Albert M. Watson Photography Inc. v Kartheiser
2023 NY Slip Op 33244(U)
September 8, 2023
Supreme Court, New York County
Docket Number: Index No. 155000/2016
Judge: Dakota D. Ramseur

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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ALBERT M. WATSON PHOTOGRAPHY INC.,

Plaintiff,

- v -

ROBERT KARTHEISER, CAROLINE WALTHER-MEADE,

Defendant.

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INDEX NO. 155000/2016

MOTION DATE 05/26/2023

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318

were read on this motion to/for JUDGMENT - SUMMARY.

In June 2016, plaintiff Albert M Watson Photography Inc. commenced this action against defendants Robert Kartheiser and Caroline Walther-Meade, alleging that it suffered significant property damage caused when a flexible water supply line in defendants' master bathroom failed. Plaintiff asserts causes of action for negligence, violation of the condominium's bylaws, "failure to take proper precautions," and gross negligence. In this motion sequence (009), defendants move for summary judgment pursuant to CPLR 3212. Plaintiff opposes. For the following reasons, the motion is granted in part.

BACKGROUND

In 2011, Defendants Kartheiser and Walther-Meade purchased condominium unit 2A at 44 Laight Street, New York, New York, otherwise known as the Grabler Building. At all relevant times, plaintiff Albert Watson Photography owned the condominium unit directly below defendants' on the first floor. (NYSCEF doc. no. 298 at ¶ 1-2, def. statement of facts; NYSCEF doc. no. 312 at 2, plaintiff counter statement of facts.) From 2011 through July 2015, defendants' condo was affected by no less than six water leaks originating from units on the third and fourth floor, including ones in September and October 2011, July and December 2012, January 2013, and May 2015.[1] (NYSCEF doc. no. 312 at ¶¶ 29-45.) Though none of these water leaks originated from defendants' apartment, at no time did defendants hire an expert to inspect its own water and plumbing fixtures.[2] Additionally, in May 2015, defendants' master bathroom

[1] Plaintiff points out that, in the defendants' contract of sale for apartment 2A, the seller informed them that water from 3A would leak into the unit's master bathroom and then into the unit below.

[2] Defendants generally admit that they did not conduct regular inspections of their water fixtures—themselves or through a professional. (*See* NYSCEF doc. no. 317 at 5- 10, def. response to plaintiff counter-statement of facts.) As discussed below, defendants argue that this failure to inspect is irrelevant to the motion's outcome since there's no evidence to suggest that any inspection would have discovered a potential problem.

toilet malfunctioned, which required them to hire Parkset Plumbing (hereinafter "Parkset") to replace the flapping device on the toilet. Parkset did not conduct a general inspection of the water fixtures. (NYSCEF doc. no. 302 at 265-266, Walther-Meade dep. transcript.)

On August 2, 2015, while defendants were out of town on an overseas vacation, the water supply line connecting the building's water supply to the toilet in defendants' master bathroom failed. The resulting flooding caused approximately $2.18 million in damages to plaintiff's apartment. (NYSCEF doc. no. 1 at ¶ 11, complaint.)[3]

In 2017, American Insurance Company ("AIC"), the subrogated insurance carrier of plaintiff, sued Kartheiser and Walther-Meade in the Southern District of New York. There, defendants moved for summary judgment dismissing AIC's negligence claims, which the court granted by Opinion and Order dated Sept. 28, 2020. Judge Netburn specifically found that: (1) defendants did not have constructive notice of a dangerous condition on their premise, and (2) the *res ipsa loquitur* doctrine was not available to AIC because it did not establish that the water supply line was within the exclusive possession of defendants. (NYSCEF doc. no. 288, Judge Netburn's Opinion and Order.)

In this action, Plaintiff asserts a negligence cause of action for failing to exercise ordinary reasonable care in maintaining their apartment (including under a *res ipsa loquitor* theory) (*id*. at 6-7); a cause of action for violating Article VI, Section 9 of the condominium's bylaws (which states Each Unit Owner shall "maintain the interior of the Unit, its furniture, furnishings, appliances, and appurtenances in good order and condition. . . shall do all redecorating and other work which may at anytime be necessary to maintain the good condition of the unit") (*id*. at 6, 8-9); a cause of action for failing to take proper precautions, i.e., for failing to turn off the water to the unit before leaving for a two-week vacation (*id*. at 9); and a cause of action for gross negligence, alleging that defendants "acted with a reckless disregard for the risks and likely consequences that they knew or should have known would ensue if they failed to properly maintain and inspect their toilet (*id*. at 10-11.) In addition, plaintiff seeks $10 million in punitive damages.

DISCUSSION

Before addressing defendants' summary judgment motion, the Court must address what is, in essence, also a motion to dismiss plaintiff's causes of action for violating the bylaws, failing to take proper precautions, and gross negligence.[4] (NYSCEF doc. no. 299 at 7-9, def. memo of law.) Defendants assert that these are all duplicative of the negligence cause of action, and thus, all should be subsumed within it. (*Id*. [arguing that the bylaw claim is nothing more than a negligent maintenance claim, that the crux of the "proper precautions" claim—defendants' failure to turn off water while on vacation—is not a separate cause of action, and that its gross

[3] Though plaintiff may be in privity with its insurer AIC (*see Hinchey v Sellers*, 7 NY2d 287 [1959]) and the issues in this motion sequence appear to be the same as in AIC's action, defendants have not asserted an issue preclusion-based defense.

[4] In advancing their arguments, defendants cite appellate precedent involving motions to dismiss, including *Sebastian Holdings, Inc. v Deutsche Bank* (108 AD3d 433 [1st Dept 2013]) and *Wildenstein v 5H&Co, Inc.* (97 AD 488 [2d Dept 2012].)

negligence claim is predicated upon simple negligence with additional boilerplate language regarding wanton, willful, and grossly negligent conduct].) Since plaintiff does not oppose the branch of the motion concerning the bylaws or taking proper precautions, those claims are dismissed. However, as to its gross negligence claim, plaintiff opposes dismissal, and the Court finds that it is not duplicative.

Gross negligence causes of action "differ in kind, not only in degree, from claims of ordinary negligence." (*Bennett v State Farm Fire & Cas. Co.*, 161 AD3d 926, 929 [2d Dept 2018], citing *Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823 [1993].) To constitute gross negligence as opposed to ordinary negligence, "a party's conduct must 'smack of intentional wrongdoing' or 'evince a reckless indifference to the rights of others.'" (*Bennett*, 161 AD3d at 929.) Put slightly differently, "a party is grossly negligent when it fails to exercise even slight care or slight diligence." (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014]; *see also Bothmer v Schooler, Weinstein, Minsky & Lester, P.C.*, 266 AD2d 154, 154 [1st Dept 1999].) These cases all suggest that gross negligence claims may be maintained alongside ordinary negligence claims. Defendants' position to the contrary conflates gross negligence with punitive damages. They cite *Rocanova v Equitable Life Assur. Soc'y* (83 NY2d 603 [1994]), *Green v Fischbein Olivieri Rozenholc & Badillo* (119 AD2d 345 [1st Dept 1986]), and *Glatter v Chase Manhattan Bank* (239 AD2d 68 [2d Dept 1998]), yet all three, in different contexts, address whether punitive damages are available as a remedy for breach of contract and/or statutory violations. None hold that causes of action for gross negligence are duplicative of ordinary negligence. Accordingly, this cause of action is not dismissed.

Summary Judgment on Plaintiff's Negligence Cause of Action

Summary judgment is appropriate where "the proponent makes a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of material issues of fact' and the opponent fails to rebut that showing." (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v prospect Hosp.*, 68 NY2d 320, 324; see also CPLR 3212 [b].) Once the proponent has made the prima facie showing, the burden shifts to the opposing party to demonstrate, through admissible evidence, factual issues requiring a trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Since summary judgment is an extreme remedy, the Court must draw all reasonable inferences in favor of the non-moving party. (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012].) Where there is doubt as to the existence of material facts or where different conclusions can reasonably be drawn from the evidence, summary judgment should be denied. (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002].)

Owners of real property owe a duty to exercise reasonable care in maintaining their property to prevent foreseeable injury to adjacent property owners. (*See Associated Mut. Ins. Coop. v 198, LLC*, 78 AD3d 597, 597 [1st Dept 2010], citing *Boxmeyer v United Capital Corp.*, 79 AD3d 780, 783 [2d Dept 2010].) To establish a prima facie claim of negligence against a property owner stemming from a defective condition on their property, the plaintiff must demonstrate that the owner either created a dangerous and defective condition or failed to remedy one despite having actual or constructive notice of it. (*See Piacquadio v Recine Realty*

Corp., 84 NY2d 967, 969 [1994], *Rooney v George Hardy St. Francis Apts., LLC*,181 AD3d 493, 494 [1st Dept 2020].) Only visible and apparent defects that exist for a sufficient length of time prior to the accident may give rise to constructive notice. (*Applegate v Long Is. Power Auth.*, 53 AD3d 515, 516 [2d Dept 2008]; *Aquino v Kuczinski, Vila & Assoc., P.C.*, 39 AD3d 216, 219 [1st Dept 2007].)

Here, as defendants argue, plaintiff has shown no evidence that defendants either caused a dangerous/defective condition or had notice of one. Plaintiff does not dispute that (1) the apartment's previous owners installed the flexible water supply line that failed in August 2015, and (2) defendants never experienced any leaks from the supply line (or any other water-bearing device) between their purchase of the apartment in May 2011 and August 2015. (*See* NYSCEF doc. no. 312 at ¶ 6, 8 [plaintiff admits that the flexible water supply line had not been changed since before defendants purchased the apartment and that there had never been a leak of any sort from any plumbing line, fixture, or appliance in the defendants' apartment from 2011 through 2015].) Nor did defendants have notice from the building's bylaws, which do not reference an inspection of the apartment's flexible water supply lines or from the particular supply line itself, as there was no tag or information about its lifespan or installation date.

Significantly, the generally poor condition of the Grabler Building's water systems—in particular, the six leaks that had originated from the apartments above and the problem with the master bathroom toilet related to the toilet's flapping device—cannot be used to ascribe constructive notice of the specific dangerous condition in their apartment to defendants. (*See DeCongelio v Metro Fund, LLC*, 183 AD3d 449, 450 [1st Dept 2020] ["A general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that cause plaintiff's [injury]"], quoting *Piacquadio*, 84 NY2d at 969; *see also Mitchell v N.Y. Univ.*, 12 AD3d 200, 201 [1st Dept 2004] ["The notice must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action."]; *Am. Ins. Co. v Kartheiser*, 2020 US Dist. LEXIS 178255 at *10-11 [SDNY 2020] [Netburn, J.] [rejecting AIC's (plaintiff's insurance company) argument that defendants had constructive notice from the fact that leaks in the Grabler Building were a regular occurrence].) Since plaintiff has not cited evidence of water leaks from defendants' apartment, and since the Grabler Building's larger, systemic water issues cannot, as a matter of law, be used to attribute notice to defendants of the specific defect in their apartment, defendants have demonstrated that the alleged problem with in the water supply line was neither visible nor apparent for a sufficient period of time to allow for its repair. Accordingly, constructive notice cannot be imputed on this basis.

Nonetheless, plaintiff contends that, irrespective of whether the dangerous/defective condition in their apartment was visible and apparent, defendants may be held liable since their duty of reasonable care required them to inspect the premise and defendants admit that neither they nor a professional ever inspected the master bathroom's water supply line.[5] (NYSCEF doc. no. 313 at 9-11, plaintiff memo of law.)[6]

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[5] *See* NYSCEF doc. no. 317 at ¶ ¶ 15, 16, 18, where defendants admit that nobody inspected the toilet from May 2011 through August 2015. As will be discussed, defendants, in those same paragraphs, deny such inspections would have revealed a dangerous condition.

[6] It appears that AIC did not advance this argument in its subrogation action in SDNY.

As explained in *Hoffman v United Methodist Church*, where "an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect." (*Hoffman*, 76 AD3d 541, 543 [2d Dept 2010]; *Bentley v All-Star, Inc.*, 179 AD3d 618, 618 [1st Dept 2020].)[7] Once a duty to inspect arises, the property owner must demonstrate that a reasonable inspection program is in place. (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007]; *Zuckerman v State*, 09 AD2d 510, 512 [2d Dept 1994] ["In general, the duty which the common law imposes on the owner or possessor of property includes the duty to make reasonable efforts to inspect the property so as to determine the presence of dangerous conditions."]) Where no such program exists, constructive notice will be "imputed" to the owner. (*Id.*) However, where evidence shows that a reasonable inspection would not have disclosed the latent defect/dangerous condition, the premise owner will not be held liable. (*See Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798, 800 [2d Dept 2003] ["Failure to make a diligent inspection constitutes negligence only if such an inspection would have disclosed the defect"]; *Singh v United Cerebral Palsy of N.Y. City, Inc.* 72 AD3d 272, 276 [1st Dept 2010] [finding that since there was no showing that a routine inspection would have uncovered the dangerous condition, defendant could not be liable for failing to inspect]; *Filarakos v St. John the Baptist Greek Orthodox Church*, 169 AD3d 489, 490 [1st Dept 2019] [finding defendants did not have constructive notice where the alleged defect was latent and not readily discernible].)[8]

Here, given that the water supply line was not in a visible and apparent dangerous condition, and defendants concede that neither they nor a professional ever inspected the master bathroom, the dispute is only whether a reasonable inspection program would have uncovered the alleged defect in the flexible water supply line. Because defendants are movants, they must demonstrate that the defect would not have been discovered upon a reasonable inspection and no issues of material fact exist.[9]

In arguing that any defect in the water line would have been undiscoverable had they inspected it, defendants submit the affidavit and report of Paul Dreyer, a licensed mechanical engineer. (NYSCEF doc. no. 295, Dreyer affidavit; NYSCEF doc. no. 297, Dreyer report.)

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[7] While defendants may be correct that plaintiff's citations apply the principle to owners of commercial property and/or property that affects the public, by no means does this duty to inspect solely apply in these contexts. (*See e.g., Maroonick v Rae Realty, LLC*, 205 AD3d 423, 424 [1st Dept 2022] [finding defendants not entitled to summary judgment where plaintiff was injured when her apartment ceiling collapsed and defendants had not inspected it in decades], *Hayes*, 40 AD3d at 500 [applying duty to inspect where a hot water hose cock broke, injuring a hired repair worker], *Conklin v 500-512 Seventh Ave., LP, LLC*, 159 AD3d 451, 451 [1st Dept 2018] [finding duty to inspect where plaintiff, a handyman employed by defendant's managing agent, was on defendant's property] and *Del Carmen Cuaya Coyotl v 2504 BPE Realty LLC*, 114 AD3d 620, 620 [1st Dept 2014] [holding failure to inspect precluded summary judgment where plaintiff's injuries were sustained on building's fire escape].)

[8] There is little, if any, distinction between imputing constructive notice where an owner fails to inspect a "concealed object that is capable of deteriorating" and imputing constructive notice where a latent defect is discoverable upon reasonable inspection. (*See Buffalino v XSport Fitness*, 202 AD3d 902, 903 [2d Dept 2022] [recognizing that defendant must establish prima facie that the defect was not visible and apparent and would not have been discoverable upon a reasonable inspection], citing *Arevalo v Abitabile*, 148 AD3d 658, 660 [2d Dept 2017].)

[9] Ultimately, whether the reasonable inspection entails hiring a professional or is simply examining the supply line by the homeowners is an issue of fact.

According to his report, the "supply pipe end fitting" showed no signs of damage, the black rubber seal was found in reasonably good condition with no marking, and the white plastic nut base had split. (NYSCEF doc. no. 297 at 2.) In his affidavit, Dreyer explained that, in his experience with similar water supply line failures, the plastic nut was defectively designed and/or manufactured such that it did not have sufficient strength to safely resist the water pressure that is normally expected. (*Id*. at ¶4). Further, he testified that defendants' water supply line, with this defect, "would have worked without incident until [the white plastic nut] failed," and that there would "most probably be no prior leaking or warning before failure," at which point it would simply split into two pieces in a "sudden and catastrophic failure." (*Id*. at ¶5.) Ronnie Guterman, who worked at Parkset in May 2015 and whom plaintiff subpoenaed, corroborated Dreyer's testimony in significant part. He testified that "on the flexible supply tube . . . you wouldn't see something to show damage [like rust or corrosion] . . . It would either leak or it doesn't leak." (NYSCEF doc. no. 289 at 91-92, Guterman dep. transcript.) Guterman described how there would be no indication or noticeable problem with the flexible water supply line before August 2, 2015, stating, "nobody would know [that it would fail a couple of months after Parkset's visit]" (*id*. at 95) and "when [it] fail[s], that's an instant failure. There's no warning. (*Id*. at 108.)

Plaintiff's opposition is based on reports submitted by experts Mauricio Sozzi (an independent adjustor who prepared a Loss Report for defendants' insurance company, Lexington Insurance Company), Leonard Parkin (whose expert report AIC relied on in its subrogation action), and Richard Vivenzio (an expert in water infiltration who inspected the water supply line in May 2019). Sozzi's Loss Report, produced five days after the flooding on August 7, 2015, found that "a braided water line to the master bathroom toilet ruptured. This appears to be the result of wear and tear." (NYSCEF doc. no. 32, Exhibit 36 at 1, Sozzi Loss Report.) Similarly, Leonard Parkin's report found that "the black rubber gasket contained cracks and fissures that were consistent with long-term degradation" (NYSCEF doc. no. 308 at 2, Parkin report) and that "the condition of the rubber gasket of the subject supply line suggests that the subject supply line had experienced degradation over an extended period of time." (*Id*. at 6.) Similarly, Vivenzio noted that the line exhibited clear signs of extreme wear and tear and degradation, including scratches on the metal coupling nut and cracks and fissures on the black rubber gasket. (NYSCEF doc. no. 310 at ¶3, Vivenzio affidavit.) Based on his inspection, he concluded that a professional inspection would likely have uncovered the degradation and would "likely" have resulted in a recommendation that the supply line be replaced. (*Id*.)

The Court finds that the expert opinions cited by plaintiff are sufficient to create questions of fact as to whether the defect in the water supply line was discoverable. A review of the relevant reports and affidavits reveals that, as defendants describe, the water leak and subsequent flooding was caused when the white plastic nut attached to the end of the supply line split in two. (*See generally* NYSCEF doc. no. 295, 297, Dreyer report and affidavit) However, given that the plastic nut was not recovered, neither party has demonstrated what type of condition the piece was in prior to the flooding. More specifically, each party' experts have put forth contradictory opinions as to whether the white plastic nut would have shown the same type of wear-and-tear that Vivenzio found on other parts of the water supply line. On the one hand, Guterman explained that "on the flexible supply tube . . . you wouldn't see something to show damage [like rust or corrosion]," that it would suddenly, instantly, and catastrophically fail without warning or prior leaks. On the other hand, Sozzi, Parkin, and Vivenzio all describe

damage to other components of the water supply line that would also have been present on the white plastic nut. As plaintiff's put it, "if the metal components suffered such damage, one can only imagine the condition of the missing plastic nut at the time of the flood." (NYSCEF doc. no. 313 at 13.) To the extent that defendants argue that Vivenzio's opinions lack an evidentiary foundation, defendants need only look at Dreyer's and Guterman's statements, which are no less conclusory and/or speculative as to why the white plastic nut would not show the same degradation as the other components in the water supply line.[10] Accordingly, these conflicting expert opinions raise triable questions of fact. (*See Bartholomew v Itzkovitz*, 119 AD3d 411, 415 [1st Dept 2014].) Accordingly, defendants are not entitled to summary judgment on plaintiff's negligence cause of action.

Negligence Under Res Ipsa Loquitor

The doctrine of *res ipsa loquitor* allows the trier of fact to infer from circumstantial evidence the existence of the defendant's negligence. (*Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 [1997]; *Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006].) To use the doctrine, the plaintiff must establish: (1) the event or injury is the kind which ordinarily does not occur in the absence of negligence, (2) it was caused by an agency or instrumentality within the exclusive control of the defendant, and (3) it was not due to any voluntary action or contribution on the part of the plaintiff." (*Wilkins v West Harlem Group Assistance, Inc.*, 167 AD3d 414, 415 [1st Dept 2018].) Here, in moving for summary judgment on plaintiff's negligence claim, defendants have not shown the doctrine to be inapplicable.

Defendants' citation to *Shinshine Corp. v Kinney Systems* (173 AD2d 293 [1st Dept 1991]) to argue that a burst water pipe (or, in this case, a supply line failure) is not the type of occurrence that happens in the absence of negligence. However, this argument misconstrues the holding in *Shinshine*: the First Department merely found that flooding is not one of the rare occurrences that creates an inference of negligence so convincing and inescapable that the *plaintiff would be entitled to summary judgment*. (*Id*. at 294.) In fact, as in *Shinshine*, the First and Second Departments have consistently found the doctrine applicable to cases where flooding originated in adjacent premises and caused damage to the plaintiff's property. (*See e.g.*, *Ever Win, Inc. v 1-10 Indus. Assoc., LLC*, 74 AD3d 735 [2d Dept 2010]; *Shinshine Corp*., 173 AD2d at 294; *Travelers Prop. Cas. Co. of Am. v Sanco Mech., Inc.*, 126 AD3d 527, 528 [1st Dept 2015]; *American Guar. &Liab. Ins. Co. v Federico's Salon, Inc.*, 66 AD3d 521, 521 [1st Dept 2009]; and *Payless Discount Centers v 25-29 North Broadway Corp.*, 83 AD2d 960, 961 [2d Dept 1981].)

Defendants also argue that they were not exclusively in control of the water supply line as they did not manufacture, install, or make any changes to it before it failed. Such an argument is unavailing. In *Mejia v Delgado* (160 AD3d 588, 588 [1st Dept 2018]), the First Department held that, for *res ipsa* purposes, the defendants retained exclusive control over the deck that collapsed even though they did not build it and only acquired it when they purchased their house.

[10] In response to the question, "If you saw what was clearly, what seemed to be damage or rust or corrosion or something indicative of what might be the beginning of a problem, would you bring that to the attention of a homeowner?," Guterman replied "On that flexible supply tube that you showed, you wouldn't see something to show you damage. You wouldn't see it…it would either leak or it doesn't." There is no further explanation.

To the First Department, it was immaterial that the defendants did not build the deck since the plaintiff only asserted a negligent maintenance claim and provided evidence supporting its theory. (*Id.*) Here, *Mejia* is directly analogous as plaintiff only asserts a negligence maintenance claim and experts Vivenzio and Parkin provide the requisite evidentiary support. *Bunting v Haynes* (104 AD3d 715 [2d Dept 2013]), which defendants cite to argue against exclusive control, is inapposite for the same reason as *Shinshine* was, namely, that the court's holding is limited by the fact that the plaintiff was moving for summary judgment. As such, the Court finds that plaintiff has established defendants' exclusive control over the master bathroom and the water supply line. Defendants do not put forth an argument as to the third element.

Lastly, the doctrine's applicability is not affected by whether a plaintiff has provided evidence of defendants actual or constructive notice of a dangerous condition. Instead, where *res ipsa loquitor* is properly invoked, notice of a defect is inferred. (*See Ezzard v One E Riv. Place Realty Co., LLC*, 129 AD3d 159, 163 [1st Dept 2015]; *Maroonick*, 205 AD3d at 423.)

Availability of Punitive Damages

As the Court of Appeals described in *Home Ins. Co. v American Home Product Corp.* (75 NY2d 196, 203-204 [1990]), punitive damages may be awarded where a defendant's alleged conduct displays a high degree of moral culpability that manifests itself as an utter disregard for the rights of others. Punitive damages usually arise in the context of intentional torts and conduct considered intentional, malicious, and performed in bad faith. (*Randi A.J. v Long Is. Surgi-Center*, 46 AD3d 74, 80-81 [2d Dept 2007].) Nonetheless, conduct warranting an award of punitive damages may consist of actions that constitute willful or wanton negligence or recklessness. (*Id.*) Such wanton negligence or reckless conduct must be sufficiently blameworthy that the award of punitive damages deters future "reprehensible conduct" by the wrongdoer and others similarly situated. (*See Ross v Louise Wise Servs. Inc.*, 8 NY3d 478, 489 [2007].) The misconduct must be exceptional, egregious (*id.*), and so flagrant as to transcend mere carelessness. (*Pisula v Roman Catholic Archdiocese of N.Y.*, 201 AD3d 88, 102 [2d Dept 2021].)

Against this backdrop, it is clear that defendants' alleged failure to inspect the master bathroom is not so wanton and reckless as to give rise to punitive damages. To reiterate, defendants had no actual notice of an alleged defect in their water supply line; failing actual notice, at no point did plaintiff establish that the defect was in any way visible and apparent for constructive notice; and the systemic water that plaintiff asserts *should* have prompted defendants to inspect their own bathroom cannot, as a matter of law, create liability. Put differently, defendants' conduct was not so flagrant as to transcend mere carelessness since they had no notice of the hazardous condition for a significant period of time and no indication that the water supply line posed such a great risk to plaintiff's property. (*See Gruber v Craig*, 208 AD2d 900, 901 [2d Dept 1994].) Lastly, there is no reason to believe imposing punitive damages will serve as a deterrent to anyone.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that plaintiff Albert M Watson Photography Inc.'s causes of action for violating the bylaws and failing to take proper precautions are dismissed; and it is further

ORDERED that defendants' Robert Kartheiser and Caroline Walther-Meade motion for summary judgment pursuant to CPLR 3212 is denied as to plaintiff's negligence cause of action; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for defendants shall serve a copy of this order, along with notice of entry, within twenty (20) days of entry.

This constitutes the Decision and Order of the Court.

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9/8/2023
DATE

DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE