

**Murillo v Rosen Group Props.**

2008 NY Slip Op 31176(U)

April 22, 2008

Supreme Court, New York County

Docket Number: 0107381/2006

Judge: Carol R. Edmead

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

PRESENT: ~~HON. CAROL EDMEAD~~

PART 35

Index Number : 107381/2006

MURILLO, HAYDEE

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

vs

ROSEN GROUP PROPERTIES

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

Sequence Number : 002

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

SUMMARY JUDGMENT

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

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

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

This motion is decided in accordance with the accompanying Memorandum Decision and is hereby

ORDERED that the motion of defendants The Joseph Rosen Foundation, s/i/h/a Jos Rosen Foundation and Williams Real Estate Co., Inc. s/i/h/a GVA Williams Real Estate Co., for an order granting summary judgment in their favor is **denied in its entirety**; and it is further

ORDERED that counsel for defendants The Joseph Rosen Foundation, s/i/h/a Jos Rosen Foundation and Williams Real Estate Co., Inc. s/i/h/a GVA Williams Real Estate Co. shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

Dated: 4/22/08

*[Handwritten Signature]*

J.S.C.

Check one:  FINAL DISPOSITION  ~~FINAL DISPOSITION~~ NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

PAPERS NUMBERED  
**FILED**  
APR 23 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 35

\_\_\_\_\_  
HAYDEE MURILLO, x

Plaintiff,

-against-

ROSEN GROUP PROPERTIES<sup>1</sup>, JOS ROSEN  
FOUNDATION, INC., GVA WILLIAMS REAL ESTATE  
CO., ATELIERS DANIELLE GISIGER and  
DANIELLE GISIGER<sup>2</sup>,

Defendants.

\_\_\_\_\_  
EDMEAD, J.S.C. x

Index No. 107381/06

**DECISION/ORDER**

**FILED**  
APR 23 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**MEMORANDUM DECISION**

Defendants The Joseph Rosen Foundation, s/i/h/a Jos Rosen Foundation (the “Foundation”) and Williams Real Estate Co., Inc. s/i/h/a GVA Williams Real Estate Co. (“GVA”) (the “moving defendants”), move for an order, pursuant to CPLR 3212, granting summary judgment in their favor, dismissing the complaint of plaintiff Haydee Murillo (“plaintiff”).

This is an action to recover damages for bodily injuries allegedly sustained by plaintiff as a result of an accident that occurred at approximately 2:00 p.m. on June 24, 2003 inside the 5<sup>th</sup> floor premises of her employer, defendant Ateliers Danielle Gisiger (“ADG”), which is in a building located at 152 West 25<sup>th</sup> Street, New York, NY (the “subject premises”). At that time, one end of a fluorescent light fixture which was hanging from the ceiling, swung down and

<sup>1</sup> The action against defendant Rosen Group Properties was previously dismissed by Order.

<sup>2</sup> The action against defendants Ateliers Danielle Gisiger and Danielle Gisiger has been previously discontinued.

struck the plaintiff.

The Foundation was at the time of the accident and still is the owner of the subject premises and GVA was at the time of the accident and still is the property manager.

*Moving Defendants' Contentions*

Other than testifying about the happening of the incident involving the light fixture that had been hanging from the ceiling above her work area, and her uncertainty as to the size or shape of the light fixture, plaintiff had no knowledge as to when the light fixture was installed or how long the fixture had been in place prior to her accident. According to the deposition testimony of Walter R. Thomassen ("Thomassen"), senior manager in the operations and engineering department of GVA, responsible for the management of the subject premises, he had no knowledge as to who had installed the light fixture that was involved in the plaintiff's accident. According to the deposition testimony of Danielle Gisiger ("Gisiger"), who is self employed in the business ADG, she has been in business for 25 years and in the subject premises since September of 1996. Other than the work done prior to her moving into the space and to make repairs necessitated by a burglary and to change light bulbs, she did not recall anyone from the building doing any work in her space. She had no complaints about the light fixtures from the time of her taking occupancy to the day of the accident.

Based on the foregoing, The Joseph Rosen Foundation, s/i/h/a Jos Rosen Foundation, and Williams Real Estate Co., Inc., s/i/h/a GVA Williams Real Estate Co., did not have any notice of any dangerous or defective condition regarding the ceiling or the light fixture and, therefore, have no liability to the plaintiff. There is not one scintilla of evidence that the moving defendants had any notice that any condition involving the ceiling or the light fixtures in the 5<sup>th</sup> floor space

occupied by ADG was even remotely dangerous or defective.

Indeed the tenant in the space ADG, took occupancy of the space in an "as is" condition and not once during the course of its occupancy complained about the ceiling or the light fixtures that were present in the space since 1996. Thus, if the tenant in the space had no notice of a dangerous or defective condition involving the ceiling or the light fixtures in the 5<sup>th</sup> floor space occupied by ADG, then the building owner and its managing agent certainly could not and would not have such notice.

*Plaintiff's Opposition*

The instant motion should be denied because material issues of fact exist which can only be resolved at trial. These factual issues include whether the defendants had constructive notice that the hanging fixture that fell from the ceiling and struck the plaintiff was defectively installed so as to constitute a hazard to third parties.

The lighting fixture was open and visible. It was a hanging fixture that extended down on a chain link line down from the ceiling. There were no visible obstructions to the actual physical structure of the fixture including its anchoring such as a drop ceiling. There was nothing to block one's view or to conceal the way it was anchored to the ceiling.

As conceded by the defendant's property manager in his deposition, the fixture was incorrectly installed. The certified copy of the paid invoice made out by JIM Electric Corp., to GVA, dated June 26, 2003, states: "Fixtures were not installed the correct way." Notwithstanding any negligence issue, the invoice establishes that there was constructive notice. According to Thomassen, "they were installed incorrectly, which means it could be like nailed to the ceiling." This concession is certainly sufficient to allow a jury to conclude the exact same

thing.

When the tenant of the premises Gisiger began to occupy the space in 1996, the hanging light fixture was already in place and she neither altered nor maintained it.

It is clear that it was the defendant GVA that exercised control over the hanging light fixture by virtue of its hiring of an electrician to repair it within two days of the accident. GVA never charged back its tenant Gisiger for the repair. Thomassen's statement in his deposition that usually a tenant would be responsible for such an event is belied by the actual actions undertaken by the property manager in hiring and paying for the repair. If the defect were visible and obvious, as attested to in the invoice of the electrician, constructive notice of the defect has been established.

Plaintiff further submits that the defendants are liable for her injuries pursuant to the doctrine of *res ipsa loquitur*. Under this doctrine, an inference of negligence may be drawn from the very occurrence of an accident and defendants' relation to it.

As for the first condition under this theory, the incident should not and would not have occurred absent some kind of negligence in the initial installation of the hanging light fixture. According to Ms. Gisiger, from her deposition, the fixture detached from the ceiling. A fixture does not detach without there being some kind of negligence in the way it was installed. Ms. Gisiger stated that a screw came out. A screw coming out from a housing would not come out absent some negligence in the way it was installed. The second condition is one of exclusive control by the defendants. Exclusivity is met in that the defendants as owner had control over the light fixture as evidenced by the post accident repair. As for the plaintiff's contribution to the accident, plaintiff did not contribute to the accident because she was working on a sewing

machine at the time and the fixture fell upon her from above.

*Moving Defendants' Reply*

At no time before this accident occurred was there any awareness by the defendants that the light fixture in question was in any danger of falling down.

The observations of Mr. Thomassen, the property manager, regarding the manner in which the light fixtures were attached to the ceiling are all with the benefit of 20/20 hindsight. Such observations are irrelevant and do not establish any prior awareness on the part of the defendants.

The invoice from JIM Electric that plaintiff submits as evidence of defendants' control over the light fixture does not establish defendants' specific awareness or constructive notice that the light fixture in question was about to fall. At best, this invoice establishes a general awareness that a number of light fixtures were attached to the ceiling improperly. There is no evidence that the method of attachment, even assuming it was improper, was in any danger of falling and the light fixtures were in danger of falling down.

As to plaintiff's theory of *res ipsa loquitur*, the third element - exclusive control - has not been met.

Analysis

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient “evidentiary proof in admissible form” to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinde*, 307 AD2d 230, 762 NYS2d 386 [1<sup>st</sup> Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1<sup>st</sup> Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported “by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions” (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Notice: Actual and Constructive

"It is well settled that in order for a landlord to be held liable for injuries resulting from a defective condition upon the premises, the plaintiff must establish that the landlord had actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, it should have been corrected" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 646, 649 NYS2d 115 [citations omitted]; see *Lupi v Home Creators*, 265 AD2d 653, 696 NYS2d 291, *lv. denied* 94 NY2d 758, 705 NYS2d 5).

Once a defendant has actual or constructive notice of a dangerous condition, the defendant has a reasonable time to undertake remedial actions that are reasonable and appropriate under all of the circumstances (*see Stasiak v Sears, Roebuck & Co.*, 281 AD2d 533, 722 NYS2d 251; *LoSquadro v Roman Catholic Archdiocese of Brooklyn*, 253 AD2d 856, 678 NYS2d 347).

To constitute constructive notice, a dangerous condition must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy the condition (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also Segretti*, 256 AD2d 234, *supra*; *Lemonda v. Sutton*, 268 AD2d 383, 702 NYS2d 275 [1<sup>st</sup> Dept. 2000]; *Gutierrez v. Lenox Hill Neighborhood House, Inc.*, 4 AD3d 138, 771 NYS2d 513 [1<sup>st</sup> Dept. 2004]; *Budd v. Gotham House Owners Corp.*, 17 AD3d 122, 793 NYS2d 340 [1<sup>st</sup> Dept. 2005]). A defendant/property owner may also have constructive notice of a dangerous condition if the plaintiff presents evidence that the condition was ongoing and recurring in the area of the accident, and such condition was left unaddressed (*see Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *see also O'Connor-Miele v. Barhite & Holzinger, Inc.*, 234 AD2d 106, 650 NYS2d 717 [1<sup>st</sup> Dept. 1996]; *Colt*, 209 AD2d 294, *supra*). By contrast, a mere general awareness of the presence of some dangerous condition is legally insufficient to establish constructive notice (*see Piacquadio v. Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *see also Gordon v. American Museum of Natural History*, 67 NY2d 836, *supra*; *Segretti*, 256 AD2d 234, *supra*).

#### Duty of Care

"Negligence consists of a breach of a duty of care owed to another" (*Di Cerbo by DiCerbo v Raab*, 132 AD2d 763, 764, 516 NYS2d 995 [3d Dept 1987]). It is axiomatic that, to

establish a case of negligence, plaintiff must prove that the defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide. *De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv. dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

The concessions by the defendant's property manager, that the fixture was incorrectly installed; the certified copy of the paid invoice made out by JIM Electric Corp., to GVA, dated June 26, 2003, which states: "Fixtures were not installed the correct way"; and Thomassen's testimony that the light fixtures "were installed incorrectly, which means it could be like nailed to the ceiling," are sufficient to raise an issue of fact concerning constructive notice, and sufficient to overcome this motion for summary judgment.

#### Subsequent Repairs

The general rule is that "evidence of subsequent repairs is not discoverable or admissible in a negligence case." *Hualde v Otis Elevator Company*, 235 A.D.2d 269, 270, 652 N.Y.S.2d 38 (1st Dept.1997) *citing Klatz v Armor Elevator*, 93 A.D.2d 633, 462 N.Y.S.2d 677 (2nd Dept.1983). As noted legal scholars have observed "an opposite rule would discourage defendants from repairing dangerous conditions in order to avoid generating evidence against themselves, (see generally, 2 Wigmore, Evidence [Chadbourn rev., 1979], § 283; McCormick,

Evidence [2nd ed.], 666-669; Richardson, Evidence [10th ed.-Prince] §§ 168, 221).” *Caprara v Chrysler Corp.* 52 N.Y.2d 114, 122-123, 436 N.Y.S.2d 251, 417 N.E.2d 545 (1981).

Furthermore, this general rule applies in a negligence action because “at the heart of such an action is either affirmative conduct in creating a dangerous condition or a failure to perceive a foreseeable risk and take reasonable steps to avert its consequences, proof that goes to hindsight rather than foresight most often is entirely irrelevant and, at best, of low probative value.” *Id.* at 122, 436 N.Y.S.2d 251, 417 N.E.2d 545.

However, there are exceptions to the general rule. Evidence of subsequent repairs is widely held to be discoverable and admissible if there are issues of control and maintenance. *Klatz v Armor Elevator*, 93 A.D.2d 633, 462 N.Y.S.2d 677 *supra*.

It is unrefuted that the defendant GVA exercised control over the hanging light fixture by virtue of its hiring of an electrician to repair it within two days of the accident. GVA never charged back its tenant Gisiger for the repair. This is clear and convincing evidence of control.

#### Res Ipsa Loquitur

In *Morejon v Rais Constr. Co.*, (7 NY3d 203 [2006]) the Court of Appeal stated that the doctrine applies when

a plaintiff to whom the defendant owes a duty of care [has been injured]  
but is not in a position to prove directly what actually happened or that a  
specific act of the defendant was negligent.

The res ipsa doctrine may allow “ a jury to consider the circumstantial evidence and infer that the defendant was negligent in some unspecified way” and that the plaintiff’s injury must have been caused by that negligence.

The doctrine “does not create a presumption of negligence against the defendant. Rather,

the circumstantial evidence allows but does not require the jury to infer that the defendant was negligent . . . [and that it] does not ordinarily or automatically entitle the plaintiff to summary judgment or a directed verdict, even if the plaintiff's circumstantial evidence is unrefuted.

In support of its motion, the moving defendants failed to make a *prima facie* showing of entitlement to judgment as a matter of law ( *see Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Porter v Milhorat*, 303 A.D.2d 736, 757 N.Y.S.2d 448). A triable issue of fact exists, *inter alia*, as to whether the injury at issue was “caused by an agency or instrumentality within the exclusive control of the defendant” ( *Kambat v. St. Francis Hosp.*, 89 N.Y.2d 489, 494, 655 N.Y.S.2d 844, 678 N.E.2d 456). The moving defendants' failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of the plaintiff's opposing papers ( *see Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d at 853, 487 N.Y.S.2d 316, 476 N.E.2d 642).

That being said, plaintiff's papers are sufficient to overcome summary judgment in favor of the moving defendants, and to permit the issue of liability to proceed to the jury, relying on the theory of *res ipsa loquitur*. Plaintiff sufficiently establishes all three prongs of the test: that the accident must be of a kind that ordinarily does not occur in the absence of negligence; the instrumentality or agency causing the accident must be in the exclusive control of the moving defendants; and the accident must not be due to any voluntary action or contribution of the plaintiff. As to exclusive control, the evidence of post accident repair is sufficient evidence of control to allow the issue to go to the jury.

#### Conclusion

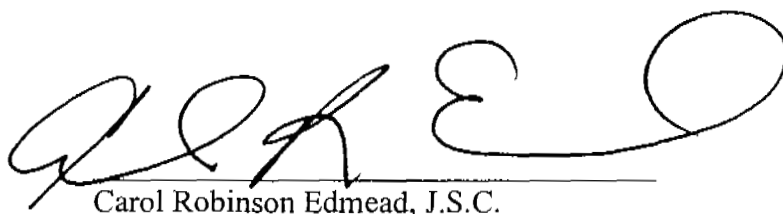
Based on the foregoing, it is hereby

ORDERED that the motion of defendants The Joseph Rosen Foundation, s/i/h/a Jos Rosen Foundation and Williams Real Estate Co., Inc. s/i/h/a GVA Williams Real Estate Co. , for an order granting summary judgment in their favor is **denied in its entirety**; and it is further

ORDERED that counsel for defendants The Joseph Rosen Foundation, s/i/h/a Jos Rosen Foundation and Williams Real Estate Co., Inc. s/i/h/a GVA Williams Real Estate Co. shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiff.

This constitutes the decision and order of this court.

Dated: April 22, 2008



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMÉAD

**FILED**  
APR 23 2008  
COUNTY CLERK'S OFFICE  
NEW YORK