SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE TRIAL/IAS PART 20

_____X

ONE BEACON INSURANCE COMPANY a/s/o HOWARD BLADY,

Plaintiff,

-against-

Index No.: 017836/08
Motion Sequence...02
Motion Date... 05/26/10

CMB CONTRACTING CORP. d/b/a MID ISLAND CONTRACTORS, INC.,

Defendant.

_____X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Reply Affirmation.....x

Upon the foregoing papers, the motion by the Defendant, CMB CONTRACTING CORP. d/b/a MID ISLAND CONTRACTORS, INC. (hereinafter referred to as "CMB") for seeking summary judgment, pursuant to CPLR § 3212, is decided as provided herein.

This action involves a property damage subrogation claim caused by a fire that occurred on May 24, 2007 at the house of the Plaintiff/subrogor, Howard Blady (hereinafter referred to as "Blady") located at 123 Everit Avenue, Hewlett, New York (hereinafter

referred to as the "Premises"). During the time prior to the fire, the Premises was unoccupied and CMB was renovating the house. One Beacon Insurance Company (herein after referred to as the "Plaintiff") commenced this subrogation action against CMB for negligent construction activities alleged during the renovation of the Premises, which it alleges resulted in the subject fire.

The Defendant, CMB, was hired by Blady to perform renovations on the Premises prior to his occupying the house. The work being done by CMB included the dormering of the second floor, which required the use of power tools and generated sawdust. Michael Raso, the owner and principal of CMB, states that while their work did generate sawdust in the area, his crew did a full cleanup at the end of the workday on May 24, 2007. (*See* Exhibit G annexed to the Defendant, CMB's motion at pp. 81-82). This included sweeping up all sawdust and unplugging all electrical tools. (*Id.*).

The Plaintiff maintains that the activities of CMB's employees likely contributed to causing the fire since a fire in an uninhabited area does not ordinarily occur without negligence. Allegedly, Mrs. Blady was concerned about the sawdust entering the finished portions of the house and requested that CMB's employees use plastic sheeting to block off the work area. (*See* Exhibit F annexed to the Defendant, CMB's motion at pp. 24-25). Mr. Blady also believed that the workers "could have been more careful with the dust". (*See* Exhibit D annexed to the Defendant, CMB's motion at p. 58).

On the day of the fire, Mr. Blady and his wife visited the Premises. Mr. Blady states that they did not use the electric lights or appliances in observance of a religious

holiday. (*See* Exhibit A annexed to the Plaintiff's affirmation in opposition at ¶ 4). Mrs. Blady also testified that on the day of the fire they were not able to access the area where the fire started which was the second floor rear bedroom. (*See* Exhibit F annexed to the Defendant, CMB's motion at p. 45).

One of the Plaintiff's experts, Salvatore Salvato, a certified fire investigator, opines that the fire started in the newly dormered area on the second floor of the Premises, the area that the Bladys stated was in the exclusive control of CMB's employees. (*See* Exhibit C annexed to the Plaintiff's affirmation in opposition at ¶¶ 2, 5). The Fire Marshall's report also indicates that the origin of the fire was on "the second floor in a new addition with the point of origin toward the rear left side of this addition". (*See* Exhibit B annexed to the Plaintiff's affirmation in opposition at p. 2). However, CMB's expert, William Hayden, a certified fire protection specialist, states that while the fire started on the second floor, it was not possible to determine with specificity the point of fire origin. (*See* Exhibit H annexed to the Defendant, CMB's motion at ¶ 8).

The Defendant, CMB contends that the Plaintiff has not made a prima facie showing that the fire was connected to CMB's work at the Premises. CMB notes that the expert affidavits of William Hayden, Larry Wharton, an electrical engineer, and the Nassau County Fire Marshall each indicate the cause of fire at the Premises was "undetermined". (*See* Exhibit H, I, and J respectively annexed to the Defendant, CMB's motion). Some potential causes of the fire, including the building's electric, smoking, and intentional arson, have been ruled out by both the Plaintiff's and the Defendant's experts. (*See* the Plaintiff's

affirmation in opposition at ¶ 33).

In opposition, the Plaintiff has offered the expert affidavit of James M. Pryor, an electrical engineer. (*See* Exhibit D annexed to the Plaintiff's affirmation in opposition). Mr. Pryor indicates that in his post-fire inspection of the proposed bedroom on the second floor, he discovered an 18-volt battery pack attached to a small section of a heavily charred wood member, indicating an extreme amount of heat in the area. (*See* Exhibit D annexed to the Plaintiff's affirmation in opposition at ¶ 4).

In further support of their allegations, the Plaintiff offered the testimony of Ray P. Miller, a construction expert, in its expert disclosure statement. (*See* Exhibit E annexed to the Plaintiff's affirmation in opposition). In this disclosure statement, the Plaintiff has indicated that Mr. Miller will testify CMB fell below a reasonable duty of care by failing to vacuum the excessive amount of sawdust created by the wood cutting work in the proposed upstairs bedroom. (*See* Exhibit E annexed to the Plaintiff's affirmation in opposition at pp. 4-5). The Plaintiff also states Mr. Miller will opine that CMB's employees should not have left the equipment in a pile where the work was being completed, instead they should have separated and stored the tools as per code. (*Id.* at p. 5). Mr. Miller will allegedly testify that CMB failed to meet the minimum construction standards designed to ensure safe work and avoid harm to property where the general contractor is in exclusive control of the premises, as in the instant action. (*Id.*).

In order for a plaintiff to establish a prima facie case of negligence, the plaintiff must demonstrate that the defendant created the condition which caused the injury, or that

the defendant had actual or constructive notice of the condition. *See Eddy v. Tops Friendly Mkts.*, 91 A.D.2d 1203 (4th Dept. 1983) , *aff'd*, 59 N.Y.2d 692 (1983).

However, the evidentiary doctrine of *res ipsa loquitur*, Latin for "the thing speaks for itself" (*see Febolt v. N.Y. Times Co.*, 32 N.Y.2d 486 (1973)), permits an inference of negligence to be drawn where the nature of the accident is such that it would ordinarily not happen without negligence. *Dermatossian v. N.Y. City Transit Auth.*, 67 N.Y.2d 219 (1986). Where an accident's actual or specific cause is unknown, this doctrine permits a plaintiff to draw an inference of negligence through the accident's occurrence by considering circumstantial evidence of the defendant's negligence. *See Morejon v. Rais Constr.Co.*, 7 N.Y.3d 203 (2006). *Res ipsa loquitur* is a common sense appraisal of the probative value of circumstantial evidence that requires evidence which shows at least the probability that the particular accident could not have occurred without a legal wrong by the defendant. *George Foltis, Inc. v. City of New York*, 287 N.Y. 108 (1941); *see Dermatossian v. N.Y. City Transit Auth.*, 67 N.Y.2d 219 (1986), *supra*.

> The conditions necessary for the application 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.

Dermatossian v. N.Y. City Transit Auth., 67 N.Y.2d 219 (1986), *supra.*; *Corcoran v. Banner Super Mkt., Inc.*, 19 N.Y.2d 425 (1967). When the doctrine is applicable, it creates a prima facie case of negligence sufficient for submission to the fact finder who may, but is not

required to, draw a permissible inference of negligence. *See Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489 (1997); *Banca Di Roma v. Mut. of Am. Life Ins. Co.*, 17 A.D.3d 119 (1st Dept. 2005).

At this point in the proceedings, while several potential causes of the fire have been ruled out, the true cause remains unknown. Pursuant to the doctrine of *res ipsa loquitur*, an inference of negligence can be drawn from the surrounding circumstances. At the time of the fire, CMB was working on the second floor, the area of the fire's origin. Michael Raso, the principal of CMB, stated that this stage of construction necessitated power tools and created sawdust in the area. These circumstances create, at the least, the probability that the fire did not start in the absence of negligence by the Defendant.

Absent a defendant's exclusive control of the instrumentality causing the incident, *res ipsa loquitur* would not apply. *See Pollack v. Toshiba Am. Med. Sys., Inc.*, 291 A.D.2d 835 (4th Dept. 2002). However, "exclusive control" is not an unyielding concept; it can be interpreted to indicate that it was probably the defendant's negligence which caused the accident. *See Corcoran v. Banner Super Mkt., Inc.*, 19 N.Y.2d 425 (1967), *supra*; *Nesbit v. N.Y. City Transit Auth.*, 170 A.D.2d 92 (1st Dept. 1991). It is not necessary for a plaintiff to entirely eliminate the possibility of other causes, but only to demonstrate that the alleged injury was more probably caused by the defendant's negligence than that of some other agency. *Nesbit v. N.Y. City Transit Auth.*, 170 A.D.2d 92 (1st Dept. 1991), *supra*; *see Gayle v. City of N.Y.*, 92 N.Y.2d 936 (1998).

The Defendant, CMB, allegedly had exclusive control of the area under

construction on the second floor of the Premises, the origin of the fire. According to the testimony of the owners, Mr. & Mrs. Blady, they were unable to enter that area of the Premises on the day of the fire. Additionally, CMB did not submit any material evidence showing that the Mr. & Mrs. Blady contributed to causing this fire. *See Smith v. Moore*, 227 A.D.2d 854 (3rd Dept. 1996) (considering a lack of evidence regarding a plaintiff's contribution as strengthening the inference of negligence on the part of the defendant). These circumstances fairly attribute the greater probability of the fire's origin to the negligence of CMB. Based on the record, the Plaintiff's theory is not unwarranted speculation. *See Tower Ins. of N.Y. v. M.B.G. Inc.*, 288 A.D.2d 69 (4th Dept. 2006).

The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts. *Lelekakis v. Kamamis*, 41 A.D.3d 662 (2nd Dept. 2007); *Pedone v. B & B Equip. Co.*, 239 A.D.2d 397 (2nd Dept. 1997). Summary judgment is not appropriate where the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution. *See Roca v. Perel*, 51 A.D.3d 757 (2nd Dept. 2008); *Barbuto v. Winthrop Univ. Hosp.*, 305 A.D.2d 623 (2nd Dept. 2003).

In the instant action, there is conflicting expert testimony regarding the place of origin of the fire, the cause of the fire, and the role, if any, of CMB's alleged negligence in the incident.

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 N.Y.2d 320 (1986). The burden is on the moving party to tender sufficient evidence to demonstrate the absence of any material issue of fact. *Id.* 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. *See Miller v. Journal News*, 211 A.D.2d 626 (2nd Dept. 1995). The Defendant, CMB, has failed to meet this burden.

Accordingly, it is hereby

ORDERED, that the Defendant, CMB CONTRACTING CORP.'s motion, seeking an Order granting summary judgment, pursuant to CPLR § 3212, is **DENIED**.

All applications not specifically addressed herein are **DENIED**.

This decision constitutes the order of the court.

DATED: Mineola, New York
July 19, 2010

Hon. Randy Sue Marber, J.S.C.