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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 100109/2007

TEPPER, LINDA

VS.

NEW YORK CONVENTION CENTER

SEQUENCE NUMBER : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion to/for _____

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

JUN 15 2011

Dated: _____

HON. JUDITH J. GISCHE J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------x

Linda Tepper,

Plaintiff (s),

-against-

New York Convention Center Operating Corporation d/b/a Jacob Javits Convention Center of New York, George Little Management, LLC and Freeman Decorating Services, Inc.,

Defendant (s).

----------x

DECISION/ORDER
Index No.: 100109/07
Seq. No.: 003, 004, 005

PRESENT:
Hon. Judith J. Gische, J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
MOTION SEQ # 3	
NYCCOC n/m (3212) w/ TJC affirm, JD affid, exhs	1
Freeman opp w/RGT affirm	2
NYCCOC reply w/TJC affirm, exhs	3
MOTION SEQ # 4	
George Little n/m (3212) w/JRM affirm, exhs	5
Freeman partial opp w/RGT affirm, exhs	6
NYCCOC opp w/TJC affirm, exhs	7
MOTION SEQ # 5	
Freeman n/m (3212) w/RGT affirm, exhs	8
NYCOC opp w/TJC affirm, exhs	9
George Little opp w/JRM affirm	10
Freeman reply w/RGT affirm, exhs	11
Plaintiff's opp re: all motions w/ELCM affirm	12

Upon the foregoing papers, the decision and order of the court is as follows:

Gische J.;

This personal injury action arises from an incident that occurred on January 26, 2006 ("date of accident") at the Jacobs K. Javits Convention Center ("Javits Center") when plaintiff Linda Tepper ("Tepper") was struck in the head by a metal bar. There are presently three motions before the court. They are as follows:

Motion sequence no. 3 by defendant New York Convention Center Operating Corp ("NYCCOC") for summary judgment, dismissing Tepper's complaint and all other claims against it, or alternatively, for summary judgment on its cross claim for conditional indemnification against Freeman Decorating Services, Inc. ("Freeman").

Motion sequence no. 4 by George Little Management, LLC ("George Little") for summary judgment, dismissing Tepper's complaint and all other claims against it or, in the alternative, summary judgment granting summary judgment on its cross claims Freeman for contribution and indemnification (contractual and common law).

Motion sequence no. 5 by Freeman for summary judgment dismissing Tepper's complaint and all other claims against it or, in the alternative, for summary judgment on its cross claims against NYCCOC for contribution and common law indemnification.

Issue has been joined and the note of issue was filed June 14, 2010. The motions by NYCCOC and George Little are timely. NYCCOC contends, however, that Freeman's motion is untimely and should be denied for that reason alone. Admittedly Freeman served its motion by regular mail on October 14, 2010. CPLR 2103 [b] [2] provides that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period." This extension of time is, however, inapplicable to a motion for summary judgment because

the period prescribed by CPLR § 3212 [a] is not measured by the date of service but the date the note of issue was filed (Group IX, Inc. v. Next Printing & Design Inc., 77 A.D.3d 530 [1st Dept. 2010]). The cases Freeman relies, on which allow an additional five day extension for service by applying CPLR 2103 [b] [2] (Luciano v. Apple Maintenance & Servs., 289 A.D.2d 90 [1st Dept 2001]; Szabo v. XYZ, Two Way Radio Taxi Assn., 267 A.D.2d 134 [1st Dept 1999]), were decided before Brill v. City of New York, 2 N.Y.3d at 652 [2004] and "should not be followed." (Group IX, Inc. v. Next Printing & Design Inc., 77 A.D.3d at 530). Applying Brill, Freeman must show "good cause" for why it did not file its motion timely and its untimely motion should be permitted.

Russell G. Tisman, Esq., provides his sworn affidavit explaining why the motion was made late. He describes various ailments he had at or about the time the motion was to have been filed and his need for medical attention. Attorney Tishman states that he had drafted the motion and it was ready to go when, on October 12, 2010, he was hospitalized.

What constitutes "good cause" is up to the court's discretion and covers a wide range of situations (see, Brill v. City of New York, supra; Filannino v. Triborough Bridge and Tunnel Authority, 34 A.D.3d 280 [1st Dept 2006]). An attorney's illness has been found to be "good cause" (Perini Corp. v. City of New York, 16 A.D.3d 37 [1st Dept. 2005]). Therefore, Freeman has shown good cause and its motion will be decided on the merits along with the motions by the other defendants. The three motions are consolidated herein for decision and order as follows:

Arguments

This personal injury action arises from an incident that occurred on January 26, 2006 at the Javits Center when Tepper, an employee of an exhibitor at the New York International Gift Fair -2006 Winter Gift Show ("gift fair") was struck in the head by a 5 - 10 pound metal bar that was part of a display booth, also known as a modular interlocking booth system ("MIS"), being set up in the "Accent on Design" section of the gift fair. At her deposition ("EBT") Tepper testified that shortly before her accident, she observed some men "throwing a big long black pole up to a guy sitting on the top of a ladder and they were laughing or joking around." The last thing Tepper heard was the sound of laughter and the next thing she recalls was waking up lying on the floor. According to eye witnesses, the workers dropped the metal bar onto plaintiff's head, knocking her to the ground and rendering her unconscious. The workers involved in the incident are Joseph Gillen and Aldo Habalumas. Gillen and Habalumas are union carpenters, who were setting up booths for the show.

NYCCOC is the public benefit corporation established by law to operate the Javits Center (Public Authorities Law § 2560 et seq). It is statutorily empowered to rent parts of the convention center and grant concessions (Public Authorities Law § 2564). In July 1995, NYCCOC assumed the role of administrator of all labor for trade shows held at the Javits Center in an effort to eradicate inefficiency, corruption and ties to organized crime (Sacco v. Pataki, 982 F.Supp. 231 [S.D.N.Y. 1997]). Before 1995, trade contractors (like Freeman) would contact trade unions directly to hire teamsters to do the work in setting up their exhibits.

NYCCOC seeks summary judgment dismissing Tepper's complaint and all cross

claims against it. Alternatively, NYCCOC seeks an order of conditional indemnification against Freeman if Tepper prevails on her claims against NYCCOC. NYCCOC alleges that although it was the nominal employer of the union carpenters involved in Tepper's accident, the workers were actually the special employees of Freeman when the accident occurred and, therefore, NYCCOC had no role in the supervision or control of those workers. Freeman is one of the Javits Center's "official service contractors" also referred to as a "trade show contractor."

Freeman contends that the carpenters who were assembling the booth or "MIS" when Tepper was struck were not its employees at all, but the employees of NYCCOC. Freeman argues that it is forced to used teamsters supplied by NYCCOC and that these laborers are, among other things, paid, supervised, instructed and controlled by NYCCOC. Freeman seeks summary judgment dismissing Tepper's complaint and all cross claims, including George Little's cross claim for indemnification, etc.

George Little is the self-professed largest marketer and producer of trade shows in North America and it sells booth space at the Javits Center to exhibitors. George Little entered into a license agreement with NYCCOC dated January 18, 2005 ("license agreement") which allowed George Little to use the Javits Center to produce the gift fair. NYCCOC's license agreement with George Little addresses the issue of labor for the gift fair:

> 15. Exclusive Labor
> A. Licensor reserves the exclusive right to supply the labor utilized within the Center to perform any of the services described in Exhibit A of this agreement ... and licensee agrees that neither Licensee nor any exhibitor nor any contractor employed by Licensee or its exhibitors, nor vendors supplying goods or services to

> Licensee or its exhibitors shall utilize any other labor to perform such services. Such labor shall be provided on written order at the established rates of the Licensor for such labor, and shall be utilized pursuant to the rules set forth in Exhibit A. Licensee agrees to comply with the rules set forth in Exhibit A."

Exhibit A to the license agreement provides, in relevant part, as follows:

> Contractor and exhibitor must hire Javits labor to perform the following tasks:
>
> A. Loading and unloading exhibitor freight materials and machinery. Loading and unloading decorating contractors' equipment to and from a marshaling point on the exhibit show floor. Exceptions are exhibitor hand-carry items . . .
>
> B. Crating and recreating, and all work involved in the erection and dismantling of exhibits, displays, backgrounds, and booths; ... handling and delivery of furniture, carpeting modular interlocking booth systems and other contractor owned and leased equipment ...

George Little retained the services of Freeman as its "official service contractor." Pursuant to George Little's written service contract with Freeman, made as of November 28, 2005 ("service contract"), Freeman was to handle the set up/take down for the gift fair. The service contract includes the labor cost of carpenters, MIS (booth) rental packages. George Little contends it is entitled to summary judgment dismissing Tepper's complaint and all cross claims against it because George Little did not supervise control or direct the union carpenters who Freeman hired pursuant to the license agreement. Furthermore, according to George Little, it relied on Freeman to provide safety equipment, materials, instructions and make all decisions about setting up the booths for the gift fair. Thus, George Little contends that it is free from actual and vicarious negligence and it was either NYCCOC or Freeman that was negligent. These arguments also presented in support of its alternate prayer for relief which is for

common law indemnification and under its service contract with Freeman.

Pursuant to Javits Center "facilities/operational policies," which are incorporated into the license agreement, the general decorating contractor hired by the event manager (here, Freeman) has these responsibilities:

> **General Decorating Contractor**:
> General Decorating Contractors are hired by your event manager. They are generally responsible for the physical planning of the event, the shipment and delivery of exhibition freight, the rental of furniture, carpets and other booth/exhibit equipment and the building and dismantling of most of the exhibits. General contractors supply their own site management and supervisors . . .
>
> **Use of Company Personnel as Managers and Supervisors**
> Contractors are permitted to use their own personnel as managers and supervisors of the labor described above provided they complete a questionnaire, been approved by the Center and affirm that they are performing only legitimate managerial tasks and that the company maintains a reasonable ratio of manager and supervisors to labor.

The Javits Center policies also provide that:

> **Labor Provided by the Center**
> The Center provides skilled and courteous employees to perform most of the labor needed for events. With few exceptions (explained below), Event Managers, Contractors, and Exhibitors must hire the Center's employees to perform the following work.

John Dillon ("Dillon") was deposed on behalf of NYCCOC. Dillon is the Director of Show Labor. He testified at his EBT that the union carpenters received their assignments and safety instructions from Freeman supervisors who decided which workers went into teams and determined breaks and overtime. Dillon also stated that

Freeman pre-funds and reimburses NYCCOC for all direct labor costs related to the union workers' services at the Javits Center, although the union workers receive their paychecks from NYCCOC. Dillon testified that Freeman indirectly pays for the union workers' workers' compensation coverage and Freeman is named as an "alternate employer" on NYCCOC's workers' compensation insurance. According to Dillon, when teamsters report for work, they are met and report to Freeman's supervisors who are Freeman's employees.

The union carpenters were deposed. Habaluyas testified at his EBT that he is one of the "state union carpenters that work out of Javits. Technically I'm a part timer there so when I get a work call, I'll receive it and then I'll go to Javits and then I'll honor whoever is hired, whether it's the general contractor or a specific I&D house, Installation and Dismantle House." He also testified that his paycheck is always from NYCCOC. Although Habaluyas testified he'd "heard of" George Little, Habaluyas also testified that he did not take instructions from anyone at George Little. Habaluyas also stated that on the day of the accident he was hired by NYCCOC to work for Freeman and his carpenter foreman was a NYCCOC employee. According to Habaluyas the foreman was supposed to "make sure [he was] treated fairly" and the foreman handled any grievances a carpenter might have with Freeman or a client. Although the foreman did observe the work being done, he testified he did not have much interaction with his foreman other than to greet him if they passed one another. When asked questions about what happened the day of Tepper's accident, Habaluyas answered that it appeared that one of the metal rods came loose and he did not know how that happened or what loosened it.

NYCCOC contends that although it is the owner of the convention center, it did not create nor have notice of a dangerous or defective condition on its property, and therefore, plaintiff's claims (and any cross claims) that NYCCOC breached a non-delegable duty to Tepper should be dismissed because she has not raised any triable issues of fact to defeat that branch of its motion.

NYCCOC also argues that judicial estoppel precludes Freeman from denying that the carpenters are its special employees because Freeman has, in other cases involving injured union workers, successfully argued that it controlled the work being performed by union laborers at the time of their injury (Girodano v. Freeman Decorating Co., 2000 WL 32356 [SDNY 2000] *nor* ; Dennis Crowley v. Larkin Pluznick Inc. and Freeman Decorating Co., 2001 WL 210496 [EDNY 2001] *nor* ; Giannola v. Shepard Exposition Services, Index No. 102463/04 [Sup Ct. N.Y. Co. 2007] *nor*). Consequently, in those cases, the injured worker was found to be Freeman's special employee, resulting in the injured worker's sole remedy being under the Workers' Compensation Law and defeating the injured worker's claim for damages under principles of common law negligence.

NYCCOC argues that even if Freeman is not judicially estopped from arguing otherwise, the evidence establishes that the union carpenters are Freeman's special employees because they were assigned to Freeman that day, there were furthering Freeman's obligations to George Little under the service contract, it was responsible for supervising, controlling, directing and instructing the union carpenters, Freeman supplied the materials required to assemble the booths, it bore all the direct labor costs related to the carpenters' services and it is an insured under NYCCOC's workers'

compensation.

Freeman relies on various deposition testimony in this and other cases which Freeman claims shows that NYCCOC is not just the nominal employer of the carpenters, but actively supervised them by, among other things, preparing and providing a safety handbook and show labor handbook and generally overseeing the safety of the carpenters. Freeman also relies on the terms of the license agreement providing that NYCCOC is responsible for the "safe and orderly operation of the Event" (license agreement ¶5).

In the alternative, Freeman argues that NYCCOC, as the landlord of the Javits Center, has a non-delegable to insure the safety of those who come to its premises for events, like the gift fair. Freeman provides the EBT testimony of Madeline Morano, NYCCOC's safety manager, in a prior action commenced in 2006. Moreno testified in that action that she monitored the build up and take down portions of various trade shows and she oversaw show carpenters.

George Little adopts NYCCOC's argument, that Tepper's injuries arose from the methods utilized by the carpenters and Freeman's failure to properly supervise work being done by them. George Little denies that it exercised or maintained any control over the carpenters. Michael Ruberry, Vice President of Operations, was deposed on behalf of George Little. Ruberry testified that Freeman supplies MIS or booth packages for rent to exhibitors who make design decisions within the show rules and regulations set forth in the Exhibitions Manual. He also testified that George Little plans and decides where and how many booths are put up.

Paragraph 36 of the license agreement provides that:

> Licensee [George Little] assumes full responsibilities for all acts or omissions of its contractors, subcontractors and vendors, and those retained by its exhibitors (including EAC's). Licensee will insured that all such persons fully comply with Licensor's Work Rules (Exh. A) and will be responsible for any non-compliance by such persons.

George Little contends that although it had "dozens" of people present at the gift fair, they were press office staff, sales people and others handling registration. No one with George Little was engaged in manual labor, supervising any of Freeman's workers or inspecting any of the work being performed by the union carpenters. According to Ruberry, it was Patrick Muldoon ("Muldoon"), Freeman's supervisor, who directed the union carpenters. George Little also contends that Freeman was in charge of safety for the set up of the gift fair, relying on Muldoon's testimony Freeman set up "safety signs throughout the entire building . . ." that he also gave safety speeches and he patrolled the show floor to keep an eye on what was going on.

According to Freeman, it complied with its (admitted) obligation to provide George Little with a defense but, later on, George Little decided to file an amended answer with cross claims against Freeman and hire its own defense lawyer. Freeman contends that George Little, by doing so, "interfered" with Freeman's right to control the defense of this lawsuit. Thus, Freeman contends, it did not breach its insurance procurement obligations under its service contract with George Little. Freeman points out that George Little initially conceded NYCCOC was solely negligent in the happening of Tepper's accident. Freeman argues that under its service contract with George Little, Freeman only has to indemnify George Little for Freeman's own conduct, but not an occurrence or accident caused by the negligence of any other party (like NYCCOC).

Alternatively, Freeman argues that if any liability is imposed upon Freeman it would be purely vicarious and, therefore, it is entitled to conditional summary judgment on its cross claims against NYCCOC for contribution and common law indemnification. It also seeks a declaration that GLM's Chubb policy (discussed later at greater length) is primary coverage for NYCCOC and, therefore, must be exhausted before NYCCOC can look to Freeman

Law Applicable to Motions for Summary Judgment

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

Discussion

Central to the dispute among the defendants is which of them is vicariously liable for the actions by the union carpenters who were involved in Tepper's accident. The general rule is that an employer will be held vicariously liable for an employee's torts (Adams v. New York City Transit Auth., 88 N.Y.2d 116 [1996]). A general employee of one employer may also be in the special employ of another (Thompson v. Grumman Aerospace Corp., 78 N.Y.2d 553, 557 [1991]). A special employee is described as

someone who is transferred for a limited time of whatever duration to the service of another (Thompson v. Grumman, supra at 557).

The doctrine of judicial estoppel precludes a party from framing its pleadings in a manner inconsistent with a position taken in a prior judicial proceeding (One Beacon Ins. Co. v. Espinoza, 37 A.D.3d 607 [2nd Dept. 2007]). The doctrine of judicial estoppel will be applied when a party has secured a judgment in its favor by adopting the prior position, and then has sought to assume a contrary position simply because its interests have changed (One Beacon Ins. Co. v. Espinoza, *supra*.; Leonia Bank v. Kouri, 3 AD3d [1st Dept 2004]). Freeman denies that the doctrine of "special employee" has any applicability to the case presently before the court and argues that the more appropriate analysis is whether NYCCOC, as the exclusive provider of labor at the Javits Center, so dominated the workforce that the union carpenters were not Freeman's special employees but remained NYCCOC's general employees.

Several factors are considered when assessing whether a special employment relationship exists. These include: 1) the right to and degree of control by the alleged employer over the manner, details, and ultimate result of the work of the special employee; 2) the method of payment; 3) the right to discharge; 4) the furnishing of equipment; and 5) the nature and purpose of the work (Quinlan v. Freeman Decorating, Inc., 160 F.Supp.2d 681, 685 [S.D.N.Y.,2001]). Of these, the prime factor is who controls the employee's manner of working and the details of the work being performed (Brooks v. Chemical Leaman Tank Lines, Inc., 71 A.D.2d 405 [1st Dept 1979] *internal citations omitted*). The provisions of a contract are not determinative of the issue of special employment (Thompson v. Grumman Corp., *supra*).

Although the issue of whether an individual is a special employee is generally a question of fact for the jury to decide, if the undisputed critical facts establish that the employee supplied became a special employee, then a determination of employment status may be made as a matter of law (*see*, Thompson v. Grumman Aerospace Corp., supra).

The doctrine of judicial estoppel is applicable to the facts of this case. Freeman has successfully argued before other courts that it is the special employer of union workers it hires to do work at the convention center, thereby limiting its workers' recovery to benefits under the workers' compensation law. The workers involved in this case are the same kind of workers, and similarly situated to, those workers whose claims were defeated by Freeman in other actions and the license agreement involved is the same. Although this case does not involve claims *by* Freeman's special employees against Freeman for negligence, there are claims of negligence *against* Freeman's special employees who are alleged to have been involved in Tepper's accident. Thus, Freeman seeks to embrace a directly contradictory and inconsistent position that what it has taken in prior judicial proceedings solely because its interests have changed and to obtain a more desirable result (One Beacon Ins. Co. v. Espinoza, *supra*).

Even if judicial estoppel were inapplicable to this case, NYCCOC has proved that it was not responsible for, nor provide, booth assembly services for the gift fair. That responsibility lies with Freeman not only pursuant to its service contract with George Little, but also under the overarching license agreement. The carpenters who were involved in the accident reported to, were directed by, and received their assignments

from Freeman. Freeman also provided them with whatever equipment they used for their assignments. Though NYCCOC issued checks to the union carpenters, the wages were pre-funded by Freeman and Freeman is an additional insured on NYCCOC's workers' compensation insurance. Although the carpenters happened to be experienced and required little, if any, actual direction on what to do once they arrived, they were working for and serving Freeman and Freeman was responsible their actions. Muldoon made it clear in his deposition testimony that he kept a close watch on troublesome union workers and that he could dismiss anyone he believed was not working up to Freeman's standards. It is also clear that the union carpenters were received whatever instructions they needed when they reported for work from Freeman.

The court also rejects arguments mounted by Freeman that NYCCOC "imposed" its workers on Freeman which should relieve Freeman from any liability as the union carpenters' special employer. None of NYCCOC's staff gave instructions to the union carpenters when they reported for work. The carpenters' interactions were solely with Freeman's supervisors and/or the carpenter foremen who were also Freeman's special employees.

Based upon this record, Freeman was the special employer of the union carpenters and they were Freeman's special employees at the time of Tepper's acccident. Although NYCCOC was the nominal employer of the union carpenters, they were transferred to Freeman which had the right to control them, the manner of their work, furnished the equipment (the booths) they were instructed to install, and the carpenters were acting in furtherance of Freeman's objective of setting up the gift fair. Since the undisputed critical facts establish that the union carpenter became Freeman's

special employees, the determination of their employment status is made as a matter of law (*see*, Thompson v. Grumman Aerospace Corp., supra). Thus, the motions by NYCCOC and George Little for summary judgment, dismissing Tepper's claims and the cross claims against them based upon the alleged negligent acts by the union carpenters, are hereby granted.

Tepper has also asserted claims against the defendants based upon the defendants failure to maintain a safe premises. NYCCOC is the owner/operator of the Javits Center. It is well established law that a landowner has a non-delegable duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party (Perez v. Bronx Park South, 285 A.D.2d 402 [1st Dept. 2001]). This common law duty is, however, tempered by the requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury (Pappalardo v. Health & Racquet Club, 279 A.D.2d 134 [1st Dept. 2000]). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it (Pappalardo, *supra*).

Freeman principally relies on a recent decision by the Hon. Saliann Scapula in the case of Rudinsky v. New York Convention Center (Sup Ct N.Y. Co., Index no 105535/06) ("Rudinsky"). The plaintiff in Rudinsky was a member of the general public attending an auto show at the Javits Center. Freeman was not a named defendant in that action and the Rudinsky case involved a trap like condition in the floor over which Mrs. Rudinsky tripped and fell. Unlike Mrs. Rudinsky, Tepper was not an attendee or

member of the public at large, but an exhibitor preparing for the opening of a show. Although it is unclear exactly how Tepper's accident happened, accepting her version of the facts, the metal bar was being tossed from one person to another when it struck her on the head. Thus, the condition described by plaintiff does not suggest a defective condition in the Javits Center, nor is there anything in this record to show that anyone notified NYCCOC of a dangerous condition such that it had sufficient time to remedy it. Therefore, to the extent that there are any claims against NYCCOC for allegedly breaching its duty to maintain a safe premises, those claims are dismissed as well.

Like NYCCOC, George Little has established that the union carpenters were not its employees and, therefore George Little is not responsible for their allegedly negligent acts. Gillen and Habaluyas each testified that they interacted with Muldoon, Freeman's supervisor and they did not receive directions, instructions or assignment from any one affiliated with George Little.

Although George Little personnel were present on the day of Tepper's accident and it was George Little that decided when the show floor was opened up to exhibitors and their employees, none of the persons employed by George Little were doing any manual labor, such as erecting MIS or using any equipment. These persons were strictly involved with the production side of the show. None of George Little's personnel directed any of the manual work being performed to set up the MIS, nor were they in the immediate area where Tepper's accident took place when it happened. Thus, George Little has established its entitlement to summary judgment on the claims against it based upon a premises liability theory. There are no triable issues of fact that George Little either created or had notice of a dangerous or defective condition on the

show floor. Therefore, the negligence claims against George Little are dismissed as well.

Freeman's motion, for summary judgment dismissing Tepper's complaint is denied. Whether the metal bar was dropped on Tepper or the MIS separated, causing a bar to fall onto her, the booth in question was assembled by Freeman's special employees. There is, therefore, a triable issue of fact whether the union carpenters were negligent.

Indemnification and Contribution

Since the claims against NYCCOC and George Little have been dismissed, both these defendants have been found to be free of negligence (actual or vicarious). George Little's indemnification obligation under its license agreement with NYCCOC is, however, quite broad and provides as follows:

> 29. Indemnification
> Licensee [George Little] shall indemnify, hold harmless, and defend Licensor [NYCCOC] . . .from all losses, claims, liability, damage, actions and judgments recovered from or asserted against [NYCCOC] . . .or expense (including, without limitation, attorneys' fees and their litigation expenses); for any injury to or death of any persons... Such indemnification shall not be effective to the extent that damage or injury results from the sole negligence, gross negligence or willful misconduct of the Indemnitee [NYCCOC].

NYCCOC contends that even if George Little is found not negligent, George Little is not entitled to dismissal of NYCCOC's claims against it for contractual indemnification, i.e. defense and the cost of defense, if any. Since this interpretation of the provision is clearly supported by the indemnification provision, George Little's

motion for summary judgment dismissing NYCCOC's indemnification cross claims against it is denied and that cross claim continues. Since NYCCOC has moved for summary judgment on its cross claims against George Little for contractual indemnification (i.e. payment of its defense costs) based upon the same provision, NYCCOC's motion is granted only to the extent that George Little is required to indemnify NYCCOC. However, since NYCCOC has failed to prove that it incurred any expenses or establish what they were, that issue is reserved for trial.

George Little's motion for summary judgment on its breach of contract cross claim against Freeman cannot be decided at this time for the following reasons. Freeman has proved that it accepted George Little's tender of defense for the Tepper accident and that it provided George Little with an attorney who filed a joint answer for Freeman and George Little. At that time, George Little had no cross claims against Freeman and their interests appeared aligned. Later, however, George Little reconsidered its legal strategy. George Little obtained separate counsel and filed an amended answer with a cross claim against Freeman. Although Freeman argues that George Little made a "mistake" by rethinking its legal strategy and that Freeman's initial defense satisfied its contractual obligation to indemnify George Little, it cannot be determined from this record whether Freeman's refusal to hire separate counsel for George Little was justified or whether George Little has legal expenses which should be Freeman's responsibility. Therefore, George Little's motion for breach of contract and indemnification is denied as there are triable issues of fact.

Freeman's request for summary judgment on its claim that George Little's insurance is primary cannot be decided in this action since any decision the court

makes would necessarily affect the insurers and they are not a party to this action (*see*, New York Cent. Mut. Fire Ins. Co. v. Steiert, 43 A.D.3d 1065 [2nd Dept 2007]; Farley v. State Farm Mut. Auto. Ins. Co., 167 A.D.2d 861 [4th Dept1990])..

Conclusion

For the foregoing reasons, the motions by defendants NYCCOC and George Little for summary judgment dismissing Tepper's claims against them are granted and the plaintiff's claims are dismissed. The Clerk shall enter judgment in favor of NYCCOC dismissing the complaint.

Freeman's motion for summary judgment dismissing Tepper's claims against it is denied as there are triable issues of fact.

The cross claims for indemnification which are pleaded as alternative bases for relief are denied insofar as any defendant seeks summary judgment granting it contractual and/or common law indemnification and/or contribution by NYCCOC.

George Little's motion for summary judgment dismissing NYCCOC's cross claim against it for contractual indemnification is denied for the reasons stated. Conversely, NYCCOC's motion for summary judgment against George Little on its cross claim for contractual indemnification is denied for the reasons stated.

Freeman's motion for summary judgment on its indemnification cross claims is denied for the reasons provided.

This case is ready to be tried. A copy of this decision and order with notice of entry shall be served by NYCCOC upon the Office of Trial Support so that the remaining claims can be scheduled for trial. Also, a copy of this decision and order shall be sent by NYCCOC to Mediator Vigilante before whom there is an scheduled

mediation.

Any relief requested but not expressly addressed is hereby denied; and it is further

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2011

So Ordered:

Hon. Judith J. Gische, JSC