Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable **LAWRENCE V. CULLEN** IAS PART 6
Justice

----------X

CHIA YUN TSAI and TAO MING TSAI, Index No.: 9047/06

Plaintiffs, Motion Date: 4/29/08

-against- Motion Cal. No.:19

DUANE READE, INC., 134-54 MAPLE AVENUE TENANTS CORP., M.P.J. REALTY, INC., LANDINGS DEVELOPMENT ASSOCIATES, MAPLE ASSOCIATES, MALVERNE GROUP, INC., and STANDISH REALTY CORP., Motion Sequence No.:1

Defendants.

----------X

The following papers numbered 1 to 19 read on this motion by defendant, DUANE READE, for summary judgment, the motion by the remaining co-defendants for summary judgment, and the plaintiff's cross motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Notice of Cross Motion-Affirmation-Exhibits.....	5 - 7
Affirmation in Opposition-Exhibits.....	8 - 9
Reply Affirmation.....	10
Notice of Cross Motion-Affirmation-Exhibits.....	11 - 13
Affirmation in Opposition-Exhibits.....	14 - 15
Reply Affirmation-Exhibits.....	16 - 17
Reply Affirmation-Exhibits.....	18 - 19

Upon the foregoing papers, it is ordered that the motion is determined as follows:

This is a negligence action to recover money damages for personal injuries allegedly sustained by plaintiff, CHIA YUN TSAI (hereinafter referred to as "TSAI") on February 20, 2006 when a rolling gate fell upon the plaintiff in the parking lot area of a Duane Reade store.

Said Duane Reade store was located at 42-28 Main Street (also known as 134-54 Maple Avenue). The parking lot was owned by defendant, LANDING DEVELOPMENT ASSOCIATES (hereinafter referred to as "LANDING"), who subleases the right to the parking lot to defendant MAPLE ASSOCIATES (hereinafter referred to "MAPLE"). Maple leases said lot to defendant DUANE READE, INC. (hereinafter referred to as "DUANE READE"). It further appears that the parties executed a Stipulation of Discontinuance as and against defendants, 134-54 MAPLE AVENUE TENANTS CORP. and M.P.J. REALTY, INC.

Defendant, DUANE READE, moves for summary judgment dismissing the plaintiffs' complaint and any and all cross claims. DUANE READE argues that plaintiff has not met the burden of proving that Duane Reade had created the dangerous condition, or that Duane Reade had actual or constructive notice of any dangerous condition pertaining to the fence.

Livingston O'Brian, store manager, testified on behalf of Duane Reade. During said deposition, Mr. O'Brian testified that the fence in question was a fence around the perimeter of the parking lot. That there were sections of said fence which were rolling, and that the two sections of fence would roll and meet each other, and then would be fastened by a chain and lock. Similarly, in opening the fence, the rolling sections would roll apart and thereafter would be secured to a stationary part of the fence with the same chain and lock. Mr. O'Brian testified that it is the opening store manager that was in charge of opening the gate, and the closing store manager that was in charge of closing the gate. Further, Mr. O'Brian stated that prior to the accident herein, he had not received any complaints that the fence was broken or not working properly, and had no knowledge of any prior accidents involved with said fence. Lastly, with respect to any necessary repairs to premises, Mr. O'Brian testified he would contact a Mr. Zahon, who worked for Duane Reade, and in fact contacted Mr. Zahon the day after the accident to come and repair the fence.

Mr. O'Brian further averred that he was not working on the day of the accident, and that it was the assistant manager, Marvin San Nicolas who was present on February 20, 2006.

In the instant cross motion, plaintiff seeks leave to file said cross motion for summary judgment, stating that there is good cause for filing said cross motion more than 120 days after the filing of the note of issue herein. Defendant does not oppose same. However, inasmuch as the motion in chief was filed in a timely manner, and the cross motion seeks relief on the same issues that were raised in defendant's timely motion, said cross motion shall also be deemed timely. (See, Conklin v. Triborough Bridge and Tunnel Authority, 49 A.D.3d 320; Bressingham v. Jamaica Hospital Medical Center, 17 A.D.3d 496).

Plaintiff, further seeks summary judgment on the issue of liability against defendant, DUANE READE. In support, plaintiff presented an affidavit of the assistant store manager, Marvin San Nicolas, who was the manager at the store on the day of the within occurrence. Mr. San Nicolas avers that when he arrived at the store, he opened the fence, drove into the parking lot and then closed the fence behind him as the store was not yet opened to the public. That at approximately fifteen minutes prior to the store opening, a stock person unchained the rolling gates and opened them. Mr. San Nicolas states that the stock person should have chained the

rolling gates to the stationary fence, and that had the rolling gate been opened and chained to the stationary fence as per proper procedure, the gate would not have been able to fall on the plaintiff.

Defendant, DUANE READE, argues in their reply that said statement is inadmissable due to the "speaking agent doctrine". The Court finds this argument unavailing in that the statement of Mr. San Nicholas is an affidavit of facts, not hearsay, and therefore is not subject to the speaking agent doctrine.

It is clear that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case, and such showing must be made by producing evidentiary proof in admissible form". (Santanastasio v. Doe, 301 A.D.2d 511 [2nd Dept. 2003]). The burden then shifts to the opponent to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the grant of summary judgment. (Zuckerman v. City of New York, 49 N.Y.2d 557 [N.Y. 1980]).

Further, in reviewing a motion for summary judgment, the court accepts as true the evidence presented by the non-moving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue." (Baker v. Briarcliff School Dist., 205 A.D.2d 652 [1994]; Fleming v. Graham, 34 A.D.3d 525 [2nd Dept. 2006]).

Based upon the foregoing, it is clear that there is a triable issue of fact as to whether the defendant, DUANE READE, created the danger by not properly fastening the rolling section of the fence to the stationary section of said fence. Therefore, defendant DUANE READE's motion for summary judgment and plaintiff's cross motion for summary judgment is denied.

Plaintiffs' cross motion further seeks an order striking the defendant, DUANE READE's answer for failing to preserve crucial evidence, or in the alternative, precluding DUANE READE from contesting that its employee negligently opened the rolling gate. Defendant, DUANE READE, argues that plaintiff was provided with a complete video surveillance of the subject accident. While plaintiff contends that Duane Reade did not preserve the part of the surveillance video showing the stock person opening the gate, plaintiff presents no evidence that such a video existed, let alone that the defendant intentionally and in bad faith destroyed such video. Moreover, a review of plaintiff's demand for discovery reveals that "All photographs, videotapes, motion pictures and the like taken of the Plaintiff(s) which the Defendant(s) will seek to introduce at the time of trial" were demanded and exchanged.

Accordingly that portion of plaintiff's cross motion seeking an order striking the defendant, DUANE READE's answer, or in the alternative precluding DUANE READE from contesting that its employee was negligent in the opening of the gate is denied.

Lastly, co-defendants, LANDING, MAPLE, MALVERNE and STANDISH, also cross move for summary judgment dismissing the plaintiff's complaint and all cross claims against them.

With respect to defendant, MALVERNE, it is contended that said corporation dissolved in 1995, and did not own, occupy, nor have any connection to the subject premises on the date of the accident. Inasmuch as there is no opposition submitted thereto, defendant MALVERNE's request for summary judgment is granted.

Defendants, LANDING, MAPLE and STANDISH, argue that they are entitled to summary judgment in that they are out-of-possession landlords. In support, said defendants submitted evidence that establishes that the parking lot was leased to DUANE READE and that defendants, LANDING, MAPLE and STANDISH, did not retain control over the premises, nor were they contractually required to maintain or repair the same. Furthermore, the terms of the lease entered into by DUANE READE, required the tenant to install the fence, and that repair and maintenance of the parking lot was the responsibility of the tenant.

Accordingly, defendants LANDING, MAPLE and STANDISH, have established their entitlement to summary judgment herein in that they were out-of-possession landlords and had relinquished control of the premises to the tenant, DUANE READE, and further that the tenant, DUANE READE, was required to maintain the premises. (See, Gavallas v. Health Ins. Plan of Greater New York, 35 A.D.3d 657 [2006]; Garner v. City of New York, 6 A.D.3d 387 [2004]; Zaglas v. Gironda, 266 AD2d 282 [1999]). While the lease provided that tenant, DUANE READE, was not to make structural repairs without the landlords approval, the allegedly dangerous condition which cause the accident was the fence, which is not structural in nature, and therefore the landlords cannot be liable. (See, Rhian v. PABR Assoc., Inc., 38 A.D.3d 637 [2007]; Yadegar v. Intl. Food Mkt., 37 A.D.3d 595 [2007]).

In opposition, the plaintiff and defendant, DUANE READE, failed to raise a triable issue of fact. Their argument that, as a matter of a law, a reservation of a right to approve structural repairs, as well as alleged ambiguity in the terms of the lease, requires denial herein is without merit. Accordingly, the branch of defendants, LANDING, MAPLE and STANDISH motion for summary judgment is granted, and determination of indemnity is moot.

Accordingly, based upon the foregoing, it is

ORDERED that defendant, DUANE READE, INC.'s, motion for summary judgment is denied; and it is further

ORDERED that the plaintiffs, CHIA YUN TSAI and TAO MING TSAI, cross motion for summary judgment on the issue of liability, and an order striking the answer of defendant, DUANE READE, INC., or in the alternative a order of preclusion is denied; and it is further

ORDERED that the cross motion by defendants, LANDING DEVELOPMENT ASSOCIATES, MAPLE ASSOCIATES, MALVERNE GROUP, INC., and STANDISH REALTY CORP., seeking summary judgment dismissing the plaintiff's complaint and all cross claims is hereby granted; and it is further

ORDERED, that the plaintiff's complaint, and all cross claims, is dismissed as against defendants LANDING DEVELOPMENT ASSOCIATES, MAPLE ASSOCIATES, MALVERNE GROUP, INC., and STANDISH REALTY CORP.; and it is further

ORDERED, that the Clerk of the Court is authorized to enter judgment in accordance with the foregoing.

A copy of this Order is being faxed to all parties herein

Dated: September 22, 2008

_____

LAWRENCE V. CULLEN, J.S.C.