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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JOSEPHINE MAROONICK,

Plaintiff,

- v -

RAE REALTY, LLC AND GATSBY ENTERPRISES, LLC,

Defendants.

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INDEX NO. 152197/2017

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action against defendants Rae Realty, LLC ("Rae") and Gatsby Enterprises, LLC ("Gatsby"), plaintiff Josephine Maroonick moves, pursuant to CPLR 3212, for partial summary judgment as to liability pursuant to the doctrine of res ipsa loquitur. The defendants oppose the motion and cross-move, pursuant to CPLR 3212, for summary judgment dismissing the complaint. The plaintiff opposes the cross motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an incident on July 31, 2016 in which the plaintiff was allegedly injured when the ceiling in her apartment, located at 176 East 3rd Street, unit 2H, in Manhattan "the premises"), collapsed on her. Doc. 1. In March 2017, the plaintiff commenced the captioned action against the defendants, alleging that they were negligent, inter alia, in their

ownership, maintenance, and management of the premises. Doc. 1. Plaintiff further alleged that the defendants were negligent pursuant to the doctrine of res ipsa loquitur. Doc. 1.

The defendants joined issue by their answer filed April 11, 2017, in which they denied all substantive allegations of wrongdoing and asserted several affirmative defenses. Doc. 7.

In her bill of particulars, the plaintiff alleged that she was injured in her apartment on July 31, 2016 when her "entire living room ceiling collapsed." Doc. 48. She claimed that the incident resulted from, inter alia, the negligence of the defendants in maintaining, repairing, managing and inspecting the premises, and she stated her intention to rely on the doctrine of res ipsa loquitur. Id.

At her deposition, the plaintiff testified that she has lived in apartment 2H at the premises for 45 years. Doc. 33 at 5. Prior to the incident, she never made any complaints about the ceiling. Id. at 11-13. Although she saw peeling paint on the ceiling prior to the incident, she never saw any cracks in it or complained about it. Id. at 12, 28. Although the ceiling had been painted approximately 10-12 years before the incident, no other work had been done on the ceiling during her tenancy. Id. at 12, 18.

The plaintiff further stated that she was injured on July 31, 2016 when the ceiling of her living room collapsed and fell on her head. Id. at 8. At that time, she was sitting on her couch when she heard a strange noise, looked up, and saw the ceiling start to collapse. Id. at 13-14. Although she tried to move away, she could not do so in time and the debris struck her. Id. at 14-16.

Although the superintendent had been in the plaintiff's apartment the day before the incident, he was there because a mirror had fallen off the wall. Id. at 8-9.

Isaac Shaban, who became property manager of the premises in 2017, after the alleged incident, appeared for deposition on behalf of the defendants. Doc. 35 at 7-8. He testified that he was employed by Gatsby, which managed the premises, and that the building was owned by Rae. Id. at 7, 17-18. His said that, as property manager, he addressed maintenance requests and construction issues. Id. at 8.

According to Shaban, a file was maintained for each apartment in the building but, other than the lease, he could not recall what was in plaintiff's tenant file. Id. at 13-14. He did not know whether any maintenance or repairs had been performed in plaintiff's apartment prior to the incident. Id. at 27.

Shaban was not aware of any complaints made by plaintiff regarding her ceiling and represented that the only complaint she ever made about the apartment since he became property manager was about her intercom. Id. at 43-44. Nor was he aware of any violations issued regarding plaintiff's apartment prior to the date of the occurrence. Id. at 44.

Shaban admitted that Rae, Gatsby and the building superintendent were responsible for maintaining the building. Id. at 8, 28. He said there was no procedure for Rae or Gatsby to inspect apartments on a periodic basis and that he did not inspect apartments unless a tenant made a complaint or requested a repair. Id. at 34-37, 40. His review of the tenant file did not reflect when plaintiff's apartment was last repaired, or if anyone had entered the plaintiff's apartment for repair or maintenance purposes, prior to the accident. Id. at 27, 38.

Nonparty witness Hilmija Skaljic, the superintendent of the building for 22 years, until 2016, also appeared for deposition. Doc. 37 at 8, 14. As superintendent, he performed "regular jobs", including minor repairs to tenants' apartments, and, if larger jobs, such as painting, were needed, a contractor would be hired. Doc. 37 at 11-12. His duties did not include inspecting

apartments to ascertain whether repairs were needed. Id. at 20. He never made any repairs in plaintiff's apartment and did not recall hiring an outside company to do so. Id. at 19-20. Although he believed he was in the plaintiff's apartment twice during the year preceding the incident to help her move furniture or other heavy items, he could not recall the last time he was in plaintiff's apartment prior to the accident. Id. at 19, 22. Although he admitted that there were "many cases" in which sinks and bathtubs overflowed in the building, causing leaks, he was not aware of any complaints made about the ceiling in plaintiff's apartment prior to the incident or of any leaks into her apartment during the months preceding the occurrence. Id. at 22-24. Skaljic did not investigate the cause of the ceiling collapse and never learned how or why it occurred. Id. at 32.

The note of issue was filed on October 16, 2020. Doc. 42.

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment as to liability based on the doctrine of res ipsa loquitur, along with such other relief as this Court deems just and proper. Doc. 28. In support of the motion, the plaintiff's attorney, relying on *Morejon v Rasi Construction Co*., 7 NY3d 203, 209 (2006), asserts that plaintiff is entitled to summary judgment based on res ipsa loquitur since "the plaintiff's circumstantial proof is so convincing and the defendant[s'] response so weak that the inference of defendant[s'] negligence is inescapable." Specifically, asserts plaintiff, the fact that defendants did not inspect, repair, or maintain the ceiling for years prior to the incident constituted a "monumental lack of care" establishing their negligence even without direct evidence of the precise cause of the collapse. Doc. 29 at par. 19.

In support of the plaintiff's motion, the plaintiff's attorney submits an affirmation; an aided report prepared by the New York City Police Department reflecting that the plaintiff was

injured "when [the] ceiling of her apartment collapsed and landed on her" (Doc. 30); the pleadings, bill of particulars, and court orders (Docs. 31-32); the deposition transcripts (Docs. 33, 35, 37); and photographs of the aftermath of the occurrence (Docs. 34 and 36).

In opposition to the motion, the defendants' attorney argues that the doctrine of res ipsa loquitur is inapplicable herein. Doc. 45 at 2. Specifically, counsel asserts that the ceiling could not have been under the exclusive control of the defendants since it was inside of the plaintiff's apartment. Doc. 45 at 2.

The defendants also cross-move, pursuant to CPLR 3212, seeking dismissal of the complaint on the ground that they did not create, or have actual or constructive notice of, any dangerous condition in the plaintiff's ceiling. Docs. 44-45. In support of the cross motion, the defendants' attorney submits, inter alia, the affidavit of Shaban, who states, inter alia, that he reviewed the tenant file for apartment 3H, the unit above plaintiff's, and determined that there were no complaints or requests to repair leaks made by the occupants of that unit prior to the date of the alleged ceiling collapse. Doc. 51.

In a reply affirmation in further support of the plaintiff's motion, her attorney argues that she is entitled to summary judgment based on res ipsa loquitur since the defendants had sole control of the ceiling in her apartment. Doc. 54. In opposition to the defendants' cross motion, plaintiff's counsel argues that plaintiff, and not defendants, is entitled to summary judgment as a matter of law. Alternatively, counsel maintains that, at the very least, issues of fact exist regarding whether the defendants had constructive notice of a potentially dangerous condition in the ceiling. Id.

In a reply affirmation in further support of the defendants' cross motion, their attorney argues that the complaint must be dismissed because the plaintiff cannot establish constructive

notice. Doc. 55. Counsel further asserts that the doctrine of res ipsa loquitur is inapplicable herein given that the defendants did not have exclusive control of the ceiling. Id.

LEGAL CONCLUSIONS

"[T]he proponent of a summary judgment motion must make 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. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once prima facie entitlement has been established, in order to defeat the motion, the opposing party must "'assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions'" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], quoting *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]).

Plaintiff's Motion For Summary Judgment

Plaintiff's motion for summary judgment as to liability is premised solely on the doctrine of res ipsa loquitur. In order to invoke this doctrine, the 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 at 209 [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).

The plaintiff has failed to establish her prima facie entitlement to summary judgment as a matter of law based on res ipsa loquitur. Initially, the doctrine is inapplicable herein since, as the defendants correctly assert, the ceiling of the plaintiff's apartment was not in their exclusive possession (*see Correa v Matsias*, 153 AD3d 1312, 1313 [2d Dept 2017] [citations omitted] [ceiling collapse]; *Brown v Howson*, 129 AD3d 570, 571 [1st Dept 2015] [ceiling collapse] citing *Pintor v 122 Water Realty, LLC*, 90 AD3d 449, 451 [1st Dept 2011] [window falling from its frame]; *cf. Dittiger v Isal Realty Corp*., 290 NY 492, 496 [1943]).

Additionally, summary judgment cannot be granted based on the doctrine since issues of fact exist regarding the defendants' liability (*see Morejon v Rais Constr. Co.*, 7 NY3d at 209; *Jainsinghani v One Vanderbilt Owner, LLC*, 162 AD3d at 604). In a case relied on by the defendants, the Appellate Division, First Department held that:

> "Where, as here, an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect . . . . If no such program of inspection is in place, constructive notice of the defect is imputed" (*Hayes v Riverbend Hous. Co., Inc*., 40 AD3d 500, 501 [1st Dept 2007], *lv denied* 9 NY3d 809 [2007] [internal quotation marks and citations omitted]). However, where evidence shows that such an inspection would not have disclosed the defect, "even if there was a breach of the duty to inspect, it was not causally related to the accident" (id.).

(*Bentley v All-Star, Inc*., 179 AD3d 618, 618-619 [1st Dept 2020]).

In light of *Bentley*, this Court finds that a triable issue of fact exists regarding whether the defendants had constructive notice of a potentially dangerous condition in the ceiling of the plaintiff's apartment and/or had a duty to inspect the ceiling. As noted previously, plaintiff

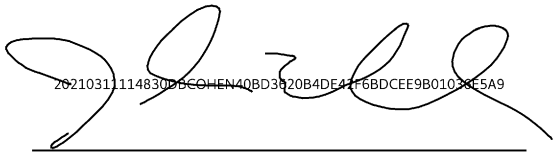
testified that there was peeling paint on her ceiling prior to the occurrence. Skaljic does not deny that he was in plaintiff's apartment approximately twice during the year preceding the incident. Additionally, plaintiff testified that Skaljic was in her apartment *the day before* her ceiling collapsed. Further, Skaljic testified that there was no protocol in place for the inspection of the apartments in the building. Thus, there is a question of fact regarding whether Skaljic should have observed the peeling paint and investigated whether it was caused by a dangerous condition (*see Lisbey v Pel Park Realty*, 99 AD3d 637, 637-638 [1st Dept 2012] [citations omitted] [where cause of ceiling collapse was unclear, an issue of fact existed regarding defendants' duty to inspect the same and defendants were not entitled to summary judgment dismissing the complaint]).

The Defendants Cross Motion for Summary Judgment

Given the findings above, the defendants have failed to establish their prima facie entitlement to summary judgment dismissing the complaint and, thus, their cross motion is denied. Accordingly, it is hereby:

ORDERED that the motion by plaintiff Josephine Maroonick for partial summary judgment pursuant to CPLR 3212 as to liability against defendants Rae Realty, LLC and Gatsby Enterprises, LLC based on the doctrine of res ipsa loquitur is denied; and it is further

ORDERED that the cross motion by defendants Rae Realty, LLC and Gatsby Enterprises, LLC for summary judgment dismissing the complaint pursuant to CPLR 3212 is denied.



3/11/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE