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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARTIN SHULMAN J.S.C.

PART 1

Index Number : 100147/2008

ESTRATEGIA CORP.

VS.

LAFAYETTE COMMERCIAL CONDO

SEQUENCE NUMBER : 007

PARTIAL SUMMARY JUDGMENT

INDEX NO. 100147/08

MOTION DATE

MOTION SEQ. NO. 007

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3
Replying Affidavits	4
Notice of Cross-Motion - Affidavits - Exhibits	5
Reply Affs.	6

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED

DEC 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Dec. 20, 2011

MARTIN SHULMAN J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

==========X

ESTRATEGIA CORP. and ALLEN HIRSCH, Index#: 100147/08

Plaintiffs, **Decision & Order**

-against-

LAFAYETTE COMMERCIAL CONDO,

Defendant.

==========X

LAFAYETTE COMMERCIAL CONDO, Third-Party Index No. 591126/09

Third-Party Plaintiff,

-against-

INTERIOR AUTOMATIC SPRINKLER, INC., CHOLO DINERO LCC, 144 KENMARE ASSOCIATES, LCC d/b/a LA ESQUINA, OBIVIA, LCC and KAM CHEUNG CONSTRUCTION, INC.,

Third-Party Defendants.

==========X

MARTIN SHULMAN, J.:

In this action to recover almost $1.5 million dollars for property damage, plaintiffs Estrategia Corp. ("Estrategia") and Allen Hirsch (collectively "plaintiffs") move for partial summary judgment pursuant to CPLR 3212 on their negligence claim against defendant, Lafayette Commercial Condo ("LCC" or "defendant"). LCC cross-moves for summary judgment dismissing plaintiffs' complaint pursuant to CPLR 3212.

LCC owns the condominium building located at 203 Lafayette Street, New York, New York (the "building"). Plaintiff Estrategia owns various units in the building, including basement storage space (the "storage space") in which co-plaintiff Hirsch, an artist, stored his artwork. On January 20, 2005 a sprinkler pipe located in an enclosed

space underneath a stairwell in the building's lobby froze and burst, flooding plaintiffs' storage space below and destroying or damaging over one hundred paintings and drawings. Plaintiffs commenced this action against defendant in January 2008 alleging two causes of action for negligence and trespass. Thereafter, LCC commenced a third-party action against various entities for contractual and common law indemnification, breach of contract and negligence.[1]

Discussion

An award of summary judgment is appropriate when no issues of fact exist. *See* CPLR 3212(b); *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 (1st Dept), *aff'd* 62 NY2d 938 (1984); *Andre v Pomeroy*, 35 NY2d 361 (1974). In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979). If the movant makes such a showing, the burden shifts to the non-movant to demonstrate the existence of factual issues requiring trial. *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007).

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[1] As mentioned in this court's prior decision and order dated April 19, 2010 (Motion at Exh. K), LCC has contended that the subject sprinkler pipe may have frozen because one or more of the third-party defendants propped open the building's front door on an unusually cold day.

A. Defendant's Cross-Motion for Summary Judgment

The court first addresses LCC's cross-motion for summary judgment dismissing plaintiffs' two causes of action for negligence and trespass.

1. Trespass

In *Phillips v Sun Oil Co.*, 307 NY 328, 331 (1954), the Court of Appeals defined trespass as follows:

> Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, **he must intend the act which amounts to or produces the unlawful invasion**, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness (citations omitted). To constitute such a trespass, the act done must be such as "will to a substantial certainty result in the entry of the foreign matter" . . . (emphasis added).

Thus, a trespass claim requires an affirmative act constituting or resulting in an intentional intrusion upon the plaintiff's property. *Congregation B'nai Jehuda v Hiyee Realty Corp.*, 35 AD3d 311, 312 (1st Dept 2006). Here, LCC argues there is no proof of any willfulness or recklessness in its maintenance of the building's sprinkler system.

In support of their trespass claim plaintiffs allege that defendant was obligated to maintain the building's sprinkler system and, as a result of a 2003 violation issued to LCC (Motion at Exh. S),[2] defendant was aware that the sprinkler system could malfunction yet took no steps to prevent future malfunctions. Citing *Stewart v State*,

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[2] On January 24, 2003, the New York City Fire Department, Bureau of Fire Prevention (the "Fire Department") issued a violation order requiring LCC to "[r]eplace the sprinkler head first floor and restore system to proper working order." *Id.*

248 AD2d 761, 762 (3d Dept 1998), plaintiffs maintain that "[w]ater and debris cast upon the lands of another is actionable as a trespass".

Plaintiffs also cite *Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 237 (1st Dept 2006), wherein the defendant landlord hired a third-party contractor to perform roof repairs. The contractor failed to cover and seal holes it opened in the roof, causing pipes to burst and water to leak into the plaintiff tenant's store. The First Department found plaintiff's allegations stated a cause of action and reinstated the plaintiff's previously dismissed trespass claim against both the landlord and the contractor.

The facts of this case are distinguishable from these two cases. In both cases, the defendants took intentional, affirmative actions resulting in the unintended consequence of water and/or debris entering the respective plaintiffs' properties. In *Stewart*, the defendant undertook highway improvements which allegedly resulted in an increased volume of surface water being discharged onto plaintiffs' properties, causing debris to be deposited as well as erosion. *Id.* at 761. In *Duane Reade*, the defendants performed roof repairs which caused water to enter plaintiff's property.

Here, as previously stated, plaintiffs allege inaction on LCC's part, rather than an intentional, willful act. Thus, plaintiffs fail "to rebut defendant's *prima facie* showing that it lacked the intent required to be liable for trespass." See *Essa Realty Corp. v J. Thomas Realty Corp.*, 31 Misc3d 1235(A), 2011 WL 2176532, at *5 (Sup Ct NY Co) (defendant granted summary judgment dismissing trespass claim where plaintiff alleged defendant knew repairs needed to be made to the facade of its building yet failed to effectuate repairs, thereby damaging plaintiff's neighboring building). For the foregoing reasons, plaintiffs' second cause of action for trespass must be dismissed.

2. Negligence

In order to establish a *prima facie* case of negligence a plaintiff must demonstrate: (1) the defendant owed a duty to the plaintiff; (2) there was a breach of that duty; and (3) plaintiffs' injury proximately resulted from the breach. *Solomon v City of New York*, 66 NY2d 1026 (1985). Further, to hold a defendant property owner liable for damage resulting from a defective condition on its premises, a plaintiff must establish that the defendant created the condition or that it had "actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected (citations omitted)." *Juarez v Wavecrest Mgt. Team Ltd.*, 88 NY2d 628, 646 (1996).

It is undisputed that the lobby and the pipe in question are part of the building's common elements which defendant is responsible to maintain. See Bylaws of the Lafayette Commercial Condo (the "Bylaws") at Article II, §2(a) (Motion at Exh. P). The complaint alleges that LCC was negligent in the building's ownership and management. Specifically, plaintiffs' first cause of action for negligence alleges that LCC breached its duty by failing to: maintain the pipe in good and sufficient repair; maintain the enclosed space surrounding the pipe with sufficient ventilation and heat; and insure the outside wall of the enclosed space was sufficiently insulated.

LCC disputes plaintiffs' claim that it negligently failed to maintain the building's pipes in a condition that would have prevented them from freezing, offering evidence that it employed a full-time, live-in superintendent at the building; provided heat to the lobby area adjacent to the sprinkler; and hired contractors to perform monthly sprinkler system inspections, monitoring and maintenance. Further, LCC denies having

knowledge of any defective condition regarding the building's sprinkler system and contends that plaintiffs do not allege[3] and cannot prove that LCC had actual or constructive notice of any defective condition.

"[I]t is the plaintiff's burden to show actual or constructive notice of a defect prior to the [occurrence]; otherwise the complaint must be dismissed." *Figueroa v Goetz*, 5 AD3d 164, 165 (1st Dept 2004) (bracketed matter added). To demonstrate that a defendant had actual notice, the plaintiff must show that the defendant created the condition or knew of its existence. *Pianforini v Kelties Bum Steer*, 258 AD2d 634 (2d Dept 1999). Additionally, "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit [defendant] to discover and remedy it." *Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986) (bracketed matter added).

In opposition to LCC's cross-motion, plaintiffs fail to raise an issue of fact as to whether LCC had notice of any alleged defective condition of the building's sprinkler system. Plaintiffs submit no evidence of any complaints to LCC about the sprinkler system or of the existence of any prior leaks. Instead, as more fully discussed *infra*, plaintiffs urge that they are not required to prove LCC had notice of a defective condition because they intend to rely upon the doctrine of res ipsa loquitur. See *Payless Discount Ctrs., Inc. v 25-29 N. Broadway Corp.*, 83 AD2d 960, 961 (2d Dept 1981)(proof of notice

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[3] Plaintiffs' complaint generally alleges at paragraph 14 that LCC knew or should have known that the pipe could freeze and rupture if the enclosed space is not insulated or heated. With regard to defendant's claim that plaintiffs fail to allege notice in their verified bill of particulars, a review of same reveals that LCC's demand did not request any particulars concerning notice. See Cross-Motion at Exh. C.

and other elements of negligence may be met by circumstantial evidence under the doctrine of res ipsa loquitur).

Notwithstanding their reliance on res ipsa loquitur, plaintiffs cite the 2003 violation order (see Motion at Exhs. S & T) which they assert placed defendant "on notice that this sort of event could occur . . ." See Plaintiffs' Reply Memorandum of Law in Further Support of Plaintiffs' Motion for Partial Summary Judgment and in Opposition to Defendant's Cross-Motion for Summary Judgment at p. 5, n. 2. However, the record here contains no facts concerning the circumstances underlying this violation order. For instance, it cannot be determined if this violation resulted from any sprinkler system malfunction or involved a frozen or burst sprinkler pipe. Further, there is no indication that this violation pertained to the sprinkler pipe in question or even occurred in the building.[4] Thus, plaintiffs' reliance on this two year old violation to establish notice is misplaced.

Plaintiffs having failed to establish notice of a defective condition, the portion of LCC's cross-motion seeking summary judgment dismissing plaintiffs' first cause of action for negligence must be granted and the complaint dismissed unless plaintiffs can establish a basis to submit their negligence claim to a jury under the doctrine of res ipsa loquitur.

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[4] LCC's managing agent and superintendent testified that LCC is comprised of the building herein located at 203 Lafayette Street and a second building located at 199 Lafayette Street, which are connected but have separate entrances. See Cross-Motion at Exh. E, pages 37-38; and at Exh. F, page 18, lines 4-11.

B. Plaintiffs' Motion for Partial Summary Judgment

Turning to plaintiffs' motion for partial summary judgment as to liability on its negligence cause of action against LCC based upon res ipsa loquitur, LCC disputes that this doctrine applies in this case. Defendant further argues that plaintiffs failed to plead res ipsa loquitur and it is premature to grant plaintiffs' motion for partial summary judgment because discovery from the third parties responsible for maintaining and testing the sprinkler system has not been completed.

At the outset, this court rejects defendant's argument that plaintiffs should not be permitted to raise res ipsa loquitur because they failed to plead it and have filed their note of issue indicating the case is ready for trial. LCC relies on the Second Department's holding in *Yousefi v Rudeth Realty, LLC*, 61 AD3d 677, 678 (2d Dept 2009):

> [T]he plaintiffs alleged for the first time in their opposition to the motion that the doctrine of res ipsa loquitur applied to this case and precluded summary judgment. "While modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by the plaintiff's submissions", in this case, the plaintiffs' inexcusable delay in presenting the new theory of liability warranted the Supreme Court's rejection of the argument. In any event, the evidence failed to show that the doctrine of res ipsa loquitur applies to this case (internal citations omitted).

Res ipsa loquitur is not a cause of action or separate theory of liability but rather an evidentiary rule that is a "common sense application of the probative value of circumstantial evidence." *Iannota v Tishman Speyer Props., Inc.*, 46 AD3d 297, 299 (1st Dept 2007), citing *Abbott v Page Airways, Inc.*, 23 NY2d 502, 512 (1969). In *Iannotta*, the First Department reinstated a negligence cause of action because the failure to specifically plead res ipsa loquitur is not a bar to invoking the doctrine where

the facts warrant its application. Here, for the reasons discussed more fully *infra*, the facts warrant permitting plaintiffs to invoke the doctrine before a jury. Plaintiffs' failure to plead res ipsa loquitur in their complaint does not render the doctrine unavailable to them at trial.

With respect to establishing liability under res ipsa loquitur, the Court of Appeals in *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 (1986) states in relevant part as follows:

> The doctrine of res ipsa loquitur represents an application of the ordinary rules pertaining to circumstantial evidence in negligence cases stemming from accidents having particular characteristics. When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident upon the theory that "certain occurrences contain within themselves a sufficient basis for an inference of negligence" . . . Res ipsa loquitur does not create a presumption in favor of the plaintiff but merely permits the inference of negligence to be drawn from the circumstance of the occurrence. **The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may–but is not required to–draw the permissible inference**." (Internal citations omitted and emphasis added).

Summary judgment is warranted "only in the rarest of res ipsa loquitur cases ... 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, 209 (2006). *See also, Ever Win, Inc. v 1-10 Indus. Assocs., LLC*, 33 AD3d 845, 847 (2d Dept 2006); *Hisen v 745 Fifth Ave. Assoc., L.P.*, 2009 WL 1098985, at *5 (Sup Ct NY Co).

To prevail on the theory of res ipsa loquitur, a plaintiff must establish that the event: (1) was a kind that ordinarily does not occur in the absence of someone's negligence; (2) was caused by an agency or instrumentality within the exclusive control

of the defendant; and (3) was not due to any voluntary action or contribution on the part of the plaintiff. *Id.* As more fully discussed below, this court disagrees with LCC's argument that plaintiffs fail to establish all three of the foregoing elements and finds that there is sufficient evidence from which a reasonable jury could find that the res ipsa loquitur doctrine applies in this case. Notwithstanding the foregoing, plaintiffs are not entitled to partial summary judgment on this claim.

Turning to the first element, plaintiffs rely upon the Second Department's holding in *Payless Discount Ctrs., Inc. v 25-29 N. Broadway Corp.*, *supra*, for the proposition that floods caused by sprinkler pipes do not normally occur in the absence of negligence:

> Sprinkler pipes do not ordinarily break if they are properly installed and maintained . . . Where the owner is in exclusive possession and control of the system, it is reasonable to presume that any break in the system was caused by the owner's neglect (citations omitted).

Indeed, sprinkler system failures, burst water pipes and water main breaks are the type of event frequently cited in res ipsa loquitur cases as typical examples of occurrences that do not happen in the absence of someone's negligence. *See, e.g., DeWitt Props., Inc. v City of New York*, 44 NY2d 417, 426 (1978) (water main break); *Dillenberger v 74 5th Ave. Owners Corp.*, 155 AD2d 327 (1st Dept 1995) (applying res ipsa loquitur where a water pipe burst in an adjacent common area); and *Swain v 383 W. Broadway Corp.*, 216 AD2d 38 (1st Dept 1995) (finding liability under res ipsa loquitur where a steam pipe burst and ruined paintings).

Citing *Shinshine Corp. v Kinney System Inc.*, 173 AD2d 293 (1st Dept 1991), LCC counters that plaintiffs fail to demonstrate that burst pipes do not occur absent

negligence. In *Shinshine*, the First Department noted that plaintiffs are rarely granted summary judgment on res ipsa loquitur and reversed such an award of summary judgment to the plaintiff therein. Defendant relies upon the *Shinshine* court's following statement: "A burst water pipe, even though unexplained, is not the type of occurrence which, by itself, creates an inference of negligence so strong as to leave no serious doubt that it could have been avoided by the exercise of due care (citations omitted)." *Id.* at 294.

Significantly, the foregoing broad statement is limited to the summary judgment context, the court stating that only in rare cases will the proof be "so convincing" that the inference of negligence is inescapable and summary judgment warranted. Indeed, the court in *Shinshine* acknowledges that collapsed ceilings and water main breaks "have been held to be the sort of events suitable for res ipsa loquitur treatment . . ."

Shinshine's implication for the case at bar is that the plaintiffs here, though not entitled to partial summary judgment as to liability under res ipsa loquitur, nonetheless sufficiently establish a basis for satisfying the doctrine's first element. Thus, provided plaintiffs meet res ipsa loquitur's remaining two elements, they may rebut LCC's entitlement to summary judgment on the negligence cause of action and be permitted to present their negligence cause of action to a jury under res ipsa loquitur.

As to the second element, plaintiffs contend that LCC had exclusive control over the building's sprinkler system by virtue of its non-delegable duty to maintain the building's common elements as set forth in Article II, §2(a) of the Bylaws (Motion at Exh. P). Plaintiffs further argue that there is no evidence anyone else accessed the lobby area where the pipe was housed.

In response, LCC argues that it did not have exclusive control over the sprinkler system because defendant hired third-parties to maintain it. Relying on its theory that the subject pipe froze due to the lobby door being left open, defendant further argues it lacked exclusive control of the lobby door because it was accessible by the building's tenants and visitors.

As stated in *Dermatossian*, *supra*:

> The exclusive control requirement, as generally understood, is that the evidence "must afford a rational basis for concluding that the cause of the accident was probably 'such that the defendant would be responsible for any negligence connected with it.'" The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence. The requirement does not mean that "the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." (internal citations omitted).

Id. at 227-228. In *Dermatossian*, the plaintiff failed to establish that defendant had sufficiently exclusive control of a defective bus grab handle "to fairly rule out the chance that the defect in the handle was caused by some agency other than defendant's negligence [where] [t]he proof did not adequately exclude the chance that the handle had been damaged by one or more of defendant's passengers who were invited to use it." *Id.* at 228. *See also Ebanks v New York City Tr. Auth.*, 70 NY2d 621, 623 (1987) (finding it was error to charge jury on the doctrine of res ipsa loquitur where the plaintiff did not offer adequate proof to refute the high probability that an escalator was damaged by a member of the public).

"Exclusivity, as it applies to res ipsa loquitur, is a relative term" which does not require a defendant to have sole physical access to the instrumentality causing the injury. *Crawford v City of New York*, 53 AD3d 462, 464 (1st Dept 2008). "[P]roof that

third parties have had access to the instrumentality generally destroys the premise, and the owner's negligence cannot be inferred . . . unless there is sufficient evidence that the third parties probably did nothing to cause the injury." *DeWitt Props., Inc. v City of New York*, 44 NY2d at 426. However, "[c]ontrol of the internal workings of an object satisfies the 'exclusive control' element." *Crawford*, 53 AD3d at 465, citing *Ianotta v Tishman Speyer Props., Inc.*, *supra*.

Here, there is no evidence of any act by a third party which might have caused the subject pipe to burst. By contrast, in *DeWitt Props., Inc. v City of New York, supra*, the defendant municipality's fault could not be inferred in connection with a water main break where the evidence indicated a utility company performed work affecting the water main. Similarly distinguishable is *Reyes v Active Fire Sprinkler Corp.*, 267 AD2d 70 (1st Dept 1999), where the plaintiff was struck by a falling piece of pipe recently installed by the defendant sprinkler company. The defendant property owner was found to lack exclusive control over the pipe in that situation.

Further, LCC's retention of third parties to maintain and monitor the building's sprinkler system does not negate its duty to maintain it as required by the Bylaws, nor does it negate its exclusive control over it for res ipsa loquitur analysis. See *Hisen v 745 Fifth Ave. Assoc., L.P.*, *supra*, at *4 (owner had non-delegable duty to provide safe means of ingress and egress and thus its retention of third party to perform repair work to instrumentality causing plaintiff's injury did not deprive it of exclusive control); *Dowling v 257 Assocs.*, 235 AD2d 293, 293 (1st Dept 1997); *Potthast v Metro-North R.R. Co.*, 400 F3d 143, 154 (2d Cir 2005). In any event, as plaintiffs point out, LCC offers no evidence that anyone else had access to the portion of the sprinkler system at issue

and defendant's own witness, building superintendent Sam Mak, testified that the sprinkler company never did anything in the lobby or in the enclosed area housing the burst sprinkler; rather, this third party merely came to the building monthly to check the water level and make sure all hoses were intact. See McSpedon Aff. in Opp. at Exh. 3, pp. 62-67. There is thus nothing in the record to suggest that a third party did anything to cause plaintiffs' injury, thereby depriving LCC of exclusive control.

Regarding LCC's theory that the pipe froze because the building's front door was propped open on an exceptionally cold day, the record indicates only that defendant's managing agent received complaints about the door being left open at some unspecified time. There is no indication the door was open on the date of plaintiffs' loss, nor is there any evidence as to who, if anyone, may have allegedly left it open. See *Atlantic Specialty Ins. Co. v. Gold Coast Devs., Inc.*, 2008 WL 974411, at *11 (EDNY 2008) (possibility that a third party could have made building colder and caused sprinkler pipe to freeze and burst is insufficient to negate defendant's exclusive control for application of res ipsa loquitur). For the foregoing reasons, LCC fails to establish as a matter of law that it lacked exclusive control of the instrumentality that caused plaintiffs' harm.

As to the third element, LCC cites deposition testimony to the effect that plaintiff Hirsch stored paint cans in the enclosed space housing the subject sprinkler pipe. LCC argues that since plaintiffs had access to this area, they cannot demonstrate that none of their actions caused the burst sprinkler pipe. However, there is nothing in the record to indicate that plaintiffs did anything that might have caused their loss. Defendant's

argument in this regard is mere speculation and is not supported by any evidence in the record.

For all of the foregoing reasons, this record contains sufficient evidence that would give rise to a permissible inference of negligence under res ipsa loquitur. Plaintiffs thus met their burden to refute defendant's entitlement to summary judgment dismissing the first cause of action for negligence by relying on the doctrine of res ipsa loquitur.

Nonetheless, plaintiffs do not make a prima facie showing of entitlement to judgment as a matter of law. The instant case is not one of those "rare" cases where the plaintiff, relying on res ipsa loquitur, has shown not only the absence of any material issue of fact but also that the inference of negligence is "inescapable." Accordingly, plaintiffs should be permitted to argue res ipsa loquitur to a jury, which may, but is not required, to draw a permissible inference that LCC was negligent.

Accordingly, that branch of plaintiffs' motion seeking summary judgment against LCC on the issue of liability in reliance upon the doctrine of res ipsa loquitur is denied. In light of the foregoing determination, it is unnecessary to address defendant's argument that summary judgment is premature because LCC requires further discovery. Additionally, the court has not relied upon the affidavit of LCC's expert, Leonard Weiss, P.C., and as such it is unnecessary to address plaintiffs' request to disregard same.

Accordingly, it is

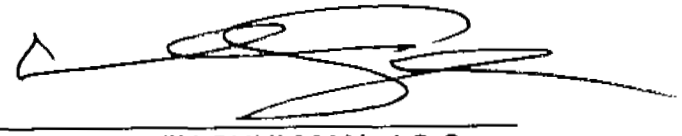
ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment is granted solely to the extent that plaintiffs' second cause of action for trespass is dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cause of action for negligence shall proceed on a theory of res ipsa loquitur only.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for plaintiffs and LCC.

Dated: New York, New York
December 20, 2011



HON. MARTIN SHULMAN, J.S.C.