SCAN

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. F. DANA WINSLOW,**

**Justice**

**TRIAL/IAS, PART 6**
**NASSAU COUNTY**

**BEVERLY KATKIN,**

**Plaintiff,**

**-against-**

**MOTION SEQ. NO.: 001**
**MOTION DATE: 6/11/09**

**HEATHERWOOD TOWERS REALTY COMPANY and YIN YOU INC., d/b/a TIAN BUFFET,**

**INDEX NO.: 10770/07**

**Defendants.**

**The following papers having been read on the motion (numbered 1-3):**

**Notice of Motion.....1**
**Notice of Cross Motion.....2**
**Affirmation in Oppostion.....3**

The motion by defendant Heatherwood Towers Realty Co. ("Heatherwood") for summary judgment on the plaintiff's complaint as well as Heatherwood's cross claim for contractual indemnity from co-defendant Yin You Inc d/b/a Tian Tian Buffet ("Buffet") is **granted** to the extent indicated.

The cross motion by Buffet seeking an order of summary judgment as to the plaintiff's complaint and all cross claims is **denied** for the reason set forth herein.

The plaintiff commenced this action for personal injuries allegedly sustained by plaintiff when, on March 13, 2005, at approximately 7:00 PM, she was injured when she was struck by a "heavy metal thing" that hit plaintiff in the head (see Exhibit D, pg. 18 annexed to Heatherwood's motion) at 6092 Jericho Turnpike, Commack, N.Y., Buffet's restaurant.

Plaintiff stated there was a front door that customers open to enter the

restaurant, then you go into a vestibule and through an inner door that goes into the restaurant (p. 11); the incident occurred when plaintiff had picked up her take-out order and had opened the inner door from the restaurant into the vestibule to exit (p. 12).

Heatherwood is the owner of the property. Buffet was the tenant of the property at the time of the incident and was operating a Chinese restaurant.

Plaintiff moves to strike the answer of Buffet as well as dismiss the affirmative defenses offered in Buffet's answer. Plaintiff seeks summary judgment on the issue of liability. Buffet cross moves for summary judgment.

Heatherwood offers the testimony of one Catherine Marchiano, an office manager with FRE Management. FRE managed Heatherwood's property at 6092 Jericho Turnpike, Commack, N.Y. (Ms. Marchiano's testimony is annexed to Heatherwood's motion; the following pages refer to that exhibit). Ms. Marchiano stated Buffet opened in August, 2001, and it had taken occupancy of the property "as is" (pgs. 17, 25). She stated Buffet inspected the premises and brought nothing to Heatherwood's attention (pgs. 25, 26). Heatherwood received no complaints from Buffet with regard to the armature or the door in issue (pgs. 18, 19).

Heatherwood notes the lease between Heatherwood and one Huang Hong Pinc for 6092 Jericho Turnpike, Commack, N.Y. (see Exhibit G annexed to Heatherwood's motion). The lease had been assigned to defendant Yin You Inc. d/b/a Tian Tian Buffet and was operating the restaurant at the time of the incident (see Exhibit F, pgs. 9-11 annexed to Heatherwood's motion).

Heatherwood points to page 9, ¶ 5 of the rider (see Exhibit G annexed to Heatherwood's motion) which states that the tenant is responsible to maintain and repair all interior and exterior doors, such as the "inner" door involved herein.

Heatherwood contends it is an out-of-possession landlord that had no notice of problems from Buffet. Thus it seeks summary judgment and it should be, as per the lease, reimbursed for its costs herein. The Court agrees.

An out-of-possession landlord was under no contractual duty to maintain or repair anything other than structural elements of a building and did not violate any specific statutory provision sufficient to impose liability in a personal injury suit brought by a patron allegedly injured when he was shocked by an exposed wire hanging from a light fixture attached underneath a shelf; thus the landlord established its *prima facie* entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it (*Sanchez v Barnes & Noble, Inc.*, 59 AD3d 698; *Valenti v 400 Carlls Path Realty Corp.*, 52 AD3d 696; *Ingargiola v Waheguru Management, Inc.*, 5 AD3d 732).

As an out-of-possession landlord Heatherwood correctly claims it should not be held liable since the lease placed responsibility for everyday maintenance and repairs of the doors on Buffet, the tenant.

Since the broken armature was not a significant structural defect, and the plaintiff did not point to any specific statutory violations to support her contention that Heatherwood breached a duty of care, Heatherwood cannot be charged with constructive notice solely based on its right of re-entry (*see Pavon v Rudin*, 254 AD2d 143).

Thus, as to that branch of Heatherwood's motion for summary judgment on its claim of contractual indemnity including costs and fees, that branch must be **granted.**

Heatherwood notes that its lease (Exhibit G annexed to Heatherwood's motion) states the tenant shall indemnify and save the owner harmless against all

claims for acts, omissions, and negligence of the tenant as to injury caused thereby.

The right to contractual indemnification depends on the specific language of the contract (*see Canela v TLH 140 Perry St., LLC*, 47 AD3d 743); the promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the surrounding circumstances (*see Hooper Associates v AGS Computers*, 74 NY2d 487). The lease between Heatherwood and Buffet constituted a comprehensive and exclusive property maintenance agreement intended to displace Heatherwood's duty as owner to safely maintain the premises (*George v Marshalls of Ma, Inc.*, 61 AD3d 925). Heatherwood had done nothing that could be categorized as negligent. Buffet is to offer liability insurance to cover Heatherwood's costs, expenses, etc., in defending any actions such as the one herein. If there was no insurance, Buffet was liable to Heatherwood directly, as per the lease (see Exhibit F, ¶ 8 and p. 4, ¶ 41 of the Rider annexed to Heatherwood's motion).

Next the court will consider plaintiff's motion (labeled as cross motion herein) to strike Buffet's answer for failure to comply/complete deposition demands.

The herein matter was commenced in June, 2007 (see Exhibit A annexed to Buffet's cross motion). Buffet's counsel notes a letter sent to Buffet dated July 31, 2008 was returned and not forwarded (see Exhibit G annexed to Buffet's cross motion and ¶ 7 of Paul Goodovitch's affirmation in support of buffet's cross motion). Buffet's counsel could not locate Ms. Cheng, the owner of Buffet, and Ms. Cheng had not contacted Mr. Goodovitch's office.

Buffet shut down in early 2008. Buffet allegedly broke the lease and

"walked away" (see Exhibit F, pgs. 31-33, 35 annexed to Heatherwood's motion) due to poor business and competition (see Exhibit F, pg. 34 annexed to Heatherwood's motion).

While the nature and degree of the penalty to be imposed for a discovery violation is a matter of discretion with the court, striking an entire answer is appropriate with a clear showing that the failure to comply is willful, contumacious or in bad faith (*see Palmenta v Columbia University*, 266 AD2d 90). From the record herein, the owner of Buffet, one Jane Cheng (Exhibit F, pg. 23 annexed to Heatherwood's motion) just abandoned her business and left her home in the middle of the night while knowing full well of this pending matter. Her counsel states she is gone and he cannot locate or contact her. Such conduct indicates the action is clearly willful, contumacious and in bad faith.

No representative has been offered by Buffet for a deposition (*see Mei Yan Zhang v Santana*, 52 AD3d 484).

The failure of a defendant in a personal injury action to appear for a deposition warranted an order providing that the defendant's answer would be stricken if he or she did not submit to a deposition at a time and place to be specified even though defendant's counsel alleges that the defendant's whereabouts were unknown and that he, counsel, tried to locate the defendant; thus the fact that the defendant has disappeared or made him or herself unavailable provides no basis for denying a motion to strike the defendant's answer for failure to appear at a deposition (*see Torres v Martinez*, 250 AD2d 759). Here, the remedy is to **grant** plaintiff's request to strike Buffet's entire answer.

As to that branch of plaintiff's motion to strike Buffet's first through fourth affirmative defenses as non-meritorious, this is a moot point since Buffet's entire

answer has been stricken.

Next the court will consider that branch of plaintiff's motion for summary judgment on the issue of liability.

While negligence cases do not generally lend themselves to resolution by motion for summary judgment, such a motion will be granted where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party (*see Morowitz v Naughton*, 150 AD2d 536).

The conditions necessary for the application of the doctrine of "*res ipsa loquitur*" are: 1) 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 agent 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 (*Corcoran v Banner Super Market, Inc.,* 19 NY2d 425). Under appropriate circumstances, the evidentiary doctrine of *res ipsa loquitur* may be invoked to allow the fact finder to infer negligence from the mere happening of the event (*States v Lourdes Hospital*, 100 NY2d 208).

"Exclusive control of the instrumentality of the accident" is not an unyielding concept, and it can be interpreted to indicate it was probably the defendant's negligence which caused the accident" (emphasis added) (*see Nesbit v NYCTA*, 170 AD2d 92).

When a specific cause of an accident is unknown, the doctrine of *res ipsa loquitur* permits an inference of negligence to be drawn from the very occurrence of a certain type of accident and the defendant's relation to it; evidence of a lessee's exclusive control over an allegedly defective upper pivot hinge of a door that fell on a worker was sufficient to allow the worker to rely on *res ipsa loquitur*

to establish a submissible case of negligence against the lessee in a personal injury action where the hinge would have required a ladder to reach it (*see Pavon v Rudin, supra*).

Doors with an armature cover do not have the covers fall in the absence of negligence (improper installation, maintenance or repair) and the mere act of opening the door does not make the accident plaintiff's fault or put the door under the plaintiff's control (*see Pavon v Rudin, supra*).

Since the doctrine of *res ipsa loquitur* concerns circumstantial evidence which allows, but does not require, the fact finder to infer that the defendant was negligent, *res ipsa loquitur* does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict even if the plaintiff's circumstantial evidence is unrefuted; thus, only in some of the *res ipsa loquitur* cases may a plaintiff win summary judgment or a directed verdict; that would happen only 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 (*Simmons v Neuman*, 50 AD3d 666)or where the defendant has totally failed to rebut the inescapable inference of negligence (*Harmon v United States Shoe Corp*, 262 AD2d 1010). That is the situation here.

Buffet did not submit any material evidence that the plaintiff contributed in any way to causing the incident (*Smith v Moore*, 227 AD2d 854).

Here, defendant has not shown anyone or anything tampered with the door operation which would have required a stepladder in a high traffic area of Buffet. This truly eliminates the likelihood that an employee or a member of the public tampered with the armature.

Plaintiff's photographs and testimony suggest that Buffet's employees took

possession of the fallen object after the incident (see Exhibit E annexed to plaintiff's cross motion; Exhibit D, p. 19 annexed to Heatherwood's motion) and Buffet offered no evidence to support an inference of some other possible cause for the incident such as a design or manufacturing design defect (*Pavon v Rudin, supra*).

There was no proof offered whether the broken component itself was generally handled by the public, and not whether the public, i.e., customers, used the larger object–the door–to which the defective piece was attached (*Pavon v Rubin, supra*, pg. 146).

Here, Buffet's reliance on *Flowers v Delta Air Lines,* 2001 WL 1590511 (EDNY; not reported in F.Supp2d) is unavailing in that the court found the unattached three rows of chairs the large plaintiff sat down in a "hard" fashion were not in Delta's exclusive control since the public had access to the row and plaintiff's own actions contributed to his injuries.

Buffet has made no effort to implead the manufacturer/designer of the armature. Buffet's focus has been on lack of exclusive control of the armature and plaintiff's possible comparative negligence in using/opening the door.

A plaintiff may obtain a summary judgment verdict in a *res ipsa loquitur* case when the plaintiff's circumstantial proof is so weak that the inference of the defendant's negligence is inescapable (*Morejon v Rais Construction Company*, 7 NY3d 203; *Simmons v Neuman, supra*).

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320). Thus, when faced with a summary judgment

motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v Journal News*, 211 AD2d 626). Thus, the burden on the moving party for summary judgment is to demonstrate a *prima facie* entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Ayotte v Gervasio*, 81 NY2d 1062). Based on the record herein, Buffet has failed to meet its burden.

As to Buffet's cross motion for summary judgment to dismiss the complaint of plaintiff and all cross claims is **denied**.

This constitutes the Order of the Court.

Dated: July 30, 2009

ENTER:

J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE