Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 51 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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SUSAN MARVILLI,

Plaintiff(s),

Index No. 10067/05

-against-

Motion Seq. No.: 004
Motion Submitted: 8/31/07

ROCKAWAY 605 LLC and JAMI MARVILLI,

Defendant(s).

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The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Motion by defendant Rockaway 605 LLC for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, a front seat passenger, in a motor vehicle accident on April 3, 2005 at approximately 11:00 a.m. On this date, the vehicle operated by co-defendant Jami Marvilli collided with a vehicle operated by third-party defendant Robert Mayfield. The accident occurred on the portion of the parking lot adjacent to the Costco Warehouse located at 805 Rockaway Turnpike, Lawrence, New York.

Defendant Rockaway 605 is an owner of a portion of the land and Costco is a tenant thereat (see ground lease dated April 14, 1993). New York State Department of Transportation (hereinafter referred to as "the State") is also the owner of a portion of the land. Rockaway 605 Corporation was given a long term permit to use the land from New York State (see permit for use of state-owned property dated April 1, 1993).

In support of its motion for summary judgment dismissing the complaint, defendant Rockaway 605 LLC maintains that the area where the head-on collision occurred is to the southeast of the Costco Warehouse on land that is owned by New York State and used pursuant to the terms of a long-term permit with New York State. Rockaway 605 LLC, therefore, asserts that it cannot be held liable for plaintiff's injuries as: 1) it is not the owner of the land where the accident occurred; 2) it had no control or possession of the area where the accident occurred; and 3) there was no dangerous conditions in the Costco parking lot and New York State land.

In support thereof, defendant relies upon various documentation including the lease and the permit; the testimony of plaintiff Susan Marville; co-defendant Jami Marvilli; Robert Seslowe, the President of Rockaway 605 LLC and Rockaway 605; and the affidavit of Irving Ojalvo, ScD., an expert on accident investigation and transportation engineering.

Summary judgment is the procedural equivalent of a trial (*Capelin Assoc. Inc. v Globe Mfg. Corp*, 34 NY2d 338 [1974]). It is a drastic remedy that will only be granted when the proponent establishes that there are no triable issues of fact (*Alvarez v Prospect*

Hosp., 68 NY2d 320 [1986]). Once the party seeking summary judgment has made a *prima facie* showing of entitlement to judgment as a matter of law, the party opposing the motion must come forward with proof in evidentiary form establishing the existence of triable issues of fact, or demonstrate an acceptable excuse for its failure to do so (*Alvarez v Prospect Hosp., supra; Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). Mere conclusions, expression of hope or unsubstantiated allegations are insufficient (*Zuckerman v City of New York, supra*).

In order to prove negligence, plaintiff must demonstrate (1) the existence of a legal duty owed to plaintiff; (2) a breach of that duty; and (3) injury to plaintiff proximately resulting from the breach (*see Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). Where there is no duty, there can be no breach, and therefore no liability in negligence (*Pulka v Edelman*, 40 NY2d 781 [1976]). In this case, defendant has satisfied its *prima facie* burden of entitlement to judgment as a matter of law.

It is well settled that an out-of-possession property owner is not liable for injuries that occur on the property unless the owner has retained control over the premises or is contractually obligated to perform maintenance and repairs (*Carvano v Morgan*, 270 AD2d 222, 223 [2nd Dept. 2000]; *see also Nikolaidis v La Terna Restaurant*, 40 AD3d 827 [2nd Dept. 2007]).

While questions of control and possession of property can be submitted to a jury for determination, courts have granted summary judgment in favor of the owner/lessor where, as in this case, the lease conclusively demonstrates that the owner/lessor was

not in possession or control of the property (*Del Giacco v Noteworthy Co.*, 175 AD2d 516 [3rd Dept. 1991]). Sections 5.01 and 5.02 of the lease and sections 1-1(d) and 10.1 of the Construction Agreement indicate that 605 Rockaway transferred possession and control of the premises including the New York State land to Costco. Hence, under the lease and construction agreement, Costco was the only entity with possession, control and responsibility for the premises, specifically including the parking area and the New York State land.

Furthermore, in his affidavit, Mr. Ojalvo concludes that the subject occurrence took place on property belonging to New York State, and that said area was properly designed and maintained.

In opposition to the motion, plaintiff argues that defendant Rockaway's liability may be premised on the failure to remedy a dangerous condition on the property, a duty imposed as incidental to the either ownership or control of the property. Specifically, plaintiff states that "[a]t the time of the incident, the parking lot area had neither lane markings nor signage, had no speed bumps; and had no dividing lanes at or near the opening to its exit/entrance to and from Incinerator Road (a/k/a Ray Boulevard); and had no traffic control devices of any kind."

Defendant Jami Marvilli opposes the motion by arguing in conclusory terms that issues of fact exist which preclude the grant of summary judgment. The papers, however, are devoid of any facts demonstrating a triable issue of fact. Mere conclusions, speculation and unsupported allegations are insufficient to defeat a motion for

summary judgment (*Castro v New York University*, 5 AD3d 135 [1st Dept. 2004]).

Contrary to plaintiff's contention, the "visit" to the property by Mr. Seslowe do not raise a question of fact. The right of inspection does not, as a matter of law, infer an assumption of responsibility by the lessor of any leased area (*Hans v Smith*, 25 AD2d 477 [3rd Dept. 1996]). In addition, the testimony of Mr. Seslowe establishes that Rockaway did not perform any work or do any maintenance, repaving, draw any lines on the pavement, install any speed bumps, post any signs, or install any lighting devices to the New York State Land.

Equally unavailing is plaintiff's contention that defendant improperly relied upon unsigned deposition transcripts (see Exhibits A, B and C; CPLR 3116[a]).

Overall, plaintiff has failed to demonstrate that Rockaway retained any control or possession of the property.

Accordingly, defendant's motion is granted and the complaint is dismissed.

This constitutes the Decision and Order of the Court.

Dated: November 26, 2007
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.