Galue v Independence 270 Madison LLC
2013 NY Slip Op 34235(U)
August 13, 2013
Supreme Court, Bronx County
Docket Number: 303246/11
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 24

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Alberto Galue,

Plaintiff,

-against-

Independence 270 Madison Llc, 270 Madison Avenue Llc, ABS Partners Real Estate Llc and J. Spaccarelli Construction Co. Inc

Defendants.

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Index No. 303246/11

DECISION and ORDER

Present:

Hon. SHARON A.M. AARONS

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of motion, as indicated below:

Papers	**Numbered**
Notice of Motion/Order to Show Cause and Exhibits Annexed	1
Affirmation in Opposition	2
Co defendant Cross Motion	3
Reply Affirmation	4

Upon the foregoing papers the Decision and Order on the motion are as follows:

Plaintiff's motion for summary judgment on the issue of liability relying on the doctrine of *res ipsa loquitur* is denied. Defendants Independence 270 Madison Llc., 270 Madison Avenue Associates Llc., and ABS Partners Real Estate Llc., (hereinafter collectively referred to as 270 Madison) opposed the motion. Co-defendant J. Spaccarelli Construction Co. Inc.'s cross motion to dismiss plaintiff's complaint and cross claims is also denied.

This is a personal injury action that occurred on February 11, 2011 at 5:30 p.m., wherein plaintiff, a maintenance worker was seriously injured when a metal towel dispenser/trash unit (hereinafter dispenser) fell off from a bathroom wall at a building located at 270 Madison Avenue, New York, New York. The building is owned by defendants

Independence 270 Madison Llc., and 270 Madison Avenue Associates Llc., and managed by defendant ABS Partners Real Estate Llc. It is undisputed that on or about March of 2010, pursuant to a construction proposal defendant J. Spaccarelli Construction Co. Inc's (referred as Spaccarelli) installed the dispensers at defendants 270 Madison's building.

Plaintiff argues that the doctrine of *res ipsa loquitur* is to be applied by this Court as the dispenser that was installed eight months prior to the accident could not have fallen off a wall in the absence of someone's negligence. Plaintiff contends that the dispenser was within the exclusive control of the defendants as defendant Spacarrelli installed the dispenser and defendants 270 Madison had a duty to maintain during and after the installation. Also, plaintiff contends that there is no evidence that he contributed to the accident. In support of plaintiff's motion for summary judgment, plaintiff submitted a copy of the pleadings, the bill of particulars, plaintiff's deposition transcript, plaintiff's employer-First Quality- cleaning contract with defendants 270 Madison, plaintiff's incident report, the construction proposal dated March 30, 2010 from defendant Spaccarelli, the deposition transcript of John Spaccarelli, the deposition transcript of George Alachouzos of ABS Partners Real Estate, Llc and photographs of a dispenser.

According to the plaintiff he has been working as a cleaner for non-party First Quality for approximately four years and was assigned to defendants 270 Madison's building in June of 2010. He stated that approximately in December of 2010 he started cleaning the 15th floor bathroom. Plaintiff worked five days a week and cleaned that floor every day until the day

of the accident. He further testified that his daily maintenance routine consisted of cleaning the toilets, wiping the metal, replenishing the paper including removing the garbage from the dispenser and mopping the floor. On the day of the accident after performing his daily cleaning routine, plaintiff testified that while he was moping the floor, the dispenser, without warning, fell off the wall striking his head.

Plaintiff points to Spaccarelli's deposition testimony who testified that he performed a renovation of the 15th floor bathroom including installation of a new dispenser around March to June 2010. After the renovation and installation was completed approximately in late June of 2010, defendant Spaccarelli did not return to the premises. He testified that the manager of the building inspected the renovation/installation work and submits the deposition transcript of George Alachouzos of ABS Partners Real Estate, Llc. Mr. Alachouzos testified that he is a construction supervisor for the entities that ABS manages and that he conducted an inspection of Spaccarelli s bathroom installation to verify that the installation was in accordance with defendants 270 Madison's building drawing. He further testified that although he conducted a final inspection of the work, they [270 Madison] were not responsible for the means and methods of the work performed by Spaccarelli. He does not recall if the dispenser was inspected after it was installed by Spaccarelli.

In opposition, defendants 270 Madison argue that plaintiff failed to meet his burden under *res ipsa loquitur* as the dispenser was not within the exclusive control of the defendants. Defendants point to plaintiff's deposition where he testified that he had been

cleaning the bathroom on the 15th floor for two months prior to the accident and he and a co-worker had the key to the dispenser and replenished the paper and removed the garbage on a daily basis. During those two months the plaintiff did not observe or was aware of any problems with the dispenser. At the time of the accident plaintiff testified that the dispenser did not make any noise nor did he observe the unit become loose from the wall. Defendants 270 Madison also point to the deposition of defendant Spaccarelli who stated that he installed the dispenser back in 2010 in accordance with the instructions contained with the dispenser kit. He further testified that he inspected the dispenser and ensured that it was tightly secured to the wall and did not move. At no time subsequent to the completion of the renovation did he receive complaints or request for repairs of any work performed by him. Defendants then point to the deposition of George Alachouzos who testified that he inspected Spacarreli's installation work and that after the work was completed he was never informed that the dispenser had become loose. Defendants argue that from the time that the dispenser was installed, tenants regularly had access to the dispenser thereby, increasing the likelihood of tampering or damaging to the dispenser.

To prevail under the doctrine of *res ipsa loquitur*, a plaintiff must establish, prima facie, that the injury does not ordinarily occur in the absence of someone's negligence; (2) the instrumentality that caused the injury must within the exclusive control of the defendant; (3) the injury is not the result of any voluntary action or contribution on the part of the plaintiff" (*Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430(1967); *Morejon v Rais Constr.*

Co., 7 NY3d 203, 206(2006); *States v Lourdes Hosp.*, 100 NY2d 208, 211–212(2003); *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494–495(1997); *Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 721). The doctrine "does not create a presumption in favor of plaintiff, but instead permits the inference of negligence to be drawn from the circumstances of the occurrence. However, only in the rarest cases will a plaintiff be awarded summary judgment or judgment as a matter of law in the course of a trial by relying upon the doctrine of *res ipsa loquitur* (*Morejon*, 7 NY3d at 209; *Lau v Ky*, 63 AD3d 801, 801).

Here, the fact that a dispenser fell without warning from a wall is the type of accident that does not ordinarily occur without negligence. Also, there is no proof submitted in conjunction with the instant motion that plaintiff contributed in any way to the accident; however, as defendants point out, application of the *res ipsa loquitur* doctrine requires that "the instrumentality responsible for the injury be under the exclusive control of the party to be cast in negligence" (*Aetna Cas. & Sur. Co. v Island Transp. Corp.*, 23 AD2d 157 [1st Dept 1996]). Plaintiff argues that even though the dispenser, which was installed and inspected by the defendants, were in a public bathroom, the parts affixing the dispenser into the wall were concealed behind the wall thereby preventing commercial tenants to have access to tamper with those parts; thereby, establishing defendants' exclusive control over the dispenser. On the other hand, defendants 270 Madison argue that the fact the dispenser fell, to which there was no notice of the defect, was not due to the failure of a component of the dispenser but that the dispenser was in a public restroom and used daily by tenants

establishing that defendants lack of exclusive control over the dispenser. After carefully examining the evidence submitted in conjunction with the instant motion, this Court finds that plaintiff has failed to establish that the dispenser was within the exclusive control of the defendants. There is inadequate proof to exclude the chance that the dispenser had been damaged by the tenants or even plaintiff's co-worker. Plaintiff cannot establish that no one tampered with the fixture subsequent to its installation (*Greenidge v HRH Construction Corp.*, 279 AD2D 400[1st Dept 2001]). "The appropriate target of inquiry is whether the broken component itself was generally handled by the public, not whether the public used the larger object to which the defective piece was attached." (*Pavon v Rudin*, 254 AD2D 143 [1st. Dept 1998]. However, issues of fact exist as to the applicability of the doctrine of *res ipsa loquitur* as it has not been established whether a component of the dispenser was defective or the entire unit was defective and not generally handled and tampered by the public. "In those cases where 'conflicting inferences may be drawn, choice of inference must be made by the jury.' " *Kambat.,* 89 NY2d 489, quoting *George Foltis, Inc. v City of New York,* 287 NY 108, 118[2007]). Based on the foregoing plaintiff's motion for summary judgment is denied; however, this does not preclude plaintiff from requesting at the time of trial a charge to the jury based on res ipsa loquitur relying on the record established at the time of trial.

Co-defendant Spaccarelli contends that as an independent contractor it owed no duty of care to the plaintiff; therefore, plaintiff's complaint should be dismissed. He also argues

that the doctrine of res ipsa loquitur is inapplicable as no duty is owed to the plaintiff and he had no exclusive control over the dispenser for approximately eight months before the accident. Furthermore, defendant Spaccarelli contends that co-defendant's 270 Madison cross claims for indemnification are to be dismissed as no negligence can be imputed to Spaccarelli.

Defendant Spaccarelli states that he was hired by defendant 270 Madison to renovate the bathrooms at 270 Madison's building and as a result of the renovation, dispensers were installed in the bathroom. Defendant Spaccarelli argues the following: that he performed the installation with the specifications indicated in the dispenser kit unit; that he used the screw supplied with the dispenser unit; that he inspected the installation and found that the dispenser was tightly secured to the wall; that defendant 270 Madison also inspected the installation and no complaints were made; that for nine months after the installation up to the time of the accident defendant Spaccarelli was never contacted to make repairs or received complaint about the installation; that plaintiff serviced the dispenser minutes before the accident and made no complaints or indicated that there was a problem with the dispenser; and that after the installation of the dispenser numerous individuals came into contact with the dispenser including the plaintiff, plaintiff's co-worker and the commercial tenants of 270 Madison.

It is well settled, that a contractor hired to perform work is generally not liable in tort to a non-contracting third-party when it breaches a contract and said breach causes injury to

a third-party. *(Stiver v Good & fair Carting & Moving, Inc.,* 9 NY3d 253[2007]; *Church v Callanan Industries, Inc.*, 99 NY2d 104[2002]; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136[2002]). This is because, contractors are generally hired to perform work pursuant to contract and "[u]nder our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." *(Id. at 138.)* When there is a breach, such contractors are generally only liable to the person who hired them, the promisee, and are not liable to third parties for any injuries resulting from a breach of their contractual obligation. *(Id.}*. Consequently, if a contractor is to be held liable for injury to a third-party as a result of their work, one of three scenarios must exist. First, a contractor is liable for injury to a third-party when said contractor causes or creates the condition alleged to have caused injury. *(Church v Callanan Industries, Inc.,* 99 NY2d 104[2002]). Second, a contractor is responsible for a non contracting third-party's injury when the third-party detrimentally relies on the contractor's continued performance and the contractor's failure to perform, positively and actively, causes injury. *(Id. at 111*; *Espinal* , 98 NY2d at 136.) Lastly, the service contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. *(Church* , 99 NY2d at 112; *Espinal.*, 98 NY2d at 140; *Palka v Servicemaster Management Services Corporation,* 83 NY2d 579,589[1994]; *Bugiada v Iko,* 274 AD2d 368.) Applying the foregoing principals to the facts pattern presented by the parties, this Court finds that failure to perform a contract is not at issue here as Spaccarelli was

compensated in conjunction with the completion of the project. Here, the claim against Spaccarelli arises out of its alleged acts in improperly installing the dispenser; thus, Spaccarelli's duty to exercise reasonable care in relation to the plaintiff in this context arose not out of a contract, but rather by its own affirmative acts that created a risk of injury to the plaintiff, a maintenance worker. Summary judgment is the procedural equivalent of a trial. (*Mendoza v Highpoint Associates, IX, LLC,* 83 AD3d 1.) It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. *(Rotuba Extruders Inc., v Ceppos*, 46 NY2d 223.) Here, if a jury finds, under *res ipsa loquitur*, that Spaccarelli negligently installed the dispenser that caused plaintiff's injury, it necessarily follows that Spaccarelli launched a force or instrument of harm. *(Smith v Consolidated Edison Co. of New York, Inc.*104 AD3d 428[2013])

Accordingly, plaintiff's motion seeking summary judgment and co-defendant cross motion to dismiss are denied.

The foregoing shall constitute the Decision and Order of the Court.

Dated: 8/13/13

SHARON A.M. AARONS, J.S.C.