NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 4

Case Disposed	❑
Settle Order	❑
Schedule Appearance	❑

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

----------x

[redacted]

Plaintiff,

-against-

[redacted]

Defendant

----------x

Index No.: [redacted]/06

DECISION/ORDER

Present:

Hon. Howard H. Sherman
Justice

The following papers numbered 1-3 read on defendant's motion for summary judgment noticed on Mar 12, 2008 and plaintiff's cross-motion for sanctions noticed on April 16, 2008 both duly submitted on the motion calendar of May 7, 2008

	PAPERS NUMBERED	
Notice of Motion- Affirmation in Support and Exhibits A-J annexed Memorandum of Law in Support of Motion	1	1A
Notice of Cross-Motion - Affirmation in Support and Exhibits 1-8 annexed - Memorandum of Law in Opposition to Motion/Support of Cross-Motion	2	2A
Affirmation in Reply/Opposition to Cr0ss-Motion	3	

Upon the foregoing papers the motion for summary judgement is denied for the reasons set forth below.

Facts and Procedural Background

Plaintiff seeks recovery for injuries allegedly sustained on September 8, 2004 when the chair on which she was sitting in a [redacted] collapsed.

This action was commenced in June 2006 with issue joined that August.

The bill of particulars alleges that defendant [redacted] was negligent in causing , creating and/or allowing a defective chair to exist within [redacted]; in failing to *inter alia,* inspect for the defect; properly maintain and service the chair; correct the defect; warn the [redacted] who would be using the chair and hire sufficient personnel to maintain the chair [Verified Bill of Particulars ¶ 11]. It is further alleged that the defendant had both actual and constructive notice of the defect [Id. ¶ 13]. In addition, plaintiff alleges that she "will also rely upon the doctrine of res ipsa loquitur." [Id. 11].

MOVING PAPERS

Defendant moves for an award of summary judgment dismissing the complaint alleging that is did not create the defective condition of the chair nor did it have either actual or constructive notice of the defect. In addition, it is argued that the chair , which was installed in the [redacted] more than fifteen years prior to the accident, was not in the exclusive control of [redacted] so as to support a theory of liability based on res ipsa. Plaintiff argues that the motion should be denied as defendant fails to come forward with sufficient proof as to when the chair was last inspected . Plaintiff also maintains that her observation of "identical chairs with missing seats" raises an issue of fact as to whether defendant had constructive notice of the condition . In addition, plaintiff contends that the theory of res ipsa is applicable to the facts of this case and warrants the denial of summary judgment.

Plaintiff testified that on the afternoon of September 8, 2004, she went to her [redacted] of the [redacted] Building of defendant's [redacted] [redacted] EBT: 16-17]. [1] She recalled being in the [redacted] on two prior occasions [EBT: 18]. There were approximately [redacted] [Id. 19]. Plaintiff described the chairs [redacted] as having "some sort of mechanism that allows the chair to attach to the desk and there are no legs, you just swivel it out." [Id. 22] with the chairs "actually hinged onto, I believe , the leg of the desk." [Id. 23]. The seats were made of plastic with cushioned upholstery [Id 24]. Plaintiff further testified that there was no [redacted] , and on the date of the accident , she sat in the second or fourth chair of the top row of the [redacted] in a seat she had never used before [Id. 25-28;56]. Four or five other [redacted] were also sitting in the top row [Id. 27]. To seat herself, plaintiff pulled the chair to the right , the side at which it was hinged to the desk [Id. 28]. She did not observe that any part of the chair was loose [Id. 29] . Fifteen minutes into the [redacted] while [redacted] , the bottom or base of her chair "just collapsed and [she] fell down." [Id. 33; 29:22-23]. Prior to the collapse she heard no noise nor did she feel the chair sliding down [Id. 30]. She fell slightly forward and "straight down to the bottom[.]" [Id. 32], a distance of approximately two and one-half feet [Id. 35]. The base of the seat was on the ground [Id. 43]. She was helped up from the floor by [redacted] and sat down on the next seat for [redacted] [Id.37-38]. At the conclusion of [redacted] that she had fallen and that she was on a lot of pain [Id. 43]. [redacted] and reported the incident to the security office in the lobby of the building [Id. 47-49]. Plaintiff testified that she never heard that anyone had complained about bases of chairs becoming detached ; however, she had previously observed "bases gone from the chairs or on the ground", although she was not sure of which [redacted] these observations were made [Id 44].

[1] Exhibit G to Moving Papers

[redacted] testified that he was [redacted] on the afternoon of September 8, 2004 [redacted] EBT: 29]. That [redacted] was conducted in [redacted] EBT: 30-31]. He recalled that the plaintiff was seated "towards the back, either in the back row or the second to the last row." [Id. 32]. At a point "not long after the beginning" [redacted] [Id. 32], [redacted] attention " was drawn to the fact that she fell" [Id. 33]. He testified that he then "went back to see if she was all right and [redacted] were helping her get back up and finding her a chair." [Id]. Plaintiff was "on the floor , . . , in an awkward position next to the chair.' [Id]. He further testified that he had heard "noise associated with the bumping of the chair as it fell on the floor" and observed that the chair in which plaintiff had been sitting was broken [Id.] [redacted] testified that his recollection of the specific condition of the chair was "not very clear " [Id. 34] and that he was unaware of any problems with the chairs [redacted], including the loosening of the seat portion of the chairs [Id. 37]. After [redacted] had concluded , [redacted] contacted the [redacted] to advise him of the incident and an investigation was conducted by the [redacted] [Id. 39-40]. [redacted] testified that he did not know whether the chair was preserved or if so, where it was located nor did he know the determination made upon the investigation [Id. 41]. In his capacity as [redacted] of the [redacted], [redacted] was responsible for [redacted] in the building, these being defined as including [redacted] as well as the ability to also [redacted]. [redacted] [Id. 12-15] The type of seating in this [redacted] was described by [redacted] "special kind of seating , which is rows of tables type of swivel chairs attached at each [redacted] " with "a place to [redacted] [Id. 15] [redacted] did not include any involvement with the physical plant of the building nor with the janitorial or custodial services provided [redacted] [Id. 9]. Based upon his experience of the custodial services provided in his office, he testified that it was his understanding that the [redacted] were cleaned every night and not on weekends [Id. 24]. He also testified that on each floor there was a business manager assigned who was the party to be informed of any maintenance requests [Id. 27].

Defendant submits two affidavits in support of the motion . The first is that of [redacted][2] who has been employed by the [redacted] since 2001, assuming the position of [redacted] in 2005. Mr. [redacted] attests that in his capacity his responsibilities include "oversight of mechanical systems operations of all buildings ..., including the [redacted] building " as well as the supervision of the custodial and mechanical staff who perform maintenance and repair services [redacted] [Affidavit of [redacted] in Support of the Motion ¶ 1]. Mr. [redacted] identifies the chair [3]as an original cross-bar style chair manufactured and installed in [redacted] "prior to 2001." [Id. ¶ 4-5]. Also based upon his review of photographs, [redacted] described " a seat pad assembly that had

[2] Exhibit I to Moving Papers

[3] The identification was made by use of photographs marked as exhibits during the course of the plaintiff's deposition .

detached from the chair rails " and he concluded that it "appears that the metal seat pins had backed out of the seat pad assembly permitting the seat pad to slide off the rails." [Id. 6]. [redacted] further attests that the [redacted] was responsible for receiving complaints regarding operations and facilities in [redacted] and since at least 2001, complaints received from [redacted] would result in a computer generated work order. In addition, in 2004, on each evening that the building was open, [redacted] custodial workers would clean the [redacted] Part of the cleaning duties "included wiping down the desks to which the seating in the [redacted] were attached , affording them an opportunity to note the condition of the attached seating[.]" and the workers "were instructed to report any issues they noted requiring maintenance and repair in a classroom to the Facilities Department." [Id. ¶¶ 8-9]. These reports also resulted in the generation of work orders [Id.]. Upon a computer search for work orders in the Facilities Department data base , [redacted] found "[n]o work orders were located regarding maintenance or repair to any chairs [redacted] for a two year period prior to and including plaintiff's accident other than a work order dated September 8, 2004 for the chair presumably involved in plaintiff's accident." [Id. 11]. Finally, [redacted] attests that in 2004 "no other documents, other than work orders, would have been generated to document a complaint regarding repair or maintenance needed to a chair in [redacted] [Id. 12].

The second affidavit is that of [redacted] Corporate Risk Manager of [redacted][4] [redacted] attests that upon review of the photographs provided, he identifies the chair depicted as [redacted] seating manufactured and sold [redacted] Upon a search of [redacted] beginning in January 1989 , he could not locate any records of the sale of this seating to the defendant and concludes as a result, that the sale and installation occurred prior to 1989 [Affidavit of [redacted] in Support of the Motion ¶ 4]. While the manufacturer does not perform routine maintenance after installation , [redacted] may perform work based upon customer complaints or requests for work during the warranty . Mr. [redacted] could not locate any records of complaints regarding the seating in [redacted] for a two year period prior to and including September 8, 2004.

DISCUSSION ANS CONSLUSIONS

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to establish that "there is no defense to the cause of action or that the cause of action or defense has no merit ," [CPLR § 3212 [b]) , sufficiently to warrant the court the court as a matter of law to direct judgment in favor of the proponent. Winegrad v. New York Univ.Med.Ctr., 64 NY2d 851, 853 [1985] To do so the proponent must " tender[ ] sufficient evidence to eliminate any material issues of fact from the case [ ] " with the "[f]ailure to make such a showing requir[ing] denial of the motion, regardless of the sufficiency of the opposing papers." Winegrad, at 853

[4]Exhibit J to Moving Papers

Upon review of the moving papers, it is submitted that defendant has failed to make the required initial showing by eliminating all material issues of fact with reference to plaintiff's claim of negligence upon application of the doctrine of res ipsa loquitur.

It is well established that "[t]he 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." Res ipsa loquitur creates a prima facie case of negligence sufficient for submission to the jury, which is permitted but not required to infer negligence (Dermatossian v. New York City Tr. Auth., 67 NY2d 219,226 [1986] The doctrine "simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence" [Id.] To rely on this doctrine

> a plaintiff need not conclusively eliminate the possibility of all other causes of the injury[]" as it "is enough that the evidence supporting the three conditions afford a rational basis for concluding that "it is more likely than not" that the injury was caused by defendant's negligence (Restatement [Second] of Torts § 328 D, comment *e*). Stated otherwise, all that is required is that the likelihood of other possible causes of the injury "be so reduced that the greater possibility lies at the defendant's door" (2 Harper and James, Torts § 19.7, at 1086) Res ipsa loquitur thus involves little more than application of the ordinary rules of circumstantial evidence to certain unusual events (*see,* Prosser and Keeton, Torts § 40, at 257 [5th ed]), and it is appropriately charged when, "upon ' a commonsense appraisal of the probative value' of the circumstantial evidence, ...[the] inference of negligence is justified" (George Foltis, Inc. v. City of New York, 287 NY 108,115).
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> Kambat v. St. Francis Hosp.,89 NY2d 489, 494-495 [1997]

The three criteria for invocation of the doctrine are listed as : "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 ; 3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." Corcoran v. Banner Super Mkt., 19 NY2d 425, 430 [1967] , mod on remittitur 21 NY2d 793 [quoting from Prosser, Torts § 39, at 218 (3d ed)]

Upon application of these criteria, it has been held in an analogous situation involving the sudden collapse of a chair in a movie theater that the first element was met as "common experience indicates that in the absence of negligence by the manufacturer, installer or inspector of a chair which is designed for use in a movie theater, it would not collapse merely because someone sits in it for an hour." Dawson v National Amusements, Inc., 259 AD2d 329, 330 [1st Dept 1999] ; see also, Finocchio v. Crest Hollow Club at Woodbury, Inc., 184 AD2d 491 [2d Dept 1992]. In addition, as to the third criterion,

as in Dawson, there is no evidence in this record that plaintiff engaged in any conduct contributing to the accident (compare, Kovit v. CVS , 14 Misc.3d 1219A [Sup Ct Nassau Cty] in which plaintiff, who weighed in excess of the maximum weight designated in a specimen label, sustained injuries when a chaise lounge collapsed when he sat on it; see also, Flowers v. Delta Air Lines, Inc., 2001 U.S. Dist. WL 1590511 [E.D.N.Y. 2001]).

With respect to the criterion of exclusive control of the chair, it is settled that a plaintiff is not required to demonstrate that "defendant had sole physical access to the instrumentality if she can demonstrate that the cause of the accident was 'probably such that the defendant would be responsible for any negligence connected with it .'" Dawson v. National Amusements, at 330 citing Dermatossian v. New York City Tr. Auth., 67 NY2d 219, at 227 Unlike the instrumentalities concerned in Dermatossian , the passenger grab handle on a public bus, or in Raimondi v. New York Racing Assn., 213 AD2d 708 [2d Dept 1995], a grandstand seat in a racetrack, the use of the seat in the defendant's [redacted] was limited to the [redacted] and its invitees and not to the public at large. It is submitted that the evidence herein, as in Dawson, demonstrates that "defendant's negligence in inspecting and maintaining the seat is a probable cause of the accident involved." Dawson, at 331 The record establishes that [redacted] employees assigned as custodial workers and supervised by the [redacted] attended to the cleaning of the [redacted] on each evening that the building was open. Among the responsibilities of this maintenance procedure was the duty to inspect the attached chairs for any defects necessitating repair , which would presumably include reporting anything missing or deficient in the area where a seat was affixed to the desk. As in Reynolds v. Boyleston Realty, Inc., 267 AD2d 70 [1st Dept 1999] , another case involving the collapse of a chair in a movie theater, here, there were no reports of a broken seat in [redacted], nor did plaintiff observe any problems with the seat when she sat down [redacted] These factors as well as the absence of what might have caused the metal pins to detach from the base "tends to show that the [defendant] had exclusive control of the seat , and that the seat more likely collapsed due to a structural defect that should have been detected on a nonnegligent inspection than to destructive behavior by a prior patron (see, Dawson v National Amusements , 259 Ad2d 329,331)." Reynolds, at 70.

Accordingly, it is ORDERED that the motion of the defendant for an award of summary judgment dismissing this complaint be and hereby is denied and the cross-motion of the plaintiff pursuant to CPLR 3126 is hereby respectfully referred to the DCM Part for disposition.

This constitutes the decision and order of this court.

Dated: July 31, 2008

Howard H. Sherman

HOWARD H. SHERMAN