SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 4

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WALLY COSTE-PICHARDO,

Plaintiff,

Index No. 302923/12

- against -

DECISION/ ORDER

NEVEIBAIS, INC.,

Defendant.

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Hon. Howard H. Sherman

Defendant seeks summary judgment dismissing the complaint in its entirety. Plaintiff cross moves for summary judgment in his favor on the issue of liability.

On or about March 29, 2012, plaintiff commenced this action to recover damages for personal injuries allegedly arising from the negligent maintenance of a premises. The complaint alleges that on June 24, 2011, at approximately 7:00 P.M., while lawfully within apartment 3E of 701 St. Nicholas Avenue, in New York ("the subject building"), plaintiff was injured when a portion of the interior hallway ceiling collapsed and fell on him. Plaintiff, 24 years old at the time of the accident, is the son of the apartment's lessee, Kenia Coste ("Coste"). Plaintiff alleges that the building was owned, maintained, inspected and controlled by defendant, that it was negligent in failing to properly maintain and repair the ceiling in a reasonably safe condition, and that said negligence caused the accident and injuries resulting therefrom. Plaintiff relies upon, *inter alia*, the theory of *res ipsa loquitur*.

THE PARTIES' CONTENTIONS

In seeking summary judgment, defendant supplies a copy of plaintiff's deposition transcript, taken on October 8, 2013. Defendant argues that such testimony establishes, as a matter of law, that

the ceiling was not in a defective or dangerous condition, defendant did not create the allegedly dangerous condition, and that defendant did not have actual or constructive notice of any alleged condition related to the ceiling. Defendant further argues that *res ipsa loquitor* does not apply to this claim because the injury causing instrumentality, namely the ceiling, was not within the exclusive control of the defendant because the apartment had been leased to the plaintiff's mother for approximately seven years prior to the accident.

Defendant's testimony reveals that, on the date of the accident, he walked out of his bedroom into the interior hallway and was about to close his bedroom door, when a three-by-three square foot piece of sheetrock fell from the ceiling striking him. With regard to the condition of the ceiling prior to the accident, plaintiff testified that he had not noticed any problems with that part of the ceiling such as "discoloration, or leaking." Plaintiff testified that he "never saw" any repairs made to that area of the ceiling and did not know of any repairs to any other parts of the ceiling within the apartment. He never made a complaint to the owner or landlord regarding the ceiling. When asked whether he knew if anyone else made a complaint regarding the ceiling or leaks, plaintiff stated "Never, that I know of. I don't know if my mother did, or – I don't know – but, no." In this regard, he testified that his mother never told him if she made a complaint.

Plaintiff was asked whether he could explain why the ceiling fell. Plaintiff responded "[n]o . . . perhaps it was very old." Plaintiff further stated that he discussed the cause of the ceiling collapse with his mother and asked her why the ceiling fell "because they supposedly had made repair in the apartment." Plaintiff was asked whether the mentioned repairs were "made in the area of the apartment where the ceiling fell." Plaintiff responded "[o]nly where the ceiling fell." No attempt to clarify this testimony was made. He then testified that no repairs were made to the hallway ceiling,

but that the bathroom was painted and the bathroom tiles changed. Defendant contends that plaintiff's testimony conclusively demonstrates that it did not create the condition and that it did not have actual or constructive notice of any dangerous condition, as plaintiff resided in the apartment for seven years, was in the best position to testify as to the condition of the ceiling, yet testified that there was no problem with the ceiling.

Plaintiff opposes defendant's motion for summary judgment and cross-moves for summary judgment in his favor on the issue of liability. Plaintiff submits the respective deposition testimony of plaintiff, Zev Matlz (field property manager employed by Tamrak) and Moishe Taub (principal of Neveibais, Inc.); the affidavit of Kenia Altagracia Pichardo Jiminian a/k/a Kenia Coste; the lease agreement for apartment 3E between Coste and defendant Nevei Bais Inc. dated August 2004; work orders related to apartment 3E dated May 11, 2011 and July 11, 2011; and a violation order issued for apartment 3E by the Fire Department of New York ("FDNY") on June 24, 2011.

Matlz testified that, on June 1, 2013, he was employed as a field property manager with Tamrak and took over management of the subject building from Soloff Management. As property manager, Matlz visited the subject building weekly to address tenants' concerns, violations, repairs, rent, inspections, and other legal issues requiring court appearances. He testified that defendant owned the subject building and that Ralph Soloff ("Soloff"), of Soloff Management, was the prior property manager. Matlz maintained that he kept a written record of every tenant complaint received; however, he could not state whether Soloff Management had the same policy in 2011. Other than leases and work orders, he has not seen any written material received from Soloff Management. Matlz asserted that he did not know if there were any prior HPD or FDNY violations regarding apartment 3E or whether there was a ceiling collapse in apartment 3E. Further, he never spoke to the

owner or Soloff regarding a ceiling collapse. Matlz testified that there appeared to be several work orders related to apartment 3E that were not turned over by Soloff and, thus, missing from the tenant file.

Taub testified that he is the sole principal of Neveibais, Inc. He maintains that he has not visited the subject building in approximately 20 years, he has no contact with tenants, he would not be advised of any complaints or repairs, and he was never made aware of a ceiling collapse in apartment 3E. Nor was he made aware of ceiling repairs in apartment 3E prior to the accident. He testified that, at the time of the subject accident, Soloff had full control and authority regarding the management, renovations, and repairs of the building. This authority was based solely upon a verbal agreement with Soloff, wherein Soloff could hire contractors and pay invoices from the building's account without Taub's approval. Taub could not recall whether the subject building ever received a violation from the City of New York or FDNY.

In her affidavit dated June 10, 2015, Coste avers that she was the lessee of the subject apartment since approximately 2004 and that the plaintiff resided in the apartment. On June 24, 2011 she was in the kitchen when the hallway ceiling collapsed on plaintiff. Immediately after the collapse, she observed the plaintiff on the floor and a large piece of sheetrock that fell from the ceiling. Coste asserts that prior to the accident she made dozens of verbal complaints "about the hallway ceiling" to the building's "super," "Ralph," whom she believed worked for the building's owner. She testified that she believed that the ceiling was in danger of falling. She also avers that, prior to the accident, she complained to the City of New York Department of Housing Development and Preservation ("HPD") regarding the condition of the ceiling, after which an inspector inspected the ceiling. Coste contends, specifically, that the hallway ceiling "seemed dangerous because it looked very old and

appeared to be sinking or 'heavy,'" rotting, and sinking. In addition, she asserts, bits of ceiling material would fall from the ceiling to the ground.

Coste contends that Ralph came into the apartment to look at the ceiling on "several occasions," and assured her that he would tell his boss and that it would be repaired. Coste asserts that approximately six weeks prior the accident Ralph arranged for repairs within the apartment, including replacing a small part of the hallway ceiling, new plaster and painting of the ceiling. Coste avers that after the repairs were made she was "mad that only parts of the apartment, including the ceiling were fixed...[she] complained to Ralph after the work was done that the entire ceiling was not fixed and that only a portion had been repaired. Ralph told [Coste] that he would talk to the owner." Coste maintains that the ceiling "still looked heavy and sinking."

The May 11, 2011 work order reveals that Soloff Management retained Alberto Zambrano, a painting and plastering contractor, to "[p]laster and paint entire apt. [3E] 6 room. Scrap and plaster 4 bedroom, livingroom, large hall, kitchen and bathroom, ceiling and wall. 4 x 4 sheetrock hallway ceiling." The invoice is marked paid on May 12, 2011. A July 7, 2011 work order, following the accident, demonstrates that Soloff Management retained Segundo Caceres, a plastering, painting and tile contractor, to remove falling ceiling and replace sheetrock and paint ceiling in the hallway of apartment 3E. Finally, the June 24, 2011 FDNY violation order, submitted by plaintiff, notes a "failure to maintain ceiling in proper order, causing collapse of sheetrock in apartment hallway" and directs that the violation be corrected forthwith.[1] The violation order was issued to "Kenias, Costes (tenants)."

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[1] Subsequent to the filing of the note of issue and this motion, plaintiff served a judicial subpoena on Lieutenant Navetta of the FDNY.

Plaintiff argue that defendant fails to meet its *prima facie* burden as it fails to demonstrate through the plaintiff's testimony the absence of a dangerous condition or that it neither created the dangerous condition, nor had actual or constructive notice of its existence. Plaintiff points out that defendant fails to submit any evidence from the owner or property manager addressing the issues of whether a dangerous condition existed, whether it created the dangerous condition, and whether it had notice, nor does defendant supply evidence regarding complaints or inspections of the subject apartment.

In this regard, plaintiff argues that the May 11, 2011 work order demonstrates that just six weeks before the accident, defendant performed repairs to a portion of the hallway ceiling directly next to the portion of the ceiling which collapsed on plaintiff. During the May 11, 2011 repairs, Soloff personally visited the apartment and had an opportunity to inspect the ceiling. Plaintiff points out that Miltz testified that a mere visual inspection of a ceiling would indicate to a property manager whether a ceiling was in danger of collapse and a ceiling in danger of collapse would need to be repaired immediately. Finally, plaintiff notes that defendant fails to submit evidence regarding any particularized or specific inspection, or its procedure, so as to demonstrate a lack of constructive notice.

Finally, plaintiff argues that he has elicited questions of fact as to whether the ceiling appeared to be in a unsafe and rotting condition and whether the collapse was caused by a failure to maintain, as cited by the FDNY. Moreover, plaintiff notes his testimony that he thought the ceiling collapsed because it was very old. Plaintiff argues that the evidence that defendant conducted repairs to area next to the area that collapsed on May 11, 2011, raises questions of fact as to whether defendant

created the dangerous condition that caused the collapse or had actual or constructive notice of the condition and failed to remedy it.

Alternatively, plaintiff argues that he may rely on the theory of *res ipsa loquitor* as defendant maintained exclusive control of maintenance and repair of the premises' ceiling. In addition, Miltz testified that a ceiling does not ordinarily collapse in the absence of negligence. Plaintiff contends that the sole proximate cause of this accident was defendant's negligence in failing to discharge its non-delegable duty to keep the premises in a reasonably safe condition.

In opposition to plaintiff's cross motion, defendant contends that material issues of fact warrant denial of plaintiff's motion. In addition, defendant objects to plaintiff's use of Miltz's and Taub's deposition transcripts on the basis that they are not signed and, in any event, they possessed no personal knowledge of information bearing on the issues.[2] Defendant also contends that Coste's assertion that the ceiling was in a visibly defective condition raises an issue of fact as to plaintiff's comparative fault in failing to avoid the defective area.

Defendant argues that Coste's affidavit must be precluded on summary judgment as she is a "previously undisclosed witness." In this regard, defendant served a July 9, 2012 demand for, *inter alia*, all witnesses and all "actual notice" witnesses. Plaintiff's September 5, 2012 Response to Combined Demands stated that plaintiff was unaware of any witnesses, at that time. An October 11, 2012 preliminary conference order directed plaintiff to exchange the names of all witnesses. Defendant argues that despite multiple opportunities to disclose Coste as a witness having information regarding notice of the alleged dangerous condition, plaintiff failed to do so.

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[2] The deposition transcripts are admissible pursuant to CPLR 3116(a).

Defendant contends that *res ipsa* is not applicable because a general duty to maintain does not establish the exclusive control element required to employ the theory, since the apartment was leased to Coste for approximately seven years. In any event, defendant points out that summary judgment is very rarely granted on the basis of *res ipsa* and only in the most exceptional cases.

In reply, plaintiff argues that Coste's affidavit should not be precluded as plaintiff testified at his October 8, 2013 deposition that Coste was in the apartment at the time of the accident and that he was not aware of whether Coste made complaints regarding the ceiling condition to the owner. In addition, during discovery defendant was provided with a copy of the lease agreement indicating that Coste was the lessee and a copy of the FDNY violation order that was issued to Coste, as the tenant, on the date of the accident. Thus, it is argued, defendant was aware of Coste.

DISCUSSION

On a motion for summary judgment, it is the burden of the summary judgment proponent to demonstrate *prima facie* entitlement to judgment as a matter of law with evidence sufficient to eliminate any material issue of fact; failure to do so requires denial of the motion regardless of the sufficiency of the opposing papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012]). A court's task is issue finding rather than issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). "It is also well established that courts should deny summary judgment where there is any doubt about the existence of a triable issue of fact" (*Molina v Phoenix Sound, Inc.*, 297 AD2d 595, 596 [1st Dept 2002]; *see Morris v Lenox Hill Hosp.*, 232 AD2d 184, 185 [1st Dept 1996], *affd* 90 NY2d 953 [1997]).

"On a motion for summary judgment, a property owner has the initial burden of demonstrating that it neither created the defective condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy" (*Garcia v City of NY*, 99 AD3d 491, 492 [1st Dept 2012]; *see Mitchell v City of NY*, 29 AD3d 372, 374 [1st Dept 2006], *rearg denied* 2006 NY App Div LEXIS 10419 [1st Dept Aug. 24, 2006, No. M-3315]). A defendant owner generally meets its summary judgment burden by submitting the deposition testimony of an individual with personal knowledge of the last date of inspection indicating the absence of a potential defective or dangerous condition, or by submitting logs, work orders or other business records to demonstrate the lack of notice of any dangerous conditions in the subject area (*see Lozano v Mt. Hope Place Props., Inc.*, 141 AD3d 455, 455 [1st Dept 2016]; *Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462, 463 [1st Dept 2010]).

Here, defendant fails to demonstrate its entitlement to summary judgment as a matter of law through the plaintiff's deposition testimony that he was not aware of a dangerous condition.[3] "[A] landowner owes a duty of care to maintain his or her property in a reasonably safe condition" (*Gronski v County of Monroe*, 18 NY3d 374, 379 [2011]). "While an out-of-possession owner is generally not liable for injuries that occur on leased premises, one who retains control of the premises, or contracts to repair or maintain the property, may be liable for defects" (*Winby v Kustas*, 7 AD3d 615, 615 [2d Dept 2004]). Notwithstanding plaintiff's testimony that the apartment was leased to Coste, defendant neither alleges, nor demonstrates, that it surrendered control of the subject apartment such that it was not responsible for inspecting and maintaining the structural interior of apartment 3E (*see Gronski v County of Monroe*, 18 NY3d at 379 [control is the test that measures generally the

[3] Given the procedural posture of this action, it bears noting that plaintiff's deposition testimony was provided through a Spanish interpreter and included numerous non-responsive and vague answers.

responsibility in tort of the owner of real property and is typically addressed by a written agreement or a course of conduct]; *Geffs v City of NY*, 105 AD3d 681, 682 [1st Dept 2013]). Defendant fails to establish prima facie that, as related to its maintenance of the apartment, it did not create the dangerous condition through the actions of its employees or agents in or around the site of the ceiling collapse. The defendant also fails to submit any evidence as to when the ceiling was last inspected or installed. Hence, it fails to establish, prima facie, that it did not have constructive notice of the alleged hazardous condition (*see Amendola v City of NY*, 89 AD3d 775, 776 [2d Dept 2011]; *Gordon v Am. Museum of Natural History*, 67 NY2d 836, 837 [1986]).

Moreover, the defendant's submission fails to eliminate all triable issues of fact as to whether it had actual notice of a on-going hazardous condition that went unaddressed. Plaintiff testified that he, personally, did not complain about a condition with the ceiling, but that he did not know whether his mother, the lessee, did. This testimony fails to establish that, as a matter of law, defendant lacked actual notice. "Merely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden" (*Hairston v Liberty Behavioral Mgt. Corp.*, 157 AD3d 404, 405 [1st Dept 2018]; *see Amendola v City of NY*, 89 AD3d at 776).

Since the defendant fails to meet its initial burden as the movant, the court need not review the sufficiency of plaintiff's opposition papers (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Amendola v City of NY*, 89 AD3d at 776).

Turning to plaintiff's cross motion for summary judgment, a plaintiff seeking summary judgment in a premises liability action, against an owner, must demonstrate that the owner created the dangerous condition or had actual or constructive notice of it (*see Pintor v 122 Water Realty, LLC*,

90 AD3d 449, 451 [1st Dept 2011]). An owner can be deemed to have constructive notice of a dangerous condition if it is visible and apparent, and if the condition existed for enough time before the accident to permit the owner's employees to discover and remedy the problem (*see Pintor v 122 Water Realty*, LLC, 90 AD3d at 451; *Gordon v Am. Museum of Natural History*, 67 NY2d at 837).

In support of summary judgment plaintiff supplies Coste's affidavit which, if considered, purports to raise an issue of fact as to whether defendant possessed actual and constructive notice of a defective condition regarding the hallway ceiling. Thus, defendant's arguments regarding preclusion of the affidavit must be discussed initially. "It is well settled that in order to impose the drastic remedy of preclusion, the court must determine that the offending party's failure to comply with discovery demands was willful, deliberate and contumacious" (*Siegman v Rosen*, 270 AD2d 14, 15 [1st Dept 2000], citing CPLR 3126 [2]; *see Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d 177 [1st Dept 2001][preclusion is a drastic remedy and is properly denied absent any demonstration that the conduct is willful and contumacious]).

Here, while plaintiff offers no explanation for why he did not affirmatively disclose Coste as a notice witness, under the circumstances at hand it cannot be said that this conduct, standing alone, was willful and contumacious, nor has there been a showing of prejudice to defendant (*see Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 580 [1st Dept 2012]; *O'Callaghan v Walsh*, 211 AD2d 531, 531-532 [1st Dept 1995]). Based on plaintiff's deposition testimony, defendant was aware of Coste's existence, her address, and her relationship to the case at least two years prior to the filing of its motion for summary judgment (*see Brown v Howson*, 129 AD3d 570, 571 [1st Dept 2015][affidavits of plaintiff's partner and neighbor stating that they had given defendants notice of the alleged ceiling cracks considered on summary judgement despite plaintiff's failure to disclosed witnesses because

plaintiff testified at her deposition as to their names and addresses]; *Palomo v 175th St. Realty Corp.*, 101 AD3d at 580 [affidavits of three notice witnesses properly considered despite untimely disclosure since one witness was a former employee of defendants, and the other two were identified by plaintiff or his mother in their deposition testimony]; *Pearson v City of NY*, 74 AD3d 1160, 1161-1162 [2d Dept 2010][witness's affidavit properly considered although not named as a witness in plaintiff's discovery response since the defendants had knowledge of his existence as a witness from plaintiff's deposition testimony]; *see also O'Callaghan v Walsh*, 211 AD2d at 531-532).

While the court will consider Coste's affidavit on this motion, to eliminate any unfair disadvantage to defendant in the future, especially in view of the significance of Coste's potential testimony, defendant is granted leave to notice the examination before trial of Coste no less than thirty days prior to trial or shall be precluded from objecting to her testimony during trial (*see Cruz v City of NY*, 81 AD3d 505, 505-506 [1st Dept 2011][witnesses' testimony need not be precluded, so long as defendant is afforded an opportunity to depose witnesses before trial]; *Pearson v City of NY*, 74 AD3d 1160, 1161-1162 [2d Dept 2010]; *Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d at 177 [motion court properly exercised discretion in considering the affidavit of plaintiff's father while striking plaintiff's note of issue and giving defendants an opportunity to depose the witness]).

Plaintiff's submissions in support of summary judgment fail to establish as a matter of law that defendant either created the alleged defective condition or had actual or constructive notice of the same (*see Mathias v Capuano*, 153 AD3d 698, 699 [2nd Dept 2017]; *Wall v Flushing Hosp. Med. Ctr.*, 78 AD3d 1043, 1045 [2nd Dept 2010]). Indeed, plaintiff argues in his motion papers that he has raised numerous issues of fact warranting a trial of this action. Specifically, Coste affirms that she verbally complained to the superintendent Ralph and HPD regarding the condition of the ceiling;

however, she does not provide a time-frame for when such complaints were made and whether the complaints specifically related to the area that collapsed or the area that was repaired. In any event, Coste's averment that the rotting and sinking ceiling condition was longstanding and visible conflicts directly with plaintiff's testimony that he did not observe anything wrong with the ceiling. This conflicting testimony regarding whether the condition was visible and apparent precludes a determination in plaintiff's favor at this juncture as to whether the condition existed for a sufficient period of time for defendant to have discovered and remedy it (*see Gordon v Am. Museum of Natural History*, 67 NY2d 836, 838 [1986]; *Lemonda v Sutton*, 268 AD2d 383, 384 [1st Dept 2000]; *see also Rivera v 2160 Realty Co., L.L.C.*, 4 NY3d 837 [2005]). Further, although the portion of the ceiling that collapsed was next to the area repaired in May 11, 2011, plaintiff does not offer evidence that the repairs were negligently performed creating a dangerous condition or that the repairs proximately caused the collapse (*see Mitchell v City of NY*, 29 AD3d 372, 374 [1st Dept 2006][testimony that construction area was level demonstrated that defendant did not create a dangerous condition]). Thus, any finding that the defendant created the condition that caused plaintiff's injury would at this juncture be speculative. The issues of fact as to whether defendant exercised reasonable care in remedying the ceiling, whether it created the alleged dangerous condition, whether a dangerous condition existed, and whether defendant had notice of any dangerous condition, preclude summary judgment in favor of plaintiff on the theory of common law negligence.

Alternatively, plaintiff seeks a finding of liability on the theory of *res ipsa loquitor*. *Res ipsa loquitur* is an evidentiary rule that allows, but does not require, the fact finder to infer negligence from circumstances when the event would not ordinarily occur in the absence of negligence (*see Nesbit v New York City Transit Auth.*, 170 AD2d 92, 99 [1st Dept 1991]). To establish a prima facie case of

negligence under the theory of *res ipsa loquitur*, plaintiff must establish that the event ordinarily does not occur in the absence of someone's negligence, that the event was caused by an agency or instrumentality within the exclusive control of the defendant, and that the event was not due to any voluntary action or contribution on the part of the plaintiff (*see Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]).

Here, the first and third elements have been sufficiently established since "the occurrence was clearly not due to any voluntary action or contribution on the part of plaintiff, and since falling plaster from a ceiling has been held to be the sort of incident suitable for the application of the doctrine" (*Mejia v NY City Tr. Auth.*, 291 AD2d 225, 227 [1st Dept 2002]; *see Dittiger v Isal Realty Corp.*, 290 NY 492, 496 [1943]). Defendant's argument that plaintiff contributed to his injuries by failing to avoid the subject hazardous area does not raise an issue of fact as to whether plaintiff contributed to the cause of the ceiling collapse.

The defendant argues that the second element of the *res ipsa* theory is not satisfied as it was not in exclusive control of the leased apartment. Defendant relies, in part, upon *Slater v Barnes* (241 NY 284 [1925]) where the Court of Appeals set aside the jury's verdict of liability based upon the theory of *res ipsa*. In *Slater* the plaintiff claimed injury from fallen plaster within his apartment. Plaintiff also contended that the defendant owner had, four years prior, negligently repaired the same area of ceiling where the plaster fell from (*id.* at 285). The trial court in Slater instructed the jury, essentially, that *res ipsa* was applicable, which allowed it to make an inference of the owner's negligence (*id.* at 286). However, the court further instructed the jury that unless the owner was able to offer a reasonable explanation for how and why the ceiling fell, they would have to find for the plaintiff (*id.*).

On appeal, the Court in *Slater* concluded that the trial judge, by erroneously imposing upon the owner "a duty of explanation of something which happened beyond the realm of his observation or control," in effect instructed the jury to find a verdict against him (*id.* at 287). Significantly, contrary to the case at hand, in *Slater* there was no evidence that the owner had any opportunity to observe the plastered ceiling over the four-year period, as he was not in possession of the premises and there was no sign of weakness or an unsafe condition (*id.* at 287). According to *Slater* the second element of *res ipsa* requires an inquiry into the factual reality of the circumstances and whether the defendant had an opportunity to exercise control.

In *Dittiger v Isal Realty Corp.* (290 NY 492 [1943]),[4] the court found that a painter injured by falling plaster from the ceiling of an apartment could rely upon the theory of *res ipsa* against the owner. In *Dittiger*, the subject apartment had been vacant for the better part of a month and during such time was in the defendant's control and under its observation (*id.* at 496). The court in *Dittiger* noted that *Slater's* authority although resulting in the opposite outcome was not contrary authority (*id.*). The determinative factor in both cases being the owner's possession and control, or lack thereof.

The exclusive control element is generally not applied "as it is literally stated or as a fixed, mechanical or rigid rule" (*Dermatossian v NY City Tr. Auth.*, 67 NY2d 219, 227 [1986]). Rather, when the evidence affords 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 requirement

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[4] Plaintiff relies upon *Astorga v Bronx 360 Realty Mgt. LLC* (2014 NY Slip Op 31956[U] [Sup Ct, Bronx County 2014]) wherein the trial court found defendant liable on the theory of *res ipsa* for a ceiling collapse due to a condition, in plaintiff's apartment, that was exclusively within the defendant's control and left unaddressed for years. The court in *Astorga* relies upon *Dittiger v Isal Realty Corp.* (290 NY 492 [1943]).

will be satisfied (*Dermatossian v NY City Tr. Auth.*, 67 NY2d at 227[internal quotations and citations omitted]).

Here, plaintiff has sufficiently demonstrated a rational basis for concluding that the defendant would be responsible for any negligence in connection with the cause of the hallway ceiling collapse, within the plaintiff's apartment, based upon evidence of defendant's control of the maintenance and repairs of the apartment. To be clear, this finding is not based upon a general obligation of the defendant, but rather the factual record showing defendant's control. The lease agreement allowed the defendant the right to enter the apartment to make repairs, and the current building manager testified that he would visit the subject building for the purpose of addressing tenant complaints, repairs and inspections. Coste's affidavit contends that the defendant was to be informed of complaints, that defendant was given access to the apartment and afforded an opportunity to observe any conditions that were visible and apparent. Coste also avers that the tenants never repaired, fixed, painted or touched the hallway ceiling. In addition, the repairs contracted by defendant before and after the accident clearly evinces defendant's actual control of the subject area. While defendant argues that a mere general obligation to maintain does not suffice to establish exclusive control, defendant offers no evidence to rebut the plaintiff's evidence of defendant's exclusive control over the subject ceiling (*see Mejia v NY City Tr. Auth.*, 291 AD2d at 225 [transit authority failed to submit evidence to rebut the plaintiff's contention that it had exclusive control of an area of ceiling above a subway platform from which a piece of concrete fell striking plaintiff]; *Lisbey v Pel Park Realty*, 99 AD3d 637, 638 [1st Dept 2012]).

Summary judgment (or a directed verdict) will be awarded to a plaintiff "only in the rarest of res ipsa loquitur 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]). Here, summary judgment in plaintiff's favor based on res ipsa is not appropriate, as a matter of law, as the record contains questions of fact regarding the cause of the ceiling collapse, and the nature and duration of any defective condition (*see Swoboda v Fontanetta*, 131 AD3d 1042, 1045 [2nd Dept 2015]; *Frank v Smith*, 127 AD3d 1301, 1303 [3rd Dept 2015]; *Lisbey v Pel Park Realty*, 99 AD3d at 638; *Gaspard v Barkly Coverage Corp.*, 65 AD3d 1188, 1189 [2nd Dept 2009]; *see generally Morris v Zimmerman*, 138 AD 114, 116 [1st Dept 1910][owner may offer evidence of an external cause for plaster to fall from the ceiling to rebut or explain the res ipsa inference of negligence in a falling plaster action]; *Dittiger v Isal Realty Corp.*, 290 NY at 496). Accordingly, it is

ORDERED, that the motion of defendant is denied; and it is further,

ORDERED, that the motion of plaintiff is denied; and it is further,

ORDERED, that defendant is granted leave to notice the examination before trial of Kenia Coste within 60 days of service upon defendant of a copy of this order with notice entry thereof or shall be precluded from objecting to her testimony at trial. This constitutes the decision and order of the Court.

Dated: March 29, 2018

E N T E R,

Howard H. Sherman, J.S.C.