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SHORT FORM ORDER
COPY

INDEX No. 08-729
CAL. No. 11-00001MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 3-29-11 (#002)
MOTION DATE 5-26-11 (#003)
ADJ. DATE 5-26-11
Mot. Seq. # 002 - MG
003 - MotD

MICHAEL DONOHUE, Plaintiff, - against - LAUREN RANIERI, HEART AND SOLE, LLC, AND MICHAEL J. PATTI, Defendants.	HANSEN & ANNUNZIATO, L.L.P. Attorney for Plaintiff 233 Broadway, 5th Floor New York, New York 10279 DeSENA & SWEENEY, LLP Attorney for Lauren Ranieri & Heart & Sole, LLC 1383-32 Veterans Memorial Highway Hauppauge, New York 11788
LAUREN RANIERI AND HEART AND SOLE, LLC, Third-Party Plaintiff, - against - U-HAUL CO. OF ARIZONA, Third-Party Defendant.	McANDREW, CONBOY & PRISCO Attorney for Michael J. Patti 1860 Walt Whitman Road Melville, New York 11747 BRYAN CAVE LLP Attorney for U-Haul Co. Of Arizona 1290 Avenue of the Americas New York, New York 10104-3300

Upon the following papers numbered 1 to 58 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20, 33 - 48; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 22 - 24, 49 - 53, 54 - 56; Replying Affidavits and supporting papers 25 - 30, 57 - 58; Other memoranda of law 21, 31 - 32; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the third-party defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint is granted; and it is further

ORDERED that this motion by the defendants/third-party plaintiffs for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint is granted to the extent that summary judgment is granted dismissing the complaint against the defendant Lauren Ranieri, and is otherwise denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained on September 25, 2007 while working to assist the defendant/third-party plaintiff Heart and Sole, LLC (H&S) move its retail shoe business from one location to another. The accident allegedly happened when a "U-haul" truck, driven by the defendant Michael Patti (Patti), backed into the plaintiff while he was holding a ramp which was attached to the rear of the truck. The plaintiff alleges, *inter alia*, that Patti was negligent in his operation of the vehicle, and that H&S negligently used the rented truck and negligently entrusted the truck to Patti. The plaintiff further alleges that the defendant/third-party plaintiff Lauren Ranieri (Ranieri), a part owner of H&S, is personally liable for the plaintiff's injuries based on the same allegations set forth against H&S. The complaint previously named U-Haul International Inc. as a defendant in the action, based on the plaintiff's belief that it was the owner of the subject rental truck. However, that was not the case. By order dated October 23, 2008, the Court (Mayer, J.) dismissed the complaint against the defendant U-Haul International Inc., and severed that party from the caption in this action. On or about April 15, 2009, H&S and Ranieri commenced a third-party action against the true owner of the rental truck, the third-party defendant U-Haul Co. of Arizona (U-Haul). The defendants/third-party plaintiffs assert, *inter alia*, that U-Haul negligently maintained the truck involved in this incident.[1]

It is undisputed that the plaintiff and Patti, who were friends of Ranieri, were helping H&S move its business on the date of the plaintiff's accident. Ranieri had used H&S's corporate credit card to rent a truck from U-Haul for that purpose. At the time of the plaintiff's accident, Patti was operating the rental truck, attempting to back it closer to the staircase of H&S's store. The truck was equipped with a ramp which could be extended from the rear of the truck. Instructions and warnings on the truck indicated that it was not safe to extend the ramp unless and until the truck was at a complete stop. There is a question whether the plaintiff was merely adjusting the position of the ramp when Patti unexpectedly put the truck into reverse or, as the defendants contend, the plaintiff was holding the extended ramp while Patti backed the truck up to the store's staircase and, when the truck moved in reverse, the ramp struck the plaintiff, injuring him.

U-Haul now moves for summary judgment dismissing the third-party complaint on the ground that, pursuant to the Graves Amendment, it has a defense as a matter of law. The Graves Amendment provides that the owner of a vehicle that "is engaged in the trade or business of renting or leasing motor vehicles" shall not be liable under any State law for damages sustained in a motor vehicle accident, provided there is no negligence or criminal wrongdoing on the part of the owner (49 USC 30106 [a]). Thus, the statute preempts the vicarious liability imposed pursuant to Vehicle and Traffic Law 388 with respect to actions commenced after its effective date of August 10, 2005 (*see* ***Graham v Dunkley***, 50

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[1] The plaintiff has not amended his complaint, or otherwise asserted a cause of action against U-Haul, based upon an inspection of the truck by his expert which did not reveal any mechanical defects.

AD3d 55, 852 NYS2d 169 [2d Dept 2008]; *see also* ***Jones v Bill***, 10 NY3d 550, 860 NYS2d 769 [2008]; ***Flederbach v Fayman***, 57 AD3d 474, 869 NYS2d 180 [2d Dept 2008]; ***Leuchner v Cavanaugh***, 42 AD3d 893, 837 NYS2d 887 [4th Dept 2007]).

In support of its motion, U-Haul submits, among other items, the pleadings, the affidavit of a professional engineer, the deposition transcripts of the four parties to the plaintiff's action, and the deposition transcript of a nonparty witness. Initially, the Court notes that, under normal circumstances, the excerpts of the deposition transcripts submitted by U-Haul are not in admissible form as they were unsigned, unsworn, and not certified by the reporter as accurate (*see* ***Marmer v IF USA Express***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). However, though the moving papers inadvertently omitted the certification pages, U-Haul supplied them in its reply, and H&S/Ranieri included certifications for the transcripts of the four party witnesses in their motion for summary judgment herein, curing that defect (*see* ***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 864 NYS2d 554 [2d Dept 2008]; ***Felberbaum v Weinberger***, 40 AD3d 808, 837 NYS2d 664 [2d Dept 2007]). Therefore, the Court may consider the transcripts of the four party witnesses to the extent that they are deemed admissions (***Morchik v Trinity School***, 257 AD2d 534, 684 NYS2d 534 [1st Dept 1999]; ***R.M. Newell Co. v Rice***, 236 AD2d 843, 653 NYS2d 1004 [4th Dept 1997]). In addition, the unsigned deposition transcripts of the four party witnesses, with notices pursuant to CPLR 3116, were submitted by H&S and Ranieri in support of their motion for summary judgment and, as a result, were adopted as accurate by them (*see eg.* ***Ashif v Wo Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]). It would be inherently inequitable to permit a party to take an inconsistent position regarding the accuracy of deposition transcripts in order to defeat an adversary's motion for summary judgment, while at the same instant relying on said transcripts as accurate to assert its right to the same relief (*see eg.* ***Kimco of New York, Inc. v Devon***, 163 AD2d 573, 558 NYS2d 630 [2d Dept 1990]; ***Knight v Knight***, 31 AD2d 267, 296 NYS2d 1007 [2d Dept 1969]; ***Fink, Weinberger, Fredman & Charney, P.C. v Lipow***, 100 Misc 2d 548, 419 NYS2d 841 [Sup Ct, Westchester County 1979]).

In light of the circumstances herein, including the moving party's explanation that it was not a party to this action when the four party witnesses were deposed, and that it did not participate therein, the Court deems the subject deposition transcripts admissible in determining U-Haul's motion for summary judgment. However, the Court notes that the deposition of the nonparty witness is unsigned, and that U-Haul has failed to submit proof that the transcript was forwarded to the witness for his review (*see*, CPLR 3116 [a]). The deposition testimony of the nonparty witnesses is not in admissible form and it has not been considered in deciding the motion (*see* ***Marmer v IF USA Express, Inc.***, *supra*; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, *supra*; ***McDonald v Mauss***, *supra*).

At his deposition, the plaintiff testified that he was asked to help move the H&S store by his friends, Ranieri and her husband, Ronald (Ron). He arrived at the H&S store at about 5:00 p.m., and the rental truck was already there. At one point that evening, he backed the truck up, and he had no difficulty doing so. Later, he attempted to align the truck ramp with the doorway of the store while Patti was in the driver's seat. He was holding the strap at the end of the ramp when the accident occurred.

Patti was deposed on March 26, 2009. He testified that he was friends with Ranieri and her family, and that he was helping with the move of the H&S store on September 25, 2007. Ranieri and he wanted to use a rental truck for the move, and he went with Ranieri to the U-Haul store that afternoon. He drove the truck back to the H&S store in St. James, New York, where he and the plaintiff, and others, helped load the truck. He then drove the truck, with the plaintiff as a passenger, to the new H&S store located in Stony Brook, New York. At the new store, he backed the truck up before they unloaded it, and he did not experience any problem doing so. After they got back to St. James, it was decided to back the truck up to the staircase at the old location to make it easier to re-load the truck. The plaintiff was holding up the ramp at the rear of the truck while he backed the truck into position. Patti further testified that he had his foot on the brake, that he put the truck in reverse, and that the truck "took off."

At her deposition, Ranieri testified that she owns H&S with her husband, her daughter and her daughter-in-law. She rented the subject ruck, and drove back from the rental store in Patti's vehicle while he drove the rental truck back to St. James. At the old location, a number of people, including her, the plaintiff, Patti, and her husband, were helping pack up the business of H&S. At one point, she heard the plaintiff and Patti discussing their intention to back the truck up to the store's staircase, and she saw the plaintiff holding the truck's ramp, while Patti moved the truck. She saw the truck jerk back, and the ramp strike the plaintiff's left ankle.

Ranieri's husband, Ron, was deposed on March 5, 2010. He testified that he is a part owner of H&S, that the plaintiff and Patti assisted in moving the business to a new location, and that his wife rented the subject truck with an H&S credit card. At one point, he saw Patti back the truck up to staircase at the old store, but the ramp was about 4 inches short of reaching the top step. The plaintiff was holding up the ramp so that Patti could back up some more when the accident happened. He saw the truck lunge back, and the ramp strike the plaintiff's left ankle.

In the affidavit submitted by U-Haul, Wade Bartlett, P.E., swears that he is a principal in Mechanical Forensic Engineering Services, LLC, and a licensed professional engineer since 1995. He states that he has obtained a masters degree in mechanical engineering, and that he is experienced in the field of motor vehicle forensics. On January 23, 2008, he inspected the subject rental truck and ran it through a number of tests to verify if it was in working order. He tested the brakes, the brake shift interlock, and whether the truck transferred into, and worked properly in, reverse gear. He attaches a copy of his inspection report which reveals that the truck worked properly in all respects material to this action.

In opposition to the motion, H&S and Ranieri submit the affirmation of their counsel, who asserts that Bartlett's expert opinion is "of no assistance" because "the motion papers do no[t] esablish or attempt to establish the chain of custody of the vehicle from the [the date of the accident] until its inspection," and that the negligent maintenance of the rental truck is not addressed therein. However, a search of the record reveals that said counsel's office was previously notified that the rental truck had been removed from service, and that it had been stored for inspection in light of the present litigation. Counsel for H&S and Ranieri also quotes from the deposition transcripts that he contends are inadmissible in deciding this motion for the proposition that the rental truck "jumped" and "jerked backwards," causing this accident. However, the opposition does not include any admissible evidence,

and mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see*, ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]; ***Rebecchi v Whitmore,*** 172 AD2d 600, 568 NYS2d 423 [1991]).

Here, it is undisputed that U-Haul is engaged in the business of leasing motor vehicles, and that it was the owner of the truck that was leased to H&S and/or Ranieri and operated by Patti. In addition, no evidence has been adduced that U-Haul was negligent or engaged in criminal wrongdoing to overcome its defense pursuant to the Graves amendment. It has been held that a party's mere statement that vehicle equipment did not work at the time of an accident, the sole basis for the opposition herein, is insufficient to raise a question of fact concerning a lessor's maintenance of a rental vehicle (***Berkan v Penske Truck Leasing Canada, Inc.***, 535 F Supp 2d 341 [WD NY 2008]; *see also* ***Franscesco Ballatore v Hub Truck Rental Corp.***, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]; ***McDonald v Grasso***, 220 AD2d 867, 632 NYS2d 240 [3d Dept 1995]).

Accordingly, U-Haul's motion for an order granting summary judgment dismissing the third-party complaint is granted.

H&S and Ranieri move for an order granting summary judgment dismissing the complaint against them on the grounds that they owe no duty to the plaintiff, who volunteered his services in assisting in the move of H&S's business, and that Ranieri is not personally liable for the rental of the subject truck because she was acting as an owner/agent of the corporation. In support of their motion, the movants submit the pleadings, the deposition transcripts of the parties to the plaintiff's action, a copy of the police report regarding the plaintiff's accident, and a copy of the rental agreement for the truck.

Initially, the Court notes that the police accident report record relied on by the movants is plainly inadmissible and has not been considered by the Court in making this determination (*see*, ***Mooney v Osowiecky***, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]; ***Szymanski v Robinson***, 234 AD2d 992, 651 NYS2d 826 [4th Dept 1996]; ***Aetna Cas. & Sur. Co. v Island Transp. Corp.***, 233 AD2d 157, 649 NYS2d 675 [1st Dept 1996]; ***Cadieux v D.B. Interiors***, 214 AD2d 323, 624 NYS2d 582 [1st Dept 1995]).

Here, H&S has failed to establish its entitlement to summary judgment on the first branch of the motion. Despite the movants assertion that they owe no duty to the plaintiff because he was an unpaid volunteer, who was merely helping friends move a family business from one location to another, there are issues of fact as to whether Patti and the plaintiff were acting for H&S at its request, for its benefit, and at its direction. In addition, the adduced evidence indicates that the plaintiff was asked to assist in the move of the business by two of the principals of the corporation. This distinguishes the instant action from those cases where a master is not held liable to a volunteer (*see* ***Farkas v Cedarhurst Natural Food Shoppe Inc.***, 51 AD2d 793, 380 NYS2d 287 [2d Dept 1976]; ***Bernhardt v American Ry. Express Co.***, 218 AD 195, 218 NYS 123 [4th Dept 1926]; ***Rice v Isbell***, 188 Misc 758, 67 NYS2d 860 [Sup Ct, Madison County 1947] *affd* 272 AD 405, 71 NYS2d 791 [3d Dept 1947]). However, there is no evidence that Ranieri acted outside the scope of her position as a part owner of the corporation, or that she otherwise exercised any direct control over Patti or the plaintiff, sufficient to render her

individually liable herein.

In addition, it is clear that Ranieri did not act individually in the rental of the subject truck. A review of the rental agreement reveals that she signed without including her title as a member of the corporation. However, the presence or absence of a reference to corporate office above or below a person's signature on an instrument does not necessarily determine the capacity in which the person signed the instrument (***PNC Capital Recovery v Mechanical Parking Sys.***, 283 AD2d 268, 726 NYS2d 394 [1st Dept 2001]; *see also* ***Key Equipment Finance v South Shore Imaging, Inc.***, 69 AD3d 805, 893 NYS2d 574 807 [2d Dept 2010]). Generally, officers or agents of a corporation are not liable on its contracts if they do not purport to bind themselves individually (*see generally* ***Savoy Record Co. v. Cardinal Export Corp.***, 15 NY2d 1, 254 NYS2d 521 [1964]; ***Georgia Malone & Co., Inc. v. Ralph Rieder***, 86 AD3d 406, 926 NYS2d 494 [1st Dept 2011]; ***Weinreb v Stinchfield***, 19 AD3d 482, 797 NYS2d 521 [2d Dept 2005]; ***ABS Partnership v AirTran Airways, Inc.***, 1 AD3d 24, 765 NYS2d 616 [1st Dept 2003]). Here, reading the rental agreement as a whole, and considering Ranieri's signature in the context of the subject transaction, it is clear that she did not intend to bind herself individually (***150 Broadway N.Y. Associates, L.P. v. Bodner***, 14 AD3d 1, 784 NYS2d 63 [1st Dept 2004]; ***Zodiac Enters. v American Broadcasting Cos.***, 81 AD2d 337, 440 NYS2d 240 [1st Dept 1981] *affd* 56 NY2d 738, 452 NYS2d 20 [1982]).

Therefore, the Court finds that Ranieri did not become bound individually under the subject rental agreement. This is especially true where the plaintiff is not a party to the rental agreement, and he did not submit any evidence that he relied upon Ranieri's signature on the agreement, or that he was prejudiced by her failure to set forth her status thereon.

Accordingly, the motion by H&S and Ranieri for an order granting summary judgment dismissing the plaintiff's complaint is granted to the extent that summary judgment is granted dismissing the complaint against the defendant Lauren Ranieri.

The claims against U-haul Co. of Arizona and Lauren Ranieri dismissed herein are severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 9/22/11

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A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**