SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57M**

Justice

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KYANA WILLIAMS,

Plaintiff,

- v -

593 RIVERSIDE ASSOCIATES, LLC, THE HEIGHTS MANAGEMENT COMPANY, LLC, H. MAINTENANCE, INC.

Defendant.

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INDEX NO. 161014/2021

MOTION DATE 03/14/2024

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117

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

BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by plaintiff when on October 5, 2021, a portion of the ceiling collapsed on her in the bathroom of an apartment, located at 593 Riverside Drive, apartment 3G in Manhattan ("Apartment"). 593 Riverside Associates, LLC ("Riverside") is the owner of the building where the Apartment is located. The Heights Management Company, LLC ("Heights") employed the building superintendent. Plaintiff asserts a cause of action sounding in negligence and invokes the doctrine of *res ipsa loquitur*.

PENDING MOTION

On February 20, 2024, plaintiff moved for an order, pursuant to CPLR § 3212: granting her summary judgment on the issue of liability against Riverside and Heights; determining that plaintiff is free from comparative negligence and did not assume any risk; determining that the

condition in the ceiling was not open and obvious; and dismissing Riverside and Heights' Second, Third, and Tenth Affirmative Defenses.

ALLEGED FACTS

Plaintiff testified that she moved into the Apartment in May 2019, and that she was subletting from Brenda George ("Brenda"). In February of 2021, the ceiling over the bathtub of the Apartment collapsed. The ceiling hole was initially covered by the building superintendent, "Fernando" with a wooden plank, and then plastered over a few weeks later. After the plank was installed, plaintiff repeatedly observed the ceiling leaking. The leaking continued after the ceiling was plastered through the date of plaintiff's accident on October 5, 2021. During this period, plaintiff repeatedly notified Fernando of the leaks, as well as resulting mold and bubbling paint. These notifications were in person, via telephone calls, and text messages. Plaintiff also made a complaint through 311, around the spring and summer of 2021, which resulted in a violation for the condition and additional notice to defendants. In September of 2021, Fernando installed a metal "deterrent" in the ceiling as a temporary fix, but it did not stop the leak. On the date of the accident, plaintiff was in the shower when debris from the ceiling fell on her head, causing her to fall and sustain injuries.

Plaintiff was shown a text message, purportedly from her to Brenda, in which Plaintiff allegedly stated "All I know is when the ceiling falls, I am calling you over so week all sue, we can all lay under it and sue" with five laughing emojis but did not recall sending it.

Heights's superintendent Luis Hernando Restrepo ("Restrepo") confirmed that a portion of the ceiling in the Apartment had previously collapsed in February of 2021. He had received a complaint that the ceiling was leaking prior to that date and was also aware that the ceiling had previously collapsed several times in apartment 4A, directly above the Apartment. While

Restrepo alleged he attempted to access apartment 5A, which was above 4A and which he believed to be the source of the water, he was unable to access the apartment because of the "illegal people" and instead "shut the water down." In the period between the February and October collapses, Restrepo stated that he thought he received texts from plaintiff about the leak and subsequent mold two or three times and performed repairs on the issue two or three times, and that he informed members of Riverside and Heights of the issue. He was also aware that the city inspected the bathroom prior to plaintiff's accident and that the building received violations for the condition. Restrepo opined that because water was not leaking every day during this period, that it was not caused by a broken pipe but due to the fact that the residents of apartment 5A "let the water fall." At some time prior to plaintiff's accident, a sheet metal deterrent was installed, as it was "preferable that [the leak] fell inside the bathtub." Restrepo claimed, based on observation after plaintiff's accident on October 5, 2021, that the ceiling did not collapse, only that some dirt fell.

DISCUSSION

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. CPLR § 3212(b); *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 (2019). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; "conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." *Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 (1988). In deciding the motion, the evidence must be viewed in the "light most

favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference." *O'Brien v Port Auth. of New York and New Jersey*, 29 NY3d 27, 37 (2017).

Plaintiff contends there is no material issue of fact as to Riverside and Heights' negligence, as they concede over six months' actual notice of a recurring leak in the bathroom ceiling of the apartment, due to plaintiff's repeated complaints, and despite at least two to three attempts failed to adequately fix it. She argues that the doctrine of *res ipsa loquitur* applies, as defendants had exclusive access to the instrumentality of her injury, namely the ceiling. She contends there is no evidence in the record that she bears any comparative fault or negligence, and thus Riverside and Heights' second, third, and tenth affirmative defenses should be stricken.

Riverside and Heights oppose, arguing that the superintendent's testimony that the leak originated in the upstairs apartment, but the residents denied him entry to fix the leak raises a triable issue of fact as to whether the repair efforts were reasonable in light of intervening or superseding actions beyond their control, and bars the application of *res ipsa loquitur*. They also argue that plaintiff's text message to her Brenda in which she joked about suing for a collapse, as well as alleged inconsistencies between her description of the accident in her deposition testimony and her hospital records, raise issues as to plaintiff's credibility, and whether the accident which was unwitnessed occurred in the manner she claims. They claim that these issues support a legal and factual basis for their affirmative defenses, and thus they should not be dismissed.

Defendant H. Maintenance, Inc. ("H Maintenance") writes in separate opposition, joining in Riverside and Heights' arguments and additionally arguing that the motion is premature, as it was not added to the action until September 8, 2023, and has not had the opportunity to conduct

discovery. They further contend that plaintiff fails to submit evidence in admissible forms, as she submits unsigned deposition transcripts and unauthenticated documents.

In reply, plaintiff argues there is no genuine dispute that she meets her *prima facie* burden, and that defendants are unable to raise a genuine issue of material fact in opposition. She contends that there is no evidence that Riverside was denied access to the upstairs apartment, and even if it was denied access there were other ways to shut down the water, as they were able to do so after plaintiff's accident. She argues that the text message to Brenda is unauthenticated, that plaintiff's hospital records are uncertified and are not attributable to plaintiff, and are thus inadmissible hearsay, and that neither document creates a material issue of fact.

Plaintiff's unsigned deposition transcripts, and accompanying photographic evidence are admissible, as unsigned deposition transcripts of a party submitted in support of their own motion may be deemed adopted. *Singh v New York City Housing Auth.*, 177 AD3d 475 (1st Dept 2019); *Franco v Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543 (1st Dept 2013). Additionally, Restrepo's unsigned deposition transcript is admissible, as it is certified, defendants do not challenge the transcript's accuracy and in fact Riverside and Heights submit the same unsigned transcript in opposition to the motion. *Id.*

While plaintiff avers that the text message between her and Brenda are not authenticated, defendants annex a sworn affidavit submitted by Brenda in another action, which properly authenticates the text message exchange.

Uncertified medical records "created in the regular course of business are admissible as business records to the extent they are germane to the diagnosis and treatment of the patient." *Viera v Khasdan*, 185 AD3d 405 (1st Dept 2020); *see Williams v Alexander*, 309 NY 283, 287 (1955). Here, the subject hospital records contain a note that "30 year old female complains of

upper back and neck pain after her bathroom ceiling fell on her while she was taking a shower this morning. The ceiling did not hit her head. She did not fall. She has pain with movement. No numbness or tingling or weakness in extremities." This note is germane to diagnosis and treatment and is thus admissible for purposes of this motion.

Plaintiff's claims against Riverside and Heights

"Generally, a landlord may be held liable for injury caused by a defective or dangerous condition upon the leased premises if the landlord is under a statutory or contractual duty to maintain the premises in repair and reserves the right to enter for inspection and repair." *Juarez by Juarez v Wavecrest Mgmt Team Ltd.*, 88 NY2d 628, 642-43 (1996). In order for a plaintiff to make a *prima facie* showing that a landlord is liable for a dangerous or defective condition upon a leased premises, a plaintiff bears the burden of proving "not only that a dangerous condition existed on the premises but also that the landlord had notice of that condition and a reasonable opportunity to repair it." *Id.*; *Reddy v 369 Lexington Ave. Co., L.P.*, 31 AD3d 732, 733 (2d Dept 2006).

Here, it is uncontroverted that Riverside and Heights had a duty to maintain the premises and had repeated actual notice of the leak in plaintiff's ceiling prior to her accident. Thus, plaintiff's meets her *prima facie* burden.

In opposition, defendants attempt to raise an issue of fact as to whether Restrepo's unsuccessful attempts to remedy the condition were reasonable under the circumstances. It is uncontroverted that Restrepo made multiple attempts in the period between the first and second ceiling collapse to address the issue. And while it is not clear from the deposition transcript what efforts were made by Restrepo to enter apartment 5A to address the source of the leak, there is

enough to raise a triable issue of fact as to whether the attempted repairs were reasonable under the circumstances.

Additionally, the text between plaintiff and Brenda, in addition to Restrepo's testimony that only dirt fell from the ceiling raises issues of fact as to the nature of the accident, which are best determined by the trier of fact, especially given the fact that plaintiff was the sole witness to the accident and plaintiff's credibility has been put at issue. *See Nardelli v Young Israel of Woodmere*, 277 AD2d 436 (2d Dept 2000).

Res Ipsa Loquitur

"*[R]es ipsa loquitur* is a rule of evidence that creates a permissible inference of negligence, not a rebuttable presumption." *Shinshine Corp. V Kinney System, Inc.*, 173 AD2d 293 (1st Dept 1991). In order to prevail on a *res ipsa* theory, a plaintiff must establish: (1) the event is of a type that does not occur in the absence of negligence; (2) it must have been caused by an agency or instrumentality within the exclusive control of the defendants; and (3) it must not have been due to any voluntary action or contribution on the part of plaintiff. *Tora v GVP AG*, 31 AD3d 341 (1st Dept 2006). The only instance when summary judgment must be granted to a plaintiff on a *res ipsa* theory is "when the 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 (2006).

While a collapsed ceiling has been held to constitute the sort of event suitable for *res ipsa loquitur* treatment, "the question of whether the doctrine is applicable in a particular case is almost invariably of no moment except in the context of charging a jury." *Shinshine*, 173 AD2d at 294. Here, as there remain issues of fact as to defendants' negligence, the doctrine of *res ipsa loquitur* does not apply at this time. Additionally, as there is uncontroverted testimony that the

leak originated in the apartment of a non-party upstairs tenant, there remain issues of fact as to whether the instrumentality was in the exclusive control of defendants.

Riverside and Heights' Affirmative Defenses

Plaintiff seeks dismissal of the following affirmative defenses:

> SECOND AFFIRMATIVE DEFENSE Whatever injuries were sustained by plaintiff or whatever damages were sustained by plaintiff at the time of the incident involved herein were the result of the culpable conduct of the plaintiff, and/or of third persons, without any culpable conduct on the part of the answering defendants, or its agents, servants and/or employees contributing thereto.
>
> THIRD AFFIRMATIVE DEFENSE Any injuries and/or damages sustained by plaintiff was not as a result of any culpable conduct of the answering defendants herein, or in the alternative, the amount of damages otherwise recoverable shall be diminished in the proportion to which the culpable conduct attributable to the plaintiff bears to the culpable conduct which caused the damages.
>
> TENTH AFFIRMATIVE DEFENSE That all risks and dangers connected with this action were known to and assumed by plaintiff herein, were open, obvious, notorious and apparent and plaintiff, in undertaking such activity, assumed the risk thereof.

"[T]he issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where… the plaintiff move[s] for summary judgment dismissing a defendant's affirmative defense of comparative negligence." *Poon v Nisanov*, 162 AD3d 804 (2d Dept 2018). Here, plaintiff meets her *prima facie* burden to dismiss Riverside and Heights' second and third affirmative defenses, as there is no evidence in the record that plaintiff contributed to her own accident. While defendants raise issues of fact as to the manner and scope of the accident, there is no evidence indicating that plaintiff caused the accident in whole or in part. However, the portion of Riverside and Heights' second affirmative defense which references the culpable conduct of third parties is not dismissed, as there is uncontroverted testimony that the leak and subsequent ceiling damage may have been caused at least in part by the non-party upstairs tenants.

Additionally, the assumption of risk defense, which typically applies to sport or recreational activity, is not available where, as here, plaintiff was simply residing in her apartment when the accident occurred. *See Asprou v Hellenic Orthodox Community of Astoria*, 185 AD3d 641 (2d Dept 2020).

Accordingly, it is hereby:

ORDERED, that plaintiffs' motion is granted, to the extent that Riverside and Heights' Third and Tenth affirmative defenses are dismissed, and Second affirmative defense is dismissed except as applied to third persons, and is otherwise denied; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office; and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that the parties are to appear for a virtual status conference with the court on August 12, 2024, at 2:00 pm via MS teams; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

This constitutes the decision and order of this court.

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7/16/2024
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**