

PRELIMINARY STATEMENT

QUESTIONS PRESENTED

1. Did the IAS Court Properly Deny BigOil's Motion for Summary Judgment Because the Evidence Proffered by Smith Established the Existence of a Genuine Issue of Material Fact Regarding Whether BigOil had a Duty to Smith due to Exercise of Control Over the Premises? (Responding to BigOil Point III)
2. Did the IAS Court Properly Deny BigOil's Motion for Summary Judgment Because Smith Established That There Are Triable Issues of Material Fact as to Whether BigOil Leased the Property with a Defective Condition to Acme for a Purpose That Invites Admission of the Public? (Responding to BigOil Points I and III.)

Smith submits that both questions should be answered in the affirmative.

COUNTERPROPOSED STATEMENT OF FACTS

A. BigOil Leases the Property to Acme, Which Operates a Gas Station and Snack Shop.

In February of 2000, Acme Convenience Store, Inc. (“Acme”) and BigOil entered into a lease agreement (the “Lease”) that was to take effect on June 1, 2000 and run through May 31, 2003 for BigOil’s existing gas station and snack shop located at 144 Hempstead Turnpike, Acme, New York. (the “Property”) (R. 70-109, 186-87, 244-47, 374, 380.)

Acme and BigOil also contemporaneously executed a Petroleum Marketing Practices Act Franchise Agreement (“PMPA Agreement”) that also took effect on June 1, 2000. (R. 110-54.)

The PMPA Agreement provided the terms and conditions under which Acme would operate the gas station and snack shop. (R. 110-54.)

B. The Lease and the PMPA Agreement Gave BigOil Substantial Control Over the Property and the Day-to-day Operations of the Gas Station and Snack Shop, Including the Right to Maintain the Floor Tiles.

Article I, ¶ 1.3(c) of the Lease gives BigOil the right to use, or grant other parties the use of, a 10-foot wide strip around the perimeter of the Property as well as “other area or areas, as determined necessary or appropriate by BigOil, for any reasonable use,” including, but not limited to, the right to erect and maintain signs, install and maintain utilities and drainage systems, provide access for pedestrians and vehicles, undertake

construction activities, and locate and operate communications facilities and services.
(R. 71.)

BigOil also retains the right to use any portion of the premises not used by Acme to operate a “related” business. (R. 71.)

The Lease also allows BigOil, at its sole discretion, to remodel or redevelop the Property at any time with only a discretionary abatement in rent and without incurring liability to Acme for damages. (R. 84.)

While the Lease provided that maintenance of certain items, including the floor tiles, was primarily Acme’s responsibility, the Lease also allows BigOil, without notice or demand, to perform those obligations on Acme’s behalf and deduct any monies spent on such maintenance from Acme’s security deposit. (R. 76-80, 92-96.)

The Lease also permits BigOil to, in lieu of honoring its maintenance obligation for the premises, to provide Acme with a “maintenance stipend” that was to be used to meet BigOil’s maintenance obligation under the lease. (R. 80-81.)

While the PMPA Agreement purports to designate Acme as an “independent contractor” with responsibility for and control over “the manner and means of the day-to-day operations” of the snack shop and gas station, the PMPA Agreement actually gives BigOil substantial control over the manner in which Acme operates the Property. (R. 145-46.)

The PMPA Agreement provides that if Acme failed to operate the snack shop in compliance with the agreement's terms and the manuals and standards provided by BigOil, BigOil can shut down the snack shop. (R. 16-17, 118.)

The PMPA Agreement also requires Acme to keep the station open on a 24 hour basis. (R. 131.)

In particular, under the PMPA Agreement, Acme is required to permit BigOil to enter and inspect the premises at "all reasonable times" to ensure that the terms of the agreement and BigOil's company standards for the operation of the facility were being met. (R. 134-35.)

In addition, Acme must correct any deviations from the BigOil standards for maintenance that BigOil's inspection discovered, and BigOil can enforce this provision by, *inter alia*, closing the Property. (R. 135.)

The PMPA Agreement also gives BigOil a separate right to enter the Property "to enforce BigOil's rights and remedies under this Agreement including taking action to preserve the integrity of Proprietary marks and the System and determining Franchise Dealer's compliance with the Standards." (R. 151.)

C. BigOil Provides Explicit Instructions and Procedures for Virtually Every Aspect of the Day-to-day Operations of the Property, Mandates Compliance with Those Procedures Through Evaluations, and Has the Power to Shut down the Premises If the Standards Are Not Met.

The BigOil Standards Handbooks for the operation of the gas station and snack shop dictate the manner in which Acme must conduct daily operations at the Property. (R. 455-578.)

The manuals dictate the hours of operation, the type of signage that must be displayed, the vendor from whom signage must be purchased, and the locations where signage must be placed. (R. 463, 485-87, 506, 516-17, 534-36, 544, 548, 560, 562-63, 568, 570, 577, 581-82, 624-26.)

The manuals specify the floor plans for the Property, as well as the color and type of trash-cans/ashtrays that may be used and where they must be located. (R. 463-64, 480-81, 506-07, 558-59, 568, 621.)

The manuals establish standards for landscaping, including how flowers may be planted or displayed and even establishes that “landscaped areas must have live flowers year-round or as weather permits.” (R. 573-74.)

The manuals also indicate that BigOil will conduct evaluations to ensure “compliance” with these standards to “improve consistency across the BigOil Chain.” (R. 494.)

D. BigOil Employees Inspect the Gas Station and Snack Shop on Almost a Daily Basis to Enforce Acme's Compliance with the Terms of the Lease and the PMPA Agreement.

Jane Doe ("Doe") was the territorial manager for BigOil in the area where the Property was located was located during the time period in which Smith's accident occurred. (R. 337-38.)

Doe described her role as a "liaison" between BigOil and the dealers, and she testified at her deposition that "she guided the dealers to provide [a] clean and attractive location in terms of appearance, to provide quality products, to be environmentally conscious, and to provide speedy and friendly service." (R. 339.)

While Doe initially claimed that her instructions to dealers regarding making certain repairs or improvements were merely "recommendations," she later conceded that she would put such "recommendations" in writing if the dealers failed to comply, and that the dealers were obligated to comply with the terms of the Lease and the PMPA Agreement. (R. 350-51.)

Doe also admitted that if a dealer persistently failed to comply with her "recommendations, BigOil would issue a "warning letter" to the non-complying dealer. (R.350-51.)

Doe acknowledged that her "recommendations" were generally followed by the dealers. (R. 351.)

In her testimony, Doe confirmed that the Lease permitted BigOil it to shut down a dealer if the dealer failed to comply with standards listed in her checklists. (R. 380-81.)

She also admitted that she specifically looked for tripping hazards, such as folded rugs or carpets, obstructions blocking the entrance, or missing floor tiles. (R. 361, 365-67.)

E. In a November 1999 Evaluation of the Property, an BigOil Territorial Manager Identifies a Missing Tile at the Property.

In her deposition testimony, Doe claimed that she did not recall ever seeing the missing floor tile at the entrance of the snack shop on the Property, but she testified that she would have noted it on the annual inspection checklist if she had seen it, and that she would have required Acme to fix it. (R. 361-62.)

But on a Standards Evaluation Form prepared by Doe for the Property on November 1, 1999, Doe made a handwritten notation on question 9 under the “Clean, Attractive and Functional Standards” section of the checklist. (R. 341-47, 665.) Question 9 on the form references “Ceiling, tiles, lenses and vents are clean, in good repair and free of dust and stains.” (R. 665.) On the form filled out by Doe for the Property, Doe underlined the word “tile” and drew a line to an open space on the page, where she wrote “missing one.” (R. 665.)

Although Doe claimed that question 9 on the Standards Evaluation Form refers only to ceiling tiles and not to flooring, the word “tiles” is separated from the word

“ceiling” by a comma on the form. (R. 237-38, 275-76, 417-18, 423-25, 427-29, 442-45, 665, 683.)

Indeed, page 2-2 of the Standards Manual for the snack shop specifies that the dealer must “clean ceiling tiles,” while page 2-3 separates the word “tiles” from “ceilings” in the “standards” list. (R. 471-72.)

F. Smith Enters the Property to Make a Purchase.

At approximately 6:00 a.m. on September 23, 2000, Smith, while on his way to work, entered the Property to purchase some gum and a newspaper. (R. 64-65, 726-27.)

Smith parked his car next to the curb in front of the Property before entering. (R. 727-28.) He was in the store for a total of three to five minutes, during which time he selected and paid for his purchases. (R. 730.)

G. As He Exits the Mini-Mart, Smith’s Foot Is Caught in a Hole Where a Missing Floor Tile Should Be, Throwing Him Head-First into the Side of His Parked Car.

As Smith exited the mini-mart to go to his parked car, the toe of his work boot on his right foot was caught in a “hole.” (R. 730-31.) He was caused to stumble head-first into the side of his parked car, striking the car with the crown of his head. (R. 730-31.) Smith’s car was parked diagonally from the exit out of the mini-mart. (R. 729.) Smith subsequently identified a missing floor tile in the mini-mart’s doorway as what caught his foot and caused him to fall into the car. (R. 731.) The missing floor tile is located in the middle of the doorway to the mini-mart. (R. 698-99,

705-10.) The area of the missing tile is littered with remnants of cement and grout which had apparently held the missing tile in place previously. (R. 698-99, 705-10.)

H. As a Result of His Fall, Smith Is Rendered a Permanent Quadriplegic.

Smith was paralyzed immediately after hitting his head on his car. (R. 740-41.) He had no feeling in his arms or legs, and could not move any part of his body. (R. 741.) He was taken to the hospital by ambulance, and immediately underwent surgery on the injury to his neck. (R. 741-42.)

Smith was then transferred to another hospital for a five month stay, during which he underwent a second surgery to have a “laminectomy” inserted in his back so that pain-killing medication could be administered to him. (R. 742.)

Smith will be required to take pain medication for the rest of his life, and the laminectomy must be filled with pain medication once a month. (R. 742-44.) Smith is able only to wiggle his toes and move his knees slightly, and although he can move his arms, he cannot open and close his hands. (R. 745.) Smith subsequently commenced this action to recover damages for his catastrophic injuries. (R. 10.)

I. BigOil Moves for Summary Judgment, Claiming That it Cannot Be Held Liable for the Dangerous and Defective Condition on the Property Because, as an Out-of-Possession Landlord, it had no Duty to Smith.

In September 2002, BigOil made its motion for summary judgment. (R. 19.) In its motion, BigOil sought summary judgment on one theory – that “there is no issue of material fact regarding its lack of duty as either franchisor or out-of-possession

landlord.” (R. 20.) BigOil offered no expert testimony in support of its motion and did not assert any other grounds for summary judgment. (R. 7-176.)

J. Smith Responds to BigOil’s Motion, Offering Evidence That BigOil Exercised Significant Control Over the Property and Offering Documentary Evidence, Photographs, and Expert Testimony Raising an Issue of Fact Regarding How Long the Floor Tile Had Been Missing.

Smith submitted his memorandum of law and supporting documents in opposition to the motion. (R. 177-748.)

In support of its claim that the tile was missing on June 1, 2000, the day Acme and BigOil signed the Lease and PMPA Agreement, Smith proffered photographs taken shortly after the accident and an affidavit from James Madison (“Madison”), a licensed professional engineer. (R. 698.)

Madison visited the Property and examined the area of the missing tile on Smith's behalf. (R. 698-102.)

In addition, he reviewed the facts, looked at photographs of the missing tile area, and took photographs of his own. (R. 698-99.)

Madison’s inspection revealed that the area of the missing tile measured 8 1/4 inches in length and 3 ½ inches in width. (R. 699.)

Madison also noted that the area, which comprised approximately 25% of the length of the doorway exit, “was partially covered with a cement and/or grout material, which created a bumpy, irregular, rough and uneven condition sufficient to catch the bottom of a person’s shoe and/or the shoe’s toe, sole or heel, and cause him/her to trip

or stumble, and Madison stated that this danger was exacerbated by the fact that a person would encounter a change in surfaces while moving through the door, creating “a trap condition.” (R. 699-701.)

Madison also determined that the defect has existed for a “significant” period of time, “probably more than six months,” based on his examination of the photographs and the composition of the grout/cement materials, which “was a very durable substance that would have worn away only very slowly over a period of time.” (R. 701.)

K. In Reply, BigOil Changed its Theory and Asserted, for the First Time, That it was Entitled to Summary Judgment Because Smith did not Produce Evidence That the Tile was Missing on the Date BigOil Leased the Property.

BigOil raised a new theory in its reply papers. (R. 750.) Specifically, BigOil asserted that Smith failed to produce evidence in admissible form sufficient to establish that the tile was missing on the effective date of the Lease and PMPA Agreement. (R. 750.) While attacking the Madison affidavit, BigOil offered no expert testimony of its own.

L. The IAS Court Denied BigOil’s Summary Judgment Motion.

The IAS Court denied BigOil’s motion or summary judgment on April 23, 2003. (R. 5.)

ARGUMENT AND AUTHORITIES

A. Standard of Review

In making a motion for summary judgment, the movant has the burden of setting forth evidentiary facts sufficient to entitle that party to judgment as matter of law. *Marshall, Bratter, Greene, Allison & Tucker v. Mechner*, 53 A.D.2d 537, 384 N.Y.S.2d 787 (1st Dep't 1976); *accord, Piccolo v. De Carlo*, 90 A.D.2d 609, 456 N.Y.S.2d 171 (3rd Dep't 1982).

Once the movant has shown entitlement to judgment as a matter of law, the burden then shifts to the other party to come forward with proof, again in evidentiary form, showing the existence of a genuine triable issue of fact. *See Borschardt v. New York Life Ins. Co.*, 102 A.D.2d 465, 467, 477 N.Y.S.2d 167 (1st Dep't), *affirmed*, 63 N.Y.2d 1000, 483 N.Y.S.2d 1012, 473 N.E.2d 262 (1984), *citing* CPLR 3212[b].

“Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact.” *International Customs Associates, Inc. v. Bristol-Meyers Squibb Co.*, 233 A.D.2d 161, 162, 649 N.Y.S.2d 789 (1st Dep't 1996).

On a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party. *Gurfein Bros., Inc. v. Hanover Ins. Co.*, 248 A.D.2d 227, 229, 670 N.Y.S.2d 423 (1st Dep't 1998).

The motion should be denied “where the factual issues if arguable or debatable.” *International Customs*, 233 A.D.2d at 162.

It has long been held that summary judgment is ordinarily inappropriate in cases involving allegations of negligence. *See Ugarriza v. Schmieder*, 46 N.Y.2d 471, 473, 386 N.E.2d 1324, 1325, 414 N.Y.S.2d 304, 304 (1979); *Villoch v. Lindgren*, 269 A.D.2d 271, 703 N.Y.S.2d 131 (1st Dep't 2000); *Moore v. Smith*, 256 A.D.2d 450, 683 N.Y.S.2d 426 (2d Dep't 1998).

The Court may affirm the decision on any grounds, including theories that were not relied on by the IAS Court or advanced by the parties. *Sega v. State*, 60 N.Y.2d 183, 190 n.2, 456 N.E.2d 1174, 469 N.Y.S.2d 51 (1983)

POINT I THE IAS COURT PROPERLY DENIED BIGOIL'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE EVIDENCE PROFFERED BY SMITH ESTABLISHED THE EXISTENCE OF A GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER BIGOIL HAD A DUTY TO SMITH DUE TO EXERCISE OF CONTROL OVER THE PREMISES. (Responding to BigOil Point III)

A. The Record Establishes That There are Triable Issues of Fact Regarding Whether BigOil was an Out-of-Possession Landlord With no Duty to Smith.

BigOil is incorrect in asserting that “there is no material issue of fact regarding BigOil’s status as an out-of-possession landlord of the premises that retained no control over the repair or maintenance of the premises under the operative lease.” (BigOil Brief at 23.)

In fact, the degree of control exercised by BigOil over Acme takes the case out of the realm of the authorities that hold that retention of a right of reentry to inspect is insufficient to impose liability on an out-of-possession landlord unless there was a

structural defect or a specific statutory violation. *See, e.g. Hausmann v. UMK, Inc.*, 296 A.D.2d 336, 744 N.Y.S.2d 404, 405 (1st Dep't 2002).

In *Dimas v. 160 Water Street Associates*, 191 A.D.2d 290, 594 N.Y.S.2d 262 (1st Dep't 1993), the court held that the landlord's course of conduct in occasionally assuming control of the maintenance and repair of lighting fixtures in the tenant's portion of building raised an issue of fact precluding summary judgment as to who was responsible for the maintenance and repair of the fixture, even though the lease appeared to require the tenant to maintain and repair fixtures in its portion of building. *Dimas*, 191 A.D.2d at 290, *citing Ritto v. Goldberg*, 27 N.Y.2d 887, 265 N.E.2d 772, 317 N.Y.S.2d 361 (1970).

Here, BigOil did not just retain a right of possession - its agreement vested in BigOil substantial control over all aspects of the property, including maintenance and repairs.

The Record demonstrates that BigOil rigorously exercised control over maintenance of the Property, including retaining responsibility for the prevention of tripping hazards like the missing floor tile.

Doe testified that when she visited the Property, she specifically looked for tripping hazards, such as folded rugs or carpets, obstructions blocking the entrance, or missing floor tiles. (R. 361, 365-67.)

When she filled out a Standards Evaluation Form on November 1, 1999, Doe noted that a tile was missing and also ordered Acme to make several other modifications to

the Property, including filling potholes, moving a trash container, replacing a rug located at the entrance, repainting shelving, and moving newspaper displays. (R. 665.)

In a prior evaluation prepared by Doe on September 17, 1998, she had directed Acme to remove certain merchandise from the store, to display certain signs, to “weed” the perimeter of the property, to paint the curb behind the building, to paint the trash-cans black, to clean and deodorize the bathrooms, and to plant “mums” on the premises. (R. 695.)

The Record also shows that if Acme failed to follow BigOil’s directives, BigOil could shut down the snack shop. (R. 16-17, 118.)

In response, BigOil asserts only that Acme does not dispute BigOil’s assertions regarding responsibility for maintenance, but offers no evidence that Acme was free to ignore BigOil’s directives regarding maintenance and repairs. (BigOil Brief at 7.)

As in *Dimas*, BigOil’s course of conduct in retaining and regularly exercising control over maintenance and repairs raises an issue of fact precluding summary judgment on the issue of whether, as a landlord, BigOil may be held liable for Smith’s injuries.

B. BigOil's Purported Status as a Franchisor Does Not Relieve It of Its Obligation to Maintain its Property in a Reasonably Safe Condition.

BigOil claims that it owed no duty to Smith because it was merely a franchisor of the Property. (BigOil Brief at 23-25.)

The evidence raises triable issues of material fact as to whether BigOil was in fact merely a franchisor, because it establishes that BigOil exercised substantial control over Acme's day-to-day operation of the gas station and snack shop. BigOil's reliance on cases dealing with franchisor liability is misplaced. (BigOil Brief at 23-24.)

BigOil's citation to the Second Circuit's unpublished decision in *Wu v. Dunkin Donuts, Inc.*, 2001 WL 170639 (2nd Cir. 2001), is unpersuasive. (BigOil Brief at 24.)

In *Wu*, the plaintiff was raped and beaten while working in a donut shop operated by a Dunkin Donuts franchisee, and sued Dunkin Donuts for failure to provide adequate security. *Id.* Dunkin Donuts did not own the property on which the franchise was located, and there was no physical defect on the premises. *Id.* The Second Circuit found that Dunkin Donuts neither had the authority to control the "instrumentality of the harm" – the franchisee's failure to provide adequate security – under the franchise agreement at issue, nor exercised any such authority, and therefore could not be held liable. Here, BigOil both retained the authority under its lease and the Franchise Agreement to control virtually all aspects of Acme's operation of the Property, and in fact exercised that authority through Doe' almost daily inspections. *Wu* therefore does not support BigOil's claimed entitlement to judgment as a matter of law.

Alonzo v. McDonalds Corp., 282 A.D.2d 395, 723 N.Y.S.2d 499 (1st Dep't 2001), cited by BigOil, is also inapposite. (BigOil Brief at 24-25.) In *Alonzo*, the defendant landlord did not reserve right to reenter premises for the purpose of inspecting the

premises. In this case, there is clear evidence that BigOil retained substantial control over both the Property and Acme's daily operations. Specifically,

The BigOil Standards Handbooks for the operation of the gas station and snack shop dictate the manner in which Acme must conduct daily operations at the Property. (R. 455-578.)

The manuals also include several checklists dictating tasks that are to be performed by the dealers on a daily, weekly, and monthly basis. (R. 473, 475, 477, 480, 482, 541, 551, 553, 555, 557, 571-72, 574, 576, 582.)

The manuals dictate the hours of operation, the type of signage that must be displayed, the vendor from whom signage must be purchased, and the locations where signage must be placed. (R. 463, 485-87, 506, 516-17, 534-36, 544, 548, 560, 562-63, 568, 570, 577, 581-82, 624-26.)

The manuals specify the floor plans for the Property, as well as the color and type of trash-cans/ashtrays that may be used and where they must be located. (R. 463-64, 480-81, 506-07, 558-59, 568, 621.)

The manuals establish standards for landscaping, including how flowers may be planted or displayed and even establishes that "landscaped areas must have live flowers year-round or as weather permits." (R. 573-74.)

BigOil specifies what uniforms must be worn by employees and requires all employees to thank each customer after a transaction is completed. (R. 465-68, 518-19, 538-42, 598, 626.)

The brand and color of paint that may be used is also specified. (R. 500-01, 556, 558-59, 566, 568-69, 576, 599-600.)

The manuals establish what types of products may be sold and how they are to be displayed. (R. 471-72, 475, 479, 482, 485-86.)

All dealers are required to participate in recycling programs whether or not such programs are required by local ordinances or other applicable laws. (R. 491-92.)

The manuals even dictate when the lights inside the Property are to be turned on and off. (476-77, 552-53.) The manuals also indicate that BigOil will conduct evaluations to ensure “compliance” with these standards to “improve consistency across the BigOil Chain.” (R. 494.)

Acme was also required to allow BigOil inspectors onto the premises to ensure that Acme was operating the Property in accordance with BigOil’s directives, and BigOil could shut the facility down if Acme did not do so.

At the very least, the Record raises triable issues of fact regarding whether BigOil retained the right to enter the property for the purpose of conducting inspections, particularly given Doe’ testimony that she visited the dealer locations in her region on almost a daily basis, that she inspected the entrance ways and floors of those locations in addition to other areas, and that a missing floor tile is an item which BigOil would have required the dealer to repair.

POINT II THE IAS COURT PROPERLY DENIED BIGOIL'S MOTION FOR SUMMARY JUDGMENT BECAUSE SMITH ESTABLISHED THAT THERE ARE TRIABLE ISSUES OF MATERIAL FACT AS TO WHETHER BIGOIL LEASED THE PROPERTY WITH A DEFECTIVE CONDITION TO ACME FOR A PURPOSE THAT INVITES ADMISSION OF THE PUBLIC. (Responding to BigOil Points I and III.)

A. Under New York Law, a Landlord May be Held Liable When it Leases a Property with a Defective Condition That Was Known or Reasonably Discoverable for a Purpose That Invites Admission of the Public.

A landowner may be held liable when it leases a property with a defective condition that was known or reasonably discoverable for a purpose that invites admission of the public, and a member of the public is subsequently injured by that defect. *See Junkerman v. Tilyou Realty Co.*, 213 N.Y. 404, 408-10, 108 N.E. 190 (1915); *Campbell v. Elsie S. Holding Co., Inc.*, 251 N.Y. 446, 448-49, 167 N.E. 582 (1929); *Lusk v. Peck*, 132 A.D. 426, 430-31, 116 N.Y.S. 1051 (4th Dep't 1909); *Ostermeier v. Victorian House, Inc.*, 121 A.D.2d 611, 612, 503 N.Y.S.2d 644 (2nd Dep't 1986); *Brady v. Cocozzo*, 174 A.D.2d 814, 814-15, 570 N.Y.S.2d 748 (3rd Dep't 1991).

Indeed, when the property is leased for a use that involves inviting the public to enter the premises, the landlord does have a duty to use all reasonable care to make the property safe before the property is leased. *Junkerman*, 213 N.Y. at 409.

This rule is designed to protect the public from unscrupulous landowners who could seek to shift the duty they owe the public to an irresponsible tenant. *Lusk*, 132 A.D. at 431.

For instance, in *Ostermeier*, the plaintiff tripped over an outdoor sidewalk carpet placed in front of the premises by the tenant and sustained injuries. *Ostermeier*, 121 A.D.2d at 612. The court concluded that the outdoor carpet was the type of dangerous condition for which a non-possessory owner could properly be held liable, citing the rule that a lessor who leases property for a public use is liable for damages resulting from a defective condition of which he knew at the time of the lease. *Id.* BigOil has offered no authority for the proposition that this rule is inapplicable in this case.

Instead, BigOil asserts, *inter alia*, that because Acme allegedly was responsible for all maintenance and repairs, BigOil cannot be held liable. (BigOil Brief at 24.) This is incorrect, as established by the decision in *Brady*, which presents a nearly identical situation. In *Brady*, the injured plaintiff, an employee at the premises both before and after the effective date of the lease, was injured when her hand was closed in the door of a public restroom at a gas station leased and operated by Getty Oil and owned by the defendant. *Brady*, 174 A.D.2d at 814. The lease provided that all maintenance was to be Getty's responsibility. *Id.* The owner argued, as BigOil does here, that he had no knowledge of any defects relating to the restroom door and that, as a non-possessory landlord, he owed no duty of care to the injured plaintiff. The court referenced the rule that a lessor who rents a premises for public use when he knew or should have known of a dangerous condition on the premises at the time of the lease remains liable to injured parties, notwithstanding that the lessor relinquished control

of the premises. *Id.* The court also noted that the plaintiff's injury occurred in an area of the property open for the general public's use, and that there was evidence that the injured plaintiff and a co-worker had complained to the owner about the door's condition prior to the effective date. The existence of such evidence precluded entry of summary judgment in favor of the owner. *Id.* at 814-15. Here, there is also evidence in the record establishing that the dangerous and defective condition that caused Smith's injuries existed at the Property before June 1, 2000, the effective date of the Lease. Whether or not BigOil conducted a reasonable inspection of the Property before it leased the property to Acme Convenience, Inc. and whether a reasonable inspection would have revealed the dangerous and defective condition that caused Smith's injuries are issues of fact for the jury to decide.

In applying this principle, courts have concluded that the issue of whether or not the landowner conducted a reasonable inspection, or whether the condition at issue would have been disclosed by a reasonable inspection, are factual issues to be determined by the jury. *Id.* It is also irrelevant whether or not the landowner is leasing the property to a first-time tenant or it is entering into a subsequent lease with the prior tenant who is still in possession of the property. As the court in *Lusk* concluded, the landowner remains liable if it had the right to enter the property and inspect it prior to the execution of the subsequent lease. *Lusk*, 132 A.D. at 432. Under this theory, the IAS Court properly concluded that BigOil could be held liable. BigOil asserts that

this Court should ignore these holdings and, in particular, refuse to follow the *Lusk* decision. (BigOil Brief at 25-27.) According to BigOil, once it initially leased the property to Acme in 1996, it had no further duty to inspect the property and, specifically it had no duty to do so at the time of the sublease. (BigOil Brief at 26-27.) BigOil, however, cites no authority for this proposition.

B. The IAS Court Correctly Concluded That the Photographs Along With the Madison Affidavit Were Sufficient to Create a Triable Issue of Fact Regarding Whether the Floor Tile was Missing at the Time of the Lease Renewal.

In its ruling, the IAS Court stated that

here where the issue relates to the time during which a defect existed, the opinion of the expert who inspected the premises within a month of the accident together with the photographs taken a few days after the accident entitle a jury, as stated in *Taylor v. City of New York*, 48 NY2d 903, 904 (1979), to infer ‘from the irregularity, width, depth and appearance of the defect, apparent from the concrete surface exhibited in the photographs, that the condition had to come into being over such a length of time that knowledge thereof should have been acquired by the defendant in the exercise of reasonable care’ (in the case at bar the crucial date, as aforesaid, being June 1, 2000, the effective date of the lease to Hempstead). *See also Blake v. City of Albany*, 48 NY2d 875 (1979); *Batton v. Eighanayan*, 43 NY2d 895 (1978); *Zavaro v. Westbury Property Investment Company*, 244 AD2d 547 (2d Dept. 1997); *Hecker v. New York City Housing Authority*, 245 AD2d 131 (1st Dept. 1997). Thus, a triable issue has been raised as to whether the defect existed on June 1, 2000.”

(R. 6.) This conclusion is supported by the evidence and the case law.

C. The Record Includes Photographs of the Accident Scene and Expert Testimony Regarding the Missing Tile and the Probable Length of Time the Tile was Missing.

The record contains evidence supporting the conclusion that there was a triable issue of material fact regarding whether the tile was missing at the time of the Lease renewal.

Smith proffered photographs of the scene taken a few days after the accident that show the missing floor tile in the middle of the entrance to the snack shop. (R. 705-07.)

Other photographs taken by Madison in October of 2000 show that the area of the missing tile was in substantially the same condition at that time. (R. 709-10.)

Smith also introduced the affidavit of Madison. (R. 698.)

Madison is a professional engineer, a member of the American Society of Civil Engineers, the Society of Professional Engineers, and numerous professional groups and organizations. (R. 698.)

In his affidavit, Madison stated that he also has “extensive engineering consulting experience.” (R. 698.)

Madison stated that he visited the Property and examined the area of the missing tile on Smith's behalf and also examined all the photographs. (R. 698-702.)

Madison’s inspection showed that the area of the missing tile measured 8 1/4 inches in length and 3 1/2 inches in width, which comprised approximately 25% of the width of the doorway exist. (R. 699.) Madison also stated that based on the conditions at the scene, it was his opinion that the defect has existed for a “significant” period of time, “probably more than six months,” noting that grout/cement surrounding the area

“was a very durable substance that would have worn away only very slowly over a period of time.” (R. 701.)

In its brief, BigOil implies that Madison’s opinion lacks probative value because “Madison did not inspect the premises until June 12, 2002, almost two years after the alleged accident.” (BigOil Brief at 13.)

In making this argument, BigOil implies that Madison did not visit the Property or examine the conditions until June of 2002, but this is incorrect. While Madison did conduct an inspection of accident scene at that time, Madison also personally inspected the premises and took photographs of the accident scene on October 15, 2000. (R. 699.)

As Madison stated in his affidavit, these photographs “show the area of the missing tile to be in essentially the same condition as the photographs taken a few days after the accident.” (R. 699.)

Madison also inspected photographs taken 4 to 5 days after the accident. (R. 698-99.)

D. The Photographs and the Madison Affidavit are Sufficient to Establish the Existence of a Triable Issue of Fact Regarding How Long the Tile was Missing.

The photographic evidence and the Madison affidavit are a sufficient basis for concluding that a triable issue of fact exists regarding how long the tile was missing.

The Court of Appeals has made it plain that such evidence can be the basis for a conclusion by a factfinder regarding how long a particular defect has existed.

In its brief, BigOil entirely ignores the Court of Appeals decision in *Taylor v. New York City Transit Authority*, 48 N.Y.2d 903, 400 N.E.2d 1340, 424 N.Y.S.2d 888 (1979), cited by the IAS Court, as well as other authority establishing that the photographic evidence and the Madison affidavit are sufficient to establish the existence of a triable issue of material fact.

In *Taylor*, the plaintiff sued the transit authority for injuries sustained in a fall on subway steps. The Court of Appeals held that from a photograph of the step and testimony of plaintiff and her daughter, the jury was presented with a question of fact from which it was entitled to conclude that the subway step represented a negligent condition that was proximate cause of plaintiff's fall. The defendant asserted that such evidence could not be used to determine whether the step had been in a deteriorated condition for a sufficient length of time such that the jury could find that the defendant had constructive notice of the defect. The Court of Appeals rejected this argument, stating that

the jury could have inferred from the irregularity, width, depth and appearance of the defect apparent from the concrete surface exhibited in the photographs, that the condition had to have come into being over such a length of time that knowledge thereof should have been acquired by the defendant in the exercise of reasonable care.

Taylor, 48 N.Y.2d at 904.

Under *Taylor*, a layperson is qualified to make a determination based on similar photographic evidence regarding how long a defect has been present.

Given that precedent, Madison, a professional engineer, may certainly rely on his background and expertise to give an opinion on the same issue. BigOil's assertion that some sort of scientific evidence is a necessary requisite cannot be reconciled with the Court of Appeals' decision in *Taylor*.

Other decisions –

In *Blake v. City of Albany*, 48 N.Y.2d 875, 400 N.E.2d 300, 424 N.Y.S.2d 358 (1979), the plaintiff filed suit to recover damages for personal injuries sustained when the plaintiff's automobile struck a sunken catch basin located in a city street near the site of a construction project. The Court of Appeals rejected the notion that the jury could not determine, based on the evidence at the scene, that the city had notice of the defect. Instead, the Court of Appeals stated that

without more, the jury could have inferred from the depressed position of the catch basin cover relative to the level of the adjoining pavement that the condition had come into existence over a sufficiently long period of time for the city, charged as it was with the duty to keep the public ways in good repair, to have discovered and corrected the condition

Blake, 48 N.Y.2d at 360.

Batton v. Elghanayan, 43 N.Y.2d 898, 374 N.E.2d 611, 403 N.Y.S.2d 717 (1978), the Court of Appeals held that photographs of the hole in which a tenant tripped and fell, taken the day after the accident, were sufficiently clear and precise to create an issue of fact as to constructive notice to landlord of the defect. *Batton*, 43 N.Y.2d at 900. Specifically, the Court of Appeals concluded that

Although reasonable men might well differ on the proper inference to be drawn, it would not be unreasonable for a jury to infer from the condition of the defect, as indicated by the discoloration of the concrete- like substance shown in the photographs, that the hole in the basement floor had been there a sufficiently long time that the landlord should have known of the defect.

Id.

E. The Authorities Cited by BigOil, Which Involve Scientific and Medical Evidence, are Inapposite.

BigOil attempts to avoid this conclusion by citing inapposite cases involving expert testimony related to medical and scientific issues. As the IAS Court noted, “an expert expressing an opinion on a medical issue may be required to refer to a foundational scientific basis or to an accepted professional practice or standard [*e.g. Romano v. Stanley*, 80 NY2d 444 (1997); *Diaz v. New York Downtown Hospital*, 99 NY2d 542 (2002)]. (R. 6.) BigOil asserts in its brief that “age dating of tiles, especially using the methodology employed by Madison, is simply not accepted by the scientific community.” (BigOil Brief at 19.) Of course, BigOil cites no authority, scientific or otherwise, for this assertion.

Instead, BigOil invokes the rule set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as authority for its claim that Madison’s expert opinion lacks probative value and is insufficient to raise a triable issue of fact. (BigOil Brief at 13.) BigOil is correct that in New York, after the Supreme Court's opinion in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993), the stricter “general acceptance” test of *Frye v. United States*, 293 F. 1013 (1923) had continued to be applied in cases where

the issue was the reliability and admissibility of novel scientific evidence. *See People v. Wernick*, 89 N.Y.2d 111, 651 N.Y.S.2d 392, 674 N.E.2d 322 (1996). Where, however, the evidence is not scientific or not novel, the *Frye* analysis is not applicable. *See People v. Persaud*, 244 A.D.2d 577, 665 N.Y.S.2d 671 (2d Dep't 1997); *People v. Roraback*, 242 A.D.2d 400, 662 N.Y.S.2d 327 (3d Dep't 1997). Madison's interpretation of the photographs does not involve scientific or novel evidence, and as the Court of Appeals determined in *Taylor, Blake*, and *Batton*, the jury can infer how long the tile was missing without the need for novel or scientific evidence.

The cases relied on by BigOil do not support the conclusion that the IAS Court improperly Madison's affidavit in denying the summary judgment motion. *Selig v. Pfizer, Inc.*, 290 A.D.2d 319, 735 N.Y.S.2d 549 (1st Dep't 2002), cited by BigOil, involves a far different situation. (BigOil Brief at 13-14.) In *Selig*, the plaintiff was attempting to establish that there was a causal link between use of the drug Viagra and the plaintiff's heart attack. Because there was no clinical data or other scientific evidence based on accepted principles supporting the claimed link, the court concluded that the expert's testimony was not probative. *Selig*, 290 A.D.2d at 320. Here, Madison did not offer evidence regarding medical or clinical issues. He was not attempting to make a diagnosis or rule out alternate causes for an injury – Madison, based on his experience and knowledge as an engineer, simply gave his opinion, based on the physical evidence, regarding the deterioration of the

cement/grout around the missing tile. BigOil has offered no authority for the proposition that an engineer may not give such an opinion without referencing scientific evidence or other data.

In *Amatulli v. Delhi Construc. Corp.*, 77 N.Y.2d 525, 571 N.E.2d 645, 569 N.Y.S.2d 337 (1991), expert testimony was offered to establish that the design of an above-ground pool was defective. (BigOil Brief at 16.) The court found the affidavit to be deficient because it contained unsupported allegations regarding “industry-wide knowledge regarding in-ground installation of these above-ground pools.” *Amatulli*, 77 N.Y.2d at 533. Here, Madison did not make unsupported allegations regarding industry standards or knowledge or claim that the tiles themselves were somehow defective.

BigOil’s reliance upon *Leggio v. Gearhart*, 294 A.D.2d 543, 743 N.Y.S.2d 135 (2d Dep’t 2002), is also misplaced. (BigOil Brief at 16.) In *Leggio*, the plaintiff offered expert testimony to establish the proximate cause of a traffic accident, and the expert claimed, after reviewing photographs of the scene, that a weeping willow tree and/or a utility pole was a proximate cause of the accident. The court concluded that the expert’s opinion regarding the cause of the accident was based merely on speculation. *Leggio*, 294 A.D.2d at 544. Here, BigOil is not challenging Madison’s opinion with respect to proximate cause, which was based on Smith’s own testimony and the physical conditions present at the Property. (R. 701-03.)

Romano v. Stanley, 90 N.Y.2d 444, 684 N.E.2d 19, 661 N.Y.S.2d 589 (1997), also cited by BigOil, is unpersuasive. (BigOil Brief at 16.) In *Romano*, an expert attempted to give an opinion that a motorist would have shown visible signs of intoxication based on the motorist's blood alcohol level. In *Romano*, the court concluded that in the absence of laboratory tests, the expert could not make such a conclusion. *Romano*, 90 N.Y.2d at 451. Indeed, as the Court of Appeals stated in *Taylor*, the jury, without the benefit of expert testimony, can infer from the irregularity, width, depth and appearance of the defect apparent from the concrete surface that the condition had to have come into being over a length of time. *Taylor*, 48 N.Y.2d at 904. BigOil therefore cannot establish that Madison's opinion, based on his experience as an engineer, must be supported by laboratory tests or other extrinsic data.

Bean v. Ruppert Towers Housing Co. Inc., 274 A.D.2d 305, 710 N.Y.S.2d 575 (1st Dep't 2000), *Shea v. Sky Bounce Ball Co., Inc.*, 294 A.D.2d 486, 742 N.Y.S.2d 383 (2d Dep't 2002), *Maldonado v. Lee*, 278 A.D.2d 206, 717 N.Y.S.2d 258 (2d Dep't 2000), and *Maria S. v. Willoa Enterprises, Inc.*, 234 A.D.2d 177, 651 N.Y.S.2d 486 (1st Dep't 1996), also cited by BigOil, do not support the conclusion that the IAS Court incorrectly relied on Madison's expert affidavit. (BigOil Brief at 17-18.) The cited cases involve experts giving opinions regarding whether certain products or conditions constitute defects – they do not involve the scenario presented here, where Madison gives an opinion regarding how long the tile has been missing. BigOil does

not contend that the missing tile did not present a hazard or that the tile was not supposed to be there in the first place. BigOil has offered no authority supporting the conclusion that Madison was required to offer additional support, beyond his own engineering experience, to give an opinion that a tile was missing and that it had been missing for some time.

F. The Record Contains Other Evidence That the Tile was Missing at the Time BigOil and Acme Entered Into the Lease and PMPA Agreement.

Smith proffered the November 1, 1999 evaluation form for the Property, which has the word “tiles” underlined and connected to the words “missing one,” written on the form by Doe. (R. 665.)

While Doe claims that the word “tiles” on the form refers to ceiling tiles only, this explanation is not corroborated by either the manner in which the question appears on the form or the BigOil Standards manual, both of which distinctly set the word “tiles” apart from the word “ceiling” with a comma. (R. 237-38, 275-76, 417-18, 423-25, 427-29, 442-45, 665, 683.)

For instance, page 2-2 of the Standards Manual for the snack shop specifies that the dealer must “clean ceiling tiles,” while page 2-3 separates the word “tiles” from “ceilings” in the “standards” list. (R. 471-72.)

At the very least, the document itself and the denials by Doe raise issues of credibility that cannot be weighed or determined on a summary judgment motion. *Lapkin v. Lapkin*, 224 A.D.2d 199, 199, 637 N.Y.S.2d 140 (1st Dep't 1996).

G. BigOil Improperly Shifted the Basis for its Summary Judgment Motion in its Reply Papers, and BigOil’s Challenges to the Madison Affidavit and the Photographs Should Therefore be Rejected.

BigOil’s arguments regarding the Madison affidavit were also improper and should be rejected because BigOil did not raise them until it filed its reply.

BigOil sought summary judgment on the grounds that “there is no issue of material fact regarding its lack of duty as either franchisor or out-of-possession landlord. (R. 20.)

BigOil did not assert that there was no evidence that the tile was missing when Smith was injured or that there was no evidence the tile was missing when the Lease and PMPA Agreement were signed.

Instead, BigOil only claimed that it had no duty to Smith.

In its reply papers, BigOil shifted its theory, claiming it was entitled to summary judgment because there was no evidence that the tile was missing when Smith was injured or when BigOil leased the Property. (R. 750.)

A party is not allowed to make a motion for summary judgment on one basis and then shift to an alternate theory in reply papers.

The purpose of reply papers is to address arguments made in the opposition papers, and a movant should not be permitted to introduce new arguments in support of, or new grounds for, a motion. *Azzopardi v. American Blower Corp.*, 192 A.D.2d 453, 454, 596 N.Y.S.2d 404 (1st Dep’t 1993) (court should not have considered arguments in support of summary judgment which made their initial appearance in reply papers).

At the time BigOil filed its summary judgment moving papers, it was aware of Madison's expert opinion because the Madison affidavit had previously been submitted in opposition to Acme's motion for summary judgment. (R. 783.)

That motion was denied by the IAS Court, and this Court has affirmed that determination. *Smith v. Acme Convenience, Inc.*, 303 A.D.2d 212, 756 N.Y.S.2d 553 (1st Dep't 2003).

CONCLUSION