272 Realty Holding Corp. v Madison
2016 NY Slip Op 32577(U)
December 21, 2016
Supreme Court, New York County
Docket Number: 150077/2009
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

272 REALTY HOLDING CORP.,

Plaintiff,

-against-

BISHOP S.C. MADISON AND HIS SUCCESSOR TRUSTEES, AS TRUSTEE FOR THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH, BISHOP C.M. BAILEY, AS TRUSTEE FOR THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE OF THE CHURCH ON THE ROCK OF THE APOSTOLIC FAITH, UNITED 125 MANAGEMENT LLC, CRG MANAGEMENT, LLC, AND MATTHEW ADAM PROPERTIES, INC.,

Defendants.

Index No.: 150077/2009
DECISION/ORDER
Motion Seq. No. 8 and 9

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for summary judgment, plaintiff's cross-motion to strike defendants' answer for spoliating evidence and for partial summary judgment on liability, and plaintiff's motion to amend the complaint.

Papers	**Numbered**
Defendants' Notice of Motion	1
Plaintiff's Notice of Cross-Motion	2
Defendants' Affirmation in Opposition	3
Defendants' Affirmation in Reply	4
Plaintiff's Reply to Cross-Motion	5
Plaintiff's Notice of Motion to Amend the Complaint	6
Defendants' Affirmation in Opposition	7
Plaintiff's Reply Affirmation in Further Support of Motion to Amend Complaint	8

Goldberg & Rimberg, PLLC, New York (Steven A. Weg of counsel), for plaintiff.
Law Office of James J. Toomey, New York (John P. Clark of counsel), for defendant Bishop C.M. Bailey, as Trustee for the United House of Prayer for All People of the Church on the Rock of the Apostolic Faith and defendant Matthew Adam Properties, Inc.

Gerald Lebovits, J.

The court consolidates motion sequences 8 and 9 for disposition.

Plaintiff, 272 Realty Holding Corp., rented a portion of the building located at 272-280 West 125th Street in New York County (the building), namely, the ground floor and a portion of the basement (the premises) from defendant Bishop S.C. Madison and his successor trustees, as Trustee for the United House of Prayer for all People of the Church on the Rock of the Apostolic Faith (Bishop S. C. Madison).[1] (Defendants' Notice of Motion, Exhibit H.) Plaintiff leased part of the premises to Uptown Retail Corp. (Uptown). Uptown operated a clothing store inside the premises called Uptown Jeans.

According to plaintiff's complaint, on May 13, 2009, "a hot water heater, pipe and/or pipe fitting burst, leaked and/or malfunctioned causing water to enter the Plaintiff's Premises." (Plaintiff's Complaint, at ¶ 52.) Plaintiff alleges that defendants' behavior — their actions and negligence — caused the water damage. (Plaintiff's Complaint, at ¶ 54.) Plaintiff asserts that defendants installed the hot water system and piping in the premises. (Plaintiff's Complaint, at ¶¶ 55-64.) Before May 13, 2009, defendants allegedly caused, created, or permitted the condition that led to the water heater/pipe to burst, leak, and malfunction. (Plaintiff's Complaint, at ¶ 65.) Plaintiff asserts that defendants carelessly, recklessly, and negligently created a dangerous and defective condition; defendants had actual or constructive notice, or both, of the dangerous condition. (Plaintiff's Complaint, at ¶¶ 72-75.) Because of the leak, plaintiff supposedly suffered water damage. (Plaintiff's Complaint, at ¶ 53.) Plaintiff could not use the premises and normally operate the business. (Plaintiff's Complaint, at ¶¶ 66, 69, 70, 71.) Plaintiff states that it suffered damages no less than $300,000. (Plaintiff's Complaint, at ¶ 77.)

After the May 2009 leak but before this action began, Uptown assigned all its claims against Bishop S.C. Madison and his successor trustees to plaintiff. In exchange for the assignment, Uptown stopped paying plaintiff use and occupancy.

Plaintiff discontinued this action against defendants United 125 Management LLC and CRG Management LLC.

Defendants, Bishop C.M. Bailey, as trustee for the United House of Prayer for all People of the Church on the Rock of the Apostolic Faith (UHOP), and Matthew Adam Properties, Inc. (Matthew Adam), now move for summary judgment to dismiss plaintiff's complaint and all cross-claims[2] on the following grounds: (1) plaintiff has no standing to sue because no evidence exists that plaintiff owned any of the inventory that was allegedly damaged; (2) no evidence exists that plaintiff sustained any other monetary damages for remediation of the water leak or interruption of its business — these claims are not adequately set forth in plaintiff's bill of particulars; (3) no evidence exists that defendants had constructive or actual notice of any defect or caused or created any defective condition; and (4) plaintiff's claim is barred by waiver of subrogation. Defendants argue that no material issues of fact exist for trial.

Plaintiff cross-moves for partial summary judgment on liability and to strike defendants' answer for spoliating evidence.

---

[1] Bishop S.C. Madison has never appeared in this action.

[2] The court notes that no cross-claims against defendants have been asserted.

Plaintiff also moves under CPLR 1002, 1013, and 3025 to amend its complaint to add Uptown as a plaintiff. Plaintiff also seeks to amend its complaint to add an alternative cause of action: defendants' negligence in damaging Uptown's property.

The court will address plaintiff's motion to amend and defendants' summary-judgment motion on the issue of standing before addressing the remaining issues in the parties' respective motions.

I. Plaintiff's Motion to Amend the Complaint

Plaintiff's motion for leave to amend the complaint to add "Uptown Retail Corp." as a plaintiff in this action and to add an alternative cause of action to the complaint — that Uptown has a claim for negligence — is denied.

Uptown assigned its rights to plaintiff, as follows:

> "All claims and causes of action that Uptown Retail Corp. had, has or may in the future have against the United House of Prayer For All People of the Church On The Rock of the Apostolic Faith, its trustees, successors and/or assigns, relating to the flood that occurred on or about May 13, 2009, causing property and water damage to the first floor and basement area located at 272-280 West 125th Street, New York, New York, used by Uptown Retail Corp. as a clothing store (the 'Assigned Property')." (Plaintiff's Notice of Motion to Amend the Complaint, Exhibit B.)

Fred Harari, Uptown's authorized signatory, executed the assignment on May 2, 2009.[3] As consideration for the assignment, Uptown stopped "pay[ing] future use and occupancy to [plaintiff] for the use of the certain first floor and basement area of 272-280 West 125th Street, New York, New York." (Plaintiff's Notice of Motion to Amend the Complaint, Exhibit B.)

Plaintiff has no basis to add Uptown as a party or to add an alternative cause of action for negligence. Uptown no longer has the right to seek damages from defendants. The 2009 assignment gave plaintiff the right to seek damages from defendants.

Defendants' argument — that plaintiff lacks standing to bring this action — is thus unpersuasive. Plaintiff, not Uptown, is the proper plaintiff.

Defendants argue that the assignment is invalid because it was executed on May 2, 2009, long before the May 13, 2009, flood. But plaintiff explains that the May 2, 2009, date on the assignment is a scrivener's error. The assignment was executed on June 2, 2009, the same date as plaintiff's verified complaint. (Plaintiff's Notice of Motion to Amend the Complaint, Affirmation in Support, at ¶ 5, n 1.) Harari explains that Uptown assigned its rights to plaintiff

---

[3] Harari is also Vice President of plaintiff 272 Realty Holding Corp.

after the store was flooded. The court accepts plaintiff's explanation for the discrepancy with the date. The court finds that Uptown's assignment to plaintiff is valid.

Defendants argue that they never learned of Uptown's assignment of rights to plaintiff until plaintiff's current motion to amend the complaint in which plaintiff attached the assignment as an exhibit. Plaintiff states that defendants had the opportunity to obtain the document — Uptown's assignment — during disclosure and that defendants had an opportunity to ask questions at examinations before trial (EBT). But defendants are not seeking a penalty or sanction for plaintiff's alleged failure to disclose the information to defendants. Nor are defendants seeking additional disclosure and EBTs relating to Uptown's assignment. No motion seeking this relief is before this court.

Defendants' remaining arguments — ha plaintiff's motion is procedurally defective; plaintiff cannot use intervention as a mechanism to revive a stale claim; amending the complaint would prejudice defendants given that the statute of limitations has expired and the note of issue has been filed; plaintiff has not mentioned the assignment in its complaint or bill of particulars — are unpersuasive.

Plaintiff's motion for leave to amend the complaint is denied.

II. Defendants' Summary-Judgment Motion and Plaintiff's Cross-Motion for Partial Summary Judgment

A court will grant summary judgment if it clearly appears that no material and triable issue of fact exists. (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957].) Likewise, the moving party "cannot obtain summary judgment by pointing to gaps in the [non-moving party's] proof." (*Coastal Sheet Metal Corp. v Martin Assoc.*, 63 AD3d 617, 618 [1st Dept 2009].) Issues of fact must be determined at trial.

Defendants' summary-judgment motion is denied in part and granted in part as explained below. Plaintiff's cross-motion for partial summary judgment is denied.

A. Standing

Defendants' first argument on summary judgment is unavailing. Defendants argue that plaintiff's claim for damage to its inventory and contents should be dismissed because plaintiff never owned the items. Defendants argue that plaintiff is not a proper plaintiff, a real party in interest. Defendants argue that plaintiff has no standing. But the court resolved that issue. Given Uptown's assignment of rights to plaintiff, as discussed above, plaintiff has standing to sue. That aspect of defendants' summary-judgment motion for dismissal of plaintiff's complaint on the basis that plaintiff lacks standing is denied.

B. Defendants' Liability

For a court to hold a landlord liable for a defective condition on the premises, the landlord "must have actual or constructive notice of the condition for such a period of time that,

in the exercise of reasonable care, [the landlord] should have corrected it." (*Payless Discount Ctr. v 25-29 N. Broadway Corp.*, 83 AD2d 960, 961 [2d Dept 1981], citing *Putnam v Stout*, 38 NY2d 607, 612 [1976].) To establish constructive notice of an alleged defect, the alleged defect must be visible and apparent and exist for a sufficient length of time before the accident to permit the defendants' employees to discover and remedy it. (*Gordon v Am. Museum of Nat. History*, 67 NY2d 836, 837 [1986].)

A plaintiff may show proof of notice, as well as all the elements of negligence, through circumstantial evidence under the doctrine of res ipsa loquitur. (*Payless Discount Ctr.*, 83 AD2d at 961.) Res ipsa loquitur applies when (1) the event is of a kind that ordinarily does not occur in the absence of someone's negligence; (2) the event is caused by an agency or instrumentality that is within defendant's exclusive control; and (3) the event was not caused by plaintiff's voluntary action or contribution. (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 495 [1997]; *Corcoran v Banner Super Market Inc.*, 19 NY2d 425, 430 [1967]; *accord Barney-Yeboah v Metro-North Commuter Railroad*, 120 AD3d 1023, 1024 [1st Dept 2014].)

Res ipsa loquitur "gives rise to a permissible inference of negligence, and does not justify either a directed verdict or summary judgment." (*Notice v Regent Hotel Corp*, 76 AD2d 820, 820 [1st Dept 1980], citing *Foltis, Inc. v City of New York*, 287 NY 108 [1941].) But "'[t]here may be cases where the prima facie proof is so convincing that the inference of negligence arising therefrom is inescapable if not rebutted by other evidence.'" (*Id.*, quoting *Foltis*, 287 NY at 121; *accord Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327, 327 [1st Dept 1989] ["The proprietary lease requires defendant to maintain, operate and repair the plumbing, heating and sprinkler systems and to maintain the common areas in good repair. The court properly granted summary judgment based on the doctrine of res ipsa loquitur which gave rise to a permissible inference of negligence which was not rebutted by evidentiary proof in admissible form."].)

The Court of Appeals has noted that

> "[r]es ipsa loquitur is a phrase that, perhaps because it is in Latin, has taken on its own mystique, although it is nothing more than a brand of circumstantial evidence. Viewed in that light, the summary judgment (or directed verdict) issue may also be properly approached by simply evaluating the circumstantial evidence. If that evidence presents a question of fact as to the defendant's liability under the *Kambat/ Corcoran* test for res ipsa loquitur, the case should go to trial. If the circumstantial evidence does not reach that level and present a question of fact, the defendant will prevail on the law." (*Morejon v Rais Constr. Corp.*, 7 NY3d 203, 211-212 [2006].)

If the exact cause of the injury is unknown, the doctrine of res ipsa loquitur permits the jury to infer negligence: "[I]t is unnecessary to prove the exact cause of the injury in order to hold the owner liable since the circumstances show that the owner 'is responsible for all reasonably probable causes to which the event can be attributed.'" (*De Witt Prop. v City of N.Y.*, 44 NY2d 417, 426 [1978] [citations omitted]; *accord Shinshine Corp. v Kinney Sys.*, 173 AD2d

293, 294 [1st Dept 1991] ["A burst water pipe, even though unexplained, is not the type of occurrence which, by itself and unattended by other exceptional circumstances, creates an inference of negligence so strong as to leave no serious doubt that it could have been avoided by the exercise of due care."].) The owner's negligence will not be inferred if proof exists that third parties "had access to the instrumentality . . . unless there is sufficient evidence that the third parties probably did nothing to cause the injury." (*De Witt Prop.*, 44 NY2d at 426 [citations omitted].)

Defendants argue that it neither had any notice of a water leak nor any duty to remedy the "water piping." (Defendants' Notice of Motion, Affirmation in Support, at ¶ 24.) Defendants argue that it did not create, install, or maintain the water piping. (Defendants' Notice of Motion, Affirmation in Support, at ¶ 24.) Defendants' counsel states that because the water tank was against a wall, defendants could not see it or access it. (Defendants' Notice of Motion, Affirmation in Support, at ¶ 24.) Defendants also argue that any earlier water leaks — before the May 2009 leak — were small and caused by grease traps in the church's kitchen, rather than from the water tank. (Defendants' Notice of Motion, Affirmation in Support, at ¶ 25.)

Defendants' evidence demonstrates that they did not have actual or constructive notice of an alleged defect. Defendants have met their burden on summary judgment. Plaintiff attempts to show through circumstantial evidence — res ipsa loquitor — that defendants had notice of a defect. But plaintiff does not meet the three prongs to the res ipsa loquitor doctrine. As explained below, plaintiff's proof shows only that material issues of fact exist.

Omar Barrett testified at his examination before trial (EBT) that he was UHOP's employee. (Defendants' Notice of Motion, Exhibit E, at 9.) He was responsible for maintenance on the premises: the elevators, the HVAC system, and any other "situations that come[s] up . . . [he] take[s] care of it." (Defendants' Notice of Motion, Exhibit E, at 9-10.) Barrett testified that pastor Eldom A. Monroe was responsible for regularly maintaining the building. (Defendants' Notice of Motion, Exhibit E, at 13.)

Barrett testified that plaintiff's business was limited to the first floor and basement and that defendant UHOP, a church, was on the second floor. (Defendants' Notice of Motion, Exhibit E, at 17.) He testified that in May 2009, he was contacted about a leak in the building; he does not remember who contacted him, but he remembers that someone from the church contacted him. (Defendants' Notice of Motion, Exhibit E, at 20.) He testified that the church had a side entrance — on Frederick Douglas — separate from plaintiff's entrance. (Defendants' Notice of Motion, Exhibit E, at 21-22.) The building's second floor has the church's main sanctuary, the church's cafeteria, pastor's office, and secretary's office. (Defendants' Notice of Motion, Exhibit E, at 22.) The cafeteria, which is used by church members, has a kitchen. (Defendants' Notice of Motion, Exhibit E, at 23.) He explained that the water tank is located "in a room inside of the kitchen" (the water-tank room). (Defendants' Notice of Motion, Exhibit E, at 24.) The water-tank room has a door with a lock on it, but the door is not locked. (Defendants' Notice of Motion, Exhibit E, at 24.) He testified that the water-tank room's dimensions are a little more than five feet by five feet. (Defendants' Notice of Motion, Exhibit E, at 27.) He testified that he never installed the water tank or serviced or repaired it. (Defendants' Notice of Motion, Exhibit E, at 25-26.)

Barrett explained that on the day of the incident, he saw water on the second floor of the building and a hole in the wall in the water-tank room. (Defendants' Notice of Motion, Exhibit E, at 29.) He testified that the hole he observed in the wall did not exist before the May 2009 incident. (Defendants' Notice of Motion, Exhibit E, at 99.) The water tank was less than a foot away from the wall. (Defendants' Notice of Motion, Exhibit E, at 30.) He observed that the pipe that had been connected to the water tank was no longer connected to the tank. (Defendants' Notice of Motion, Exhibit E, at 36-37.) The water was about two inches high, running from the water-tank room into the kitchen and cafeteria. (Defendants' Notice of Motion, Exhibit E, at 33.) The cafeteria had carpet and the carpet was wet. (Defendants' Notice of Motion, Exhibit E, at 33-34.) Barrett testified that he met Francis Rivera, UHOP's employee, on the second floor and that Rivera had shut off the water. (Defendants' Notice of Motion, Exhibit E, at 32.)

Barrett testified that he called his supervisor, Apostle Hebrew Wiggins, UHOP's national maintenance supervisor, about the leak. (Defendants' Notice of Motion, Exhibit E, at 35.) Immediately thereafter, Barrett contacted Apostle Green, who works out of the Washington headquarters, and who handles the realty property. (Defendants' Notice of Motion, Exhibit E, at 51.)

Barrett testified that he called Senid Plumbing (Senid) and that Senid replaced the water tank. (Defendants' Notice of Motion, Exhibit E, at 67.) Barrett testified that he never had to call Senid before the incident about any water-tank issues. (Defendants' Notice of Motion, Exhibit E, at 68.)

Barrett testified that before this incident, a grease trap in the second-floor kitchen had backed up and leaked. (Defendants' Notice of Motion, Exhibit E, at 69-70.) It had happened only once. (Defendants' Notice of Motion, Exhibit E, at 72.) He does not remember when the grease trap had leaked.

He testified that before the incident he never observed rust or holes on the water tank. (Defendants' Notice of Motion, Exhibit E, at 81.) He was not aware of any issues with the water tank. (Defendants' Notice of Motion, Exhibit E, at 93.)

Barrett testified that Matthew Adam was defendant UHOP's property manager. (Defendants' Notice of Motion, Exhibit E, at 89-90.)

Hebrew Wiggins, Sr. testified that he has been UHOP's employee since November 1999. (Defendants' Notice of Motion, Exhibit G, at 10.) He testified that he is the regional manager for maintenance for 130 churches nationwide. (Defendants' Notice of Motion, Exhibit G, at 11.) Wiggins testified that he is specifically responsible for the churches in the "Florida district, Virginia, District of Columbia, Pennsylvania, New York, New England," and whatever other church the bishop tells him to check on. (Defendants' Notice of Motion, Exhibit G, at 13.) Wiggins testified that he would travel with the bishop to the building about four times a year. (Defendants' Notice of Motion, Exhibit G, at 19.) Wiggins testified that whenever the bishop asked him to check on a church, he would do so and report back to the bishop. (Defendants'

Notice of Motion, Exhibit G, at 19.) Wiggins testified that UHOP owns the subject building. (Defendants' Notice of Motion, Exhibit G, at 21.)

Wiggins testified that Barrett was not responsible for maintaining the building. (Defendants' Notice of Motion, Exhibit G, at 25.) Wiggins testified that the individual church was responsible for maintaining the property. (Defendants' Notice of Motion, Exhibit G, at 25.) Wiggins did not know whether UHOP had hired a management company to take care of the building. (Defendants' Notice of Motion, Exhibit G, at 26.)

Wiggins does not remember anything about a May 2009 leak in the building. (Defendants' Notice of Motion, Exhibit G, at 27.)

Plaintiff's evidence, however, contradicts defendants' evidence on the issue of actual or constructive notice. Through circumstantial evidence — res ipsa loquitor — plaintiff attempts to show that defendants had notice of a defect — a water tank/water piping — to cause water damage to plaintiff's premises. But plaintiff's proof is not "so convincing that the inference of negligence arising . . . is inescapable." (*See Notice*, 76 AD2d at 820, citing *Foltis*, 287 NY at 121 [1941].) At best, plaintiff's proof shows material issues of fact are in dispute.

According to Harari, the premises had "numerous prior floods . . . . [he] was told at least once that such floods resulted from clogged grease traps on the second floor. [He] do[es] not believe that all of those floods were due to clogged grease traps but rather from other issues on the second floor." (Plaintiff's Notice of Cross-Motion, Affidavit of Fred Harari, Oct. 29, 2014, at ¶ 6.) At his EBT, Harari testified that the store's manager, Harry Latchana, contacted him about the May 2009 leak. (Defendants' Notice of Motion, Exhibit D, at 28-30.) Harari testified to the following: "[W]e had thought it was from the kitchen cause this is the first time we had leaks in the store. Nothing to this magnitude but there had been many leaks in the store prior to this leak]." (Defendants' Notice of Motion, Exhibit D, at 32-33.) Harari testified: "There had been leaks all the years [plaintiff was in the premises], there's always been issues with the grease trap that was above us, there was a kitchen upstairs. There were many times I guess that would get clogged but never to the extent of this leak." (Defendants' Notice of Motion, Exhibit D, at 47.) Harari does not know what caused the May 2009 leak. (Defendants' Notice of Motion, Exhibit D, at 47.)

Harari did not explain at his EBT when the earlier leaks occurred in relation to the May 2009 leak. Nor did he explain what caused the earlier leaks. The person with the most knowledge appears to be the store's manager, Latchana. But the EBT transcript, if any, for Latchana is not attached to the parties' moving papers. In any event, Harari's testimony creates an issue of fact for trial.

Plaintiff does not meet all three prongs to res ipsa loquitor.

Plaintiff has not met the first prong to the res ipsa loquitor doctrine — tha the event is of a kind that ordinarily does not occur absent someone's negligence. The First Department has interpreted this first prong to mean "that the accident would not ordinarily have occurred without neglect of some duty owed to the plaintiff." (*Nabson v Nordall Realty Corp.*, 257 AD2d 659, 661

[1st Dept 1939]; *accord Swain v 383 West Broadway Corp.*, 216 AD2d 38, 38 [1st Dept 1995] ["Plaintiff's paintings were destroyed when a steam pipe burst in the storage area of defendant's building. The evidence was sufficient to support the jury's conclusion that defendant had constructive notice of the deteriorated condition of the steam pipes, and, we would add, was also sufficient to establish liability under the doctrine of res ipsa loquitur."].)

Plaintiff relies on the testimony of non-party witness, Robert Giuliante. He testified that the water tank had a hole in it and that the hole looked like deterioration. (Plaintiff's Notice of Cross Motion, Exhibit B at 18-19.)

Defendants' counsel, however, argues that because the water tank was against a wall, defendants could not see or access it. (Defendants' Notice of Motion, Affirmation in Support, at ¶ 24.) Defendants' employee, Barrett, testified that before the incident he never observed rust or holes on the water tank. (Defendants' Notice of Motion, Exhibit E, at 81.) Defendants deny that the tank had deteriorated.

Barrett testified that he was not aware of any issues with the water tank. (Defendants' Notice of Motion, Exhibit E, at 93.) Barrett testified that he observed a hole in the wall in the water-tank room. (Defendants' Notice of Motion, Exhibit E, at 29.) He testified that the hole he observed in the wall did not exist before the May 2009 incident. (Defendants' Notice of Motion, Exhibit E, at 99.) The water tank was less than a foot away from the wall. (Defendants' Notice of Motion, Exhibit E, at 30.) He observed that the pipe that had been connected to the water tank was no longer connected to the tank. (Defendants' Notice of Motion, Exhibit E, at 36-37.)

The court cannot determine whether the water damage to the premises would not have occurred in the absence of defendants' negligence — neglect of duty to maintain a water tank/water pipes.

It is unclear from the parties' evidence whether the flood occurred because the water tank was deteriorated and that defendants had not properly maintained the water tank/pipes or whether the pipe connecting the water tank to the wall/pipes in the wall burst. In the former scenario, defendants would have had notice of the deterioration. In the latter scenario, defendants would have had no notice.

Also problematic is the second prong to res ipsa loquitor — that the event is caused by an agency or instrumentality that is within defendant's exclusive control. It is unclear who had exclusive control over the water tank/water pipes in the building and whose responsibility it was to maintain the water tank and pipes. Plaintiff has not met the second prong to the res ipsa loquitor doctrine.

On its summary-judgment motion, defendants submit the EBT transcript of Ira Meister. According to Meister, President of Matthew Adam, Matthew Adam is a property-management company that manages residential and commercial properties. (Defendants' Notice of Motion, Exhibit F, at 9-10.) He testified that Matthew Adam provided accounting services to UHOP from April 30, 2004, until 2010. (Defendants' Notice of Motion, Exhibit F, at 19, 21.) Meister explained that even though Matthew Adam's contract with UHOP, Article 1, provides that

Matthew Adam was hired to manage and operate the building, Matthew Adam was not responsible for managing the building. (Defendants' Notice of Motion, Exhibit F, at 24.) After Meister was contacted about the May 2009 leak, he contacted Apostle Green, UHOP's Director of Management. (Defendants' Notice of Motion, Exhibit F, at 30.) Meister told Apostle Green to "get somebody over there to make a repair and take care of it . . . ." (Defendants' Notice of Motion, Exhibit F, at 30.) Rivera also contacted Meister and Rivera told him about the leak. (Defendants' Notice of Motion, Exhibit F, at 32.) Meister testified that Meister's "duty was to contact the United House of Prayer which I did." (Defendants' Notice of Motion, Exhibit F, at 33.) He testified that it was not his responsibility to contact anyone to repair the leak. (Defendants' Notice of Motion, Exhibit F, at 33.)

He testified that he had visited the building more than 20 times. (Defendants' Notice of Motion, Exhibit F, at 34.) He testified that the first floor had five stores. (Defendants' Notice of Motion, Exhibit F, at 36.) He visited the stores to "drop[] off rent bills." (Defendants' Notice of Motion, Exhibit F, at 37.) He handled the "leasing . . . for the church, renewals basically." (Defendants' Notice of Motion, Exhibit F, at 39.) Matthew Adam was responsible for "collect[ing] the rents from the tenants and process[] them and at the end of the month sen[d] a check down to Washington." (Defendants' Notice of Motion, Exhibit F, at 63.) Meister did not know anything about a water tank. (Defendants' Notice of Motion, Exhibit F, at 52.)

In its cross-motion for partial summary judgment, plaintiff submits UHOP's agreement with Matthew Adam in which Matthew Adam agreed to manage the subject premises.

At his EBT, Meister testified about Matthew Adam's written agreement with UHOP. He testified that with respect to section 3.1 of Matthew Adam's agreement with UHOP, Matthew Adam handled only the financial aspect for the building. (Defendants' Notice of Motion, Exhibit F, at 43.) With respect to section 3.8 of the parties' agreement — the alterations, repairs, and maintenance section — he testified that the section did not apply to this building. (Defendants' Notice of Motion, Exhibit F, at 45.) He testified that sections 3.12 and 7.2 also did not apply to the building. (Defendants' Notice of Motion, Exhibit F, at 46.) Meister testified that UHOP managed the property, namely, Apostle Green and Omar Bennett. (Defendants' Notice of Motion, Exhibit F, at 44.)

The agreement, section 10.4, provides that the "agreement constitutes the entire agreement between the parties hereto with respect to the subject matter . . . . This Agreement may be amended or modified only by a written instrument executed by Property Manager and Owner." (Plaintiff's Notice of Cross-Motion, Exhibit F.) Meister, however, testified that he had an oral directive from Bishop Madison when Matthew Adam signed the agreement in 2004: Matthew Adam must "not deal with the church property or the building. . . . only collect the rents . . . . don't manage the building . . . . don't get involved in any affairs of the church. We just take care of collecting money."[4] (Defendants' Notice of Motion, Exhibit F, at 47.) The church would "directly handle[] the property." (Defendants' Notice of Motion, Exhibit F, at 48.)

[4] The court notes that Bishop S.C. Madison has never appeared in this action.

Defendants' counsel, who represents both UHOP and Matthew Adam, concedes, in his affirmation in opposition to plaintiff's cross-motion, that Mathew Adam's "management of the property did not extend beyond rent collection and bill paying, and that even that duty ended shortly after the date of the incident." (Defendants' Affirmation in Opposition, at 5.) Defendants' counsel relies on Meister's EBT transcript.

Plaintiff argues that UHOP and Matthew Adam are both liable. But the court cannot tell if UHOP or Matthew Adam had exclusive control over the instrumentality — the water tank/pipes in the building.

Plaintiff, however, meets the third prong to the res ipsa loquitor doctrine — that the event was not caused by plaintiff's voluntary action or contribution. It is undisputed that plaintiff's actions did not cause the leak; it did not contribute to the damages to the premises. Plaintiff "had never had anything to do with the water tank on the second floor . . . which was used for the United House's cafeteria." (Plaintiff's Notice of Cross-Motion, Affidavit of Fred Harari, Oct. 29, 2014, at ¶ 7.) Plaintiff had never been in the second floor kitchen before the May 2009 flood. (Plaintiff's Notice of Cross-Motion, Affidavit of Fred Harari, Oct. 29, 2014, at ¶ 7.)

Although plaintiff has not met all the prongs to res ipsa loquitor, materials issues of fact warrant a trial on the issue of defendants' liability.

C. Plaintiff's Damages

Defendants argue that plaintiff cannot prove that it suffered any damages. Defendants argue that plaintiff's never owned the goods allegedly damaged. Defendants argue that because plaintiff never repaired the water damage, plaintiff may not recover damages for the repair work to the premises. Defendants also argue that Harari conceded that plaintiff never paid Servpro of Central Manhattan (Servpro) to clean up the premises. Defendants argue that no proof suggests that plaintiff suffered lost profits. Defendants assert that Harari has no business records to substantiate plaintiff's damages. In support of this argument, defendants submit plaintiff's complaint, bill of particulars, and EBT transcripts.

In opposition, plaintiff argues that defendants neither pursued the issue of damages at the EBTs nor sought the information during disclosure. According to plaintiff, defendants never questioned Harari at his EBT about the damages to the goods. Plaintiff also asserts that Uptown paid plaintiff $20,000 a month in use and occupancy in 2009; after the leak, Uptown stopped paying use and occupancy. Plaintiff asserts that extensive litigation ensued between plaintiff and defendants for nonpayment of rent.

Plaintiff's bill of particulars provides that "[p]laintiff computed the sum on the attached report for repair and remediation, plus damaged inventory, plus inability to conduct business as usual." (Defendants' Notice of Motion, Exhibit C, at ¶ 11.) Plaintiff's bill of particulars includes "reports and [a] CD." (Defendants' Notice of Motion, Exhibit C, at ¶ 11.) Defendants, however, do not attach to their motion the reports and the CD mentioned in plaintiff's bill of particulars.

But from the evidence defendants submits, the court notes that plaintiff never asserted loss of rental income in its complaint or in its bill of particulars. Thus, plaintiff has not asserted a claim for loss of rental income.

Defendants' argument that plaintiff never owned the goods is no longer an issue given the court's earlier discussion of Uptown's assignment to plaintiff.

Damaged Inventory

Defendants own evidence demonstrates that plaintiff suffered damages. Barrett, defendant UHOP's employee, testified at his EBT about plaintiff's damages. Barrett observed water in plaintiff's premises, on the first floor. (Defendants' Notice of Motion, Exhibit E, at 41.) He observed water coming down from the second floor ceiling to the first floor. (Defendants' Notice of Motion, Exhibit E, at 41.) Barrett testified that he observed wet clothes in plaintiff's premises, on racks and on tables. (Defendants' Notice of Motion, Exhibit E, at 45-46.) He observed wet walls, wet floor, standing water on the floor, and ceiling tiles that had fallen. (Defendants' Notice of Motion, Exhibit E, at 47.) He does not know what damage, if any, occurred in the basement. (Defendants' Notice of Motion, Exhibit E, at 50.)

Most, if not all, of Harari's EBT is about plaintiff's damages. Harari testified at his EBT that the store's manager, Latchana, created a six-page document, itemizing the inventory that was damaged. (Defendants' Notice of Motion, Exhibit D, at 55-57.) Harari testified that the inventory that was salvaged was sold to customers, but he has no receipts, tax records, or business filings. (Defendants' Notice of Motion, Exhibit D, at 45.) He testified that the rest of the inventory was destroyed and thrown out: "Most of it was garbage." (Defendants' Notice of Motion, Exhibit D, at 171.) He testified that all the carpeting was damaged. (Defendants' Notice of Motion, Exhibit D, at 44.)

Plaintiff also provides photographs of the damages. (Plaintiff's Notice of Cross-Motion, Exhibit A.)

Plaintiff produced to defendants all the invoices for the merchandise it purchased that was damaged in the flood. That plaintiff did not pay some of the invoices and has outstanding balances is not critical to plaintiff's claim for damages. (*See Ever Win, Inc. v 1-10 Industry Assoc.*, 111 AD3d 884, 885 [2d Dept 2013] ["The fact that the plaintiff had not yet paid for a portion of the subject goods did not render the jury's award a windfall for the plaintiff."].)

Assuming that plaintiff proves defendants' liability, the court notes that plaintiff will have a difficult time proving its damages. Harari had no proof that the items listed on the invoices were the same items that were in the premises on May 13, 2009, when they were allegedly damaged. The parties have not submitted any EBT transcript from Latchana, the person with the most knowledge. According to Harari, Latchana bought most of the inventory in the store. (Defendants' Notice of Motion, Exhibit D, at 52, 57.) After the flood, Lachana sold some of the inventory that plaintiff could salvage. Harari's personal knowledge of the damages is limited and speculative.

Defendants' motion as to plaintiff's damaged inventory is denied.

Repair and Remediation

Harari does not know what Casella Construction Corporation (Casella) did, if at all, in terms of remediation to the premises. (Defendants' Notice of Motion, Exhibit D, at 75-76.) It appears that Casella estimated the clean-up at $96,523. (Defendants' Notice of Motion, Exhibit H.) Plaintiff provides no proof that Casella did any remediation work. (*Pop Cowboy, Inc. v 175 W. 73rd St. Realty Corp.*, 292 AD2d 300, 301 [1st Dept 2002] ["Damages based on the $16,500 estimate for redoing the tenant's floor should not have been awarded, there being no dispute that such work was never done."].) Plaintiff's claim for $96,523, based on an estimate, is dismissed.

Harari testified that Servpro worked in the basement area. No person or entity, other than plaintiff's employees and Latchana, cleaned the first floor. (Defendants' Notice of Motion, Exhibit D, at 77-79.) Harari testified that Servpro has not yet been paid. (Defendants' Notice of Motion, Exhibit D, at 74.) Servpro's bill is for $14,571.43. Defendants' Notice of Motion, Exhibit H.) Plaintiff may seek damages for its remediation — Servpro's remediation work — even though plaintiff has not yet paid Servpro. (*See Ever Win, Inc.*, 111 AD3d at 885.)

Defendants' motion as to plaintiff's repair and remediation work is granted in part and denied in part.

Lost profits

Harari conceded at his EBT that he has no records to substantiate plaintiff's business interruption. (Defendants' Notice of Motion, Exhibit D, at 168.) Plaintiff has no proof that it lost profits. Plaintiff has no records of Uptown's sales from January 1, 2009, to May 2013. (Defendants' Notice of Motion, Exhibit D, at 93.) Plaintiff's claim for lost profits is dismissed.

Defendants' motion as to plaintiff's lost profits is granted.

D. Waiver of Subrogation

Defendants argue in conclusory fashion that plaintiff's complaint should be dismissed because it is barred by waiver of subrogation: Plaintiff's lease with UHOP contains a waiver-of-subrogation clause and thus bars plaintiff's claim. Defendants argue that plaintiff was required to procure an insurance policy that would protect it against the type of loss plaintiff alleges in its complaint.

According to plaintiff, it obtained insurance from Tower Insurance Company of New York (Tower). (Defendants' Notice of Motion, Exhibit H.) Harari, however, states in conclusory fashion that it did "not recover any money from its own insurance policy in this case." (Plaintiff's Notice of Motion to Amend the Complaint, Exhibit B.)

Defendants do not sufficiently explain their argument. Defendants have not met their burden to warrant dismissing plaintiff's complaint.

In any event, the Court of Appeals has held that "[s]ubrogation, an equitable doctrine,

allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." (*Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654, 660 [1997].) Tower, the insurer, has not commenced a subrogation action asserting a claim against defendants for negligence.

III. Plaintiff's Cross-Motion to Strike Defendants' Answer for Spoliating Evidence

Plaintiff cross-moves for spoliation sanctions. Plaintiff argues that defendants' answer should be stricken because defendants discarded the water tank. UHOP's contractor, Senid Plumbing, removed the water tank and discarded it. According to plaintiff, it never had an expert inspect the tank.

Defendants' counsel states that defendant Matthew Adam had nothing to do with the tank. Defendants' counsel states that neither UHOP nor Matthew Adam were in control of the tank when litigation commenced.

A party moving for spoliation sanctions "must establish that (1) the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) the records were destroyed with a 'culpable state of mind,' which may include ordinary negligence; and (3) the destroyed evidence was relevant to the moving party's claim or defense." (*Duluc v AC & L Food Corp.,* 119 AD3d 450, 451 [1st Dept 2014], citing *VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012].) A duty to preserve evidence is triggered once a party reasonably anticipates litigation, that is, when the "party is on notice of a credible probability that it will become involved in litigation." (*VOOM HD Holdings LLC*, 93 AD3d at 43.)

Courts will impose sanctions for destroying evidence against an entity responsible for destroying the evidence. (*Miller Realty Assocs. v Amendola*, 51 AD3d 987, 989 [2d Dept 2008] ["Supreme Court providently exercised its discretion in declining to sanction the plaintiff for spoliating of evidence, as it was not responsible for the discarding of the dipping tank and contaminated soil by the remediation company hired by its new tenant."]; *McLaughlin v Brouillet*, 289 AD2d 461, 461 [2d Dept 2001] ["The plaintiff, who was prejudiced along with Chrysler by the vehicle's destruction [by the vehicle's owner who destroyed the vehicle without the plaintiff's knowledge], was not responsible for the spoliation."]; *Platinum Equity Advisors, LLC v SDI, Inc.*, 51 Misc3d 1230 [A], *9, 2016 NY Slip Op 50887 [U], *9 [Sup Ct, NY County 2016] ["The facts in this case . . . do not demonstrate the 'practical control' found by the First Department. The Celerant Entities are not parties to this action. SDI is the sole shareholder of the Celerant Entities—in fact, it is not a shareholder at all. There is no demonstration that SDI is involved in formulating Celerant's business strategy and no admission that SDI could obtain Celerant's documents on request."], quoting *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 118 AD3d 428, 431 [1st Dept 2014] [concluding that a subsidiary's electronically stored information was sufficiently under the corporation's "practical control" to trigger a duty to ensure that evidence was adequately preserved], *revd on other grounds* 26 NY3d 543, 553-554 [2015] ["On this record, we see no reason to disturb the unanimous finding of the lower courts that the MP defendants had sufficient control over VarigLog to trigger a duty on its part to preserve the ESI.

Nor is there any basis to disturb the findings of fact by the Appellate Division that the MP defendants were negligent in failing to discharge that duty."].)

Sanctions are inappropriate if a party does not discard evidence to frustrate disclosure and cannot be presumed to be responsible for the evidence's disappearance. (*Cordero v Mirecle Cab Corp.*, 51 AD3d 707, 709 [2d Dept 2008] ["Here, the plaintiffs, who were never in possession of the MRI films, did not discard the MRI films in an effort to frustrate discovery. . . . the plaintiffs cannot be held responsible for a nonparty's accidental loss of the MRI films. Finally, we note that the plaintiffs were prejudiced along with Mirecle by the loss of the MRI films."].)

Courts determine whether to impose spoliation sanctions by looking at "the extent that the spoliation of evidence may prejudice a party, and whether a particular sanction is necessary as a matter of elementary fairness." (*Dulac*, 119 AD3d at 451-452.) An extreme sanction, such as the court's striking a party's pleading, is appropriate only when the missing evidence deprives a moving party of the ability to establish the party's case. (*Squitieri v City of NY*, 248 AD2d 201, 202 [1st Dept 1998].)

It is undisputed that defendant UHOP hired Senid, a non-party, to remove the water tank after the leak. Also undisputed is that Senid discarded the water tank: Giuliante testified that the tank was "junked." (Plaintiff's Notice of Cross Motion, Exhibit B at 19.) Also undisputed is that when plaintiff commenced this action, the water tank was on Senid's property.

At his EBT, Barret testified that the tank was removed from the building "maybe within a week" from the flood, which occurred on May 13, 2009. (Defendant's Notice of Motion, Exhibit E at 73.) UHOP hired Senid to remove the tank. According to Giuliante, Senid "held onto this water tank from May until July of 2009." (Plaintiff's Notice of Cross Motion, Exhibit B at 20.) Plaintiff served the summons and complaint on defendants on June 22, 2009. (Plaintiff's Notice of Cross Motion, Exhibit D.) Plaintiff did not sue Senid.

Photographs date stamped July 2, 2009, show that the water tank was on Senid's property before it was discarded. (Plaintiff's Notice of Cross Motion, Exhibit C.) Giuliante testified at his EBT that Senid usually piles up tanks until a "junk man" removes them. (Plaintiff's Notice of Cross Motion, Exhibit B, at 20.) Assuming that the date on the photographs is accurate, Senid had not yet discarded the water tank as of July 2, 2009 — 10 days after plaintiff commenced this action. Harari states that by July 2, 2009, he notified UHOP's representatives that plaintiff commenced this lawsuit. On July 8, 2009, Senid issued an overdue invoice to UHOP for cutting and removing the water tank from the boiler room. (Plaintiff's Notice of Cross Motion, Exhibit E.)

Plaintiff argues that defendants "had the presence of mind to take pictures of the tank . . . but took no action to preserve the tank. Defendants' conduct is obviously willful and should not go unpunished." (Plaintiff's Reply to Cross-Motion, at ¶ 4.)

It is unclear who took the photographs. It is undisputed that defendants turned over the photographs to plaintiff during disclosure. Defendants have never denied that its agents took the photographs.

Defendants — in hiring Senid as a non-party contractor to remove the water tank — had practical control over Senid to ensure that the water tank be preserved. (*Pegasus Aviation I, Inc.*, 118 AD3d at 431.) Given that defendants hired Senid to remove the water tank, defendants knew it would be discarded. Also, given that defendants' agents took photographs of the water tank 10 days after plaintiff commenced this action, the court assumes that defendants had access and control over the tank regardless whether the tank was on Senid's property. Defendants could have obtained the water tank from Senid on July 2, 2009, before Senid discarded it.

Only plaintiff has been prejudiced by the destruction of the water tank. Defendants have not been prejudiced.

Plaintiff has demonstrated that the party with control over the evidence — defendants — had an obligation to preserve the water tank at the time it was destroyed.

Although plaintiff does not prove that defendants intentionally discarded the water tank, defendants had an obligation to warn Senid not to discard it and therefore defendants were negligent in preserving the water tank. The second prong of the spoliation test is satisfied by defendants' negligence in preserving the water tank for trial. (*Duluc*, 119 AD3d at 451.)

Plaintiff argues that without the physical water tank, it is impossible for an expert to form an opinion about the cause of the flood. Plaintiff has not sufficiently established that defendant acted willfully or contumaciously in discarding the water tank. But defendants' conduct amounts to negligence. The water tank's unavailability has impaired plaintiff's ability to establish defendants' liability about the water tank's condition. The third prong of the test for spoliation is satisfied. The water tank is relevant to the plaintiff's claim in this matter. (*Duluc*, 119 AD3d at 451.)

Plaintiff, however, has not been severely deprived of proving defendants' negligence and can still prevail through other evidence. Therefore, the court is not striking defendants' answer but instead the trial court shall issue an adverse inference charge to the jury about defendants' failure fully to preserve the water tank. An adverse inference charge restores balance to the action and deters defendants from using the absence of the water tank to their own advantage. (*See Baldwin v Gerard Ave., LLC*, 58 AD3d 484, 485 [1st Dept 2009].) Plaintiff's cross-motion is granted only to the extent that the trial court shall issue an adverse-inference charge to the jury.

As discussed above, who had control over the water tank will be determined at trial. Although defendants' counsel states that Matthew Adam had no control over the tank, inconsistencies in the evidence prevent this court from determining which defendant, UHOP or Matthew Adam, or both, is responsible for the spoliation of evidence.

Accordingly, it is

ORDERED that defendants' CPLR 3212 motion (sequence no. 8) for summary judgment is denied in part and granted in part. That aspect of defendants' motion dismissing plaintiff's

claim for repair and remediation (by Casella Construction Corporation) and for plaintiff's claim for lost profits is granted. Defendants' motion is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion (sequence no. 8) is granted in part and denied in part. It is granted only to the extent that an adverse-inference charge shall be given at trial informing the jury of defendants' failure to preserve the water tank. That aspect of the motion for partial summary judgment and striking defendants' answer is denied; and it is further

ORDERED that plaintiff's motion (sequence no. 9) for leave to amend the complaint is denied; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon all parties.

Dated: December 21, 2016

J.S.C.
HON. GERALD LEBOVITS
J.S.C.