

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
COUNTY OF NASSAU - PART 19

Scan

Present: HON. WILLIAM R. LaMARCA  
Justice

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KEITH LANE and SUSAN LANE, JULIAN  
TAVALARO and MICHELLE TAVALARO,  
PATRICK MADDEN and MICHELLE MADDEN,  
THOMAS MC DERMOTT and NANCY  
MC DERMOTT, JOHN T. MADDEN, STEVE NAPOLI,  
KEVIN CANHAM and JEANNETTE CANHAM,  
NATIONWIDE INSURANCE COMPANY a/s/o  
PASQUALE CIBELLIS, STEWART GELMAN and  
OCEANVILLE MANSON SUPPLY, MERCHANTS  
INSURANCE COMPANY, a/s/o ORZANO, INC.,  
JAMES DEPRESO, GARY FISH, LEONARD ROSSELO,  
LOUIS DeVITO, CPA, P.C., LOUIS DE VITO, individually,  
GELMAN & DEVITO, CPA'S, P.C., STEWART GELMAN,  
individually and PASQUALE CIBELLIS,

Motion Sequence # 003  
Submitted March 13, 2007

Plaintiffs,

-against-

INDEX NO: 9994/06

OCEANSIDE INSTITUTIONAL INDUSTRIES, INC.,  
WALTER HERMAN, FRANK FERRARA, VINCENT  
ORZANO, and FRANK FERRARA and WALTER  
HERMAN PARTNERSHIP,

Defendants.

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**The following papers were read on this motion:**

<b>Notice of Motion/Order to Show Cause.....</b>	<b>1</b>
<b>LANE, TAVALARO, MADDEN, MCDERMOTT and NAPOLI</b>	
<b>Affirmation in Opposition.....</b>	<b>2</b>
<b>DEPRESCO, FISH and ROSSELO Affirmation in Opposition.....</b>	<b>3</b>
<b>ORZANO Affirmation in Opposition.....</b>	<b>4</b>
<b>Reply Affirmation.....</b>	<b>5</b>

Defendants, WALTER HERMAN and FRANK FERRARA, move for an order, pursuant to CPLR §3211 and §3212 granting them summary judgment dismissing the plaintiffs' complaint. Plaintiffs, LANE, TAVALARO, MADDEN, MCDERMOTT, NAPOLI, DEPRESCO, FISH and ROSSELO oppose the motion as does co-defendant, VINCENT ORZANO. The motion is determined as follows:

This action consists of nine (9) separate lawsuits which have been consolidated. In all of them, the plaintiffs seek to recover damages suffered as the result of the June 29, 2003 fire and explosion that occurred at the premises at 2511 Long Beach Road, Oceanside, New York. The premises are owned by defendant VINCENT ORZANO, and leased by defendant, OCEANSIDE INSTITUTIONAL INDUSTRIES, INC. (hereinafter referred to as "OCEANSIDE"), a commercial laundromat. Defendants, WALTER HERMAN and FRANK FERRARA, were then and are now the Vice-President and President, respectively, of OCEANSIDE. The plaintiffs allege that the fire and explosion were the result of the defendants' negligence.

An investigation by the Nassau County Fire Marshall resulted in a finding that the fire was accidental in nature, caused by the spontaneous heating of freshly dried cotton linen. The Fire Marshall's report explained:

At approximately 21:30 hours, fifteen (15) laundry bins of freshly washed and dried cotton linens still hot from the dryers were placed in the warehouse, and the warehouse was secured. The linen spontaneously heated/ignited, and the ensuing fire caused an acetylene tank to explode, causing injuries to twenty-two (22) firefighters. This same tank also struck the south side frame of the first bin overturning it and caused the hole in the south exterior wall. An LPG [liquid propane gas] tank attached to the forklift parked inside the warehouse BLEVE'd [boiling liquid expanding vapor exploded] approximately ten (10) minutes after the initial acetylene tank explosion and caused no injuries.

OCEANSIDE was issued an appearance ticket for the improper storage of three (3) acetylene tanks and three compressed oxygen gas cylinders being together.

The individual defendants, WALTER HERMANN and FRANK FERRARA, seek summary judgment dismissing the complaint against them and maintain that there are no grounds for holding them individually liable for the incident or for piercing OCEANSIDE's corporate veil.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact". *Sheppard-Mobley v King*, 10 AD3d 70, 778 NYS2d 98 (2d Dept. 2004), *aff'd. as mod.*, 4 NY3d 627 (2005), citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923, 501 NE2d 572 (C.A.1986); *Winegrad v New York University Medical Center*, 64 NY2d 851, 487 NYS2d 316, 476 NE2d 642 (C.A. 1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers". *Sheppard-Mobley v King, supra; Alvarez v Prospect Hospital, supra; Winegrad v New York University Medical Center, supra*. Once the movant's burden is met, the burden shifts to the

opposing party to establish the existence of a material issue of fact. *Alvarez v Prospect Hospital, supra*.

“A corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced”. *American Express Travel Related Services Co., Inc. v North Atlantic Resources, Inc.*, 261 AD2d 310, 691 NYS2d 403 (1<sup>st</sup> Dept. 1999), citing *People v Apple Health & Sports Clubs*, 206 AD2d 266, 613 NYS2d 868 (1<sup>st</sup> Dept. 1994), *lv den.* 84 NY2d 1004 (1994); *Westminister Const. Co. v Sherman*, 160 AD2d 867, 554 NYS2d 300 (2d Dept. 1990); *Key Bank v Grossi*, 227 AD2d 841, 642 NYS2d 403 (3d Dept. 1996); *see also, Espinosa v Rand*, 24 AD3d 102, 804 NYS2d 186 (1<sup>st</sup> Dept. 2005); *Ideal Steel Supply Corp. v Fang*, 1 AD3d 562, 767 NYS2d 644 (2d Dept. 2003).

In support of their motion, HERMANN and FERRARA have submitted an affidavit by FRANK FERRARA in which he states:

At the time of the incident in June Of 2003, Oceanside Institutional Industries, Inc. had approximately 400-500 employees. Among them were various management personnel who supervised day to day operation of the business.

Neither I or Walter Herman instructed any employees as to the manner in which our products should be stored or the manner in which any type of compressed gasses should be stored.

At their depositions, both HERMANN and FERRARA invoked their Fifth Amendment privilege and refused to testify regarding the storage of products, any prior infractions or the fire. As a result, an adverse inference may be drawn against them in this action, in the same manner that a missing witness charge may be employed against a party who fails

to call a material witness. *Stolowski v 234 East 178<sup>th</sup> Street LLC*, 12 Misc.3d 1159A, 819 NYS2d 213 (2006), citing *Marine Midland Bank v John E. Russo Produce Co.*, 50 NY2d 31, 427 NYS2d 961, 405 NE2d 205 (C.A. 1980).

Moving defendants have not met their burden of establishing their entitlement to summary judgment. The mere fact that they did not instruct the employees concerning storage procedures does not establish a lack of knowledge by them or responsibility by them as to what the company's handling and storage policies and procedures were, thereby absolving them of responsibility here, particularly since Oceanside had been cited twice in the eight years preceding the fire concerning its storage of gases. Accordingly, it is hereby

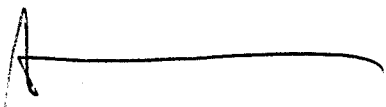
**ORDERED**, that HERMANN's and FERRARA's motion for an order granting them summary judgment dismissing plaintiffs' complaint is denied; and it is further

**ORDERED**, that the parties are presently scheduled to appear before the undersigned on June 26, 2007 at 9:30 A.M. for a Certification Conference.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 7, 2007

  
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WILLIAM R. LaMARCA, J.S.C.

**ENTERED**

JUN 13 2007

NASSAU COUNTY  
COUNTY CLERK'S OFFICE

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