

**Jappa v Starrett City, Inc.**

2008 NY Slip Op 30831(U)

February 19, 2008

Supreme Court, Kings County

Docket Number: 0037515/2005

Judge: Bernadette Bayne

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At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, Brooklyn, New York, on the 19th day of February 2008.

P R E S E N T:

HON. BERNADETTE BAYNE

Justice.

\_\_\_\_\_  
YVONNE JAPPA,

Plaintiff,

- against -

STARRETT CITY, INC.

\_\_\_\_\_  
Defendant.

**DECISION AND ORDER**

Index No. 37515/05

The following papers numbered 1 to 5 read on this motion:

Papers Numbered

Notice of Motion/ Affidavits (Affirmations) Annexed_____	_____ 1 _____
Notice of Cross- Motion/ Affidavits (Affirmations) Annexed_____	_____ 2 _____
Affirmations in Opposition_____	_____ 3 _____
Reply Affirmations_____	_____ 4-5 _____

Plaintiff in the instant action claims that she was injured while standing in the lobby of her apartment building when, while waiting for an elevator, a ceiling tile and/or other pieces of the ceiling, fell and struck her in the head, neck, shoulder and arm. The aforementioned building,

located at 1430 Freeport Loop, in Brooklyn, New York, was owned by the defendant. The defendant also admits that, at least on the date of the plaintiff's accident, they maintained, inspected and were responsible for repairs at the aforementioned premises. In her summons and complaint as well as her bill of particulars, the plaintiff alleges that the defendant was negligent and that the defendant had both actual and constructive notice of the defective condition that caused the plaintiff's accident. In the defendant's verified answer, they deny any negligence on their part, and they also deny that an accident occurred that resulted in injuries to the plaintiff. Defendant now moves for summary judgment on the issue of liability, pursuant to CPLR §3212, on the grounds that they did not have any notice, either actual or constructive, of any alleged condition that the plaintiff claims caused her to be injured, and as such, the defendants contend that the plaintiff cannot establish a prima facie case of negligence warranting judgement in their favor as a matter of law.

Plaintiff, in opposition to the motion, cross moves this Court for an Order pursuant to CPLR §3025, giving plaintiff leave to amend her bill of particulars to include a new theory of negligence based upon the doctrine of *res ipsa loquitur*. Plaintiff argues that if she is permitted to amend her bill of particulars, she can prove the elements required to establish a prima facie case of negligence on the theory of *res ipsa loquitur*, which she contends would or should also defeat the defendant's motion for summary judgement.

#### **Summary judgment standard**

The proponent of summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980); Sillman v Twentieth Century-Fox

Film Corp., 3 NY2d 395, 404 (1957). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. Matter of Redemption Church of Christ v Williams, 84 AD2d 648, 649 (3d Dept 1981); Greenburg v Manlon Realty, 43 AD2d 968, 969 (2d Dept 1974); Winegrad v New York University Medical Center, 64 NY2d 851 (1985).

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co., 168 AD2d 610 (2d Dept 1990). Summary judgment shall be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law. Friends of Animals, Inc., v Associated Fur Mfrs., 46 NY2d 1065 (1979).

### Discussion

It is well settled in New York State that a landowner has a duty to keep the land reasonably safe for persons on the land, Basso v. Miller, 40 N.Y.2d 233, 386 N.Y.S.2d 564, 568, 352 N.E.2d 868 (1976). For a landowner to be liable to a person on the land for an injury caused by a condition on the land, the plaintiff must establish three basic elements (aside from causation and injury): a dangerous condition existed on the land; the owner created or had notice of the condition; and the owner failed to take reasonable measures to protect persons on the land from the condition. A landowner's duty regarding dangerous conditions on the land exists regardless of the cause or nature of the condition. Liability may attach to a landowner whether the danger is posed by a man-made structure or device on the land, or arises from such commonplace circumstances as the

spilling of liquid, or the accumulation of debris. See generally, Drake v. State, 97 Misc.2d 1015, 416 N.Y.S.2d 734, (Ct.Cl.1979), aff'd on the opinion below, 75 A.D.2d 1017, 432 N.Y.S.2d 676 (4<sup>th</sup> Dept., 1980); Buckowski v. Smith, 185 A.D.2d 556, 586 N.Y.S.2d 386, (3<sup>rd</sup> Dept., 1992); Schechtman v. Lappin, 161 A.D.2d 118, 554 N.Y.S.2d 846, (1<sup>st</sup> Dept., 1990); Goslin v. La Mora, 137 A.D.2d 941, 525 N.Y.S.2d 66, (3<sup>rd</sup> Dept., 1988); Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 622 N.Y.S.2d 493, 646 N.E.2d 795 (1994); Downey v. R.W. Garraghan, 198 A.D.2d 570, 603 N.Y.S.2d 222, (3<sup>rd</sup> Dept., 1993); Farina v. A.R.A. Servs., Inc., 151 A.D.2d 456, 542 N.Y.S.2d 246, (2<sup>nd</sup> Dept., 1989); Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 501 N.Y.S.2d 646, 492 N.E.2d 774 (1986).

Of course, the mere fact that a dangerous condition exists on a piece of property does not automatically make the owner liable for injury caused by the condition. A property owner is not an insurer of the safety of those on the land. Thus, in light of the owner's duty to exercise only reasonable care, liability normally attaches only where the owner had actual or constructive notice of the dangerous condition. See Barnaby v. Rice, 75 A.D.2d 179, 428 N.Y.S.2d 973, (3<sup>rd</sup> Dept., 1980); Piacquadio v. Recine Realty Corp., 622 N.Y.S.2d at 494; Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647; Santoni v. Bertelsmann Property, Inc., 21 A.D.3d 712, 800 N.Y.S.2d 676 (1<sup>st</sup> Dept., 2005); Zanki v. Cahill, 2 A.D.3d 197, 768 N.Y.S.2d 471 (1<sup>st</sup> Dept., 2003); Katz v. Seminole Realty Corp., 10 A.D.3d 386, 780 N.Y.S.2d 778 (2<sup>nd</sup> Dept., 2004). A landowner has constructive knowledge of a dangerous condition only where the condition is "visible and apparent" and existed for a sufficient period of time so that the owner should have discovered it, Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647. However, a property owner's general awareness that a dangerous condition may exist does not constitute notice of a

particular dangerous condition, Piacquadio v. Recine Realty Corp., 622 N.Y.S.2d at 494; Gordon v. American Museum of Natural History, supra.

Even where a property owner has no actual or constructive notice of a dangerous condition on the land, the owner is liable for injuries caused by the condition where the owner's negligence, or the negligence of another person acting for the owner, created the condition, Russell v. New York City Housing Authority, 194 A.D.2d 505, 599 N.Y.S.2d 576, (1<sup>st</sup> Dept., 1993); Lewis v. Metropolitan Transportation Authority, 99 A.D.2d 246, 472 N.Y.S.2d 368, (1<sup>st</sup> Dept., 1984); *see also* Gordon v. American Museum of Natural History, supra.

Where a landowner has a duty to take measures with respect to a dangerous condition and that duty is based on actual or constructive notice of the condition, the owner must act within a reasonable time of receiving the notice. Whether the time interval is reasonable depends on such factors as how soon someone on the land is likely to encounter the danger, and how serious a resulting injury is apt to be; Gordon v. American Museum of Natural History, 501 N.Y.S.2d at 647.

In the present case, the defendant claims that there is no proof that it had any notice, either actual or constructive, of any alleged condition that plaintiff claims caused her injury. Defendant argues that the plaintiff's bill of particulars is silent on the issue of actual notice, and that at her deposition, the plaintiff admitted that she never complained about or reported any defective condition regarding the ceiling tiles to the defendant. Defendant further argues that despite the plaintiff's allegation of constructive notice, she fails to state the specific dangerous condition, or specify how the defendant knew about it. The evidence proffered by the defendant is sufficient for proving as a matter of law that they are entitled to summary judgement, pursuant to CPLR §3212,

and as such, the burden shifts to the plaintiff to submit proof as to why the motion should not be granted.

Plaintiff, in opposition to the defendant's motion, cross moves this Court for an Order granting her leave to amend her bill of particulars to assert a theory of negligence pursuant to the doctrine of *res ipsa loquitur*. Plaintiff further argues that if she is permitted to assert *res ipsa loquitur* as a theory of negligence, she can prove the three elements necessary to make a prima facie case, thereby defeating the defendant's motion.

The doctrine of *res ipsa loquitur* constitutes a specialized application of circumstantial evidence to cases with a particular set of characteristics. The doctrine is based on the understanding, derived from everyday experience, that certain accidents normally do not occur in the absence of someone's negligence. *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 501 N.Y.S.2d 784, 492 N.E.2d 1200, (1986). The doctrine enables the plaintiff to establish a *prima facie* case with a combination of circumstantial evidence and judicial notice of common experience. In New York, the doctrine does not shift the burden of proof to the defendant, so as to require the jury to find for the plaintiff unless the defendant produces certain evidence. It does not create a conclusive presumption of negligence. Rather, when *res ipsa loquitur* applies, the doctrine permits, but does not require, the jury to draw an inference of negligence when the defendant adduces no evidence tending to negate the propriety of the inference. *Dermatossian v. New York City Transit Auth.*, *supra*. If the defendant does adduce evidence tending to establish that the injury was not caused by any negligence on its part, then the jury considers that evidence, together with the plaintiff's evidence and the permissible inference, to determine whether the plaintiff has sustained the burden of proving by a preponderance of the evidence that the defendant's negligence

caused the plaintiff's injury. George Foltis, Inc. v. City of New York, 287 N.Y. 108, 38 N.E.2d 455, 459 (1941). *See also* Walden v. Otis Elevator Co., 178 A.D.2d 878, 577 N.Y.S.2d 732, (3<sup>rd</sup> Dept., 1991); Williams v. Swissotel New York, Inc., 152 A.D.2d 457, 542 N.Y.S.2d 651, (1<sup>st</sup> Dept., 1989). The plaintiff may simultaneously rely on the doctrine and on alternative theories of proving negligence. Hryciuk v. 120 Wall Co., 201 A.D.2d 254, 607 N.Y.S.2d 28, (1<sup>st</sup> Dept., 1994); Valentine v. Armor Elevator Co., 155 A.D.2d 597, 547 N.Y.S.2d 656, (2<sup>nd</sup> Dept., 1989); Kerber v. Sarles, 151 A.D.2d 1031, 542 N.Y.S.2d 94, (4<sup>th</sup> Dept., 1989). Nevertheless, since the doctrine is only a special application of the law of circumstantial evidence, no particular problem arises if the jury renders a general verdict of negligence based on *res ipsa loquitur*. Nesbit v. New York City Transit Auth., 170 A.D.2d 92, 574 N.Y.S.2d 179, (1<sup>st</sup> Dept., 1991).

The doctrine of *res ipsa loquitur* often applies in cases of falling objects. Dittiger v. Isal Realty Corp., 290 N.Y. 492, 49 N.E.2d 980, (1943). An object normally does not fall from a building onto pedestrians or vehicles on the street or sidewalk in the absence of someone's negligence. *See, e.g.*, Mejia v. New York City Transit Authority, 291 A.D.2d 225, 737 N.Y.S.2d 350, (1<sup>st</sup> Dept., 2002) where a plaintiff was injured when he was struck by a piece of ceiling as he waited on a subway platform. The court ruled that the doctrine of *res ipsa loquitur* was applicable and that it was not necessary for the plaintiff to establish that defendant had notice of the defective condition. In Kaplan v. New Floridian Diner, 245 A.D.2d 548, 667 N.Y.S.2d 65, (2<sup>nd</sup> Dept., 1997) the Court ruled that refusal to instruct a jury on *res ipsa loquitur* was error in a customer's action against a restaurant to recover for injuries sustained when the ceiling fell on him. In Pavon v. Rudin, 254 A.D.2d 143, 679 N.Y.S.2d 27 (1<sup>st</sup> Dept., 1998) a cleaning worker was injured when she was hit on the head by a door after the top pivot hinge broke or tore from the wall. The Court ruled

that the tenant was liable for the plaintiff's injuries when the tenant had responsibility for everyday maintenance and repairs, and the tenant initiated renovations of the office and hired the contractors who installed the door. Since the tenant was in exclusive control of the premises, the Court held that the plaintiff could rely on *res ipsa loquitur* to establish a submissible case.

Generally, the doctrine of *res ipsa loquitur* applies when the plaintiff establishes three elements. First, the event must be of the kind which ordinarily does not occur in the absence of someone's negligence. Second, the event must be caused by an agency or instrumentality within the exclusive control of the defendant. Finally, the accident must not have been due to any voluntary action or contribution by the plaintiff. Dermatossian v. New York City Transit Auth., supra.

The Court is satisfied that the plaintiff can satisfy the first element because it seems clear that pieces of a ceiling, or ceiling tiles, do not ordinarily fall from the ceiling in the absence of someone's negligence. The second element of *res ipsa loquitur* requires that the accident be caused by an agency or instrumentality within the exclusive control of the defendant. This is the element which proves that defendant caused the plaintiff's injury. Corcoran v. Banner Super Market, Inc., 19 N.Y.2d 425, 280 N.Y.S.2d 385, 387, 227 N.E.2d 304 (1967). The courts apply this element in a flexible manner. The element, like the doctrine itself, requires a likelihood, not a certainty, that the defendant is the negligent party. Dermatossian v. New York City Transit Auth., supra; Corcoran v. Banner Super Market, Inc., supra. In Rountree v. Manhattan & Bronx Surface Transit Operating Auth., 261 A.D.2d 324, 692 N.Y.S.2d 13 (1<sup>st</sup> Dept., 1999) a bus passenger was injured when the bus on which she was a passenger came to a sudden, violent stop and she was thrown 20 feet across the bus. In ruling that a *res ipsa loquitur* instruction was proper, the Court

concluded that while sudden jerks and stops are normal, there is a point at which such movements are so unusually forceful that they give rise to a presumption of negligence. The exclusive control requirement was applied flexibly, so that this requirement did not preclude the application of the doctrine in the case of an unusually abrupt stop.

In certain cases where the facts make the inference of defendant's negligence particularly strong, the courts permit the use of the doctrine, even though the accident could in theory have been caused, but very likely was not caused, by the conduct of the plaintiff or a third party. Thus, although the sudden separation of a chair leg from a chair in a restaurant could have been caused by the single or combined effect of the conduct of the plaintiff, prior customers who used the chair, and/or the manufacturer, *res ipsa loquitur* is still appropriate in such a case against the entity primarily in control of the chair and primarily responsible to the plaintiff—the restaurant. Notwithstanding those theoretical possibilities of a third party's or plaintiff's negligence, such a sudden collapse ordinarily would not occur in the absence of the negligence of the restaurant. Finocchio v. Crest Hollow Club at Woodbury, Inc., 184 A.D.2d 491, 584 N.Y.S.2d 201, (2<sup>nd</sup> Dept., 1992).

In this case, the evidence proves that the defendant has exclusive control of the ceiling where the accident occurred. The defendant's witness, Carlos Deleon, testified at his deposition that he and his co-workers were responsible for fixing "anything that's broken in the building", including ceilings. Despite the defendant's argument that the plaintiff may have used her cane to hit or poke the ceiling, or that someone else may have tampered with the ceiling, there is no proof of this at all, and as such, the Court concludes that the second element required for *res ipsa loquitur* to be applied is satisfied.

The third element of *res ipsa loquitur* requires the absence of contributory culpable conduct on the part of the plaintiff. As stated earlier, there is no evidence of any negligent conduct on the part of the plaintiff that could have contributed to the happening of this accident, and as such, the third element required to charge *res ipsa loquitur* is also satisfied.

As it has been established that the plaintiff can satisfy the three elements necessary for the theory of *res ipsa loquitur* to be given to the jury, we turn to the issue of plaintiff's request for leave to amend her bill of particulars to include a theory of negligence based on *res ipsa loquitur*.

CPLR §3042(b) allows the bill of particulars to be amended one time as of right, provided the amendment is made prior to the filing of the note of issue. Presumably this amendment can make any change in the bill of particulars, just as an amendment as of course can make any change in a pleading under CPLR §3025(a). The latter is restricted in time to the outset of the action, while CPLR §3042(b) keeps the bill of particular's amendment time open during the whole pre-note of issue period. If the amended bill of particulars introduces a substantial change, the other side may still resort to the disclosure devices to prepare to meet it. If the note of issue has been filed, cutting off an amendment as of right, or if the of-right amendment has already been used up even though the note of issue has not yet been filed, or if the time for the of-right supplement of the damages claims in a personal injury case has expired, court leave will be required for any change in the bill of particulars. The standard used by the courts in considering whether to allow an amendment after the note of issue has been filed is generally that applicable to the pleading itself under CPLR 3025(b). Maloney v. Union Free School Dist. No. 7, 46 A.D.2d 789, 360 N.Y.S.2d 699, (2<sup>nd</sup> Dept., 1974). In the absence of prejudice the motion should be freely granted. Kerlin v. Green, 36 A.D.2d 892, 320 N.Y.S.2d 200, (4<sup>th</sup> Dept., 1971). In fact, the absence of prejudice, such

as where the party had knowledge all the while of just what it is that her adversary wants to add to the bill, may make it an abuse of discretion to refuse the amendment. Ackerman v. City of New York, 22 A.D.2d 790, 253 N.Y.S.2d 775, (2<sup>nd</sup> Dept., 1964).

From the outset, it should be noted, that there is no requirement that *res ipsa loquitur* be pled in either the summons and complaint, or in the bill of particulars. In fact, in Weeden v. Armor El. Co., 97 A.D.2d 197, 468 N.Y.S.2d 898, (2<sup>nd</sup> Dept., 1983), the Court held that “neither the plaintiff’s failure to specifically plead *res ipsa loquitur* nor the allegation of specific acts of negligence, along with a general allegation thereof, by way of the complaint as amplified by the bill of particulars, constitutes a bar to the invocation of *res ipsa loquitur* where the facts warrant its application.” See also, Abbott v. Page Airways, 23 N.Y.2d 502; O’Connor v. Circuit City Stores, Inc., 14 A.D.3d 676, 789 N.Y.S.2d 252, (2<sup>nd</sup> Dept., 2005); Ladd v. Hudson Val. Ambulance Serv., 142 A.D.2d 17, 534 N.Y.S.2d 816; Butler v. Martins, 10 Misc.3d 1064(A), 814 N.Y.S.2d 560, 2005 WL 3501583, (2005).

Despite the fact that it is not required, the Court is nevertheless inclined to grant the plaintiff’s motion to amend her bill of particulars to assert *res ipsa loquitur*. Although the note of issue has already been filed in this case, the defendants have failed to adequately demonstrate in what way they would be prejudiced if the amendment is permitted. Unlike a scenario where a plaintiff is seeking to allege new or different injuries, which would almost automatically entitle the defendant to further discovery, in this case, no further discovery is necessary, or if it is, the defendants have failed to state what discovery they require. In fact, defendant’s argument that they will be prejudiced by the amendment because they have not prepared a defense to the theory of *res ipsa loquitur* is belied by the fact that their defense has already been spelled out in detail in their

opposit on and reply papers to the within motions. The jury is still free to reject the inference of negligence and the defendants are still free to present evidence that would tend to show or prove that the jury should reject the inference of negligence afforded by the doctrine of *res ipsa loquitur*.

As such, the plaintiff's cross-motion to amend her bill of particulars to include a theory of negligence based upon *res ipsa loquitur* is granted, and as the plaintiff has successfully demonstrated that she can satisfy all three of the elements required for *res ipsa loquitur* to apply and be charged to the jury, the defendant's motion for summary judgement is denied.

### Conclusion

Accordingly, it is

**ORDERED**, that the motion of defendant for summary judgement and dismissal of the within action on the grounds that plaintiff cannot prove that the defendant had either actual or constructive notice of the condition of the alleged condition that caused her injury is denied, and it is further,

**ORDERED**, that the cross motion of the plaintiff seeking leave to amend her bill of particulars to assert a theory of negligence based upon the doctrine of *res ipsa loquitur* is granted.

This constitutes the Decision and Order of the Court.

E N T E R

  
HON. BERNADETTE BAYNE  
J. S. C.

**HON. BERNADETTE BAYNE**