

Salinas v Dorrian's Rest. Bar
2021 NY Slip Op 30724(U)
March 9, 2021
Supreme Court, New York County
Docket Number: 152968/2013
Judge: Margaret A. Chan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

-----X

JACQUELINE SALINAS,
Plaintiff,

INDEX NO. 152968/2013

MOTION DATE

MOTION SEQ. NO. 004

- v -

DORRIAN'S RESTAURANT BAR and EIGHT TOTS
REALTY CORP.,

DECISION + ORDER ON
MOTION

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document numbers 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116

were read on this motion to/for SUMMARY JUDGMENT.

In this personal injury action, plaintiff seeks to recover damages from an incident that occurred on February 2, 2013, at defendant 1616 Second Ave. Restaurant Inc. d/b/a Dorrian's Red Hand Restaurant i/s/h Dorrian's Restaurant Bar ("Dorrian's"), housed in a building owned by defendant Eight Tots Realty Corp. ("Eight Tots"). Plaintiff now moves for summary judgment as to liability under the theory of res ipsa loquitor. Defendants separately oppose the motion, including on the ground that it is untimely. Plaintiff's motion is denied for the reasons below.

Background

Plaintiff alleges that she was injured on February 2, 2013, at approximately 1:00 am during a party at a restaurant space leased and operated by Dorrian's. Plaintiff claims that she was sitting on a bench in Dorrian's back-bar area when a white painted plywood panel fell from the sidewall striking plaintiff on the head.

Plaintiff commenced this action in April 2013 and filed her note of issue on February 14, 2020. The preliminary conference order requires that dispositive motions, including for summary judgment, must be filed within 60 days of filing the note of issue; this motion was filed on December 4, 2020, or 234 days after the note of issue was filed.

Plaintiff argues that there is good cause for the delay in filing her motion, including the COVID-19 pandemic and the Governor's executive order in response to the pandemic which tolled the time to file the motion. In addition, while plaintiff acknowledges that even with the toll, her motion was filed three days late.¹ Plaintiff asserts that defendants will not be prejudiced by the short delay. Even assuming that plaintiff sufficiently established good cause for the delay such that the court would consider her motion, for the reasons below, plaintiff is not entitled to summary judgment.

Plaintiff argues that summary judgment is appropriate here as the record, including the deposition testimony of James Dorrian, the manager of Dorrian's, and of Daniel Dorrian, an employee of Eight Tots, shows that defendants were responsible for the wood panel that fell on plaintiff's head and that the panel fell from an area that was not accessible by the general public. Specifically, plaintiff points to testimony that defendants would access the space above the panel to perform repairs and other work.

In further support of her motion, plaintiff submits an affidavit from an expert and engineer, Scott Silberman, P.E., who reviewed the parties' deposition transcripts and photographs from the night of the occurrence and inspected the area on October 26, 2016 (NYSCEF # 105). Mr. Silberman opines, to a reasonable degree of engineering certainty, that the panel as mounted and existing on the night of the accident was a dangerous and defective condition as photographs revealed that the panel was being held to the wall with only a wood screw fastener, and that the panel was intended to be secured by two hinges and a metal sliding latch. He also opines that defendants' actions in accessing the panel requiring repeated removal of the wood screw fastener "could reasonably cause a reduction in the load carrying capacity" (*id.* at ¶ 12).

In opposition to the motion, Dorrian's submits the affidavit of James Dorian who states that he believes that the Second Avenue subway "construction and the explosions caused the hatch to become loose and eventually fall [and that he did] not know [the hatch] was loose before the accident" (NYSCEF # 109, at ¶ 5). Eight Tots argues that plaintiff's expert's opinion is conclusory, and that the record does not establish that the panel was removed and/or reinstalled repeatedly as assumed by plaintiff's expert.

¹ Specifically, plaintiff asserts that due to the pandemic, the time to file legal papers was tolled from March 20, 2020 to November 3, 2020, and that counting the 34 days between the filing of the note of issue on February 14, 2020 and the March 20, 2020 tolling date, she had 26 days after the toll expired on November 3, 2020 to file a summary judgment motion, and that she filed the motion on December 4, 2020, which is 29 days after the expiration of the toll, or 3 days late.

Discussion

“[O]n a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment. The burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists warranting a trial” (*Bendik v Dybowski*, 227 AD2d 228, 228 [1st Dept 1996] [internal citations omitted]). Notably, summary judgment is “rarely granted in negligence cases since the very question of whether a defendant’s conduct amounts to negligence is inherently a question of fact in all but the most egregious cases” (*Johannsdottir v Kohn*, 90 AD2d 842,842 [2d Dept 1982]).

“It is a well-established principle that a landowner is under a duty to maintain its property in a reasonably safe condition under the existing circumstances, including the likelihood of injury to third parties, the potential that any such injury would be of a serious nature and the burden of avoiding the risk” (*Zuk v Great Atl. & Pac. Tea Co., Inc.*, 21 AD3d 275, 275 [1st Dept 2005] [internal citations omitted]). “In order to recover damages for breach of this duty, a party must establish that the [landowner] created, or had actual or constructive notice of the hazardous condition which precipitated the injury” (*id.* [internal citations omitted]).

Here, while it can be inferred from plaintiff’s evidence tending to show that defendants caused or created the condition that resulted in plaintiff’s injuries, summary judgment is not appropriate as the record is insufficient to establish defendants’ negligence as a matter of law (*see Ugarriza v Schmeider*, 46 NY2d 471, 475 [1979] [“when the suit is founded on a claim of negligence, the plaintiff will generally be entitled to summary judgment only in cases in which there is no conflict at all in the evidence, the defendant’s conduct fell far below any permissible standard of due care, and the plaintiff’s conduct either was not really involved...or was clearly of exemplary prudence in the circumstances ”][internal citations and quotations omitted]).

As plaintiff asserts the doctrine of *res ipsa loquitur*, plaintiff must establish three elements: “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 [1997] [citation omitted]). “When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident” (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219 at 226 [1986]).

Even assuming plaintiff has made a sufficient showing that that *res ipsa loquitur* applies here, summary judgment based on the doctrine is not warranted. Significantly, *res ipsa loquitur* does not create the presumption of negligence, but “merely permits the jury to infer negligence from the circumstances of the occurrence. The jury is thus allowed – but not compelled – to draw the permissible inference” (*Kambat*, 89 NY2d at 495). Accordingly, the application of *res ipsa loquitur* provides a basis for granting summary judgment in favor of a plaintiff “only in the rarest of... cases ... when the plaintiffs’ circumstantial proof is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable” (*Morejon v Rais Constr. Corp.*, 7 NY3d 203, 209 [2006]). The proof before the court does not meet this standard; hence plaintiff is not entitled to summary judgment based on the application of *res ipsa loquitur*.

Conclusion

In view of the above, it is

ORDERED that plaintiff’s motion for summary judgment is denied.

3/9/21
DATE


MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

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