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SHORT FORM ORDER

INDEX No. 04-22191
CAL. No. 09-01491-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH F. COSTELLO
Justice of the Supreme Court

MOTION DATE 5-20-10 (#008)
MOTION DATE 6-2-10 (#009)
ADJ. DATE 6-16-10
Mot. Seq. # 008 - MD
009 - MG

MARTHA HART and ANDRE C. HART, Plaintiffs, - against - BAER'S RUG & LINOLEUM COMPANY INC., OMNI CONSTRUCTION GROUP and DAVIDOW FAMILY LIMITED, Defendants.	SIBEN & SIBEN, LLP Attorneys for Plaintiffs 90 East Main Street Bay Shore, New York 11706 ANDREA G. SAWYERS, ESQ. Attorney for Defendant Baer's Rug & Linoleum 3 Huntington Quadrangle, P.O. Box 9028 Melville, New York 11747
DAVIDOW FAMILY LIMITED, Third-Party Plaintiff, - against - TGA ASSOCIATES, INC. d/b/a OMNI CONSTRUCTION, Third-Party Defendant.	PAGANINI, GAMBESKI, CIOCI, et al. Attorneys for Defendant/Third-Party Plaintiff Davidow Family Limited 1979 Marcus Avenue, Suite 220 Lake Success, New York 11042-1002 KRAL, CLERKIN, REDMOND, RYAN, et al. Attorneys for Third-Party Defendant TGA Associates 496 Smithtown Bypass, Suite 204 Smithtown, New York 11787

Upon the following papers numbered 1 to 59 read on this motion and cross-motion to RRRR; Notice of Motion/ Order to Show Cause and supporting papers (008) 1 - 18; Notice of Cross Motion and supporting papers (009) 19- 48; Answering Affidavits and supporting papers 49 -50; 51-53; 54-55; Replying Affidavits and supporting papers 56-57; 58-59; Other_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (008) by the defendant, Davidow Family Limited, for an order pursuant CPLR 2221 to renew motion (007) which motion was brought pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and any cross-claims asserted against it is granted as to renewal as timely and upon renewal is denied.

ORDERED that this motion (009) by the defendant, TGA Associates, Inc., for an order pursuant to CPLR 2221 for renewal of that part of its prior motion which was brought pursuant to CPLR 3212 for an order granting summary judgment dismissing the complaint and any cross-claims asserted against it was brought in the action

pending under Index No. 05-10826 instead of Index No. 04-22191 and was denied without prejudice, is granted as to renewal as timely and upon renewal is granted and the complaint and cross-claims asserted against it in this action are dismissed with prejudice as asserted against TGA Associates, Inc. d/b/a Omni Associates; and the third-party complaint by Davidow Family Limited as asserted against TGA Associates, Inc. d/b/a Omni Construction Group is also dismissed with prejudice on the basis of the complaint in the main action being dismissed against TGA/Omni.

This is an action to recover damages for injuries sustained by the plaintiff, Martha Hart, on April 30, 2003, when she was caused to fall at the premises located at 75 Oak Street, Patchogue, New York. The plaintiff alleges that the defendants, Davidow Family Limited (Davidow) TGA Associates, Inc. d/b/a Omni Construction Group (TGA/Omni), and Baer's Rug & Linoleum Company, Inc. (Baer's), were negligent in, among other things, creating a dangerous condition and unsafe place for the plaintiff to walk by causing and permitting the accumulation of a sticky and/or adhesive material to be and remain on the floor, creating a hazard and a trap at a construction/renovation site at the premises, which condition the defendant is alleged to have had actual and constructive notice of. The plaintiff alleges she was lawfully in the course of her employment as a customer service representative for the Social Security Administration at the location when the incident occurred.

In motion (008), Davidow Family Limited, seeks an order granting summary judgment dismissing the complaint and any cross-claims asserted against it on the basis that although it owned the building which it leased to the United States of America, Social Security Administration, it did not cause or create the condition complained of, it did not have actual or constructive knowledge of the condition complained of, and the condition was open and obvious.

In support of its motion, Davidow has submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, Davidow answer with cross-claim asserted against TGA/Omni and Baer's, third-party complaint; third-party answer with counterclaim by TGA against Davidow, TGA answer, Baer's answer with cross-claims asserted against Davidow and TGA/Omni, plaintiff's verified bill of particulars; copy of the orders dated March 16, 2010 (Costello, J.) and December 14, 2005 (Werner, J.); Agreement dated March 13, 2002 between AMH Management Company and TGA/Omni; copies of the transcripts of the examinations before trial of Martha Hart dated January 30, 2007 with continuation on June 4, 2007, Sanford Davidow dated September 21`, 2005, Thomas Reoch dated August 15, 2007, Louis Baer dated August 15, 2007, Gary Wagner dated May 30, 2008, Brendan Cussen dated October 17, 2008; and a copy of the lease agreement dated February 14, 2002.

In motion (009) TGA Associates, Inc (TGA/Omni) seeks dismissal of the complaint and cross-claims asserted against it in the action pending under this Index No. 04-22191. In its answer, Davidow Family Limited (Davidow) has asserted a cross-claim against Baer's Rug & Linoleum Company (Baer's)and Omni wherein it seeks indemnity and/or contribution based upon Baer's and Omni's alleged negligence, breach of contract, breach of warranty and other culpable conduct. In its answer, Baer's has asserted a cross-claim against the co-defendants, namely Davidow and Omni for indemnification based upon the co-defendants' alleged negligence, breach of contract, breach of warranty, and/or violation of statute. It is noted that the complaint was previously dismissed in the action pending under Index No. 05-10826. TGA/Omni seeks dismissal of the complaint and cross-claims asserted against it on the basis that the contract provides that the construction manager TGA shall have no control over the work of the subcontractors and that the construction manager, TGA, is not responsible for safety precautions at the job site, and that each individual contractor was responsible for safety. Further, claims TGA/Omni, it served a Notice to Admit upon Baer's, who did not timely respond to the Notice, thus constituting a judicial admission that Baer's is obligated to defend and indemnify Omni in the event that the plaintiff's accident is found to have been caused by, either in whole or in part by an act of negligence on the part of Baer's.

In support of motion (009), TGA/Omni has submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint in this action, Davidow's answer with cross-claim against Baer's and Omni, Baer's answer with cross-claim against Davidow and Omni, summons and complaint in action under index no. 05-10826 with TGA/Omni answer, third-party summons and complaint with TGA/Omni answer with counterclaim against Davidow, plaintiff's verified bills of particulars; copies of the transcripts of the examinations before trial of Martha Hart dated January 30, 2007, continued June 4, 2007, and January 16, 2008, Sanford Davidow dated September 21, 2005, Thomas Reoch dated August 15, 2007, Louis Baer dated August 15, 2007, Gary Wagner dated May 30, 2008, Brendan Cussen dated October 17, 2008; Notice of Motion with affirmation of Thomas Maher; copy of the order with Notice of Entry dated April 7, 2010 (Costello, J.); photographs; copy of contract between Omni and Baer's dated May 7, 2002; and a copy of the Notice to Admit dated April 23, 2008 with Exhibit A annexed.

In opposing these motions, the plaintiff has submitted an attorney's affirmation. In opposing the motions, Baer's has submitted an attorney's affirmation and a copy of the Response to Notice to Admit dated May 27, 2008. In opposition to the motion by TGA/Omni, Davidow has submitted an attorney's affirmation.

An action was commenced by the plaintiffs under Index No.04-22191 against Baer's Rug & Linoleum Company, Inc., Omni Construction Group and Davidow Family Limited. Davidow Family Limited commenced a third-party action against TGA Associates, Inc. d/b/a Omni Construction Group. An separate action was commenced under Index No. 05-10826 by the plaintiffs against TGA Associates, Inc. By way of an order dated December 14, 2005 (Werner, M.), wherein the Davidow Family, Limited, moved under Index No. 04-22191 pursuant to CPLR 602 for an order consolidating that action with the instant action, such motion was granted only to the extent of directing a joint trial and requiring separate notes of issue and certificates of readiness be filed and separate court fees be paid in each of the actions joined for trial.

The proponent of a summary judgment motion 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. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (Sillman v Twentieth Century-Fox Film Corporation, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (Winegrad v N.Y.U. Medical Center, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v N.Y.U. Medical Center, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (Joseph P. Day Realty Corp. v Aeroxon Prods., 148 AD2d 499 [2nd Dept 1989]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (Castro v Liberty Bus Co., 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]).

MARTHA HART

Martha Hart testified to the extent that on April 30, 2003 she had been employed full-time by the Social Security Administration since July, 1998 as a service representative. Her accident occurred between 9:45 a.m. and 10:30 a.m. at 75 Oak Street, Patchogue, at the office building she had been working at since 1998. She arrived at work at 7:00 a.m. and was wearing "2-inch clogs." She was enroute to see the technical expert near the new/old cafeteria/break room which had been redone. She went from her office in the new building toward the exit door to

the left, through an interior tunnel about eighteen or nineteen feet long that led from the new building to the new building. As she was exiting the tunnel and opened the door, she slipped and fell in the room on the other side of the tunnel, which room she described as barren, office space. She could not recall whether or not she opened the door in the tunnel fully before proceeding into the office space beyond, but stated the door opened into the office space. She stepped forward with her right foot and it slipped back towards the tunnel and she fell to the ground. As she opened the door into the office space, she did not look at the floor where she would be stepping and was looking straight ahead. After she fell, she did not look at the floor and did not know what area had glue on it. She felt some gluey substance on her hands from where her hands touched the floor. It was colorless and she did not recall if it had an odor. She did not recall seeing carpeting or tools. After she fell, three co-workers and two construction workers came to assist her, including the technical expert, Diana Kunz whose desk and chair was in the office room that she was entering. She stated that after she fell she saw a worker to her left with knee pads, kneeling, with her shoes in his hand wiping off glue and came over to her to give her the shoes. She walked barefoot to the chair at Ms. Kunz's desk and did not notice if the floor felt sticky as she walked from where she fell to the chair. She stated that Ms. Kunz, who walked from her desk over to where she had fallen to assist her, assisted her to her to the chair at the desk. She then stated that the worker placed her shoes on her feet. The flooring in the office area was made of concrete but she did not know the color. She could not recall the area of the floor that the glue covered. She described the lighting in the tunnel and the office space where she fell as "good." She stated the Social Security Administration at times sent out emails and announced on a loud speaker the work that was going to be done at a particular period of time, but she did not recall any announcement about the area where she fell. She did not notice yellow tape or a chain or something cordoning off the area. She believed that last time she took this route to the technical expert was two days before the accident. She last saw construction work being done in the building about a week before and did not see any work being done on the date of the accident.

SANFORD DAVIDOW

Sanford Davidow testified to the effect that Davidow Family Limited is a partnership, consisting of he and his wife Saundra Davidow. His three children each own 1% of the partnership. The partnership was formed "a long time ago" for the purpose of holding title to property known as 75 Oak Street, Patchogue, consisting of one building about 25,000 square feet. The partnership leased the building to General Services Administration of the United States for about thirty years, including the date of the accident on April 30, 2003. He stated that pursuant to the terms of the Lease of Real Property dated February 13, 2002, entered into between Davidow Family Limited and U.S. Government, signed by he and his wife, and Carol Diaz, the executive in charge of the eastern district for General Services Administration (GSA), the owner is responsible for everything in the building and the maintenance of the building and the parking lot with the exception of the utilities.

Sanford Davidow states he has been a resident of Florida since 1982, but visited the building between five and ten times in the six months preceding the accident as the building was under construction and renovation for an approximate period of fifteen to eighteen months prior to the accident. He stated the Omni Construction was the general contractor or construction manager hired in relation to the construction pursuant to a written contract entitled "Standard Form of Agreement between Owner & Construction Manager, 1992 Edition, between owner AMH and TGA." Sanford Davidow stated he was a shareholder of the corporation known as AMH, along with his wife Saundra. AMH was formed to manage the property for Davidow Family Limited. There was no contract or agreement between AMH and Davidow Family. He was the only one who visited the site on behalf of AMH in the six months preceding the accident, and interacted with the management of the building employed by the Social Security Administration, representatives of GSA and Omni Construction. He stated that initially the building was about 17,000 square feet and GSA wanted more room, so he added 8,000 square feet and remodeled the entire building. The work was done in phases and GSA employees continued to work at the site during construction, along with NOA employees who occupied about 700 square feet of the building. There had been about ten on-site

meetings, some of which he attended and which Omni would be present. If he was not in attendance, a representative from Omni appeared representing his interests. Some people from Social Security and some subs were also involved. He and Omni hired the subs of which there were about ten. He hired the roofers and landscapers through AMH. Baer's Rug and Linoleum Company, Inc., solicited by Omni, worked at the site, but he did not know if that was pursuant to a written contract. He did not believe he ever met Mr. Baer. Tom Reoch, the principal with Omni, was his contact with Omni; Chip Dean was the supervisor; and Ken was the foreman. He was not familiar with TGA Associates, Inc. and did not know if TGA had a relationship with Omni.

Sanford Davidow stated he learned about the accident when he was told by someone that one of the GSA employees was going from one office to a storeroom or cafeteria and slipped on glue that was on the floor as carpet was being laid. He later spoke to Stewart Blau (sic) from GSA who advised him that the door was not guarded and no announcement was made that there was work going on in the area where the plaintiff fell. The construction work had been completed prior to the date of the accident. However, about 6,000 feet of carpeting was noted to be missing when the carpet was being installed a month before, and replacement carpet had to be reordered. It took about a month to six weeks before the additional carpeting arrived. Therefore, when Baer's came to install the carpeting, there was no one present from Omni or any other construction company as construction had been completed. He assumed Omni contacted Baer to advise the carpeting was available for installation and also stated that Omni was not still on the job. The accident occurred on the last day of the installation of the replacement carpet. There were no representatives at the site from AMH or Omni at the time of the accident. He did not make arrangements with Baer's to complete the carpet installation and did not know if Omni made arrangements with Baer's.

THOMAS REOCH

Thomas Reoch testified to the effect that since 1998 he has been the president, owner and sole shareholder of Omni Construction Group, whose official corporate name is TGA Associates, Inc., and acts as a general contractor and construction manager. He identified his signature on the agreement between AMH Management and TGA Associates, and indicated the agreement was for TGA to perform an addition and alterations to an existing building that was owned by the client (AMH Management). TGA was the construction manager on the job and there was no general contractor. The building housed the Social Security Administration which did not provide any workers for the construction. Mr. Roech stated that TGA did not hire subcontractors and that his client AMH Management did. Initially Sanford Davidow paid the contractors, but when Davidow went to Florida, he asked TGA to pay the contractors on his behalf and sent the money to TGA to do so. Over the course of the job there were about twenty contractors. A letter dated July 15, 2002 was sent to Mr. Stuart Blough of the Social Security Administration from TGA/Omni's senior estimator and project manager, Chip Dean, outlining the course of action for the project, indicating it would be done in three phases, and that phases two and three were going to be done while employees were in the building as TGA/Omni would be working normal working hours. Phase one was the construction of the new addition. Roech testified that phase four was the installation of carpet tile by Baer's, but he did not know what else phase four consisted of. He believed the accident occurred during phase three, the renovation of the interior space. Mike Cody was project supervisor and was at the job daily, all day. Mike Cody, who has since died, would meet with Stuart Blough, the general manager for Social Security Administration, several days in advance to review the work that was going to be done on any given day, and keep a log, which cannot be found since Mr. Cody died. TGA/Omni had no workers on the premises. Mike Cody also met with Chip Dean who went to the site about once a week. Roech went to the site about twice of month, and usually when Davidow was in town.

Mr. Roech stated that Davidow hired Baer's Rug & Linoleum and that Davidow paid Baer's through TGA. He believed there was a contract and he had a purchase order. He stated Davidow purchased the carpeting and it

was stored somewhere on-site. He never learned that some carpet had been stolen or removed. There were two carpeting contractors, the first of whom was terminated due to non-performance of the job, and the second carpeting contractor was Baer's. Stuart Blough would have been responsible for providing employees of the Social Security Administration with notice about accessibility to areas where work was being done, and it was TSA/Omni's responsibility to let Stuart know what areas they would be working in next. If TSA/Omni was working in an area, employees were not allowed into the area, pursuant to verbal instructions given to Blough. He stated that Baer's finished the area where the accident happened the same day they started it, on the date of the accident. He stated that generally the adhesive is applied and about an hour later the carpet tile is installed on the adhesive. He did not know how many employees Baer's had at the site or who they were. He never heard any announcements being made about the work that was being done when he was at the site, and did see signs, usually typed and in bold face, posted, however, he did not know when or where they were posted. He learned of the plaintiff's accident the day after from Chip Dean. Roech further testified that he spoke to Al Baer, the owner of Baer's carpet, and was advised that a Baer's worker put up caution tape and the area was cordoned off and secured from employees of Social Security prior to the work being performed. He stated that safety is the responsibility of the individual contractor. TSA/Omni had laborers on site for phase one and sporadically thereafter. There was no reason for TSA/Omni to have workers on the site on the date of the accident as the only work being done was the carpeting.

LOUIS BAER

Louis Baer testified to the effect that he has been president of Baer's Rug & Linoleum Company, Inc. since 1981 and is the sole shareholder and owner. On the date of the accident, the company's business was floor covering installation and sales. He stated that Omni Construction, whom he had worked for several times before, brought Baer's onto the job in early April or March of 2003, pursuant to a purchase order submitted to Tom Roech who told him what the job was and asked him to give a price. Baer's was at the site on and off for about three or four weeks, phased, but not continuous. He was not at the job site on the date of the accident, but had Gary Wagner, his lead man, working at the site as an installer. He learned from Wagner that a lady slipped, he cleaned her shoes, and she went to her desk afterwards. The custom and practice was to block off access to areas that were being worked on by using caution tape or using buckets of adhesive to block an area.

BRENDAN CUSSEN

Brendan Cussen testified to the effect that he/she is employed by Baer's Rug for over thirty years as project manager/estimator, reviewing plans, and putting a price together for the project, ordering materials and running the job. A book is maintained in chronological order for the jobs. All contracts are put into a jobs folder. Baer's previously dealt with Omni on one job before the Social Security job. When shown a transmittal form, Cussen had no recollection of receiving the form and stated Al Baer, Sr. was running the Social Security job and he would have received the form. A standard exhibit describing the work would accompany a transmittal form and would be attached to a contract.

GARY WAGNER

Gary Wagner testified to the effect that he has been employed by Baer's Rug for twenty three years doing floor covering. He first started working at the site of the accident, an open room at the Social Security Administration, about a week before the date of the accident. The first phase was to the right of the accident. The area to the left of the accident was already completed. On the date of the accident, he was spreading glue to put down 3 feet by 3 feet carpet tiles in the center of the room, working with his foreman, Chris Christiansen, and a helper whose name he did not know, and a shop steward from Carpenters' Union 2287, who had an apprentice there. Someone from the carpet manufacturing company, Millington, was there also. Baer's had in place two or three red cones, about three or four feet high with a black base, each about three feet apart, going from the wall out

into the room when the plaintiff walked in. They had blocked off both sides and the back of the room as they worked down the center of the room, so a total of about eight or nine cones were on the floor. Had the cones not been available, they would have used yellow caution tape in the area of the cones. They were going to use yellow caution tape across the back when they were finished spreading glue in the back. They had not yet put the tape up as they were not finished gluing and needed to exit through the door. The cones came from the maintenance closet in the building. Mr. Wagner testified that before the plaintiff fell, she had walked about ten feet into the room on an area that had no glue on the floor surface. He stated the plaintiff walked around the cones, into the room and made a quick left into the open area. When she was not able to walk around the men who were standing there at the end of the glue, waiting for the glue to dry, he heard one of them yell "Stop, stop, stop." He turned when he heard that but she had already fallen by the time he turned around. She was on her hands and one knee. She was not near the door when she fell, but was about ten to twelve feet away from the door and about four or five feet from the nearest cones, and right next to the men she tried to walk around. He went over to the plaintiff, helping her up and apologizing to her. She seemed embarrassed, had glue on her shoes, knees and hands. She walked with him unassisted across the room to the office space where she sat on a chair. He described her as being about five feet six inches tall and about 180 pounds. Chris, with whom he worked, got some wet paper towels and they wiped off her shoes after she took them off. He spent about two to three minutes with her and she said she was alright. He did not see her the rest of the day and he returned to his work. He further testified that they had been working there six days, gluing all day, and the glue gave off an odor, making it very obvious what was going on. It was their last day working in the room. They were the only trade working in the area. He described the lighting in the area as very good. During the period of time they were working in the area, he saw no flyers or posters or signs about the construction that was going on within the building. He was never instructed to post signs.

It is determined that TGA/Omni has established prima facie entitlement to summary judgment dismissing the complaint. It is further determined that Davidow Family Limited has not established prima facie entitlement to summary judgment dismissing the complaint.

DAVIDOW FAMILY LIMITED

A landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk. Although a jury determines whether and to what extent a particular duty was breached, it is for the court first to determine whether any duty exists, taking into consideration the reasonable expectations of the parties and society generally. The scope of any such duty of care varies with the foreseeability of the possible harm. The scope of a landowner's duty to maintain property in a reasonably safe condition may also include a duty to warn of a dangerous condition. However, a landowner has no duty to warn of an open and obvious danger. Unless a hazard is latent, a person entering the property is just as aware as the landowner of the condition of the property and the risks associated with it. Where a plaintiff has presented evidence that a dangerous condition exists on the property, the burden shifts to the landowner to demonstrate that he or she exercised reasonable care under the circumstances to remedy the condition and to make the property safe, based on such factors as the likelihood of injury to those entering the property and the burden of avoiding the risk. Evidence that the dangerous condition was open and obvious cannot relieve the landowner of this burden. Proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence, see, Cupo v Karfunkel et al, 1 AD3d 48 [2nd Dept 2003].

A landlord moving for summary judgment in a premises liability case has the initial burden of establishing that it did not create the defective condition or have actual or constructive notice of its existence for a sufficient

length of time to discover and remedy it, Rashid et al v Clinton Hill Apartments Owners Corp. et al, 70 AD3d 1019 [2nd Dept 2010].

Pursuant to the testimony of Sanford Davidow, under the terms of the lease agreement between AMH and the United States, the owner is responsible for everything in the building and the maintenance of the building and parking lot. He admitted to being an owner of the building and hired some of the subcontractors and thought Bear's was obtained through Omni. Davidow attended most of the job meetings at the site with subcontractors and discussed the progress and safety, but did not recall there being a safety manager or safety officer with regard to safety at the construction site. He was aware that the Social Security Administration Office was operating out of the building while construction was ongoing. He reviewed bills submitted by subcontractors and paid them through Omni. He was made aware by Omni or Baer's that Baer's was working at the site to install flooring. Construction had been 100% completed at the site months before the accident, but someone stole the carpeting and he was unaware of that loss until the carpeting ran out. He then had to reorder carpeting and it took about a month to six weeks before the additional carpeting arrived, so he was on the manufacturer's back constantly. AMH purchased the carpeting and it was delivered to Baer's warehouse. Baer's then brought the carpeting to the site for installation. It was during the installation of the carpeting that the plaintiff slipped on the adhesive glue and claims to have sustained injury as a result thereof.

The agreement between Owner and Construction Manager dated March 13, 2002 provides at paragraph 4.11 that the owner reserves the right to perform construction and operations related to the project with the owner's own forces and to award contracts in connection with the project.... When performing construction or operations related to the project, the owner agrees to be subject to the same obligations and to have the same rights as the contractors. At paragraph 2.3.15, it is set forth that the with respect to each contractor's own work, the construction manager shall not be responsible for safety precautions in connection with the work of each of the contractors as these are solely the contractor's responsibility under the contract for construction.

Although as a landowner Davidow had the obligation to maintain the premises in a reasonably safe condition, and although construction was 100% complete at the site, and the carpeting was the last remaining job to be completed at the site, Davidow has established that it did not have actual or constructive notice of the condition complained of, namely the placement of cones during the application of the adhesive glue and installation of the carpeting to help prevent injury to others who may be in the area. However, there are factual issues which preclude summary judgment concerning whether or not the Social Security Administration was notified by Davidow that the carpet installation work was being undertaken on that day so that warning signs could be posted advising Social Security Administration employees of the work being done in the area where the accident occurred. There was testimony that Mr. Blough was the contact person for Social Security for the purpose of alerting about any construction or work being conducted in the building. Such factual issue precludes summary judgment on the issue of whether Davidow fulfilled his obligation or duty to maintain the premises in a reasonably safe condition by warning the lessees of the work being done.

Accordingly, motion (008) for summary judgment dismissing the complaint and any cross-claims asserted against the defendant Davidow Family Limited is denied.

TGA/OMNI

The document entitled Standard Form Agreement Between Owner and Construction Manager, and Thomas E. Roech, president, construction manager on behalf of TGA Associates, Inc. d/b/a The Omni Construction Group, provides at section paragraph 2.3.12 that the construction manager shall review the safety programs developed by

each of the contractors for purposes of coordinating the safety programs with those of the other contractors. The construction manager's responsibilities for coordination of safety programs shall not extend to direct control over or charge of the acts or omissions of the contractors, subcontractors, agents or employees of the contractors or subcontractors, or any other persons performing portions fo the work and not directly employed by the construction manager. Here the adduced testimony establishes that TGA/Omni was aware of the safety practices utilized by Baer's, including cordoning off the area with buckets and/or yellow safety tape.

Paragraph 2.3.15 of that agreement provides that with respect to each contractor's own work, the construction manager shall not have control over or charge of and shall not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the work of each of the contractors, since these are solely the contractor's responsibility under the contract for construction. The construction manager shall not be responsible for a contractor's failure to carry out the work in accordance with the respective contract documents. The construction manager shall not have control over or charge of acts or omissions of the contractors, subcontractors, or their agents or employees, or any other persons performing portions of the work not directly employed by the construction manager. Based upon the foregoing, it has been established prima facie that TGA/Omni did not have control over the subcontractor's means, methods, and techniques, sequences or procedures, or for safety precautions and programs which are solely the contractor's responsibility.

The adduced testimony establishes that TGA/Omni was not present at the site on the date of the accident as all the construction had been completed. TGA/Omni was not responsible for the means, methods and techniques sequences or procedures employed by the subcontractors, and safety was the responsibility of each contractor.

In the contract between Omni and Baer's Rug dated May 7, 2002, at paragraph 16, Hold Harmless Clause, it is provided that the subcontractor agrees to defend, indemnify and hold harmless TGA Associates, Inc. d/b/a Omni Construction Group, the Owner, the Architect and their employees and against all claims, damages, losses and expenses including attorney's fees arising out of or resulting from the performance of the work contemplated in such contracts verbal or written provided that and such claims, damages, loss or expense is: 16.1.1 attributable to bodily injury, sickness, disease, death or injury to or destruction of tangible property including the loss of use resulting therefrom and; 16.1.2 cause in whole or in part by negligent act or omission of the subcontractor, and the subcontractor's subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts by any of them may be liable, regardless of whether or not such act is caused by a party indemnified hereunder.

Baer's has raised no factual issue to preclude summary judgment on the issue of liability being granted to TGA/Omni. Nor has the plaintiff or co-defendant Davidow raised a factual issue to preclude summary judgment dismissing the complaint and the cross-claims asserted against TGA/Omni in this action on the issue of liability.

Accordingly, motion (009) is granted and the complaint and cross-claims asserted against TGA/Omni in this action are dismissed with prejudice.

Dated: July 9, 2010

Ralph J. Costello
J.S.C.

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