

**Smith v Andre**

2007 NY Slip Op 31973(U)

June 26, 2007

Supreme Court, New York County

Docket Number: 0103759/2004

Judge: Emily Jane Goodman

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
**EMILY JANE GOODMAN**

PRESENT:

PART 17

Index Number : 103759/2004

SMITH, LAURA

vs

LIN, PAUL

Sequence Number : 005

SUMMARY JUDGMENT

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

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

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

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 \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*and cross motion are decided for the motion*

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

Dated: 6/26/07

*[Signature]*  
**EMILY JANE GOODMAN** /s.c.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

-----X

LAURA SMITH,

Plaintiff,

Index No. 103759/04

-against-

DONOVAN ANDRE and YVETTE-BRISSETTE ANDRE,  
PAUL LIN and DAWN PETERSON,

Defendants.

-----X

**Emily Jane Goodman, J.S.C.:**

Defendants Paul Lin (Lin) and Dawn Peterson (Peterson) move, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims as to them, in this action to recover damages for personal injuries sustained by plaintiff Laura Smith. These defendants previously moved for the same relief. Their previous motion was denied, in a decision dated December 20, 2005, with leave to renew after completion of discovery. The motion is granted as to dismissal of the complaint, but is denied as to dismissal of cross claims.

#### **I. Background**

This action was brought by plaintiff after she was injured when she slipped on snow and ice on the front steps of a building located at 19 Willow Place, Yonkers, New York, wherein she resided (the premises). She claims that her accident was exacerbated by a shaky handrail. The accident occurred on

January 17, 2003.

Defendant Donovan Andre (Andre) testified that he and his wife, defendant Yvette-Brisette Andre, became the owners of the premises on October 31, 2002, months prior to the accident. Aff. of Shin, Ex. H., Dep. of Andre, at 7. Both before and after the Andres became owners of the premises, Andre managed the premises, taking care of the maintenance tasks, such as repair of the premises and snow removal. *Id.* at 20-21; Shinn Aff., Dep. of Lin, at 25, 46-47. Andre shared this responsibility with a tenant of the premises, Maria Howard. Dep. of Andre, at 18-19.

The deposition evidence shows that, although Lin and Peterson sold the premises to the Andres in October 2002, Lin and/or Peterson retained the mortgage and insurance on the premises, intending, apparently, to keep the mortgage until the Andres could obtain a mortgage for themselves. *Id.* at 18-20; Edwards Aff., Ex B, Dep. of Lin, at 41-44. After the sale, the Andres continued to send the rents from the premises to Lin, who used them to make the mortgage payments. Dep. of Lin, at 57-56. The evidence further shows that Lin took tax deductions for the premises on his 2003 tax return, the propriety of which has not been explained by Lin, who maintains that he had no interest in the property after the transfer.

## **II. Discussion**

The proponent of a summary judgment motion must "make a

prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form to eliminate any material issues of fact." *Epstein, Levinsohn, Bodine, Hurwitz & Weinstein, LLP v Shakedown Records, Ltd.*, 8 AD3d 34, 35 (1st Dept 2004); see *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). Upon submission of such evidence, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to raise a material issue of fact." *Lewis v Safety Disposal System of Pennsylvania, Inc.*, 12 AD3d 324, 325 (1<sup>st</sup> Dept 2004); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

There is no question that the Andres became owners of the premises upon transfer to them of the deed. See Real Property Law § 244; *Janian v Barnes*, 284 AD2d 717 (3d Dept 2001); *Matter of Cahill*, 264 AD2d 480 (2d Dept 1999).

"Liability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or a special use of such premises." *Gibbs v Port Authority of New York*, 17 AD3d 252, 254 (1st Dept 2005). "The existence of one or more of these elements is sufficient to give rise to a duty of care." *Abdellatif v Khoukaz*, 21 AD3d 1278, 1278 (4th Dept 2005).

Despite what may be improprieties in Lin's tax return, Lin and Peterson have met their burden to dismiss the complaint as against them. It is undisputed that neither occupied, owned or

made a special use of the premises. Further, there is no evidence that either controlled the premises. *Abdellatif v Khoukaz, supra*, the closest case which the Court could find to this unusual case, is nonetheless inapposite. In that case, the court found an issue of fact as to control where the defendant had transferred ownership of a property to a relative, but still collected the rent, remained the mortgagor, and made and paid for repairs to the building. Here, however, although Lin and/or Peterson retained the mortgage and insurance and indirectly collected rents through the Andres to pay the mortgage after the sale,<sup>1</sup> there is no evidence that they made repairs to the property after the sale, and the testimony is to the contrary. Accordingly, in this case, control is lacking. Assuming that the tax deductions which Lin took on the premises after the transfer were improper, that act would not transform Lin into an owner, or create control. If plaintiff and the Andres are implicitly asserting an estoppel argument against Lin and Peterson, the misrepresentation has been made by Lin to the Federal and/or State taxing authorities, not to the parties. Accordingly, Lin and Peterson are entitled to summary judgment dismissing the

---

<sup>1</sup>According to Lin's testimony, the mortgage was not assumable by the Andres and therefore, he believed that he had to retain the mortgage in his name, and continue to pay the mortgage with funds from the Andres. Dep. of Lin, at 43-44. The fact that Lin did this however, does not create the element of ownership or control, although it may raise issues for the mortgagee.

complaint against them.

However, Lin and Peterson are not entitled to summary judgment dismissing any cross claims. Lin and Peterson have not sustained their burden in this regard and do not assert any ground for such relief.<sup>2</sup> In opposition to the motion for summary judgment, the Andres allege that Lin agreed to maintain insurance on the property until the mortgage was transferred into the Andres' name. The Andres attach Lin's affidavit, made in this action, which states in paragraph 7 that "We had an agreement to maintain the Insurance and Mortgage until the Mortgage Transferred in their name (Yvette & Don Andre)." In his deposition, Lin claims that although he signed the affidavit, it was Yvette Andre who wrote that paragraph, and Lin didn't understand what he was signing (Dep. of Lin, at 41-42). The Andres also attach the deposition testimony of Yvette Andre, referencing her testimony regarding Lin's agreement to maintain insurance on the premises. Notably, the Reply Affirmation of counsel for Lin and Peterson fails to address the Andres' claim

---

<sup>2</sup>At the time the motion for summary judgment was made, there was no cross claim asserted against Lin or Peterson in any pleading. However, the Andres previously brought a motion for leave to amend their answer to assert a cross-claim against Lin and Peterson, based on Lin's purported agreement to insure the property. That motion was granted by Decision and Order, dated 6/7/06. Although an Amended Answer & Crossclaim was not served until 6/15/07 and was not filed until 6/18/07, that document was not required to be served until 10 days after receipt of a copy of the 6/7/06 decision. The only notice of entry of the 6/7/06 decision was served by counsel for the Andres, dated 6/14/07.

regarding the alleged agreement to insure.

Accordingly, it is

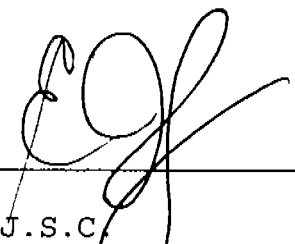
ORDERED that the motion brought by defendants Paul Lin and Dawn Patterson for summary judgment is granted to the extent that the complaint is dismissed as against them, but is denied as to dismissal of cross claims; and it is further

ORDERED that the parties settle judgment.

**This Constitutes the Decision and Order of the Court.**

Dated: June 26, 2007

ENTER:



---

J.S.C.  
**EMILY JANE GOODMAN**