SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

DARLEEN WOLFF,

Plaintiff,

-against-

ISC PARK AVENUE CORP., RENOTECH INTERIORS, INC., and JNM INNOVATION CORP.,

Defendants.

Index No. 2846/16

Motion Seq:
003 MG , 004 MD
Decision/Order

The following papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	XX
Answering Papers.....	XXXX
Reply.....	XX
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	X

Plaintiff Darleen Wolff seeks damages for personal injuries she sustained when she fell outside her place of employment. She alleges that she tripped over a folded black rubber mat that was thrown on or near her path of travel, and that her view of the mat was obscured by a garbage pail. Plaintiff sues the owner of the property, ISC Park Avenue Corp. (ISC) and Renotech Interiors, Inc. (Renotech), the company that was hired by her employer, non-party Telephonics Corporation (Telephonics), to design and outfit an area inside Telephonics with office furniture/cubicles.

A third-party action was commenced by Renotech against its sub-contractor, JNM Innovation Corp. (JNM), who actually performed the installation of the office furniture/cubicles inside Telephonics. Renotech alleges two causes of action sounding in common law indemnification and contribution.

By stipulation so-ordered on November 15, 2016, JMN's motion for consolidation was withdrawn and the Index Nos. 18089/2014 and 2846/2016 were consolidated under 2846/2016 (Pitts, J.).

Plaintiff alleges that the defendants were negligent in their ownership, operation, maintenance and management of the premises in that they failed to provide plaintiff with a safe place to walk, and that they were negligent in the performance of certain work done at the premises, resulting in plaintiff's accident.

ISC seeks summary judgment dismissal of the complaint and all cross-claims asserted against it (Motion Sequence 003). Plaintiff has received Workers' Compensation benefits and ISC maintains that it is entitled to summary judgment because it is the alter ego of Telephonics, and as such, plaintiff's claim is barred under the Workers' Compensation statute. In the alternative, ISC argues that it is not liable to plaintiff because it is an out-of-possession landlord. Finally, ISC maintains that it did not create the alleged dangerous condition, nor did it have actual or constructive notice of same.

By its cross-motion, JNM also seeks summary judgment dismissal of the complaint of plaintiff Wolff and all cross-claims and/or third-party claims alleged against it. JNM claims that, since it does not own, maintain, or control the premises, or the subject mat, it had no duty or obligation to plaintiff Wolff. JNM also maintains that its work did not relate in any way to the alleged condition that caused plaintiff's fall. In the alternative, JNM argues that, even if it moved or folded the mat, which it denies, JNM is not liable because the condition was open and obvious (Motion Sequence 4).

Plaintiff and Renotech each oppose both motion sequences.

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving parties, herein the plaintiff and Renotech (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (***Winegrad v. New York University Medical Center***, 64 MY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Id.***) "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v. Prospect Hospital***, 68 NY2d 320, 324 [1986]).

ISC's Summary Judgment Motion

A. Alter Ego

In support of its motion, ISC submits the pleadings, the deposition testimony of plaintiff, Telephonics' facilities supervisor, plaintiff's coworker, Renotech's owner, project manager and employee, and JNM's president/owner. ISC also submits, *inter alia*, the declarations page from

Griffon Corporation's commercial general liability insurance policy, an affidavit from ISC's vice president, who is also the senior vice president of Griffon Corporation, and a copy of a lease between ISC and Telephonics.

ISC, through its vice president, Seth Kaplan, states that ISC is a "real estate holding company and is a wholly owned subsidiary of Griffon. Griffon is the ultimate parent of ISC." Kaplan further states that "Telephonics (plaintiff Wolff's employer) is an indirect wholly owned subsidiary of Griffon. Griffon is the ultimate parent company of Telephonics." He also avers that Griffon files consolidated tax returns on behalf of its businesses, including ISC and Telephonics, that ISC owns the building located at 770 Park Avenue, Huntington where the accident occurred, that Telephonics and ISC entered into a written lease, and that ISC maintains a bank account "for the sole purpose of collecting rent from Telephonics on a monthly basis," which is used to pay property insurance for the building located at 770 Park Avenue. Finally, Kaplan states that a "single workers' compensation policy issued by Zurich Insurance is used by ISC, Griffon and Telephonics under Griffon's name. Plaintiff received workers' compensation benefits under that policy."

"Generally, the sole remedy of an employee injured in the course of employment against his or her employer is recovery under the Workers' Compensation Law" (***Constantine v. Premier Cab Corp.***, 295 AD2d 303, 303 [2d Dept 2002]). "A parent corporation may be deemed to be an employer of an employee of a subsidiary corporation for Workers' Compensation purposes if the subsidiary functions as the alter ego of the parent. However, the parent corporation must exercise complete dominion and control of the subsidiary's day-to-day operations" (***Dennihy v. Episcopal Health Services, Inc.***, 283 AD2d 542, 543 [2d Dept 2001]).

"A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated entity" (***Quizhpe v. Luvin Construction Corp.***, 103 AD3d 618, 619 [2d Dept 2013]). "However, a mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (***Samuel v. Fourth Avenue Associates, LLC***, 75 AD3d 594, 595 [2d Dept 2010]; *see also* ***Batts v. IBEX Construction, LLC***, 1121 AD3d 765 [2d Dept 2013]; ***Constantine***, ***supra*** at 304).

"Closely associated corporations, even ones that share directors and officers, will not be considered alter egos of each other if they were formed for different purposes, neither is a subsidiary of the other, their finances are not integrated, assets are not commingled, and the principals treat the two entities as separate and distinct" (***Longshore v. Paul Davis Systems of the Capital District***, 304 AD2d 964, 965 [3d Dept 2003]; *see also* ***Queens West Development Corporation v. Nixbot Realty Associates***, 121 AD3d 903, 906 [2d Dept 2014]; ***Lopez v. Mount Kisco Country Club Realty Corporation***, 10 Misc3d 1079[A] [Sup Ct Westchester County 2006]).

Based upon Seth Kaplan's affidavit, neither ISC nor Telephonics is a subsidiary of the other; rather, they are each either a wholly owned or indirect wholly owned subsidiary of Griffon Corporation, who is not a party to this action, nor is Griffon plaintiff's employer. Mr. Kaplan's

affidavit also fails to make any statement that ISC controls the day-to-day operations of Telephonics.

ISC's principal reliance upon ***Ortega v. Noxxen Realty Corp***. (26 AD3d 361 [2d Dept 2006]) is misplaced considering the underlying facts of that case. In that matter, Noxxen submitted sufficient proof to make out its *prima facie* entitlement to summary judgment by showing that it was an alter ego of Gaseteria, plaintiff's employer. Gaseteria was the parent company of wholly owned subsidiary real estate holding company Noxxen, unlike the facts here. In addition, there was no written lease between Noxxen and Gaseteria; Noxxen did not charge Gaseteria any rent, and Noxxen operated without its own bank account.

Here, there is a written lease between ISC and Telephonics; ISC charges Telephonics monthly rent; ISC has its own bank account; ISC pays property insurance from the rents collected from Telephonics, and, as noted neither ISC nor Telephonics is a subsidiary of the other. Moreover, the submitted lease states that ISC is a New York Corporation with an address of 100 Jericho Quadrangle, Jericho, New York and that Telephonics is a Delaware corporation with an address of 789 Park Avenue, Huntington, New York.[1]

Although ISC and Telephonics are covered by the same workers' compensation policy issued to Griffon Corporation, and that Griffon files consolidated tax returns on behalf of its businesses, including ISC and Telephonics, these factors are unavailing considering the significant distinguishing features of the instant action from the factors present in ***Ortega***. Similarly unavailing is Mr. Kaplan's statement that ISC has no employees or stationery, and that it did not take a security deposit from Telephonics.

Plaintiff's testimony also fails to assist ISC in establishing that it is an alter ego of Telephonics. Plaintiff testified that she was employed by Telephonics for at least six years as of the date of her accident, that the name "Telephonics" appears on the top left corner of her paychecks, that the building is owned by "Griffin Corporation" (sic), and that Telephonics rents from "Griffin." When she first worked at that building approximately fifteen years earlier, before she worked in another profession for several years, she was paid by ISC; however, for the six years prior to her accident, she was a Telephonics employee. Importantly, she testified that there are no signs on the premises that bear the ISC name; she does not work with any documentation that bears the ISC name; the company name on her identification card is Telephonics, not ISC, and she did not know if ISC owns Telephonics, or if Telephonics owns ISC.[2]

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[1] The Court takes judicial notice of New York State's Department of State/Division of Corporations records listing Telephonics as a Delaware corporation, with a Chief Executive Officer Kevin McSweeney and a principal executive office address of 815 Broadhollow Road, Farmingdale, New York. ISC is listed in the same database as a New York corporation, with Chief Executive Officer Robert F. Mehmel and a principal executive office address of 712 5th Avenue, 18th Floor, c/o Griffon Corporation, New York, New York.

[2] As established by Mr. Kaplan's affidavit, neither company (ISC or Telephonics) owns the other.

Also, Telephonics' facilities supervisor, John Gubista, testified that he had been an employee of Telephonics for twenty-five years at the time of his deposition in January 2016. He further testified that he was not familiar with an entity called ISC Park Avenue Corp.

There are too many indicia of the separate nature of ISC and Telephonics, plus a lack of evidence that either company exerts any control over the other, for ISC to establish its *prima facie* entitlement to summary judgment as a matter of law based upon the theory that it is an alter ego of Telephonics.

B. Out-of-Possession Landlord

The submitted lease between ISC and Telephonics provides that it is the lessee's obligation to keep the premises "in good order, condition and repair," including "every part thereof, structural and non structural," including sidewalks, at its own expense. The lease also provides that the lessor has no obligation to repair and maintain the premises. The lease terms permit the lessor access to the premises "at reasonable times for the purpose of inspecting the same, showing the same to prospective purchasers, tenders or lessees, and making such alterations, repairs, improvements or additions to the premises or to the building of which they are a part as lessor may deem necessary or desirable."

As a general matter, an out-of-possession landlord who is not contractually obligated to perform maintenance and repairs, and who has not retained control of the premises is not liable for injuries sustained on the premises (***Greco v Starbucks Coffee Company***, 58 AD3d 681 [2d Dept 2009]; ***Valenti v 400 Carlls Path Realty Corp.***, 52 AD3d 696 [2d Dept 2008]). "An out-of-possession landlord is not liable for injuries that occur on its premises unless it retains control over the premises or is contractually bound to repair unsafe conditions (citations omitted). Control may be evidenced by lease provisions making the landlord responsible for repairs or by a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (citations omitted)" (***Taylor v. Lastres***, 45 AD3d 835, 835 [2d Dept 2007]).

Reservation of a right of entry may constitute sufficient retention of control to impose liability for injuries caused by a dangerous condition only if the condition constitutes a specific statutory violation, and there is a significant structural or design defect (***Ingargiola v Waheguru Management, Inc.***, 5 AD3d 732 [2d Dept 2004]); *see also* ***Espada v City of New York***, 74 AD3d 1276 [2d Dept 2010]; ***Landy v 6902 13th Avenue Realty Corp.***, 70 AD3d 649 [2d Dept 2010]; ***Mejia v Era Realty Co.***, 69 AD3d 816 [2d Dept 2010]).

In this action, plaintiff has not alleged either a violation of a specific statutory safety provision or the existence of a significant structural or design defect.[3] She alleges that she tripped over a moveable rubber mat.

[3] Plaintiff's Bill of Particulars, paragraph 10, states that "plaintiff knows of no violations of statutes or ordinances by the defendants herein."

Moreover, John Gubista, Telephonics' facilities supervisor, testified that he supervises four mechanics and two porters on a daily basis at the subject premises. He was the facilities supervisor on the date of plaintiff's accident, October 8, 2013. It is the duty of the facilities personnel to fill work requests for such things as flickering light bulbs, stuck locks, sticking doors, door maintenance, to maintain the cleanliness of walkways, including during inclement weather like ice and snow. In addition, Mr. Gubista testified that Telephonics also employed a safety director. On the day of plaintiff's accident, Mr. Gubista was in charge of telling Renotech and JNM where they could pick up the furniture from a trailer in the rear of the property, and where the furniture was to be located, including which entrance to the building they could use to bring the furniture inside.

Mr. Gubista also testified that the black rubber "walk-off" mats are placed on the walkways, this one specifically outside of the north entrance to the Telephonics building, under the canopy. These mats were in use on the date of plaintiff's accident. The purpose of the mat is to catch sand and debris before it enters the building. Each mat is approximately five feet by three feet. Occasionally the mats would be changed, but they would be replaced with the same type of mat. The facilities personnel, specifically the day porter, would take the mats up momentarily, knock the debris out, sweep up, and put the mats back down outside the exterior entrance door on a daily basis. Thus, the placement and maintenance of the mats is squarely the obligation of Telephonics' facilities personnel.

Based upon the terms of the lease, the absence of any allegation of a statutory safety provision or of a significant structural or design defect, and the testimony of Mr. Gubista, it is the Court's determination that defendant ISC has established its *prima facie* entitlement to summary judgment as a matter of law based upon its alternate theory that it is an out-of-possession landlord who is not responsible for the maintenance of the rubber mat that allegedly caused plaintiff to trip and fall.

C. Creation and Notice of Condition

The submitted deposition testimony establishes unequivocally that ISC did not create the condition with the allegedly folded rubber mat, nor did ISC have actual or constructive notice of the alleged dangerous condition. Telephonics engaged Renotech to set up the office furniture/cubicles inside Telephonics' offices. In fact, Robert Scott, Renotech's part owner and president, testified that Teleophonics was a "very good customer" of Renotech's, having engaged Renotech to carry out many projects prior to the October 2013 installation of office furniture and twelve work stations. There is no evidence that ISC was involved in any of the projects that Renotech performed for Telephonics, including the October 2013 project that became the setting for plaintiff's fall.

The parties present at Telephonics on the day of plaintiff's fall were Telephonics, Renotech and JNM. There is no evidence that anyone from ISC was present or had any duties with regard to the project, or with regard to execution of the project, including getting the furniture into the Telephonics building.

According to the testimony of William Cisneros, Renotech's truck driver, the October 2013 project took only approximately two days to complete. He and his helper, Jorge Molina, brought

Renotech's empty box truck and dollies to the subject premises so that Telephonic's furniture located in a trailer on the rear of the property could be unloaded, driven to the building entrance designated for use by Mr. Gubista, and brought into the Telephonics building for assembly by JNM. Cisneros stated that he helped bring the material inside the Telephonics building and that Nilson Henriquez of JNM and Nilson's crew were also there. They used dollies to get the material inside the building. Cisneros acknowledged that the presence of the mat made it difficult to move the materials on the dollies. According to his testimony, Cisneros went inside the building at one point. When he came out, the runner/mat had been moved, but he did not know who moved it. It was no longer in front of the door. Cisneros denied having moved the mat. Cisneros also testified that he did not know or remember where the mat was placed after it had been moved, but he stated that he recalled that it had been rolled up, not flapped over itself or squished together.

John Gubista testified that he did not know if the mat/runner was removed on October 8, 2013, nor did he know if it was even present on that date; yet, he also testified that the mats were present year-round, and in rain or shine. He also stated that he never witnessed the mats being moved when Renotech made furniture deliveries on other occasions.

Nilson Henriquez, owner and president of JNM, the subcontractor of Renotech, testified that he has done several jobs at the subject premises, both as a former employee of Renotech, and on the date of plaintiff's accident as the owner/president of JMN. He stated that he did not remember if the mats were present on the days that he worked on the October 2013 project at the subject premises. He did testify, however, that if there were mats near an entranceway over which he would have to travel with the dolly loaded with material, he would typically remove the mats so that the dolly "can run easier." He further stated that he did no know who placed a "rolled-up mat" in the location where it was when the plaintiff tripped over it, and he never told anyone employed by Renotech to move the mats off to the side.

Renotech's project manager for the October 2013 job performed at Telephonics, Michael Walker, testified that he would set up the Renotech employees in the morning and tell them, as well as tell the JNM employees, what they were to do that day. Walker would then leave the job site after a couple of hours. He personally did not know if a black runner was down on the walkway when he arrived, or if there was a garbage can near the entrance, but Renotech did not bring any garbage cans or runners to the job site. Mr. Walker did, however, state that he became aware that someone at the job site removed a runner from the walkway. He testified that he thought that someone from Renotech removed a runner from the walkway. According to Mr. Walker, once the company started looking into the incident, one of the crew members mentioned that they removed the runner off the walkway to get the dollies into the building. Walker did not know which one of the crew members told him this information. Walker considered Cisneros, Henriquez and Jorge Molina as part of the "crew" in addition to any other guys that Henriquez/JNM brought along. The crew member told Walker that "it was obstructing getting the furniture into the building, so they rolled it up and put it on the side of the walkway, off the walkway," but the person could not recall on which side of the walkway the runner was placed.

As far as ISC is concerned, Mr. Walker testified that he had never heard of ISC until this action was commenced, that Renotech has never entered into a contract with ISC to the best of his

knowledge, that he has never dealt with employees of ISC, that ISC never directed Renotech how to perform the subject project, that ISC did not provide Renotech with any materials, and that ISC did not pay Renotech. Renotech was paid by Telephonics.

Robert Scott, Renotech's part owner and president, prepared a report of the subject incident involving plaintiff after his company received the summons and complaint. Portions of that report were read into the record at his deposition. He based the contents of his report on discussions of the incident that he had with Michael Walker, William Cisneros and Nilson Henriquez. It is clear from the questioning about the written report that either a Renotech employee or one of the JNM employees/crew moved the mat/runner because it was creating "an unsafe condition for the furniture carts." ISC did not create the alleged dangerous condition. Furthermore, there is absolutely no evidence that ISC or any ISC personnel were involved in this incident or had any obligation or duty to be so involved, or that ISC even had any knowledge that the project was taking place, let alone had knowledge that a mat was moved during the execution thereof.

Thus, ISC has also established its *prima facie* entitlement to summary judgment as a matter of law based upon its contention that it did not create the alleged dangerous condition or have actual or constructive knowledge of its existence.

Since ISC did not establish its *prima facie* entitlement to summary judgment on the basis of alter ego, the Court need not consider the sufficiency of the plaintiff's and Renotech's papers in opposition in this regard; however, the Court will consider the opposing parties' papers with respect to ISC's alternate bases for dismissal.

Neither plaintiff's nor Renotech submit any evidence that raises a triable issue of fact as to ISC in relation to the issues of creation and notice of the alleged dangerous condition. It is clear from the testimony that ISC did not create the condition, nor is there any evidence that ISC had any routine inspection or maintenance duties with respect to the subject premises, or specifically to the execution of Telephonics' projects. Accordingly, summary judgment dismissal of the complaint and all cross-claims is granted to ISC on this ground.

The Court also grants summary judgment dismissal of the complaint and all cross-claims on the basis that ISC was an out-of-possession landlord. The opposition papers do not dispute the terms of the lease as submitted by ISC in its moving papers, and the opposing parties do not offer any evidence that ISC had any obligations to inspect or maintain the premises, or the subject mat. Plaintiff's argument that the affidavit of Seth Kaplan is unavailing ignores the specific terms of the lease concerning Teleponics' obligation to maintain the premises, at its own expense.

Based upon the foregoing, the complaint and all cross-claims as asserted against ISC are dismissed.

JNM's Cross-Motion for Summary Judgment

A. JNM Owed No Duty of Care to Plaintiff

While it is undisputed that JNM did not own or control the subject premises, and that JNM is not in contractual privity with plaintiff, it is equally undisputed that JNM was sub-contracted by

Renotech to install the office furniture for Telephonics, and that JNM was engaged in that work on the date and at the time of plaintiff's accident.

"Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party [citations omitted]" (***Espinal v. Melville Snow Contractors, Inc.***, 98 NY2d 136, 138 [2002]). "Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party [citations omitted]" (***Id.***). "On the other hand, we have recognized that under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract [citations omitted]" (***Id.*** at 139). There are "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm' [citation omitted]; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citation omitted] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely [citation omitted]" (***Id.*** at 140; *see also* ***Church v. Callanan Industries, Inc.***, 99 NY2d 104, 111 [2002]).

Plaintiff alleges that JNM was, among other things, negligent in the performance of the work being performed at the subject premises, and that JNM carelessly, recklessly and negligently caused "a certain runner to be rolled up and left on the sidewalk and/or walkway thereat, constituting a dangerous and defective condition. . ."

An award of summary judgment to a sub-contractor dismissing a common-law negligence claim is improper when the submitted evidence raises a triable issue of fact as to whether the sub-contractor's employee created an unreasonable risk of harm that was the proximate cause of the plaintiff's injuries (***Poracki v. St. Mary's Roman Catholic Church***, 82 AD3d 1192, 1195 [2d Dept 2011]; ***Abramowitz v. Home Depot USA, Inc.***, 79 AD3d 675, 677 [2d Dept 2010]; ***Erickson v. Cross Ready Mix, Inc.***, 75 AD3d 519, 523 [2d Dept 2010]; ***Vilorio v. Suffolk Y Jewish Community Center, Inc.***, 33 AD3d 696, 697 [2d Dept 2006]; ***Marano v. Commander Electric, Inc.***, 12 AD3d 571, 572 [2d Dept 2004]; ***Davilmar v. City of New York***, 7 AD3d 559, 560-561 [2d Dept 2004]).

Here, the submitted deposition testimony raises triable issues of fact and of credibility such that JNM has failed to establish its *prima facie* entitlement to summary judgment as a matter of law. Specifically, there are questions of fact as to who removed the mat/runner (Renotech or JNM), where it was placed after it was removed, and whether it was rolled up or thrown to the side of the walkway.

Cisneros of Renotech and Henriquez of JNM both acknowledged that the mat made the movement of the dollies with furniture on top of them more difficult. Cisneros stated that the mat was moved to make it easier to operate the dollies on the date of plaintiff's accident, but he did not know who moved them. Henriquez admitted that it was typical for him and his crew to remove such mats to make the dollies move easily, but he testified that he did not even know if there were

mats present on the date of plaintiff's incident. Nonetheless, Henriquez stated that he did not know who placed a rolled-up mat in the area where plaintiff tripped over it.

In yet another iteration of the facts, Renotech's project manager, Michael Walker, recalled that upon investigating the incident, one of the crew members mentioned that they removed the runner off the walkway to get the dollies into the building. Walker did not know which one of the crew members told him this information.

Renotech's owner, Robert Scott, testified that his report of the subject incident reflected his discussions with Walker, Cisneros and Henriquez. Moreover, Scott read portions of his report into the record at deposition, some portions of which stated that the runner was rolled up and "we placed it well out of the exterior walkway." Mr. Scott explained that when he used the pronoun "we," he was referring to JNM, "who were actually doing the—responsible to do the work there." When he used the word "team" in his report referring to who was working at the job site, Mr. Scott explained that "[i]t refers to Renotech and its subcontractor." When asked if he thought it was JNM that moved the mat why he did not specify that in his report, Mr. Scott replied, "[b]ecause I'm not an attorney. Next time I probably will, because I realized the implications." Further according to Mr. Scott, no one can remember who actually moved the runner. When asked how Mr. Scott came to write that the runner was placed "well out of the exterior walkway," he replied that, "Nilson [Henriquez] confirmed that's what they did." According to Mr. Scott, Nilson Henriquez personally told that to him. Robert Scott also stated that his project manager, Mr. Walker, never told him that a Renotech employee moved the runner from the walkway.

Mr. Scott also drew a diagram to accompany his report. Based on that diagram, which is based on his conversations with Walker, Henriquez and Cisneros, the runner was placed to the right of the doorway. Further according to the report, the runner was moved because, "as the carts rolled over it, it was creating an unsafe condition. So they, whoever 'they' were, placed it to the side." Mr. Scott also confirmed that a combination of JNM and Renotech employees were working at Telephonics on the date of plaintiff's accident. Scott's references to the "crew" in his report primarily meant JNM employees. Scott stated that Cisneros and his helper, Jorge, "were there to transport the furniture to the site. And Nilson [Henriquez] and his team were to take the furniture in and assemble it;" however, Cisneros testified that he helped JNM employees take the furniture into the Telephonics offices.

This contradictory testimony, standing alone, is sufficient to raise triable issues of fact and credibility, but plaintiff's testimony further establishes the necessity of denying JNM's motion.

In the morning, when plaintiff entered the building to begin working, she saw the mats on the walkway, as they usually appear. When she exited the building after her work day was finished, her husband, also a Telephonics employee, was waiting for her in their car located in the parking lot. She walked to her right as she exited through the exterior door that was propped open by a brick. Her husband was parked to the right. She took approximately two steps off the concrete walkway, at a 90-degree angle to her right, and then onto a paved area, walking diagonally to the waiting car. She passed a security booth to her right. As she walked, there was a gray-colored, waist-high garbage pail located near the booth. The pail was in her path of travel, so she walked

to the left of it. As she did so, her right foot hit the mat and she fell. She described that, as she walked to the left of the garbage pail, which is usually not located there, she did not see the mat on the ground because of the garbage pail. After she fell, she saw the mat. She described that the mat was folded over itself lengthwise, appeared to have been "thrown," and that it was "bunched."

A coworker, John Barone, testified that he saw plaintiff on the ground after her accident. Plaintiff was approximately ten feet beyond the canopy that covers the entrance, and to the right of it. According to Mr. Barone, the black runner/mat that is usually present at the exterior entrance door on a daily basis was not present when he saw plaintiff on the ground. Mr. Barone saw the mat to the right of the exit door, but it was not laying flat on the ground. According to his testimony, the mat was "[p]robably rolled over, I guess, twice."

In further contrast to plaintiff's and Barone's testimony, Henriquez of JNM testified that he learned about plaintiff's accident on the day that she fell because "they were talking about it outside." When asked who was talking about it, Henriquez replied that it was Cisneros and "the helpers." Henriquez did not remember how these people learned that an accident occurred because they told him that they did not witness it. He heard "that there had been tubes there and that she had passed over the tubes."

The "tubes" apparently refers to Cisneros' testimony in which he stated that a woman he saw and identified as the plaintiff turned to her right before she reached the security booth and traversed over conduit tubes running between the building and the booth. According to Cisneros, this woman did not fall, but walked to a waiting car. He testified that he based his identification of this woman as the plaintiff because "the other guys told [him]." According to Cisneros, the workers from Renotech and JNM never said that they saw this woman fall.

Based upon the divergent testimony, there exist questions of fact not only as to the happening of the accident, but the placement of the mat/runner and how it appeared when plaintiff tripped over it (rolled/folded/bunched/thrown), and as to which employee of which entity moved the mat while performing the work of moving and assembling office furniture for Telephonics. The assembly of the office furniture by JNM on the date of plaintiff's accident involved moving it into the Telephonics quarters, which led to the removal of the runner/mat based on the testimony; therefore, and contrary to JNM's contention, JNM's work is related to the alleged dangerous condition that caused plaintiff claims caused her to fall. It remains a triable question of fact as to whether one of the JNM employees created an unreasonable risk of harm that was the proximate cause of the plaintiff's injuries. These questions can only be answered by the trier of fact once it can see and hear the witnesses and assess their credibility (see ***Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6***, at 14; ***Donato v. ELRAC, Inc.***, 18 AD3d 696 [2d Dept 2005]; ***Frame v. Markowitz***, 125 AD2d 442 [2d Dept 1986]).

B. Open and Obvious Nature of the Condition

JNM simply states that, even if it moved or moved or folded the subject mat, JNM contends that the alleged dangerous condition was open and obvious. Aside from this conclusory assertion

in its Memorandum of Law, JNM offers no evidence to contradict plaintiff's testimony that a gray-colored, waist-high garbage can obscured her vision of the bunched up mat.

Whether a condition is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his senses may be rendered a trap for the unwary where the condition is obscured, or the plaintiff is distracted (***Stoppeli v Yacenda***, 78 AD3d 815, 816 [2d Dept 2010]).

Henriquez's affidavit submitted in support of the instant cross-motion does not address the topic of the garbage can at all. Henriquez testified at his deposition that he did not know if a garbage can was present on the date of plaintiff's accident, nor did he recall if JNM used garbage cans with respect to the work it performed on October 8, 2013. John Gubista, Telephonics' facilities supervisor testified that his porters used garbage cans daily of the type described by plaintiff, but that outside contractors were not prohibited from using the garbage cans if they asked to use one. Accordingly, none of the witnesses has controverted plaintiff's statement that she did not see the mat in her path of travel because her view of it was blocked by the garbage pail; therefore, JNM has not established its *prima facie* entitlement to summary judgment based upon its contention the condition was open and obvious.

In view of the foregoing determinations, it is unnecessary to determine whether the papers submitted in opposition to JNM's cross-motion are sufficient to raise a triable issue of fact (*see* ***Levin v Khan***, 73 AD3d 991 [2d Dept 2010]; ***Kjono v Fenning***, 69 AD3d 581[2d Dept 2010]).

ISC's summary judgment motion is granted and the complaint and all cross-claims are dismissed (Motion Sequence 3).

JNM's cross-motion for summary judgment is denied (Motion Sequence 4).

The foregoing constitutes the Decision and Order of this Court.

Dated: April 16, 2019
Riverhead, NY

CARMEN VICTORIA ST. GEORGE, J.S.C.

AS TO ISC: FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]

AS TO JNM: FINAL DISPOSITION [ ] NON-FINAL DISPOSITION [X]