

**P.J.'s of Little Italy, Inc. v Everest Natl. Ins. Co.**

2022 NY Slip Op 31788(U)

June 2, 2022

Supreme Court, New York County

Docket Number: Index No. 656924/2017

Judge: William Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. WILLIAM PERRY PART 23

*Justice*

-----X

P.J.'S OF LITTLE ITALY, INC. D/B/A PELLEGRINO'S RESTAURANT,	INDEX NO. <u>656924/2017</u>
Plaintiff,	MOTION DATE <u>10/15/2021</u>
	MOTION SEQ. NO. <u>004</u>

- v -

EVEREST NATIONAL INSURANCE COMPANY,  
MULBERRY STREET COMMERCIAL PROPERTIES LLC,  
MULBERRY CONDOMINIUM ASSOCIATES LLC,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 004) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

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

Upon the foregoing documents, plaintiff's motion for partial summary judgment on the issue of liability and directing an inquest on damages, motion sequence 004, is denied.

In this action, plaintiff P.J.'s of Little Italy, Inc., d/b/a Pellegrino's Restaurant ("plaintiff and/or PJ's"), alleges claims of negligence and breach of contract against defendant Mulberry Condominium Associates, LLC. ("defendant and/or Mulberry"). The claims relate to an incident that occurred on January 11, 2017, when water drained from a tank located on the roof of the building leaked into the restaurant located on the ground floor and allegedly damaged PJ's restaurant causing it to cease operations. It is alleged that PJs operated its restaurant pursuant to a lease with discontinued defendant Mulberry Street Commercial Properties LLC and that the building was owned by defendant Mulberry. (NYSCEF Doc. Nos. 91, 89).

On November 21, 2019, this court consolidated for joint discovery and trial, a subrogation action commenced by Everest National Insurance Company, under Index No.

653851/2019, directing that each action shall maintain its own index number. (NYSCEF Doc. No. 57). Plaintiff discontinued its claims against defendant Everest National Insurance Company on January 9, 2019 (NYSCEF Doc. No. 41); plaintiff discontinued its claims against defendant Mulberry Street Commercial Properties LLC on October 14, 2020 (NYSCEF Doc. No. 66). On April 26, 2021, Everest discontinued its claims against defendant Rosenwach Tank Co., in the subrogation action. (NYSCEF Doc. No. 8). Both actions remain pending against defendant Mulberry Condominium Associates LLC.

Plaintiff argues that it is entitled to summary judgment on liability, invoking the doctrine of *res ipsa loquitor*. It claims that the undisputed evidence shows that Mulberry negligently drained the water tank located on the roof of the building and then failed to monitor the process which led to ice falling off the tank. Plaintiff contends that it has satisfied the elements of *res ipsa* and that defendant's negligence caused a "massive flood" in its restaurant which was located on the ground floor and basement.

Mulberry opposes the motion claiming that issues of fact exist that must be decided by a jury. Mulberry argues that plaintiff has not met its burden to prove a *res ipsa* case and there are issues as to whether Mulberry breached a duty. Mulberry denies plaintiff's claim that a chunk of ice fell off the water tank and ruptured a hole in the roof and maintains that there is no evidence that the procedure used to drain the tank was flawed. (NSYCEF Doc. No. 104, ¶¶ 22, 23). Defendant claims that a jury should decide whether it was foreseeable that a chunk of ice could have fallen off the tank damaging the roof that allegedly caused the flooding of PJ's restaurant.

Additionally, defendant maintains that it did not have exclusive control of the roof, noting that PJs' machine room and HVAC system were also located on the roof. (NYSCEF Doc. No. 100, Chun Hui Qiu's deposition testimony, page 23 lines 23- 24 and page 54 lines 6 – 11).

PJs admits that the day before the incident, its employee, Luis Morales, was on the roof to repair a motor/smoke extractor for PJ's restaurant. (NYSCEF Doc. No. 94, Morales' deposition testimony, page 77, line 12, page 78, line 23). Defendant also relies on Morales' deposition testimony, noting that he testified that the smoke extractor is located right next to the water tank, and that Morales testified that he accessed the roof about 6-7 times on the day of the incident and collected pieces of the roof that the roofing company was discarding. (NYSCEF Doc. No. 101, Morales' deposition testimony, page 80 lines 7-10, page 89 lines 2-10, page 113 lines 11-21).

Plaintiff also cites to Morales' testimony noting that he testified that he noticed ice on the sides of the tank the day before the flood but claims that he was on a different section of the roof to repair the motor. (NYSCEF Doc. No. 94, Morales' deposition testimony, Page 77, line 12, Page 78, line 23). Plaintiff further notes that Morales testified that on the day of the incident, he made several trips to the roof, took pictures and a video, and later went to the roof to shut off the valve on the water tank. (NYSCEF Doc. No. 94, Page 89 line 2, Page 92, line 21).

Defendant contends that the deposition testimony raises issues of fact that preclude summary judgment and argues that plaintiff cannot rely on *res ipsa* since the deposition testimony shows that Morales had access to the roof and the water tank valve. Defendant maintains that plaintiff has not established that defendant was negligent, and that fact issues related to foreseeability and causation cannot be decided as a matter of law on this record.

## **DISCUSSION**

"It is settled that negligence cases by their very nature do not lend themselves to summary dismissal since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." (*McCummings v New York City Transit Auth.*, 81 NY2d 923, 926 [1993], quoting *Ugarrizza v Schmieder*, 46 NY2d

471, 474 [1979]). "The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law." (*Ryan v Trustees of Columbia Univ. in the City of N.Y., Inc.*, 96 AD3d 551, 553, 947 N.Y.S.2d 85 [1st Dept 2012] [internal quotation marks and citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. (*Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226, 750 N.Y.S.2d 1 [1st Dept 2002]).

Granting summary judgment on the ground of *res ipsa loquitur*, occurs only in the rarest of cases. Summary judgment is appropriate where "plaintiff's 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. Co.*, 7 NY3d 203, 209, 851 N.E.2d 1143, 818 N.Y.S.2d 792 [2006]). To establish *res ipsa loquitur*, "(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; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (*id.*, quoting *Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430, 227 N.E.2d 304, 280 N.Y.S.2d 385 [1967], quoting Prosser, Torts § 39 at 218 [3d ed]).

*Res ipsa loquitur* does not create a presumption of negligence; rather, it is a rule of circumstantial evidence that allows the jury to infer negligence. (See *Morejon v Rais Const. Co.*, *supra*). The doctrine creates a prima facie case of negligence sufficient for submission to a jury, and the jury may, but is not required to, draw the permissible inference (*Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226-227, 492 NE2d 1200, 501 NYS2d 784 [1986]; see also, *George Foltis, Inc. v City of New York*, 287 NY 108). "A defendant is free to rebut the inference by presenting different facts or otherwise arguing that the jury should not apply the inference in a

particular case." (*Ezzard v One E. Riv. Place Realty Co.*, 129 AD3d 159, 162, 8 N.Y.S.3d 195 [1st Dept 2015]).

Here, defendant contends that the deposition testimony presents questions of fact as to whether Mulberry was negligent. Candy Xiu testified on behalf of Mulberry that management was aware of the ice condition on the side of the tank by reason of the tank leakage, and the need to remove ice from the tank. Defendant maintains, however, that there is no evidence that representatives of the building were aware that ice had fallen or could have fallen and thereby cause a hole in the roof. In addition, Mulberry relies on the testimony of Maggie Dai, the former manager for the building, to demonstrate that there are issues of fact related to whether the process utilized to drain the water tank was flawed, whether the super left the roof during the drainage process and whether the ice had ruptured a hole in the roof. (NYSCEF Doc. No. 103, Maggie Dai's deposition testimony, p. 80; lines 16-21).

Plaintiff has not met its burden to establish defendant's negligence as a matter of law, nor has it established its prima facie entitlement to summary judgment based on the doctrine of *res ipsa loquitur*. Initially, the court finds *res ipsa loquitur* is inapplicable here because, as defendant correctly asserts and plaintiff admits, the roof of the building and the water tank were not in Mulberry's exclusive control. The deposition testimony of PJs' employee confirms that Mr. Morales was on the roof the day before the incident repairing the smoke extractor that was next to the water tank and was present on the roof the day of the incident, 6 or 7 times. (NYSCEF Doc. No. 101, Morales' deposition testimony, page 80 lines 7-10, page 89 lines 2-10, page 113 lines 11-21). There is also testimony confirming that Mr. Morales had access to the valve and on the day of the flood went to the roof to shut off the valve on the water tank. (NYSCEF Doc. No. 94, Morales' deposition testimony, Page 89 line 2, Page 92, line 21).

Based on the testimony, plaintiff cannot satisfy the second or third element necessary to establish *res ipsa*, namely that the incident was not due to any voluntary action or contribution on the part of plaintiff. (*Morejon v Rais Constr. Co.*, 7 NY3d at 209). Moreover, summary judgment cannot be granted because issues of fact exist regarding the defendant's liability. As noted, defendant has raised issues of fact as to whether the water tank was in Mulberry's exclusive control. In addition, defendant has raised fact issues related to whether it was foreseeable that the ice which is alleged to have been on the side of the tank could have fallen off the tank, and whether the ice ruptured a hole in the roof causing the flood. (NYSCEF Doc. No. 101, Morales' deposition testimony, page 80 lines 7–10, page 89 lines 2–10, page 113 lines 11–21).

Plaintiff postulates that defendant should have known that the ice would melt due to temperature fluctuations and should have known that a large chunk of ice could cause damage, such as a hole in the roof, as is alleged to have happened here. Plaintiff hypothesizes that the very act of opening a valve to drain a water tank located on the roof of a building with a chunk of ice on the side of it, is an act that would not occur without negligence. It is, however, not the court's province to resolve fact issues on a motion for summary judgment; rather, it is for the jury to decide whether it was foreseeable that ice would fall from the water tank, causing a hole in the roof and whether that hole caused the flood in plaintiff's restaurant.

This case is not one of the rare instances in which summary judgment as to liability may be granted as a matter of law based on application of the doctrine (*Maroonik v Rae Realty LLC*, 2022 N.Y. App. Div. LEXIS 2866 \* [1<sup>st</sup> Dept 2022] [where the Court denied summary judgment on the basis of *res ipsa* when the collapse of plaintiff's living room ceiling while she was watching a movie caused her to sustain injuries, concluding that neither party has provided an


explanation of why the ceiling collapsed], citing *Barney-Yeboah v Metro-N. Commuter R.R.*, 120 AD3d 1023, 1023-24, 992 N.Y.S.2d 215 [1st Dept 2014], revd 25 NY3d 945, 6 N.Y.S.3d 549, 29 N.E.3d 896 [2015]).

Whether the process used by defendant to drain the tank was flawed or was performed in a negligent manner and whether that negligence was the direct result of PJs claimed damages, however, is not for the court to decide, but for the trier of fact. (*McCummings v New York City Transit Auth.*, 81 NY2d 923, 926 [1993]). Plaintiff's expert affidavit does not resolve these fact issues, nor does it establish prima facie entitlement to summary judgement. (NYSCEF Doc. No. 88). Indeed, the expert's conclusions are purely speculative and thus, the affidavit lacks sufficient probative value to constitute prima facie evidence of defendant's negligence. (See *Diaz v New York Downtown Hosp.*, 287 AD2d 357, 358, 731 N.Y.S.2d 694 [1st Dept 2001], affd 99 NY2d 542, 784 N.E.2d 68, 754 N.Y.S.2d 195 [2002]).

Accordingly, plaintiffs' motion for partial summary judgment on the issue of liability is denied, and it is

ORDERED that the plaintiff's motion for partial summary judgment pursuant to CPLR 3212 as to liability against defendant Mulberry Condominium Associates, LLC based on the doctrine of *res ipsa loquitur* is denied.

6/2/2022  
DATE

  
WILLIAM PERRY, 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"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE