SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 07

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ZAPATA, BELKIS Index №. **0025406/2018**

-against- Hon. **WILMA GUZMAN,**

FT. SHERI REALTY LLC Justice Supreme Court

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The following papers numbered 1 to ____ Read on this motion, (Seq. No. 3) for **SUMMARY JUDGMENTLIABILITY**, noticed on **June 30 2020**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the Decision & Order annexed hereto.

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 7/8/21

Hon. _____
WILMA GUZMAN, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

BELKIS ZAPATA,
Plaintiff,

-against-

FT. SHERI REALTY, LLC and ALMARC REALTY CORP.,
Defendants,

Index No.: 25406/2018E
Motion Date: 3/15/21
Mot. Seq. No.: 003

DECISION/ORDER
Present:
Hon. Wilma Guzman
Justice Supreme Court

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, Affidavit in Support, Memorandum in Support and Exhibits Thereto	**1**
Affirmation in Opposition and Exhibits thereto	**2**
Affirmation in Reply	**3**
Notice of Cross-Motion, Affirmation in Support and Exhibits Thereto	**4**
Affirmation in Opposition, Memorandum of law and Exhibits Thereto	**5**
Affirmation in Reply	**6**

Motion and Cross-Motion decided as follows: Upon deliberation of the application made by PLAINTIFF, by **Notice of Motion**, and all papers in connection therewith, for an order, pursuant to CPLR § 3212, for summary judgment on the issue of liability, is heretofore GRANTED.

Upon deliberation of the application made by Defendants, Ft. SHERI REALTY, LLC (hereinafter "FT. SHERI") and ALMARC REALTY (hereinafter "ALMARC"), by **Notice of Cross-Motion**, and all papers in connection therewith, for an order, pursuant to CPLR § 3212, for summary judgement dismissing the Complaint and any and all cross-claims against them, is heretofore DENIED.

Upon deliberation of the application made by Defendants, Ft. SHERI REALTY, LLC (hereinafter "FT. SHERI") and ALMARC REALTY (hereinafter "ALMARC"), by **Notice of Cross-Motion**, and all papers in connection therewith, for an order, pursuant to CPLR § 3211, dismissing the complaint against them, is heretofore DENIED.

This motion arises out of an action for personal injuries sustained by BELKIS ZAPATA (hereinafter "Plaintiff") on September 5, 2017 as a result of a partial ceiling collapse in the bathroom of her apartment, 23A at 3340-44 Ft. Independence Avenue, Bronx, New York. Plaintiff was in the bathroom when part of the ceiling, above the toilet, fell striking her in the back of her neck and body. Plaintiff filed a summons and complaint against FT. SHERI, the building owner, and ALMARC, the property management company, on May 9, 2018. Plaintiff alleges that FT. SHERI and ALMARC (together hereinafter known as "Defendants") are responsible for the defective condition of the ceiling as they had a duty to keep the property in a reasonably safe condition.

Plaintiff moves for summary judgment arguing that Defendants are liable for the ceiling collapse under a theory of *res ipsa loquitor* arguing that ceilings do not normally collapse. Further, Plaintiff argues that Defendants failed to fix an ongoing leak in the bathroom ceiling despite being on notice of the condition. Plaintiff also denies ever having access to the instrumentality that caused the ceiling collapse. Plaintiff testified that she repeatedly complained to the superintendent, at the time, about the bathroom leak for at least two months. Plaintiff further testified that the ceiling had become stained and discolored from the leak. Further, Plaintiff relies on the admissions of the property manager, Sheik Saddick, that complaints were made orally to him and the superintendent, who was responsible for minor plumbing and contracting work on the property. Management hired third party contractors to conduct larger repairs only memorializing the transactions through receipts. In addition to photos of the accident, Plaintiff submits the bill for a bathroom repair done by an outside party two to three weeks after the ceiling collapse. The superintendent is no longer employed by Defendants, as the property was sold, and was not deposed. Deposition testimony revealed that Defendants kept no records, notes, or schedules for property walkthrough inspections. Further, Mr. Saddick cannot recall the last time that he visited the property before the accident.

In opposition, Defendants argue *res ipsa loquitor* is inappropriate for this case. Defendants argue that Plaintiff as the tenant was in exclusive control of the apartment and the bathroom ceiling. Additionally, Defendants' agents only had access to occupied apartments with tenant's permission. Defendants contend that it is not possible for the pipe to have been leaking because it is not a hot water pipe, but a steam pipe and would have been off. Further, Defendants argue that the most probable cause of the ceiling collapse was a sudden toilet overflow in unit 33A. The property manager, Mr. Saddick, testified that he spoke with the superintendent about the accident but never personally investigated the ceiling collapse himself. Mr. Saddick further testified that the superintendent suggested that the cause of the ceiling collapse was a toilet overflow. He further testified that Defendants had discarded all records pertaining to leases in the Plaintiff's apartment building.

Defendants also cross-move for summary judgment dismissing the complaint arguing that they did not create the condition. Defendants argue that Plaintiff failed to provide notice of the defective condition. In support of this motion they have submitted the expert affidavits of the property manager, Mr. Saddick, and a professional engineer, Jeffrey J. Schwalje P.E, which stated in sum and substance that the cause of the ceiling collapse was a toilet overflow. Mr. Schwalje further stated that there was no prior notice based on his September 2020 site examination. Both experts state that they rely, in part, on the superintendent's representations.

In addition, Defendants argue that Plaintiff's affidavit is feigned though they did not challenge the affidavit in opposition to Plaintiff's motion.

In moving for summary judgment, the moving party must demonstrate, *prima facie*, entitlement to judgment as a matter of law by negating any issue of material fact. See Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1983). Movants should support their motion by affidavits made by "a person having knowledge of the facts" and "other available proof" in an admissible form. CPLR § 3212(b); see Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980). The motion must be denied, regardless of the sufficiency of the opposition, if the movant fails to meet this burden. See Winegrad, 64 N.Y.2d at 853.

To establish a *prima facie* case on the basis of *res ipsa loquitor* one must prove that: (1) the event is one that does not normally occur without negligence; (2) the instrumentality that caused the event was in the exclusive control of defendants; and (3) the Plaintiff did not voluntarily act or contribute to the occurrence. See Kambat v. St. Francis Hosp., 89 N.Y.2d 489, 494 (1997). Exclusive control can be proven as long as it is more probable that the Defendant, and not a third party, caused the condition. Dermatossian v. New York City Transit Auth., 67 N.Y.2d 219, 228 (1986). In these cases, summary judgment is granted when the evidence of the defendant's negligence is "inescapable." See Morejon v. Rais Constr. Co., 7 N.Y.3d 203, 209 (2006).

Here, Plaintiff has met their *prima facie* burden and the evidence of negligence is inescapable. Id. Ceilings do not normally collapse without negligence. See Dittiger v Isal Realty Corp., 290 N.Y. 492, 495 (1943); Mejia v. New York City Transit Authority, 291 A.D.2d 225, 227 (1st Dept. 2002). Nor could Plaintiff be expected to have access to the pipes within the ceiling of the Defendants' building. See George Foltis, Inc. v. City of New York, 287 N.Y. 108, 117 (1941); Pavon v. Rudin, 254 A.D.2d 143, 146 (1st Dept. 1998). Further, Defendants by their own admission were responsible for all repairs including minor plumbing and contracting work. Additionally, Defendants' alternate theory as to the cause of the collapse is speculative and inadmissible hearsay. See Zuckerman, 49 NY2d at 562-63; Grullon v. City of New York, 297 A.D.2d 261, 263-64 (1st Dept. 2002). Due to the forgoing, Plaintiff's motion for summary judgment on the issue of liability is granted.

Defendant's Cross-motion for Summary Judgment

The Court having granted Plaintiff's motion for summary judgment denies Defendants motion for summary judgment as they have failed to meet their *prima facie* burden for summary judgment. Neither supporting affidavit is made by a person with knowledge of the facts. See Zuckerman, 49 NY2d at 563. More importantly, both expert opinions are founded on hearsay, as the theory of a toilet overflow come directly from statements made by the superintendent who has not been deposed. See Stock v. Otis Elevator Co., 52 A.D.3d 816, 817(2nd Dept. 2008); Oldham v. City of New York, 155 A.D.3d 477, 477 (1st Dept. 2017). Neither expert offers any evidentiary poof to support their conclusions. See Stock, 52 A.D.3d at 817; Fountain v. Ferrara, 118 A.D.3d 416, 416 (1st Dept. 2014). Further, Plaintiff testified to having requested the superintendent enter the

apartment to inspect and repair the leak. Plaintiff's testimony is consistent with her affidavit where she stated that she complained for two to six months prior to the ceiling collapse. Thus, the court finds Defendants' argument regarding the Plaintiff's affidavit unavailing.

Defendants also raise CPLR § 3211 in their cross-motion but present no argument for the Court to consider therefore that part of the motion is denied.

Accordingly, it is:

ORDERED and ADJUDGED that the motion by Plaintiff for an Order, pursuant to CPLR §3212, awarding Plaintiff summary judgement on the issue of liability, is heretofore granted. It is further

ORDERED and ADJUDGED that this matter shall be set down for an assessment of damages upon the filing of the Note of Issue and payment of appropriate fees. It is further

ORDERED and ADJUDGED that the Cross-Motion by Defendants for an Order, pursuant to CPLR §3212, awarding Defendants summary judgment dismissing the Complaint and any and all cross-claims against them, is heretofore denied. It is further

ORDERED and ADJUDGED that the Cross-Motion by Defendants for an Order, pursuant to CPLR §3211, dismissing the Complaint against them, is heretofore denied. It is further

ORDERED and ADJUDGED Plaintiff shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 7/8/21

HON. WILMA GUZMAN, J.S.C.