

**Yi Zhu v Apple, Inc.**

2024 NY Slip Op 34662(U)

May 8, 2024

Supreme Court, Westchester County

Docket Number: Index No. 50499/2015

Judge: Damaris E. Torrent

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
YI ZHU,

Plaintiff,

-against-

APPLE, INC., "XYZ CORP.", true name being fictitious and unknown, and "JOHN DOE 1-10", true names being fictitious and unknown,

Defendants.

-----X  
**DAMARIS E. TORRENT, A.J.S.C.**

**DECISION AND ORDER**

**Index No.: 50499/2015**

**Motion Date: 4/16/2024**

**Seq. No. 7**

The following papers numbered 149 to 187 were read on plaintiff's motion for an order granting summary judgment as to liability against defendant Apple, Inc. ("defendant"):

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion / Affirmation (Jasne) / Affidavit (plaintiff) / Exhibits A – P-1 / Memorandum of Law in Support	149 – 176
Memorandum of Law in Opposition / Affirmation (Asche) / Exhibit A – E	178 – 184
Affirmation (Jasne) / Reply Memorandum of Law	186 – 187

Upon the foregoing papers, plaintiff's motion is denied.

This action for personal injuries arises out of an accident that occurred on January 15, 2012.

On that date, plaintiff was at defendant's store in White Plains, New York, when a banner/display rod fell and hit him on the back of his head.<sup>1</sup>

<sup>1</sup> Plaintiff's verified bill of particulars dated May 11, 2016, states that he was hit with a "metal bar track light fixture" (NYSCEF Doc. #163). Plaintiff's supplemental verified bill of particulars dated August 2, 2016, his second supplemental verified bill of particulars dated November 9, 2016, and his third supplemental verified bill of particulars dated November 22, 2016, state that he was hit with a "metal bar hanging Apple advertisement" (NYSCEF Doc. #164, 165, 166).

By Notice of Motion filed on February 16, 2024, plaintiff moves for an order granting summary judgment as to liability against defendant, arguing that defendant is negligent pursuant to the doctrine of *res ipsa loquitur*. Although plaintiff disagrees with the statements in defendant's incident report dated January 15, 2012 (the "Incident Report"), as to how the accident occurred, for the purposes of this motion, he accepts the statements in the Incident Report that, *inter alia*, he "backed up into [their] iPhone 4S display and stepped on the fabric. At this point the display came down and the bar hit him on the head" (NYSCEF Doc. #155).<sup>2</sup> Plaintiff argues that the doctrine of *res ipsa loquitur* applies, because the banner/display was installed in an unsafe manner. He argues that the banner/display should not have been able to come loose from its mounting or hung low enough to be caught by his foot and be a tripping hazard. Plaintiff argues that defendant had exclusive control over the banner/display, including its mounting and its location. Plaintiff argues that he did not voluntarily trip himself and that simply stepping backwards and tripping on the fabric on the floor was not a contributory factor to the accident.

Plaintiff also argues that he has established his *prima facie* case of negligence based on the same facts. He argues that he does not need to demonstrate that defendant had notice of the defective condition, because defendant created the defective condition.

Plaintiff further argues that defendant is strictly liable for his damages based on the same facts.

In opposition, defendant argues that plaintiff has not demonstrated his entitlement to summary judgment based on the doctrine of *res ipsa loquitur*. Defendant argues that plaintiff has not offered any evidence to support his conclusion that the banner/display was installed in an

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<sup>2</sup> Plaintiff testified at his deposition that he was in the store for a few minutes to give his wife her wallet. He testified that after he gave her the wallet, something hit him on the back of his head (NYSCEF Doc. #156, p. 36, 40). He testified that he had not moved at all when he felt it hit him (NYSCEF Doc. #156, p. 43, 44).

unsafe manner or location. Defendant argues that not every object that a plaintiff trips on constitutes a tripping hazard. Defendant argues that even if plaintiff could meet his prima facie burden, there are issues of fact as to whether the banner/display was installed in an unsafe manner or location.

Defendant also argues that since plaintiff does not dispute that the banner/display fell when he stepped backwards onto it, he cannot demonstrate that the accident was not due to any voluntary action or contribution on his part.

In reply, plaintiff argues that the fact that the banner/display was in a public place, with no barrier surrounding it, and was not secured strongly enough to withstand a patron stepping on it or backing into it, is evidence of negligence.

Plaintiff argues that he did not contribute to the accident by merely stepping on the fabric.

*Res Ipsa Loquitur*

“For the doctrine of res ipsa loquitur to apply, a plaintiff must establish three conditions: [f]irst, the event must be of a kind that ordinarily does not occur in the absence of someone’s negligence; second, it must be caused by an agency or instrumentality within the exclusive control of the defendant; and third, it must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Bicchetti v Toyota*, 217 AD3d 743, 744 [2d Dept 2023] [internal quotation marks omitted]; *Dilligard v City of New York*, 170 AD3d 955, 956 [2d Dept 2019]). “[O]nly in the rarest of res ipsa loquitur cases may a plaintiff win summary judgment or a directed verdict. That would happen only 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” (*Morjeon v Rais Const. Co.*, 7 NY3d 203, 209 [2006]; *Bunting v Haynes*, 104 AD3d 715, 716 [2d Dept 2013]).

Here, plaintiff has not established his prima facie entitlement to summary judgment

pursuant to the doctrine of *res ipsa loquitur*. Specifically, plaintiff's moving papers raise issues of fact as to the first element, whether the event was of a kind that ordinarily does not occur in the absence of negligence, and as to the third element, whether plaintiff contributed to the accident, since plaintiff accepts, for the purposes of this motion, the statements in the Incident Report that the banner/display rod fell on him after he stepped back onto the banner/display.

#### *Negligence*

"The elements of negligence are '(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom'" (*Abbott v Johnson*, 152 AD3d 730, 732 [2d Dept 2017]; *Comack v VBK Realty Associates, Ltd.*, 48 AD3d 611, 612 [2d Dept 2008]).

"An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition" (*Devoe v Nostrand II Meat Corp.*, 216 AD3d 738, 739 [2d Dept 2023]; *Hernandez v Conway Stores, Inc.*, 143 AD3d 943, 944 [2d Dept 2016]). "In a premises liability case, the plaintiff must establish the existence of a defective condition and that the defendant either created or had actual or constructive notice of the defect" (*Ingram v Costco Wholesale Corp.*, 117 AD3d 685, 685 [2d Dept 2014]; *Caldwell v Pathmark Stores, Inc.*, 29 AD3d 847, 847 [2d Dept 2006]).

Here, Plaintiff has not established his prima facie case of negligence, because he has not submitted any evidence to demonstrate that defendant created a defective condition by installing the banner/display in an unsafe manner. Plaintiff's reliance on the deposition testimony of Mark Husar ("Husar"), a retail manager for defendant, to demonstrate that the banner/display was installed in an unsafe manner, is misplaced. Although Husar testified that "the one component on the floor didn't look like it was attached and that would normally be attached" (NYSCEF Doc.

#167, p. 72), a review of his testimony reveals that he was referring to plaintiff's exhibit 2, which was shown to him during his deposition. Plaintiff has not demonstrated that plaintiff's exhibit 2 is a picture of the banner/display at issue in this action or that the alleged defect was created by defendant.

Additionally, plaintiff's moving papers raise issues of fact as to whether defendant created a defective condition. Although plaintiff argues that defendant created a defective condition by, *inter alia*, hanging the banner/display in such a manner that it could come loose from its mounting and hanging it low enough to be caught by his foot, the deposition testimony of defendant's employees raise issues of fact as to whether those conditions existed and/or were created by defendant. For example, Husar testified at his deposition that there were tracks that were along both the ceiling and the floor, that they would place a banner that would hang from the ceiling in those tracks (NYSCEF Doc. #167, p. 12), that the banner would be hung from the ceiling and attached to the floor so that it would not move (NYSCEF Doc. #167, p. 13), and that the banner would not move when secured (NYSCEF Doc. # 167, p. 15-24). He also testified that he had no independent recollection of there being any problems with these mechanisms (NYSCEF Doc. #167, p. 79). Husar further testified that the banners did not touch the floor (NYSCEF Doc. # 167, p. 41, 53, 78). (*De La Cruz v NJE Enterprises, Inc.*, 220 AD3d 841, 841 [2d Dept 2023] ["[W]hether a dangerous or defective condition exists on the property of another so as to create liability depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury"] [internal quotation marks omitted]).

#### *Strict Liability*

Plaintiff has not established his prima facie entitlement to summary judgment pursuant to the doctrine of strict liability. The only case plaintiff cites in support of this argument, *N Town*

*Roosevelt Assoc. v Muller*, 1980 NY Misc LEXIS 1989 [App Term, 1st Dept 1980], which discusses the applicability of the doctrine of strict liability to landlords for their breach of the implied warranty of habitability, does not support his conclusory argument that strict liability should apply here.

In light of the foregoing, defendant's opposition need not be considered (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] ["The 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 eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers"].

All other arguments not specifically addressed herein have been considered and have been found to be without merit.

Accordingly, it is hereby

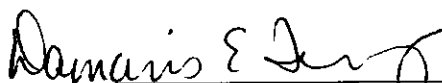
ORDERED that plaintiff's motion for summary judgment as to liability against defendant is denied; and it is further

ORDERED that the parties shall appear for settlement conference on June 5, 2024 at 10:00 a.m. in Courtroom 1601.

The foregoing constitutes the Decision and Order of the Court.

Dated: May 8, 2024  
White Plains, New York

ENTER:

  
HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF