

**Stein v Eighth Ave. Sky, LLC**

2009 NY Slip Op 33353(U)

June 2, 2009

Sup Ct, New York County

Docket Number: 114893-08

Judge: Judith J. Gische

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

3

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
Howard Stein,

Plaintiff (s),

**-against-**

Eighth Avenue Sky, LLC, Papa John's  
International, Inc., and Prime Pizza, LLC,

Defendant (s).  
-----X

**DECISION/ ORDER**  
Index No.: 114893-08  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Def Papa n/m (§3212) w/MEP affirm, SR affid, exhs .....	1

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff Howard Stein to recover monetary damages for injuries allegedly sustained by him as he traversed a public sidewalk. This action was commenced with the filing of the summons and complaint on November 6, 2008. At the time this motion was brought, only defendant Papa John's International, Inc. ("Papa John's") had answered the complaint. Since then, the owner and Prime Pizza have filed their answer. Neither of those defendants, however, have taken a position on this motion and they did not assert any claims against Papa John's. Plaintiff has not opposed this motion either. Therefore, the court has a timely, unopposed motion for summary judgment before the note of issue has been filed. It will be decided on

default, on the merits. Although on default, Papa John still has to make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985).

The court's decision on this motion is as follows:

### **Arguments**

Defendant Prime Pizza, LLC ("Prime Pizza") is Papa John's franchisee. It has a franchise agreement with Papa John's for the Papa John's pizza restaurant ("restaurant") located at 765 8<sup>th</sup> Avenue, New York, New York ("building"). The building is owner/operated etc., by defendant Eighth Avenue Sky, LLC ("owner"). Papa John's contends it is entitled to summary judgment because under the franchise agreement between Papa Johns and Prime Pizza made June 20, 2003 ("franchise agreement"), Papa John's has "no responsibility for the day-to-day operations of the restaurant or the management of your [Prime Pizza], including without limitation, ensuring the safety and security of your [Prime Pizza's] customers or employees . . ." Franchise Agreement, para 21 (b).

According to plaintiff, he was injured when he slipped/fell on an allegedly defective cellar door in front of the restaurant. The franchise agreement does not obligate Papa John's to maintain, service, etc., any part of the building or premises. Moreover, under the franchise agreement, Prime Pizza is required to indemnify Papa John's for any claims arising from the restaurant's operations, and also obtain commercial premises liability insurance. Franchise Agreement para 21 (c) and para 18 (a).

## Discussion

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1<sup>st</sup> dept 2001). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 AD2d 134 (1<sup>st</sup> dept. 2000).

Papa John's is not the owner of the building. Prime Pizza is not a subsidiary of Papa John's. The relationship between Papa John's and Prime Pizza is that of franchisor/franchisee. Schoenwandt v. Jamfro Corp., 261 A.D.2d 117 (1<sup>st</sup> Dept 1999). Although under the franchise agreement Papa John's retained the authority to exercise quality control over the product sold by its franchisee, Papa John's did not direct Prime Pizza employees, own or control the premises where the accident is alleged to have occurred, or have any responsibility under the franchise agreement to do repairs to the space occupied by its franchisee. Martinez v. Higher Powered Pizza, Inc., 43 A.D.3d 670 (1<sup>st</sup> Dept 2007). Papa John's has proved it did not owe a duty of reasonable care to the plaintiff. Since plaintiff has not opposed this motion, he has not come forward with any triable issues of fact. Therefore, Papa John's is entitled to summary judgment in its favor dismissing the complaint. The Clerk shall enter judgment in favor of Papa John's International, Inc. against plaintiff Howard Stein.

Since the other defendants have answered, this case must be scheduled for the preliminary conference. **The preliminary conference is set for June 25, 2009 at 9:30**

**a.m. in Part 10, 60 Centre Street, Room 232.**

**Conclusion**

It is hereby,

**ORDERED** that defendant Papa John's International, Inc.'s motion for summary judgment is hereby granted, on default.


**ORDERED** that the clerk shall enter judgment in favor of Papa John's International, Inc. against plaintiff Howard Stein, dismissing the complaint against it; and it is further

**ORDERED** that the preliminary conference is set for **June 25, 2009 at 9:30 a.m. in Part 10, 60 Centre Street, Room 232;** and it is further

**ORDERED** that any relief not expressly addressed herein is denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

Dated: New York, New York  
June 2, 2009

So Ordered:  
  
\_\_\_\_\_  
Hon. Judith J. Gische, J.S.C.

**FILED**  
JUN 03 2009  
COUNTY CLERK'S OFFICE  
NEW YORK