Mejia v Delgado
2017 NY Slip Op 31765(U)
August 21, 2017
Supreme Court, New York County
Docket Number: 157361/2014
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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LETYS MEJIA,

Plaintiff,

-against-

SAMUEL DELGADO and KATIA J. DELGADO,

Defendants.

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DECISION/ORDER

Index No.: 157361/2014

Mot. Seq. 003

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Defendants, Samuel Delgado ("Samuel") and Katia J. Delgado ("Katia") (collectively "Defendants") now move pursuant to CPLR 3212 to dismiss the complaint ("Complaint") of plaintiff, Letys Mejia ("Plaintiff").

Factual Background[1]

Plaintiff's Complaint and Bill of Particulars allege that on May 25, 2014, Plaintiff was attending a barbecue at Defendants home when the deck attached to the rear of the home collapsed, causing Plaintiff to fall to the ground (Compl. ¶6; Bill of Particulars ¶5). Plaintiff further alleges that, among other things, Defendants were negligent as they failed to monitor and maintain the subject deck (Bill of Particulars, ¶6.d).

Defendants' Motion

In support of their motion to dismiss, Defendants argue that they did not have notice of the alleged defective condition of the subject deck, since no complaints were ever made about the deck and Defendants did not notice any defective condition associated with the deck. Moreover,

[1] The factual background of this matter is further discussed in the Court's September 23, 2016 Order, *Mejia v. Delgado*, 2016 N.Y. Slip Op. 31769(U) (N.Y. Sup. Ct., New York County 2016).

Defendants did not create the condition that Plaintiff alleges to have caused her injury, as they did not construct the subject deck, and that it was already in place when they purchased the home on August 30, 2009. Further, the June 22, 2009 Certificate of Compliance issued by the Building Department of the Town of Chester ("Certificate of Compliance") indicates that the previous owners built the deck, and that it conformed to previously approved plans (Casas Aff., Ex. K, Certificate of Compliance). Additionally, Defendants submitted the June 20, 2009 Home Inspection Report ("Report"), which demonstrates that there was no "obviously visible defect" associated with the subject deck (*id.*, Ex. J, Home Inspection Report). Additionally, Defendants did not perform construction on the subject deck.

Plaintiff's Opposition

In opposition, Plaintiff argues that Defendants failed to maintain their property in a reasonably safe condition by failing to perform maintenance on the subject deck. Specifically, Defendants failed to perform the maintenance indicated by the Report, which states that "[t]he deck should be cleaned and sealed or stained to improve durability" (Report, p.8). Moreover, Defendants submit photographs of the subject deck after it collapsed, which depict the "visible signs of the deterioration of the subject deck"(Wilt Opp. Aff. ¶24).

Next, Plaintiff contends that Defendants had a duty to inspect the subject deck, because of the age and the visible signs of deterioration.

Further, Defendants had constructive notice of the defective condition of the subject deck. In support of its argument, Plaintiff submitted the affidavit of Rudolph Rinaldi, A.I.A ("Rinaldi"), an architect registered in the State of New York (Wilt Opp. Aff. Ex. 1, Affirmation of Rinaldi, p.1). Rinaldi affirmed that the subject deck "showed visible signs of the deterioration

of its mechanical connectors and the drying out and warping of structural wood members and boards" (Rinaldi Aff., p.4).

Additionally, Plaintiff asserts that Defendants are liable under the theory of res ipsa loquitor, since deck collapses do not typically occur in the absence of negligence, the subject deck was in the control of Defendants, and Plaintiff did not contribute to the collapse of the deck.

Defendants' Reply

In reply, Defendants first argue that Rinaldi's affirmation and the Report fail to raise an issue of fact. Specifically, Rinaldi's affirmation as to the cause of the collapse of the deck is speculative, as he never inspected the subject deck. Further, Rinaldi's affirmation fails to connect the failure to perform the maintenance as indicated in the Report to the structural issues of the deck. Moreover, the Report did not mention structural issues concerning the subject deck. Further, Defendants did not cause the alleged defective condition, since the subject deck was built twenty-five years before the Report was created.

Finally, Defendants argue that res ipsa is inapplicable. Initially, the Court should not consider Plaintiff's res ipsa argument since it was not plead. Further, Defendants did not have notice of the alleged defects in the subject deck. Moreover, Defendants did not have exclusive control of the deck since it was built by the prior homeowners.

Summary Judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D 'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606, 607, 957 N.Y.S.2d 88, 91 [1st Dept 2012],

quoting *Alvarez v, Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986] and *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]).

The burden then shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212[b]; *Sokolowsky*, 101 A.D.3d 606). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v. Steward M Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 [1978]; *Carroll v. Radoniqi*, 105 A.D.3d 493 [1st Dept 2013]). The Court views the evidence in the light most favorable to the non-moving party, and gives the non-moving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v. Stop & Shop, Inc.*, 65 N.Y.2d 625, 626, 491 N.Y.S.2d 151, 480 N.E.2d 740 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231, 413 N.Y.S.2d 141, 385 N.E.2d 1068 [1978]).

An owner of a premises cannot be held liable for injuries caused by an allegedly defective condition unless the plaintiff establishes that the owner either created or had actual or constructive notice of the condition (*see Gordon v. American Museum of Natural History*, 67 N.Y.2d 836, 837, 501 N.Y.S.2d 646, 492 N.E.2d 774 [2007]; *Applegate v. Long Is. Power Auth.*, 53 A.D.3d 515, 516, 862 N.Y.S.2d 86 [2d Dept 2008]; *Powell v. Pasqualino*, 40 A.D.3d 725, 836 N.Y.S.2d 218 [2d Dept 2008]). To 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 [the defendant] to discover and remedy it" (*Gordon*, 67 N.Y.2d at 837).

"A landowner must act as a [] reasonable person in maintaining the property in a reasonably safe condition, in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk" (*Hayes v. Riverbend Hous. Co., Inc.*, 40 A.D.3d 500, 501, 836 N.Y.S.2d 589 [2007], *lv. denied* 9 N.Y.3d 809, 844 N.Y.S.2d 784, 876 N.E.2d 513 [2007]). Further, "constructive notice will not be imputed where a defect is latent and would not be discoverable upon reasonable inspection" (*Curiale v. Sharrotts Woods, Inc.*, 9 A.D.3d 473, 475, 781 N.Y.S.2d 47 [2d Dept 2004]; *see Scoppettone v. ADJ Holding Corp.*, 41 A.D.3d 693, 694, 839 N.Y.S.2d 116 [2d Dept 2007]; *Lal v. Ching Po Ng*, 33 A.D.3d 668, 823 N.Y.S.2d 429 [2d Dept 2006]).

Here, Defendants demonstrated their prima facie entitlement to judgment as a matter of law by showing that they did not create or have actual or constructive notice of the condition.

First, Defendants submitted the testimony of Katia and Samuel, indicating that they never received any complaints and did not observe any defective condition associated with the subject deck. Defendants testified that the subject deck was already in place when they purchased the home in August 2009 (Casas Aff., Ex. F, Deposition Trans. of Katia, 5:9-21; *id.*, Ex. G, Deposition Trans. of Samuel, 4:10-11; 5:3-14, 7:20-24). Defendants further testified that the only repairs made to the deck was to replace the steps, which Samuel performed (Ex. F, 11:4-25; 12:2-20; 22:25; 23:2-4; Ex., G, 23-25; 6:2; 7:2-15; 11:7-9; 23:2-9). On the date of the incident, Defendants hosted a barbecue at their home wherein 38 or 39 guests were present throughout the house and yard (Ex. F, 9:14-25; 10:2-12). Defendants further testified that from the time they purchased their home up to the date of Plaintiff's accident, they had hosted approximately six or seven similar-sized parties (*id.*, Ex. F, 7:7-9; 12:21-25; 13:2-13; 22:3-10; Ex. G, 9:8-18).

Defendants testified that they neither received notices regarding the subject deck, nor complaints regarding the deck (Ex. F, 13:14-17; Ex. G, 13:10-14). Further, Defendants testified that there were no apparent depressions, or un-level parts of the deck (Ex. F, 13:18-25; 14:2; Ex. G, 9:22-25; 10:2-3). Moreover, the deck did not make any noticeable noises (Ex. F, 13:18-21; Ex. G, 9:22-25; 10:2-3).

Next, the Report suggested that a visual inspection of the subject deck at the time they purchased the home revealed no visible defective condition associated with the deck. The section of the Report entitled "The Scope of the Inspection" indicates that the "purpose of this inspection is to identify and disclose visually observable major deficiencies of the inspected systems and items at the time of inspection only" (Report at 5). In relevant part, the Report indicated that the only "repair"[2] needed to be preformed on the subject deck is: "[t]he deck should be cleaned and sealed or stained to improve durability" (*id.* at 8).

Defendants also submit the Certificate of Compliance which indicated that in June 2009 the rear deck "conforms substantially" with the approved plans filed with the Chester Building Department and legal provisions.

In opposition, Plaintiff fails to raise a material issue of fact as to Defendants' creation or notice of the alleged defective condition. First, Rinaldi's affirmation fails to establish that the visible condition of the subject deck triggered Defendants' duty to inspect. Rinaldi indicated that Defendants should have performed a more "in-depth" inspection of the subject deck because of the age and visible signs of deterioration of the deck (Rinaldi Aff. at 4). Specifically, the expert relied on two photographs depicting the subject deck after it collapsed (*id.*, at Ex. 2). Rinaldi

[2] The term "Repair" as used in the Report "denotes a system or component which is missing or which needs corrective action to assure proper and reliable function" (Report, p.2).

affirmed that the subject deck was defective, in that it "showed visible signs of the deterioration of its mechanical connectors and the drying out and warping of structural wood members and boards" (Rinaldi Aff. at 4). However, Rinaldi indicated that the alleged defective conditions—that the mechanical connectors showed signs of deterioration and the drying out and warping of structural wood members and boards—were visible in the photograph depicting the subject deck after its collapse, but he fails to affirm, or even suggest, that the defective condition was visible when the subject deck was intact (*see Olsen v. Martin*, 32 A.D.3d 625, 626, 820 N.Y.S.2d 354 [3d Dept 2006] ["Proof, discovered after the incident, . . . does not establish that [a defective condition] was apparent or visible beforehand"]). Moreover, Plaintiff's expert failed to indicate how long the alleged defect existed.

Further, Rinaldi's affidavit is speculative and insufficient to raise a triable issue of fact. "[O]rdinarily, [in a negligence action,] the opinion of a qualified expert that a plaintiff's injuries were caused by a deviation from relevant industry standards would preclude a grant of summary judgment in favor of the defendants" (*Murphy v. Conner*, 84 N.Y.2d 969, 972 [1994]). "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is insufficient to withstand summary judgment" (*Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 [2002]; *see Romano v. Stanley*, 90 N.Y.2d 444, 452 [1997] [finding that an expert's affidavit to defeat summary judgment "must contain sufficient allegations to demonstrate that the conclusions it contains are more than mere speculation and would, if offered alone at trial, support a verdict in the proponent's favor"]).

Here, Rinaldi never explained how he made the determination that the deck was in a defective condition. While the photographs depict that the collapsed subject deck was ostensibly worn, the existence of the claimed defective condition—the deteriorated mechanical connectors and warped structural members and boards— is not fairly inferable from the photographs (*see Matter of Aetna Cas. & Sur. Co. v. Barile*, 86 A.D.2d 362, 364, 450 N.Y.S.2d 10 [1st Dept 1982]; *Davidson v. Sachem Central School Dist.*, 300 A.D.2d 276, 751 N.Y.S.2d 300 [2d Dept 2002]). Additionally, the expert not did identify which mechanical connectors were deteriorated and which structural members and boards were warped, and failed to inspect the subject deck or any of its components after the collapse (Rinaldi Aff. at 1).

As to the maintenance of the subject deck, Rinaldi's declaration that the "industry recommends that in maintaining wooden decks that topical 'treatments' be applied as soon as the deck is finished, after the first year, and thereafter at three (3) or five (5) year intervals" (Rinaldi Aff., at 3, ¶2), is speculative since he failed to reference any generally-accepted standard or code or his own personal knowledge to support his statement *(see Diaz*, 99 N.Y.2d at 544). Further, the expert did not provide a detailed explanation of how Defendants' failure to provide "topical treatments" to the subject deck contributed to the collapse of the deck (*id.*).

While Plaintiff failed to rebut Defendants' prima facie showing, issues of fact exist as to the applicability of the doctrine of res ipsa loquitur.

At the outset, Defendants' argument that Plaintiff should not be permitted to raise res ipsa loquitur because it was not plead is denied, since "[a] plaintiff's failure to specifically plead res ipsa loquitur does not constitute a bar to the invocation of res ipsa loquitur where the facts warrant its application (*Smith v. Consol. Edison Co. of New York*, 104 A.D.3d 428, 428, 961

N.Y.S.2d 73, 74 [1st Dept 2013], citing *Ianotta v. Tishman Speyer Props., Inc.*, 46 A.D.3d 297, 298, 852 N.Y.S.2d 27 [1st Dept. 2007]).

It is well settled that "[i]n order to submit a case to a trier of fact on the theory of *res ipsa loquitur,* a plaintiff must establish the event to be (1) of a kind that ordinarily does not occur in the absence of someone's negligence, (2) caused by an agency or instrumentality within the exclusive control of the defendant, and (3) not due to any voluntary action or contribution on the part of the plaintiff" (*Crawford v. City of New York*, 53 A.D.3d 462, 464, 863 N.Y.S.2d 11 [1st Dept 2008], citing *Corcoran v. Banner Super Mkt.*, 19 N.Y.2d 425, 430 [1967]). Further, as a rule of evidence, res ipsa loquitur only "creates a permissible inference of negligence, not a rebuttable presumption" (*Shinshine Corp. v. Kinney System, Inc.*, 173 A.D.2d 293, 294, 569 N.Y.S.2d 686 [1st Dept 1991], citing *George Foltis, Inc. v. City of New York,* 287 N.Y. 108, 38 N.E.2d 455 [1st Dept 1941]).

Here, the record contains sufficient evidence that would give rise to a permissible inference of negligence on the part of Defendants under res ipsa loquitur. Initially, with respect to the third factor, the parties do not dispute that Plaintiff did not contribute to the collapse of the subject deck.

As to the first element, this Court finds that the type of wooden deck affixed to Defendants' home does not generally collapse in the absence of negligence, *e.g.*, the improper maintenance or inspection of the subject deck (*see Mejia v. New York City Transit Auth.*, 291 A.D.2d 225, 737 N.Y.S.2d 350 [1st Dept 2002] [where plaintiff was struck in the head when piece of ceiling in train station fell upon his head, "first" element was sufficiently established since "falling plaster from a ceiling has been held to be the sort of incident suitable for the

application of the doctrine"]; *see also Sterbinsky v. 780 Riverside Drive, LLC*, 139 A.D.3d 458, 29 N.Y.S.3d 792, 793 [1st Dept 2016] [finding that res ipsa applied where plaintiff was injured when the metal grate he was walking on collapsed]; *Hoffman v. United Methodist Church*, 76 A.D.3d 541, 906 N.Y.S.2d 328, 330 [2d Dept 2010] [finding a triable issue of fact as to the liability of the defendant under the doctrine of res ipsa loquitur where plaintiff was injured when a wooden step became detached from the step's supporting structure]; *see also Torres v. Cordice*, 11 Misc.3d 23, 812 N.Y.S.2d 731 [App. Term, 1st Dept 2006] ["[s]tairs and protective hand railings do not generally collapse and fall apart in the absence of negligence, i.e., due to faulty maintenance or repair . . . ."]; *Pavon v. Rudin*, 254 A.D.2d 143 [1st Dept 1998] [where door fell off the hinge and hit plaintiffs head, stating that first element of res ipsa was clearly established, as "[d]oors mounted on pivot hinges do not generally fall in the absence of negligence]; *Brisbon v. Mount Sinai Hosp.*, 8 Misc 3d 47 [N.Y. Sup. Ct., New York County 2005] [stating that the "first" element of res ipsa was "clearly established"; a protective hand railing plaintiff was holding "gave way" and "came off"]).

Defendants' argument that they did not have notice of the alleged defective condition does not operate as a bar to the application of res ipsa in this matter (*see Ezzard v. One East River Place*, 129 A.D.3d 159, 8 N.Y.S.3d 195 [1st Dept 2015]; *Singh v. United Cerebral Palsy of New York City, Inc.*, 72 A.D.3d 272, 276, 896 N.Y.S.2d 22, 25 [1st Dept 2010] [determining that res ipsa applied even where plaintiff failed to rebut defendants' prima facie evidence of lack of notice]).

With regard to the second element, exclusivity "'does not require the elimination of all other possible causes of the incident,' or that a defendant had 'sole physical access to the

instrumentality causing the injury'" (*Hisen v. 754 Fifth Ave. Assocs., L.P.*, 23 Misc.3d 1114, 2009 NY Slip Op 50773 [U] [N.Y. Sup. Ct., New York County 2009], citing *Crawford*, 53 A.D.3d at 464). Further, courts "do not generally apply this requirement as it is literally stated . . . or as a fixed, mechanical or rigid rule . . . ." (*Mejia v New York City Transit Auth.*, 291 A.D.2d 225, 227 [1st Dept 2002], quoting *Dermatossian v. New York City Tr. Auth.*, 67 N.Y.2d 219, 227 [1986]). "Rather, its purpose is to confine the application of the doctrine to those situations where it is more likely than not that defendant caused the accident" (*Mejia*, 291 A.D.2d at 227).

Here, Defendants were in-possession, private homeowners. There is no evidence on the record indicating that any other party had access to the subject deck.

Defendants' argument that they did not have exclusive control over the deck because the prior owner of the home built the home and deck is unavailing. The Report suggests that the subject deck was not in a defective condition at the time Defendants purchased the home in 2009, and thus, it is likely that Defendants' negligence, rather than another, created the condition that caused Plaintiff's accident. Moreover, Plaintiff does claim that the construction of the deck was negligent. Nor does Plaintiff's expert claim that the cause of the accident was negligent construction (*compare Bunting v. Haynes*, 104 A.D.3d 715, 716, 961 N.Y.S.2d 290, 291 [2d Dept 2013]; *Crosby v. Stone*, 137 A.D.2d 785, 786, 525 N.Y.S.2d 332, 333 [2d Dept 1988] [finding the exclusivity element of res ipsa not met where the "testimony of the plaintiff's expert revealed that the most likely cause of the plaintiff's injury was the defective design and construction of the porch, which was built before the defendants purchased the house"]).

Thus, Defendants are not entitled to summary judgment dismissing the entirety of the Complaint.

CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of Defendants for summary judgment, pursuant to CPLR 3212, dismissing the Complaint of Plaintiff, is granted with regard to Plaintiff's theories of negligence based on actual and constructive notice; and it is further

ORDERED that the case shall proceed on a theory of res ipsa loquitur only; and it is further

ORDERED that Defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: August 21, 2017

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.