| **Woolf v Empire State Crossfit LLC** |
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| 2019 NY Slip Op 33928(U) |
| February 19, 2019 |
| Supreme Court, Westchester County |
| Docket Number: 54185/2016 |
| Judge: Terry Jane Ruderman |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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KAREN WOOLF, as Mother and Natural Guardian of B.W., an Infant, KAREN WOOLF, Individually, and ANDREW WOOLF, Individually,

Plaintiffs,

-against-

DECISION AND ORDER
Index No. 54185/2016
Motion Sequence Nos. 3 and 4

EMPIRE STATE CROSSFIT LLC, d/b/a EMPIRE STATE CROSSFIT, LUMIRAM DEVELOPMENT CORP. and DANIEL STEARNS,

Defendants.

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RUDERMAN, J.

The following papers were considered in connection with the motion by defendants for an order pursuant to CPLR 3211 and 3212 dismissing all claims against Lumiram Development Corp. ("Lumiram"), and dismissing plaintiffs' res ipsa loquitur claims as against all defendants (sequence 3), and plaintiffs' cross-motion for a missing evidence charge or alternative relief based on Stearns' discarding of evidence (sequence 4):

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation, Exhibits A - M | 1 |
| Notice of Cross-Motion, Affirmation, Exhibits A - I | 2 |
| Reply Affirmation, Exhibits N - O, and Affirmation in Opposition to Cross-Motion | 3 |

This personal injury action arises out of an accident that occurred on September 10, 2015 at Empire State Crossfit gym in Larchmont, New York, in which a shelf dislodged and fell on the head of infant plaintiff B.W., allegedly causing traumatic brain injury and necessitating emergency

surgery. Plaintiffs initially commenced the action against Empire State Crossfit LLC, the tenant and occupant of the premises, and Lumiram, the property owner; Daniel Stearns, the sole owner and operator of Empire State Crossfit, was then added as a defendant.

Defendant Lumiram moves to dismiss all claims asserted against it, based on its status as a out-of-possession landlord who neither caused nor create the dangerous condition nor had notice of it, since it was located inside the premises leased to Empire State Crossfit, where Lumiram had no contractual duty of maintenance or repair.

Defendants also seek the dismissal of plaintiffs' res ipsa loquitur claim, contending elements necessary for the doctrine's application are lacking.

Plaintiffs oppose both forms of relief, and cross-move for a negative inference charge based on Stearns' disposal of the bracket and screws that had been used to install the fallen shelf. Defendants oppose the imposition of spoliation sanctions, on the ground that plaintiffs have not demonstrated that the failure to preserve the brackets and screws was in any way prejudicial to plaintiffs' case, nor was Stearns' conduct willful, contumacious or in bad faith.

Analysis

Lumiram's Liability as Landlord

Defendant Lumiram has provided evidence demonstrating that it is an out-of-possession landlord which is not obligated under the lease to maintain the interior of the premises, and therefore cannot be liable for a defect in the manner in which a shelf was installed by its tenant. It submits a copy of a lease which provides, in paragraph 8, that tenant Empire State Crossfit is responsible for the interior of the premises, and the landlord is responsible to maintain and repair the exterior of the premises, the common areas and the utilities. The lease also specifically provides that the tenant is responsible for the negligent acts of its agents arising from any work done by the

tenant. Additionally, under lease paragraph 14, the landlord had the right to make changes to the entrances, hallways, passageways or other parts of the premises used by the general public, but had no such right within the tenant's space.

> "Generally, an out-of-possession landlord is not liable for injuries sustained at the leased premises unless it is contractually obligated to maintain or repair the premises. Furthermore, in the absence of a statutory duty, a landlord's mere reservation of a right to enter leased premises to make repairs is insufficient to give rise to liability for a subsequently-arising dangerous condition. Although reservation of a right to enter may constitute sufficient retention of control to permit a finding that the landlord had constructive notice of a dangerous condition which constitutes a violation of a statutory duty, this exception applies where there is a significant structural or design defect"

*Angwin v SRF Partnership,* 285 AD2d 570, 571 [2d Dept 2001] [internal citations omitted]). In *Angwin*, the condition which allegedly caused the plaintiff's injuries was an improperly secured magnetic lock which had been mounted above a door frame as part of an alarm system, and which fell on her; the Court held that in view of the landlord's limited obligations under the lease, the claimed dangerous condition was "not a significant structural defect for which an out-of-possession landlord can be held liable" (*id.*). The shelf at issue here is, similarly, not the type of significant structural defect for which the landlord can be held liable.

In opposing this aspect of defendants' motion, plaintiffs argue that this Court may not properly rely on the lease submitted by defendants to establish the landlord's and tenant's respective responsibilities. They observe that the document submitted on defendants' motion was just one of two different lease documents that were produced in discovery, and, indeed, it appears to be the earlier version of the two: the term of the lease relied on in defendants' moving papers runs from September 1, 2012 to August 31, 2017, while the second version or draft that was produced in discovery runs from October 1, 2012 to September 31, 2017. Plaintiffs also note that defendants' submission was marked up with changes, including handwritten alterations and renumbered

paragraphs and subparagraphs – which proposed changes Lumiram's ower testified that she agreed to – and that the rider was not signed by the tenant. They cite *Lalicata v 39-15 Skillman Realty Co.* (63 AD3d 889, 890 [2d Dept 2009]), where the Court denied the landlord's motion for summary judgment because the landlord "failed to provide a complete copy of the lease between the defendants and Brooks Brothers demonstrating their lack of control or contractual obligation to maintain the stairs" on which the plaintiff fell (*id.*).

While the lack of a signature on the lease rider could have legal ramifications, it does not indicate that the main portion of the lease, which *is* signed by both tenant and landlord, is unenforceable. Both parties to the lease have sworn that they have no other lease documents, and neither is disclaiming or denying that they are bound by the documents, both versions of which contain the same operative provisions. Plaintiff has no evidence tending to establish the existence of a third lease, containing different substantive terms. Therefore, there is no material dispute of fact as to the terms of the lease as they apply to the present situation. Unlike the circumstances in *Lalicata*, this Court is able to determine that the landlord here had no contractual obligations with regard to defective conditions created by the tenant within the interior of the leased premises during the term of the lease.

The parties' dispute as to whether Lumiram qualifies as an "out-of-possession landlord," given its office space in the same building, is also immaterial. In cases where summary judgment was denied to a landlord with a presence on the property, its use or retention of part of the building is not enough of a basis for denying summary judgment; the crucial question of fact concerns whether the landlord retained control or responsibility over the area where the accident occurred, and had notice of the dangerous condition. For example, in *Massucci v Amoco Oil Co.* (292 AD2d 351, 352 [2d Dept 2002]), summary judgment was denied to the landlord, which used part of the

building in which the accident occurred, because it "failed to establish as a matter of law that it did not retain control over the vestibule" where the alleged defective condition was located (*id.*). The Court in *Massucci* pointed to "evidence that [the landlord] retained office space in the building and that its employees used the vestibule to exit and enter the building" to establish the existence of "an issue of fact as to the joint responsibility of [the landlord] and [the tenant] for the maintenance of the vestibule" (*id.*). Similarly, in *Kolmel-Hayes v South Shore Cruise Lines, Inc.* (23 AD3d 530, 530 [2d Dept 2005]), after the property owner made a prima facie showing that "it had relinquished control of the subject premises to [its tenant], which agreed by the terms of its lease to repair and maintain the premises, the owner's summary judgment motion was denied based on evidence submitted in opposition that "it maintained an office on the premises, retained control over the premises, *and had actual notice of the allegedly dangerous condition that caused the injuries*" (*id.*). No such evidence of control of the interior of the leased premises, or notice of a defective condition created by the tenant therein, are presented here.

There is no showing that Lumiram's office in the building gave it any control over the interior of the leased premises, nor is there any evidence that its presence in another part of the building gave it notice of the allegedly dangerous condition entirely within the leased premises that caused the injuries. On the latter issue, plaintiffs contend that evidence that Lumiram had constructive notice of the unsafe shelf at issue here is derived from the deposition testimony of Corinne Ram, the sole owner of Lumiram, who acknowledged that she had entered the leased premises a few times to request the rent check. From this testimony, plaintiffs reason that she therefore necessarily had notice of a *different* shelf, located in the front office of the leased premises, which shelf Stearns conceded at his deposition "look[ed] to be leaning a little," and from that, plaintiffs proceed to further reason that the leaning shelf that Ram would have seen put

Lumiram on notice that it should inspect the premises for dangerous shelving elsewhere on the premises. This attenuated reasoning fails to justify finding an issue of fact as to whether Lumiram had notice of an unsafely installed shelf in a room within the leased premises.

In view of the foregoing, the branch of defendants' motion seeking summary judgment dismissing the claim against Lumiram is granted.

Res Ipsa Loquitur

Plaintiff's complaint includes a claim based on res ipsa loquitur, a doctrine that allows a jury, in certain circumstances, to infer negligence merely from the happening of an event and the defendant's relation to it. To rely on the doctrine, a plaintiff must establish three conditions: "First, the event must be of a kind that ordinarily does not occur in the absence of someone's negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494-495 [1997], quoting *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986] [other internal citations omitted]).

The first condition is established, since a shelf does not normally fall in the absence of negligence (*see Hutchings v Yuter*, 108 AD3d 416, 417 [1st Dept 2013]). Defendants contend, however, that plaintiffs cannot establish the second condition, since the shelf cannot be viewed as within defendants' exclusive control, as it is used by gym members as a place to put their weightlifting shoes and other personal items. However, "[c]ourts do not generally apply this requirement as it is literally stated" *(Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 227 [1986]). That is, "exclusive control" may be found even when members of the public have contact regular with the allegedly defective item. For instance, in *Marinaro v Reynolds* (152 AD3d 659 [2d Dept 2017]), where the plaintiff pleaded res ipsa loquitur in her claim against a homeowner based

on a defective deck stair, the Court concluded that an issue of fact was presented as to as to whether the homeowner could be said to have exclusive control of the step, despite the use of it by guests (*id.* at 662). The central issue is whether some other person's negligence might have had a part in the accident. Just as in *Marinaro*, the claimed defect in the deck stair would not likely be attributable to other guests' walking on the step, here, other gym members' placement of items on the shelf would not in itself render them responsible for negligence in how the shelf was secured to the wall.

In *Dermatossian v New York City Tr. Auth.*, the Court held that the case should not have been submitted to the jury on a res ipsa loquitur theory because the plaintiff's "did not adequately exclude the chance that the handle had been damaged by one or more of defendant's passengers" (67 NY2d at 228). Here, in contrast, the context is a summary judgment motion in which it is defendants' burden to establish their right to dismissal of the claim as a matter of law. They have not established that as a matter of law they did *not* maintain exclusive control of the shelf as that term is understood for this purpose; rather, as in *Marinaro*, an issue of fact is presented as to as to whether the gym owner could be said to have had exclusive control of the shelf, despite the use of it by members.

Finally, on plaintiffs' res ipsa loquitur claim, defendants also contend that as a matter of law the doctrine is inapplicable because the actions of the infant plaintiff contributed to causing the accident, as did the negligence of the plaintiff mother. They point to the deposition testimony of the infant plaintiff that he touched the shelf with his finger, and to the acknowledgment by the infant plaintiff and his brother that they were kicking and throwing balls in the room; they add that the plaintiff mother's failure to supervise the children in the room also contributed to the accident. However, none of this evidence establishes that the actions of any plaintiff proximately caused the

shelf to fall, such as to entitle defendants to dismissal of the doctrine in the summary judgment context.

Cross-Motion for a Spoliation Sanction

It is undisputed that Stearns discarded the bracket and screws by which the shelf at issue had been attached to the wall, although the shelf was retained and plaintiffs had the opportunity to inspect the wall to which the shelf had been secured. Plaintiff relies on a case in which video surveillance footage were not preserved (*see SM v Plainedge Union Free Sch. Dist.*, 162 AD3d 814 [2d Dept 2018]), and another where fetal heart monitor strips were discarded (*see Coleman v Putnam Hosp. Ctr.*, 74 AD3d 1009, 1009 [2d Dept 2010]), in both of which negative inference charges were the imposed sanction.

> "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense. A culpable state of mind for purposes of a spoliation sanction includes ordinary negligence. Where evidence was intentionally or wilfully destroyed, its relevance is presumed. However, where evidence was negligently destroyed, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense"

(*SM v Plainedge Union Free Sch. Dist.*, 162 AD3d at 818).

That Stearns knew he was throwing out the bracket and screws is clear, although there is nothing to indicate that he did so in order to somehow interfere with plaintiffs' future lawsuit. Nor do plaintiffs suggest how those items would have contributed to their prosecution of the case. While the import and value of surveillance video of an accident, or the data in fetal monitoring strips, is clear, the usefulness of the bracket and screws at issue here is less apparent, particularly since Stearns admitted that he did not screw the shelf onto the bracket and that he installed the shelf

in an unsafe manner. Nevertheless, since the evidence was intentionally rather than accidentally discarded, the use of the negative inference charge, PJI 1:77.1, is appropriate here. Notably, it allows but does not require the jury to draw a negative inference *if* the defendant (1) failed to preserve the evidence, (2) was on notice of an impending lawsuit at the time, and (3) the unpreserved evidence would have been important to litigated issue(s).

There has been no showing that would justify the proposed alternative of striking defendants' answer.

In view of the foregoing, it is hereby

ORDERED that defendants' motion is granted to the extent that the complaint is dismissed as against defendant Lumiram, and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is granted to the extent that the negative inference charge, PJI 1:77.1, should be given at the time of trial in connection with the disposal of the bracket and screws; and it is further

ORDERED that the remaining parties are to appear on Tuesday, March 26, 2019 at 9:15 a.m. in the Settlement Conference Part, Courtroom 1600, Westchester County Supreme Court, 111 Dr. Martin Luther King Jr. Blvd, White Plains, New York to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
February 19, 2019

HON. TERRY JANE RUDERMAN, J.S.C.