STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

DONALD PAGE, JR. and SUSAN PAGE,

Plaintiffs,

-against-

EXPRESSIONS FLORAL DESIGN STUDIO, MICHAEL GOLDEN and MICHAEL GOLDEN d/b/a EXPRESSIONS FLORAL DESIGN STUDIO, INC. and ROVETTO DESIGN GROUP, INC. and FROELICH HEATING & APPLIANCE CO., INC.,

Defendants

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0549-04 Index No. 210276

Appearances: Fine, Olin & Anderman
Attorneys For Plaintiffs
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Attorneys For Defendant Rovetto Design Group, Inc.
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DECISION/ORDER

George B. Ceresia, Jr., Justice

On December 10, 2002, plaintiff Donald Page, Jr. ("plaintiff") allegedly slipped and

fell in the roadway behind certain parking spaces associated with commercial premises being operated by defendant Rovetto Design Group, (hereinafter Rovetto) located at 407 River Street in the City of Troy, New York. Plaintiffs allege that defendant Rovetto owned, maintained and controlled the premises. Defendant Rovetto has made a motion for summary judgment to dismiss the complaint and all cross-claims on the ground that it does not own, maintain or control the area where plaintiff allegedly fell.

In support of the motion, Rovetto has submitted a copy of the lease for the premises indicating that Rovetto was a tenant of a portion of the building designated 407 River Street, transcripts of depositions of the plaintiffs, the owner of the building, and Edward Rovetto, the owner of defendant Rovetto, an affidavit from Mr. Rovetto and an affidavit of a title searcher which indicates that the roadway or alley behind 405 River Street where plaintiff fell is owned by the City of Troy, New York.[1] Such proof indicates that while Rovetto's lease included four parking spaces behind the building, it did not include the area where plaintiff fell. The proof also indicates that Rovetto did not maintain or control the area where plaintiff fell.

Summary judgment is a drastic remedy which should only be granted when it is clear that there are no triable issues of fact (see Andre v Pomeroy, 35 NY2d 361, 364 [1974]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

[1]405 and 407 River Street are part of the same building.

absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see also Bush v St. Clare's Hosp., 82 NY2d 738, 739 [1993]). Once the movant has established a right to judgment as a matter of law, the burden shifts to the opponent of the motion to establish, by admissible proof, the existence of genuine issues of material fact (see Zuckerman v City of New York, 49 NY2d 557 [1980]). In general, the Court will then view the evidence in a light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference, and determine whether there is any triable issue of fact (see Boyce v Vazquez, 249 AD2d 724, 726 [3d Dept 1998]; Martin v Briggs, 235 AD2d 192, 196 [1st Dept 1997]; Simpson v Simpson, 222 AD2d 984, 986 [3d Dept 1995]).

Defendant Rovetto has clearly met its initial burden of making a prima facie showing of an absence of liability for an accident which occurred in a publicly owned roadway or alley (see Haymon v Pettit, 37 AD3d 1194 [4th Dept 2007]; Boehm v Barnaba, 7 AD3d 911 [3d Dept 2004]). Plaintiffs, in opposition to the motion, have submitted only an attorney's affirmation which argues that because UPS trucks and other delivery vehicles occasionally parked in the parking spaces in the rear of the building, that Rovetto made a special use of the roadway area where plaintiff fell. Plaintiff has not shown that the manner of use of the parking spaces has any bearing on the use, ownership, maintenance or control of the area where plaintiff fell. Moreover, the occasional use of an area for deliveries does not support a special use exception giving rise to liability for defects in a pubic sidewalk or roadway (see Tyree v Seneca Ctr.-Home Attendant Program, 260 AD2d 297 [1st Dept 1999]; Kaminer v

Dan's Supreme Supermarket/Key Food, 253 AD2d 657 [1st Dept 1998]). Plaintiffs have therefore failed to raise any triable issue of fact in opposition to the motion.

Accordingly, it is

ORDERED, that the motion for summary judgment dismissing the complaint and all cross-claims against Rovetto Design Group, Inc. is hereby granted.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for defendant Rovetto who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: Troy, New York
July 16, 2007

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated March 30, 2007;
2. Affirmation of Anthony Rotondi, Esq. dated March 30, 2007 with Exhibits A-H annexed;
3. Affidavit of Edward Rovetto sworn to March 26, 2007;
4. Affidavit of Margaret Egan, sworn to March 15, 2005 with Exhibit annexed;
5. Memorandum of Law dated March 30, 2007;
6. Affirmation in Opposition of George A. Kohl, 2nd, Esq., dated May 14, 2007;
7. Reply Affirmation of Anthony Rotondi, Esq. dated May 17, 2007.