Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Salome Nicholson,

Plaintiff,

-against-

Copaigue Union Free School District,

Defendant.

Index No.: 31664/2010

Motion Sequence No.: 001; MG; CD
Motion Date: 5/16/13
Submitted: 7/31/13

Motion Sequence No.: 002; MD
Motion Date: 7/3/13
Submitted: 7/31/13

Attorney for Plaintiff:

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119 West Main Street
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Attorney for Defendant:

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Clerk of the Court

Upon the following papers numbered 1 to 18 read upon these motions for summary judgment and leave to amend bill of particulars: Notice of Motion and supporting papers, 1 - 13; Answering Affidavits and supporting papers, 14 - 16; Replying Affidavits and supporting papers, 17 - 18; it is

ORDERED that this motion by defendant for summary judgment and this motion by plaintiff for leave to amend her bill of particulars are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by defendant for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiff's complaint is granted; and it is further

ORDERED that this motion by plaintiff pursuant to CPLR 3025 granting her leave to amend her bill of particulars is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff on May 28, 2009 at approximately 8:30 p.m. while attending a Sports Award Night dinner in the cafeteria of the Walter O'Connell Copiague High School located at 1100 Dixon Avenue in Copiague, New York. The accident occurred when a chair collapsed shortly after plaintiff sat on it. By her bill of particulars, plaintiff alleges that defendant was negligent in, among other things, creating or allowing the subject chair to be and remain in a defective and dangerous condition, and failing to warn plaintiff of said condition. In addition, plaintiff alleges that defendant had actual and constructive notice of said condition.

Defendant now seeks summary judgment dismissing plaintiff's complaint on the grounds that it had no actual or constructive notice of the defective, collapsing, chair. Defendant's submissions in support of its motion include the summons and complaint, defendant's answer, plaintiff's bill of particulars, the deposition transcripts of plaintiff and of defendant by Jeffrey Engelhardt, and the affidavit of Jeffrey Engelhardt.

Plaintiff, in turn, requests leave to amend her bill of particulars to add the doctrine of res ipsa loquitur as a theory of negligence. Plaintiff asserts that she can satisfy all three elements of the doctrine inasmuch as 1) the collapse of a chair as a result of a person sitting on it is not something that ordinarily occurs without negligence, 2) defendant had exclusive control of the chair inasmuch as defendant's employees arranged the cafeteria for the event earlier in the evening of plaintiff's fall, and 3) plaintiff did not do anything to cause the chair to collapse, she merely sat on it and within seconds it collapsed.

In its reply and opposition to plaintiff's cross motion, defendant argues that plaintiff has offered no proof of the nature of the defect of the chair or who last used the chair or that defendant knew or should have known about the chair. In addition, defendant contends that plaintiff cannot establish one of the elements of res ipsa loquitur, exclusive control by defendant over the subject chair, given the number of attendees at the Sports Award Night, and that in any event, claiming res ipsa loquitor does not obviate the requirement of proving that defendant created a defective condition or had actual and/or constructive notice of the condition.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the

sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Generally, in the absence of prejudice or surprise to the opposing party, leave to amend a bill of particulars should be freely granted "unless the proposed amendment is palpably insufficient or patently devoid of merit" (***Delahaye v Saint Anns School***, 40 AD3d 679, 684-685, 836 NYS2d 233 [2d Dept 2007]; *see* CPLR 3025 [b]; ***Schreiber–Cross v State of New York***, 57 AD3d 881, 885, 870 NYS2d 438 [2d Dept 2008]; ***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; *see also* ***Rodgers v New York City Tr. Auth.***, 109 AD3d 535, 536, 970 NYS2d 572 [2d Dept 2013]).

Res ipsa loquitur requires that "(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff" (***Dermatossian v New York City Tr. Auth.***, 67 NY2d 219, 226, 501 NYS2d 784 [1986]; *see* ***Tyndale v St. Francis Hosp.***, 65 AD3d 1133, 886 NYS2d 51 [2d Dept 2009]).

Plaintiff testified at her deposition that she believed the sports award dinner was between 7 p.m. and 9 p.m., that she arrived at approximately 7:30 p.m., and that she and her daughter Bria sat at the first table with the girls' track team in front of the podium. In addition, plaintiff testified that at 8:15 p.m. there was a break for dinner, Bria's father, Tyrone had arrived, and was standing near a table two or three tables behind plaintiff's table. Plaintiff explained that there were empty chairs around said table because people had left the tables to get on line for food. Plaintiff also testified that she got up and went to said table, she pulled up a chair and sat down at the table, and Tyrone also sat down. Plaintiff further explained that a few seconds after she sat down on the chair, which was a pink plastic with metal legs shaped like a "U," the legs of the chair straightened out and the chair collapsed to the floor. She had never sat in that chair previously and did not know who had sat in it before her. Plaintiff stated that the chair did not wobble and did not provide any indication that it was about to collapse. Tyrone was the sole witness to plaintiff's accident.

Jeffrey Engelhardt testified at his deposition that he is currently the chief custodian for the high school, that at the time of plaintiff's accident he was the head custodian, and that he was present in the cafeteria during the sports award banquet on the date of plaintiff's accident. He explained that the tables and chairs used at the banquet were the same tables and chairs that would be used during

the normal lunch period during the day, and that he assisted two custodians working under his supervision, John Abrams and Mike Alba, who were involved in setting up the cafeteria for the banquet. There were six chairs per table. Mr. Engelhardt described the chairs as having burgundy-colored plastic seats with metal legs attached by screws or rivets. In addition, he testified that the chairs were not repaired, instead they were discarded if they were damaged, and no records were created if a chair was discarded. During the setting up of the cafeteria that evening, he did not notice that there was any defect with any of the chairs and he was not informed by Mr. Abrams or Mr. Alba of any defect in any of the chairs. Mr. Engelhardt also testified that he did not know what happened to the subject chair, that none of the custodial staff working that evening informed him that they had discarded the subject chair, and that he never saw the subject chair after the accident. He further testified that he was not present in the cafeteria the entire time of the banquet but was present after its end to clean the cafeteria and set it up for the students' use the next day. At said time, no one directed his attention to a broken chair.

Here, defendant established its entitlement to judgment as a matter of law by submitting evidence demonstrating that it neither created nor had actual or constructive notice of the alleged defective condition of the chair (*see* ***Lawrence v Rockland County Bd. of Cooperative Educ. Services***, 93 AD3d 766, 940 NYS2d 321 [2d Dept 2012]; ***Quinones v Federated Dept. Stores, Inc.***, 92 AD3d 931, 939 NYS2d 134 [2d Dept 2012]; ***Levinstim v Parker***, 27 AD3d 698, 815 NYS2d 596 [2d Dept 2006]; ***Loiacono v Stuyvesant Bagels, Inc.***, 29 AD3d 537, 814 NYS2d 695 [2d Dept 2006]). Notably, with respect to prior notice of an alleged defective condition, plaintiff's deposition testimony reveals that the subject chair did not wobble and did not give any indication to plaintiff that it was about to collapse when plaintiff pulled it and then sat on it.

In addition, plaintiff cannot not rely, based on the subject circumstances, on the doctrine of res ipsa loquitur, which, if applicable, would permit a trier of fact to infer that defendant was negligent (*see* ***Morejon v Rais Constr. Co.***, 7 NY3d 203, 209, 818 NYS2d 792 [2006]; ***Kambat v St. Francis Hosp.***, 89 NY2d 489, 494-495, 655 NYS2d 844 [1997]; ***Miles v Hicksville U.F.S.D.***, 56 AD3d 625, 626, 867 NYS2d 537 [2d Dept 2008]). To invoke said doctrine, a plaintiff must establish, among other things, that the injury-causing event was caused by an agency or instrumentality within the defendant's exclusive control (*see* ***Morejon v Rais Constr. Co.***, 7 NY3d 203, 209, 818 NYS2d 792; ***Corcoran v Banner Super Mkt.***, 19 NY2d 425, 430, 280 NYS2d 385 [1967]; ***Miles v Hicksville U.F.S.D.***, 56 AD3d 625, 626, 867 NYS2d 537). Here, the proffered proof indicates that the subject chair was located in the school's cafeteria and used by students for mealtimes and by students and non-students when events, such as the subject Sports Award Night dinner, were held in the cafeteria. Plaintiff's testimony reveals that although plaintiff did not know who had sat in the subject chair prior to her that same evening, the subject chair and those around it were emptied at 8:15 p.m. by attendees going to stand in line for dinner just before she sat down. Thus, numerous individuals had access to said chair and defendant did not have exclusive control over it (*see* ***Lawrence v Rockland County Bd. of Cooperative Educ. Services***, 93 AD3d 766, 940 NYS2d 321; ***Miles v Hicksville U.F.S.D.***, 56 AD3d 625, 626, 867 NYS2d 537; ***Loiacono v Stuyvesant Bagels, Inc.***, 29 AD3d 537, 814 NYS2d 695; ***Chini v Wendcentral Corp. Inc.***, 262 AD2d 940, 692 NYS2d 533 [4th Dept 1999] *lv denied* 94 NY2d 752, 700 NYS2d 426 [1999]; *cf.*

Tyndale v St. Francis Hosp., 65 AD3d 1133, 886 NYS2d 51; ***Finocchio v Crest Hollow Club at Woodbury, Inc.***, 184 AD2d 491, 584 NYS2d 201 [2d Dept 1992]). Therefore, the insufficiency and lack of merit of plaintiff's proposed amendment to add the claim of res ipsa loquitur is clear and free from doubt such that plaintiff's request for leave to amend her bill of particulars is denied (*see* ***Southwell v Middleton***, 67 AD3d 666, 890 NYS2d 57 [2d Dept 2009]; *see also id.*).

Accordingly, the motion for summary judgment is granted and the complaint is dismissed in its entirety and the motion for leave to amend plaintiff's bill of particulars is denied.

Dated: 10/15/2013

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

__X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION