

**Kushner v New York Convention Ctr. Dev. Corp. of
N.Y.**

2010 NY Slip Op 31596(U)

June 15, 2010

Supreme Court, New York County

Docket Number: 109113/06

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 109113/2006
KUSHNER, SELENE
VS.
NEW YORK CONVENTION CENTER
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 109113/06
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

this motion is for Summary Judgment

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

PAPERS NUMBERED
1
2, 2A, 2B
3, 4, 5

Memo of law M1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

JUN 22 2010

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-15-10


MARCY S. FRIEDMAN c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57**

-----X
SELENE KUSHNER and MAC KUSHNER,

Index No.: 109113/06

Plaintiffs,

-against-

NEW YORK CONVENTION CENTER DEVELOPMENT
CORPORATION OF NEW YORK, NEW YORK
CONVENTION CENTER OPERATING CORPORATION and
VNU EXPOSITIONS, INC.,

Defendants.

-----X
VNU, INC. I/S/A VNU EXPOSITIONS, INC.,

Index No.: 590613/08

Third-Party Plaintiff,

-against-

FREEMAN DECORATING SERVICES, INC.,

Third-Party Defendant.
-----X

This action arises from a trip-and-fall incident that occurred at a trade show that was being held at the Jacob K. Javits Convention Center (the Javits Center) in Manhattan on May 24, 2005. Third-party defendant Freeman Decorating Services, Inc. (Freeman) moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint brought against it by defendant/third-party plaintiff VNU, Inc. i/s/a VNU Expositions, Inc. (VNU). VNU moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims as against it. Plaintiffs Selene Kushner and Mac Kushner cross-move, pursuant to CPLR 3403(a)(4), for an order granting plaintiff a special trial preference based upon her age, as well as

leave to amend the caption of this action.

On the date of the accident, plaintiff was an attendee at the Incentive Show, a trade show which was being held at the Javits Center in New York City (the show). The Javits Center is a convention hall that regularly holds large events. Defendant New York Convention Center Development Corporation (NYCCDC) is the public benefit corporation which owns the Javits Center, and defendant New York Convention Center Operating Corporation (NYCCOC) is the entity which operates the Javits Center and employs its workers for the State of New York. Defendant and third-party plaintiff VNU produced and organized the show. Defendant Freeman served as the show's service contractor. By order dated August 11, 2008, this court granted NYCCDC's motion for summary judgment dismissing the complaint against it. Plaintiff subsequently discontinued the action as against NYCCOC.

On December 14, 2004, VNU entered into a written license agreement with defendant NYCCOC, under which NYCCOC granted VNU a license to use the Javits Center facilities for the show. (Freeman's Notice of Motion, Ex. 1). Notably, the Javits Center retained the exclusive right to provide electrical services (License Agreement at ¶ 11[B]), and to require VNU to hire "Javits labor" to perform specified work, including all work requiring the use of bolts and screws or nail fasteners, rug-laying, and carpeting. (License Agreement, Ex. A.)

VNU hired Freeman, pursuant to a show services agreement, dated July 21, 2004, to serve as VNU's official service contractor for various trade shows owned and produced by VNU. As the service contractor, Freeman was to provide various exclusive and non-exclusive services and materials, including furnishings, carpeting, and electrical utilities. (Freeman Notice of Motion, Ex. 2, Show Services Agreement at 9-10.)

The show services agreement stated in pertinent part:

[Freeman] will provide material handling, overhead rigging, cleaning and electrical utilities on an exclusive basis, unless the facility for which the event is held has the exclusivity for any of the above-mentioned services. Upon requests, [Freeman] will subcontract with VNU's preferred cleaning contractor. It is the responsibility of VNU to negotiate and pay charges for services provided directly by the facility. In the event a facility requires pre-show and post-show cleaning, VNU will be responsible for the charges.

(Id. at 10).

In her deposition, plaintiff testified that, while attending the trade show on the date of her accident, she sustained personal injuries when she snagged her right foot on a piece of exposed electrical wire between two pieces of carpet. (Plaintiffs' Ex. A, Kushner Dep. at 34-35, 117-118, 122.) Specifically, plaintiff testified that "the rug was slit and there was a wire that was showing." (Id. at 129.) She also testified that "there was an opening" between two carpets, and the wire was "sticking up." (Id. at 143.)

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b].)" (Zuckerman, 49 NY2d at 562.)

In moving for summary judgment, VNU claims that it owed no legal duty to plaintiff because VNU did not own or control the Javits Center and neither created nor had actual or

constructive notice of the condition that caused her fall. While it is undisputed that VNU did not install the wire or the carpet, VNU's motion must fail.

It has long been held that “[l]iability for a dangerous condition on property is predicated upon occupancy, ownership, control, or special use of the such premises.” (Balsam v Delma Eng'g Corp., 139 AD2d 292, 296 , ly dismissed and denied 73 NY2d 783.) Both “landlords and permittees have a common-law duty to minimize foreseeable dangers on their property.” (Maheshwari v City of New York, 2 NY3d 288 [2004].)

Here, VNU had a license to use the Javits Center for its show, including the right to decorate the space. Even assuming arguendo that Freeman was an independent contractor, rather than VNU's agent, the general rule that a party who retains an independent contractor is not liable for its negligence is subject to the exception that the owner (or licensee) “has a nondelegable duty to provide the public with a reasonably safe premises and a safe means of ingress and egress.” (Backiel v Citibank, N.A., 299 AD2d 504, 505 [2d Dept 2002].) Applying this authority, the court holds that if Freeman was negligent in providing for the installation of the carpeting or leaving the wire exposed, VNU cannot avoid liability to plaintiff. VNU's motion for summary judgment should accordingly be denied.

Freeman moves for summary judgment dismissing the third-party action, primarily on the ground that Freeman was not negligent. More particularly, Freeman cites the facts that plaintiff tripped on the wire, and that, under the license agreement between NYCCOC and VNU, electrical services were provided exclusively by NYCCOC. While Freeman acknowledges that it contracted with VNU to provide the carpeting, it claims that it used union labor hired from NYCCOC, and that it is therefore not responsible for any defects in the manner in which the

carpeting was laid.

Non-party witness William Hare, the assistant director of labor for the Javits Center, testified that since July 1995, NYCCOC has “usurped the function” of the labor unions by providing all of the laborers who work at the Javits Center, and that official service contractors, like Freeman, are no longer permitted to bring in their own teamsters or carpenters. (Freeman’s Notice of Motion, Ex.5, Hare Deposition at 74-76.) Mr. Hare further testified, without contradiction, that while the Javits Center supplies the laborers, it does not supervise them and, instead, the contractor supervises and directs the laborers. (Id. at 19.) The contractor has the option of hiring Javits Center foremen to supervise but is not required to do so. (Id. at 23.)

William A. Kuehnle, Freeman’s general manager, testified that Freeman served as a general service contractor for the show, providing services to “build” the show. (Plaintiffs’ Ex. C, Kuehnle Deposition at 10-11.) He explained that all the work which was necessary to put on a trade show at the Javits Center is covered by union contracts, and that “[d]epending on what task is involved a specific union will have jurisdiction over that task.” (Id. at 38.) Kuehnle maintained that Freeman does not supervise the installation of aisle carpeting or electrical lines, and that Freeman uses the unions’ foremen to supervise the work. (Id. at 38-42.) Kuehnle, like Hare, testified that Freeman is not permitted to install any carpet for the show, as the Javits Center is “the sole source provider of labor at the Javits Center.” (Id. at 130.) In addition, Kuehnle testified that Freeman does not pay the laborers for their work, but instead, Freeman pays the Javits Center. (Id. at 38-39.)

Kuehnle acknowledged, however, that one of Freeman’s functions at the show was “installing and removing the aisle carpets.” (Id. at 24-25.) He also acknowledged that Freeman

was responsible for inspecting the work and bringing problems to the attention of the laborers provided by the Javits Center. Kuehnle thus testified that, after the carpet is installed and before the show begins, the appropriate Javits Center foreman, as well as the “decorating leads” from Freeman, “take a look through the floor to see if there was any hiccups,” which he defined as work that was not done or a “trip hazard.” (Id. at 62-63.) In addition, an hour or so before the show opens, a variety of other people do a walk-through, “eyeballing everything.” (Id. at 63.) Kuehnle explained that, if a wire were protruding through a carpet, such condition would be brought to the attention of the Javits Center representative or the Javits Center department that oversees the electricians. (Id. at 64.)

Kuehnle denied that he received a complaint about a wire protruding from a piece of carpet. (Id. at 64-65.) However, as noted above, Kuehnle’s own testimony confirmed that Freeman was responsible for the installation of the carpet. An issue of fact therefore exists as to whether Freeman, through the union laborers it employed, created the alleged defect by leaving the piece of wire exposed. Put another way, Freeman’s attempt to avoid liability, based on the fact that it was required to employ union labor supplied by the Javits Center, is unavailing. Kuehnle’s own testimony also raises a triable issue of fact as to whether Freeman was negligent in inspecting the installation. Given that Freeman had the opportunity to inspect before the show opened, a triable issue of fact also exists as to whether it had constructive knowledge of the defect – i.e., whether the condition of the wire existed for a sufficiently long period of time to have enabled Freeman to have discovered and arranged to remedy it. (See generally Gordon v American Museum of Natural History, 67 NY2d 836 [1986].)

In view of this holding, the branch of Freeman’s motion to dismiss VNU’s contribution

and indemnification claims must fail. The branch of the motion to dismiss VNU's third cause of action against Freeman for failure to procure insurance should be granted. Freeman makes a prima facie showing, based on the affidavit of its insurance agent, that it procured the required insurance. VNU fails, in opposition, to raise a triable issue of fact on this claim.

The branch of plaintiffs' motion for a trial preference is granted without opposition. The branch seeking to amend the caption to delete NYCCDC and NYCCOC as parties is granted, as they are no longer parties.

It is accordingly hereby ORDERED that the motion of third-party defendant Freeman Decorating Services, Inc. (Freeman) for summary judgment is granted to the extent of dismissing the third cause of action (breach of contract to procure insurance) in the third-party complaint of defendant/third-party plaintiff VNU, Inc. i/s/a VNU Expositions, Inc.; and it is further

ORDERED that the motion of VNU, Inc. i/s/a VNU Expositions, Inc. for summary judgment is denied; and it is further

ORDERED that the cross-motion of plaintiffs Selene Kushner and Mac Kushner is granted to the extent of granting plaintiff a special trial preference based upon her age, and amending the caption to delete New York Convention Center Development Corporation and New York Convention Center Operating Corporation as parties; and it is further

ORDERED that upon service of a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158), said Clerk shall place the aforesaid action upon the trial calendar with a special preference.

This constitutes the decision and order of the court.

Dated: New York, New York
June 15, 2010

FILED
JUN 22 2010
Marcy Friedman
MARCY FRIEDMAN, N.Y.S. CLERK'S OFFICE
NEW YORK
COUNTY CLERK'S OFFICE