

**Fuzzell v Josam Assoc. LLC**

2009 NY Slip Op 31203(U)

June 1, 2009

Supreme Court, New York County

Docket Number: 112399/07

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 : 112399/2007  
**FUZZELL, SUSIE**  
vs.  
**JOSAM ASSOCITES LLC**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 112399/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

is motion to/for \_\_\_\_\_

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

PAPERS NUMBERED	
1	_____
2	_____
3	_____

Cross-Motion:  Yes  No

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

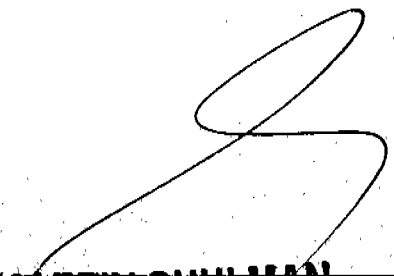
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**FILED**

JUN 03 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 1, 2009

  
**MARTIN SHULMAN**  
J.S.C. J.S.C.

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

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

-----X  
SUSIE FUZZELL,

Plaintiff,

Index No. 112399/07

-against-

JOSAM ASSOCIATES LLC,

Defendant.

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

Defendant Josam Associates LLC ("defendant") moves for summary judgment dismissing the complaint in this personal injury action. On February 21, 2007 at approximately 10:15 p.m., at the Hess gas station located at 496 Plainview Road, Hicksville, New York, plaintiff, a Hess employee, walked to her car and fell on a piece of ice. The ice was a remnant of a snowstorm which had occurred a week prior to the accident and was located near the cashier's booth in an area frequented by the public.

Plaintiff commenced this action on September 13, 2007, and initially sued defendant as the landlord of the premises and Merit Oil of New York ("Merit") as the leaseholder. The gas station is now owned by the Hess Oil Company ("Hess"). When Hess acquired Merit, the action against Merit was discontinued by stipulation. Plaintiff alleges defendant landlord failed to inspect and maintain the area of the accident and had actual and/or constructive notice of a dangerous condition on the premises.

In support of its motion for summary judgment dismissing the action against it, defendant contends that, as the landlord of the premises, it had no control of the premises and assumed no duties to maintain the premises. Defendant submits a copy of deposition testimony from Michael Levin, a partner in defendant company. Mr. Levin

confirms that defendant is the owner of the subject property. The lease for the subject property was originally between defendant and BP Oil Company, Inc. and over the years the lease was assigned to successive tenants. Hess is the present lessee/tenant. Mr. Levin testified that defendant's sole task was to collect the rent and that Hess had the sole responsibility to maintain the premises. Mr. Levin also testified that defendant never entered into any agreement with a third party for any work at the premises including the removal of snow. The rent checks were mailed directly from Hess' corporate headquarters to defendant. At no time did defendant enter the premises to collect the rent.

Defendant submits a copy of its lease with Hess' predecessor in interest. The lease provides, in relevant part:

Lessee's Improvements: Lessee shall have the obligation and privilege of constructing, equipping, maintaining and operating on the premises any and all improvements of whatever kind, on, under and above the ground, it may desire to use or may require in operating, transacting, carrying on and conducting on said premises the business of storing, distributing and marketing petroleum products or any other lawful business, providing the present use and zoning status is not jeopardized.

Defendant contends that the evidence submitted is proof that defendant is not obligated to remove snow from the premises, and that Hess, as lessee, is responsible for the removal.

Plaintiff opposes the motion, asserting that defendant had a non-delegable duty to maintain the premises in a reasonably safe condition, which would include the removal of snow or other debris on the premises. Plaintiff argues that there is no specific obligation in the lease with respect to the tenant performing any maintenance and no reference at all to snow or ice removal. The provision defendant relies upon

only pertains to improvements to the premises. Plaintiff also argues that the underlying policies of public safety and owner responsibility provide a reasonable basis for imposing liability.

Plaintiff cites *Johnston v Cent. Parking Sys., Inc.*, 19 Misc 3d 1109(A), 859 N.Y.S.2d 903 (Sup Ct, NY County 2008), in support of her position. In that case, plaintiff was injured in a parking garage while waiting for his car when a railing gave way as he was leaning against it. The defendants, the garage operator and the landlord, both moved for summary judgment. The court denied the landlord's motion, holding that the landlord had an obligation to provide members of the general public with a reasonably safe premises. Even assuming that the landlord as owner of the premises net leased its property to the garage operator without reserving to itself any right of re-entry for inspection or repair, landlord was nevertheless held responsible in tort, pursuant to its duty to cure defects at the premises through the imputation of constructive notice, much as if it had retained a right to re-enter. Plaintiff argues that defendant's motion must be denied because there is an issue as to whether defendant had actual or constructive notice of the icy condition in the area of the accident.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1<sup>st</sup> Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People ex rel. Spitzer v*

*Grasso*, 50 AD3d 535, 545 (1<sup>st</sup> Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Liability for a dangerous condition on property may only be predicated upon occupation, ownership, control or special use of such premises. See *Sew Wai Yong v City of New York*, 41 AD3d 212, 213 (1<sup>st</sup> Dept 2007). Control is the test which measures generally the responsibility in tort of the owner of real property; this principle recognizes that the person in possession and control of the property is best able to identify and prevent any harm to others. See *Butler v Rafferty*, 100 NY2d 265, 270 (2003). An out-of-possession owner who did not create an unsafe condition will not be liable for injuries that occur on the premises unless it has retained control over the premises or is contractually or statutorily obligated to repair or maintain the property. *Negron v Rodriguez & Rodriguez Storage & Warehouse, Inc.*, 23 AD3d 159, 160 (1<sup>st</sup> Dept 2005).

Based on the evidence provided by defendant, there is no indication that defendant created the dangerous condition, had or retained control over the premises, or was contractually obligated to repair or maintain the premises. In opposition, plaintiff does not discuss the issue of control. She refers to opinions which hold that a property owner has a special duty to keep the entrances and passageways to public buildings safe for tenants, their employees and all classes of people who come into the premises for reasonably foreseeable purposes. See *Backiel v Citibank, N.A.*, 299 AD2d 504, 506-507 (2d Dept 2002). These cases discussed by plaintiff do not involve the issue of

control over the premises. Here, plaintiff has not raised any issue of fact with respect to control. Therefore, defendant is entitled to summary judgment dismissing this action.


Accordingly, it is

ORDERED that defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision, Order and Judgment. Courtesy copies of this Decision, Order and Judgment have been provided to counsel for the parties.

DATED: New York, New York  
June 1, 2009

  
\_\_\_\_\_  
HON. MARTIN SHULMAN, J.S.C.

**FILED**

JUN 03 2009

COUNTY CLERK'S OFFICE  
NEW YORK