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| Allstate Ins. Co. v McCormack |
| 2019 NY Slip Op 30987(U) |
| April 4, 2019 |
| Supreme Court, New York County |
| Docket Number: 154619/2016 |
| Judge: Margaret A. Chan |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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ALLSTATE INSURANCE COMPANY A/S/O SHEILA LENNON

Plaintiff,

- v -

KATHLEEN MCCORMACK,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71

were read on this motion to/for

JUDGMENT - SUMMARY

DECISION AND ORDER

In this subrogation action based on property damages to a co-operative apartment unit owned by subrogee, Sheila Lennon, defendant Kathleen McCormick now moves pursuant to CPLR 3212 for summary dismissal of the complaint of plaintiff, Allstate Indemnity Company as subrogee for their insured, Sheila Lennon. Plaintiff cross-moves pursuant to CPLR 3212 for summary judgment of its negligence claim against defendant.

The property damage to Lennon's apartment was alleged to have been caused by a pipe burst or broken hose on June 10, 2013, in defendant Kathleen McCormack's kitchen in apartment 8B at 50 Park Avenue in the city, county, and state of New York. Lennon's apartment is 6B, and Lennon claimed that she sustained substantial water damages to her apartment as a result.

Defendant testified that there were no issues with the pipes and plumbing, or leaks in her apartment 8B prior to the subject incident, and that there was no work performed on the plumbing in the time that she lived in the apartment (NYSCEF # 43, 10:14-21; 26:4-21). While Lennon claims that her apartment was flooded due to a broken hose, defendant takes issue with plaintiff's subpar investigation of the cause of the leak. Defendant further testified that she was on vacation all summer and away from the subject apartment at the time of the alleged pipe burst (*id.*, 17:1-8).

Discussion

“Summary judgment must be granted if the proponent makes ‘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,’ and the opponent fails to rebut that showing” (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers” (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

A property owner seeking summary judgment in a negligence action is “required to establish that it maintained its [property] in a reasonably safe manner, and that it did not create a dangerous condition which posed a foreseeable risk of injury to individuals expected to be present on the property” (*Westbrook v WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71 [1st Dept 2003]). To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendants to discover and remedy it (*see Gordon v American Museum of Natural History*, 67 N.Y.2d 836 [1986]).

At the outset, based on her testimony, coupled with fact that she was not in her apartment for at least a week prior to the incident, defendant meets her *prima facie* burden by demonstrating that she did not create, or have actual notice or constructive notice of the alleged defective condition.

In opposition, plaintiff raises an issue of fact exist as to the applicability of the doctrine of *res ipsa loquitur*. While plaintiff did not assert this claim in its complaint, “failure to specifically plead *res ipsa loquitur* does not constitute a bar to the invocation of *res ipsa loquitur* where the facts warrant its application (*Smith v Consol. Edison Co. of New York*, 104 AD3d 428, 428 [1st Dept 2013], citing *Ianotta v Tishman Speyer Props., Inc.*, 46 AD3d 297, 298 [1st Dept 2007]).

It is well settled that “[i]n order to submit a case to a trier of fact on the theory of *res ipsa loquitur*, a plaintiff must establish the event to be (1) of a kind that ordinarily does not occur in the absence of someone's negligence; (2) caused by an agency or instrumentality within the exclusive control of the defendant; and (3) not due to any voluntary action or contribution on the part of the plaintiff (*Crawford v City of New York*, 53 AD3d 462, 464 [1st Dept 2008], citing *Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430 [1967]). Further, as a rule of evidence, *res ipsa loquitur* only “creates a permissible inference of negligence, not a rebuttable presumption” (*Shinshine Corp. v Kinney System, Inc.*, 173 AD2d 293, 294 [1st Dept 1991], citing *George Foltis, Inc. v City of New York*, 287 NY 108 [1941]).

Initially, the court notes that there is no legal distinction between a pipe burst case and plaintiff's allegation herein (*see Lizden Industries, Inc. v Franco Belli Plumbing and Heating and Sons, Inc.*, 2009 WL 4009129 (Sup Ct N.Y. County 2009 [applying "pipe burst" analysis where damage was caused by a broken pipe])). In a "pipe burst" case, the damages tend to be caused by water leaking from a broken pipe, as is alleged here. Here, the record contains sufficient evidence that would give rise to a permissible inference of negligence on the part of defendant under *res ipsa*.

As for the first element of *res ipsa*, the alleged cause of the damage, the broken hose underneath the sink located in defendant's apartment 8B, is an event that does not occur absent someone's negligence (*see Shinshine Corp.*, 173 AD2d at 294; *Johnson v Pat Reilly, Inc.*, 2009 WL 2029559 [Sup Ct N.Y. County 2009]).

Second, plaintiff demonstrates that defendant had exclusive control over the pipe that allegedly burst. Paragraph 18 of defendant's proprietary lease indicates that defendant is solely responsible for the maintenance, repair, and replacement of plumbing fixtures and equipment (NYSCEF # 65) (*see Dillenberger v 74 Fifth Ave. Owners Corp.*, 155 AD2d 327 [1989] [granting summary judgment to plaintiffs who sued for damages related to a burst water pipe, claiming that defendants were in control of the plumbing system where the proprietary lease required defendant to maintain, operate and repair the plumbing]; *Behrens v 45 East 72nd Street Inc.*, 2017 WL 634666, at *3 [Sup Ct N.Y. County 2017]). Defendant's argument that it was her custom and practice to refer to the building's superintendent, Peter Molony, is of no moment, since the proprietary lease clearly states that it is her responsibility to maintain the plumbing in her apartment and fails to show that she did not have exclusive control over the subject plumbing. Finally, there is no dispute that plaintiff's actions did not contribute to the subject incident. Thus, *res ipsa* can be applied to this case. And defendant's motion for summary judgment is denied.

However, this does not mean that plaintiff is entitled to summary judgment of its claim on the issue of liability. "[T]he circumstantial evidence allows but does not require the jury to infer that the defendant was negligent" (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209). Summary judgment to a plaintiff in a *res ipsa* case should be a rare event; it is granted "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" (*id.*; *see Shinshine Corp.*, 173 AD2d at 294 ["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 facts of this case do not present such a rare event. Notably, the only evidence supporting plaintiff's argument that defendant's negligence caused the

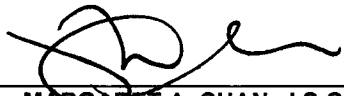
pipe burst is the fact that a hose connecting to the sink of apartment 8B to the water supply of the building broke, which the court finds to be insufficient to warrant summary judgment.

Conclusion

Accordingly, it is hereby

ORDERED that defendant's motion pursuant to CPLR 3212 for summary dismissal of the complaint is denied; it is further

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment of the complaint is denied.

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| 4/4/2019 DATE |  MARGARET A. CHAN, J.S.C. | |
| CHECK ONE: | <input type="checkbox"/> CASE DISPOSED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION |
| APPLICATION: | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER | <input type="checkbox"/> SUBMIT ORDER |
| | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE |