

Watson v OLR ECW Hous. Dev. Fund Co., Inc.
2023 NY Slip Op 35225(U)
October 13, 2023
Supreme Court, Bronx County
Docket Number: Index No. 31065/2020E
Judge: Veronica G. Hummel
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To commence the statutory
time for appeals as of right
(CPLR 5513[a]), you are
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of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 20

FELICIA WATSON,

Plaintiff,

-against-

OLR ECW HOUSING DEVELOPMENT FUND
COMPANY, INC., OLR ECW, L.P., OMNI NEW
YORK LLC., and RELIANT REALTY SERVICES,
LLC.,

Defendants.

Index No. 31065/2020E
HON. VERONICA G. HUMMEL, A.J.S.C.

Mot. Seq. No. 1

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all of the papers filed in NYSCEF in connection with the motion of plaintiff FELICIA WATSON (Mot. Seq. 1) for an order, pursuant to CPLR 3212, granting plaintiff summary judgment against defendants OLR ECW HOUSING DEVELOPMENT FUND COMPANY, INC., OLR ECW, L.P., OMNI NEW YORK LLC., and RELIANT REALTY SERVICES, LLC., on the issue of liability and dismissing the affirmative defenses related to comparative negligence, assumption of risk, contributory negligence, and culpable conduct.

This is an action to recover for personal injuries allegedly occurring when a bathroom ceiling collapsed causing plaintiff injury on August 24, 2020 (the Accident). Plaintiff alleges that the ceiling collapsed because of a water leak from the apartment above. Defendants own and manage the relevant multiple unit dwelling apartment building, which is located at 1663 Eastburn Avenue, Bronx, N.Y. (the Building).

On the motion, the deposition transcripts of plaintiff and the Superintendent (Pedro Emilo) are submitted. In addition, attorney affirmations, the pleadings, notices to admit, work invoices, and photographs are provided to the court. The parties do not submit personal affidavits.

Plaintiff's attorney uploaded the motion exhibits to NYSCEF without the appropriate descriptive labels in violation of the rules of NYSCEF and good practice. Henceforth exhibits improperly uploaded to NYSCEF will not be considered by the court.

The undisputed facts are as follows: Defendants owned and managed the Building on the date of the Accident. On the date of the Accident, plaintiff was a tenant in a first floor apartment, apartment 1F (Plaintiff's Apartment). Above Plaintiff's Apartment was apartment 2F (the Second Floor Apartment), and above that was apartment 3F (the Third Floor Apartment). Plaintiff was reaching over the toilet in the Plaintiff's Apartment when the ceiling above the toilet collapsed.

At deposition, plaintiff testified that she has lived in the Plaintiff's Apartment since 2000. The Accident happened at night. She was going into the bathroom to get cotton balls off of her toilet and the next thing she remembered is sitting on the floor in front of her toilet, unconscious. When she awoke, there was gravel and wet material on

the floor and sheetrock was hanging down from the ceiling and covering her. 911 was called and the Superintendent came upstairs.

Plaintiff testified that she has had numerous leaks in the bathroom prior to the ceiling falling. There has been water in the ceiling and water in the walls. Each time there was a leak she would call or text the Superintendent, he would come upstairs and look at it. She would also inform management by calling them or taking pictures and e-mailing them and would also text pictures to the superintendent. Copies of these pictures and texts are not submitted on the motion nor did plaintiff specify the dates of these events.

The Superintendent's name is Pedro and he testified that he has been the superintendent for about five years. Plaintiff had numerous leaks in the bathroom prior to the ceiling falling and there has been water in the ceiling and water in the walls. Each time there was a leak she would call or text the Superintendent. He would come upstairs and look at the defect and plaintiff would inform management by calling them or taking pictures and e-mailing them. Plaintiff also texted pictures to the Superintendent.

The Superintendent testified that he has been working in the Building since 2017. His duties are to keep the Building clean, repair small problems, do some plumbing and some electrical. If he couldn't fix a problem, he would report it to management and they would send a contractor to do the job. He also performed annual inspections of all the apartments. He has done an annual inspection of the Plaintiff's Apartment every year. He was aware of an issue with water leaking into the Plaintiff's Apartment. The water was leaking from the Third Floor Apartment into the Plaintiff's Apartment, and it was a continuous issue for several years before the Accident.

He testified that, in the Plaintiff's Apartment, there had been a ceiling with water damage (the original ceiling) that was covered up with another piece of dry wall (the drop ceiling) that was done before he came into the Building. He testified that when he was trying to resolve the leak in the Plaintiff's Apartment, the original ceiling was covered and the drop ceiling cover had a little damage. He fixed it, he did plastering and repainted, but never looked under the drop ceiling sheetrock and did not see the original ceiling.

He stated that, over time and before the Accident, he went to the Third Floor Apartment, and found that the tenants in the Third Floor Apartment had splashed water on the floor in the bathroom, while bathing or by the use of a washing machine, a number of times, causing a leak to flow all the way down to damage the ceiling in the Plaintiff's Apartment. He fixed the damage in the Plaintiff's Apartment drop ceiling by plastering, painting. Once he broke the wall behind the shower body in the Third Floor Apartment to figure out if something was wrong with the plumbing but everything was fine. He believes that the ceiling collapsed in the Plaintiff's Apartment was because of water being splashed by the upstairs neighbors on the third floor.

The Superintendent acknowledged that plaintiff complained about water damage and water dripping from her ceiling. There were frequent problems and he had to change the drop ceiling a couple of times, frequently. It was a lot of water, sometimes coming down to her bathroom and there were leaks "all the time". He tried to address it but was never able to correct the issue because the upstairs neighbors continued to splash water. The leak did not originate from a faulty pipe. He found everything to be dry behind the

wall with no need to call a plumber. The Building sent a letter to the upstairs tenant, in apt. 3F, asking them to remove their washing machine and threatening eviction.

The Superintendent was shown a number of photographs that were taken of the bathroom after the Accident. In photograph 7 he identified that the ceiling was a drop ceiling, with another hidden, now revealed, ceiling above it (the original ceiling). In the photograph, there is a large dark spot in the now visible original ceiling, which the Superintendent identified as water damage. He stated that he could not see the defect before the Accident as the drop ceiling hid the defect. The original ceiling was covered by the drop ceiling before he become the Superintendent.

When asked if at any time, while trying to resolve the ceiling leak, did he remove the drop ceiling to see the higher original ceiling, he responded that: the original ceiling was covered up; there was little damage in the drop ceiling; he would plaster and repaint the drop ceiling; and he never saw the original ceiling.

The Accident occurred on August 24, 2020. The maintenance, inspection and repair records for the Plaintiff's Apartment and the Third Floor Apartment are submitted. The records cover the maintenance, inspection and repair of the Plaintiff's Apartment for 11/20/2017 through 10/2020, and for the Third Floor Apartment from 11/21/2017 through 10/29/2020. In relevant part, the documents reflect repairs being done to leaks in the Plaintiff's Apartment ceiling in March 2019, April 2019, May 2019, and October 2019, almost ten months before the August 2020 Accident. The Superintendent also repaired leaks in the kitchen and bathroom sinks.

In 2018 and March, April and May 2019, extensive work was done around the bathroom and kitchen in the Third Floor Apartment to stop leaks. The January 27, 2018 invoice specifically states that the “unit on the second and first floor are affected by the [Third Floor Apartment’s] leak”. In June 2020, two months before the Accident, work on the toilet was done. The invoice dated August 24, 2020, post-accident, states that a leak was reported in the Third Floor Apartment and the Second Floor Apartment. The ceilings fell down in the Second Floor Apartment and the Plaintiff’s Apartment.

Legal Analysis

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case. *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). When deciding a summary judgment motion, a court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957). In making this determination, the court must view the evidence in the light most favorable to the party opposing the motion, and must give that party the benefit of every inference that can be drawn from the evidence. *Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475 (2013); *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 (2012). Every available inference must be drawn in the nonmoving party’s favor. *De Lourdes Torres v. Jones*, 26 N.Y.3d 742, 763 (2016). If there is any doubt as to the existence of a triable issue, summary judgment should be denied. *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

In general, to impose liability for an injury caused by a ceiling collapsing because of a leak, a plaintiff must show that the defendant had prior notice, actual or constructive,

of the leak and that the leak was never repaired. *Ellisy v. Eklecco, LLC*, 56 A.D.3d 517 (2d Dep't 2008); *Figueroa v. Goetz*, 5 A.D.3d 164, 165 (1st Dep't 2004); *See, e.g., Dunn v. 6-8 St. Nicholas Realty Corp.*, 204 A.D.3d 466 (1st Dep't 2022) (plaintiff established his *prima facie* entitlement to summary judgment by submitting evidence that the hotel had actual notice of the defect that caused his injury and that correction of the defect was not shown to have ever been attempted). Here, plaintiff argues that defendants had actual and constructive notice of the alleged ceiling defect.

Actual Notice:

It is undisputed that a timely email or communication from a tenant to a landlord or managing agent concerning a defective condition may constitute actual notice. Here, plaintiff establishes her *prima facie* entitlement to judgment as a matter of law by submitting evidence demonstrating that plaintiff gave defendants notice of the leaks and defendants were aware of the recurring leak in the bathroom before the Accident. *Dunn v. 6-8 St. Nicholas Realty Corp.*, 204 A.D.3d 466 (1st Dep't 2022); *Toussaint v. Ocean Ave. Apartment Associates, LLC*, 144 A.D.3d 664 (2d Dep't 2016). According to testimonial and documental evidence, the ceiling had leaked for years before the Accident, an employee of defendant had been by to examine the condition and attempted to remedy the leaks, plaintiff made numerous complaints about the leaks, but the leaks were never properly fully remedied. *Id*; *Figueroa v. Goetz, supra*; *Toussaint v. Ocean Ave. Apt. Assoc., LLC, supra*.

Based on the record, defendants raise a question of fact as to actual notice. *See Lozano v. Mt. Hope Place Properties, Inc.*, 141 A.D.3d 455 (1st Dep't 2016). Defendants do not deny that plaintiff informed them over time and at different times of the leaks when they occurred. In essence, instead, defendants assert that the evidence shows that every leak

plaintiff complained of was remedied and that the collapse was related to a new different leak in the same location caused by the upstairs tenants' behavior without actual notice to defendants. There is no definitive statement by either party setting forth a date for the most recent complaint made by plaintiff of a leak in the Apartment before the incident. Nor can it be determined, without an assessment of credibility, what caused the Accident. Based on the record, and viewing the evidence in favor of the non-moving party, therefore, the court finds that the issue is a factual question to be determined by the jury. *Id.*; see *Fabian v. Mamadet Realty Corp.*, 2022 N.Y. Slip Op. 32214(U) (Bronx Sup. Ct. 2022); compare *Toussaint v. Ocean Ave. Apt. Assoc., LLC*, *supra* (actual notice found as a matter of law where tenant complained three days prior to incident of a ceiling leak); *Dunn v. 6-8 St. Nicholas Realty Corp.*, *supra*.

Constructive Notice

Plaintiff also demonstrates constructive notice. A defendant has constructive notice of a defect when the defect is visible and apparent, and existed for a sufficient length of time before the accident that it could have been discovered and corrected. *Gordon v. American Museum of Natural History*, 67 N.Y.2d 836 (1986). In addition, a defendant who has actual knowledge of a particular ongoing and recurring hazardous condition may be charged with constructive notice each specific reoccurrence of that condition. *Toussaint v. Ocean Ave. Apartment Associates, LLC.*, *supra*. Mere notice of a general or unrelated condition, however, is insufficient to constitute constructive notice of the specific condition that caused plaintiff's injuries. *Id.*; *Willis v. Galileo Cortlandt, LLC.*, 106 A.D.3d 730 (2d Dep't 2013). Constructive notice will not be imputed where a defect

is latent and would not be discoverable upon reasonable inspection. *Matson v. Dermer Management, Inc.*, 200 A.D.3d 772 (2d Dep't 2021).

Based on the submissions, for the reasons set forth above, plaintiff sets forth a *prima facie* showing that the defendants had constructive notice of the alleged defect and the defect existed for a sufficient length of time before the Accident such that it could have been discovered and corrected. *Compare Matson v. Dermer Management, Inc, supra.*

In opposition, for the reasons set forth above, defendants generate an issue of fact. While it is undisputed that defendants were aware of a long standing leak issues in the Plaintiff's Apartment, defendants allege that each leak was fixed, with the last repair shown in the records occurring in the Plaintiff's Apartment ten months before the Accident. The questions of whether the remedial actions were adequate and what actually caused the August 2020 accident are issues of fact for the jury. Furthermore, while the Superintendent acknowledges that he never looked at the drop ceiling and that a significant water stain existed there, that evidence does not establish the immediate cause of the leak that resulted in plaintiff's injury and the issue is for the jury. Based on the very limited record, the lack of details, and viewing the evidence in favor of the non-moving party, questions of fact exist as to whether defendants had constructive notice of the defect that caused plaintiff's injury warranting the denial of summary judgment in plaintiff's favor.

Res Ipsa Loquitur

Plaintiff fails to establish a *prima facie* entitlement to summary judgment based on the doctrine of *res ipsa loquitur*, as the accident – the collapse of plaintiff's ceiling - is not a

situation in which “the plaintiff's circumstantial proof is so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable” *Maroonick v. Rae Realty, LLC., supra*; *Tora v. GVP AG*, 31 A.D.3d 341, 342 (1st Dep’t 2006). Accordingly, 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. *Maroonick v. Rae Realty, LLC., supra*.

In contrast, based on the record, the application of the inference of negligence under the theory of *res ipsa loquitur* is warranted. The application of the legal inference is appropriate where the plaintiff can establish that: (1) the event must be of a kind that 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. *See, e.g., Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 (1997). 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. *Maroonick v. Rae Realty, LLC., supra*; *Mejia v. New York City Transit Authority*, 291 A.D.2d 225 (1st Dep’t 2002).

Here, the Accident is the kind that does not usually occur in the absence of negligence and there is no proof that plaintiff contributed to causing the Accident. *See, Id.; Maroonick v. Rae Realty, LLC., supra*; *Wenzel v. All City Remodeling*, 195 A.D.3d 496, 497 (1st Dep’t 2021); *Astorga v. Bronx 360 Realty Mgt. LLC*, 2014 N.Y. Slip Op 31956[U] (Sup Ct, Bronx County 2014).

Nor have defendants refuted plaintiff’s contention that they had exclusive control of the area where the Accident occurred. *Maroonick v. Rae Realty, LLC., supra*; *Mejia v. New*

York City Transit Authority, supra; Astorga v. Bronx 360 Realty Mgt. LLC., supra. See, e.g., Castillo-Sayre v. Citarella Operating LLC., 195 A.D.3d 513, 513 (1st Dep't 2021). In fact, a review of the record reveals that there is no competent evidence on the record showing that defendants were not in exclusive control of the relevant area. *See, e.g., Castillo-Sayre v. Citarella Operating LLC., supra.*

Hence, even assuming the absence of any evidence that defendants had actual or constructive notice of the alleged defect, the absence of that evidence is not fatal to plaintiff's claim, because notice is inferred when *res ipsa loquitur* applies to the accident *Maroonick v. Rae Realty, LLC., supra; see Valdez v. Upper Creston, LLC, 201 A.D.3d 560, 561 (1st Dep't 2022); Mejia v. Delgado, 160 A.D.3d 588 (1st Dep't 2018).*

In addition, that part of the motion that seeks the dismissal of the affirmative defenses related to comparative negligence is granted. Plaintiff sets forth a showing that her actions did not contribute to the Accident and the relevant affirmative defenses lack merit, and defendants do not offer opposition to that showing. In any event, there are no triable questions of fact raised as to the issue.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

ORDERED that the part of the motion of plaintiff FELICIA WATSON (Mot. Seq. 1) that seeks an order, pursuant to CPLR 3212, granting plaintiff summary judgment against defendants OLR ECW HOUSING DEVELOPMENT FUND COMPANY, INC.,

OLR ECW, L.P., OMNI NEW YORK, LLC., and RELIANT REALTY SERVICES, LLC., on the issue of liability based on actual notice is denied; and it is further

ORDERED that the part of the motion of plaintiff (Mot. Seq. 1) that seeks an order, pursuant to CPLR 3212, granting plaintiff summary judgment against defendants on the issue of constructive notice is denied; and it is further

ORDERED that the part of the motion of plaintiff (Mot. Seq. 1) that seeks an order, pursuant to CPLR 3212, granting plaintiff summary judgment against defendants based on the principle of *res ipsa loquitur* is denied; and it is further

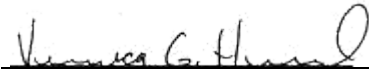
ORDERED that the part of the motion of plaintiff (Mot. Seq. 1) that seeks an order directing the application of the inference of negligence pursuant to *res ipsa loquitur* at trial is granted; and it is further

ORDERED that the part of the motion of plaintiff (Mot. Seq. 1) that seeks an order dismissing all affirmative defenses related to comparative negligence, assumption of risk, contributory negligence, and culpable conduct is granted without opposition; and it is

ORDERED that the Clerk shall mark the motion (Mot. Seq. 1) decided in all court records.

This constitutes the Decision and Order of the Court.

Dated: October 13, 2023

Hon. 
HON. VERONICA G. HUMMEL, A.J.S.C.