Smith v TS ZO L.L.C.

2023 NY Slip Op 34440(U)

December 18, 2023

Supreme Court, New York County

Docket Number: Index No. 155677/2019

Judge: David B. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAVID B. COHEN** **PART 58**

Justice

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DENNA SMITH,

Plaintiff,

- v -

TS ZO L.L.C., FINDYOURZO, TISHMAN SPEYER PROPERTIES, and ADRIAN FERNANDEZ

Defendants.

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INDEX NO. 155677/2019

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, defendant Adrian Fernandez moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against him.

I. Factual and Procedural Background

This case arises from an incident on March 12, 2019, in which plaintiff was allegedly injured while getting a massage in a lounge within the lobby of a building located at 200 Park Avenue in Manhattan (the premises) (NYSCEF Doc No. 13). She commenced this action against defendants asserting claims of negligence on the part of defendants, their agents, and their employees (Doc No. 108). Fernandez joined issue by his answer dated October 29, 2019, denying all substantive allegations of wrongdoing and asserting various affirmative defenses (Doc No. 109). Fernandez moves for summary dismissal of the complaint as against him (Doc Nos. 104-105), which plaintiff opposes (Doc No. 121).

A. Deposition Testimony of Plaintiff (Doc No. 112)

At her deposition, plaintiff testified that she worked for a law firm located on the premises and stated her understanding that defendant Tishman Speyer Properties (Tishman) provided the massages, as well as other wellness services, as a benefit to people who worked there. All massages took place in the ZO lounge located in the lobby of the premises. On the day of the incident, she went to the lobby for her appointment and was seated in a massage chair. She was facing the ground with her face resting on a pad, while her knees were slightly bent and rested on two other pads. Shortly after her massage began, the chair made a "creaking noise . . . out of nowhere" and collapsed, causing her to fall forward and injure herself. She was unsure exactly how the collapse occurred, but speculated that a "safety mechanism" on the bottom of the chair "popped."

B. Deposition Testimony of Fernandez (Doc No. 113)

Fernandez testified that he was an independent contractor who worked for nonparty Exubrancy, and confirmed that there was a written agreement between him and Exubrancy to that effect (Doc No. 80). He owned the massage chair that he used and was never instructed by anyone from defendant TS ZO L.L.C. or Tishman about how to perform his work. Upon arriving at the premises, he would set up his equipment in the ZO lounge area of the lobby. Prior to each massage, he cleaned and inspected the chair.

There was a wire underneath the chair that connected the front and rear legs, and that wire was secured by two bolts. The wire allowed the chair to fold closed, making it easier to carry and transport. Minutes after plaintiff's massage began, as he applied slight pressure to plaintiff's back, he heard a "clink" from the chair and it collapsed. One of the bolts had broken in half, with one piece left inside the chair and the other ejected out into the lobby somewhere. The chair had never

collapsed in that way, and the way it collapsed differed from the way the chair normally folded closed. Lastly, he had performed between five and ten other massages that day prior to plaintiff's accident.

II. Legal Analysis and Conclusions

Fernandez contends that he is entitled to summary dismissal of the complaint as against him because he has established that he neither created the allegedly dangerous condition nor had actual or constructive notice of it.

In opposition, plaintiff maintains that Fernandez had sufficient notice because his inspections of the bolts on the massage chair made him aware that the bolts were old and fatigued. Plaintiff also maintains that Fernandez is liable under the doctrine of res ipsa loquitur.

In reply, Fernandez argues that plaintiff cannot raise res ipsa loquitur in opposition to his summary judgment motion, because it is a new theory of liability never previously raised in the complaint or bill of particulars. He further argues that res ipsa loquitur does not apply here because plaintiff's accident is not one that normally does not occur without negligence. Finally, he contends that plaintiff failed to identify a triable question of fact regarding the issues of creating the allegedly dangerous condition and actual or constructive notice.

Defendant's contention that plaintiff's res ipsa loquitur arguments must be disregarded because she cannot assert a new theory of liability in opposition to a summary judgment is unavailing. "Res ipsa loquitur is not a separate theory of liability [from common-law negligence]," and "[a] plaintiff's failure to specifically plead res ipsa loquitur does not constitute a bar to the invocation of [it] where the facts warrant its application" (*Smith v Consolidated Edison Co. of N.Y., Inc.*, 104 AD3d 428, 428-429 [1st Dept 2013]). Therefore, plaintiff's failure to mention res ipsa loquitur in her pleadings does not make it unavailable to her (*see id.* at 429 [allowing plaintiff

to oppose summary judgment motions by arguing res ipsa loquitur applied despite failing to plead it his complaint]). In any event, "[s]ummary judgment must be denied if it is shown that there are issues of fact supporting an actionable claim[,] . . . regardless of whether the cause of action was properly pleaded in the complaint" (*Ramos v Jake Realty Co.*, 21 AD3d 744, 745 [1st Dept 2005]; *see Swift Funding, LLC v Isacc*, 144 AD3d 471, 472 [1st Dept 2016]).

To invoke res ipsa loquitur, it must be established "that the event [was] the kind which ordinarily does not occur in the absence of negligence, that it was caused by an agency or instrumentality within the exclusive control of the defendant, and it was not due to any voluntary action or contribution on the part of the plaintiff" (*Dawson v National Amusements*, 259 AD2d 329, 330 [1st Dept 1999]; *see Smith*, 104 AD3d at 429).

Here, Fernandez has not demonstrated that plaintiff is unable to establish each of those elements. Regarding the first element of ordinary occurrence, common knowledge provides that, in the absence of negligence, a chair of any kind does not ordinarily collapse because someone sits in it for a short period of time (*see Dawson*, 259 AD2d at 330 [finding first res ipsa loquitur element satisfied where movie theater chair collapsed]; *Finocchio v Crest Hollow Club at Woodbury*, 184 AD2d 491, 492-493 [2d Dept 1992] [finding doctrine of res ipsa loquitur applicable to collapse of chair at wedding reception]; *Rose v Bagon*, 37 AD2d 949, 949 [1st Dept 1971] [finding doctrine applicable to broken beauty parlor chair]). Fernandez testified at his deposition that the collapse occurred because one of the bolts securing a wire connecting the front and rear legs broke in half. That method of failure does not occur without some sort of negligence, whether it be on the part of the designer, manufacturer, or individual tasked with assembling and inspecting the chair.

With respect to the second element of exclusive control, Fernandez testified that he owned the chair, set it up the morning of plaintiff's accident, and regularly inspected it during that day.

This is sufficient to demonstrate that there is a triable question of fact regarding whether his "negligence in inspecting and maintaining the [chair] is a probable cause of the accident involved" (*Dawson*, 259 AD2d at 330 [denying summary judgment, in part, because plaintiff demonstrated chair was within exclusive control of defendant]; *see Finocchio*, 184 AD2d at 492 ["The evidence of the defendant's exclusive control was sufficient . . . to warrant submission to the jury on the plaintiff's theory of res ipsa loquitur."]). Finally, "the record contains no evidence whatsoever that plaintiff did anything to contribute to the accident" (*Dawson*, 259 AD2d at 330; *see Smith*, 104 AD3d at 430 [finding third element satisfied because "there [wa]s no evidence or allegation that plaintiff caused or contributed to the occurrence of the accident"]).

Therefore, Fernandez failed to establish prima facie that res ipsa loquitur is not applicable to the instant facts and his motion for summary dismissal of the complaint as against him must be denied (*see Dawson*, 259 AD2d at 329-330 [denying summary judgment because evidence demonstrated that res ipsa loquitur was applicable]).

The parties remaining contentions are either without merit or do not need to be addressed given the findings set forth above. Accordingly, it is hereby:

ORDERED that the motion by defendant Adrian Fernandez for summary judgment dismissing the complaint as against him is denied; and it is further

ORDERED that the parties are to appear for a settlement/trial scheduling conference in person at 71 Thomas Street, Room 305, on January 31, 2024, at 9:30 a.m.

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12/18/2023
DATE

DAVID B. 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