

Luthmann v Messbauer
2007 NY Slip Op 33262(U)
October 10, 2007
Supreme Court, Richmond County
Docket Number: 0101229/2005
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND**

PART DCM 3

Index No.: 101229/2005

Motion No.: 3

VANESSA LUTHMANN,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

LINDA MESSBAUER,

Defendant

The following items were considered in the review of this motion for summary judgment

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Papers	3
Exhibits	Attached to Papers
Memorandum of Law	

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The defendant moves this court for an order pursuant to CPLR § 3212 granting summary judgment and dismissing the complaint. The plaintiff opposes this motion

This is an action for personal injuries allegedly sustained by the plaintiff on January 27, 2004 when the plaintiff was allegedly shocked by electricity in the apartment she leased from the defendant, Linda Messbauer. According to the plaintiff's deposition testimony, at the time of the accident, she was renting the second floor apartment of a two family home owned by the defendant and located at 75-11 198th Street, Queens, New York. At the time of the accident, she had lived in the apartment with her ex-boyfriend, Nicholas Laino, for approximately six months. Specifically, the plaintiff was electrically shocked from a light switch while she was attempting to turn on the light in the living room of the apartment. The switch controlled a track lighting ceiling fixture. The plaintiff further testified that she or her ex-boyfriend changed the light bulbs using 100 watt bulbs

in the track lighting very close in time to the date of the accident. As a result of the electric shock, the plaintiff stated that she was thrown backwards and blacked out. After "911" was called, she was transported to Flushing Hospital Medical Center where she was admitted for two days suffering from chest pains.

The defendant testified that she owned the premises where the accident occurred and that as soon as she found out about the incident and the subsequent allegation that there was something wrong with the electrical system, she hired an electrician to inspect and repair, if necessary, any problem. The electrician found that there was no evidence of any kind of burned wires, smoke or water damage, or any other kind of malfunction. The electrician also informed the defendant that incorrect bulbs were installed in the track lighting fixture.

The defendants, in making this motion, rely upon the affidavit of their electrical expert, James M. Pryor, B.S.E.E.T.¹ from Cesco, Inc. Electrical Consulting. Mr. Pryor stated that based upon the examination that he conducted, there was no evidence which led to a conclusion that an electrical fault at the subject light switch created an electric shock. Mr. Pryor found "no evidence available for our investigation which leads to a conclusion that an electrical fault at a deco style wall switch, located with the living room of a second floor apartment, created an electrical shock." Furthermore, he stated that "due to the fact that the deco style wall switch, located within the living room of a second floor apartment, and the plastic cover plate placed over the wall switch were both made of nonconductive material, the only point of a return electrical path for a static shock would be the two screws used to mount the plastic cover plate to the wall switch." However, there was "no evidence which indicated an electrical shock created by an energized mounting screw, as a result of an electrical fault, occurred."

¹Bachelor's of Science in Electrical Engineering Technology.

Here, the defendant landlord has the duty of using reasonable care in view of all of the circumstances to maintain its premises in a safe condition.² For the plaintiff to establish a cause of action sounding in negligence, they must prove that the premises were not maintained in a reasonably safe condition and that there was a malfunction in the electrical system. In support of their motion to dismiss, the defendant relies upon the conclusions of both the electrician hired to repair the alleged electrical problems, as well as the affidavit from the defendant electrical engineer which stated that the subject wall switch did not create an electrical shock.

A motion for summary judgment must be denied if there are “facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. “Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion.”³ The court’s role upon a motion for summary judgment is one of issue finding rather than issue determination.⁴ Summary judgment should not be granted where there is any doubt as to the existence of a triable issue or where the existence of an issue is arguable.⁵ Once the moving party has made a showing of sufficient evidence, the burden shifts to the party opposing summary judgment to put forth evidence in admissible form to establish a triable issue of fact.⁶

In opposition, the plaintiff does not submit evidence to establish a triable issue of fact, but instead argues that this case should be controlled and decided by the legal doctrine of *Res Ipsa Loquitor*. Specifically, the plaintiff argues that where the specific cause of an accident is unknown, the Court or a Jury may infer negligence merely from the happening of an event and the defendant’s relation to it.

²*Basso v. Miller*, 40 NY2d 233 [1970].

³ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

⁴ *McKinney v. Setteducatti*, 183 AD2d 879 [2d Dept 1992].

⁵ *American Home Assurance Co., v. Amerford International Corp*, 200 AD2d 472 [1st Dept 1994].

⁶ *Zuckerman v. City of New York*, 49 NY2d 557 [1980].

To rely upon *res ipsa loquitor*, the plaintiff must prove that 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.⁷ This theory fails on all three elements.

Assuming *arguendo* that the plaintiff was indeed shocked, an electrical shock can and does regularly occur in the absence of someone's negligence. Moreover, the second element is fatal to the plaintiff's argument. The subject light switch was not an instrumentality within the exclusive control of the defendant. The plaintiff resided in the apartment where the alleged shock occurred. The plaintiff used the light switch on a regular basis. And, the defendant did not have access to the light switch unless the plaintiff let her into the apartment. Therefore, the plaintiff, and not the defendant, had exclusive control of the light switch. Finally, the third element fails as the plaintiff admitted at her deposition that either she or her ex-boyfriend changed the light bulbs in the tract lighting connected to the outlet close in time to the date of the accident, which according to the electrician hired after the incident, were the wrong light bulbs.

Accordingly, it is hereby:

ORDERED, that the defendant's motion for summary judgment is granted and this action is dismissed.

ENTER,

DATED: October 10, 2007

Joseph J. Maltese
Justice of the Supreme Court

⁷ *Kambat v. St. Francis Hospital* 89 NY2d 489 [1997].