At a Term of the Supreme Court held in and for the County of Wayne at the Hall of Justice in the Town of Lyons, New York on the 19th day of January, 2022.

PRESENT: Honorable Daniel G. Barrett
Acting Supreme Court Justice

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WAYNE

NAKEISHA SMITH,

Plaintiff

DECISION
Index No. 82844

-vs-

MARSHALL FARMS GROUP, LTD, INDIVIDUALLY, AND D/B/A MARSHALL INGREDIENTS

MARSHALL INGREDIENTS, LLC

LIMEKILN ENTERPRISES, LLC F/K/A MARSHALL INGREDIENTS, LLC

MARSHALL PET PRODUCTS, LLC,

Defendants

Defendants Marshall Farms Group, LTD, individually, and d/b/a Marshall Ingredients, (hereafter Marshall Farms Group) and Marshall Pet Products, LLC (hereafter Marshall Products) have filed this motion seeking dismissal of the Plaintiff's Complaint.

In an earlier application the action against Marshall Ingredients, LLC (hereafter Marshall Ingredients) was dismissed, as the Plaintiff, Nakeisha Smith, elected to receive benefits afforded to her by the Workers Compensation Law.

Ms. Smith was severely injured on July 22, 2017 while working as an employee of Marshall Ingredients. She was cleaning dryer number 1 when she sustained her injuries.

An examination of the history of dryer number 1 and the relationships between Marshall Ingredients, Marshall Pet Products and Marshall Farms Group is essentially in the adjudication of this application.

The Defendants provided deposition testimony of Scott Marshall who is the President and CEO of Marshall Farms Group, Peter Reid who was President of both Marshall Ingredients and Marshall Pet Products, and Julie Bixby who was an employee of Marshall Ingredients from 2014 to 2019.

Mr. Marshall submitted a supplemental affidavit and the former Director of Finance for Marshall Pet Products, Issac Ball, submitted an affidavit. In addition the following documents were provided:

1. Lease Agreement between Marshall Pet Products and Wayne County Industrial Development Agency;

2. Lease Back Agreement between Wayne County Industrial Development Agency to Marshall Pet Products;

3. Purchase Agreement for real property located at 5786 Limekiln Road to 5786 Limekiln Property LLC dated May 1, 2019;

4. Asset Purchase Agreement dated May 1, 2019 between Mayer Bros. Apple Products, Inc. (buyer), Marshall Ingredients (seller) and Marshall Pet Products (seller parent).

Plaintiff, interim, provided the following items:

1. Deposition transcript of Scott Marshall taken on August 30, 2021;

2. Deposition transcript of Peter Reid taken on August 30, 2021;

3. Deposition transcript of Julie Bixby taken on September 29, 2021;

4. Expert disclosure/report of Eugene Camerata dated October 28, 2021;

5. Purchase and Sale Agreement of 5876 Limekin Road, Wolcott, New York;

6. Deed to 5876 Limekiln Road;

7. Deed search pertaining to 5876 Limekiln Road;

8. Purchase Order from Marshall Pet Products to Buhler Aeroglide for dryer number 1;

9 Photographs taken of dryer number 1 and inspection of facility dated September 28, 2021;

10. Deposition transcript of William Collins.

HISTORY OF DRYER NUMBER 1

Marshall Pet Products purchased dryer number 1 for Marshall Ingredients Division in 2010. In January of 2014, Marshall Pet Products transferred all assets related to Marshall Ingredients and created a separate accounting record for Marshall Ingredients with its own general ledger and supporting financial reports. This transfer of assets included dryer number 1.

Marshall Ingredients carried dryer number 1 on its accounting books, took annual depreciation for it and was solely responsible for the maintenance and repair of dryer number 1.

In 2019 Marshall Ingredients sold dryer number 1 to Mayer Bros.. This was memorialized in the Asset Purchase Agreement dated May 1, 2019. Marshall Ingredients was identified in that contract as the seller. Marshall Pet Products was identified as the seller parent. At the time Plaintiff's injury, dryer number 1 was the exclusive responsibility of Marshall Ingredients.

DISTINCTIONS BETWEEN DEFENDANTS

Marshall Ingredients manufactured food products. Marshall Pet Products sold ferrets as pets and sold pet accessories for ferrets. Marshall Pet Products did not engage in manufacturing.

Marshall Farms Group is a specialty breeder. It breeds animals for sale and medical research. The Boards of Directors of Marshall Farms Group, Marshall Pet Products, and Marshall Ingredients all had different members. These companies had separate management teams running the day-to-day operations including hiring and supervising employees. Marshall Pet Products and Marshall Ingredients did not share employees with the exception of Peter Reid who was President of both Marshall Ingredients and Marshall Pet Products.

Marshall Farms Group did not participate in the operations of either Marshall Ingredients or Marshall Pet Products. Marshall Farms Group and its corporate offices and breeding facilities were located in another town from where Marshall Ingredients was located. Marshall Farms Group did not share any employees with either Marshall Pet Products or Marshall Ingredients. Marshall Farms Group was pay master for Marshall Ingredients and Marshall Pet Products. It provided an office administrator for payroll and benefits and administration for permanent employees. (Plaintiff was not a permanent

employee at the time.) Each company had its own accounting, tax returns, operations and business functions.

Marshall Pet Products is the parent corporation of Marshall Ingredients. Marshall Pet Products is the sole owner of Marshall Ingredients.

LANDLORD TENANT RELATIONSHIP BETWEEN MARSHALL PET PRODUCTS AND MARSHAL INGREDIENTS

Prior to the date of the accident, Marshall Pet Products and Marshall Ingredients had entered into a lease agreement with the Wayne County Industrial Development Agency (IDA) whereby Marshall Pet Products gave the IDA a leasehold interest to 13.3 acres of land it owned and a building to be constructed that would house Marshall Ingredients. The IDA, Marshall Pet Products and Marshall Ingredients then entered into a lease back agreement whereby the IDA leased the 13.3 acres and the building to Marshall Pet Products. This lease back agreement authorized a sublease to Marshall Ingredients as "operator".

The lease agreement provided at Section 6.3 (ii) that Marshall Ingredients was solely responsible for all building maintenance and repair. In addition, Marshall Ingredients had sole responsibility for all machines and repair of all building contents including the machinery.

There was no signed written lease between Marshall Pet Products and Marshall Ingredients but the deposition and the submitted affidavits demonstrate that these two companies conducted themselves in a manner consistent with the leaseback agreement.

ANALYSIS

In a negligence action, the threshold issue in a premises liability action is whether the defendant owed the plaintiff a duty. River v Nelson Realty, LLC, 7 N.Y. 3d 530 (2006). The existence and extent of a duty is a question of law for the court to decide, Espinal v Melville Snow Contractors, Inc., 98 N.Y. 2d 136 (2002). Although Marshall Pet Products and Marshall Ingredients do not have a written lease, their course of conduct is despositive regarding the delegations of control over the premises (see Rose v Kozak, 175 A.D. 3d 165 (3rd Dep't 2019).

The first item to address is whether Marshall Pet Products is an out-of-possession landlord. A determination of whether one was actually an "out-of-possession" landlord, and thus free of any duty of care to injured parties upon their land, has required a two-pronged analysis to determine if there was both a lack of physical possession and relinquishment of substantial control. Ahern v Steele, 70 Sickles 203, 115 N.Y. 203; Gronski v County of Monroe, 18 N.Y. 3d 374 (2011).

First the owner must be physically absent from any occupation or possession of the premises, or at least that part of the premises where the injury occurred. Ahern, supra; Gronski, supra. In addition, the landlord must relinquish, "complete control, of the property. Gonski, supra." Only when both prongs are met is one considered at law to be an out-of-possession landlord.

The building occupied by Marshall Ingredients is composed of three separate sections. One part was for receiving products used in the manufacturing process. The second part was where the manufacturing and alleged injury occurred and the third part was a warehouse. Ms. Bixby testified that Marshall Pet Products used the warehouse portion of this building. Mr. Reid and Mr. Marshall testified that Marshall Ingredients had the exclusive use of the entire building. This discrepancy in testimony does not affect Marshall Pet Product's status as an out-of-possession landlord as it did not exercise any control or have possession of the manufacturing portion of the building. (See Brocco v Eastern Metal Recycling Terminal, LLC 2001 W.L. 6205987) (Supr. Ct. Bronx County 2021).

"It is well settled that an out-of-possession landlord who relinquishes control of the premises and is not contractually obligated to repair unsafe conditions is not liable...for personal injuries caused by an unsafe condition existing on the premises." Adolf v Erie County Indus. Dev. Agency, 174 A.D. 3d 1519, 1519 (4th Dep't 2019), Addeo v Clarit Realty, LTD, 176 A.D. 3d 1581 (4th Dep't 2019); Flickner v Hungerford, 186 A.D. 2d 992 (4th Dep't 1992).

Even if the out-of-possession landlord reserves the right to re-enter the premises, it does not establish sufficient control to impose liability. In such a situation liability may only be imposed where a significant structural or design defect violates a specific statute. Ferro v Burton, 45 A .D. 3d 1454 (4th Dep't 2007); Schwegler v City of Niagara Falls, 21 A.D. 3d 1268 (4th Dep't 2005).

An out-of-possession landlord had no responsibility for an alleged defect, and thus was not liable to a commercial tenant's employee who was injured when he inserted a short stick into a malfunctioning trash compactor in an attempt to loosen garbage, where the alleged defect was not a significant structural or design defect that was contrary to a specific statutory safety provision, and landlord did not dominate and control the building with respect to the matter at issue. Humareda v 500a East 87th Street, LLC, 117 A.D. 3d 533 (1st Dep't 2014).

Plaintiff cites OSHA violations which were issued to Marshall Ingredients regarding devices on dryer number 1 as a basis for liability against the landlord, Marshall Pet Products. This strategy is ineffective because OSHA regulations are non-statutory and cannot be the basis for liability against an out-of-possession landlord. Conti v Kimmel, 255 A.D. 2d 201 (1st Dep't 1998). OSHA regulations are not statutes, and in any event, are directed to employers, not landlords and cannot serve as a basis for liability to out-of-possessions landlords. Kocurek v Home Depot, USA, 286 A.D. 2d 577 (1st Dep't 2001); Rizzuto v Wenger Contr. Co., 91 N.Y. 2d 343 (1998).

Marshall Pet Products as sole member and parent of Marshall Ingredients cannot be liable by virtue of ownership alone. The fact of a parent corporation's ownership of a controlling interest in the shares of a subsidiary, standing alone, cannot be a basis for liability. Billy v Consolidated Mach Tool Corp., 51 N.Y. 2d 152, 153, rearg. den. 52 N.Y. 2d 829 (1980). Stock control, interlocking directors and officers are an insufficient basis to find liability without more, Townley v Emerson Electric Co., 178 Misc. 2d 740, 743 (Sup. Ct. Monroe Co. 1998).

A parent company will generally not be held liable for the obligations of its subsidiary unless it can be shown that the parent exercised dominion and control over the subsidiary. (Potash v Port Auth. of NY and NJ, 279 A.D. 2d 562 (2nd Dep't 2001).

The evidence presented in this application demonstrates that Marshall Pet Products and Marshall Farms Group had no involvement in the day-to-day operations of Marshall Ingredients.

Marshall Pet Products and Marshall Ingredients used the same accident report form, and had the same liability insurance policy. They had the same president and used the same pay master to administer wages and benefits for full time employees. These items do not demonstrate the kind of control by Marshall Pet Products over Marshall Ingredients to show that they acted as one company. If, in fact, the Plaintiff could demonstrate that these two companies acted as one, then Marshall Pet Products would be entitled to the exclusive protection against law suits brought by injured workers against employers for Worker's Compensation Law §11 and §29(6). A parent corporation maybe deemed an employer of an employee of a subsidiary corporation for Worker's Compensation purposes if the subsidiary functions as the alter ego of the parent. Batts v Ibex Constr., LLC, 112 A.D. 3d 765 (2nd Dep't 2013).

In opposition to this application Plaintiff cites Labor Law §200 as a basis to secure liability against the Defendants. Labor Law §200 will not apply where the defendant did not have control over the manner in which the injured plaintiff performed his or her work.

See Hargrave v LaChase Constr. Serv., LLC, 115 A.D. 3d 1270 (4th Dep't 2014). The defendant was entitled to the dismissal of the plaintiff's Labor Law §200 in common law negligence claims where defendant was not responsible for either performance of plaintiff's work or the premises on which that work was undertaken. Miller v Savarino Constr. Corp., 103 A.D. 3d 1137 (4th Dep't 2014). (That defendant was entitled to summary judgment dismissing plaintiff's Labor Law §200 and common law negligence claims where defendant was responsible for coordinating the activities and safety programs of the contractors at the project, but had no control over the acts, omissions or safety precautions of the contractor).

There is a distinction "between those cases in which the injury was caused by the defective condition of the premises and those in which the injury was the result of a defect not in the land itself but equipment or its operation." Sponholz v Benderson Prop. Dev., Inc., 273 A.D. 2d 791, 792 (4th Dep't 2000). With respect to the later, duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own tools, materials, methods, or through negligent acts of its subcontractor occurring as a detail of work, unless the owner or contractor exercised some degree of supervision or control. Ross v Curtis Palmer Hydro-Elec. Co., 81 N.Y. 2d 494 (1993).

A vital issue is whether there is an issue of fact with respect to the ownership of dryer number 1 requiring a denial of this application. Plaintiff asserts that Marshall Pet Products owned Marshall Ingredients so therefore Marshall Pet Products owned dryer number 1. Plaintiff relies on the Asset Purchase Agreement, the deed, and portions of the deposition testimony of Scott Marshall and Julie Bixby. The referenced deposition pages do not support this contention, nor does the deed or the Asset Purchase Agreement. As stated in Zucher v City of New York 49 N.Y. 2d, 557, 562 (1980), "Bald assertions, speculation, mere conclusions, expressions of hope are simply insufficient to successfully oppose a motion for summary judgment".

The opinion of the expert regarding the ownership of dryer number 1 is equally unavailing. Materials cited in his report do not establish that dryer number 1 was owned by Marshall Pet Products. He, like Plaintiff's counsel, has no personal knowledge of the activities of Marshall Pet Products.

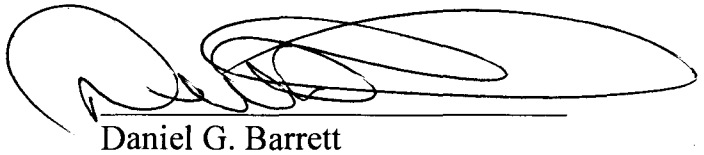
The Plaintiff sued the Defendants in a single negligence cause of action. As held in Alnashmi v Certified Analytical Group, Inc., 89 A.D. 3d 10, 18-19 (2d Dep't 2011), if an out-of-possession landlord has no duty to a plaintiff, the issue of actual or constructive notice under the common law of negligence need not be addressed. Therefore, the fact the Mr. Reid as President of Marshall Pet Products visited Marshall Ingredients frequently is no basis to assess liability against Marshall Pet Products.

Marshall Pet Products is entitled to summary judgment because it was an out-of-possession landlord and owed no legal duty to the Plaintiff.

Marshall Farms Group is entitled to summary judgment because it had no relationship with the Plaintiff and no significant contact with the operations of Marshall Ingredient.

This constitutes the Decision of the Court. Counsel for the Defendants to prepare an Order consistent with this Decision.

Dated: April 14, 2022
Lyons, New York



Daniel G. Barrett
Acting Supreme Court Justice