

61 A.D.3d 677, 877 N.Y.S.2d 132, 2009 N.Y. Slip Op. 02777
(Cite as: 61 A.D.3d 677, 877 N.Y.S.2d 132)

C
Supreme Court, Appellate Division, Second Department, New York.
Victoria YOUSEFI, et al., appellants,
v.
RUDETH REALTY, LLC, et al., respondents.
April 7, 2009.

Background: In an action to recover damages for personal injuries, plaintiffs appealed from order of the Supreme Court, Westchester County, O. Bellantoni, J., which granted summary judgment in favor of defendants.

Holdings: The Supreme Court, Appellate Division, held that:

- (1) defendants established their prima facie entitlement to judgment as a matter of law, and
- (2) plaintiffs' delay in presenting new theory of liability warranted rejection of that theory.

Affirmed.

West Headnotes

[1] Negligence 272 ↪ 1013

272 Negligence

272XVII Premises Liability

272XVII(B) Necessity and Existence of Duty

272k1013 k. Conditions Created or

Known by Defendant. Most Cited Cases

Defendants did not create allegedly defective condition of exit door or have actual or constructive notice of same, precluding liability for plaintiff's personal injuries.

[2] Judgment 228 ↪ 183

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k183 k. In General. Most Cited Cases

In an action to recover damages for personal injur-

ies, plaintiffs' delay in presenting new theory of liability warranted rejection of their argument, raised for first time in their opposition to defendants' motion for summary judgment, that doctrine of res ipsa loquitur applied.

****133** Robert L. Boydston, White Plains, N.Y. (Susan R. Nudelman of counsel), for appellants.

Boeggeman, George & Corde, P.C., White Plains, N.Y. (Cynthia Dolan of counsel), for respondents Rudeth Realty, LLC, and Great Atlantic & Pacific Tea Company, Inc.

Goodman & Jacobs, LLP, New York, N.Y. (Sue C. Jacobs and Howard M. Wagner of counsel), for respondent Georal International of New York, Inc.

WILLIAM F. MASTRO, J.P., MARK C. DILLON, THOMAS A. DICKERSON, and JOHN M. LEVENTHAL, JJ.

***677** In an action, inter alia, to recover damages for personal injuries, etc., the plaintiffs appeal, as limited by their brief, from (1) so much of an order of the Supreme Court, Westchester County (O. Bellantoni, J.), entered September 27, 2007, as granted that branch of the motion of the defendants Great Atlantic & Pacific Tea Company, Inc., and Rudeth Realty, LLC, which was for summary judgment dismissing the complaint insofar as asserted against them, and that branch of the cross motion of the defendant Georal International of New York, Inc., which was for summary judgment dismissing the complaint insofar as asserted against it, and (2) so much of an order of the same court entered March 12, 2008, as, upon reargument, adhered to those portions of the original determination.

ORDERED that the appeal from the order entered September ***678** 27, 2007, is dismissed, as that order was superseded by the order entered March 12, 2008, made upon reargument; and it is further,

61 A.D.3d 677, 877 N.Y.S.2d 132, 2009 N.Y. Slip Op. 02777
(Cite as: 61 A.D.3d 677, 877 N.Y.S.2d 132)

ORDERED that the order entered March 12, 2008, is affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the respondents appearing separately and filing separate briefs.

[1] The Supreme Court properly granted that branch of the motion of the defendants Great Atlantic & Pacific Tea Company, Inc. (hereinafter A & P), and Rudeth Realty, LLC (hereinafter Rudeth), which was for summary judgment dismissing the complaint insofar as asserted against them. Evidence submitted by A & P and Rudeth established, prima facie, that they did not create the alleged defective condition of the subject exit door or have actual or constructive notice of same (see *Lasser v. Northrop Grumman Corp.*, 55 A.D.3d 561, 865 N.Y.S.2d 301; *Cox v. Pepe-Fareri One, LLC*, 47 A.D.3d 749, 850 N.Y.S.2d 559; *Johnson v. Nouveau El. Indus., Inc.*, 38 A.D.3d 611, 831 N.Y.S.2d 527). In opposition, the plaintiffs failed to raise a triable issue of fact (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 508 N.Y.S.2d 923, 501 N.E.2d 572).

[2] In addition, the plaintiffs alleged for the first time in their opposition to the motion that the doctrine of res ipsa loquitur applied to this case and precluded summary judgment. "While modern practice permits a plaintiff to successfully oppose a motion for summary judgment by relying on an unpleaded cause of action which is supported by the plaintiff's submissions" (*Gallelo v. MARJ Distribs., Inc.*, 50 A.D.3d 734, 736, 855 N.Y.S.2d 602, quoting *Comsewogue Union Free School Dist. v. Allied-Trent Roofing Sys., Inc.*, 15 A.D.3d 523, 524, 790 N.Y.S.2d 220; see *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276, 280, 413 N.Y.S.2d 309, 385 N.E.2d 1238), in this case, the plaintiffs' inexcusable delay in presenting the new theory of liability warranted the Supreme Court's rejection of the argument (see *Medina v. Sears, Roebuck & Co.*, 41 A.D.3d 798, 800, 839 N.Y.S.2d 162; *Mainline Elec. Corp. v. Pav-Lak Indus., Inc.*, 40 A.D.3d 939,

939-940, 836 N.Y.S.2d 294). In any event, the evidence failed to show that the doctrine of res ipsa loquitur applies to this case (see *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 226, 501 N.Y.S.2d 784, 492 N.E.2d 1200).

The defendant Georal International of New York, Inc., established its prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it by demonstrating that it did not owe a duty of care to the plaintiffs by virtue of its limited service agreement with A & P (see *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120, 773 N.E.2d 485; *Altinma v. East 72nd Garage Corp.*, 54 A.D.3d 978, 865 N.Y.S.2d 109). In opposition, the plaintiffs failed to raise a triable issue of fact (see *679H.R. *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 168, 159 N.E. 896).

N.Y.A.D. 2 Dept., 2009.

Yousefi v. Rudeth Realty, LLC

61 A.D.3d 677, 877 N.Y.S.2d 132, 2009 N.Y. Slip Op. 02777

END OF DOCUMENT