SHORT FORM ORDER

INDEX No. 05-8627
CAL. No. 08-00655-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

P R E S E N T :

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 8-4-08 (004)
MOTION DATE 8-22-08 (005 & 006)
ADJ. DATE 8-4-08 (004)
ADJ. DATE 9-26-08 (005 & 006)
MNEMONIC: # 004 - MD
005 - MD
006 - MD

CARMEN RANKIN,	FABER & TROY Attorneys for Plaintiff 180 Froehlich Farm Boulevard Woodbury, New York 11797
Plaintiff,	TONETTI & AMBROSINO Attys for Deft Professional Installation Services 548 West Jericho Turnpike Smithtown, New York 11787
- against -	O'CONNOR, REDD, LLP Attys for Deft National Storage & Conveyer 200 Mamaroneck Avenue White Plains, New York 10601
PROFESSIONAL INSTALLATION SERVICES, INC., NATIONAL STORAGE AND CONVEYOR SYSTEMS, INC. and BRENTWOOD REAL ESTATE, LLC.,	PEREZ, FUREY & VARVARO Attys for Deft Brentwood Real Estate 333 Earle Ovington Boulevard, P.O. Box 9372
Defendants.	Uniondale, New York 11553

Upon the following papers numbered 1 to 45 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; 18 - 24 ; Notice of Cross-Motion and supporting papers 25 - 37 ; Answering Affidavits and supporting papers 38 - 41 ; Replying Affidavits and supporting papers 42 - 45 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (004) by the defendant National Storage and Conveyor Systems, Inc. (hereinafter National), the motion (005) by the defendant Professional Installation Services, Inc. (hereinafter Professional), and the motion (006) by Brentwood Real Estate, LLC (hereinafter Brentwood), for an order granting summary judgment are consolidated and determined together; and it is

ORDERED that the motion (004) by the defendant National for, inter alia, an order (i) granting summary judgment pursuant to CPLR 3212 dismissing the complaint insofar as

asserted against it, (ii) granting common law indemnification against Professional, and (iii) awarding it reimbursement of prior defense costs against Professional is denied in all respects; and it is further

ORDERED that the motions (005) by the defendant Professional and (006) by Brentwood for orders granting summary judgment pursuant to CPLR 3212 dismissing the complaint insofar as asserted against them are denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a slip and fall on the premises located at 1775 5th Avenue Bay Shore, New York (hereinafter premises) on November 11, 2003. The plaintiff allegedly tripped and fell on a wooden plank or pallet which was jutting out into the parking lot/driveway on the premises leased by the plaintiff's employer, Duralee Fabrics, Ltd. (hereinafter Duralee), a non-party, and owned by the defendant Brentwood. Pursuant to the written lease between Brentwood and Duralee, which runs from November 20, 2000 until November 19, 2010, the premises include the "[e]ntire warehouse and office space." It further provides that the tenant "agrees to do everything required of the [tenant] in the [l]ease." By way of background, the plaintiff filed a Worker's Compensation claim against Duralee, dated October 17, 2003, for the injuries which she allegedly sustained to her left knee in connection with her accident.

The gravamen of the complaint is that the defendants Brentwood, Professional and National negligently maintained the premises in creating and/or failing to remove a hazardous condition where persons traversed; in failing to warn about a dangerous condition; and in failing to maintain adequate safety measures. In their answers, the defendants have interposed cross-claims against each other sounding in common law and/or contractual indemnity as well as contribution.

The defendant National now moves for, inter alia, an order (i) granting summary judgment pursuant to CPLR 3212 dismissing the complaint insofar as asserted against it, (ii) granting common law indemnification against Professional and (iii) granting it reimbursement of prior defense costs against Professional. The defendants Professional and Brentwood now move for orders granting summary judgment pursuant to CPLR 3212 dismissing the complaint insofar as asserted against them. In support of its motion, Brentwood argues that the plaintiff's action against it is barred by virtue of the exclusivity of the Worker's Compensation Law as is the parent company of Duralee. In the alternative, it argues it is not responsible for the plaintiff's alleged injuries as Brentwood relinquished control of the premises to Duralee. Professional and National assert that the alleged condition of the premises was open and obvious and not inherently dangerous as a matter of law. National contends that it did not create or have actual or constructive notice of the condition, and that, in any event, it did not owe the plaintiff a duty of care as (I) it did not launch a force or instrument of harm, (ii) it did not displace another person's duty to maintain the premises and (iii) the plaintiff did not detrimentally rely on the continued performance of the work by National.

"[L]iability for a dangerous or defective condition on [real] property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property" (***Turrisi v Ponderosa, Inc.***, 179 AD2d 956, 957, 578 NYS2d 724 [3d Dept 1992]). "The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care" (***Quick v. G.G.'s Pizza & Pasta***, 53 AD3d 535, 536, 861 NYS2d 762 [2d Dept 2008]). A general contractor may be liable in common law negligence and under Labor Law § 200 if it has control over the work site and actual or constructive notice of the dangerous condition (***Keating v Nanuet Bd of Educ.***, 40 AD3d 706, 707, 835 NYS2d 705 [2d Dept 2007]; *see*, ***Kerins v Vassar, Coll.***, 15 AD3d 623, 625, 790 NYS2d 697 [2d Dept 2005]).

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]). While an out-of-possession owner is generally not liable for injuries that occur on leased premises, one who retains control of the premises, or contracts to repair or maintain the property, may be liable for defects (*see,* ***Eckers v Suede***, 294 AD2d 533, 743 NYS2d 129 [2d Dept 2002]). Where a plaintiff has presented evidence that a dangerous condition exists on the premises, the burden shifts to the landowner to demonstrate it exercised reasonable care under the circumstances to remedy the condition and to make the premises safe, based on such factors as the likelihood of injury to those entering the premises and the burden of avoiding the risk (***Cupo v Karfunkel***, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]).

The defendants failed to establish their prima facie entitlement to judgment as a matter of law as to whether the alleged condition was open and obvious and not inherently dangerous (*see*, ***DiVietro v Gould Palisades Corp.***, 4 AD3d 324, 771 NYS2d 527 [2d Dept 2004]; ***Cupo v Karfunkel***, 1 AD3d 48, *supra*; *cf.*, ***Brown v Melville Indus. Assoc.***, 34 AD3d 611, 823 NYS2d 697 [2d Dept 2006]). At her deposition, the plaintiff testified that she saw construction taking place in Duralee's parking lot upon her arrival to work the day of the accident. She also saw material being delivered that day. At the end of the work day, the plaintiff walked through the parking lot with fellow Duralee employee, Gladys Salmerone (hereinafter Salmerone). On their way to Salmerone's car, they decided to join another employee, Linda Cassata, who was feeding some stray cats on the grassy area. As she was walking and talking with Salmerone, with the parking lot curb to her left, she was looking forward to see if there were any cars. At some point, the plaintiff's left foot became wedged underneath a piece of wood which extended out from under construction material and past the curb, whereupon she tripped and fell forward to the ground. According to the plaintiff, she did not realize that wood was sticking out from under the construction material until after she had fallen. Contrary to the defendants' assertions, the alleged open and obvious condition of the construction materials, under the facts presented herein, did not absolve the defendants of liability but instead presents an issue of fact as to the plaintiff's

comparative fault (*see*, ***Cupo v Karfunkel***, 1 AD3d 48, *supra*). In the instant case, the condition which caused the accident can be attributed to the negligent maintenance of the property. It appears from the record that a piece of wood may have been obscured by the construction materials on top and not be readily observable to pedestrians. Additionally, the plaintiff testified that she was looking forward to see if there were passing cars as she walked along the curb to the subject location.

National failed to demonstrate, prima facie, that it was neither negligent nor had the authority to direct, supervise or control the placement of construction materials and related work giving rise to the injury (*cf.*, ***Mid-Valley Oil Co. Inc. v Hughes Network Sys, Inc.***, 54 AD3d 394, 863 NYS2d 244 [2d Dept 2008]; ***Cohen v Schachter***, 51 AD3d 847, 857 NYS2d 727 [2d Dept 2008]). , At his deposition, Roop Tawney (hereinafter Tawney) testified that he was employed by National as the director of material handling at the time of the accident. In 2003, National was hired by Duralee to put up a mezzanine at the subject location. National designed the mezzanine, ordered the necessary materials and hired Professional as a subcontractor to receive/load the materials and to perform the installation. Tawney also testified, however, that he attended a meeting with Michael Fogarty, President of Professional and John J. Wolfe, Duralee's Director of Operations (hereinafter Wolfe), in which it was agreed that construction materials would be placed "on the curb, on the far side of the parking lot." Tawney further testified that, during the relevant period, he saw materials being stored on the curb which had been separated and partially used. Similarly, Fogarty testified at his deposition, that he, Wolfe, Tawney and another National employee, Dan Rupert, instructed Professional to place materials on the grass along the perimeter of the parking lot. On the other hand, William Fuchs (hereinafter Fuchs) of Duralee testified, at his deposition, that he never had any contact with either Tawney or Fogarty, raising triable issues concerning instructions given to Professional about the placement of materials as well as the credibility issues for a jury (*see*, ***Nicklas v Telden Realty Corp.***, 305 AD2d 385, 759 NYS2d 171 [2d Dept 2003]). It is evident, therefore, that National, as the general contractor, assumed some measure of responsibility for the placement of construction materials in the parking lot. Thus, National failed to establish, prima facie, that it lacked control over the work site or notice of the allegedly dangerous condition, thus precluding a finding, as a matter of law, that it was not negligent (***Keating v Nanuet Bd of Educ.***, 40 AD3d 706, 835 NYS2d 705 [2d Dept 2007]; *cf.*, ***Cohen v Schachter***, 51 AD3d 847, *supra*).

The defendants Brentwood and Professional failed to establish their prima facie entitlement to judgment as a matter of law as to whether they lacked actual or constructive notice of the condition and whether the alleged defect or hazard caused or contributed to the plaintiff's trip and fall (*see*, ***Gonzalez v Padin***, 299 AD2d 954, 749 NYS2d 765 [4th Dept 2002]; ***Walls v City of New York***, 48 AD3d 792, 853 NYS2d 122 [2d Dept 2008]). Wolfe testified, at his deposition, that Duralee hired National to construct a mezzanine at its place of business. He advised Professional's employees where to place the materials after they unloaded it. Materials were stored "mostly on the grass". However, about 20% was placed in unused parking spaces. He admitted that some of the materials extended over the curb into the parking lot. Wolfe further testified that construction material was delivered in stages

on a daily basis and that some was delivered on the day of the accident. Fuchs testified, at his deposition, that he saw materials at the site but was unsure of the date. Fogarty testified, at his deposition, that National hired his company pursuant to a purchase order for the unloading of construction materials and the installation of a mezzanine at Duralee's premises. It was the normal custom for "dunnage" or wood to be placed under stacked construction materials. Fogarty further testified that while he saw more than one pile of corrugated decking parallel to the curb along the perimeter of the parking lot, he never saw any material protruding beyond the curb or in the parking lot. Based upon the foregoing, these are issues of fact raised by the testimony of the plaintiff, Wolfe and Fogarty regarding whether Duralee's parking lot was used to store construction material, whether any material extended out over the curb, and whether Professional created the allegedly dangerous condition that caused the plaintiff's accident (*see*, ***Mejia v City of New York***, 33 AD3d 675, 823 NYS2d 108 [2d Dept 2006])

Since the plaintiff is entitled, at this stage, to every reasonable inference that can be drawn from the testimony (*see*, ***Brandes v Inc. Vill. of Lindenhurst***, 8 AD3d 315, 316, 777 NYS2d 720 [2d Dept 2004]), and it is reasonably inferable from the testimony of the plaintiff and other witnesses that the construction material had been placed or left protruding over the parking lot curb, this testimony is sufficient to raise a triable issue of fact as to the defendants' creation of the allegedly dangerous condition (*see*, ***Brown v Outback Steakhouse***, 39 AD3d 450, 833 NYS2d 222 [2d Dept 2007]). Since the relevant deposition testimony was included in the defendants' moving papers, the existence of this issue precludes a finding that the defendants established their prima facie entitlement to judgment as a matter of law (*see*, ***Marek v Burmester***, 37 AD3d 668, 830 NYS2d 340 [2d Dept 2007]), and denial of the motions is thus required, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Marek v Burmester***, *supra*).

Brentwood also failed to establish its prima facie entitlement to judgment as a matter of law whether it did not have a duty to maintain and control the parking lot (*see*, ***Deerr'Matos v Ulysses Upp, LLC***, 52 AD3d 645, 861 NYS2d 368 [2d Dept 2008]; ***Winby v Kustas***, 7 AD3d 615, 775 NYS2d 906 [2d Dept 2004]; *cf.*, ***Casale v Brookdale Medical Assocs.***, 43 AD3d 418, 841 NYS2d 126 [2d Dept 2007]). The lease submitted in this case is silent as to whose responsibility it was to maintain the parking lot (*see*, ***Greis v Eckerd Corp.***, 2008 NY Slip Op 7087 [2d Dept, Sept 23, 2008]; *cf.*, ***Marchese v Fresh Meadows Assocs.***, 207 AD2d 871, 616 NYS2d 767 [2d Dept 1994]). While Fuchs testified, at his deposition, that the lease was a "net lease" which provided that Duralee was responsible for "everything," he also testified that Leonard Silverman, Lee Silverman, Martin Rosenberg and Amy Benjamin "have offices in Brentwood Real Estate, LLC and in Duralee," thus raising an issue of fact as to whether Brentwood was an in-possession landlord and, therefore, obligated to maintain the parking lot where the accident occurred (*see*, ***Pelaez v Seide***, 49 AD3d 618, 852 NYS2d 800 [2d Dept 2008]; ***Ellers v Horowitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]).

A parent corporation may be deemed to be an employer of an employee of a subsidiary corporation for Workers' Compensation purposes if the subsidiary functions as the alter ego of the parent (***Dennihy v. Episcopal Health Servs.***, 283 AD2d 542, 543, 724 NYS2d 768 [2d Dept 2001]). The parent corporation, however, must exercise complete domination and control of the subsidiary's day-to-day operations (*see*, ***Smith v Roman Catholic Diocese***, 252 AD2d 805, 806, 677 NYS2d 183 [3d Dept 1998]).

Brentwood is not entitled to summary judgment upon the basis that it is the alter ego of Duralee because it failed to submit sufficient evidence to demonstrate, as a matter of law, that it exercises complete domination and control of Duralee's day-to-day operations (*see*, ***Hageman v B & G Building Svcs.., LLC***, 33 AD3d 860, 823 NYS2d 211 [2d Dept 2006]; ***Almonte v Western Beef, Inc.***, 21 AD3d 514, 800 NYS2d 739 [2d Dept 2005]). Although Brentwood presented some evidence that the two entities were related and that they operate out of the same location, there are triable issues of fact as to whether the parent corporation exercised such control as to entitle it to raise the defense of the exclusivity of Worker's Compensation (*see*, ***Dennihy v Episcopal Health Servs. Inc.***, 283 AD2d 542, *supra*). While Fuchs testified, at his deposition, that Brentwood and Duralee have offices at the premises, he also testified that Brentwood had no involvement with the purchase and/or installation of the structural mezzanine in 2003. Additionally, although Fuchs testified that Martin Rosenberg, Leonard Silverman, Lee Silverman and Amy Benjamin were the principals of both Brentwood and Duralee, Wolfe testified, at his deposition, that Martin Rosenberg, Leonard Silverman and he were the principals and the managers of Brentwood. Furthermore, while Fuchs testified, as noted above, that he had no contact with representatives of National or Professional, Tawney and Fogarty, testified otherwise.

As to the cross-claims, where a party is held liable at least partially because of his or her own negligence, contribution against all other culpable tort-feasors is the only available remedy (*see*, ***Glaser v M. Fortunoff of Westbury Corp.***, 71 NY2d 643, 529 NYS2d 59 [1988]). Conversely, "the predicate for common law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (***Kagan v Jacobs***, 260 AD2d 442, 442, 687 NYS2d 732 [2d Dept 1999]). Where indemnity is at issue, one party is alleging that the other party should bear complete responsibility for the tort (***McDermott v City of New York***, 50 NY2d 211, 220, 428 NYS2d 643 [1980]), and that he or she is not responsible in any way for the injuries to the plaintiff (*see*, ***Barry v Hildreth***, 9 AD3d 341, 342, 780 NYS2d 159 [2d Dept 2004]). The right to indemnity "springs from a contract, express or implied, and full, not partial, reimbursement is sought" (***McDermott v City of New York***, *supra* at 216). Thus, the indemnitor is either totally responsible or not (*see*, ***McDermott v City of New York***, *supra* at 220).

Brentwood failed to establish its prima facie entitlement to summary judgment on the cross-claims against the other defendants sounding in common law contribution and indemnification because factual issues exist as to whether National was free from

negligence and whether it was solely responsible for the accident (*see*, ***Kwang Ho Kim v D & W Shin Realty Corp.***, 47 AD3d 616, 852 NYS2d 138 [2d Dept 2008]; ***Baillie Lumber Co., L.P., v Al L. Burke, Inc.***, 43 AD3d 1290, 842 NYS2d 818 [4th Dept 2007]). Additionally, Brentwood failed to establish its prima facie entitlement to summary judgment on its cross-claim for contractual indemnification because it did not establish that it was free from any negligence with regard to plaintiff's accident (*see*, ***Gil v Manufacturer's Hanover Trust Co.***, 39 AD3d 703, 833 NYS2d 634 [2d Dept 2007]). As National and Professional failed to demonstrate that they were free from negligence, their motions for summary judgment dismissing the cross-claims for contractual indemnification insofar as asserted against them are also denied.

In light of the foregoing, National's motion for reimbursement of prior defense costs against Professional is denied without prejudice, subject to renewal at the time of trial in the discretion of the trial Justice.

Dated: November 10, 2008

J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**