she is "cross-moving" for summary judgment. Co-defendants

[1]Motion sequence numbers 004 and 005 are consolidated for determination herein.

oppose Literacy's motion, Literacy opposes co-defendants' motion, and all defendants oppose plaintiff's purported "cross-motion."

Plaintiff alleges she was injured on March 16, 2009 while attending a training session at the premises of defendant Literacy, on the 10th floor at 32 Broadway, New York, New York, when a window blew into the room and struck her. Defendant Literacy occupied the 10th floor and a portion of the 11th floor of the building at 32 Broadway pursuant to a lease dated November 28, 2000 with the owner/landlord at that time, defendant 32-42 Broadway.[2] Defendant 32-42 Owner purchased the building in October 2005, and defendant Cammeby's was the managing agent of the building at the time of the accident.

Defendants 32-42 Broadway, Broadway Owners and Cammeby's argue they are entitled to summary judgment dismissing the complaint on the ground that they neither created nor had notice of the alleged defective condition of the window. Defendant 32-42 Broadway additionally argues it is entitled to summary judgment based on the undisputed fact that it was not the owner of the building at 32-42 Broadway on the date of plaintiff's alleged accident, March 19, 2009. In support of the motion, the owners and managing agent submit an attorney's affirmation; the pleadings; plaintiff's Verified Bill of Particulars; plaintiff's deposition testimony; the deposition testimony of Aron Weber who is employed by managing agent Cammeby's; an affidavit from Aron Weber; the lease between 32-42 Broadway and Literacy; the deposition testimony of Ira Yankwitt who is employed by Literacy; discovery demands and responses; the deed transferring ownership of the building from 32-42 Broadway LLC to 32-42 Broadway Owner LLC;

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[2]According to Cammeby's Regional Director Aron Weber, Literacy terminated its lease early and vacated the premises on June 25, 2011 and moved to the building at 39 Broadway.

defendants' Proposed Amended Answer; plaintiff's Note of Issue; and a June 9, 2009 letter from Liberty Mutual Insurance Company on behalf of the owners and managing agent advising Literacy that "you or your general liability carrier take over the handling of this claim without reservation."

Defendant Literacy argues it is entitled to summary judgment dismissing the complaint on the ground that it owed no duty to plaintiff, since the dangerous condition of the window was a structural defect that was the landlord's statutory and contractual responsibility. Literacy also argues that it neither created nor had notice of the dangerous condition of the window. In support of its motion, Literacy submits an attorney's affirmation; the pleadings; plaintiff's Verified Bill of Particulars; plaintiff's deposition testimony; the deposition testimony of Aron Weber, Cammeby's witness; the deposition testimony of Ira Yankwitt, Literacy's witness; plaintiff's Supplemental Bill of Particulars; the Management Agreement between Cammeby's and 32-42 Broadway; the Incident Report regarding plaintiff's accident signed by J. Brogan; an invoice from Eagle Windows, Inc., dated April 2, 2009; the lease between 32-42 Broadway and Literacy; an affidavit from Literacy's Chief Financial Officer Craig Tozzo; Weber' s affidavit; plaintiff's Note of Issue; Literacy's responses to plaintiff's discovery demands; Literacy's motion to strike the Note of Issue; and co-defendants' responses to Literacy's discovery demands

In opposition to both summary judgment motions and in support of her purported "cross-motion" for summary judgment, plaintiff submits a two-page attorney's affirmation, the Incident Report prepared and signed by J. Brogan, the April 2, 2009 invoice from Eagle Windows Inc. and a two-page memorandum of law. Plaintiff argues there are no factual issues as to

defendants' liability, since this is a "classic" res ipsa loquitur case, so notice is not required. Plaintiff also argues that based on the lease and the parties' course of conduct as evidenced by the invoice showing that the repairs to the window were billed directly to Cammeby's, the owner and the tenant in possession "commonly exercised control over the window" and had "exclusive control" of the falling window that caused plaintiff's injuries.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also Winegrad v. New York University Medical Center, 64 NY2d 851, 852 (1985). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. See Alvarez v. Prospect Hospital, supra at 324.

Defendants owners, managing agent and tenant have all made a sufficient prima facie showing that they are not liable for plaintiff's injuries. First, it is undisputed that defendant 32-42 Broadway was not the owner of the premises on the date of the accident. The deed conclusively establishes that 32-42 Broadway transferred its interest in the property to Broadway Owner on October 10, 2005.

Second, based on the affidavits, deposition testimony and documentary evidence, defendants Broadway Owner, Cammeby's and Literacy have established that they neither created, nor had actual or constructive notice of the dangerous and defective condition of the window that caused plaintiff's injuries. See Matas v. Clark & Wilkins Industries, Inc, 61 AD3d 582 (1st

Dept), lv app den 13 NY3d 703 (2009); Williams v. Church Homes Assocs, LP, 49 AD3d 386 (1st Dept 2008); Marszalkiewicz v. Waterside Plaza, LLC, 35 AD3d 176 (1st Dept 2006).

At her deposition, plaintiff testified as to the following. She is employed by Literacy Volunteers of Westchester and Rockland, as Vice-President of Curriculum and Training, and is responsible for program management and training. On March 16, 2009, she was attending a training event at defendant Literacy Assistance Center, sponsored by Literacy and the New York State Department of Education. The training took place in a "large meeting room" on the 10th floor of 32 Broadway, and approximately 80 to 100 people were in attendance. She was seated "right along the windows" about two to three feet away from them, and described the windows as "four feet wide and maybe eight feet tall" with "heavy construction, glass, metal frame." She described the day as "windy" and prior to the accident, she heard "a constant heavy wind sound that was in the background." She testified that the "window blew in and hit me," and she quickly bent forward and the window "landed right on top of me." The window did not shatter and the "whole window," the frame and the glass, was on her back, and several people had to lift it off her body. Before the accident, nothing indicated that something out of the ordinary was about to occur. Plaintiff previously attended training sessions at Literacy's premises prior to March 16, 2009, and had not complained about any of the windows on the 10th floor, including the window that fell on her, and was not aware of any prior similar accidents.

Aron Weber, the regional director of defendant Cammeby's Management Company since 2006, testified at his deposition as follows. Cammeby's is the managing agent for the building at 32 Broadway and manages the day-to-day operations and maintenance pursuant to a contract with

the owner. On March 16, 2009, Joseph Brogan was the chief engineer for the building and in 2012, he retired. Weber identified Brogan's signature on the Incident Report, and explained that he supervised Brogan but Brogan was employed by the owner. Weber did not know what caused the window to fall, and prior to March 16, 2009, there were no similar incidents of windows falling inside the building and no complaints about loose or falling windows. In his affidavit, Weber states that none of the windows on the 10th floor were replaced from the time he began working for Cammeby's in 2006 to the date of the accident. Generally, twice a year, Safety Building Cleaning Corp. cleans the exterior and interior of the windows at 32 Broadway, and if the Safety cleaning people had found a problem with any of the windows, they would have reported the problem to Brogan and Brogan would have advised Weber. Weber did not receive any complaints from Safety about the windows on the 10th floor prior to March 19, 2009, including the subject window, and Brogan did not advise him of any complaints from Safety regarding the windows. Weber produced invoices from Safety showing that the windows at 32 Broadway were cleaned in July 2007, April 2008 and July 2008.

Weber explained that if Safety or anyone else had reported a problem with the windows to him or Brogan, a work order would have been generated and Eagle Windows would have been called to perform the repairs. Weber identified the April 2, 2009 invoice from Eagle Windows for post-accident repairs to the window on the 10th floor, and produced a computer print out of the services provided by Eagle and the expenses related to those services for two years prior to the accident. According to those records, Eagle did not perform any repairs to windows on the 10th floor during that two-year period. Weber reviewed Cammeby's work orders for the 10th

floor for two years prior to March 16, 2009, and found no complaints or repairs relating to any problems with the windows on the 10th floor, including the subject window. He also reviewed Literacy's tenant file and found no complaints regarding the windows prior to March 16, 2009, including the window involved in the accident.

Literacy's witness, Ira Yankwitt, testified as to the following. Yankwitt was employed by Literacy from 2000 to 2007, and in 2012, was re-hired as the Executive Director. Although he was not working for Literacy in 2009, Yankwitt explained that Literacy Assistance Center is a non-profit organization that provides training and technical assistance to adult literacy teachers, program managers and programs. He explained that Literacy used the space on the 10th floor primarily as a "training space and meeting room," and that "[w]e may have at times, very infrequently, as a courtesy to other organizations allowed them to use the space." Since Yankwitt was not employed by Literacy in 2008 or 2009, he did not know if any other entity had used the 10th floor training space during that time. With respect to the windows in the 10th floor training room, when he was working for Literacy from 2001 to 2007, he "recall[ed] opening and closing them during my time there," explaining that "[i]f we were having a training and it was hot, we might have opened them a crack" and "[i]f we noticed they were opened a crack and it was cold, we might have closed them." Yankwitt did not have any difficulty during the times he opened and closed the windows, and did not "recall any noteworthy difficulties with the windows."

Literacy submits an affidavit from Craig Tozzo, its Chief Financial Officer for 18 years, who retired in May 2014. Tozzo explains that from the time Literacy moved into 32 Broadway and until the date of the accident, he had an office in the building, but not on 10th floor. He did not become aware of plaintiff's accident until the day after it occurred or "later," and on the day of

the accident, the Executive Director at that time, Elyse Barbell, "handled the matter." Tozzo states that before Literacy moved into the space at 32 Broadway, and from that time up to the date of the accident, Literacy did not perform or have any work performed on windows on the 10th floor, including the window in question. He explains that the inspection and repair of the building structures, including the windows, were the responsibility of the building owner and its managing agent, Cammeby's, and if "there were any problems or issues with the building structure on the premises, including the windows, it would have been reported to myself or the former Executive Director, Elyse Barbell . . . . usually by telephone, to the Managing Agent, Cammeby's who in 2009 had offices across the street from 32 Broadway at 45 Broadway"; in 2009, no procedures were in place to document those calls to the managing agent. Tozzo states that from the time Literacy moved into 32 Broadway until the date of the accident, there were no prior complaints, no prior accidents or incidents, no problems and no repairs with respect to the windows on the 10th floor, including the window at issue.

Defendants and plaintiff submit an Incident Report dated March 16, 2009, written and signed by Joseph Brogan, the chief engineer for 32 Broadway on the date of the accident. The Incident Report identifies plaintiff Elaine Giardino as the "person involved," and describes the incident as follows:

> Was informed by Jamie that she received a call from Literacy Group a tenant on the 10th fl at 32 Bway, that a window had fallen in and struck a woman. I responded to the 10 fl and found the [window] from the north leaning up against the radiator cover, with bottom edge on the floor. The balances were in a angled position left side down right side up. I was told it had just blown in. A woman was near window and was struck on the Rt shoulder. An ambulance had been called by someone from the Literacy Group. Woman declined the ambulance and left with one of the staff members from the Literacy Group.

The parties also submit an invoice dated April 2, 2009 from Eagle Windows Inc., and addressed to Cammeby's Management Co, LLC, which lists the job location as "32 Broadway 10th floor" and describes the work performed as "repair of 1 (one) existing window by changing the balance and broken hardware." The record includes documents produced in discovery that are referenced in Weber's affidavit and cover the two-year period prior to the accident. Those documents include three invoices from Safety Building Cleaning Corp. for cleaning the windows at 32 Broadway in July 2008, April 2008 and July 2007; a computer printout from the "Vendor History Ledger" listing five invoices from Eagle Windows for work performed in 2007, 20008 and 2009; and numerous work orders or "tickets" detailing Literacy's various complaints to Cammeby's about the leased premises and the actions taken by Cammeby's to address those complaints.

Based on the foregoing, defendants have sufficiently established that neither the owner, managing agent nor tenant created, or had actual or constructive notice of the dangerous condition of the window that fell on plaintiff. Specifically defendants have shown that the window was not replaced or repaired prior to the accident, and that there were no prior complaints about the window, no prior similar accidents, and no prior similar dangerous conditions. See Matas v. Clark & Wilkins Industries, Inc, supra; Williams v. Church Homes Assocs, LP, supra; Marszalkiewicz v. Waterside Plaza, LLC, supra; but see Hermina v. 2050 Valentine Ave LLC, 120 AD3d 1131 (1st Dept 2014) (triable issues of fact whether owners and managers had constructive notice of defective condition of window where prior to the accident, defendants were aware of problems with windows staying in upright position based on the replacement of balances in plaintiff's own windows and other windows in the building); Radnay v. 1036 Park Corp, 17

AD3d 106 (1st Dept 2005) (triable issue of fact as to constructive notice of defective window based on handyman's testimony that plaintiff's wife told him a month before the accident that the windows were "sliding down," and testimony indicating that the owner and managing agent knew that other windows in the building had defective springs).

In opposition, plaintiff has failed to raise a triable issue of fact as to notice. Plaintiff does not allege or offer any proof that defendants owner, managing agent or tenant had actual or constructive notice of the dangerous condition of the window. Rather, plaintiff relies solely on the doctrine of *res ipsa loquitur* to support her argument that notice is not required. Plaintiff's counsel asserts that defendants had exclusive control of the instrumentality, i.e., the falling window, that caused plaintiff's injuries, and that she "did absolutely nothing but sit in her chair next to the subject window when it dislodged from its hinges and fell on her."

Res ipsa loquitur is a rule of circumstantial evidence that permits the jury to infer negligence based solely upon the occurrence of an accident, on the theory that "some accidents by their very nature would ordinarily not happen without negligence." Dermatossian v. New York City Transit Authority, 67 NY2d 219, 226 (1986). A plaintiff invoking the doctrine must establish three essential elements: 1) the accident must be of a kind that ordinarily does not occur in the absence of negligence; 2) the instrumentality or agency causing the accident must be in defendant's exclusive control; and 3) the accident must not be due to any voluntary action or contribution by plaintiff. See id at 226. If all three elements are satisfied, *res ipsa loquitur* is applicable, and notice of the dangerous or defective condition is inferred and plaintiff need not establish actual or constructive notice. See Ezzard v. One East River Place Realty Co, LLC, 129 AD3d 159, 162 (1st Dept 2015).

Here, the first and third elements are established, as a window does not generally fall out into a building in the absence of negligence, and plaintiff was simply seated near the window when it fell onto her. However, contrary to plaintiff's assertion, this is not a case where any of the defendants, the tenant, owner or managing agent, had exclusive control of the instrumentality that caused the accident. Literacy's Executive Director Ira Yankwitt testified that Literacy is a non-profit organization that provides training and technical assistance to adult literacy teachers, program managers and programs, and that the room on the 10th floor where plaintiff was injured, was used by Literacy primarily as a "training space and meeting room." Plaintiff testified that on March 19, 2009, she and approximately 80 to 100 other people were participating in a training session on the 10th floor of 32 Broadway sponsored in part by Literacy. She also testified that prior to March 19, 2009, she had attended other Literacy training sessions at the same location including one about three months earlier. Yankwitt testified that when he worked for Literacy from 2001 to 2007, Literacy permitted other organizations to use the room on the 10th floor, albeit infrequently, and that he had personally opened and closed the windows in the room on the 10th floor in order to regulate the temperature.

Based on the foregoing, it is clear that the window that caused the accident was located in a room that was used on a regular basis, including on the day of the accident, for training sessions attended by many people, all of whom had access to the window. Under these circumstances, plaintiff has failed to establish control of the window by defendants of "sufficient exclusivity to fairly rule out the chance that the defect in the [window] was caused by some agency other than defendants' negligence." Dermatossian v. New York City Transit Authority, supra at 228. Thus, since the proof does "not adequately exclude the chance" that the window was damaged by one or

more of the participants in the training sessions with access to the window, the instrumentality that caused the accident was not in defendants' exclusive control and the doctrine of *res ipsa loquitur* is inapplicable. Id; see e.g. Pintor v. 122 Water Realty, LLC, 90 AD3d 449 (1st Dept 2011) (defendants lacked exclusive control where defect in window could have been caused by any of the realtors, prospective tenants, and other people who entered apartment while it was vacant); Sowa v. S.J.N.H. Realty Corp, 21 AD3d 893 (2nd Dept 2005) (plaintiff failed to establish the window was under defendants' exclusive control, as according to her own account, an unidentified construction worker opened the window at her request, before the accident, which gave rise to an inference that he could have caused it to malfunction); Radnay v. 1036 Park Corp, supra (where accident occurred as a result of a defective window in plaintiff doctor's office and he or someone else was in a position to cause the defect, the window and its mechanism were not within defendant's exclusive control).

To support her assertion as to exclusive control, plaintiff cites the Appellate Division Fourth Department decision in Brink v. Anthony J. Costello & Son Development, LLC, 66 AD3d 1451 (4th Dept 2009). Plaintiff's reliance on that decision is not persuasive. Brink involved a door that came off its hinges. In determining that an issue of fact existed as to whether the door was in defendant's exclusive control, the Fourth Department cited the Appellate Division First Department decision in Pavon v. Rudin, 254 AD2d 143 (1st Dept 1993). Pavon also involved a door that came off its hinges, but plaintiff submitted an expert affidavit that the accident was caused by the installation of the wrong hinge on the door, or by a hinge that was defective or improperly installed. The First Department held that the IAS court "improperly assumed the

'instrumentality' in question was the door, rather than the pivot hinge which caused the door to fall," reasoning that "[t]he appropriate target of inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached." Id at 146. The First Department found that even though the door was used by employees and clients, "the malfunctioning pivot hinge was concealed when the door was closed and was also located too high up to be within easy reach of anyone without a stepladder," which "lessens the likelihood that an employee or member of the public tampered with it." Id.

Here, in contrast, plaintiff offers only her attorney's unsupported and speculative assertions that the window "dislodged from its hinges" and "fell out . . . due to broken hinges and balance, both of which were in the exclusive control [of] defendants." Plaintiff fails to submit an expert affidavit or any other competent proof that hinges were in fact a component of the window's mechanism. Nor does plaintiff submit any competent proof that the window fell out as a result of broken hinges, if any, or broken balances, or any other malfunctioning hardware or mechanism that was not generally accessible to and handled by the many people who used the 10th floor training room. Under the holding in Pavon, such proof is necessary to raise an issue of fact as to whether defendants' had exclusive control over the instrumentality that caused the accident. See id. Although the invoice from Eagle Windows indicates that the window was repaired post-accident "by changing the balances and broken hardware," without an expert affidavit or an affidavit or sworn testimony from the person who performed the repairs, the invoice alone is insufficient to raise an issue of fact as to the cause of the accident and defendants' exclusive control.

Thus, given the inapplicability of *res ipsa loquitur* and the absence of notice of the defective condition, plaintiff cannot maintain an action for negligence against any of the defendants, and defendants are entitled to summary judgment dismissing the complaint. In view of this conclusion, the court need not reach the issues raised by defendants as to whether the owner or the tenant was responsible for the maintenance and repair of the window. Moreover, given the dismissal of the complaint, the branch of the motion by defendants 32-42 Broadway, Broadway Owner and Cammeby's for leave to amend their answer to assert cross-claims against Literacy for contractual and common law indemnification, breach of contract and contribution, and if the amendment had been granted, for summary judgment on their cross-claim against Literacy for contractual indemnification, is denied as moot. Finally, even though plaintiff did not make a formal cross-motion for summary judgment, since the Court has determined that defendants are entitled to summary judgment, plaintiff is not entitled to such relief.

Accordingly, it is

ORDERED that the branch of the motion (motion seq. no. 004) by defendants 32-42 Broadway LLC, 32-42 Broadway Owner LLC and Cammeby's Management Co, LLC, for summary judgment dismissing the complaint and all cross-claims as against them is granted, and the complaint and all cross-claims are dismissed as against defendants 32-42 Broadway LLC, 32-42 Broadway Owner LLC and Cammeby's Management Co, LLC, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the motion (motion seq. no. 004) by defendants 32-42 Broadway LLC, 32-42 Broadway Owner LLC and Cammeby's Management Co, LLC for leave

to amend their answer and for summary judgment against co-defendant Literacy Assistance Center, is denied as moot; and it is further

ORDERED that the motion (motion seq. no. 005) by defendant Literacy Assistance Center for summary judgment is granted and the complaint and all cross-claims are dismissed as against defendant Literacy Assistance Center, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that to the extent plaintiff "cross-moves" for summary judgment, the cross-motion is denied.

DATED: October 5, 2016

ENTER:

HON. JOAN A. MADDEN
J.S.C.