

**Uveges v New 56-19 Associates, L.P.**

2009 NY Slip Op 30158(U)

January 20, 2009

Supreme Court, New York County

Docket Number: 115960/06

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARTIN SHULMAN**  
J.S.C.

PART 1

Index Number : 115960/2006  
**UVEGES, VALERIE**  
VS.  
**NEW 56-10 IG ASSOCIATES**  
SEQUENCE NUMBER : 002  
SUMMARY JUDGMENT

INDEX NO. 115960/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

This motion to/for \_\_\_\_\_

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ... A-G  
Answering Affidavits — Exhibits \_\_\_\_\_  
Repeating Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1  
2, 3  
4, 5

*Notice of Cross-Motion - Affs. - Exh. - 6*  
*Answering Affs - Exh. - 7, 8; Repeating Affs - 9*  
Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *and cross-motion are*  
*decided in accordance with the attached*  
*decision and order.*

**FILED**  
JAN 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: January 20, 2009

MARTIN SHULMAN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 1

----- X  
VALERIE UVEGES,

Plaintiff,

Index No. 115960/06

-against-

NEW 56-19 ASSOCIATES, L.P. and ISSEKS  
BROTHERS, INC.,

Defendants.

----- X  
**MARTIN SHULMAN, J.:**

Defendant Isseks Brothers, Inc. ("Isseks") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims asserted against it. Defendant New 56-19 Associates, L.P. ("Associates") cross-moves for the same relief.

This is an action for damages based on personal injuries allegedly sustained by plaintiff on June 20, 2006, when a toilet bowl in an apartment where she was babysitting exploded when it was flushed. Associates is the owner of the apartment building. Non-party BLDG Management Inc. ("BLDG") is the managing agent. Isseks is a company that, *inter alia*, cleans water tanks.

On June 20, 2006 Isseks was retained by Associates to clean the water tank on top of the building. According to the affidavit of plaintiff's plumbing expert, William Kennedy (plaintiff's exhibit D), the cleaning process involves shutting down the water tank, shutting down and draining the entire domestic water system, cleaning the system and then refilling the tank. Mr. Kennedy opines that the toilet explosion was caused by defendants' failure to properly close and then re-open all the flush valves in the building

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and that defendants failed to provide adequate warning to the tenants (see plaintiff's exhibit D).

The original complaint named Associates as the sole defendant. Associates impleaded Isseks and plaintiff thereafter amended her complaint naming Isseks as a direct defendant. The amended complaint asserts a single cause of action based on defendants' alleged negligence.

In support of its motion for summary judgment Isseks relies on, *inter alia*, the affidavit of its vice president, David Hochhauser (Isseks' exhibit F), who states that the building's superintendent had sole responsibility for turning the water off before the tank was cleaned and turning it back on after the tank was cleaned. Mr. Hochhauser states further that he is not aware of any other complaints about exploding toilets from the residents of the building. Isseks also paraphrases the deposition testimony of BLDG's property manager which the court will disregard as hearsay because the transcript of that testimony is not available. Isseks then argues that all claims against it should be dismissed because there is no evidence that its work was the proximate cause of plaintiff's accident and because the building's superintendent was the only person responsible for turning the building's water system off and on.

In support of its cross-motion Associates cites a plethora of cases pertaining to summary judgment and introduces the doctrine of *res ipsa loquitur* which it then argues has no application herein because Associates did not have exclusive control over the subject toilet.

Plaintiff's opposition to Isseks' motion is based primarily on detailing the severity of plaintiff's injuries and speculation as to their cause, neither of which constitutes

meaningful opposition. In opposition to Associates' cross-motion plaintiff contends that the doctrine of *res ipsa loquitur* applies herein because Associates had full control of the domestic water pipes in the building.

The proponent of a motion for summary judgment must establish his defense or cause of action sufficiently to warrant a court's directing judgment in his favor as a matter of law and he must do so by tender of evidentiary proof in admissible form (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If this burden is met, the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact; mere conclusions or unsubstantiated assertions are insufficient (*id.*). Isseks' contention that it merely cleaned the roof-top water tank and that the building's superintendent was solely responsible for turning the building's water system off and on is supported by the affidavit of Isseks' vice president and not refuted by the superintendent or anyone else. The court therefore finds that Isseks is entitled to summary judgment dismissing all claims and cross-claims asserted against it.

Associates' cross-motion does not fare as well. Isseks has demonstrated as a matter of undisputed fact the superintendent was responsible for the domestic water system. There is no affidavit or deposition testimony from the superintendent denying this responsibility and no excuse has been given by Associates (or its managing agent BLDG) for his failure to respond. Indeed, both plaintiff and Associates have failed to produce anyone with personal knowledge of the underlying facts. The doctrine of *res ipsa loquitur* (the thing speaks for itself), invoked by Associates, permits an inference of negligence where the cause of an accident is unknown (see *Dermatossian v New York*

*City Transit Authority*, 67 NY2d 219, 226 [1986]). Here, the court finds that, in the context of the instant motions, plaintiff's accident was caused by the superintendent's failure to properly regulate the building's water supply on June 20, 2006. While this finding warrants the denial of Associates' cross-motion, it does not warrant summary judgment in plaintiff's favor which is allowed under CPLR 3212(b).

Summary judgment is a drastic remedy which is properly denied if there is any doubt as to the existence of a triable issue (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]). Remarkably, plaintiff has introduced the issue of notice. Exhibit A to both of her attorney's opposing affirmations is a letter from BLDG to "All Residents" dated June 13, 2006 advising them that the building's water supply will be shut down on June 20, 2006 due to maintenance of the water tank (see plaintiff's affirmations in opposition, exhibit A). The letter then gives the following warning: "Please make sure that all faucets, including the ones in the bathroom, are in the off position in order to avoid leaks. Do not turn on your faucets until you have been notified by the building staff that the water supply has been restored.... Should you have any questions or comments please do not hesitate to contact me" (*id.*). The letter is signed by the building's managing agent.

While the residents were not specifically notified of the possibility of exploding toilets, the court notes that there is nothing to suggest that anyone else in the building was visited by the unusual fate allegedly suffered by plaintiff. Furthermore, nothing is known about plaintiff other than her purported status as a babysitter. She has submitted neither an affidavit nor deposition testimony to the court. Her note of issue

has been filed signifying that discovery is complete, yet she and her potential revelations remain a mystery.

Accordingly, it is hereby


ORDERED that Isseks' motion for an order granting it summary judgment dismissing all claims and cross-claims asserted against it is granted; and it is further

ORDERED that Associates' cross-motion for an order granting it summary judgment is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. Courtesy copies of this decision and order have been sent to counsel for the parties.

DATED: January 20, 2009



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Martin Shulman, J.S.C.

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