SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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LINDA KANDEL,

Plaintiff,

DECISION AND ORDER
(Motions # 2,3, and 4)

-against-

Index No.: 030566/2016

RYE MARBLE, INC. RYE MARBLE & GRANITE, INC., MAJESTIC KITCHENS INC. and "JOHN DOE" as further described in the annexed complaint,

Defendants.
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Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 17, were considered in connection with (i) Defendant Majestic Kitchens Inc. (hereinafter "Majestic") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in its favor, dismissing the action (Motion #2); (ii) Defendants Rye Marble, Inc. and Rye Marble & Granite, Inc.'s (hereinafter collectively "Rye Marble") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in its favor, dismissing the action (Motion #3); and (iii) Plaintiff's Notice of Cross-Motion for leave to Supplement her Bill of Particulars to allege statutory violations it is claimed Defendants violated (Motion #4):

PAPERS	**NUMBERED**
NOTICE OF MOTION BY DEFENDANT MAJESTIC/AFFIRMATION IN SUPPORT/ AFFIDAVIT OF WILLIAM LUCENO/EXHIBITS "A-N"	1-3
PLAINTIFF'S AFFIRMATION IN OPPOSITION AND IN SUPPORT OF CROSS-MOTION/AFFIDAVIT OF VINCENT ETTARI/EXHIBITS "1-6")/EXHIBITS "A-H"	4-5
NOTICE OF MOTION BY DEFENDANT RYE MARBLE/AFFIRMATION IN SUPPORT/AFFIDAVIT OF TED DIPIETRO/EXHIBITS "A-M"	6-8
PLAINTIFFS'S AFFIRMATION IN OPPOSITION/AFFIDAVIT OF VINCENT ETTARI/EXHIBITS "1-7"	9-10
NOTICE OF CROSS-MOTION/AFFIRMATION IN SUPPORT OF CROSS-MOTION/EXHIBITS "1-7"	11-12

DEFENDANT MAJESTIC's AFFIRMATION IN OPPOSITION TO CROSS-MOTION AND IN REPLY TO PLAINTIFF'S AFFIRMATION IN OPPOSITION/ EXHIBITS "A-E"	13-14
AFFIRMATION IN OPPOSITION TO CROSS-MOTION BY DEFENDANT RYE MARBLE/AFFIDAVIT OF STEVEN ZALBEN/EXHIBITS "A-C"	15-16
PLAINTIFF'S REPLY AFFIRMATION IN SUPPORT OF CROSS-MOTION	17

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff with the filing of the Summons and Complaint on February 22, 2016, alleging that she was caused to sustain injuries on August 31, 2013, when the granite counter-top she was standing upon broke, causing her to fall. Issue was joined as to the Rye Marble Defendants by the filing of an Answer on March 25, 2016, and as to Defendant Majestic by the filing of an Answer with cross-claims on April 26, 2016. Defendant Rye Marble was granted leave to amend their Answer to assert a statute of limitations defense by Order dated January 16, 2018. An Amended Answer was filed on January 26, 2018. Plaintiff, in her Verified Bill of Particulars, claims Defendants were negligent with respect to the installation of the granite counter-top on the island in Plaintiff's kitchen, and more specifically, in failing to brace the counter-top overhangs on each end so as to prevent the overhang from breaking or cracking, in creating a dangerous condition, in allowing an unsafe to dangerous condition to remain, in creating an uneven condition and in failing to warn Plaintiff not to stand on the counter-top. Additionally, Plaintiff claims the applicability of the doctrine of Res Ipsa Loquitur.

Defendant Majestic filed the instant Notice of Motion seeking an Order granting summary judgment, arguing that it cannot be held liable because Paul Guttman, the individual that designed the kitchen, was an independent contractor and not an employee of Majestic. It further contends that this action is barred by the statute of limitations because the counter-top was installed in 2003, and the action sounds in professional malpractice rather than common law negligence. Additionally, Majestic contends that Plaintiff cannot, as a matter of law,

establish that Defendant's actions were a proximate cause of Plaintiff's injuries since photographs show the fracture line on the granite to be on top of the dishwasher and not on the overhang itself. Lastly, it argues that the doctrine of *res ipsa loquitur* is inapplicable because the instrumentality involved was under Plaintiff's control and Majestic did not have "exclusive control" of the injury producing instrumentality. Defendant Rye argues that it is entitled to summary judgment because Rye owed the plaintiff no duty outside of contractual obligations; proximate cause cannot be established in the absence of expert testimony and the *res ipsa loquitur* doctrine is inapplicable to the instant matter.

In opposition to the summary judgment motions, Plaintiff argues that the relevant statute of limitations period runs not from the installation of the counter-top but from the date of the injury. She notes that a cause of action for negligent design only accrues upon completion of the construction only where it seeks damages to the property which has its genesis in the contractual relationship between the parties, and does not apply to actions for personal injury. In opposition to the motion, the Plaintiff submits the expert affidavit of Vincent Ettari, who based upon an examination of the counter-top and the testimony of the parties, he opines that based upon a reasonable degree of engineering certainty, the counter-top in question did not conform with various requirements of the New York State Uniform Fire Prevention and the New York Building Code, as well as industry standards, as set forth in his affidavit, and that the failure to meet certain standards and codes was a proximate cause of the subject occurrence. Plaintiff also cross-moves to supplement her Verified Bill of Particulars with respect to the various codes and statutes her expert opines were violated.

In opposition to the motion to supplement her Verified Bill of Particulars, Defendants contend that said application must be denied because what is really sought, is a motion to amend that seeks to introduce additional claims which had not, theretofore, been before this Court. They further claim that Plaintiff has not explained the delay in moving, has not set forth a reasonable excuse supported by an affidavit of merit and that to grant such relief

would result in prejudice to Defendants. With respect to Rye Marble's motion for summary judgment, it submits the affidavit of Steven Zalben, who reviewed the Affidavit of Plaintiff's expert, Vincent Ettari, and whose opinion it is (i) that the counter-top was properly installed over, and supported by, the cabinet around the dishwasher and (ii) that the various statutes and regulations relied upon by Plaintiff's expert are inapplicable to the counter-top at issue. Defendant Rye Marble asks this Court to disregard Mr. Ettari's affidavit as baseless, as a matter at law.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of each case and is generally a question of fact for the jury." Perez v. 655 Montauk, LLC, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011).

As an initial matter, the Court will address the cross-motion to supplement her Verified Bill of Particulars with respect to various statutes, codes or industry standards which

Plaintiff's expert contends were violated by Defendants with respect to the design and/or installation of the granite counter-top. "A plaintiff may serve a supplemental bill of particulars, even without leave of court, to assert statutory violations which merely amplify his or her theories of liability." Balsamo v. City of New York, 287 A.D.2d 22, 27, 733 N.Y.S.2d 431 (2d Dept. 2001). See also Orros v. Yick Ming Yip Realty, Inc. 258 A.D.2d 387, 685 N.Y.S.2d 676 (1st Dept. 1999)(Plaintiff should have been permitted to file a supplemental bill of particulars with respect to defendants' alleged violations of statutes, ordinances, rules, and/or regulations, since these amendments, which merely amplify and elaborate upon facts and theories already set forth in the bill of particulars and raise no new theory of liability.); Noetzell v. Park Avenue Hall Housing Development Fund Corp., 271 A.D.2d 231, 705 N.Y.S.2s 577 (1st Dept. 2000). In the instant matter, Plaintiff may supplement her Bill of Particulars since no new theories of liability are set forth but merely serve to supplement Plaintiff's claims of negligent design and installation of the counter-tops. Thus, Plaintiff's cross-motion is granted.

Defendant Majestic argues that it is entitled to summary judgment because Paul Guttman, who designed Plaintiff's kitchen renovation, was an independent contractor and not an employee. "As a general rule, a part who engages an independent contractor is not liable for the independent contractor's negligent acts." Metling v. Punia & Marx, Inc. 303 A.D.2d 386, 387, 756 N.Y.S.2d 262 (2d Dept. 2003). The rule developed from the premise that the employer of an independent contractor has no right to control the manner in which the contractor's work is to be done and that it is therefore more sensible to place the risk of loss on the contractor. Id. In order to prevail on the basis of this argument, Defendant Majestic must establish, as a matter of law, that Mr. Guttman was an independent contractor, over whom it exercised no control, and was not one of its employees. See Chou v. A to Z Vending Service Corp., 36 A.D.3d 745, 830 N.Y.S.2d 204 (2d Dept. 2007).

William Luceno, the owner of Defendant Majestic, testified at his examination before trial that Paul Guttman worked as a kitchen salesman, and sometimes as a designer, for

Majestic from the early 2000's up until 2006 or 2007. He further testified that he does not know whether or not Majestic had any role in designing or installing any of the cabinetry at Plaintiff's house. Paul Guttman testified at his non-party examination before trial that he designed Plaintiff's kitchen and that he believed he was working through Majestic Kitchens at the time. Plaintiff's cabinetry and counter-top was installed in 2003, during the time period that Paul Guttman was employed as a sales person/designer for Defendant Majestic. Notably, the plans, designs and diagrams for the kitchen renovation noted that they were done for Majestic. Additionally, the bill for the installation of the granite counter-top was sent by defendant Rye to Defendant Majestic. Given these documents and testimony, Defendant Majestic has failed to establish, as a matter of law, that Mr. Guttman was an independent contractor over whom it had no control.

Nor is there any merit to Defendants' claim that this matter must be dismissed because the statute of limitations has expired. "As a general rule, 'a cause of action for personal injuries, whether sounding in negligence, malpractice, or products liability, accrues at the time of injury.'" Barrell v. Glen Oaks Village Owners, Inc., 29 A.D.3d 612, 613, 814 N.Y.S.2d 276 (2d Dept. 2006). "Stated another way, accrual occurs when the claim become enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." Id. In Barrell, plaintiff's claim against defendant plumbing company for negligent installation accrued on the date the injury was sustained, and not on the date the work was performed. Likewise, in the instant matter, Plaintiff's claim accrued on the date of injury and not the date of installation of the granite counter-top.

Furthermore, Defendant Majestic's argument that Plaintiff's claim against it is more in the nature of professional malpractice than negligence, and thus barred by the statute of limitations, has also been rejected by the Courts. In Cubito v. Kreisberg, 69 A.D.2d 738, 419 N.Y.S.2d 578 (2d Dept. 1979), the Court held that a claim against an architect for negligent design ran from the date of injury. The Court noted defendant's argument that it is unfair to

hold him liable for errors in design when injuries are sustained many years after the rendition of his services and he is no longer associated with the project, but held that despite the hardship produced on the professional, it is nonetheless the rule in New York. Id. at 582. Since Plaintiff commenced this action within three years of the date of her injury, the instant matter is not barred by the statute of limitations.

Defendants also moved for summary judgment on the ground that Plaintiff could not prove proximate causation as a matter of law. Proximate cause is almost invariably a factual issue. Haibi v. 790 Riverside Drive Owners, Inc., 156 A.D.3d 144, 147, 64 N.Y.S.3d 22 (1st Dept. 2017). Ordinarily, it is for the trier of fact to determine the issue of proximate cause, but the issue may be decided as a matter of law where only one conclusion may be drawn from the established facts. Kalland v. Hungry Harbor Associates, LLC, 84 A.D.3d 889, 922 N.Y.S,2d 550 (2d Dept. 2011).

Here, defendants have failed to meet their burden on this issue, and in any event, Plaintiff has demonstrated a triable issue of fact. It is interesting to note that defendant Rye Marble argues that proximate cause cannot be established by Plaintiff in the absence of expert testimony but then fails to produce an expert affidavit in support of its summary judgment motion with respect to this issue, notwithstanding the fact that Defendants have the burden upon summary judgment. Rather, defendants rely upon photographs and the testimony of Mr. Di Pietro and Paul Guttman who aver that in their experience as an owner and salesman/designer of kitchens (neither of whom are architects or engineers) that they have never seen granite break and therefore the design and installation of the counter-tops could not be the result of their negligence. This testimony, however, fails to sustain Defendants' burden on the issue of proximate cause in a summary judgment motion.

Even if Defendants had met their burden upon summary judgment on the issue of proximate cause, Plaintiff's expert affidavit raises triable issues of fact as to Defendants' negligence. Where the expert's ultimate assertions are speculative or unsupported by any

evidentiary foundation, the opinion should be given no probative force and is insufficient to withstand summary judgment." Ramos v. Howard Industries, Inc., 10 N.Y.3d 218, 224, 855 N.Y.S.2d 412 (2008). In the matter at bar, however, Plaintiff's expert affidavit sets forth an evidentiary basis for his opinion, as well as the statutes, regulations and industrial customs that he believes were violated and which form the basis of negligence and proximate cause. As such, the Court finds it to be neither conclusory or speculative.

In reply, Defendant Rye Marble submits its own expert affidavit wherein its expert reaches a different conclusion and disagrees that the statutes, codes, and regulations are applicable to the construction of Plaintiff's kitchen counter-top. However, "while the shortcomings that defendants perceives may well affect the weight to be accorded to the expert's opinion at trial, his affidavit is legally sufficient to raise triable issues of fact at this stage." Elsawi v. Saratoga Springs City School Dist. 141 A.D.3d 921, 922, 36 N.Y.S.3d 278 (3d Dept. 2016). Moreover, given the generally competent conflicting expert opinions, the Court should not make credibility determinations on defendants motion. Lopez-Viola v. Duell, 100 A.D.3d 1239, 955 N.Y.S.2d 220, 224 (3d Dept. 2012). Thus, Defendants summary motions on the ground that Plaintiff cannot establish proximate cause as a matter of law is also without merit.

The Court does, however, agree with Defendants that Plaintiff cannot establish the applicability of the *res ipsa loquitur* doctrine. For the doctrine of *res ipsa loquitur* to apply to a case: (I) 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; and (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Morejon v. Rais Const. Co., 7 N.Y.3d 203, 209, 818 N.Y.S.2d 792 (2006). Here, Plaintiff cannot establish any of these elements and as such, that claim must be dismissed.

Accordingly, it is hereby

ORDERED the Notice of Motion filed by Defendant Majestic Kitchens Inc. for summary judgment and dismissal of the Complaint (Motion #2) is DENIED, except to the extent that Plaintiff's res ipsa loquitur claim is dismissed; and it is further

ORDERED that the Notice of Motion filed by Defendants Rye Marble, Inc, and Rye Marble & Granite Inc. for summary judgment and dismissal of the Complaint (Motion #3) is DENIED, except to the extent that Plaintiff's res ipsa loquitur claim is dismissed; and it is further

ORDERED that Plaintiff's cross-motion to supplement her Verified Bill of Particulars in the form annexed to the moving papers (Motion #4) is GRANTED; and it is further

ORDERED that the parties are directed to appear in the Trial Readiness Part on

WEDNESDAY, JULY 18, 2018, at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
June 14, 2018

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties via -NYSCEF-