

Hannigan v Birch St. Corp.

2019 NY Slip Op 30080(U)

January 7, 2019

Supreme Court, New York County

Docket Number: 151968/2016

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** IAS MOTION 2

Justice

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INDEX NO. 151968/2016

SUSAN HANNIGAN,

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE BIRCH STREET CORP., BIRCHLAND REALTY CORP., and
SCHINDLER ELEVATOR CORPORATION,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 54, 55, 56, 57

were read on this motion to/for SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that the motion is denied.

In this personal injury action, plaintiff Susan Hannigan moves, pursuant to CPLR 3212, for summary judgment against defendant Schindler Elevator Corp. (Schindler) based on the doctrine of res ipsa loquitur. Schindler opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND:

This action arises from an incident on August 18, 2015 in which plaintiff Susan Hannigan was allegedly injured while exiting the elevator located in the building where she lived at 40 East Birch Street, Mount Vernon, New York. Docs. 20, 47. In her complaint, she alleged that the building was owned and/or operated by defendants The Birch Street Corp. (Birch Street) and

Birchland Realty Corp. (Birchland). Doc. 45.¹ She claimed that Birch Street and Birchland hired Schindler to maintain, inspect and repair the elevator. Doc. 45.

Plaintiff commenced the captioned action by filing a summons and verified complaint on March 8, 2016. Doc. 1. Schindler joined issue by service of its answer filed March 23, 2016. Doc. 3. In its answer, Schindler cross-claimed against Birch Street and Birchland for contribution and common-law indemnification. Doc. 3.

In her bill of particulars against Schindler, plaintiff claimed that the alleged accident occurred when she tripped while exiting the elevator at the lobby level of her building. Doc. 20, at par. 4. Specifically, she alleged that the incident occurred because the elevator cab was misleveled. Doc. 20, at par. 4.

On November 15, 2017, plaintiff filed the instant motion seeking summary judgment against Schindler pursuant to CPLR 3212 based solely on the doctrine of *res ipsa loquitur*. In support of the motion, plaintiff submits, inter alia, an affidavit by plaintiff in which she represents that she was injured due to a misleveled elevator cab. Doc. 42, at par. 2. She further claims that “[t]he elevator had been broken on and off for months leading up to the incident and had never been properly fixed.” Doc. 42, at par. 2. Plaintiff further represents that “[t]he incident was caused solely by the negligence of the [d]efendants” and that “[t]here was no contributory or comparative negligence on [her] part.” Doc. 42, at par. 4.

Plaintiff also submits, inter alia, the pleadings (Docs. 45, 47), a contract between Birch Street and Schindler dated May 6, 2015, pursuant to which Schindler was to perform preventative maintenance on the elevator (Doc. 43), work orders and repair invoices (Doc. 48)², and the

¹ Plaintiff's claims against these two entities were discontinued by stipulation filed May 10, 2018. Doc. 60.

² The work orders reflect that Schindler addressed misleveling on May 4, 2015 and again on June 16, 2015. Doc. 48. The records further reflect that the elevator was back in service on August 10, 2015, 8 days before the alleged incident. Doc. 48.

purportedly sworn but unnotarized statement of witness Rose Cinalli, who claims that the elevator had frequently misleveled prior to the alleged occurrence. Doc. 49.

Schindler opposes the motion, arguing that plaintiff is not entitled to summary judgment based on the doctrine of *res ipsa loquitur* since there was no complaint of misleveling for two months prior to the alleged accident. It further asserts that this is not one of the rare situations in which summary judgment in favor of plaintiff can be granted based on *res ipsa loquitur*.

LEGAL CONCLUSIONS:

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; [and] (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Corcoran v Banner Super Mkt.*, 19 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).

Res ipsa loquitur is most often invoked in the context of jury charges and the “application of the doctrine as a basis for awarding summary judgment is inappropriate.” *Vaynberg v Provident Operating Corp.*, 269 AD2d 442 (2d Dept 2000). Although the courts have, on occasion, granted summary judgment pursuant to the doctrine in certain situations, “only 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).

This Court finds that plaintiff has failed to meet this extremely onerous burden and that her motion must thus be denied.

Initially, the sole evidence introduced by plaintiff to establish that she did not cause or contribute to the alleged accident is her conclusory affidavit. Although the Court of Appeals recently held that “[t]o be entitled to partial summary judgment a plaintiff does not bear the . . .

burden of establishing . . . the absence of his or her own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]), that case did not apply the doctrine of *res ipsa loquitur* which, as noted above, requires a plaintiff to establish that he or she did not contribute to the occurrence. Here, plaintiff's representation that "[t]he incident was caused solely by the negligence of the [d]efendants" and that "[t]here was no contributory or comparative negligence on my part" (Doc. 42, at par. 4), is utterly conclusory and thus insufficient to entitle her to summary judgment. See *Juarez v Rye Depot Plaza, LLC*, 140 AD3d 464, 465 (1st Dept 2016); *Matter of NY City Asbestos Litig.*, 123 AD3d 498, 499 (1st Dept 2014).

Although plaintiff's attorney admits that his client was deposed (Doc. 57 at par. 4), counsel has not submitted plaintiff's deposition transcript or any explanation why it was not annexed to the motion. Since plaintiff fails to present evidence establishing, as a matter of law, that the "inference of defendant's negligence is inescapable" (*Morejon v Rais Const. Co.*, 7 NY3d at 211), summary judgment on the basis of *res ipsa loquitur* is denied.

Further, although it has been held that the misleveling of an elevator does not ordinarily occur in the absence of negligence (*see, e.g. Rojas*, 150 AD3d at 537-538), it is unclear from the evidence presented by plaintiff whether the elevator was within Schindler's exclusive control. Paragraph 2 of the Terms and Conditions of Schindler's contract provides that Birch Street was to "retain [its] responsibilities as Owner and/or Manager of the premises and of the [elevator]." Doc. 43. Thus, summary judgment is denied on this ground as well.


Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Susan Hannigan, pursuant to CPLR 3212, seeking summary judgment as against defendant Schindler Elevator Corporation is denied; and it is further

ORDERED that the parties are to appear for a compliance conference in this matter on April 9, 2019 at 2:15 p.m. at 80 Centre Street, Room 280; and it is further

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

1/7/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	