SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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MARY LURIA, NELSON LURIA,

Plaintiffs,

- v -

ROBERT OSTERHUS, 12 EAST 86TH STREET, LLC, URBAN ASSOCIATES, LLC

Defendants.

INDEX NO. 159766/2014

MOTION DATE 6/15/2017

MOTION SEQ. NO. 005 and 006

DECISION AND ORDER

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HON. KELLY O'NEILL LEVY:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 107, 109, 110, 111, 112, 113, 114, 115, 116, 117, 125, 126, 132, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for Summary Judgment

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 118, 119, 120, 121, 122, 123, 124, 127, 128, 129, 130, 131

were read on this motion to/for Summary Judgment

Upon the foregoing documents, it is

Motion sequence 005 and 006 are consolidated for disposition.

This is an action arising from an accident where the plaintiff, a pedestrian, was struck by a piece of broken glass that allegedly blew off the roof of a building and onto the street below.

Defendant Robert Osterhus (hereinafter, Osterhus) moves, pursuant to CPLR § 3212, for summary judgment in his favor, and for dismissal of plaintiffs Mary Luria (hereinafter, Mrs. Luria) and Nelson J. Luria's (hereinafter, Mr. Luria) complaint and all cross-claims of defendants 12 East 86th Street, LLC (hereinafter, 12 East) and Urban Associates, LLC

(hereinafter, Urban Associates) (mot. seq. 005). 12 East and Urban Associates partially oppose as to the cross-claims.

Plaintiffs cross-move, pursuant to CPLR § 3212, for partial summary judgment in their favor on liability, and for an order imposing sanctions on 12 East and Urban Associates for spoliation of evidence (mot. seq. 005). Defendants oppose the branch of the cross-motion seeking partial summary judgment on liability. 12 East and Urban Associates also oppose plaintiffs' request for spoliation sanctions.

In addition, 12 East and Urban Associates move, pursuant to CPLR § 3212, for summary judgment in their favor, and for dismissal of plaintiffs' complaint and all cross-claims against them (mot. seq. 006). Plaintiffs oppose. Osterhus partially opposes the branch of the motion seeking dismissal of the cross-claims.

BACKGROUND

At approximately 10:15 pm on July 8, 2014[1], Mary Luria was walking home when she was struck by a piece of shattered glass in front 35 East 85th Street in Manhattan. The glass allegedly came from a glass table top which was located on the terrace of 12 East 86th Street, Apartment 1700 (Apartment 1700). The building at 12 East 86th Street is owned by 12 East and managed by Urban Associates. On the date of the accident, Osterhus was the tenant at Apartment 1700. The table was located on the southeast corner of the terrace, which was surrounded by a parapet wall. A gust of wind allegedly dislodged the glass table top from its base, causing it to fall and shatter. The wind allegedly propelled shards of glass east on East 85th Street. A shard hit Mrs. Luria's ankle, causing her injuries.

[1] Plaintiff Mary Luria testified at her deposition that the accident occurred "just before the July 4th weekend," but later submitted an affirmation attesting to the date of the accident as July 8, 2014, which corresponds with the date on the hospital records [Lenox Hill Hospital Records (ex. C to the Weisfuse aff. in reply)].

Immediately prior to the accident, plaintiffs had taken a taxi to the corner of 85th Street and Madison Avenue and intended to walk home from there. Mrs. Luria exited the taxi first and started walking while Mr. Luria remained in the taxi to pay the fare. Mrs. Luria was about one third of the way down the street when the accident occurred [Mary Luria tr. (ex. F to the Toomey aff.) at 11]. After she fell, Mrs. Luria observed pieces of glass showered on both the north and south sides of East 85th Street (*id.* at 48). Mr. Luria testified that upon exiting the taxi he felt a "very strong gust of wind" at his back and shortly afterwards he heard an explosion and observed a shower of glass falling in front of him and behind his wife when he saw her fall [Nelson J. Luria tr. (ex. O to the Lechleitner aff.) at 28-29]. Mrs. Luria testified at first that there was just "a little bit of wind," "not much," at the time of the accident [Mary Luria tr. (ex. F to the Toomey aff.) at 18]. She later testified that it was a "very windy night" [Mary Luria tr. (ex. K to the Toomey aff.) at 18].

Plaintiffs' expert, Irving U. Ojalvo, a licensed professional engineer, approximated the wind speed of the shard as it struck Mrs. Luria to be 48.4 mph [Irving U. Ojalvo Expert Affidavit (ex. A to the Weisfuse aff. in reply)]. Plaintiffs' expert, Mark L. Kramer, a professional meteorologist, analyzed weather conditions and forecasts related to wind in Manhattan for July 8, 2014, specifically a severe thunderstorm warning from the National Weather Service that there would be damaging winds in excess of 60 mph, and concluded that defendants had more than ample warning to remove the glass from the table and store it inside [Mark L. Kramer Expert Affidavit (ex. B to the Weisfuse aff. in reply)]. Osterhus' expert, Leonard P. Parkin, an engineering consultant, asserts that Mr. Ojalvo's analysis was inconclusive as to the amount of lift force imparted to the glass table top because the initial position and location of the table top

is unknown [Leonard P. Parkin Expert Affidavit (referred to as ex. A and annexed as ex. B to the Toomey aff. in opp.) at ¶ 6].

A day after the accident, Senko Marsic, a handyman at plaintiffs' building, 45 East 85th Street, went to the roof of another building located at 30 East 85th Street and with the use of binoculars, observed a table and broken glass on the terrace of the building on the other side of Madison Avenue [Senko Marsic tr. (ex. P to the Lechleitner aff.) at 133-136]. Marsic also observed broken glass on the sidewalk on East 85th Street and picked up one random piece of broken glass that was in the roadway between parked cars (*id.* at 65-66, 97, 106).

John Grady, the superintendent of 12 East 86th Street and employee of Urban Associates, testified that he received a phone call in July 2014 from the property manager, Wilce Robles, advising that plaintiffs claimed that glass had fallen from the building, upon which he went to the 17th floor to inspect the roof [John Grady tr. (ex. H to the Toomey aff.) at 15-16, 22, 46]. Grady observed that there was a table in the corner by the parapet wall, that the glass table top was missing, and that there was broken glass on the floor under the table (*id.* at 16-18, 20, 25, 55). Grady then cleaned up the broken glass and disposed of it (*id.* at 21, 23-24). He testified that if a hurricane or dangerous winds were predicted, tenants would receive a notification from the building asking them to remove their items from the roof deck, but tenants were ultimately responsible for securing their own items on their decks (*id.* at 30, 92).

Osterhus testified that before he had moved in, he asked Wilce Robles, the property manager of 12 East 86th Street and employee of Urban Associates, to remove all the furniture that had been left by a previous tenant on the terrace and that Robles assured him that he would remove everything [Robert Osterhus tr. (ex. G to the Toomey aff.) at 11-12]. Conversely, Wilce Robles testified that Osterhus wanted to keep some items on his deck, including the glass table

and some chairs [Wilce Robes tr. (ex. I to the Toomey aff.) at 17, 62-63, 65-66]. Osterhus also testified that he had told John Grady that the items had not been removed and that Grady said he would remove them (Osterhus tr. at 14). After the accident, Osterhus spoke with Grady, who apologized for the accident and stated that the accident would not have happened had he not been on vacation that week, as he would have removed the glass because of the windy conditions (*id.* at 36).

DISCUSSION

Negligence Claim

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

In their complaint, plaintiffs allege negligence and loss of consortium. To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of his or her injuries. *See Pulka v. Edelman*, 40 N.Y.2d 781, 782 (1976). Absent a duty of care, there is no breach and no liability. *Id.*

Osterhus argues that he owed no duty to Mrs. Luria as the table was the property of a previous tenant and he had no obligation to maintain, secure, or inspect it. He also asserts that he specifically asked Robles to remove the table from the terrace, that the building constantly used Osterhus' terrace to access the roof, and that the building staff would remove the glass from the table periodically without telling Osterhus during the winter or in windy conditions. Osterhus claims that he had no notice of the alleged dangerous condition and that a question of fact exists as to the origin of the glass.

12 East and Urban Associates contend that plaintiffs were not able to identify the origin of the glass, and that even if the glass did come from Osterhus' terrace, the building owed no duty to plaintiffs as members of the general public. They further argue that the building had no duty to inspect or secure the glass table and that the accident was unforeseeable as it was too remote. 12 East and Urban Associates further assert that the ownership of the table does not alter liability because the table was in Osterhus' possession and control, within his leased space.

Plaintiffs argue that defendants on both motions failed to establish their initial burden of eliminating any triable issues of fact and failed to establish that they owed no duty to pedestrians on the street. Plaintiffs also assert that res ipsa loquitur reduces their burden of proof on summary judgment.

For a plaintiff to establish a prima facie case of negligence pursuant to the doctrine of res ipsa loquitur, he must establish 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 Transit Auth., 67 N.Y.2d 219, 226 (1986) (internal quotations omitted). If a plaintiff can establish all three elements of the doctrine of res ipsa loquitur, an

inference of negligence is permitted but not compelled. *See Crockett v. Mid-City Mgmt. Corp.*, 27 A.D.3d 611, 612 (2d Dep't 2006).

In *Veltri v. Stahl*, a pedestrian was injured by a glass storm window that fell from an apartment building. *Veltri v. Stahl*, 155 A.D.2d 287, 287 (1st Dep't 1989). When considering the lower court's denial of the plaintiff's summary judgment motion there, the court held that the second element of the res ipsa loquitur doctrine was unresolved, as the defendant owner was not in actual possession of the apartment from which the window fell and the defendant lessee was out of the country at the time of the accident. *See id.* at 287-288. To establish exclusive control to satisfy the second element, 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.'" *Id.* (internal citation omitted) Similar to the situation in *Veltri*, because it is not clear which defendant, 12 East and Urban Associates or Osterhus, had exclusive control and was responsible for securing the glass table top, the second element of the res ipsa loquitur doctrine is not satisfied, and summary judgment on this theory of liability is unwarranted.

Here, triable material questions of fact exist that preclude the granting of all the summary judgment motions. Here, there is a question of whether Osterhus had asked Robles to remove the table from the terrace. Osterhus claims that he had asked Robles to remove the table, while Robles claims that Osterhus wanted to keep the table. Additionally, there are questions of whether Osterhus told Grady to remove the table and whether Grady replied that he would remove it. Furthermore, it is unclear whether the building took responsibility for inspecting and removing loose furniture and other items from the terraces during times of inclement weather, or if that responsibility was passed onto the tenants. It is clear based on the testimony and

photographic evidence presented that the glass came from Osterhus' terrace. But because triable material questions of fact exist, Osterhus', plaintiffs', and 12 East and Urban Associates' motions and cross-motion for summary judgment are all denied.

Spoliation of Evidence Claim

Plaintiff moves for spoliation sanctions against 12 East and Urban Associates for discarding the shards of glass from the subject table. "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a 'culpable state of mind,' and 'that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense.'" *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 N.Y.3d 543, 547 (2015) (internal citations omitted). "[I]f the evidence is determined to have been negligently destroyed, the party seeking spoliation sanctions must establish that the destroyed [evidence] [was] relevant to the party's claim or defense." *Id.* at 547-548 (internal citation omitted).

Plaintiffs assert that by throwing away the broken glass shards after the accident, 12 East and Urban Associates spoliated important evidence and have caused plaintiffs to be prejudiced, warranting sanctions, including an adverse inference against 12 East and Urban Associates in deciding the present motions.

12 East and Urban Associates argue that plaintiffs never served a demand to preserve evidence, that plaintiffs both testified as to how the accident happened and have a surveillance video recording of the accident, that they obtained and retained a piece of broken glass, that there is no missing "essential physical" or "key" evidence, and there is no evidence that any evidence was intentionally destroyed.

Plaintiffs fail to establish that the discarded broken glass was relevant to their claim. Plaintiffs also fail to show that 12 East and Urban Associates possessed an obligation to preserve the broken glass at the time of its disposal, and that the broken glass was discarded with a culpable state of mind. Since plaintiffs never served a demand to preserve evidence, they both testified as to how the accident happened and they obtained and retained a piece of broken glass, there is no missing "essential physical" evidence, and no evidence that any evidence was intentionally destroyed, plaintiffs' cross-motion for an order imposing sanctions on 12 East and Urban Associates for spoliation of evidence is denied.

The court has considered the remainder of the arguments and finds them to be without merit.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that defendant Robert Osterhus' motion, pursuant to CPLR § 3212, for summary judgment in his favor, and for dismissal of plaintiffs Mary Luria and Nelson J. Luria's complaint and all cross-claims of defendants 12 East 86th Street, LLC and Urban Associates, LLC (mot. seq. 005) is denied; and it is further

ORDERED that plaintiffs' cross-motion, pursuant to CPLR § 3212, for partial summary judgment in their favor (mot. seq. 005) is denied; and it is further

ORDERED that plaintiffs' request for an order imposing sanctions for spoliation of evidence on 12 East and Urban Associates (mot. seq. 005) is denied; and it is further

ORDERED that 12 East and Urban Associates' motion, pursuant to CPLR § 3212, for summary judgment in their favor, and for dismissal of plaintiffs' complaint and all cross-claims (mot. seq. 006) is denied.

This constitutes the decision and order of the court.

4/6/18
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.
HON. KELLY O'NEILL LEVY
J.S.C.

CHECK ONE:	☐	CASE DISPOSED			☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☒	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE