

**Carrera v Roach**

2007 NY Slip Op 30380(U)

March 22, 2007

Supreme Court, New York County

Docket Number: 0108807

Judge: Rolando T. Acosta

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

PRESENT

PART 1

Index Number : 108807/2005

CARRERA, FANNY

vs

ROACH, STEPHEN

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

MAR 28 2007

NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: \_\_\_\_\_

*[Handwritten signature]*  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 61

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Fanny Carrera and Juvenal Carrera

**DECISION/ORDER**

Plaintiff

Index No. 108807/05

against –

**FILED**

Seq. No.1

MAR 28 2007

Present:

Stephan Roach and Carol Schwartz,

NEW YORK

COUNTY CLERK'S OFFICE

Defendants

**Rolando T. Acosta**  
Supreme Court Justice

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The following documents were considered in reviewing defendants' motion for an order granting summary judgment dismissing the complaint:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion and Affirmation</b>	<b>1 (Exhibits A-G)</b>
<b>Affirmation and Affidavit in Opposition</b>	<b>2 (Exhibits A-C)</b>

Plaintiff, defendants' house keeper, was injured when the stool she was using to clean bookshelves collapsed. Defendant moved for an order granting summary judgment dismissing the complaint, arguing that they owed plaintiff no duty of care, and even if they did, they had no notice (either actual or constructive) that plaintiff was using the stool to reach high places. Indeed, they argued, the stool, which held a vase and flowers, was used for decorative purposes only. They also argued that *res ipsa loquitur*, which requires, *inter alia*, that the stool was under defendants' exclusive control, Cohen v Interlaken Owners, Inc., 275 A.D.2d 235 (1<sup>st</sup> Dept. 2000), is inapplicable to this matter.

Plaintiff disputes that the stool was for decorative purposes, noting that it was kept in the laundry room with other cleaning supplies. Moreover, although defendant had initially provided a small step ladder that plaintiff used to clean the book shelves, that ladder had been missing from the apartment for the six months proceeding the accident. The other ladder was too big to be used in the area where the accident occurred.

Viewing the facts in the light most favorable to the non-moving party, Fundamental Portfolio Advisors v. Tocqueville Asset Management, 7 N.Y.3d 96, 106 (2006), defendants

have failed to establish their prima facie entitlement to summary judgment. Contrary to defendants' assertion, they not only owed plaintiff a duty to warn her of dangerous conditions in the apartment, but they also had a duty to keep the apartment in a reasonably safe condition. Westbrook v. WR Activities-Cabrera Supremarkets, 5 A.D.3d 69 (1<sup>st</sup> Dept. 2004).

Even if defendants had established their prima facie entitlement to summary judgment, the burden would simply shift to plaintiff to raise triable issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980) Here, there are triable issues of fact of whether defendants had knowledge that plaintiff was using the stool, especially given that the small ladder which plaintiff had previously used was no longer available and the stool at issue was kept in the laundry room with the other cleaning supplies. There are also issues of fact as to whether the stool was safe for the purposes for which it was provided, Nosowitz v 75-76 Polk Avenue, 33 A.D.2d 648 (2<sup>nd</sup> Dept. 1970), and whether the stool was defective. Agnelli v Tonegatti 20 A.D.2d 887 (1<sup>st</sup> Dept. 1964).

Defendants' claim that they did not have exclusive control of the stool such as to preclude reliance on res ipsa loquitur is not dispositive of this motion. According to defendants, plaintiff conceded using the stool on numerous occasions and thus, by definition she exercised "considerable control over [the] stool." Exclusive control, in the context of res ipsa loquitur, however, means:

that the evidence "must afford a rational basis for concluding that the cause of the accident was probably 'such that the defendant would be responsible for any negligence connected with it.' " (2 Harper and James, Torts § 19.7, at 1086, quoting Prosser, Res Ipsa Loquitur in California, 37 Cal L Rev 183, 201 [1949].) The purpose is simply to eliminate within reason all explanations for the injury other than the defendant's negligence. . . . The requirement does not mean that "the possibility of other causes must be altogether eliminated, but only that their likelihood must be so reduced that the greater probability lies at defendant's door." (2 Harper and James, Torts § 19.7, at 1086).

Dermatossian v New York City Transit Authority, 67 N.Y.2d 219, 227 (1986). Thus, the fact that plaintiff in this case used the stool does not necessarily preclude the use of res ipsa loquitur. Indeed, the facts in this case are remarkably similar to those in Nosowitz v 75-76 Polk Avenue, supra, 33 A.D.2d 648. In Nosowitz, the plaintiff, a tenant in a building owned by defendant, was injured when the stool he was standing on to change a fuse collapsed. The fuse box was in the boiler room and there was evidence indicating that the stool had been provided by the defendant. Other tenants had access to the boiler room and at least one other tenant had used the stool for the purpose of changing a fuse. "No proof of negligence other

than the happening of the accident was proffered by plaintiff." Id at 649. The trial court dismissed the complaint at trial at the end of plaintiff's case. In reversing, the Appellate Division, Second Department, held:

"The requirement of exclusive possession and control is not an absolutely rigid concept. It implies that the possession and control of the defendant over the instrumentality are of such a character that the probability that the negligent act was caused by someone other than the defendant is so remote that it is fair to permit an inference that the defendant is the negligent party" (Cameron v. Bohack Co., 27 A D 2d 362, 364). "The exclusive control requirement is thus subordinated to its general purpose, that of indicating that it probably was the defendant's negligence which caused the accident" (Corcoran v. Banner Super Market, 19 N Y 2d 425, 432 [emphasis in original]). In the instant case the only persons who had access to the basement were employees of defendant and tenants who had the right to enter to change their fuses. The jury could have found that defendant had supplied the stool for the precise purpose of permitting these parties to stand upon it to reach their fuse boxes. The evidence was uncontradicted that plaintiff's fuse box was located in such a position on the wall that an object to stand upon was a necessity if the box were to be reached. It makes no difference that defendant may have been under no duty to supply such an object since the jury could find that it chose to do so. Defendant then was under an affirmative duty to use reasonable care to see that the stool it provided was safe for the purpose for which it was to be used (Prosser, Torts [3d ed.], § 63, pp. 418-420). The fact that other tenants could have used or did use the stool for the intended purpose does not render its sudden collapse under normal usage less susceptible of an inference of defendant's negligence (cf. Kane v. Jack & Betty Realty Corp., 14 A D 2d 885). Accordingly, on this record, the jury was free to find that defendant was at all times in possession and control of the area in question; that defendant supplied this stool for the use of its tenants; that plaintiff was lawfully in the area and was injured while properly employing the stool thus furnished to him by defendant; and that the collapse of the stool was an accident which does not ordinarily occur in the absence of negligence. The fact that other parties similarly had been invited to use the stool does not so weaken the inference of defendant's negligence with respect to this particular kind of accident as to render the above-mentioned doctrine inapplicable.

Id. Here, as in Nosowitz, a trier of fact could find that defendants were in control of the stool, that it was provided for plaintiff's use in cleaning the apartment, and that the collapse of the stool was an accident which does not ordinarily occur in the absence of negligence. That being said, however, whether the Court will actually give the jury a charge on res ipsa

loquitur,<sup>1</sup> NY PJl 2:65, is a decision that will be made at the time of trial.

Accordingly, it is hereby

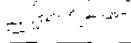
ORDERED that defendants' motion for an order granting summary judgment is DENIED.

This constitutes the Decision and Order of the Court.

March 22, 2007

ENTER

SO ORDERED

  
\_\_\_\_\_  
Rolando T. Acosta, J.S.C.

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1. Res ipsa loquitur does not create a presumption of negligence, it merely permits the jury to infer negligence from the circumstances of the occurrence. Morejon v Rais Construction Co., 7 N.Y.3d 203, 209 (2006). Indeed, even in the absence of rebuttal, the jury is not bound to draw the inference of negligence. Id.; Kambat v. St Francis Hospital, 89 N.Y.2d 489 (1997).