Jaisinghani v One Vanderbilt Owner, LLC
2017 NY Slip Op 32300(U)
October 27, 2017
Supreme Court, New York County
Docket Number: 160545/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2

Justice

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PRIYA JAISINGHANI,

Plaintiff,

- v -

ONE VANDERBILT OWNER, LLC, WALDORF EXTERIORS, LLC, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK

Defendant.

INDEX NO. 160545/2015

MOTION DATE 3/28/2017

MOT. SEQ. NOS. 001 and 002

DECISION AND ORDER

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On motion sequence No. 001, the following e-filed documents, listed by NYSCEF document number 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 110,

were read on this application to/for Judgment - Summary

On motion sequence No. 002, the following e-filed documents, listed by NYSCEF document number 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 109, 111,

were read on this application to/for Discovery

In this personal injury action, plaintiff Priya Jaisinghani alleges that, on September 24, 2015, she was walking in front of 51 East 42nd Street, near the corner of Vanderbilt Avenue, when a 14" square plexiglass tile fell from the underside of a sidewalk shed and struck her in the head. Under motion sequence No. 001, plaintiff moves for partial summary judgment in her favor on the issue of liability. Defendants oppose. The motion is **denied**. Under motion sequence No. 002, defendants move for an open commission to depose plaintiff's employer in Washington D.C. and for various other discovery related relief, based upon, among other things,

plaintiff's refusal to submit to an independent medical examination by a neuropsychologist. Plaintiff opposes. The motion is **granted, in part**.

I. Plaintiff's motion for partial summary judgment on liability is denied.

Plaintiff claims that she is entitled to summary judgment on liability based on the doctrine of res ipsa loquitur. Res ipsa loquitur is "a brand of circumstantial evidence" (*Morejon v Rais Const. Co.*, 7 NY3d 203, 211 [2006]) that allows a fact finder to infer negligence "merely from the happening of an event and the defendant's relation to it" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *see Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 162-163 [1st Dept 2015]). The plaintiff in a res ipsa loquitur case is relieved from having to offer any direct evidence of negligence, such as through proof of actual or constructive notice of a dangerous condition. *See Sterbinsky v 780 Riverside Dr., LLC*, 139 AD3d 458 (1st Dept 2016); *Rojas v New York Elevator & Elec. Corp.*, 150 AD3d 537, 537-538 (1st Dept 2017). For res ipsa loquitur to apply, "(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 part of the plaintiff." *Corcoran v Banner Super Mkt.*, 29 NY2d 425, 430 (1967) (internal quotation marks and citation omitted); *see Kambat v St. Francis Hosp.*, 89 NY2d at 494; *Brown v Howson*, 129 AD3d 570, 571 (1st Dept 2015); *Aponte v City of New York*, 143 AD3d 552 (1st Dept 2016).

However, the doctrine is most often invoked in the context of jury charges rather than on summary judgment. "[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only when 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 NY3d at 211; *see e.g. Fofana v New Jersey Tr. Corp.*, 146 AD3d 443 (1st Dept 2017) (granting summary judgment where car rolling down a hill led to inescapable inference of negligence); *Spearin v Linmar, L.P.*, 137 AD3d 571, 572 (1st Dept 2016) (denying summary judgment); *Zecevic v LAN Cargo S.A.*, 137 AD3d 465 (1st Dept 2016) (denying summary judgment); *Levin v Mercedes-Benz Manhattan, Inc.*, 130 AD3d 487 (1st Dept 2015) (granting summary judgment where garage door coming down on plaintiff gave rise to inescapable inference of negligence); *Stubbs v 350 E. Fordham Rd., LLC*, 117 AD3d 642, 644 (1st Dept 2014) (denying summary judgment).

At the time that plaintiff walked beneath the sidewalk shed, the building located at 51 East 42nd Street was part of a demolition and construction project across the street from Grand Central Terminal. Defendants concede that One Vanderbilt Owner LLC was the owner of the project, defendant Tishman Construction Corporation of New York was the construction manager for the project, and defendant Waldorf Exteriors LLC was the demolition contractor. None of the named defendants built the sidewalk bridge. Rather, the sidewalk bridge was built by a separate contractor named "Safway." Plaintiff's assertion that she was hit in the head by a falling object while she was walking underneath the sidewalk shed in front of defendants' project satisfies her initial burden on the motion. The circumstances strongly suggest that this is a situation where plaintiff's own actions could have played no role in the happening of the accident, that defendants are in the best position to explain what happened, and that the accident does not ordinarily happen in the absence of negligence. Accordingly, the burden shifted to defendants to show why this is not a rare instance in which summary judgment on res ipsa loquitur is appropriate.

Defendants submit, among other things, the affidavit of Bernard Lorenz, an engineering expert. Lorenz avers that the sidewalk bridge was built around the light fixture that ultimately came loose and fell on plaintiff's head. He asserts that it is standard practice in the construction industry to build around fixtures such as the one that came loose, and to presume that fixtures are properly constructed and will remain attached to buildings. Lorenz explains that sidewalk bridges are meant to protect pedestrians from debris associated with demolition, but not from falling objects that are unrelated to the demolition.

Lorenz's opinion that defendants satisfied their duty of care to plaintiff, because sidewalk bridges are not designed to protect pedestrians from pieces of a falling fixture, somewhat misses the point that entities that own buildings have a general duty to ensure that parts of those buildings do not come loose and fall to the sidewalk below. The precise moment when demolition began is of no moment, since the duty to ensure that pieces of buildings do not fall on pedestrians is present at all times. There is no question that defendants collectively owned and controlled the subject building, the work site, and, by extension, the fixture. *Compare Sacca v 41 Bleecker St. Owners Corp.*, 51 AD3d 586 (1st Dept 2008). Indeed, Lorenz opines that "[t]he accident in this case occurred for reasons wholly unrelated to the sidewalk shed, and unrelated to any construction or demolition activities at the site." That may very well be so. If, indeed, the accident happened merely because a piece of the building came loose and fell on plaintiff, liability could still attach under the doctrine of res ipsa loquitur, since it was defendants' responsibility, as the owner of the building, to "exercise reasonable care in maintaining the façade of the building through a program of inspection." *Stubbs v 350 E. Fordham Rd., LLC*, 117 AD3d at 644. Defendants' obligation over the building as it existed did not vanish merely because it purchased the lot solely in order to eventually demolish the building. By purchasing

the building, defendants undertook responsibility to exercise reasonable care to maintain it until demolition took place.

In that regard, Lorenz opines that the object could have fallen as a result of "defective design, defective manufacture, defective or improper installation, damage from the elements and damage from vibration resulting from street or subway traffic, or any number of unknown events on one of New York City's busiest streets." "Such defect(s) could have existed and remained latent in the light fixture for weeks, months or years without incident before allowing the light fixture cover to fall." Lorenz further indicates that his inspection revealed the specific possibility that "water or other elements had penetrated the light fixture, which could have affected the bonding," but that this exposure "would not have been readily observable from the outside of the light fixture, even close up." Lorenz also posits that, even if the fixture was "initially installed properly, . . . one or more of the types of events mentioned above could have caused, or combined to cause, the light fixture cover to debond," and that "such defects would not have been readily observable by anyone." According to Lorenz, the tile also could have come loose because of a screw or fastener that was either not properly secured or threaded or was became dislodged, and that this condition "may well have been impossible to observe from the outside of the light fixture, even close up."

Thus, the evidence suggests the possibility that the object fell as a result of a defect that existed in the building long before defendants became involved with the project, purchased it, and began plans to demolish it. Although defendants' purchase of the building certainly carried a duty to exercise reasonable care, this Court is not convinced that the evidence overwhelmingly suggests that its activities were insufficient. Indeed, a reasonable jury could conclude on these facts that, despite the inference of negligence associated with objects coming loose and falling to

the ground, defendants nevertheless fulfilled their duties to pedestrians, and their duty of care did not extend to an examination of the fixture that would have revealed a defect. The motion for partial summary judgment on liability is denied.

II. Defendants' motion for discovery related relief.

Defendants timely move to vacate the note of issue pursuant to 22 NYCRR 202.21 (e), which motion may be granted where "it appears that a material fact in the certificate of readiness is incorrect, or that the certificate of readiness fails to comply with the requirements of this section in some material respect." Vacatur of the note of issue under this section should be granted where it appears that the inability to conduct further discovery would result in prejudice to a party. *See Williams v C&M Auto Sales Corp.*, 105 AD3d 419 (1st Dept 2013).

Defendants' chief objection to the filing of the note of issue is that, on November 30, 2016, plaintiff filed a fifth supplemental bill of particulars in which plaintiff alleged, for the first time, a claim for loss of earnings in an amount in excess of $5.24 million. (Doc. No. 45.) According to defendants, the fifth supplemental bill of particulars was served after plaintiff's deposition had taken place, and no further deposition of plaintiff was held thereafter. On January 13, 2017, plaintiff filed the note of issue and certificate of readiness (Doc. Nos. 40, 59) and, on January 20, 2017, defendants moved to vacate same (Doc. Nos. 41-62).

The first bill of particulars, served on January 29, 2016, contained an itemization for loss of earnings, and specified that it was in the amount of $13,400 "and continuing." It further specified that "[p]laintiff was unable to attend an interview for a position with a prospective employer. Plaintiff was denied the position and claims same as lost earnings caused by the

subject incident." (Doc. No. 45.) This item of lost earnings is rather ambiguous, since it may be read to imply that it refers only to the time that plaintiff spent away from work, while she recovered from the injuries she allegedly sustained. There is nothing in the bills of particulars preceding the fifth supplemental bill of particulars claiming, or even suggesting, that the amount sought is as a result of an inability to work due to the effects of a traumatic brain injury. Although traumatic brain injury is pleaded, this link is not specifically alleged.

Based on the content and timing of the bills of particulars served on defendants, defendants are entitled to an additional deposition of plaintiff limited to the issue of her claim for lost earnings. Plaintiff's deposition was held on September 19, 2016, before defendants were served with the fifth supplemental bill of particulars. The absence of a clear indication that plaintiff's claim for lost earnings was predicated on her future inability to work, rather than merely based on time taken off of work to recover from the immediate injuries and a particular job interview that she missed for the same reason, as well as the increase in the amount of damages claimed by orders of magnitude, convince this Court that further discovery is needed on the issue of plaintiff's lost earnings claim.

Defendants are entitled to a further deposition of plaintiff limited to that issue. The discovery conference orders have already afforded defendants three years of employment history records, including tax returns. (Doc. No. 46). While defendants may question plaintiff regarding jobs preceding that period, they have not demonstrated a need or entitlement to additional years of records.

With respect to the demand to depose plaintiff's employer, "[a] commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state." CPLR 3108; *see generally* Siegel, NY Prac § 360 (5th ed.). A party seeking an open

commission must make a "strong showing of necessity and demonstrate that the information is unavailable from other sources" (*MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 103 AD3d 486, 487 [1st Dept 2013] [internal quotation marks, ellipses, and citations omitted]; *see Karaduman v Newsday, Inc.*, 95 AD2d 669, 669 [1st Dept 1983]; *Punwaney v Punwney*, 2016 NY Slip Op 31178[U], *2 [Sup Ct, NY County 2016, Mendez, J.]) as well as allege "that the out-of-State deponent would not cooperate with a notice of deposition or would not voluntarily come within this State or that the judicial imprimatur accompanying a commission will be necessary or helpful" (*MBIA Ins. Corp. v Credit Suisse Sec. [USA] LLC*, 103 AD3d at 488 [internal quotation marks and citations omitted]). Defendants have not made the required strong showing of necessity to undertake the burdensome and invasive move of deposing plaintiff's employer. Thus, that branch of the motion is denied.

Plaintiff has submitted to a neurological IME as well as a neuropsychiatric IME, and defendants now seek an order directing plaintiff to appear for a neuropsychological IME. A plaintiff whose physical condition is in controversy may be required to submit to a physical examination, and it is "within the trial court's discretion to require a plaintiff to submit to more than one physical examination." *Chaudhary v Gold*, 83 AD3d 477, 478 (1st Dept 2011); *see* CPLR 3121; *Koump v Smith*, 25 NY2d 287 (1969); *Brown v Metropolitan Transp. Auth.*, 256 AD2d 17, 18 (1998). "However, the party seeking the examination must demonstrate the necessity for it." *Chaudhary v Gold*, 83 AD3d at 478.

Jeffrey A. Brown, M.D., defendants' neuropsychiatrist, who examined plaintiff for eight hours over a period of two days, does not adequately state why it is necessary for a neuropsychologist to conduct additional tests of plaintiff. He explains that, as a neuropsychiatrist, his role was to "assess the accuracy and reliability of patients as historians

(Can you believe what they tell you?), the impact on plaintiff behavior of past and present substance abuse, the presence or absence of motivational syndromes which can range from unconscious symptom exaggeration and misperception to frank conscious malingering, the behavioral impacts on plaintiffs of family problems, the impact on plaintiffs' current functioning of prior education and early childhood experiences, the presence or absence of plaintiff ability and motivation to work/return to work, the neurobehavioral effects of past and present medications on employability and daily living, [and] the effects of pre-accident and post-accident." (Doc. No. 56.) He further explains that a neuropsychologist is necessary to perform "quantitative, typically timed, tests to give a picture of a person's cognitive functioning at the present time." (*Id.*) However, Dr. Brown concedes that he "conducted neuropsychological screening tests as part of [his own] neuropsychiatric evaluation." (underlining in original) (*Id.*) Dr. Brown further states that defendants need the services of a neuropsychologist in order to evaluate the raw data generated by other neuropsychologists, and that ethical rules prohibit neuropsychologists from sharing their data with anyone but other neuropsychologists. (*Id.*)

Dr. Brown's affidavit does not adequately explain why it would be necessary for additional neuropsychological testing to be conducted. He does not explain which neuropsychological screening tests he performed, why they are different from the tests that a new neuropsychologist would perform, and why it would not be adequate for defendants to retain a neuropsychologist to review the data that Dr. Brown and plaintiff's neuropsychologist have already generated. In the absence of such an explanation, this Court must conclude that subjecting plaintiff to an additional IME would be unnecessary and duplicative. Defendants are free to utilize the services of a neuropsychologist, if they so choose, who would then be in a position to review the raw data that has already been generated.

Defendants also fail to demonstrate why it is necessary to subject plaintiff to an ophthalmological IME merely because she has complained that she has experienced some issues related to her vision. Vision concerns are peripheral to her main complaints.

Finally, defendants have not adequately demonstrated a need to access to plaintiff's OB/GYN or fertility records in order to explore the psychological effects, if any, of plaintiff's miscarriages. *See Del Gallo v City of NY*, 43 Misc 3d 1235(A), 2014 NY Slip Op 50929(U) (Sup Ct, NY County 2014, Freed, J.).

Since the note of issue inaccurately stated that discovery was complete and defendants are entitled to an additional deposition of plaintiff, the note of issue is stricken. 22 NYCRR 202.21 (e).

Accordingly, it is hereby:

ORDERED that plaintiff's motion for partial summary judgment in her favor on the issue of liability is denied (motion sequence No. 001); and it is further

ORDERED that defendants' motion for discovery related relief is granted to the limited extent that the note of issue filed by plaintiff on January 13, 2017 (Doc. No. 40) is stricken and that plaintiff shall submit to an additional examination under oath in accordance with this decision, and the motion is in all other respects denied; and it is further

ORDERED that the parties shall appear for a status conference on January 23, 2017, unless the additional discovery has taken place and a new note of issue has been filed before that date; and it is further

ORDERED that this constitutes the decision and order of the court.

10/27/2017
DATE

KATHRYN E. FREED
J.S.C.

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE