[* 1]

SCANNED ON 4/29/2009

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

PRESENT: HON. JOAN A. MADDEN PART 11

Justice

Michael Klussman

Plaintiff,

- v -

AT Reynolds & Sons, Inc, et al.

Defendant.

INDEX NO. 103338/05

MOTION DATE 7-24-08

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for + cross m/s Summary Judgment

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion + cross m/s are decided in accordance with the annexed Memorandum Decision + Order.

FILED
APR 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 22, 2009

J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

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

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MICHAEL KLUSSMAN and JUDITH KLUSSMAN,

Plaintiffs,

-against-

A.T. REYNOLDS & SONS, INC., LEISURE TIME SPRING WATER, INC., WILLIAMS REAL ESTATE AND MANAGEMENT LLC, WILLIAMS REAL ESTATE CO. INC., WILLIAMS REAL ESTATE LLC, GVA WILLIAMS LLC, CURE WATER SYSTEMS INC., DARBERT OFFSET CORP., NEW CITY REALTY CORP., NEW CITY REALTY, INC., NEW YORK CITY PRESS, INC., ARADCO LIMITED and GRAPHICS SEVEN CONDOMINIUM and THE CURE CONNECTION Inc.,

Defendants.

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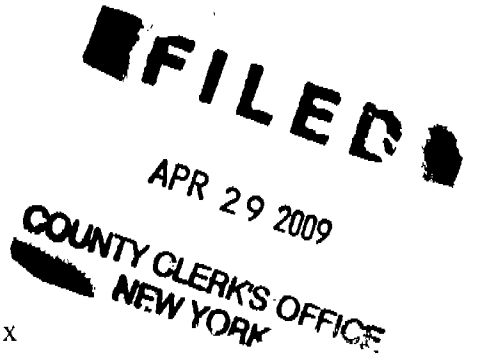
Index No: 103338/05

Decision and Order

Motion Seq. Nos.: 003 & 004



Hon. Joan Madden, J.:

In this personal injury action brought by plaintiffs Michael Klussman (plaintiff or Klussman) and Judith Klussman (collectively, plaintiffs), defendants Williams Real Estate and Management LLC., Williams Real Estate LLC, and GVA Williams LLC (collectively, the Williams defendants) move for summary judgment dismissing this action and for costs and sanctions against plaintiffs (motion sequence No. 003). Defendants A.T. Reynolds & Sons, Inc. and Leisure Time Spring Water, Inc. (collectively, Leisure Time) move for summary judgment dismissing plaintiffs' complaint as well as all cross claims asserted against them (motion sequence No. 004).

Defendants Williams Real Estate Co., Inc. and Aradco Limited (collectively, Aradco), New City Realty Corp. (New City), Cure Connections, Inc., s/h/a The Cure Connection, Inc.

(Cure) and Darbert Offset Corp. (Darbert) cross-move for summary judgment dismissing plaintiff's complaint and all cross claims asserted against them. New City also cross-moves for summary judgment on its contractual indemnity claim against Darbert and on its common-law indemnity claim against Cure.

Opposition papers to the instant motions/cross motions have been submitted as follows: plaintiffs oppose Leisure Time's motion; Leisure Time opposes Aradco's, Cure's and Darbert's cross-motions; and Darbert and Cure oppose that branch of New City's cross motion that seeks summary judgment on Darbert's indemnification claims.

The motions and cross-motions are for consolidated for disposition herein.

Background

At the time of the accident, plaintiff was employed as a tractor trailer driver by non-party County Petroleum (County) of Ferndale, New York. His regular duties consisted of delivering fuel oil to commercial and residential premises. Typically, during the summer months, plaintiff would also make deliveries of ice and/or water for Leisure Time, including regular runs from Leisure Times' facility in Kaimaesha, New York to its warehouse in Summervile, New York . During other times of the year, plaintiff would, with less frequency and regularity, also make Leisure Time deliveries.

On November 13, 2003, plaintiff drove a tractor trailer containing racks of 5 gallon bottles of water from Leisure Time's facility in Kiamesha and was to deliver them to Cure at the loading dock of 207 West 25th Street, New York City (the premises). From there, Lee Schlaff (Schlaff), a co-owner of Cure, would move the racks to a basement storage space. To unload the racks of water from the trailer onto the loading dock, plaintiff used a manual palette jack. To

bridge the space between the floor of the trailer and the floor of the loading dock, plaintiff utilized a loading ramp. While moving the third load of racks, plaintiff's foot became wedged between the palette jack and an "I" beam on the loading dock, causing, inter alia, a compound fracture that required surgery and the insertion of surgical hardware. Thereafter, plaintiffs commenced this action to recover for those personal injuries.

Summary Judgment

It is well-established that, "[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor." *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 (1979), quoting CPLR 3212 (b). Thus, the movant bears the initial burden of proving his/her entitlement to summary judgment. *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). If the moving party meets that burden, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues. *Kaufman v Silver*, 90 NY2d 204, 208 (1997); *William Iselin & Co. v Mann Judd Landau*, 71 NY2d 420, 427 (1988). Unsubstantiated, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324-325 (1986).

In determining a summary judgment motion, the court must construe the evidence in the light most favorable to the opposing party. *SSBSS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 584-85 (1st Dept 1998); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). But, although "'summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue' [citation omitted]" *(Rotuba Extruders v Ceppos*, 46

NY2d 223, 231 [1978]), it is also "designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law. . . . [W]hen there is no genuine issue to be resolved at trial, the case should be summarily decided" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The Williams Defendants' Motion

The Williams defendants move for summary judgment dismissing plaintiffs' complaint, asserting that they have never owned, maintained, managed or controlled the premises and have never had any connection with it, and that plaintiffs' continuation of their claims against them after such time as these facts were known, warrants the imposition of costs and fees pursuant to CPLR 8303 (a).

The Williams defendants' denial of occupancy, ownership, control, special use or any other connection to the property is supported by the uncontroverted deposition testimony of Daniel Robitalle (annexed as Exh. H to Williams defendants' motion). It is well established that "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises." *Gibbs v Port Authority of New York*, 17 AD3d 252, 254 (1st Dept 2005). And, no party has offered any factual or legal basis on which the Williams defendants may be held liable herein.

Accordingly, and upon the lack of any opposition hereto, that branch of the Williams defendants' cross motion seeking summary judgment dismissing plaintiffs' complaint and all cross claims asserted against them are granted. Given the facts and circumstances herein, that branch of the Williams defendants' motion seeking an award of costs and fees as against plaintiffs is denied.

Leisure Time's Motion

Leisure time moves for summary judgment as to plaintiffs' complaint asserting: 1) that plaintiff was a special employee of Leisure Time and, therefore, plaintiffs' claims against it are barred by the exclusivity provisions of the Workers' Compensation Law (WCL); and, 2) that Leisure Time bears no liability for plaintiff's injuries because it did not own the loading dock where the injury occurred, it was not in any way involved with the construction or maintenance of the loading dock and that it did not own or provide the palette jack or ramp that plaintiff was using when he was injured.

Leisure Time does not dispute that plaintiff was in the general employ of County on the date of the accident or that County was responsible for plaintiff's wages, fringe benefits, and workers' compensation benefits. It argues that, based on its direction of the manner, details and ultimate result of the plaintiff's work, his use of Leisure Time equipment and his prior history of transporting Leisure Time loads, plaintiff was its special employee and, as such, the instant action is barred by the exclusivity provisions of WCL.

Plaintiffs oppose this branch of Leisure Time's motion arguing that, at the very least, Leisure Time has failed to demonstrate the absence of any issue of triable fact as to plaintiff's employment status and, accordingly, that Leisure Time's motion must be denied.

A. Special Employee

The exclusive remedy of workers' compensation applies when a plaintiff is the general employee of one employer but also the special employee of another employer. *Thompson v Grumman Aerospace Corp.*, 78 NY2d 553 (1991). "A special employee is described as one who is transferred for a limited time of whatever duration to the service of another" (citation omitted).

Id. at 557.

"Principal factors in determining the existence of a special employment relationship include who has the right to control the employee's work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer's or the general employer's business." *Ugijanin v 2 West 45th Street Joint Venture*, 43 AD3d 911 (2nd Dept 2007). In *Thompson*, the Court of Appeals noted that "[w]hile not determinative, a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work." *Thompson*, 78 NY2d at 558.

Whether a person can be fairly categorized as a special employee is "usually a question of fact." *Id.* at 557. However, "the determination of special employment status may be made as a matter of law where particular, undisputed critical facts compel that conclusion and present no triable issue of fact." *Id* at 557-558. "'A finding of special employment is justified only where the special employer exerts complete and exclusive control over the purported special employee, as to whom the general employee has relinquished all control.'" *Fox v Brozman-Archer Realty Services, Inc.*, 266 AD2d 97, 99 (1st Dept 1999), quoting *Sanfilippo v City of New York*, 239 AD2d 296, 296 (1st Dept 1997), citing *Thompson v Grumman Aerospace Corp.*, 78 NY2d at 557. However, the special relationship is not defeated solely by the fact that the general employer was responsible for paying the employee's wages and workers' compensation benefits. *Adams v North-Star Constr. Co., Inc.*, 249 AD2d 1001, 1002 (4th Dept 1998).

In support of its argument that plaintiff was its special employee, Leisure Time notes the following: 1) on the date of the accident plaintiff, was operating a Leisure Time tractor trailer that

carried Leisure Time water; 2) when plaintiff arrived at the Leisure Time facility to pick up the truck, he knew which tractor and trailer had been designated by Leisure Time for his use and all paperwork concerning the delivery, including the location of the delivery and contact information for Schlaff, were contained therein; 3) the tractor trailer was fueled and ready to go, the keys were contained therein and the trailer had already been loaded by Leisure Time staff; 5) part of plaintiff's responsibility to Leisure Time was to help unload the racks from the trailer; 6) prior to the accident, plaintiff had delivered many loads for Leisure Time and would often receive direction from Leisure Time personnel as to where to go and what to take.

In opposing Leisure Time's motion, plaintiffs note the following: 1) on November 12, 2003, the day preceding the accident, at the conclusion of plaintiff's shift at County, he was told by his immediate supervisor, Mitchell Blank (Blank), that, on the following day, he would be transporting a load of Leisure Time water; 2) Blank gave plaintiff the numbers of the Leisure Time-owned tractor and trailer that he would be using and advised him that the relevant paperwork would be in the back of the trailer; 3) Blank also told plaintiff that the delivery would go to Cure and that he should meet Schlaff there between 8:00 - 9:00 A.M.; 4) he received no other directions regarding the delivery and, as long as he arrived between 8:00 - 9:00 A.M., he was free to determine when he would depart and what route he would take; 5) on the date of the delivery, he arrived at the Leisure Time facility, found everything in accordance with Blank's directions and, prior to his trip, did a pre-trip inspection of the tractor and filled out a Department of Transportation inspection form that had been provided by County; 6) prior to leaving, he did not go into Leisure Time's office or have contact with any Leisure Time personnel; 7) the cab of the tractor did not have a CB radio or other communication device provided by Leisure Time; 8) on

the way to New York City, plaintiff observed that a temperature gauge showed that the engine was overheating, plaintiff pulled over, checked out the truck, determined by himself that the gauge was faulty and proceeded to the delivery site; 9) previously, when making deliveries of Leisure Time products, he had always used a County tractor and on regular summer runs would only be told by a Leisure Time personnel which specific trailer to take; 10) when delivering ice for Leisure Time, he would be told by Leisure Time personnel which trailer to take and what to load into that trailer; 11) he never considered himself a Leisure Time employee, always wore his County uniform, was always directed by Blank as to which days he would be transporting Leisure Time products and received the same rate of pay from County whether he was transporting County or Leisure Time products.

Leisure Time does not dispute that Blank gave plaintiff the directions detailed above or that, on the date of the accident, plaintiff had absolutely no contact with any Leisure Time staff. Seemingly, though plaintiff's November 13, 2003 delivery differed significantly, in terms of timing, delivery location and equipment utilized, from the regular summertime runs, Leisure Time seeks to link this particular delivery to plaintiff's summertime runs. However, whether or not during plaintiff's summer runs for Leisure Time he was, in fact, Leisure Time's special employee for workers' compensation purposes, is not dispositive as to plaintiff's status on the date of the accident.

As held by the Appellate Division, First Department, in *Bellamy v Columbia University* (50 AD3d 160, 163 [1st Dept 2008]), "it is not sufficient for the proponent of special employment to show a mere cession by the general employer of some measure of control; the cession must be shown to have been complete, and concomitant with the proponent's complementary assumption

of control. Thus, in Thompson, special employment was established where 'combined with other indicia of special employment, the uncontroverted record document[ed] [the special] employer's *comprehensive and exclusive daily control over and direction of the special employee's work duties'"* (emphasis in original) (citation omitted).

Given plaintiff's uncontroverted sworn deposition testimony detailing the instructions that he received from his County supervisor (Transcript of plaintiff's deposition testimony, annexed as Exh H to Leisure Time's motion), his lack of contact with any Leisure Time personnel on the date of the accident, and the discretion afforded plaintiff in planning his trip, on the record before this Court, it cannot be said that, as a matter law, Leisure Time has demonstrated that it assumed *comprehensive and exclusive control* over plaintiff's work duties on the date of the accident. As such, Leisure Time has failed to demonstrate the absence of any material issue of fact as to whether, at the time of plaintiff's accident he was their special employee for purposes of the WCL. *See Sanfilippo v City of New York*, 239 AD2d at 296 (denying summary judgment where issues of fact existed as to whether general employer or purported special employer supervised and controlled plaintiff's work and the contract for plaintiff's services did not settle the question as a matter of law); *compare Gherghinoiu v ATCO Properties & Management, Inc.*, 32 AD3d 314 (1st Dept), *lv denied* 7 NY3d 716 (2006) (holding that worker was defendant's special employee based on uncontroverted evidence that plaintiff was directly controlled on a daily basis by defendant's employees who had the exclusive right to hire and fire them at the relevant job site). Accordingly, that branch of Leisure Time's motion seeking summary judgment dismissing plaintiff's complaint because the instant action is barred by the exclusivity provisions of the WCL is denied.

B. Negligence

Leisure Time also asserts that it bears no liability for plaintiff's injuries because it did not own the loading dock and was not in any way involved with its construction or maintenance, and that it did not own or provide the palette jack or loading ramp that plaintiff was using when he was injured.

It is undisputed that the trailer floor of the Leisure Time trailer was approximately one and a half feet higher than the loading dock and that it was necessary for plaintiff to use a ramp to bridge both the distance in height and the gap in horizontal space between the trailer floor and the loading dock. It is also uncontroverted that the Leisure Time trailer contained a palette jack, but no ramp of any kind, and that there was a ramp at the loading dock which plaintiff utilized to offload the trailer. It is plaintiffs' contention, inter alia, that given the height differential to be bridged, that this ramp was too short to allow plaintiff to safely offload the trailer. Apparently, the incline created by the short length of the ramp was excessively steep and, given the height differential, the ramp's legs were too short to hold the ramp securely in place. Moreover, as indicated below, there is evidence in the record that Leisure Time was aware that an additional ramp was needed when making deliveries to Cure and for this reason it usually included a ramp in the trailers going there.

As gleaned from plaintiffs' verified bill of particulars (plaintiff's BP)[1], plaintiffs alleges that all of the defendants, including Leisure Time, are liable for plaintiffs' damages because they

[1]Regrettably, plaintiffs failed to serve individually particularized bills of particulars (bp's) on each defendant. Instead, plaintiffs chose to serve identical bp's on each defendant ignoring differences in the parties relative connection, or lack thereof, with the premises, the loading dock or with plaintiff's delivery or employment.

were:

> "negligent, wanton, reckless and careless, in among other things, allowing, causing, and/or permitting dangerous, hazardous, and unsafe conditions to exist on the aforesaid premises; in failing to design, construct or rebuild the loading dock with appropriate height for unloading freight from a tractor trailer; in failing to provide a hydraulic ramp on the loading dock to raise access to the trailer from the loading dock; in failing to provide any moveable ramp to adequately bridge the height differences between the loading dock and the tractor trailer; in providing an inadequate bridge 'plate' or 'aluminum ramp' at the loading dock; in failing to provide or construct a device on the loading dock which would keep the 'bridge plate' or 'aluminum ramp' from falling down between the loading dock and the tractor trailer; in failing to provide a forklift, and/or chains and palette grips for unloading freight from tractor trailers; in failing to provide an adequate number of personnel to unload freight from a tractor trailer; in failing to adequately train personnel in safely unloading freight from a tractor trailer; in failing to inspect the palette jack; in providing a broken or unusable palette jack; in providing a palette jack with an inoperative stopping mechanism; in failing to provide a safe place to work; in acting with reckless disregard for the safety of others; failed to provide such devices and equipment and/or failed to construct, place and operate such devices so as to give proper protections to persons employed on the job site, including plaintiff herein; in violation of Section 200 of the Labor Law of the State of New York and the rules and regulations implemented thereunder; in negligently, wantonly and recklessly placing the plaintiff in a position of peril."

(Plaintiffs' BP annexed as Exh G to Leisure Time motion, ¶ 3-4)

Leisure Time argues, that because it did not own the ramp that was used by plaintiff, it cannot be held liable for injuries arising from its use. This argument fails to absolve Leisure Time from any and all liability. Clearly, as detailed above, plaintiffs' allegations against Leisure Time includes its *failure* to provide an appropriate ramp. And, as the deposition testimony of Leisure Time's plant manger, Robert Whitaker (Transcript of Whitaker EBT, annexed as Exh I to Leisure

Time's motion) (Whitaker EBT) makes clear, usually, Leisure Time would put a "dock plate" (ramp) on trailers making deliveries to Cure because, as suggested by prior drivers, it might prove helpful because it was "a difficult place to unload." (Whitaker EBT, at 39-40). Apparently, for deliveries to other locations no such ramps had to be sent along. *Id.*

Leisure Time also argues that the proximate cause of plaintiff's injury was the offloading method devised by plaintiff, in consultation with Schlaff. Prior to his injury, plaintiff, together with Schlaff, had removed two loads of racks of water utilizing the palette jack provided by Leisure Time, and the ramp that was on the loading dock, without any injury to plaintiff. It appears that during those two prior offloads, the ramp proved unstable, the palette jack got stuck on the ramp, and several bottles of water fell off the palette jack and broke. And, during the offload of the second load, Leisure Time's palette jack broke as plaintiff attempted to make a turn on the loading dock. Schlaff provided plaintiff with a palette jack owned by Cure and plaintiff, after consulting with Schlaff and an on-premises elevator operator, decided that for the next load, i.e., the third load of water, he would pull the pallette jack down the ramp at a higher rate of speed and then, when the load was on the loading dock, he would stop it from going forward into the loading dock wall by pressing the lever on the palette jack that would stop the load. After the load stopped moving, plaintiff could then navigate the necessary turn and then lift up the load on the palette jack again. Leisure Time asserts that it was plaintiff's method and/or the failure of Cure's palette jack to stop that caused plaintiff's accident and, therefore, that it cannot be held liable for plaintiff's injuries.

Once again, Leisure Time has failed meet its burden of demonstrating the absence of any triable issue of fact as it relates to its purported negligence in failingt to provide plaintiff with

appropriate equipment, e.g., an appropriate ramp, to safely offload the trailer. Accordingly, that branch of Leisure Time's motion that seeks summary judgment as to plaintiffs' complaint is denied.

Aradco's Cross Motion

Williams Real Estate Co., Inc., the managing agent of the commercial condominium located at 207 West 25th Street, and Aradco Limited, representative of the owners and administrators of the condominium's finances and self-acknowledged owner of the loading dock, move for summary judgment asserting that the loading dock complied with all relevant safety standards.

In support of its cross motion for summary judgment, Aradco submits the affidavit of Stanley Fein (Fein), (Fein Affidavit, annexed as Exh G. to Aradco cross motion). In his affidavit, Fein, who was retained by the Aradco defendants to inspect the loading dock, avers, in sum and substance, that his inspection of the dock revealed no defect in either its design or construction and that it met all applicable safety standards.

Leisure Time opposes Aradco's cross motion arguing that questions of fact exists as to whether Aradco's failure to have a dock elevator, dock leveler or appropriate dock ramp at the loading dock warrants a finding of liability against Aradco.

Significantly, Leisure Time has not offered an affidavit from any expert or any other admissible evidence that disputes Fein's conclusions that the dock as, designed and constructed, viz. without a dock elevator or leveler, met all applicable safety standards. Nor has there been any specific allegation that Aradco was under any duty to provide a ramp to accommodate the Leisure Time Trailer. As noted *supra*, unsubstantiated, conclusory allegations unsupported by competent

evidence are insufficient to defeat a summary judgment motion. *Alvarez v Prospect Hosp.*, 68 NY2d at 325. Accordingly, Aradco's motion for summary judgment is granted.

New City's Cross Motion

New City is an occupant of commercial space at the premises and leased space therein to Darbert. Thereafter, Darbert leased the basement space therein to Cure. New City cross-moves for summary judgment dismissing plaintiffs' complaint and all cross claims against it asserting that it did not own the loading dock and had no connection to it, was not the intended recipient of the delivery plaintiff was making and had no connection to the equipment used by plaintiff during the delivery. In the event that its summary judgment cross motion is denied, New City seeks contractual indemnification from Darbert and common-law indemnification from Cure.

In the absence of any opposition to that branch of New City's cross motion seeking summary judgment dismissing plaintiffs' complaint and all cross claims asserted against it, that branch of New City's cross motion is granted. As summary judgment dismissing plaintiffs' complaint has been granted in New City's favor, that branch of New City's cross motion seeking indemnification from Darbert and Cure has been rendered moot.

Darbert's Cross Motion

Darbert cross-moves for summary judgment, asserting that it did not own the subject loading dock or the equipment used by plaintiff in the delivery, and had no connection to same, nor did it cause or create any of the alleged dangerous conditions. In support of its motion, Darbert relies, in part, on the deposition testimony of Bertram Cohen (annexed as Exh. F to Darbert cross motion), in which Cohen avers that the ramp at issue was not owned by Darbert.

Leisure Time opposes Darbert's cross motion, arguing that it remains a question of fact as

to whether Darbert allowed, permitted or caused the ramp used by plaintiff to be located on the loading dock.

There has been absolutely no allegation that the ramp that was on the loading dock was defective, in and of itself. Apparently, that ramp proved quite useful when serving to bridge the gap between the loading dock and truck floors that were at the same height level as the loading dock, e.g., box trucks. The use of this ramp to unload a tractor trailer whose cargo floor exceed the height of the loading dock by one and a half feet, cannot create liability on Darbert's part. And, as noted *supra,* on previous deliveries to Cure, Leisure Time had included (presumably appropriate) ramps on its trucks. Accordingly, Darbert's cross motion for summary judgment is granted.

Cure's Cross Motion

Cure cross-moves for summary judgment dismissing plaintiffs' complaint and all cross claims against it, arguing that it did not own, operate, maintain or control the premises where the accident occurred, or cause or otherwise contribute to the accident's occurrence.

Leisure Time opposes Cure's cross motion arguing that there remain unresolved questions of fact as to whether or not liability can attach to Cure premised on: Schlaff's directing plaintiff to back up to a specific point on the loading dock: Schlaff's help to plaintiff in "devising" the "faulty scheme," i.e. attempting to stop the load from moving by dropping the load, that resulted in plaintiff's injury; and, the fact that plaintiff was using a Cure palette jack when he was injured.

Schlaff's unrefuted deposition testimony (annexed as Exh. K to Leisure Time motion) discloses that he used the subject Cure palette jack both before and after plaintiff was injured and found said palette jack to be in good operating condition. In addition, there have been absolutely

no facts alleged, by any party, that the specific location on the loading dock at which plaintiff unloaded differed in any way from any other portion of the loading dock. There also is no allegation that at the time of the accident, Schlaff was physically assisting plaintiff to move that specific load. To the extent, if any, that plaintiff's consultations with Schlaff resulted in ill-devised plans that led to plaintiff's injury, there has been absolutely no allegation that Schlaff or Cure were in any position to control or direct the manner in which plaintiff performed his duties. Accordingly, Cure's cross motion for summary judgment is granted.

Accordingly, it is hereby

ORDERED that the motion of defendants Williams Real Estate and Management LLC., Williams Real Estate LLC, and GVA Williams LLC for summary judgment and the cross motions of defendants Williams Real Estate Co., Inc., Aradco Limited, New City Realty Corp., Cure Connections, Inc., s/h/a The Cure Connection, Inc., and Darbert Offset Corp. for summary judgment are granted and the complaint is hereby severed and dismissed as against said defendants and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the motion of Williams Real Estate and Management LLC., Williams Real Estate LLC, and GVA Williams LLC for the imposition of costs and fees against plaintiffs is denied; and it is further

ORDERED that the motion of defendants A.T. Reynolds & Sons, Inc. and Leisure Time Spring Water, Inc. for summary judgment dismissing plaintiffs' complaint is denied and the action shall continue; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 11 room 351, 60 Centre Street on May 14, 2009 at 2:30 pm.

DATED: April 22, 2009

J.S.C.