

**Torres v Verizon N.Y. Inc.**

2007 NY Slip Op 32850(U)

August 20, 2007

Supreme Court, Kings County

Docket Number: 0035422/2005

Judge: Leon Ruchelsman

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : CIVIL TERM: PART 16

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MICHELLE TORRES & AXEL TORRES,  
Plaintiffs, Decision and order

- against - Index No. 35422/05

VERIZON NEW YORK INC., & CLEON SIMPSON,  
Defendants, August 20, 2007

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PRESENT: HON. LEON RUCHELSMAN

The plaintiff has moved for summary judgment pursuant to CPLR §3212 seeking judgement. The defendant opposes the motion and papers were submitted by both parties. Upon reviewing the arguments of both parties this court now makes the following determination.

Background

On June 7, 2005 the defendant Cleon Simpson was working on the Seventh floor of 43 Sumner Avenue in Kings County as an employee of defendant Verizon repairing the telephone service of one of the apartments in the building. While there, the defendant placed a cardboard box on the window sill of the apartment. Inside the box were copper wires and other materials estimated at a weight of approximately twenty pounds. The defendant, while retrieving something from the box caused the box to fall and injure plaintiff on the street down below. This lawsuit was commenced and discovery materials were exchanged. Following discovery the plaintiff now moves for summary judgement

arguing that as a matter of law the defendant was negligent in the placement of the box on a window sill and in allowing the box to fall. The defendant argues that whether he committed negligence is a question which can only be resolved by a trier of fact and that consequently summary judgement must be denied.

#### Conclusions of Law

Summary judgment may be granted where the movant establishes sufficient evidence which would compel the court to grant judgment in his or her favor as a matter of law (Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 [1980]). Summary judgment would thus be appropriate where no right of action exists foreclosing the continuation of a lawsuit.

The doctrine of res ipsa loquitur is often utilized to prove negligence in falling object cases (see, generally, Corcoran v. Banner Super Market Inc., 19 NY2d 425, 280 NYS2d 385 [1967]). It is well settled that to establish negligence based upon this doctrine it must be proven that the event was something that does not ordinarily occur without negligence, the instrumentality was in the exclusive control of the defendant and the plaintiff did not in any way contribute to the accident (States v. Lourdes Hospital, 100 NY2d 208, 762 NYS2d 1 [2003]). However, the doctrine is one of evidence, permitting an inference of negligence, not a presumption of negligence, thus it is

generally not appropriate to utilize the doctrine on a motion for summary judgement (Martinez v. New York, 292 AD2d 349, 738 NYS2d 383 [2d Dept., 2002]). There are instances, however, where the inference of negligence based upon the doctrine is so compelling as to render the defendant unable to adequately rebut the inference at all (Thomas v. New York University Medical Center, 283 AD2d 316, 725 NYS2d 35 [1<sup>st</sup> Dept., 2001]). In Thomas, the court held that the inference was so strong where a patient under anaesthesia fell off an operating table, since it was virtually impossible to explain how that could happen without some negligence.


In this case, likewise, the inference of negligence is apparent and indeed can best be described as inescapable. Moreover, last term the Court of Appeals revisited this issue, namely whether res ipsa loquitur is sufficient to grant summary judgement. The court in Morejon v. Rais Construction Company, 7 NY3d 203, 818 NYS2d 792 [2006] noted that while such a scenario is possible it is a "rare event". In Morejon, some building material allegedly fell off the roof and injured plaintiff. The Appellate Division had held that res ipsa could never be utilized to permit summary judgement (see, Morejon v. Rais Construction Company, 18 AD3d 632, 795 NYS2d 654 [2d Dept., 2005]). The Court of Appeals rejected a categorical denial of the use of the doctrine for summary judgement purposes but noted that it should

be used sparingly, only "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". Thus, the Court of Appeals explained that if the circumstantial evidence creates a question of fact concerning the defendant's negligence, then summary judgement should be denied. The events of this case call for this rare application of the doctrine of res ipsa to prove and hence grant summary judgement. The defendant has not raised any issue which can possibly eliminate any negligence on his part. Specifically, there are no questions whether the defendant's conduct can be characterized as negligent and no question that all the res ipsa elements have been satisfied. Therefore, the motion seeking summary judgement is hereby granted.

So ordered.

ENTER:

DATED: August 20, 2007  
Brooklyn N.Y.

  
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Hon. Leon Ruchelsman  
JSC