SHORT FORM ORDER

INDEX NO.: 0027404/2005
SUBMIT DATE: 12/13/2006
MTN. SEQ.#: 002; 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:
HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 11/13/2006
MOTION NO.: 002-MD
003-XMG;CASEDISP

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MURRAY FROHMAN,

Plaintiff,

-against-

ROC LUBE REALTY INC., ZIPPY LUBE INC. and ZIPPY LUBE INC. d/b/a AVIS LUBE, INC.,

Defendants.

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Attys. for Plaintiff
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Attys. for Defendant *Zippy Lube Inc.*
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Jericho, NY 11753

ROC LUBE REALTY INC.
730 Fulton Street
Farmingdale, NY 11735

Upon the following papers numbered 1 to 21 read on this motion for default judgment and cross-motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1-6; Notice of Cross Motion and supporting papers 7-16; Answering Affidavits and supporting papers 17-19; Replying Affidavits and supporting papers 20-21; Other ____; it is

ORDERED that this motion by plaintiff, Murray Frohman, for an order granting a judgment of default against defendant, Roc Lube Realty, Inc., is denied, as the conclusory allegations contained in plaintiff's affidavit are insufficient to demonstrate a *prima facie* case of negligence against said defendant; and it is further

ORDERED that the cross-motion by defendants, Zippy Lube, Inc. and Zippy Lube, Inc., doing business as Avis Lube, Inc., for summary judgment dismissing the complaint is granted and the complaint is hereby dismissed.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on August 17, 2005 while he was a customer at the automotive service garage owned and operated by the defendant, Zippy Lube, Inc. Plaintiff has averred that he was injured when he "fell into a garage pit" on the premises. According to the affidavit of eyewitness Ariel Ulberg, defendant's office manager, on the day of the accident the plaintiff was on the premises for the purpose of having his car tires rotated and his car engine power washed. While the vehicle was parked outside in front of the right garage door to the service area, she observed plaintiff walk backward toward the area of the open bay inside the garage, and heard an employee warn plaintiff "about the open pit and that customers were not allowed inside the bay area." The pit located within the garage contains an oil catch basin which is used to catch oil from vehicles that are being serviced. A photograph of the oil pit was submitted in support of the motion. At the time of the accident there were no vehicles in the pit area, and the oil pit into which plaintiff fell was open and obvious. In addition, Ulberg averred that signs are posted in the customer waiting area and inside the bay area which state in bold print, "Absolutely no customers allowed in service area."

The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [1974]; ***Benincasa v Garrubo***, 141 AD2d 636, 529 NYS2d 797 [2d Dept 1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman***, 121 AD2d 295, 503 NYS2d 58 [1st Dept 1986]). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (*see* ***Gilbert Frank Corp. v Federal Insurance Co.***, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988], citing ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595, 404 NE2d 718 [1980]; ***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790, 390 NE2d 298 [1979]). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests (*see* ***Gilbert Frank Corp. v Federal Insurance Co.***, *supra*).

Here, the defendant established its *prima facie* entitlement to judgment as matter of law by demonstrating that the oil pit was open and obvious and not inherently dangerous, and the plaintiff failed to submit evidence sufficient to raise a triable issue of fact (*see* ***Bernth v King Kullen Grocery Co.***, ___ AD3d ___, 2007 NY Slip Op 593 [2d

Dept 2007]; *see also* ***Sclafani v Washington Mutual***, ___ AD3d ___, 2007 NY Slip Op 290 [2d Dept 2007]; ***Brown v Melville Industrial Associates***, 34 AD3d 611, 823 NYS2d 697 [2d Dept 2006]).

DATED: 7 March '07

HON. JOHN J.J. JONES, JR.
J.S.C.

CHECK ONE: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION