

Morris v Ten Thirty One Prods., LLC
2021 NY Slip Op 31138(U)
April 9, 2021
Supreme Court, New York County
Docket Number: 151358/2018
Judge: Arlene P. Bluth
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. ARLENE P. BLUTH **PART** **IAS MOTION 14**

Justice

-----X

SHANON MORRIS

Plaintiff,

- v -

TEN THIRTY ONE PRODUCTIONS, LLC,

Defendant.

-----X

INDEX NO. 151358/2018

MOTION DATE 04/08/2021

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The motion for summary judgment by plaintiff is denied.

Background

Plaintiff seeks recovery for injuries suffered when a nearly thirty-pound fog machine fell on her from a perch eight feet above. She was at a Halloween event run by defendant. Plaintiff claims that this is a classic example of res ipsa loquitur and that she should be entitled to summary judgment. She points out that defendant admitted that it has exclusive control over the fog machine by not responding to a notice to admit.

In opposition, defendant claims that it responded to the notice of admit in a timely fashion and it never admitted to owning the fog machine in this response. Defendant argues that the photo attached to the notice to admit was of such poor quality that defendant could not ascertain what was being depicted. Defendant claims that plaintiff has not met her burden for summary judgment and that defendant did not have exclusive control due the numerous patrons that visited this Halloween attraction.

In reply, plaintiff points out that the notice to admit issue is besides the point because defendant's witness testified that defendant was the owner and operator of the attraction (a maze with various dead ends).

Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting

therefrom” (*Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 825, 37 NYS3d 750 [2016]).

Res Ipsa

“In order to submit a case to a trier of fact based on [res ipsa], a plaintiff must establish that the event (1) was of a kind that ordinarily does not occur in the absence of someone’s negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant and (3) was not due to any voluntary action or contribution on the part of the plaintiff” (*Singh v United Cerebral Palsy of New York City, Inc.*, 72 AD3d 272, 276-77, 896 NYS2d 22 [1st Dept 2010] [internal quotations and citation omitted]).

The branch of the motion that seeks summary judgment based on the doctrine of res ipsa loquitor is denied. There is no dispute that the accident occurred at a Halloween attraction attended by numerous patrons. Therefore, the Court is unable to conclude that defendant had exclusive control over the fog machine (*Kosakowski v 1372 Broadway Assoc., LLC*, 160 AD3d 567, 567, 74 NYS3d 553 [1st Dept 2018]). Once visitors started walking around the maze, it was entirely possible that someone could have dislodged the fog machine or interfered with it.

Moreover, the doctrine of res ipsa is typically utilized by a jury (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494, 655 NYS2d 844 [1997]). It is not usually a basis to grant summary judgment as a matter of law in favor of the injured plaintiff (*Morejon v Rais Const. Co.*, 7 NY3d 203, 212, 818 NYS2d 792 [2006] [noting that a motion by a plaintiff seeking summary judgment based on res ipsa should only be granted in “exceptional” cases]).

To the extent that plaintiff claims that defendant’s witness testified that it had control over the attraction, that does not constitute an admission justifying the imposition of liability on defendant. Defendant’s witness merely admitted that defendant owned and operated the

attraction. It did not admit that it had exclusive control of the fog machine as visitors walked around the premises.

Safety Cable

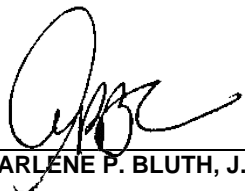
The other key issue on this motion is the safety cable. According to plaintiff, a safety cable would have prevented the fog machine from moving and, ultimately, from falling on plaintiff. And she insists that a safety cable had to be used here. But the Court cannot grant summary judgment based on this issue because defendant’s witness did not recall if a safety cable was used in this case (NYSCEF Doc. No. 43 at 58).

The fact is that the accident happened in a “poorly lit” corridor and no one is quite sure what caused the accident. That prevents the Court from granting plaintiff summary judgment. A jury will make a determination after hearing all the evidence. But this Court cannot find that defendant was negligent for not installing a safety cable where there is no definitive evidence that it failed to use a safety cable.

Accordingly, it is hereby

ORDERED that the motion for summary judgment by plaintiff is denied.

4/9/2021
DATE


ARLENE P. BLUTH, J.S.C.

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