

SCA

**SHORT FORM ORDER**

**SUPREME COURT - STATE OF NEW YORK**

**Present:**

**HON. ROY S. MAHON**

**Justice**

**ANDREW BERGMAN and ELIZABETH BERGMAN,**

**TRIAL/IAS PART 20**

**Plaintiff(s),**

**INDEX NO. 25710/97**

**- against -**

**MOTION SEQUENCE  
NO. 3 & 4**

**GAYLE PETAGNO, SLOMIN'S OIL COMPANY  
and BLUE RIDGE INSURANCE COMPANY,**

**MOTION SUBMISSION  
DATE: June 5, 2002**

**Defendant(s).**

**The following papers read on this motion:**

|                                  |           |
|----------------------------------|-----------|
| <b>Notice of Motion</b>          | <b>X</b>  |
| <b>Notice of Cross Motion</b>    | <b>X</b>  |
| <b>Affirmation in Opposition</b> | <b>XX</b> |
| <b>Reply Affirmation</b>         | <b>X</b>  |

Upon the foregoing papers, the motion by the plaintiffs for an Order for determination that defendants, Petagno and Slomin's are dischargers pursuant to New York Navigation Law; Summary Judgment as to the issue of liability pursuant to New York Navigation Law; and for such other relief this Court deems just and proper and the cross motion by the defendant Slomin's Oil Company for an Order pursuant to CPLR §3212 dismissing the plaintiffs' Complaint, and all cross-claims as against defendant Slomin's Oil Company on grounds that no triable issue of material fact exists that plaintiffs have failed to sustain or state a cause of action in negligence or under Navigation Law §181 as against defendant Slomin's Oil Company; denying plaintiffs' motion to deem Slomin's Oil Company a discharger under the Navigation Law and for summary judgment in its entirety; and for such other and further relief as this Court deems just, proper and equitable are both determined as hereinafter provided:

This negligence action arises out of an alleged oil spill from a home heating oil tank owned by and in the home of the defendant Gayle Petagno that allegedly occurred on October 22, 1996 and thereafter. The defendant Slomin's made deliveries of home heating oil to the defendant Petagno's home. The tank in issue was buried in cement at the premises. When examined by the New York State Department of Environmental Conservation the oil tank was found to have holes which caused the oil to spill into the ground resulting in claimed damage by the plaintiffs.

The Court observes that the plaintiffs do not contest the defendant Slomin's contention that the

plaintiffs' Second, Third and Fourth Cause of Action have been discontinued.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a prima facie showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

The Court in pertinent part in its prior Order dated August 16, 2000 stated:

"Initially, the Court observes that the plaintiffs have failed to include, pursuant to CPLR 3212(b), in the plaintiffs' application a copy of the pleadings in the action. As such, the plaintiffs' motion for an Order determining that defendant Petagno and Slomin's are dischargers pursuant to NY Navigation Law; summary judgment as to the issue of liability pursuant to NY Navigation Law is **denied** (see, **Lawlor v County of Nassau**, 166 AD2d 692, 561 NYS2d 644, Second Dept., 1990)."

The Court observes that the plaintiffs in the instant application have again failed to submit the pleadings as required by CPLR §3212(b) (see, **Lawlor v County of Nassau**, *supra*). The plaintiffs' submission of the pleadings in the plaintiffs' reply is insufficient to correct the failure to submit said pleadings in the plaintiffs' motion (see, **Lumbermen's Mutual Casualty Company v Morse Shoe Company**, 218 AD2d 624, 630 NYS2d 1003 (First Dept., 1995). The Court further observes that the plaintiffs in support of that portion of the application which seeks a determination that the defendants Petagno and Slomin's Oil Company are dischargers pursuant to the Navigation Law have failed to submit in support of the plaintiffs' application any evidence in admissible form that is addressed to the issue of the oil discharge other than the conclusory affirmation of the plaintiffs' counsel.

Accordingly, based upon the foregoing, the plaintiffs' application for an Order for determination that defendants, Petagno and Slomin's are dischargers pursuant to New York Navigation Law; Summary Judgment as to the issue of liability pursuant to New York Navigation Law is **denied**.

The defendant Slomin's Oil Company in support of that defendants application has submitted an affidavit from David E. Smith, a manager of said defendant and the deposition transcripts of David Smith and the defendant Gayle Petagno. Said deposition transcripts are properly considered in relation the defendant Slomin's Oil Company's application. (see, **Olan v Farrell Lines Incorporated**, 64 NY2d 1092, 489 NYS2d 229, 479 NE2d 229)

A review of the respective submissions establishes that the defendant Slomin's Oil Company is in substance a mere deliverer of oil. (see, **State of New York v Cronin**, 186 Misc2d 809, 717 NYS2d 828) The contention advanced by the plaintiffs and defendant Petagno that the defendant Slomin's was or should have been on notice of the hole in the defendant Petagno's is conclusory and unsupported by the submissions.

As such, the defendant Slomin's Oil Company's application for an Order pursuant to CPLR §3212 dismissing the plaintiffs' Complaint, and all cross-claims as against defendant Slomin's Oil Company on grounds that no triable issue of material fact exists that plaintiffs have failed to sustain or state a cause of action in negligence or under Navigation Law §181 as against defendant Slomin's Oil Company; denying plaintiffs' motion to deem Slomin's Oil Company a discharger under the Navigation Law and for summary judgment in its entirety is granted.

SO ORDERED.

DATED:

7/31/2002

*Ray S. Mahon*

J.S.C.

