At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 28 day of November 2023.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF KINGS

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Index No: 514976/2019

YVONNE J. WHYTE,

Plaintiff(s)

-against-

ORDER

DN 63 ROCKAWAY PARKWAY LLC

Defendant(s)

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	48-53; 63-64
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	58-59

In this matter, Yvonne J. Whyte ("Plaintiff") moves (Motion. Seq. 3) pursuant to CPLR § 3212 for summary judgment on the issue of liability with respect to DN 63 Rockway Parkway LLC's ("Defendant") negligence. Defendant has opposed the motion on the grounds that there are issues of material fact present and that Plaintiff's own negligence may have caused or contributed to her injuries.

This action arises out of a slip-and-fall accident that occurred on September 26, 2018, at 3:00 a.m. in Plaintiff's apartment against Defendant landlord for its alleged negligence in causing, permitting, and/or allowing water to drip from a leaking ceiling and collect on the floor of Plaintiff's apartment. In her EBT, Plaintiff states that on the date of the accident, she woke up to go to the bathroom and as she was walking in the hallway, she slipped and fell backwards.[1] Plaintiff claims that she was looking straight ahead, but that she did not turn on any lights, because she was familiar with the path.[2] Plaintiff states that after she fell, she realized there was a lot of water on the ground and that her nightgown, skin, and hair were wet.[3] Plaintiff testified that about a week before the accident there was a crack in the ceiling in the hallway that had

[1] (Yvonne J. Whyte Dep. Page 47 lines 13-15; 55 lines 7-8).
[2] (Yvonne J. Whyte Dep. Page 46 lines 19-25; 47 lines 1-10; 48 lines 1-18).
[3] (Yvonne J. Whyte Dep. Page 55 lines 20-25; 59 lines 5-24).

begun to leak and that her daughter-in-law called the landlord to repair it.[4] Plaintiff states that the crack eventually developed into a hole in the ceiling after a repairman came and cut out a portion of the ceiling and repatched it.[5] Plaintiff claims that she did not observe any leaking prior to going to bed around midnight.[6] In support of her motion, Plaintiff submits photographs of the ceiling at the beginning of the leak and after the accident and an affidavit of Kyianna Murray ("Murray"), her daughter-in-law, who submits text messages between her and Dovber Lipskier ("Lipskier"), the representative of DN 63 Rockway Parkway LLC, wherein Murray notified Lipskier on September 18, 2018 that the ceiling and sink in the apartment were leaking.

In opposition, Defendant argues that material issues of fact are present including what caused the undetermined source of water because Plaintiff testified that she slipped on a wet surface but has not submitted evidence that the ceiling was leaking on the night of the accident. Defendant states that this not only calls into question the Plaintiff's credibility as she was the sole witness to the accident but also makes Plaintiff's res ispa loquitur argument inapplicable. Additionally, Defendant raises issues of fact regarding the lack of lighting in the apartment when Plaintiff slipped, and that Plaintiff may have been comparatively negligent in the causing of the accident by proceeding from her bedroom to the bathroom with the lights off. Defendant claims assuming arguendo that Plaintiff put Defendant on notice, beforehand, of the leak in the ceiling, Defendant diligently repaired the ceiling and there was no report of a further leak up to and including the date of the accident. Defendant states that the submitted text messages show that there were no reports of the leak after the repair was done and that Plaintiff has failed to submit evidence as to the repairman's negligence. In support of its opposition, Plaintiff submits Lipskier's EBT, wherein he testified that Defendant retained a contractor to perform repairs on the Plaintiff's apartment ceiling after a leak occurred on September 18, 2018.[7] Lipskier testified that the water which was leaking through the ceiling came from the roof and claims that after the initial repair was done to stop the leak in the apartment, Defendant arranged for a roof contractor to perform a permanent repair of the roof.[8] Lipskeir states that the roofer was called to the location multiple times because the leak did not stop after his first visit.[9] Furthermore, Lipskier

[4] (Yvonne J. Whyte Dep. Page 68 lines 13-15).
[5] (Yvonne J. Whyte Dep. Page 68 lines 20-25).
[6] (Yvonne J. Whyte Dep. Page 73 lines 21-25; 74 lines 2-9).
[7] (Dovber Lipskier Dep. Page 57 lines 23-25; 65 lines 7-11).
[8] (Dovber Lipskier Dep. Page 66 lines 10-16; 73 lines 8-15).
[9] (Dovber Lipskier Dep. Page 67 lines 23-25; 67 lines 2-7; Page 72 lines 5-13; 92 lines 7-14).

testified that the photographs submitted fairly and accurately depicted the ceiling of plaintiff's apartment as it looked at the beginning of the leak and right after the incident.[10]

It is well established that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable (*Elzer v Nassau County*, 111 AD2d 212, [2d Dept 1985]; *Steven v Parker*, 99 AD2d 649, [2d Dept 1984]; *Galeta v New York News, Inc.*, 95 AD2d 325, [1st Dept 1983]). When deciding a summary judgment motion, the Court must construe facts in the light most favorable to the non-moving party (*Marine Midland Bank N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]; *Rebecchi v Whitemore*, 172 AD2d 600 [2d Dept 1991]). To be entitled to summary judgment on the issue of liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Higashi v M & R Scarsdale Restaurant, LLC,* 176 AD3d 788 [2d Dept 2019]; *Webb v Scharf,* 191 AD3d 1353 [4th Dept 2021]). When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries -- if so, the comparative fault of each party is then apportioned by the jury (*Rodriguez* at 324).

Multiple Dwelling Law 78 imposes a nondelegable duty upon the owner of a multiple dwelling the duty of keeping every part of such premises in good repair, including its roof. The owner shall be responsible for compliance with the provisions of this section; but the tenant is also liable if a violation is caused by the tenant's own willful act, assistance, or negligence or that of any member of the tenant's family, household, or guest (Multiple Dwelling Law 78[1]; *Weiss*

[10] (Dovber Lipskier Dep. Page 97-99).

v City of New York, 16 AD3d 680 [2d Dept. 2005]; *Liddell v Novak*, 246 A.D. 848 [2d Dept. 1936]; *Onetti v Gatsby Condominium*, 111 AD3D 496 [1st Dept. 2013]).

In a premises liability case, the plaintiff must establish the existence of a defective condition and that the defendant either created or had actual or constructive notice of the defect (*Ingram v Costco Wholesale Corp.*, 117 AD3d 685 [2d Dept 2014]; *Caldwell v Pathmark Stores, Inc.*, 29 AD3d 847 [2d Dept 2006]; *Crawford v Pick Quick Foods*, 300 AD2d 431 [2d Dept 2002]). To constitute constructive notice, a defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the owners time to discover and remedy it (*Gordon v American Museum of Natural History,* 67 NY2d 836 [1986]; *Kiskiel v Stone Edge Management, Inc.*, 129 AD3d 672 [2d Dept 2015]). If a hazard or dangerous condition is open and obvious, the owner of the property has no duty to warn a visitor of the danger (*Cupo* at 51; *Kastin v Ohr Moshe Torah Institute, Inc.*, 170 AD3d 697 [2d Dept 2019]; *Fishelson v Kramer Properties, LLC,* 133 AD3d 706 [2d Dept 2015]). However, proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (*Cupo* at 52; *Russo v Home Goods, Inc.*, 119 AD3d 924 [2d Dept 2014]; *Gradwolh v Stop & Shop Supermarket Co., LLC,* 70 AD3d 634 [2d Dept 2010]). A plaintiff does not have to have personal knowledge of the cause of their fall (see *E.F.v City of New York*, 203 AD3d 887 [2d Dept. 2022; *Moiseyeva v New York City Hous. Auth.*, 175 AD3d 1527 [2d Dept. 2015]). A determination that a defective or dangerous condition was the proximate cause of an accident can be established in the absence of direct evidence of causation and may be inferred from the facts and circumstances underlying the injury (*Id.*; *Buglione v Spagnoletti*, 123 AD3d 867 [2d Dept. 2014]).

Generally, whether a dangerous or defective condition exists is a question of fact for the jury unless the defect is demonstrated to be trivial as a matter of law (see *Trincere*; *Fisher v JRMR Realty Corp.*, 63 AD3d 677 [2d Dept 2009]; *Hymanson v A.L.L. Assoc.*, 300 AD2d 358 [2d Dept 2002]). The determination of whether a condition is trivial does not rest exclusively upon the dimension or depth of the defect in inches but must be made upon an examination of all the facts presented, including the width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury (*Trincere* at 978 quoting *Caldwell v Village of Island Park,* 304 NY 268 [1952]). Circumstances has been interpreted to

include, but not be limited to, the sufficiency of the lighting, the existence of rain, snow, leaves or debris (*Fontana v Winery*, 84 AD3d 863 [2d Dept. 2011]). The "trivial defect doctrine" stands for the proposition that a defendant cannot use the doctrine to prevail on a summary judgment motion solely on the basis of the dimensions of an alleged defect (*Hutchinson* at 84). In deciding whether a defendant has met its burden of showing prima facie triviality, a court must, except in unusual circumstances, avoid interjecting the question of whether the plaintiff might have avoided the accident simply by placing his feet elsewhere (*id.*).

The doctrine of res ipsa loquitur applies when a plaintiff establishes: (1) the event is of the kind that ordinarily does not occur in the absence of someone's negligence; (2) the event was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) the accident was not due to any voluntary action or contribution on the part of the plaintiff (*Corcoran v Banner Super Market,* Inc., 19 NY2d 425 [1967]; *Berlich v Maimonides Medical* Center, 208 AD3d 1148 [2d Dept. 2022]; *Valdez v Upper Creston, LLC*, 201 AD3d 560 [1st Dept. 2022]). Notice is inferred when the doctrine of res ipsa loquitur applies (*Valdez* at 561; *Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159 [1st Dept. 2015]).

Here, the court finds that Plaintiff has established entitlement to judgment as a matter of law. Under a theory of premises liability, Defendant has a non-delegable duty to maintain its premises in good condition, including the roof. It is undisputed that Defendant received notice of the leak on or about September 18, 2018, that an initial repair was performed on the ceiling, and that roofers returned to the premises multiple times because additional repairs were needed to stop the leak. Plaintiff was able to identify the location of the defect and that the defect was a crack which developed into a hole in the ceiling of her hallway. She also sufficiently identified and described the cause of her fall, to wit, as slipping on water that had collected on the floor due to the leak in the ceiling after it rained. Additionally, Plaintiff's medical records, which were read at her deposition, further indicate that in describing how she fell, she told doctors that she slipped in her apartment due to rainwater leaking onto the floor.[11] In his EBT, Lipskier testified that the submitted photographs fairly and accurately depicted the defect in Plaintiff's ceiling at the beginning of the leak and after the incident. However, in its opposition, Defendant has failed to submit sufficient evidence showing that it diligently repaired the hole or inspection records

[11] (Yvonne J. Whyte Dep. Page 105).

following the repair demonstrating that prior to Plaintiff's fall, that the leak was fixed and that there was no leak after it was repaired.

To the extent that Defendant argues that Plaintiff's actions were a proximate cause of her own accident, while the comparative fault of each party is typically a question for a jury a court may properly decide the issue as a matter of law in instances where there are no specific factual allegations to support it and no valid line of reasoning which could lead the jury to find Plaintiff comparatively negligent (see *Shea v New York City Transit* Authority, 289 AD2d 558 [2d Dept. 2001]; *Perales v City of New York*, 274 AD2d 349 [1st Dept. 2000]). In this case, the Defendant does not allege that Plaintiff caused the hole, nor did it proffer any evidence to establish that the water on the floor was there as a result of some other defect within Plaintiff's control or that the area where the crack or hole in the ceiling was located, was distinguishable from the area where Plaintiff slipped. Contrary to Defendant's contention that Plaintiff's failure to turn on lights while walking to the bathroom contributed to her injuries, it was not Plaintiff's burden to prove freedom from negligence by providing evidence that she used due care in walking along the hallway where she fell (see *Schindler v Welz &* Zerweck, 145 ad 532 [2d Dept. 1911]; *Marshall v. Handler*, 237 AD2d 158, [1st Dept. 1997]). Rather, it was incumbent upon Defendant to demonstrate that there was an alternative, safer route that plaintiff chose not to take, which Defendant has failed to do (see *McGuire v Spence,* 91 NY 303 [1883]; *Rose v Brown & Williamson Tobacco Corp.*, 53 AD3d 80 [1st Dept. 2008]). Moreover, Defendant's contention that Plaintiff should have put a bucket under the hole before bed is immaterial since a bucket would not be necessary if the leak was properly repaired.

The court also finds that Defendant has failed to establish that the doctrine of res ipsa loquitur does not apply in this case. The fact that both the landlord and the contractor may have controlled plaintiff's ceiling does not preclude application of the doctrine (see *Wenzel v All City Remodeling, Inc.*, 195 AD3d 496 [1st Dept. 2021]; *Orea v NH Hotels USA, Inc.*, 187 AD3d [1st Dept, 2020]). Defendant has failed to establish that the water in the hallway came from anywhere other than the ceiling or was the result of any other defect. Additionally, contrary to Defendant's contention, it was the dripping water that caused Plaintiff's fall, not the lighting conditions or where she placed her feet. The maintenance of the roof and ceiling were in the exclusive control of Defendant and its agents and Defendant has failed to submit any evidence demonstrating that it diligently repaired the hole or inspection records following the repair showing that it had

rained and that there was no further leakage. Furthermore, Defendant has failed to submit any evidence from the person or entity that it hired to repair the roof establishing what work was performed or claimed to have been performed on the roof and ceiling.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment on the issue of liability against Defendant is granted.

This constitutes the decision and order of the court.

Hon. Ingrid Joseph J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice