At an IAS Civil Term Part 31, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on March 10, 2009.

PRESENT: **HONORABLE MICHAEL A. AMBROSIO**

YUN CHENG CHEN, ET ANO., PLAINTIFFS, - AGAINST - CINCINNATI INCORPORATED, ET ANO., DEFENDANTS.	INDEX NO. **13959-2006**
C. C. & F. REALTY CORP., THIRD-PARTY PLAINTIFF, - AGAINST - CHAN AND FUNG'S HARDWARE, INC., THIRD-PARTY DEFENDANT.	INDEX NO. **75678-2007** **DECISION AND ORDER**
CHAN & FUNG'S HARDWARE, INC., SECOND THIRD-PARTY PLAINTIFF, - AGAINST - BURLINGTON INSURANCE CO., AND SINORISE CORP., SECOND THIRD-PARTY DEFENDANT.	INDEX NO. **76065-2007** **MARCH 10, 2009**

The following papers numbered 1 to 22 read on this motion:	Papers Numbered
Notice of Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 -3 10 - 14
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Upon the foregoing papers in this action by plaintiffs Yun Cheng Chen (Chen) and Yong He Seng (collectively, plaintiffs) alleging strict products liability and negligence, defendant Cincinnati Incorporated (Cincinnati) moves for summary judgment dismissing plaintiffs' complaint and any cross claims as against it. Defendant/third-party plaintiff CC&F Realty Corp. (CC&F Realty) moves for summary judgment dismissing plaintiffs' complaint and all cross claims and counterclaims as against it.

A 5 Series x 8' mechanical press brake, which was designed and manufactured by Cincinnati, was sold by Cincinnati to its distributor, Harrington-Wilson-Brown Corporation, and then shipped to the customer, Henry Spen & Company, Inc. (Henry Spen), on or about December 14, 1956. At some point, Henry Spen sold the press brake to Metadure Corporation, who then sold it to Goldenshtein Restaurant (Goldenshtein).By deed dated July 25, 1985, CC&F Realty purchased the building located at 275 Front Street, in Brooklyn, New York, from Goldenshtein. The press brake was left inside the building by Goldenshtein and transferred to CC&F Realty, along with the building, as part of the sale. Shortly after the purchase of the building, CC&F Realty leased the entire building to Chan & Fung's Hardware, Inc. (Chan & Fung) for use in its business of manufacturing kitchen equipment, including stoves, refrigerators, tables and cupboards. Upon entering the building as a tenant, Chan & Fung used the press brake in its business.

The press brake is a general purpose industrial machine that can be used to, among other things, bend, notch, corrugate, and punch metal. The upper moving portion of the press brake is the ram and the lower stationery portion is the bed. The attachment of tooling enables metal-working operations. For metal bending operations, a punch is attached to the ram and a die is attached to the bed. A bending operation is performed when metal is placed between the punch and die. The press brake was equipped to activate the ram's descent to the bed by a mechanical foot pedal. The area where the punch and die come together is known as the point of operation.

Chen was a press brake operator employed by Chan & Fung, whose duties included the daily operation of the press brake. On December 19, 2005, Chen, while working at Chan & Fung, was using the press brake to bend a piece of metal, which was approximately 78 inches long, and intended to be used as a support beam for a table. In doing so, Chen held the metal piece with his

hands and operated the press brake by means of the foot pedal. After making a bend, the metal piece fell behind the machine. While Chen's foot remained on the pedal, continuing to activate the press brake, Chen reached for the metal piece and his left wrist became trapped between the punch and die. As a result, Chen suffered a crush injury to his left wrist, requiring him to undergo three surgeries, including the insertion of a metal plate and screws. Based upon his injuries in the course of his employment, Chen applied for and received benefits under the Workers' Compensation Law from Chan & Fung.

On May 8, 2006, plaintiffs commenced this action, alleging claims of strict product liability and negligence as against Cincinnati. On April 13, 2007, plaintiffs amended their complaint to add CC&F Realty as a defendant, alleging a claim of negligence against it based upon its ownership and control of the press brake. Yong He Seng, Chen's wife, alleges a derivative claim for loss of consortium against Cincinnati and CC&F Realty. CC&F Realty subsequently commenced a third-party action against Chan & Fung, seeking contribution and contractual indemnification. Chan & Fung then commenced a second third-party action against its insurers, Burlington Insurance Co. and Sinorise Corporation, seeking contractual indemnification. By order dated October 27, 2008, Cincinnati's oral application for leave to serve a third-party complaint against Chan & Fung to allege a "grave injury" was granted and CC&F Realty's motion to amend its third-party complaint to include a "grave injury" claim against Chan & Fung was also granted.

In moving for summary judgment dismissing plaintiffs' complaint as against it, Cincinnati contends that plaintiffs cannot sustain their strict products liability and negligence claims because the design of the subject press brake was not defective as a matter of law. Plaintiffs, who claim that the press brake was defective, predicate their claim of a design defect in the press brake on the

absence of any safety devices on the press brake to prevent Chen's hand or wrist from entering the point of operation during the bending process.

"In order to establish a prima facie case in strict products liability for [a] design defect, [a] plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing [the] plaintiff's injury" (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]; *see also Anaya v Town Sports Intl., Inc.*, 44 AD3d 485, 486 [2007]). The manufacturer has an obligation to make the product reasonably safe for both its intended and "unintended yet reasonably foreseeable use" (*Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 385-386 [1976]; *see also Lopez v Precision Papers*, 67 NY2d 871, 873 [1986]; *Sheppard v Smith Well Drilling & Water System.*, 93 AD2d 474, 478 [1983]).

Thus, to prevail on a strict products liability claim based on a design defect, a plaintiff must prove that the product was unreasonably dangerous for its intended use; that is, that "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" (*Voss*, 59 NY2d at 108; *see also Giunta v Delta Intern. Mach.*, 300 AD2d 350, 352-353 [2002]). Where the plaintiff claims negligence under a design defect theory, the plaintiff must, in addition to the above, prove that the manufacturer could have foreseen the injury, and, therefore, acted unreasonably in designing the product (*see Voss*, 59 NY2d at 107; *Blandin v Marathon Equip. Co.*, 9 AD3d 574, 576 [2004]). "Where . . . a qualified expert opines that a particular product is defective or dangerous, describes why it is dangerous, explains how it can be made safer, and concludes that it is feasible to do so, it is usually for the jury to make the required risk-utility analysis" (*Wengenroth v Formula Equip. Leasing, Inc.*, 11 AD3d 677, 680 [2004];

Milazzo v Premium Tech. Servs. Corp., 7 AD3d 586, 588 [2004]).

Plaintiffs have submitted the expert affidavit of Neal A. Growney, P.C., a licensed professional engineer. Mr. Growney attests that the press brake was defective and unreasonably dangerous because "it did not come equipped with safeguards to prevent an operator from placing his or her hand into the point of operation and suffering a crush injury."

Mr. Growney explains that a foot pedal can be dangerous for an operator because it frees his or her hands so they can enter the point of operation during activation of the press brake. Mr. Growney asserts that it is foreseeable that a worker could suffer a crush injury by inadvertently inserting a body part into the point of operation during the normal use and operation of the press brake with a foot pedal. Mr. Growney opines that without safeguards on the press brake as standard equipment, the press brake poses an unreasonable risk of danger to workers.

Mr. Growney sets forth that the safety devices which were available at the time the press brake was manufactured in 1956 included: dual palm button controls, presence sensing devices (such as a light curtain), wrist restraints, pull-back devices, and a barrier guard. Mr. Growney opines that these safety devices would have prevented Chen's accident because they prevent an operator from inserting his or her hands or wrists into the point of operation of the press brake.

Mr. Growney states that one or more of these aforementioned safeguards should have been placed on the press brake as standard equipment. Mr. Growney provides his opinion that these safety devices were feasible at the time of the 1956 manufacture of the press brake, and describes how they were, in fact, displayed in Cincinnati's literature. Significantly, Mr. Growney further notes that a Cincinnati publication acknowledged that European standards required the manufacturer to safeguard press brakes with respect to point of operation safety. In fact, Doug Dragoo, Cincinnati's engineer,

testified. at his deposition, that the press brakes delivered to the European market had safeguarding equipment as standard equipment (Dragoo's Dep. Transcript at 33-34). Mr. Growney asserts that the benefits of including those safeguards are greater than any impact that they would possibly have on the utility of the press brake.

Mr. Growney further opines that the press brake was defective because it was equipped with a foot pedal, and was a multi-stroke machine, rather than being configured as a single stroke (or stroke stop) machine. Mr. Growney asserts that a single stroke feature could have prevented inadvertent cycling of the ram that could cause injuries at the point of operation. Specifically, Mr. Growney explains that if the press brake had been equipped with the single stroke feature, the ram would have come to a stop at the top of the cycle and would not have come down on Chen's wrist when he reached into the point of operation after the falling metal piece, thereby preventing the accident from occurring. Mr. Growney asserts the press brake should have been manufactured as a single stroke (or stroke stop) machine on a standard basis, rather than making this an option, as was offered in Cincinnati's catalog before and in 1956. Mr. Growney states that the safety benefits of this single stroke device would outweigh its impact on the utility of the press brake in that it would not have appreciably slowed down production.

Mr. Growney sets forth his opinion that an unguarded press brake or a foot pedal actuated one without the single stroke feature is never reasonably safe. Mr. Growney thus opines, to a reasonable degree of engineering certainty, that the press brake was unreasonably dangerous for workers without point of operation safeguards or a single stroke feature.

In its instant motion, Cincinnati does not dispute that the press brake was not reasonably safe as it was being used by Chen at the time of the accident. Rather, Cincinnati argues that the press

brake, as sold to the buyer, Henry Spen, in 1956, was not unreasonably dangerous because Henry Spen's intended use of the press brake was for punching operations. Cincinnati asserts that this intended use did not require any point of operation safeguarding device. Cincinnati contends that CC&F Realty, as the owner, and Chan & Fung, as the subsequent user/employer (rather than it), were in the best position to balance the benefits and risks of not having a safety device for Chan & Fung's intended use of the press brake for metal bending.

In addressing Cincinnati's argument, it is noted that generally, a manufacturer is considered to be "in the superior position to discover any design defects and alter the design before making the product available to the public" (*Voss*, 59 NY2d at 107). However, the Court of Appeals, in *Scarangella v Thomas Built Buses* (93 NY2d 655, 661 [1999]), recognized an exception to this rule where the manufacturer offers optional safety devices, but the buyer opts not to purchase them. Pursuant to the holding in *Scarangella* (93 NY2d at 661), a manufacturer which fails to include a safety feature on its product as standard equipment, but makes it available to the buyer as a purchasable option, will not be liable for a design defect as a matter of law where the evidence and reasonable inferences therefrom show that:

> "(1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available;
> (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and
> (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and risks of not having the safety device in the specifically contemplated circumstance of *the buyer's* use of the product" (emphasis in original).

On a motion for summary judgment, the defendant has the initial burden of establishing that

all three *Scarangella* factors are satisfied (*see Campbell v International Truck & Engine Corp.*, 32 AD3d 1184, 1185 [2006]; *Beemer v Deere & Co.*, 17 AD3d 1097, 1098 [2005]). The burden then shifts to the plaintiff to raise a triable issue of fact with respect to at least one of these *Scarangella* factors in order to survive summary judgment with respect to its design defect theory (*see Beemer*, 17 AD3d at 1098; *Bova v Caterpillar, Inc.* 305 AD2d 624, 625 [2003]; *Passante v Agway Consumer Prods.*, 294 AD2d 831, 832 [2002]).

In support of its motion, Cincinnati relies upon the *Scarangella* case and contends that it has satisfied all three *Scarangella* factors. With respect to the first *Scarangella* factor, Cincinnati notes that the buyer of the press brake, Henry Spen, and the eventual possessor of the press brake at the time of the accident, i.e., Chan & Fung, are not the same. Cincinnati claims that Henry Spen was thoroughly knowledgeable in the use of the press brake and was aware of the safety features available. To support this claim, Cincinnati has submitted evidence that Henry Spen was incorporated on January 7, 1946. Cincinnati asserts that this shows that Henry Spen had been in the fabricating business for approximately 10 years at the time that it ordered the press brake from it. Cincinnati further states that the use of a press brake was fundamental to Henry Spen's fabricating business. Cincinnati has also submitted the August 16, 1956 purchase order by Henry Spen which shows that the press brake was customized for Henry Spen with "plane and drill bed" and "plane and drill ram for 7 3/4" high angle brackets" with the horizontal leg of angles to be drilled "per blueprint sent in by customer." Cincinnati asserts that this customization was for a specific use and that, although available for purchase, Henry Spen did not order any point of operation safeguard.

Plaintiffs, in opposition,[1] assert that with respect to the first *Scarangella* factor, there is no specific information concerning whether at the time Henry Spen purchased the press brake in 1956 he was thoroughly knowledgeable regarding the press brake or its use or was actually aware of the safety features available. However, as noted by Cincinnati, due to the passage of time since 1956, direct testimony by Henry Spen cannot be practically obtained, and his 10-year experience in the fabricating business and his customization by blueprint of the press brake appear to support Cincinnati's claim with respect to the first *Scarangella* factor.

With respect to the third *Scarangella* factor, Cincinnati asserts that since the range of uses of the press brake varied (from punching operations as used by Henry Spen to bending operations as used by Chan & Fung), Henry Spen was in a better position to balance the benefits and risks of not having the safety devices in the specifically contemplated circumstances of his use for punching operations. Cincinnati has submitted the expert affidavit of William B. Eaton, a professional engineer, who states that at the time of the accident, the press brake was set up for bending operations, which constituted a change from its original configuration for use in punching operations. While Mr. Eaton does not dispute that it was dangerous to operate the press brake without safeguards in the circumstances presented in the instant action, he opines that "[t]here is no single point of operation safeguarding means that is universal in nature and capable of furnishing effective protection and functional compatibility, irrespective of prevailing production setup constraints." Mr. Eaton states that the inclusion of an appropriate point of operation safeguarding means was the responsibility of the employer, Chan & Fung, as mandated by prevailing OSHA Part 1910.212 and

[1] By order dated October 27, 2005, all opposition by any party based upon the untimeliness of Cincinnati's motion was withdrawn.

OSHA-adopted ANSI B11.3 requirements.

In opposition, plaintiffs assert with respect to the third *Scarangella* factor, that Cincinnati has not proffered specific evidence that Henry Spen was in a better position than Cincinnati to balance the benefits and risks of not having safety devices on the press brake. Furthermore, it is noted that "OSHA, ANSI and New York state regulations mandate use of guards at the point of operation . . . in an attempt to remedy the dangers associated with foot activated press brakes," and such industry standards are only a minimum requirement (*see Mustafa v Halkin Tool Ltd.*, 2007 WL 959704, *16 [ED NY 2007]. While these standards impose responsibilities on employers pertaining to press brake safety, they do not concomitantly obviate the responsibility of the manufacturer with respect to product safety (*see id.*).

In any event, even if it is assumed that Cincinnati has satisfied these two *Scarangella* factors, in order to be absolved of liability herein, it is incumbent upon it to satisfy the second *Scarangella* factor, which requires that Cincinnati show that there exist normal circumstances of use in which the press brake was not unreasonably dangerous without a safety device. Cincinnati contends that there exists such normal circumstances of use. Specifically, Cincinnati argues that the use to which the press brake was put by Henry Spen constituted a normal circumstance of use in which the press brake was not unreasonably dangerous without the optional safety device.

To support this argument, Cincinnati relies upon Mr. Eaton's expert affidavit. Mr. Eaton asserts, in such affidavit, that the subject press brake was originally furnished for Henry Spen with planed/drilled ram and bed faces and angle brackets, which permitted accommodation of tooling arrangements different from conventional bending dies. Mr. Eaton states that this "changed the general purpose function and application" of the press brake. Mr. Eaton notes that Henry Spen

utilized the press brake for punching operations. Mr. Eaton explains that "punching type metal forming operations are performed through use of unitized tooling arrangements, as well as by separate punch/die setups." Mr. Eaton explains that "[u]nitized tooling designs generally incorporate a material feed opening between the punch (upper tooling) and die (lower tooling) elements sufficient to accommodate the material gauge (thickness), while effectively preventing operator access to that point of operation area." Mr. Eaton opines that the use of a "unitized tooling design furnishes a point of operation safeguarding means as an integral provision." Mr. Eaton further opines that the subject press brake, as originally designed and shipped "for use in unitized compatible tooling punching operation, did not require any additional point of operation safeguarding for safe use." Cincinnati thus argues that Mr. Eaton's expert affidavit shows that the use of the press brake with unitized tooling for punching operation constitutes a normal circumstance of use for which the press brake was not unreasonably dangerous without any safety devices.

In opposition, plaintiffs have submitted Mr. Growney's expert affidavit, wherein he vehemently disagrees with Mr. Eaton's opinion that because the setup of the press brake at the time of sale allowed it to be equipped with unitized tooling for punching operations, it changed the general purpose of the machine and eliminated the need for point of operation safeguarding. Mr. Growney explains that the setup of the press brake at the time of sale simply enabled the ram and the bed to be set up with an apparatus that could expand the use of the press brake to, among other things, allow punching, or to create a wider bending surface for off-center bending or punching, or for progressive forming and wiping. Mr. Growney opines that these additional uses for the press brake do not eliminate the need for safeguarding or a single stroke feature because a point of hazard still exists with punching, forming, and wiping in that a worker could still reach into the point of

operation during the downstroke of the ram and suffer a crush injury, Mr. Growney thus explains that even with the configuration present on the subject brake for punching, a point of operation hazard still exists.

Mr. Growney also points out that since the configuration of the press brake, at the time it was sold to Henry Spen, only added to and did not restrict, the potential use and applications of the press brake, it was reasonably foreseeable that the press brake could still be used for metal bending operations, which Cincinnati concedes, was unreasonably unsafe without the added safeguards or a single stroke feature. Indeed, Mr. Eaton characterizes the press brake as a "general purpose" mechanical press brake.

Mr. Growney also notes that punching work could be performed without unitized tooling. Mr. Eaton concedes that "[p]unching type metal forming operations are performed through [either the] use of unitized tooling arrangements, [or] by separate punch/die setups." Additionally, Mr. Growney points out that a November 23, 1962 letter from Cincinnati to Henry Spen states that 5-5/8" holes were being made. Mr. Growney explains that since holes of that size are not possible to have with commercially available unitized tooling, this indicates that punching operations were occurring at that time on the press brake without unitized tooling. As is shown in a photograph of a Cincinnati catalog, punching work could be performed without unitized tooling where the tooling is attached to both the ram and bed, leaving an opening at the point of operation. As explained by Mr. Growney, this would, therefore, leave a point of operation hazard without safety devices.

Cincinnati argues that even if the press brake had been used for additional functions or for punching without unitized tooling, as long as the press brake with the use of unitized tooling, was a normal use which was not unreasonably dangerous without the optional equipment, then the second

Scarangella factor must be held as having been satisfied. Such argument is unavailing. Mr. Growney, in his expert affidavit, specifically sets forth that even assuming that unitized tooling was exclusively used by Henry Spen, since, in such a setup, the ram comes down and makes contact with a striker plate on the unitized tooling, which then causes the punching mechanism to occur, this would create two point of operation hazards, i.e., one between the ram and the striker plate, and the other within the unitized tooling. Mr. Growney also cites, as examples, two other accidents (among the approximately 180 accidents that occurred with Cincinnati's press brake, which were disclosed during discovery) that occurred with Cincinnati's press brake while unitized tooling was used when the press brake was set up for punching operations. Thus, there is a divergence of opinion between Mr. Eaton and Mr. Growney, which presents a triable issue of fact (*see Wengenroth*, 11 AD3d at 680; *Haight v Banner Metals*, 300 AD2d 356, 357 [2002]).

Cincinnati also argues that the conclusion that there exist normal circumstances of use for which the press brake was reasonably safe without the optional safety devices can be inferred from the fact that the subject press brake was not involved in a prior accident during the 50 years from the time of its purchase in 1956. Evidence that a product alleged to have caused injury was used for some time without an accident does not immunize the manufacturer from liability for the injury, but raises a factual issue for the jury (*see generally Wagner v Chance Co., Pitman Div.*, 231 AD2d 566, 566 [1996]; *Goldberg v Union Hardware Co.*, 162 AD2d 658, 658 [1990]). Thus, inasmuch as there is a material and triable issue of fact as to whether there are no normal circumstances of use in which the press brake, without a safety device or a single stroke feature, is not unreasonably dangerous, Cincinnati's motion for summary judgment must be denied (see *Mustafa,* 2007 WL 959704, *16).

In addressing CC&F Realty's motion, it is noted that plaintiffs' claim as against CC&F

Realty is grounded in negligence, not strict products liability. Plaintiffs argue that because CC&F Realty was the owner of the press brake at the time of Chen's accident and the press brake was not equipped with appropriate safety devices, it has a viable common-law negligence claim as against CC&F Realty, as the owner of a defective product. .

CC&F Realty denies that it was the owner of the press brake. CC&F Realty contends that the press brake was simply left on the property, when it purchased it from Goldenshtein, and that it immediately leased the property to Chan & Fung, which assumed possession and control of the press brake. CC&F Realty asserts that since Chan & Fung was the first and only tenant of the property, Chan & Fung possessed "all the trappings of ownership" in that it maintained and serviced the press brake, bought and installed parts for it, and reaped the benefits of selling items made with the press brake by its employees.

However, the July 25, 1985 deed to CC&F Realty contained standard boilerplate language in which the premises were conveyed "together with the appurtenances and all the estate" of the seller, Goldenshtein. CC&F Realty also executed a mortgage in connection with the purchase of the property, which pledged, along with the property, "all fixtures . . . attached or used in connection with said premises . . . and all other equipment and machinery. . . used in the operation of the buildings standing on said premises. The press brake was permanently bolted to the floor and was included in the sale of the property to CC&F Realty.

CC&F Realty argues, however, that even assuming that it is the owner of the press brake, it was an out-of-possession landlord, which exercised no control over the press brake. It is well settled that an out-of-possession owner-lessor is not liable for negligent conditions upon property where it does not retain control over the property and where it is not contractually obligated to perform

maintenance and repairs (*see Seney v Kee Assoc.*, 15 AD3d 383, 384 [2005]; *Notkin v Gristina Vineyards,* 298 AD2d 445, 448 [2002]; *Butler v Passaro*, 166 AD2d 548, 549 [1990]; *Hildenbrand v Porto,* 144 AD2d 131,132 [1988]; *Gelardo v ASTHMA Realty Corp.*, 137 AD2d 787, 788 [1988]). Under the lease, CC&F Realty was not contractually obligated to repair or maintain the premises. Specifically, paragraph 30 of the rider to the lease between CC & F Realty, as the landlord, and Chan & Fung, as the tenant, provided that the "[l]andlord shall not be required to make any expenditures for . . . repairs in said premises during the term of the written lease" and that "[t]enant must make all repairs of whatsoever kind or nature during the term of the written lease, or any renewal thereof, without any contributions on the part of the [l]andlord."

Moreover, paragraph 30 of the rider to the lease between CC&F Realty, as the landlord, and Chan & Fung, as the tenant, provided that "[t]enant accepts the [d]emised [p]remises, improvements and personalty on the [d]emised [p]remises in their present 'As Is' condition and without any representation of warranty by the [l]andlord as to the condition of such property." It further provided that "[t]he [l]andlord shall not be responsible for any latent defect . . . in such building, improvements and personalty."

While the lease provides that "[t]he [l]andlord may, at reasonable times, enter the [l]eased [p]remises to inspect it, to make repairs or alterations, and to show it to potential buyers, lenders or tenants," the mere "[r]eservation of a right of entry for inspection and repair may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition . . . only where liability is based on a significant structural or design defect that violates a specific statutory provision" (*Seney*, 15 AD3d at 384; *see also Tragale v 485 Kings Corp.*, 39 AD3d 626, 627 [2007]; *Ingargiola v Waheguru Mgt.*, 5 AD3d 732, 733-734 [2004]; *Dominguez v Food City Mkts.*, 303

AD2d 618, 619 [2003]). Here, plaintiffs have not alleged a violation of any specific statutory provision applicable to CC&F Realty. All of the statutory provisions cited to by plaintiffs, including 12 NYCRR 19, 29 CFR 1910. 212, 29 USC § 654, and ANSI § 5.1.6 and 6.1.1, 6.1.2, 6.1.4, 6. 1.11, 6.1.4.3, are only applicable to employers. Thus, liability for negligence by CC & F Realty cannot be based upon any of these statutory provisions. In addition, Building Code § 27-127 and § 27-128 are general provisions which deal with the safe maintenance of a building and its facilities; they do not relate to press brakes or other manufacturing equipment housed on the property and provide no basis to impose liability upon CC&F Realty. Furthermore, a landowner is not liable for injuries that are not inherently dangerous (*see Sun Ho Chung v Jeong Sook Joh,* 29 AD3d 677, 678 [2006]; *Zimkind v Costco Wholesale Corp.,* 12 AD3d 593, 594 [2004]; *Bryant v Superior Computer Outlet,* 5 AD3d 343, 344 [2004]).

Thus, in order to hold CC&F Realty liable for negligence, it must be shown that it exercised control over Chen and the press brake (*see Notkin*, 298 AD2d at 445-446; *Fessler v Brunzee*, 89 AD2d 640, 641 [1982]). Plaintiffs argue that CC&F Realty had control over the press brake due to the fact that one individual, Peter Chang, owns all of the corporate shares of both the lessor, CC&F Realty, and the lessee, Chan & Fung, and because Peter Chang has complete access to and control over the building and the press brake. Plaintiffs' argument is unavailing. The mere fact that an individual is a shareholder in more than one corporate entity does not warrant disregarding the separate corporate entities (*see Worthy v New York Hous. Auth.*, 21 AD3d 284, 287 [2005]; *Matter of Total Care Health Indus. v Department of Social Servs.*, 144 AD2d 678, 679 [1988]). Plaintiffs' complaint is devoid of any allegations whatsoever that Peter Chang operated CC&F Realty and Chan & Fung as the alter egos of each other, or which would otherwise warrant a piercing of their

corporate veils (*see Matter of Total Care Health Indus.*, 144 AD2d at 679). In addition, Peter Chang is not an individual defendant herein and there are no allegations that he is the alter ego of CC & F Realty or Chan & Fung (*see Worthy*, 21 AD3d at 287-288; *Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 587 [1987]).

Rather, CC&F Realty and Chan & Fung are separate corporate entities with different corporate purposes. CC&F Realty was founded for the purpose of purchasing 275 Front Street. CC&F Realty makes no products and has no employees. As noted above, Chan & Fung is in the business of manufacturing kitchen equipment. According to CC&F Realty's accountant, CC&F Realty received only rental income from Chan & Fung and never paid payroll tax expenses. Furthermore, at the time of the 1985 purchase of the property, Peter Chang was not the sole shareholder of CC&F Realty, and Mr. Fung was the president of CC&F Realty. Moreover, if there were no corporate distinction between CC& F Realty and Chan & Fung, plaintiffs' complaint as against CC&F Realty would be barred by the Workers' Compensation Law (*see Romano v Curry Auto Group,* 301 AD2d 509, 510 [2003]).

Plaintiffs argue, however, that CC&F Realty, through Peter Chang, exercised actual control over the press brake and Chen. Specifically, plaintiffs rely upon the fact that Peter Chang interviewed Chen for his job with Chan & Fung, and that Peter Chen had knowledge about the instructions on the press brake and about Chan & Fung's safety policies. The interview of Chen, however, was conducted by Peter Chang, on behalf of Chan & Fung. CC&F Realty was not involved with the training or supervision of Chen. Safety instruction and operation directives were conducted through the foreman and Chen's co-worker, Mr. Quan, who was employed by Chan & Fung. There is no showing whatsoever that any action taken by Peter Chang with respect to Chen or the press brake

was taken on behalf of CC&F Realty, as opposed to Chan & Fung.

It is noted that a landlord can be held liable for an injury that occurs on its property if it either created or had actual or constructive notice of a dangerous condition (*see Torres v West St. Realty Co.*, 21 AD3d 718, 722 [2005]). Plaintiffs, however, have not shown that CC&F Realty created the defective condition of the press brake. The evidence discloses only that the press brake was left on the property by the former owner, Goldenshtein. There is no evidence that CC&F Realty repaired the press brake or exercised control over it. It is undisputed that CC&F Realty never purchased press brake equipment or tools. All documents with respect to the press brake referred to either Chan & Fung or to Bowery Restaurant Supply and there are no documents referring to CC&F Realty.

Plaintiffs rely upon the fact that numerous invoices show that Bowery Restaurant Supply purchased additional parts for the press brake in 2003 from Cincinnati. Plaintiffs assert that Bowery Restaurant Supply is a separate company that is also owned by Mr. Chang. Plaintiffs contend that CC& F Realty can, therefore, be held liable to them based upon this exercise of control over the press brake by Mr. Chang, through Bowery Restaurant Supply. This contention is without merit. CC&F Realty has demonstrated that Chan & Fung did business as Bowery Restaurant Supply. The 1999 commercial lease between CC&F Realty and Chan & Fung names the tenant as Chan & Fung "d/b/a Bowery Discount Hardware & Restaurant Supply." In addition, a check dated July 7, 2003 issued to Cincinnati is from Chan & Fung "d/b/a Bowery Discount Hardware Supply." Schedule B of the Assignment to the Bank of East Asia dated March 11, 1999 also references Chan & Fung d/b/a Bowery Restaurant Supply. Peter Chang also testified, at his deposition, that Chan & Fung's name was changed to Chan & Fung d/b/a Bowery Restaurant Supply, Inc. (Peter Chang's Dep. Transcript at 31-32, 38). There is also no evidence whatsoever that CC&F Realty did business as Bowery

Restaurant Supply.

Additionally, there is no evidence that CC&F Realty was on notice of any defective condition of the press brake. It did not, at any time, inspect the press brake and, as discussed above, it has not been shown that any actions which were taken by Mr. Chang were performed other than on behalf of Chen & Fung, a separate corporate entity from CC&F Realty.

Thus, plaintiffs have not shown that there was any duty owed by CC&F Realty to Chen or how there was any breach of this duty (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]). Consequently, CC&F Realty cannot be held liable, based upon a theory of common-law negligence, to plaintiffs (*see id.)*.

Plaintiffs also argue that CC&F Realty may be held liable under a theory of mutual benefit bailment because CC&F Realty permitted Chan & Fung to use the press brake in return for rent. Such argument is without merit as Chan & Fung's use of the property and the machinery and equipment thereon were controlled by the terms of the lease. Summary judgment dismissing plaintiffs' complaint as against CC&F Realty is, therefore, mandated (*see* CPLR 3212 [b]).

Accordingly, Cincinnati's motion for summary judgment dismissing plaintiffs' complaint and all cross claims as against it, is denied. CC&F Realty's motion for summary judgment dismissing plaintiffs' complaint and all cross claims and counterclaims as against it, is granted. In view of this dismissal, the third-party action of CC&F Realty as against Chan & Fung must be dismissed as moot.

This constitutes the Decision and Order of the Court.

DATED: **MARCH 10, 2009**

MICHAEL A. AMBROSIO