SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9

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MUSSARAT JOHN and MICHAEL JOHN,

Plaintiffs,

-against-

JAN CO. CENTRAL, INC., 181st WASHINGTON HEIGHTS ASSOCIATES LLC, and MAVERICK MANAGEMENT CORP.,

Defendants.

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DECISION/ORDER

Index No. 507328/13
Mot. Seq. No. 3
Submitted: 4/6/17

HON. DEBRA SILBER, J.S.C.:

**Recitation, as required by CPLR §2219(a), of the papers considered in the review of plaintiffs' motion for summary judgment.**

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation and Affidavits Annexed ..... | 1-16 |
| Affirmation in Opposition..... | 17 |
| Reply ..... | 18 |

**Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:**

Plaintiff Mussarat John (the claims of plaintiff Michael John, her husband, are purely derivative) moves for summary judgment on the issue of liability against the defendants. The defendants oppose the motion. All defendants are represented by one law firm. For the reasons which follow, the motion is granted.

This is an action for personal injuries allegedly sustained by plaintiff on June 19, 2012, when a large rectangular cover for a florescent light fixture fell from the ceiling and struck plaintiff while she was standing at a counter at a Burger King restaurant at

1419 St. Nicholas Avenue in the Washington Heights section of New York County. In defendants' Second Verified Amended Answer, defendant Jan Co. Central, Inc. (hereinafter "Jan Co.") admits it was the lessee of the subject store. Defendant 181st Washington Heights Associates LLC admits it was the owner of the subject premises. None of the testimony or evidence submitted by plaintiff in this motion establishes any relationship between defendant Maverick Management Corp. and the subject premises.

Plaintiff testified at her EBT, and stated in her affidavit, that she was a patron at the Burger King located at 1419 St. Nicholas Avenue in Manhattan on the day of the accident. She said she had placed an order and was standing at the service counter waiting for the food she had ordered when a part of the light fixture fell from the ceiling and struck her on the head, causing injuries.

Divyang Shah testified at an EBT on behalf of defendant Jan Co. Central, Inc. He stated that he is the "New York District Manager" for Jan Co. The district he manages for Jan Co. includes the location where the subject accident took place. Jan Co. presumably owns a franchise for the Burger King restaurant where the accident took place, and their Burger King was there on the date of the accident and for some time prior to the accident.

Mr. Shah testified that he was not employed by defendant on the date of the accident. He has no personal knowledge of the incident. He is unaware of any procedures the company has in place for regular inspection or maintenance of the ceiling fixtures or for changing the light bulbs. He stated that it is probably the job of the store's manager to change bulbs which have burned out. He said a ladder was required to change the bulbs. He stated that customers do not have any access to the light fixtures, which are on the ceiling. He also stated that there are no contracts with any

maintenance companies for this store. He said "if I have any maintenance, I call my office and they will send somebody" [Page 14], which he clarified to mean a Jan Co. employee and not any other company.

The accident report prepared by the manager of the restaurant (Exhibit K) states that the "overhead light lens . . . fell directly on a customer forehead . . . I put ice on her forehead and another customer call 911."

Plaintiff served a Notice for Discovery and Inspection dated May 30, 2014, which included a request for all records pertaining to the light fixtures located on the ceiling of the Burger King located at 1419 St. Nicholas Avenue, New York, NY, as of June 19, 2012 and for a period two years prior.

Defendants' response, dated August 21, 2014 includes the following:

> **RECORDS PERTAINING TO THE LIGHTING FIXTURES FOR 6/19/2010-6/19/2012**
>
> Defendants are not in possession of any records responsive to this request. Upon information and belief, no repairs or alterations were made in that time, and no complaints pertaining to same were received. Defendants object to Plaintiffs' demands for all other maintenance records for the premises as irrelevant, overly broad and unduly burdensome, and not reasonably calculated for discovery of admissible evidence.

The affidavit of plaintiffs' expert, Scott Silberman, P.E. an engineer, states that he conducted an inspection and an investigation with regard to the cause of the accident, and he viewed the surveillance video of the occurrence as well as photos of the incident. He went to the restaurant on August 18, 2014 and conducted an in-person inspection of the ceiling-mounted light fixtures over the service counter. He opines, with what he describes a reasonable degree of engineering certainty, that there are only two plausible explanations for the accident. The first possible explanation is that both of the

two latches which hold the lens or cover in place were left open and disengaged when the cover was last removed to change a bulb. The second possible explanation is that the latches were so defective as to be incapable of being engaged and closed the last time the cover was removed, in which case the latches required immediate repair and/or replacement at that time, and the lens/cover should have been removed until it was repaired as it could not be properly closed.

Mr. Silberman opines that neither of those two scenarios would have occurred had the defendant restaurant put into place a reasonable and necessary maintenance protocol for their premises, which included periodic inspections.

He concludes that, to a reasonable degree of engineering certainty, the type of damage to the latches which resulted in their not functioning properly was caused by the mishandling of the fixture cover and/or the latches during a previous opening of the cover to change a bulb or the ballast or to clean the cover. He states that the cover would not have fallen had the fixture been properly inspected, maintained and/or repaired.

Plaintiff argues that it is entitled to summary judgment on liability based on the doctrine of *res ipsa loquitur.*

The doctrine of *res ipsa* provides for an inference of negligence when a plaintiff establishes that (1) the type of accident at issue ordinarily does not occur in the absence of negligence; (2) the instrumentality causing the accident was in the defendant's exclusive control; and (3) the accident was not due to any voluntary action or contribution by the plaintiff.

*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 [1st Dept 2007], citing *Abbott v Page Airways, Inc.*, 23 NY2d 502, 512 [1969].

With respect to establishing liability under *res ipsa loquitur*, the Court of Appeals in *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219 [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).

Summary judgment is warranted in res ipsa 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 754 Fifth Ave. Assoc., L.P.*, 23 Misc. 3d 1114[A] [Sup Ct NY Co 2009]. Otherwise, it is properly a question for the jury. See PJI 2:65.

Turning to the first element herein, the court finds that this is the type of accident that does not occur in the absence of negligence. See, *Matsur NYCTA*, 66 AD3d 848 [2d Dept 2009]; *Boventre v Max*, 229 AD2d 557, 558 [2d Dept 1996]. Since the light fixture was on the ceiling, the possibility that a member of the public tampered with it can be fairly ruled out, as acknowledged in the testimony of Jan

Co's witness. See, *Matsur v NYCTA,* 66 AD3d 848. It is clear that this accident is an example of the type of occurrence that does not happen in the absence of someone's negligence. *Greenidge v HRH Constr. Corp.,* 279 AD2d 400 [1st Dept 2001]. In that case, the Appellate Division states [at 401] "the inexplicable fall of a lighting fixture . . . does not ordinarily occur without negligence."

Defendants' sole argument in opposition on this issue addresses the testimony and qualifications of the plaintiff's expert witness; however, while the court found Mr. Silberman's affirmation to be useful, based upon the EBT testimony and the facts of this case, one would be hard pressed to conclude that an expert is necessary in order to determine that this is the type of accident that res ipsa loquitur applies to. Further, expert testimony is not required in circumstances such as these. *Kambat v St. Francis Hosp.*, 89 NY2d 489 (1997).

As to the second element, defendant's exclusive control over the premises, as stated in *Dermatossian,* 67 NY2d 219, 227-228:

> 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).

Exclusivity, as it applies to res ipsa loquitur, does not require a defendant to have sole physical access to the instrumentality which caused the injury. *Crawford v City of New York*, 53 AD3d 462, 464, [1st Dept 2008]. However, "proof 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." *De Witt Props., Inc. v City of New York,* 44 NY2d 417, 426 [1978]. See also *James v Warmuth*, 21 NY3d 540 (2013).

In the instant matter, Jan Co's own witness acknowledged that third parties did not have access to the light fixture, and, in fact defendants' sole argument on this issue is that there is no evidence that defendants Maverick and 181st Washington Heights had either control over the premises or notice of the condition; defendants do not make this argument concerning defendant Jan Co.

As to the third element, there is clearly no issue of plaintiff's possible contributory negligence.

As such, plaintiff is entitled to summary judgment on the basis of res ipsa loquitur against Jan Co. See, *Jappa v Starrett City, Inc.*, 67 AD3d 968 [2d Dept 2009]; *Greenidge v HRH Constr. Corp.*, 279 AD2d 400 [1st Dept 2001] (light fixture); *Silberman v Lazarowitz*, 130 AD2d 736 [2d Dept 1987] (glass shelves); *Pavon v Rudin*, 254 AD2d 143 [1st Dept 1998] (hinge).

In this matter, plaintiff was an invitee on defendant's premises, and Jan Co. had a duty to keep the premises in a reasonably safe condition. See, *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825 [2d Dept 2009]. Included in that duty is a duty to make periodic inspections of the premises and its fixtures and appurtenances and to reasonably maintain and repair the premises. See, *Bergin v Golshani,* 130 AD3d 767 [2d Dept 2015].

In conclusion, plaintiff is granted summary judgment on liability as against defendant Jan Co. Central, Inc. However, summary judgment is denied as against defendants 181st Washington Heights Associates LLC and Maverick Management Corp. Plaintiff has failed to make out a prima facie case with regard to these two

defendants.

The foregoing constitutes the decision and order of the court.

Dated: Brooklyn, New York
June 2, 2017

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court