NEW YORK SUPREME COURT - COUNTY OF BRONX
IAS PART 08

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SOILA LISBEY,

Plaintiff,

INDEX No. 307047/2008

-against-

PEL PARK REALTY, 2860 DECATUR CORPORATION and JOHN T. SATRIALE,

Defendants.

Present:
HON. BETTY OWEN STINSON
J.S.C.

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The following papers numbered 1 to 5 read on this motion for summary judgment and cross-motion for discovery, noticed on 10-14-2010 and submitted as No. 33 on the Calendar of 11-15-2010

	PAPERS NUMBERED
Notice of Motion -Exhibits and Affidavits Annexed	1, 2
Order to Show Cause	
Answering Affidavits and Exhibits	3
Reply Affidavits and Exhibits	4
Stipulations	
Memorandum of Law	5

Upon the foregoing papers this motion and cross-motion are decided per annexed memorandum decision.

Dated: March 19, 2012
Bronx, New York

BETTY OWEN STINSON, J. S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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SOILA LISBEY,

Plaintiff, INDEX № 307047/2008

-against- DECISION/ORDER

PEL PARK REALTY, 2860 DECATUR CORPORATION and JOHN T. SATRIALE,

Defendants.

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HON. BETTY OWEN STINSON:

This motion by defendants for summary judgment dismissing the plaintiff's complaint is granted. Cross-motion by plaintiff for an order compelling defendants to produce discovery and/or imposing sanctions is denied.

On July 23, 2008 plaintiff was present in her apartment in a building owned and managed by defendants, when most of her living room ceiling collapsed, allegedly causing her to suffer certain bulging and herniated cervical and lumbar spinal discs. She sued defendants, discovery was conducted, and a note of issue was filed on May 14, 2010. Defendants made the instant motion for summary judgment dismissing the action for plaintiff's failure to show they had actual or constructive notice of a ceiling defect in the living room of her apartment.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient

admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence (*Augerbach v Bennett*, 47 NY2d 619 [1979]; *Ruttura & Sons Construction Co. v J. Petrocelli Construction*, 257 AD2d 614 [2nd Dept 1999]).

A landowner has a duty to maintain his property in a reasonably safe condition in view of all the circumstances (*Basso v Miller*, 40 NY2d 233 [1976]). To establish a *prima facie* case of negligence in a premises liability case, a plaintiff must prove the defendant had actual or constructive notice of the dangerous or defective condition and sufficient time, within the exercise of reasonable care, to correct or warn about its existence (*Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *Lewis v Metropolitan Transp. Auth.*, 99 AD2d 246 [1st Dept 1984], *aff'd*, 64 NY2d 670 [1986]). Constructive notice can be established if the defect is visible and apparent and in that condition for a sufficient length of time that the defendant is presumed to have seen it or was negligent in failing to see it (*Gordon*, 67 NY2d 836). The mere happening of an accident, however, does not establish liability (*Lewis*, 99 AD2d 246).

In support of the motion, defendants offered copies of the pleadings, the plaintiff's bill of particulars, the note of issue and the deposition testimony of plaintiff, of John T. Satriale, Luis Molina and Mark Fothe. The note of issue was accompanied by a certification that all discovery was complete except for a demand, made on the same day that the note of issue was filed, for additional repair records to a different apartment in the building.

Plaintiff testified that she was on her computer in her living room when she heard some cracking sounds which she ignored (deposition of Soila Lisbey, August 20, 2009 at 27-28). About 20 to 30 minutes later she heard more cracking sounds. She looked up, saw the ceiling opening up from the middle and ran, but did not make it out of the living room before she was struck by the falling ceiling. (*Id.*). She had never made any prior complaints to the building "office" or to the superintendent about the living room ceiling (*id.* at 75-76). She never saw any spots or leaks on the living room ceiling (*id.*). The bathroom ceiling had a leak and had been repaired previously (*id.* at 34-35, 86). About 2 years before the accident, an area of the ceiling in the living room above the window had been repaired after a water leak from the "heater" above (*id.* at 81-82). After the accident, a tenant on the second floor told plaintiff she had "a part"of her ceiling come down in her apartment (*id.* at 78-79).

Luis Molina, superintendent of the building since 2000, testified that he was responsible for general maintenance and repairs in the building (deposition on April 27, 2010 at 5-6). If there were complaints from tenants, he would inspect and repair as necessary (*id.*). Plaintiff never complained about her living room ceiling except for peeling paint over her heater (*id.* at 16). It was repaired about a year and a half or two years before the accident. There was no bubbling, cracks or anything else on the living room ceiling at that time. He always inspects the whole ceiling if he works on any part of it. (*Id.*). He painted her bathroom because it had peeling paint about two years before the subject incident (*id.* at 14-15). When he inspected the fallen ceiling immediately after the accident, it was dry (*id.* at 28). It just detached from the middle of the room (*id.*). Molina repaired it himself by adding extra two-by-fours to the ceiling beams to accommodate pre-cut sections of sheet rock and then putting up a sheet rock ceiling (*id.* at 37-38).

About a year before the plaintiff's accident, a ceiling in another apartment in the building was cracking and buckling and Molina repaired that by reinforcing the plaster and wire mesh with four-inch screws and placing sheet rock underneath it (*id.* at 16-17). Other than those two incidents, there have been no other issues with ceilings in any of the other apartments in the building (*id.* at 18). There was nothing else buckling up or falling down (*id.* at 20).

John T. Satriale, owner of the corporation that owned the building, testified that Molina had been superintendent for about 7 or 8 years (deposition on November 24, 2009 at 12-13). Satriale visited the building occasionally and was aware of no other complaints by plaintiff other than those set forth above (*id.* at 46) and a complaint about her floors in February 2008 (*id.* at 33).

Mark Fothe, managing agent, testified that he viewed the apartment the day after the accident (deposition on April 27, 2010 at 48-49). Parts of the ceiling along the window wall and along the opposite wall were still attached (*id.*). Fothe was previously in the apartment approximately six months before the accident to check on some repair, perhaps the painting and patching of the bathroom ceiling, and there was no bulging or cracking in the living room ceiling at that time (*id.* at 67-69). Plaintiff told him after the accident that she had never heard noises or cracking before the subject incident (*id.* at 73, 78). Her complaint about the floors had been about mismatched floor tiles (*id.* at 33).

In opposition to the motion and in support of her cross-motion, plaintiff offered a copy of a citation from the New York City Department of Buildings; a handwritten statement purportedly by Luis Molina; and color photographs with views of the fallen ceiling and plaintiff, face-down on the floor of her living room with a cell phone in her hand. Plaintiff argued that the landlord's right to enter to make repairs as stated in the lease provided constructive notice, that plaintiff's

complaint about the bathroom ceiling constituted actual notice and the citation by the Buildings Department together with the lease provision giving the landlord a right to enter supported application of the doctrine of *res ipsa loquitur*. Plaintiff also argued that the motion was premature as a demand had been made for repair records for the ceiling of a second apartment in the building.

The citation from the Buildings Department was dated the day after the accident and noted the defect to be "ENTIRE LIVING CEILING APPROX 144 SQ FT COLLAPSED TO THE FLOOR, IMPOSING ADDED WEIGHT TO THE FLOOR BELOW".

The handwritten statement, purportedly by Luis Molina, was dated August 6, 2008. It was not notarized or authenticated in any other way. It stated that Molina was not aware of any problems with the plaintiff's ceiling before the accident. The subject ceiling was a plaster ceiling on wire mesh. It split in the center. "Something similar" happened about a year before in a different apartment in the building. That ceiling was "buckling". It was repaired by reinforcing the plaster ceiling with 3-12" screws and laying sheet rock under it.

Defendants have established their entitlement to summary judgment which the plaintiff has not refuted with admissible evidence. Defendants met their burden of proof by showing the defendants had no prior notice of the defective ceiling in the plaintiff's apartment. Plaintiff testified she made no complaints about the living room ceiling, that repair of chipped paint to a small portion of the ceiling above the window had been made previously and she noticed no spots or signs of leaking before the ceiling fell. The superintendent testified that he had inspected the living room ceiling when he painted a small area of ceiling above the window and had also painted plaintiff's bathroom ceiling. He found no signs of bubbling or cracking in the living room

at that time. Fothe testified that he was in plaintiff's apartment approximately 6 months before the subject incident and saw no signs of problems with the living room ceiling.

Plaintiff's submissions in opposition do not raise an issue of fact for trial by showing the defendants had any kind of advance notice of the falling ceiling. The Department of Buildings citation was issued after the subject incident and related to the fact the fallen ceiling was adding weight to the floor below and needed to be repaired. Cracking and buckling of another ceiling in the building did not provide notice of a dangerous condition in every ceiling in the building. There was no finding of a proximate cause for either the buckling ceiling in that apartment or for the falling ceiling in plaintiff's apartment. The building was erected in the 1930's and there could have been any number of conditions impacting those particular plaster ceilings over time, including previous leaks that had been repaired decades ago with plaster, or a weak area of a particular beam with no outward sign of defect. A jury would be required to speculate as to the cause of the collapse to find negligence by the defendants. In the previous eight years before the accident and in the year following it, the superintendent was unaware of any other ceiling in the building with a similar problem, other than what he testified to.

Even if all plaintiff's submissions were considered admissible, they do not add relevant information. The superintendent repaired both ceilings himself and testified as to those repairs. Plaintiff was presumably aware of the repair to the second ceiling as early as the date of Luis Molina's purported statement, only two weeks after the subject accident. There is no justification for filing a note of issue and, at the same time, demanding discovery of items plaintiff was aware of at the very beginning of the case. In addition, there is no evidentiary showing such repair records would add any relevant information to the testimony already provided about those repairs

and, therefore, this demand is not enough to deny summary judgment to the defendants (*see Augerbach*, 47 NY2d 619). The doctrine of *res ipsa loquitur* is also inapplicable here. There is no evidence this is the type of accident that only occurs because of negligence, or that the defendants had exclusive control of the instrumentality of injury, two of the three elements required for the application of *res ipsa loquitur* (*see Dermatossian v NYCTA*, 67 NY2d 219 [1986][all three elements of *res ipsa loquitur* must be satisfied for application of the doctrine]).

Movants are directed to serve a copy of this order on the Clerk of Court who shall enter judgment dismissing the complaint.

This constitutes the decision and order of the court.

Dated: March 19, 2012
Bronx, New York

BETTY OWEN STINSON, J. S.C.