[* 1]

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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Justice

Index Number : 100528/2007

YOON, SO YOUNG

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 002

PARTIAL SUMMARY JUDGMENT

INDEX NO. 100528/07

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 02 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 10/7/09

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

SO YOUNG and JUM HEE RIM,

Plaintiffs,

Index No. 100528/07

- against -

Decision and Order

THE CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY and MANHATTAN AND BRONX SURFACE TRANSPORTATION OPERATING AUTHORITY,

Seq. No. 002

Defendants.

----------X

HON. EILEEN A. RAKOWER

Plaintiffs bring this action for personal injuries allegedly sustained when a "bus stop sign pole" fell and hit them while they were waiting for a bus "about mid-block between 46th and 47th Streets" in the County and State of New York on July 20, 2006. Plaintiffs now move for an order granting partial summary judgment, pursuant to CPLR 3212, on the issue of liability. Defendant the City of New York opposes.[1]

Plaintiffs, in support of their motion, submit the affidavit of plaintiff Jum Hee Rim; the affidavit of plaintiff So Young Yoon; three color photocopies of a photograph of the accident site; the deposition transcript of Joseph Farina, Supervisor of Traffic Device Maintainers for the City; a copy of a document referred to by Mr. Farina as a "Block Side Status Order;" and a copy of Justice Mill's order, dated September 27, 2007.

Plaintiffs argue that City was responsible to maintain and inspect the subject pole. Plaintiffs claim that the pole was not acted upon by any intervening force before

[1]The complaint was dismissed as to all other defendants pursuant to the order of the Honorable Justice Mills, dated September 27, 2007.

it fell without cause or warning. Thus, plaintiffs assert that this action falls under the theory of *res ipsa loquitur*. Plaintiffs point to the "Block Side Status Order" sheet and to Mr. Farina's testimony to substantiate their claims that City was in control of the pole. Mr. Farina testifies that a pole was replaced "113 feet south of West 47th Street," on July 25, 2006. Plaintiffs assert that this is the pole that fell on them, and the fact that City replaced the pole is evidence of their control.

City, in opposition, argues that *res ipsa loquitur* is inappropriate in this instance because *res ipsa loquitur* is only rarely used to grant summary judgment in favor of the plaintiff. Further, City argues, even if it were appropriate it cannot be used here because plaintiffs have failed to establish that City was in exclusive control of the bus stop pole. The pole was exposed to the elements and could have been hit by a car or damaged by a contractor's machinery.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

The theory of *res ipsa loquitur* is a type of circumstantial negligence. Where the actual cause of an accident is unknown, *res ipsa loquitor* allows the fact finder to infer negligence from the mere happening of the event. Where the plaintiff asserts the theory as a basis for a motion for summary judgment, his proof must be "so convincing and the defendant's response so weak that the inference of defendant's negligence is inescapable." (*Morejon v. Rais Const. Co.*, 7 NY3d 203[2006])

To establish the elements of *res ipsa loquitur*, plaintiffs here must show that the sign pole breaking and falling (1) does not ordinarily occur in the absence of someone's negligence, (2) was within the exclusive control of the defendant, and (3) was not due to any voluntary action or contribution on the part of either plaintiff.

Plaintiffs submit the affidavit of Jum Hee Rim, who states:

> I, along with co-plaintiff, my friend, So Young Yoon, was waiting for a bus. While we were waiting, the bus stop sign pole immediately to our left suddenly fell and struck both of us. . . . Before this accident, the pole was standing upright without any visible damage. As another photo (Exhibit 2) also taken at the scene shows, the pole broke off a few inches above its base where it meets the sidewalk.

Plaintiffs establish that neither of them caused or contributed to the fall of the pole. Further, the photograph of the broken pole, does support the first element, that this does not occur in the absence of someone's negligence. Interestingly, the pole is not bent or leaning, not uplifted from its moorings or its base, but cracked and broken through and through at the shaft of the pole.

City, while submitting nothing more than an affirmation of counsel, urges that plaintiffs have not met their initial burden of establishing that the sign pole was within its exclusive control, since the pole is open to the elements and is handled by the public. Further, plaintiffs have failed to establish that City had prior written notice of any defect. Additionally, as Mr. Rim readily concedes, even if inspected, there was no visible damage to the pole.

"Exclusivity, as it applies to res ipsa loquitor, is a relative term. 'It does not require the elimination of all other possible causes of the incident' but simply 'a rational basis for concluding that it is more likely than not that the injury was caused by defendant's negligence." (*Crawford v. City of New York*, 53 AD3d 462 [2008], internal citations omitted)

While plaintiff may have established that City had control of the poles, generally, control of the pole for purposes of *res ipsa loquitor* is more often a question for the jury. Accepting Mr. Rim's affidavit that damage to the pole was not evident, expert testimony might shed light on what would cause the pole to crack and break at the point in the shaft where it snapped, such that there is a connection between exclusive control of the pole and the incident in question. (*See Crawford*).

"Only in the rarest of res ipsa loquitor cases may a plaintiff win summary judgment." (*Morejon*).

Wherefore it is hereby

ORDERED that plaintiffs' motion is denied.

DATED: October 27, 2009

EILEEN A. RAKOWER, J.S.C.