

Vidyasagar v Fulton Associates

2006 NY Slip Op 30187(U)

June 21, 2006

Supreme Court, New York County

Docket Number: 0106910/2005

Judge: Shirley W. Kornreich

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

PRESENT, **SHIRLEY WERNER KORNREICH**
J.S.C.

PART 54

Index Number : 106910/2005

VIDYASAGAR, NITYA

vs
FULTON ASSOCIATES

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to 6 were read on this motion to/for Summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
1, 2
3, 4, 5

Cross-Motion: Yes No

FILED

JUN 26 2006

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 6/21/06

SHIRLEY WERNER KORNREICH
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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

-----X
NITYA VIDYASAGAR,

Plaintiff,

DECISION and ORDER

-against-

Index No.: 106910/05

FULTON ASSOCIATES, 142 FULTON LLC,
CORTLAND REALTY CO., CENTURY REALTY
INC and JEFF PERKINS

Defendant.

-----X
KORNREICH, SHIRLEY WERNER, J.

FILED
JUN 26 2006
NEW YORK
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This is an action brought to recover for personal injuries sustained when pieces of a glass window fell from 142 Fulton Street, New York, N.Y. (the "Building") and struck plaintiff. Jeff Perkins ("Perkins") is the tenant of the apartment from which the glass fell (the "Apartment"); 142 Fulton LLC ("Fulton LLC") is the owner of the Building; Fulton Associates previously owned the Building; Century Realty, Inc. ("Century") manages the building; and in the complaint, Cortlandt Realty Inc. ("Cortlandt") also is alleged to manage the Building. Plaintiff moves for partial summary judgment as to liability only.

I. **Facts**

A. **Plaintiff's Submissions**

Plaintiff avers the following in her affidavit. On September 11, 2002, she was walking along Fulton Street on the way to visit a friend. When she was in front of the Building, pieces of glass came crashing down, striking her head and arm, causing her injury. The pieces of glass came from the window of the Apartment occupied by Perkins.

The June 1996 lease, submitted by plaintiff, obligates Perkins to make all necessary repairs to the windows and window frames in the Apartment.

B. Defendants' Submissions

In their Verified Answer, defendants Fulton Associates, Fulton LLC, Cortlandt, and Century assert that under the lease, Perkins had the sole responsibility to maintain the Apartment, including the windows and the window frames. In opposition, Perkins submits an August 1996 stipulation of settlement executed by him and Century. The stipulation provides that Century is responsible for maintaining the building and making repairs. In fact, the agreement references the windows in the Apartment that required repair. Perkins avers that at the time of the accident he was traveling to Kennedy Airport. He recalls that his window was closed when he left the Apartment.

II. Conclusions of Law

Plaintiff moves for summary judgment under the doctrine of *res ipsa loquitur*. Recently the Court of Appeals reaffirmed "that only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment 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."

Morejon v. Rais Construction Company, 2006 N.Y. Slip Op 3619, **5 (2006). *Res ipsa loquitur* allows the trier of fact to infer that defendant was negligent. *Id.* at **8; *Kambat v. St. Francis Hospital*, 89 N.Y. 2d 489, 495 (1997); *Concoran v. Banner Super Market, Inc.*, 19 N.Y.2d 425, 433 (1967). The conditions required 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 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.

Prosser, Torts [5th ed.], § 39, p. 244. *See also Concoran*, 19 N.Y.2d at 430; *Dermatossian v. New York City Transit Authority*, 67 N.Y.2d 219, 226 (1986); *Kambat*, 89 N.Y.2d at 494; *Mejia v. New York City Transit Authority*, 291 A.D.2d 225, 227 (1st Dept. 2002).

While it seems clear that the injury here occurred as a result of negligence without contribution from plaintiff, “exclusive control” is lacking. The Court in *Concoran* opined that “[e]ven though there is beyond all possible doubt negligence in the air, *it is still necessary to bring it home to the defendant*” (19 N.Y.2d at 431) (emphasis in original). In a case with analogous facts, the Appellate Division, Second Department held that “[s]ince there were two persons who may have been the cause of this accident, the landlord or the tenant, each of whom may have been independently negligent, *res ipsa loquitur* does not apply.” *Gildea v. Harris Fine Realty and Construction*, 249 A.D. 775 (2d Dept. 1936). *See also Bain v. New York Majestic Corporation*, 31 N.Y.S.2d 434, 435 (1st Dept. 1941).

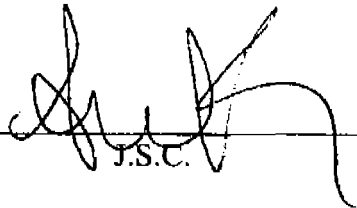
In the instant case, the parties dispute whether the lease required Fulton LLC, Century, Cortlandt, Fulton Associates to repair the window. However, the Multiple Dwelling Law obligates a landlord to keep a building in repair. NY Mult D § 78(1). *See Gildea*, 249 A.D. at 775-76 (holding that “there is an implied right [of landlord] to enter to make repairs and alterations to safeguard the public traveling on the sidewalk”). Furthermore, because Perkins occupied the apartment, he too had control over the window. Since defendants may have been independently negligent, plaintiff’s summary judgment motion fails on the “exclusive control” requirement of the *res ipsa loquitur* doctrine. Accordingly, it is

ORDERED that plaintiff’s summary judgment motion is denied; and it is further

ORDERED that the parties are to appear before the Court for their status conference, as scheduled, at 9:30 a.m. on Thursday, August 3, 2006 at 111 Centre Street, Room 1227, New York, N.Y.

ENTER:

Date: June 21, 2006



J.S.C.

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