

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 20, 2019

526914

GREATER BINGHAMTON DEVELOPMENT,
LLC,

Appellant,

v

MEMORANDUM AND ORDER

STELLAR 83 COURT, LLC, et al.,
Respondents,
et al.,
Defendants.

Calendar Date: May 3, 2019

Before: Garry, P.J., Egan Jr., Lynch, Clark and Rumsey, JJ.

Law Offices of Ronald C. Benjamin, Binghamton (Michael J. Hutter of Powers & Santola, LLP, Albany, of counsel), for appellant.

Rupp Baase Pfalzgraf Cunningham LLC, Buffalo (Matthew J. Smith of counsel), for Stellar 83 Court, LLC, respondent.

Mackenzie Hughes, LLP, Syracuse (Samantha L. Millier of counsel), for PMC Property Group, Inc., respondent.

Goldberg Segalla, LLP, Buffalo (Heather K. Zimmerman of counsel), for Blackrock Construction LLC and another, respondents.

Napierski, VanDenburgh, Napierski & O'Connor, LLP, Albany (Mark J. Dolan of counsel), for Rami Construction, Inc., respondent.

Williamson, Clune & Stevens, Ithaca (John H. Hanrahan 3d of counsel), for Chenango Electric, respondent.

Garry, P.J.

Appeal from an order of the Supreme Court (Tait, J.), entered March 23, 2018 in Broome County, which, among other things, granted certain defendants' cross motions for summary judgment dismissing the complaint and cross claims against them.

In December 2010, a fire occurred in a five-story building that was under construction in the City of Binghamton, Broome County, causing extensive structural damage to that building and resulting in water and fire damage to the adjacent building, which is owned by plaintiff. Plaintiff commenced this negligence action against defendants Stellar 83 Court, LLC, the owner of the building where the fire originated, PMC Property Group, the property manager for the construction project, and several contractors working in the building. Plaintiff moved for partial summary judgment on the issue of liability, and, as relevant here, Stellar 83 Court, PMC Property Group, Inc., defendant Blackrock Construction LLC and defendant Rami Construction, Inc. (hereinafter collectively referred to as defendants) cross-moved for summary judgment dismissing the complaint and all cross claims against them. Supreme Court found that, given the lack of evidence regarding the cause of the fire, plaintiff could not demonstrate that the fire was caused by defendants' negligence, and that the doctrine of *res ipsa loquitur* did not apply. Accordingly, Supreme Court denied plaintiff's motion and granted defendants' cross motions. Plaintiff appeals arguing that Supreme Court erred in granting defendants' cross motions for summary judgment.

Plaintiff's contentions upon appeal are limited to the applicability of the *res ipsa loquitur* doctrine. To establish an inference of negligence pursuant to *res ipsa loquitur*, "(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 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 Constr. Co., 7 NY3d 203, 209 [2006] [internal quotation marks and citations omitted]). "Only when these essential elements have been established, after the plaintiff has first demonstrated the nature of the instrumentality which caused the injury and its connection with the defendant, does a prima facie case of negligence exist" (Dermatossian v New York City Tr. Auth., 67 NY2d 219, 227 [1986] [citations omitted]).

In support of their cross motions for summary judgment, defendants offered proof that their conduct did not proximately cause the fire. They also relied upon evidence demonstrating that the fire – which was of unknown origin – was not the type of event that could not occur in the absence of negligence, and that they did not have exclusive control of the area where the fire began or the instrumentality that caused the fire. The fire marshal who investigated the fire stated that he believed that it began on an upper floor, which collapsed onto the lower floors. When the fire was extinguished, three quarters of the roof and all of the floors had burned, and most of their remains ultimately collapsed into the basement, completely destroying the presumed area of origin. The fire marshal explained that there are four potential causes of a fire – accidental, natural, incendiary and undetermined – and that the cause of this fire was undetermined. He was unable to eliminate various possible accidental or nonaccidental causes; these included electrical hazards, "hot work" performed with torches on the work site, smoking, a battery-operated winch or possible intentional acts. The fire marshal stated that he had no opinion regarding the cause, and that he would not be surprised to learn of any cause.

Plaintiff proffered no expert testimony in opposition to defendants' cross motions to eliminate the potential nonnegligent causes. For the doctrine of *res ipsa loquitur* to apply, plaintiff was required to establish "that the fire was one that ordinarily would not have occurred in the absence of defendants' negligence" (92 Ct. St. Holding Corp., LLC v Monnet,

106 AD3d 1404, 1407 [2013]). Although plaintiff was not required to "eliminate[] every alternative explanation for the event, it was required to demonstrate that the probability of other causes was so reduced that defendants' negligence was more likely than not to have caused the injury" and, in the absence of evidence establishing that any one possible cause of the fire was more likely than the others, plaintiff failed to do so in this case (id.; see Fontanelli v Price Chopper Operating Co., Inc., 89 AD3d 1176, 1178 [2011]; Schultheis v Pristouris, 45 AD2d 864, 864-865 [1974]; Cooke v Bernstein, 45 AD2d 497, 500 [1974]). Plaintiff's assertion that defendants were in exclusive control of the instrumentality that caused the fire is similarly unpersuasive, given that the instrumentality that caused the fire is unknown (see Faville v County of Albany, 163 AD3d 1297, 1299 [2018]; Board of Educ. of Ellenville Cent. School v Herb's Dodge Sales & Serv., 79 AD2d 1049, 1049-1050 [1981]). Accordingly, Supreme Court properly determined that the doctrine of *res ipsa loquitur* did not apply in this case and granted defendants' cross motions for summary judgment.

Egan Jr., Lynch, Clark and Rumsey, JJ., concur.

ORDERED that the order is affirmed, with one bill of costs.

ENTER:



Robert D. Mayberger
Clerk of the Court