

Poesz v 110 Church Owner LLC
2021 NY Slip Op 33321(U)
May 25, 2021
Supreme Court, Kings County
Docket Number: Index No. 500556/2016
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 25th day of May 2021.

P R E S E N T:

HON. LARA J. GENOVESI,
J.S.C.

-----X
MARGIT POESZ,

Plaintiff,

-against-

110 CHURCH OWNER LLC, SFM REALTY CORP.,
50 MURRAY STREET ACQUISITION LLC, MONARCH
REAL ESTATE MANAGEMENT LLC, and LIONSHEAD
110 DEVELOPMENT II LLC,

Defendants.

-----X

Index No.: 500556/2016

DECISION & ORDER

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Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	<u>NYSCEF Doc. No.:</u>
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed _____	<u>127-146, 151-155</u>
Opposing Affidavits (Affirmations) _____	<u>163-168</u>
Reply Affidavits (Affirmations) _____	<u>169-170</u>

Introduction

Defendants, 110 Church Owner LLC, Monarch Real Estate Management LLC, and Lionshead 110 Development LLC, move by notice of motion, sequence number

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eight, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Plaintiff, Margit Poesz, opposes this motion.

Plaintiff moves by notice of motion, sequence number nine, for an order (1) pursuant to CPLR § 3025(b), allowing plaintiff to supplement her verified bill of particulars asserting *res ipsa loquitur*,¹ and (2) granting partial summary judgment against defendants 110 Church Owner LLC, Monarch Real Estate Management, LLC, and Lionshead 110 Development II LLC, on the issue of liability, under the doctrine of *res ipsa loquitur*. Defendants oppose this motion.

Background

This action involves injuries sustained by plaintiff when she was allegedly struck by a patio size umbrella on July 8th, 2014, while walking on the sidewalk abutting 50 Murray Street, New York, New York. Defendant 110 Church LLC is the lessor of the building located at 50 Murray Street, defendant Monarch Real Estate Management LLC is its managing agent, and defendant Lionshead 110 Development II LLC was the lessee at the time of the accident. The building is comprised of residential apartments, with a communal terrace on the 20th floor; some units have private terraces.

Plaintiff testified at an examination before trial (EBT) on October 1, 2018 with a Hungarian translator. She was standing on the sidewalk “on Church Street, close to the corner of Murray Street” (NYSCEF Doc. # 140, Poesz EBT at 31). It was a “very

¹ Plaintiff’s counsel concedes in the affirmation in support that allowing plaintiff to supplement her verified bill of particulars to add the allegation asserting *res ipsa loquitur* is “not even necessary” (see NYSCEF Doc. # 153, Aff. in Support at ¶ 20).

strong” windy day (*id.* at 36). Plaintiff testified that she “sensed something big and light colored hit my head” and hit her “face on the right-hand side” (*id.* at 43, 44). Plaintiff “couldn’t see whether it was flying or how it actually came down” and the object “was not from the side” (*id.* at 56). Plaintiff did not see the object before it struck her, although plaintiff believes it was a “patio sun umbrella made of wood” with a white top (*id.* at 44-46, 53). Plaintiff does not know where the umbrella came from (*see id.* at 59, 60). A policeman “told [plaintiff] that other people told him that people saw that an umbrella was flying down and hit her – hit me in the face” (*id.* at 57). Plaintiff’s husband found the umbrella “next to the building” where she was injured (*id.* at 50). She believes that the umbrella came from a patio above the building next to where she was struck, but does not have any definitive information that the umbrella came from any specific terrace (*see id.* at 70). Four photographs of the umbrella that allegedly struck plaintiff are annexed to defendant’s motion (*see* NYSCEF Doc. # 138, Exhibit I).

Hector Juarez, the live-in superintendent for the building at 50 Murray Street at the time of the accident, testified at an EBT on November 13, 2019. Juarez testified that the building is a residential building comprised of rental properties, and 50 Murray Street is the same building as 110 Church Street (*see* NYSCEF Doc. # 144, Juarez EBT at 16, 30). Juarez is responsible for overseeing the mechanics, staff duties, and operations of the buildings (*see id.* at 15). The building has 20 floors and 515 rental units with a terrace on the 20th floor. Employees only entered the units to fill work orders (*see id.* at 17-19, 27). The terrace and outdoor common spaces did not have umbrellas (*see id.* at 19, 20). Some of the units had private terraces (*see id.* at 20). Juarez does not recall if there were any

rules prohibiting the use of umbrellas on the private terraces but testified that none of the units had umbrellas on the private terraces (*see id.* at 22, 23). Juarez testified that he did not recognize the umbrella that struck plaintiff, does not know where the umbrella came from, he never saw an umbrella like that at 50 Murray Street or 110 Church Street, and he has never seen an umbrella on any of the private terraces (*see id.* at 27, 34).

Plaintiff provided an affirmation from Anthony Bellezza, Ph.D., a biomedical engineer, to her motion. Dr. Bellezza is a “technology entrepreneur with experience in business management and technology development with early state medical device and electrical technology companies. He specializes in identifying, financing, and introducing early or seed-stage technologies to the marketplace” (NYSCEF Doc. # 151, Bellezza CV). Dr. Bellezza performed “an analysis on the likelihood that the patio umbrella that struck and injured Margit Poesz on July 8, 2014 fell from the building located at 110 Church Street” (NYSCEF Doc. # 151, Bellezza Aff. at ¶ 2, 3). Dr. Bellezza relied on a New York City Police Department Aided Report, Bellevue Hospital Center medical records, the EBTs of Poesz and Juarez, eleven photographs of the accident scene and subject umbrella, National Climactic Data Center climate data for July 8, 2014, and street and satellite images² of the accident scene available on google (*see* NYSCEF Doc. # 151, Bellezza Report at 1). Dr. Bellezza performed a “kinematic analysis”, where he noted

During the subject incident, the umbrella fell from an initial stationary position. It accelerated toward the earth due to gravity (resisted by drag forces). In addition, wind and other disturbances could have accelerated the umbrella laterally (to

² The images relied on by Dr. Bellezza are annexed as NYSCEF Doc. # 170, Exhibit A, to plaintiff’s affidavit in reply.

the side) in the direction of the wind. The umbrella continued to gain speed until it struck Ms. Poesz's head above her right eye and on her right shoulder. Thus, the path traveled by the umbrella depends on its starting position and the environmental conditions prevailing during its fall . . . the topography of Ms. Poesz's surroundings and the environmental conditions (specifically, the wind speed and direction) substantially limit the possible starting points for the umbrella . . . of these buildings, the subject building is the only one from which, given the weather conditions, a patio umbrella could reasonably be supposed to fall and strike Ms. Poesz. Each of the rooftops of the other buildings (the building on the east side of Church Street, and those on the far sides of Park Place and Murray Street) is sufficiently low that a patio umbrella falling from one of these roofs onto Ms. Poesz would approach Ms. Poesz at an angle of less than 45 degrees relative to horizontal. In order for this to occur, the wind would have had to accelerate the umbrella laterally *more* during its fall than gravity accelerated it downward. Such an angle of approach is not reasonable for a projectile like this umbrella without *exceptionally* high winds, far beyond those reported on the evening of the subject incident. Furthermore, the location of Ms. Poesz's laceration above her right eye and her right shoulder injury, in conjunction with her position (facing south-southwest) strongly points to an origin for the umbrella on the near side of the street. Her injuries are not consistent with an umbrella falling from the roof of a building across Church Street.

(Bellezza Report at 5, 6). Dr. Bellezza further noted that

It is exceedingly likely that the umbrella fell along essentially a line-of sight direction. According to data gathered by the national Centers for Environmental Information, a branch of the National Oceanic and Atmospheric Administration (NOAA), the maximum local wind gusts reported on the night of the subject incident were approximately 50 mph. Although sufficient to displace the terrace umbrella, this wind speed is not sufficient to cause it to substantially change lateral direction during flight; the umbrella moved one sideways direction as it fell backwards"

(Bellezza Report at 6). He also relies on a satellite image of 110 Church Street, which was captured in July 2014, and “clearly show[s] a terrace umbrella matching the subject umbrella located on a 7th floor terrace of 110 Church Street” (*id.* at 4). Dr. Bellezza concluded that

- a) To a reasonable degree of scientific certainty, the patio umbrella that struck and injured Ms. Poesz fell from a 7th floor terrace of 110 Church Street.
- b) In addition, the nature and location of her injuries and the heights and conditions of other buildings in the vicinity make it exceedingly unlikely that a patio umbrella could have fallen from one of these other locations.
- c) This is further corroborated by google map photographs which clearly show a terrace matching the subject umbrella on a 7th floor terrace of 110 Church Street.

(Bellezza Aff. at ¶ 2, 3).

Defendant provided an affirmation from Andrew R. Yarmus, P.E., F.NSPE. Yarmus is a “licensed Professional Engineer, a New York State Certified Code Enforcement Official, and a Fellow of the national Society of Professional Engineers” (NYSCEF Doc. # 167, Yarmus Aff. ¶ 1). Yarmus was asked to form an opinion, with a reasonable degree of engineering certainty, “as to apparent validity of certain claims outlined in Plaintiff’s Exchange of Expert Witness Disclosure Pursuant to CPLR 3101(d) for Anthony J. Bellezza, Ph.D.” (*id.* at ¶ 2). Yarmus concluded that because Dr. Bellezza is a biomechanical engineer, and “there are no issues related to biological systems in evaluating the alleged path of a flight of an umbrella from a rooftop terrace, as is alleged to have occurred during the subject accident in this case, and it is therefore unclear what credentials Dr. Bellezza might have which would qualify him as an expert regarding the

subject accident” (*id.* at ¶ 4). Because Dr. Bellezza is a biomechanical engineer, Yarmus opined that he is “unqualified to interpret meteorological records” (*id.* at ¶ 5). Yarmus contends that “Dr. Bellezza’s report identifies four buildings which he believes could have been the source from which the subject umbrella is alleged to have fallen from a rooftop terrace,” and that “it must be noted that Dr. Bellezza’s report seems to rely upon, and only includes, black and white images of these buildings, and therefore does not appear to have analyzed the color of any of the rooftop umbrellas which might have been present on any of these rooftops in advance of the subject incident” (*id.* at ¶ 6). Yarmus concluded, with a reasonable degree of engineering certainty, “that plaintiff, and plaintiff’s expert, Anthony J. Bellezza, Ph.D., have not, in face, proven with any degree of engineering, nor even general, certainty that Margit Poesz was in fact struck by an umbrella which fell from a rooftop terrace from 50 Murray Street” (*id.* at ¶9).

Discussion

Amend Verified Bill of Particulars

"In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Flanders v. E.W. Howell Co., LLC*, 193 A.D.3d 822, 2021 WL 1396205 [2 Dept., 2021]). “Additionally, ‘[t]he legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt’ ... It is ‘clear that a plaintiff seeking leave to amend the complaint is not required to establish the merit of the proposed amendment in the first

instance' [internal citations omitted]" (*Lucido v. Mancuso*, 49 A.D.3d 220, 851 N.Y.S.2d 238 [2 Dept., 2008]; *see* CPLR 3025[b]).

Cases involving CPLR 3025 (b) that place a burden on the pleader to establish the merit of the proposed amendment erroneously state the applicable standard and are no longer to be followed. No evidentiary showing of merit is required under CPLR 3025 (b). The court need only determine whether the proposed amendment is 'palpably insufficient' to state a cause of action or defense or is patently devoid of merit. Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied. If the opposing party wishes to test the merits of the proposed added cause of action or defense, that party may later move for summary judgment upon a proper showing (*see* CPLR 3212).

(*id.*).

For plaintiff to recover through the doctrine of *res ipsa loquitur*, plaintiff "must establish the following in order for the doctrine to apply: '(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'" (*Bunting v. Haynes*, 104 A.D.3d 715, 961 N.Y.S.2d 290 [2 Dept., 2013], *quoting*, *Corcoran v. Banner Super Market, Inc.*, 19 N.Y.2d 425, 227 N.E.2d 304 [1967]). "The exclusive control requirement, as generally understood, is that the evidence must afford a rational basis for concluding that the cause of the accident was probably such that the defendant would be responsible for any negligence connected with it" (*Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219, 492 N.E.2d 1200

[1986]). Here, defendants failed to demonstrate that it would be prejudiced by the plaintiff's delay in moving for leave to amend the verified bill of particulars to state a cause of action through the doctrine of *res ipsa loquitur*, and the amendment is neither palpably insufficient nor totally devoid of merit.

Summary Judgment

Plaintiff and defendants move herein for summary judgment on the issue of liability. “[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” (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra*; *see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

“To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff” (*Donatien v. Long Is. Coll. Hosp.*, 153 A.D.3d 600, 57 N.Y.S.3d 422 [2 Dept., 2017], quoting, *Alvino v. Lin*, 300 A.D.2d 421, 751 N.Y.S.2d 585 [2 Dept., 2002]). “If there is no duty of care owed by the defendant to the plaintiff, there can be no breach and, consequently, no liability can be imposed upon the defendant” (*Greenbaum v. Mare Meats, Inc.*, 178 A.D.3d 775, 111 N.Y.S.3d 890 [2 Dept., 2019], citing, *Pulka v. Edelman*, 40 N.Y.2d 781, 358 N.E.2d 1019 [1976]; *Donatien v. Long Is. Coll. Hosp.*, 153 A.D.3d 600, *supra*).

A property owner “has a duty to maintain its premises in a ‘reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk” (*Dudnik v. 1055 Hylan Offices, LLC*, 164 A.D.3d 870, 83 N.Y.S.3d 202 [2 Dept., 2018], quoting, *Basso v. Miller*, 40 N.Y.2d, 352 N.E.2d 868 [1976]). To be entitled to summary judgment, defendants are required to show, prima facie, that it “maintained its premises in a reasonably safe condition and that it did not have notice of or create a dangerous condition that poses a foreseeable risk of injury to persons expected to be on the premises” (*see Gradwohl v. Stop & Shop Supermarket Co., LLC*, 70 A.D.3d 634, 896 N.Y.S.2d 85 [2 Dept., 2010]). “Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a prima facie showing that he or she is free from fault” (*Carias v. Grove*, 186 A.D.3d 1484, 131 N.Y.S.3d 99 [2 Dept., 2020], citing, *Boulos v. Lerner-Harrington*, 124 A.D.3d 709, 2

N.Y.S.3d 525 [2 Dept., 2015]; *Fried v. Misser*, 115 A.D.3d 910, 982 N.Y.S.2d 574 [2 Dept., 2014]; *see also Gaudio v. City of New York*, 189 A.D.3d 1546, 140 N.Y.S.3d 103 [2 Dept., 2020]).

In the case at bar, neither moving party established entitlement to summary judgment as a matter of law. Even assuming, *arguendo*, that the umbrella fell from a private terrace at 110 Church Street or 50 Murray Street, based on the evidence provided, it is unclear whether the tenant's private terraces were within defendants' control. Juarez testified that he never saw an umbrella on the private terraces and did not know of any policies regarding the use of umbrellas on the private terraces. No evidence was provided as to the defendants' general policy on allowing umbrellas on the premises, and "defendants failed to show that, as the owners of real property, the relinquished exclusive control" of the private terraces, thus "absolving them of liability" (*see Saunders v. 511 Galaxy Realty Corp.*, 64 A.D.3d 564, 883 N.Y.S.2d 549 (2 Dept., 2009)). Further, plaintiff has not established that the umbrella that struck her was within the exclusive control of the defendant, which is a necessary element to state a cause of action to recover through the doctrine of *res ipsa loquitur* (*see Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219, *supra*; *Roman v. 233 Broadway Owners, LLC*, 99 A.D.3d 882, 955 N.Y.S.2d 52 [2 Dept., 2012]).

Additionally, "[t]he competing expert opinions presented an issue of credibility for the trier of fact to determine" (*Rapaport v. Sears, Roebuck & Co.*, 28 A.D.3d 449, 812 N.Y.S.2d 642 [2 Dept., 2006]). "Where conflicting expert testimony is presented, the trier of fact is entitled to accept one expert's opinion and reject that of another, and the


trier of fact's resolution of the credibility of conflicting expert testimony is entitled to great weight” (*Ruggiero v. Ruggiero*, 143 A.D.3d 964, 40 N.Y.S.3d 169 [2 Dept., 2016]).

Plaintiff submitted the affidavit of Anthony Bellezza, Ph.D. in biomedical engineering, who opined “to a reasonable degree of scientific certainty, the patio umbrella that struck and injured Ms. Poesz fell from a 7th floor terrace of 110 Church Street.” Defendant submitted the affidavit of Andrew R. Yarmus, P.E., F.NSPE, a “licensed Professional Engineer, a New York State Certified Code Enforcement Official, and a Fellow of the national Society of Professional Engineers.” Yarmus concluded, with a reasonable degree of Engineering certainty, “that plaintiff, and plaintiff’s expert, Anthony J. Bellezza, Ph.D., have not, in face, proven with any degree of engineering, nor even general, certainty that Margit Poesz was in fact struck by an umbrella which fell from a rooftop terrace from 50 Murray Street.” Accordingly, a question of fact exists as to whether the umbrella that allegedly struck plaintiff came from 110 Church Street or 50 Murray Street.

Conclusion

Accordingly, defendants’ motion, sequence number eight, is denied. Plaintiff’s motion, sequence number nine, is granted to the extent it seeks to supplement the verified bill of particulars. This constitutes the decision and order of this case.

ENTER:


Hon. Lara J. Genovesi
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