

Rivera v F & S Contr., LLC
2021 NY Slip Op 30328(U)
February 3, 2021
Supreme Court, New York County
Docket Number: 157618/2019
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 157618/2019

CARMEN RIVERA,

Plaintiff,

MOTION SEQ. NO. 002

- v -

F & S CONTRACTING, LLC, F & S CONTRACTING
GROUP INC., SABEY CONSTRUCTION, INC, and
INTERGATE MANHATTAN LLC,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, plaintiff Carmen Rivera moves, pursuant to CPLR 3212, for summary judgment on liability as against defendants F&S Contracting LLC (“F&SC”), F&S Contracting Group, Inc. (“F&SCG”), Sabey Construction, Inc. (“Sabey”), and Intergate Manhattan LLC (“Intergate”) (collectively “defendants”). Defendants oppose the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff commenced the captioned action by filing a verified summons and complaint on August 5, 2019. Doc. 1. In her complaint, she alleged that, on July 25, 2018, she was injured at 375 Pearl Street in Manhattan due to the negligence of the defendants in their ownership, maintenance and control of the premises. Id.

Defendants joined issue by their verified answer filed October 25, 2019, in which they denied all substantive allegations of wrongdoing and asserted various affirmative defenses. Doc. 3.

In her verified bill of particulars dated January 31, 2020, plaintiff alleged that she was injured on July 25, 2018 at 6:05 a.m. when a fence fell on her at the “[r]ear of 375 Pearl Street . . . cross street Avenue of [the] Finest/2 Police Plaza, New York, New York” and that defendants “had both actual and constructive notice of the alleged defect since they caused/created the condition.” Doc. 20 at pars. 2, 19. Plaintiff further alleged that, “[u]pon information and belief, the condition existed for at least several weeks” and that “[d]efendants erected the fence in question, maintained same, and exercised control over it.” Id. at par. 19. Finally, plaintiff claimed that defendants “failed to properly maintain, erect and secure the fence in question” and that the doctrine of *res ipsa loquitur* was applicable herein. Id. at pars. 21-22.

On January 31, 2020, plaintiff also served a notice to admit on defendants. Doc. 31. The notice sought admissions as to whether defendants: 1) installed the fence which injured plaintiff; 2) maintained the fence which injured plaintiff; and 3) controlled the fence which injured plaintiff. Doc. 31. In a response dated March 13, 2020, defendants admitted that F&SCG installed the fence, but objected to the demands regarding maintenance and control of the same as improper on the ground that they sought admissions as to ultimate factual issues in the case. Doc. 32.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment against defendants as to liability. Doc. 25-32. In support of the motion, plaintiff argues that she was injured while walking to work when a chain link fence at a construction site at 375 Pearl Street fell on top of her. Doc. 26 at par. 3. Plaintiff further asserts that, since defendants admitted in their response

to plaintiff's notice to admit that F&SCG "installed the fence involved in the subject accident" (Doc. 23, Doc. 26 at par. 10), "[t]he negligent installation, maintenance, care and supervision of [the] fence was the proximate cause of [her] accident." Doc. 26 at par. 11. Plaintiff further maintains that, since defendants "did not specifically deny that they maintained and/or controlled the fence after it was installed", those allegations must be deemed admitted, and that "the only inference that can be drawn is that the fence was negligently installed and/or controlled and/or supervised and/or maintained by [d]efendants." Doc. 26 at pars. 15, 17. Based on the foregoing, urges plaintiff, no questions of fact exist herein and she is entitled to summary judgment based on the doctrine of *res ipsa loquitur*. *Id.* at par. 18.

In support of the motion, plaintiff submits an attorney affirmation (Doc. 26); an affidavit in which she attests to the fact that she was injured when a fence surrounding a construction site fell on her and that she "was completely free of negligence" (Doc. 27); the pleadings (Docs. 28-29); a photograph of the accident scene (Doc. 30)¹; and plaintiff's notice to admit and defendants' response thereto (Docs. 31-32). Plaintiff also provides a video of the accident which depicts the fence falling on plaintiff on what appears to be a windy day.

In their affirmation in opposition, defendants argue that the motion must be denied since plaintiff failed to establish its *prima facie* entitlement to summary judgment as a matter of law. Doc. 35. They further assert, *inter alia*, that: the motion is premature because virtually no discovery has been conducted, in part because of the Covid-19 pandemic²; Intergate, the owner of the site, breached no duty of care to plaintiff and had no notice of the condition of the fence; Sabey, the general contractor at the site, breached no duty of care to plaintiff and cannot be found liable unless it supervised and/or controlled the installation of the fence; and that plaintiff

¹ The photograph is of such poor quality that it is essentially impossible to discern any useful information from it.

² Indeed, this Court notes that no preliminary conference has been held.

has failed to establish that F&SCG owed a duty to her. *Id.* Further, defendants strenuously assert that the doctrine of *res ipsa loquitur* is inapplicable herein since the alleged incident occurred on a windy day and an issue of fact thus exists regarding whether the fence was properly secured.

Id.

LEGAL CONCLUSIONS

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Such a motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as by pleadings and other proof such as affidavits, depositions and written admissions. *See* CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012][internal quotation marks and citation omitted]). If the moving party meets its burden, it becomes incumbent upon the non-moving party to establish the existence of material issues of fact (*Id.*, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*" (*Vega*, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

In order to invoke the doctrine of *res ipsa loquitur*, plaintiff must establish: "(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." (*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006] [citations omitted]).

The granting of summary judgment based on the doctrine of *res ipsa loquitur* is appropriate only in "exceptional cases" and not where there are issues of fact with respect to defendants' liability (*see Morejon v Rais Constr. Co.*, 7 NY3d at 209; *Jainsinghani v One Vanderbilt Owner, LLC*, 162 AD3d 603, 604 [1st Dept 2018]). Partial summary judgment on liability must only be granted to a plaintiff on a *res ipsa loquitur* theory "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*, 7 NY3d at 209).

Here, the motion papers submitted by plaintiff fail to establish as a matter of law that no issues of fact exist regarding whether the accident was due "to any voluntary action or contribution on the part of the plaintiff" (*James v Wormuth*, 21 NY3d 540, 546 [2013]). Plaintiff's complaint and bill of particulars are silent as to exactly where at 375 Pearl Street plaintiff was when she was injured. Although plaintiff represents in her affidavit in support of the motion that she was a pedestrian on a sidewalk when she was injured, she does not allege precisely where she was when the fence struck her and/or whether she was authorized to be in that area. As noted above, the photograph of the scene of the alleged incident submitted by plaintiff is devoid of any probative value. Although a plaintiff moving for partial summary judgment on liability is not required to establish the absence of her own comparative fault (*see Rodriguez v City of New York*, 31 NY3d 323, 324-325 [2018]), plaintiff fails to show that no factual issue exists regarding defendants' negligence (*Romero v Xcellent Car Wash & Express Lube*, 171 AD3d 584, 584-585 [1st Dept 2019] [citations omitted]). Indeed, since plaintiff's conclusory affidavit fails to address *any* wrongdoing by defendants, it fails to raise an issue of

fact regarding their negligence (*See Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009]).³

Although this Court acknowledges that F&SCG admits that it installed the fence, this does not, contrary to plaintiff's insinuation, render it automatically liable for the accident.

The facts of *Zecevic v LAN Cargo S.A.*, 137 AD3d 465 (1st Dept 2016) are similar to those herein. In that case, plaintiff was allegedly injured when a crate fell on him while he was working at John F. Kennedy International Airport. Defendants asserted, as they do here, that the accident occurred when the crate was blown by the wind. The IAS Court denied plaintiff's motion for partial summary judgment on the issue of liability and the Appellate Division, First Department affirmed, holding that "[a]lthough plaintiffs may be entitled to invoke the doctrine of res ipsa loquitur at trial, they are not entitled to partial summary judgment because the circumstantial proof is insufficient to create an inescapable inference of defendants' negligence." (*Id.* at 465 [citations omitted]).

Finally, plaintiff's motion is premature insofar as discovery in this matter is in its nascent stage and depositions have yet to be conducted (*See Blech v West Park Presbyterian Church*, 97 AD3d 443 [1st Dept 2012] [citations omitted]).

The parties' remaining contentions are either without merit or need not be addressed given the findings above.

Therefore it is hereby:

ORDERED that plaintiff's motion for partial summary judgment on liability is denied, without prejudice to renew at the completion of discovery; and it is further

ORDERED that the parties are to appear for a preliminary conference on March 1, 2021 at 3:00 p.m. unless, prior to that date, they email to this Court (at jjudd@nycourts.gov) a

³ Given the conclusory nature of plaintiff's affidavit (Doc. 27), it is also insufficient to establish the third element of the test for the applicability of res ipsa loquitur, i.e., that her own actions did not contribute to the occurrence.

