

Martins v Little 40 Worth Assoc., Inc.

2008 NY Slip Op 33268(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 123051/02

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **EMILY JANE GOODMAN**

PART 17

Justice

Index Number : 123051/2002

MARTINS, ATINSOLA

vs.

LITTLE 40 WORTH ASSOCIATES

SEQUENCE NUMBER : # 009

SUMMARY JUDGMENT

INDEX NO. 123051-02

MOTION DATE _____

MOTION SEQ. NO. #009

MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is granted

and cross motion also decided

FILED

NOV 08 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/25/08

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
ATINSOLA MARTINS and RISIKAT MARTINS,

Plaintiffs,

-against-

Index No. 123051/02

LITTLE 40 WORTH ASSOCIATES, INC., and
NEWMARK & CO., REAL ESTATE INC.,

Defendants.

-----X
LITTLE 40 WORTH ASSOCIATES, INC., and
NEWMARK & CO., REAL ESTATE INC.,

Third-Party Plaintiff(s),

-against-

Third-Party
Index No. 591205/04

PARTNERS CLEANING, LLC,

Third-Party Defendant.

-----X
PARTNERS CLEANING, LLC,

Second/Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 590607/05

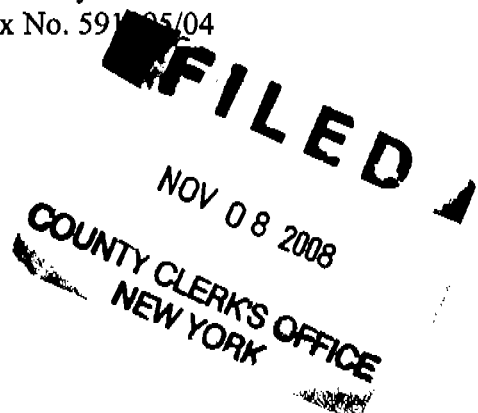
TWI-LAQ INDUSTRIES, INC., and
CHEMICAL SPECIALTIES MANUFACTURING
CORPORATION,

Second/Third-Party Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Motion sequence numbers 009 and 010 are consolidated for disposition.

In this action for personal injuries, plaintiff Atinsola Martins alleges that, on March 23, 2001, he was exposed to hazardous chemical fumes from the carpet cleaning shampoo used to



clean the carpet at his place of employment at 40 Worth Street in Manhattan. As a result of this exposure, plaintiff claims that he has sustained symptoms of asthma and chemical sensitivity.

In motion sequence number 009, defendants/third-party plaintiffs 40 Worth Associates LLC s/h/a Little 40 Worth Associates, Inc. (Little 40) and Newmark & Co., Real Estate, Inc. (Newmark) move, pursuant to CPLR 3212, for summary judgment on their third-party claims for indemnification and breach of contract against third-party defendant Partners Cleaning, LLC (Partners). Partners cross-moves for summary judgment dismissing the third-party complaint and all cross claims asserted against it. Alternatively, Partners seeks indemnification from second third-party defendants Twi-Laq Industries, Inc. (Twi-Laq) and Chemical Specialties Manufacturing Corporation (Chem Spec).

In motion sequence number 010, Twi-Laq moves for summary judgment dismissing the second third-party complaint and all cross claims as against it. Twi-Laq also moves, in the alternative, for summary judgment granting indemnification and legal defense costs against Chem Spec. Chem Spec cross-moves for summary judgment dismissing the second third-party complaint and all cross claims as against it.

BACKGROUND

Little 40 and Newmark are the owner and managing agent of 40 Worth Street, respectively. Partners is allegedly the carpet cleaning contractor that cleaned the carpets at the premises. Twi-Laq and Chem Spec are the distributor and manufacturer of the product that allegedly caused plaintiff's injury, Formula 161.

Plaintiff testified at his deposition that, on March 23, 2001, he was an engineer employed by the New York City Department of Design and Construction (Plaintiff 5/23/05 Deposition

[Dep.], at 11). Plaintiff was assigned to 40 Worth Street (*id.*). His office was located in Room 836, a shared office on the eighth floor which occupied approximately 10 percent of the floor space on that floor (*id.* at 14, 15). Plaintiff testified that he reported to work at about 8:00 A.M. on that date (*id.* at 27). According to plaintiff, he had headaches and stomach trouble, and felt weak all morning (*id.* at 27-28). He testified that when he arrived at work, he did not have any indication that the carpets had been cleaned; he did not smell any unusual odors (*id.* at 39, 40). Plaintiff told his supervisor that he felt ill, and then went to the hospital (*id.* at 30, 32). He later learned that the carpet had been cleaned over the preceding weekend (Plaintiff 10/30/06 Dep., at 66). At some point thereafter, plaintiff was diagnosed with asthma as a result of his exposure to the carpet cleaning chemicals (Plaintiff 5/23/05 Dep., at 63).

According to plaintiff, he told his supervisor that he was experiencing similar symptoms the year before, in 2000 (*id.* at 41). He went for treatment in St. Peter's Hospital in New Brunswick, New Jersey, where a doctor told him that his physical symptoms were the consequence of being exposed to carpet cleaning products (*id.* at 44, 45). After he returned to the office, he learned from a co-worker that the carpets had just been cleaned (*id.* at 45). Plaintiff informed his supervisor that he had gone to the hospital because he was feeling shortness of breath, headaches, and weakness, and that it was due to carpet cleaning (*id.* at 50). His supervisor told him that he was going to talk to the carpet cleaners (*id.* at 51).

Thomas Lora, the building superintendent, testified that the carpets were cleaned four times per year in March 2001 (Lora Dep., at 15). Lora testified that Room 836 was carpeted and tiled, but did not recall the exact percentage of the area that was carpeted; he stated that it might be half carpeted and half tiled (*id.* at 14). According to Lora, carpet cleaning was usually done

over the weekend, especially on Saturdays, but he was unsure whether there was any particular rule about when carpet cleaning was performed (*id.* at 28). Lora never received any complaints about anyone becoming ill from carpet cleaning (*id.* at 65).

The chief operating officer of Partners, Jeffrey Edelman, testified that, in March 2001, the company performed a variety of cleaning services at 40 Worth Street, including carpet cleaning and shampooing (Edelman Dep., at 8, 14). Partners only used a cleaning product manufactured by Chem Spec, Formula 161, to shampoo the carpets (*id.* at 26-27). The drying time of the product is normally 46 hours (*id.* at 32-33). Partners never received any complaints from any tenants regarding carpet cleaning (*id.* at 39-41). The cleaners typically use less Formula 161 than that specified in Chem Spec's instructions (*id.* at 43). Partners only cleans on weekends; therefore, the last time that the carpet could have been cleaned would have been March 18th (or four and a half days before plaintiff was exposed to Formula 161) (*id.* at 64).

Steven Wels testified on behalf of Twi-Laq (Wels Dep., at 5-6). According to Wels, Twi-Laq is in the business of manufacturing janitorial and industrial chemicals, and also distributes chemicals made from other manufacturers (*id.* at 6-7). Twi-Laq sold supplies to Partners, including Formula 161, which was manufactured by Chem Spec (*id.* at 9, 14, 15, 26). When items are received from Chem Spec, they are shrink-wrapped and packaged, and are located on a pallet (*id.* at 16). The cases are not opened, but the pallets are broken down so that they can be stored in a warehouse (*id.*).

Faisal Islam, a chemist and the technical director of Chem Spec, testified that Chem Spec manufactured Formula 161 in March 2001 (Islam Dep., at 9, 10, 15-16). Formula 161 is approximately 80 percent water, 10 percent polymer, five percent soap, and two to three percent

2-butoxyethanol (*id.* at 41, 50, 64). The product's instructions require dilution in a ratio of 16 to 1 when applied to carpets (*id.* at 41-42). Prior to being shipped, Formula 161 is tested for quality control, including appearance, odor, specific gravity, pH, and solid content (*id.* at 19-20). Islam asserted that 2-butoxyethanol was not a hazardous ingredient of Formula 161; the solution was 80 percent water and was further diluted upon its application (*id.* at 41-42). Based upon his experience sampling workers who handled pure 2-butoxyethanol, even the undiluted chemical was not dangerous (*id.* at 47). He is unaware of any claims that exposure to the product had caused any illness (*id.* at 25-27).

By summons and complaint filed on October 22, 2002, plaintiff and his wife, Risikat Martins, suing derivatively for loss of services, commenced the instant action for negligence against Little 40 and Newmark. Specifically, plaintiffs claim in the bill of particulars that Little 40 and Newmark were negligent in failing "to properly instruct and warn the plaintiff that the chemical used in the carpet shampoo and cleaner chemical was highly dangerous; in failing to properly supervise and control the use of the chemical used in the cleaning of the carpet; in failing to place warning signs or barricades at or about said condition; in failing to comply with the statutes and ordinances pertaining to such cases made and provided, and the defendants were further negligent under the circumstances" (Verified Bill of Particulars, ¶ 5). Furthermore, Little 40 and Newmark are charged with creation and knowledge of the hazardous chemicals (*id.*, ¶ 10).

Thereafter, by service of a third-party complaint, Little 40 and Newmark impleaded Partners, asserting claims for indemnification, contribution, and failure to procure and/or provide insurance coverage. Partners brought a second third-party complaint against Twi-Laq and Chem Spec, seeking indemnification and contribution grounded on theories of negligence, strict

products liability, and breach of warranty.

DISCUSSION

“It is well settled 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 demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers’”

(*Johnson v CAC Bus. Ventures, Inc.*, 52 AD3d 327, 328 [1st Dept 2008], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the proponent makes a prima facie showing, the burden shifts to the opposing party to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[I]ssue-finding, rather than issue-determination, is the key to (reviewing a motion for summary judgment)” (*Bautista v David Frankel Realty, Inc.*, 54 AD3d 549, 556 [1st Dept 2008], quoting *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, *rearg denied* 3 NY2d 941 [1957]).

The court first considers the cross motions for summary judgment because granting these motions would render the motions for indemnification moot.

Chem Spec’s Cross Motion for Dismissal of the Second Third-Party Complaint

Chem Spec argues that there is no evidence that plaintiff was exposed to any respirable fumes from Formula 161. In addition, Chem Spec contends that plaintiff’s injury was not caused by his exposure to Formula 161.

To establish a relationship between an individual’s illness and a toxin suspected of

causing that illness, a plaintiff must establish: (1) his level of exposure to that toxin, (2) general causation, i.e., that the toxin is capable of causing the alleged illness, and the level of exposure to the toxin that will engender the illness (the dose-response relationship), and (3) specific causation, i.e., the “likelihood” that the toxin caused the plaintiff’s injuries (*Parker v Mobil Oil Corp.*, 7 NY3d 434, 446 n 2, 448 [2006], *rearg denied* 8 NY3d 828 [2007] [citation omitted]; *see also Zaslowsky v J.M. Dennis Constr. Co. Corp.*, 26 AD3d 372, 373 [2d Dept 2006]; *Amorgianos v National R.R. Passenger Corp.*, 303 F3d 256, 268 [2d Cir 2002]). The third prong requires an evaluation of the possibility of other causes (*Zaslowsky*, 26 AD3d at 373). This three-step process is recommended by the World Health Organization and the National Academy of Sciences for establishing a causal link between an individual’s illness and a toxin believed to have caused the illness (*id.*).

In order to meet its summary judgment burden, a defendant may show that there was no causal connection between the plaintiff’s exposure to the toxin and his injuries through ““expert evidence based on a scientifically-reliable methodology”” (*Cinquemani v Old Slip Assoc., LP*, 43 AD3d 1096, 1097 [2d Dept 2007], quoting *Zaslowsky*, 26 AD3d at 374; *Heckstall v Pincus*, 19 AD3d 203, 204 [1st Dept 2005]; *Lewin v County of Suffolk*, 18 AD3d 621, 622 [2d Dept 2005]).

Chem Spec submits an affidavit from Henry P. Shotwell, Ph.D., a certified industrial hygienist, who opines, to a reasonable degree of scientific certainty, that plaintiff’s exposure to 2-butoxyethanol¹ did not cause his injury. Shotwell bases his conclusion on the following:

- “[t]he square footage of Room 836 is either 3,670 square feet, at most; or

¹The Material Safety Data Sheet for Formula 161 lists 2-butoxyethanol as a hazardous ingredient, and states that inhalation may cause “irritation of the upper respiratory tract” (Guarneri Affirm., Exh. K). There are no other hazardous ingredients (*id.*).

more probably, 2,268 square feet” and his “understand[ing] that only 50% of the floor in Room 836 was carpeted” (Shotwell Aff., ¶ 9).

- “[i]f 1 gallon of shampoo is used for every 2,000 square feet of carpet, we would need to use 0.9 gallons, containing 9/10 of 7.19 grams, or 6.6 grams of [2-butoxyethanol]. If the application rate is actually 1 gallon of shampoo for every 4,000 square feet of carpet, then only 3.3 grams of [2-butoxyethanol] would have been applied. I used the greater numbers in my calculations” (*id.*).
- Since March 23, 2001 was a Friday, at least 104 hours expired between the time the product could last have been applied and when plaintiff reported for work on that date (*id.*, ¶ 10).
- According to the National Library of Medicine’s Hazardous Substances Database, the half-life of 2-butoxyethanol in air is 16 hours (*id.*, ¶ 11).

Shotwell continues, stating that, if all of the initial 6.6 grams of 2-butoxyethanol evaporated into the room² (which had a volume of 29,360 cubic feet or 831 cubic meters), the room concentration would have been 7.76 milligrams of 2-butoxyethanol per cubic meter of air, and 0.086 milligrams per cubic meter after 104 hours had expired (*id.*). According to Shotwell, normal office ventilation would have further diluted the concentration of 2-butoxyethanol (*id.*). OSHA has set a permissible exposure limit of 240 milligrams per cubic meter of air for a worker working eight hours a day and five days a week for a working lifetime without a significant risk of harm (*id.*, ¶ 12). Given that 0.086 milligrams is far less than OSHA’s permissible exposure limit, even without considering the effects of office ventilation, “any such de minimus potential exposure” could not and did not have any adverse health effects on plaintiff (*id.*). Shotwell also states that he conducted a review of medical literature concerning the potential effects of 2-butoxyethanol, and did not find any reports that asthma could be caused by exposure to the

²Shotwell states that Room 836 is 3,670 square feet with an eight-foot high ceiling (Shotwell Aff., ¶ 11).

chemical (*id.*, ¶ 13). The only reports of adverse effects from exposure to 2-butoxyethanol concern a possible blood condition, not a lung condition (*id.*).

Additionally, Chem Spec points to the deposition testimony of its technical director, Faisal Islam, who testified that 2-butoxyethanol was not hazardous because it was diluted in Formula 161 (Islam Dep., at 41-42). Islam further asserted that, based upon his sampling of Chem Spec's workers who handled pure 2-butoxyethanol, the undiluted chemical was also not hazardous (*id.* at 47).

An expert's opinion "must be based on facts in the record or personally known to the witness" (*Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646, *rearg denied* 6 NY2d 882 [1959]). Further, an expert may not reach a conclusion by assuming material facts not supported by the evidence and may not guess or speculate in drawing a conclusion (*Briggs v 2244 Morris L.P.*, 30 AD3d 216 [1st Dept 2006]; *Quinn v Artcraft Constr.*, 203 AD2d 444, 445 [2d Dept 1994]).

Here, Shotwell's analysis is based on assumptions that are not supported by the record. Shotwell assumes that the carpeted area of Room 836 was 1,835 square feet. Although Chem Spec asserts that half of the room was carpeted, the record is equivocal on this point. Lora testified that he did not recall the percentage of carpeted area, and that it *might* have been half carpeted and half tiled (Lora Dep., at 14). Additionally, Shotwell assumes that Partners used nine-tenths of a gallon of Formula 161 to clean the carpet. There is no evidence to support this assumption. Finally, while Chem Spec's technical director, a chemist, asserted at his deposition that undiluted 2-butoxyethanol is not hazardous, there is no basis to qualify him as an expert in the area of industrial hygiene (*see Matott v Ward*, 48 NY2d 455, 459 [1979] [an expert "should

be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable”]; *see also* Prince, Richardson on Evidence § 7-304 [Farrell 11th ed]). Even if Islam were qualified to testify as an expert, he has not given sufficient details of Chem Spec’s employees’ exposure to pure 2-butoxyethanol, in order to conclusively prove that 2-butoxyethanol is not hazardous, especially in light of the Material Safety Data Sheet for Formula 161 which lists 2-butoxyethanol as a hazardous ingredient, and states that inhalation may cause “irritation of the upper respiratory tract” (Guarneri Affirm., Exh. K). Therefore, Chem Spec has not established that Formula 161 did not cause plaintiff’s injury (*see Cinquemani*, 43 AD3d at 1098 [defendants failed to meet burden of establishing no causal link between plaintiff’s alleged injuries and his one-time exposure to methyl ethyl ketone, through physician’s affidavit which was conclusory and unsupported by the facts]).

Accordingly, Chem Spec’s motion must be denied “regardless of the sufficiency of the opposing papers” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [internal quotation marks and citation omitted]).

Cross Motion by Partners for Dismissal of the Third-Party Complaint

Partners argues that plaintiff’s injury was not a foreseeable consequence of its cleaning the carpet with Formula 161, citing *Perkins v AAA Cleaning* (30 AD3d 790 [3d Dept 2006]). Although the Material Safety Data Sheets indicate that 2-butoxyethanol may cause respiratory problems in its undiluted form, the deposition testimony of Chem Spec’s technical director makes clear that Formula 161 is not hazardous; Formula 161 is 80 percent water and is further

diluted when applied. Partners further contends that there are no similar prior complaints about Formula 161. Partners maintains that there is also no evidence that plaintiff's complaints about his respiratory distress in 2000 were ever transmitted to the building owner through its superintendent or his employer.

Little 40 and Newmark contend, in opposition, that Partners has failed to meet its burden on summary judgment. These defendants maintain that Partners was the only entity that undertook carpet cleaning in the building. And, plaintiff alleges that he was injured as a result of carpet cleaning performed by Partners.

In *Perkins* (30 AD3d at 791), the plaintiff, who was hyperreactive to environmental irritants, allegedly experienced respiratory distress as the result of carpet cleaning at her workplace. The plaintiff sued the carpet cleaning service for negligence, claiming that the carpet cleaning service failed to properly apply the carpet cleaning solutions, ventilate the offices or warn her of the danger of inhaling the vapors (*id.*). The Court concluded that the risk of respiratory injury was not a foreseeable consequence of the carpet cleaning because there was no evidence connecting the cleaner with the alleged injury, and unlike here, the safety data sheets for the undiluted suspect chemical only warned of dizziness, headaches or unconsciousness, but not of an adverse respiratory condition (*id.* at 791-92). Therefore, the service owed no duty to her concerning that particular risk, absent evidence of known health risks from the solutions, or that the service had any way of knowing of the worker's hypersensitivity (*id.*).

The court concludes that *Perkins* is not controlling in the instant case. Under New York law, the issue of foreseeability is usually analyzed in determining whether one actor owes a duty of care to another (*see Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997] ["[i]n analyzing questions

regarding the scope of an individual actor's duty, the courts look to whether the relationship of the parties is such as to give rise to a duty of care, whether the plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks"] [citations omitted]). "Foreseeability of risk is an essential element of a fault-based negligence cause of action because the community deems a person at fault only when the injury-producing occurrence is one that could have been anticipated" (*Sanchez v State of New York*, 99 NY2d 247, 258 [2002], quoting *Di Ponzio*, 89 NY2d at 583). "If the defendant could not reasonably foresee any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence, and no liability" (*Danielenko v Kinney Rent A Car*, 57 NY2d 198, 204 [1982] [internal quotation marks and citation omitted]).

Here, in contrast to *Perkins*, plaintiffs have no direct claims against the carpet cleaner, Partners. Plaintiffs are claiming that Little 40 and Newmark were negligent in creating and having knowledge of a dangerous condition, failing to supervise and control the carpet cleaning, and failing to warn him about the dangers of the carpet cleaning chemicals (Verified Bill of Particulars, ¶¶ 9, 10). Little 40 and Newmark are, in turn, seeking indemnification and contribution from Partners. There is no dispute that Newmark entered into a contract with Partners for cleaning services. "[W]here a person contracts to do certain work he is charged with the common-law duty of exercising reasonable care and skill in the performance of the work required to be done by the contract" (*Strauss v Belle Realty Co.*, 98 AD2d 424, 434 [2d Dept 1983], *aff'd* 65 NY2d 399 [1985] [internal quotation marks and citations omitted]). Although Partners submits evidence that its workers were trained to use less carpet shampoo than the amount recommended by the manufacturer (Edelman Dep., at 43), it has not shown that the

shampoo was not negligently applied in this case. In any event, the evidence here is unlike the evidence in *Perkins* because in this case, the safety data sheets for the undiluted suspect chemical warn of an adverse upper respiratory irritation.

In view of the factual issues as to its negligence, Partners is not entitled to summary judgment dismissing the third-party complaint.

Motion by Little 40 and Newmark for Summary Judgment on Indemnification and Breach of Contract

Little 40 and Newmark contend that they are entitled to contractual indemnification from Partners, pursuant to the terms of a purchase order for carpet cleaning services. In support of the motion, Little 40 and Newmark submit a purchase order dated February 22, 2001 for “pre-spot rotary shampoo and extract all carpets,” without any terms or conditions, and a second purchase order dated January 7, 2003 for “strip & refinish tile flooring plus terrazzo floor in front of [Design & Construction Office]), with terms and conditions (Brennan Affirm., Exh. O). These defendants also offer an affidavit from Tom Lora, the building superintendent, in which he states that the purchase orders are “standard” (Lora Aff., ¶¶ 5-6). Little 40 and Newmark further maintain that Partners breached the contract by failing to defend and indemnify them.

In opposition, Partners points out that Little 40 and Newmark have not submitted the terms and conditions of the purchase order for the carpet cleaning services, only the purchase order relating to stripping and refinishing the floor. Additionally, there is no evidence that the hold harmless provisions of the purchase order would apply to the carpet cleaning work.

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the

surrounding facts and circumstances” (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [internal quotation marks and citations omitted]). Here, Little 40 and Newmark have failed to establish the terms of the purchase order for carpet cleaning services. Although Lora states that the purchase orders are “standard,” he does not indicate that they contain the same indemnification provisions. Partners also disputes that these terms apply to cleaning services. Without the terms of the contract, the court is also unable to determine whether Partners is in breach for failure to procure insurance or defend Little 40 and Newmark.

Little 40 and Newmark also seek common-law indemnification from Partners. The predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and thus, a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*Trump Vil. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept], *lv denied* 1 NY3d 504 [2003]; *Kagan v Jacobs*, 260 AD2d 442 [2d Dept 1999]). To establish a claim for common-law indemnification, “the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *see also Priestly v Montefiore Med. Center/Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]).

Little 40 and Newmark have also failed to show that they are entitled to common-law indemnification from Partners. First, Little 40 and Newmark have not established that they were not negligent. The only evidence offered by Little 40 and Newmark – deposition testimony by the building’s superintendent that Newmark did not provide tools, materials, or equipment to

Partners (Lora Dep., at 48) – does not show that they did not supervise, direct or control the work (see e.g. *Uribe v Fairfax, L.L.C.*, 48 AD3d 336, 337 [1st Dept 2008]; *Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]; *Landgraft v 1579 Bronx Riv. Ave., LLC*, 18 AD3d 385, 387 [1st Dept 2005]). Second, Little 40 and Newmark have not presented any evidence to show that Partners was negligent. This issue must, therefore, await resolution at trial.

In sum, Little 40 and Newmark are not entitled to summary judgment.

Motion by Partners for Indemnification

Partners also moves for common-law indemnification from Twi-Laq and Chem Spec, pointing to deposition testimony that its employees were instructed in the proper use of Formula 161, and were trained to use a lesser amount of the product than that recommended by Chem Spec.

However, Partners has failed to establish that it was not negligent or that either Twi-Laq or Chem Spec were negligent (see *Correia*, 259 AD2d at 65). In any case, Chem Spec has raised an issue of fact as to whether Partners was negligent in its application of Formula 161. Chem Spec submits evidence showing that the product label for Formula 161 states that it should be used in a “well ventilated area and only as directed” (Sena Affirm. in Opp., Exh. A). According to Edelman, Partners generally did not open the windows when performing carpet cleaning work (Edelman Dep., at 31). Thus, that part of its motion seeking common-law indemnification must be denied.

Twi-Laq’s Motion for Dismissal of the Second Third-Party Complaint and Indemnification

Twi-Laq contends that Partners only seeks to recover against it for negligence, and it was

not negligent because it did not alter the product in any way and did not take an active role in manufacturing the product. Twi-Laq further argues that, even if Partners has a strict products liability claim against it, the deposition testimony of Chem Spec's technical director demonstrates that the product was not defective.

Partners points out that its third cause of action seeks recovery in strict products liability and breach of warranty. Partners maintains that Twi-Laq's motion is premature because there has been no finding that the product, Formula 161, was or was not, defective.

"In strict products liability, a manufacturer, wholesaler, distributor, or retailer who sells a product in a defective condition is liable for injury which results from the use of the product 'regardless of privity, foreseeability or the exercise of due care'" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 60 [2d Dept], *lv dismissed* 100 NY2d 614 [2003], quoting *Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]). The plaintiff must prove that the product was defective as a result of a manufacturing flaw, improper design, or a failure to provide adequate warnings, and that the defect was a substantial factor in causing the injury (*Wheeler v Sears Roebuck & Co.*, 37 AD3d 710 [2d Dept 2007]).

"Distributors and retailers may be held strictly liable to injured parties, even though they may be innocent conduits in the sale of the product, because liability rests not upon traditional consideration of fault and active negligence, but rather upon policy considerations which dictate that those in the best 'position to exert pressure for the improved safety of products' bear the risk of loss resulting from the use of the products"

(*Godoy*, 302 AD2d at 60, quoting *Sukljan v Ross & Son Co.*, 69 NY2d 89, 95 [1986]; *see also Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264, 265 [1st Dept], *lv dismissed* 9 NY3d 891 [2007]).

As pointed out by Partners, the second third-party complaint does, in fact, assert causes of action for indemnification as against Twi-Laq based on negligence, strict products liability, and breach of warranty. There is no evidence that Twi-Laq was negligent. However, while Chem Spec's technical director Faisal Islam testified that Formula 161 was tested for quality prior to being shipped, and that he believed that pure 2-butoxyethanol was not hazardous, his testimony does not establish that the product was not defective, for the reasons previously stated (*see* pages 9-10). Accordingly, Twi-Laq has failed to establish that Formula 161 was reasonably safe for its intended use (*see Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 108 [1983] [a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner]), or that the batch of Formula 161 in this case was not defectively manufactured.

As the distributor of Formula 161, Twi-Laq is entitled to conditional indemnification from Chem Spec (*see German v Morales*, 24 AD3d 246, 247 [1st Dept 2005] [awarding distributor conditional indemnification from manufacturer]). “[A] seller or distributor of a defective product has an implied right of indemnification as against the manufacturer of the product” (*Godoy*, 302 AD2d at 62). The right to indemnification includes the right to attorney's fees and costs and disbursements (*Lowe*, 40 AD3d at 265). Conditional indemnification serves the interest of justice and judicial economy in awarding the indemnitee “the earliest possible determination as to the extent to which he may expect to be reimbursed” (*id.* at 264, quoting *McCabe v Queensboro Farm Prods.*, 22 NY2d 204, 208 [1968]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 009) by defendants/third-party plaintiffs 40 Worth Associates LLC s/h/a Little 40 Worth Associates, Inc. and Newmark & Co., Real Estate, Inc. for summary judgment is denied; and it is further

ORDERED that the cross motion by third-party defendant Partners Cleaning, LLC for summary judgment is denied; and it is further

ORDERED that the motion (sequence number 010) by second third-party defendant Twi-Laq Industries, Inc. for summary judgment is granted only to the extent of awarding conditional indemnification as against second third-party defendant Chemical Specialties Manufacturing Corporation, and is otherwise denied; and it is further

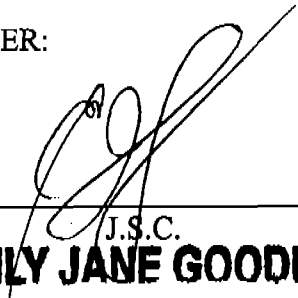
ORDERED that the cross motion by second third-party defendant Chemical Specialties Manufacturing Corporation for summary judgment is denied.

This Constitutes the Decision and Order of the Court.

Dated: November 25, 2008

FILED
NOV 08 2008
COUNTY CLERK'S OFFICE
NEW YORK

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