Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS** IAS PART 4
Justice

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ANGELA ORDONEZ,

Plaintiff(s),

-against-

HYSTER-YALE GROUP, INC.,
MESSE, INC.,
TINGUE BROWN AND CO., and
MERITEX, INC.

Defendant(s).

----------x

Index
No.: 710074/2018

Motion
Dated: July 28, 2020

Motion
Cal. No.: 12

Motion
Seq. No.: 3

The following papers numbered EF44 to EF52, EF62 to EF67, and EF70, read on this motion by defendant Meritex LLC (Meritex) for an Order granting summary judgment dismissing the complaint.

	Papers Numbered
Notice of Motion-Affirmation- Affidavit- Exhibits-Memorandum of Law.....	EF 44-52
Opposing Affirmation--Exhibits-.....	EF 62-67
Reply Affirmation.....	EF 70

Upon the foregoing papers it is Ordered that the motion by defendant Meritex is determined as follows:

The within action arises from an accident that occurred on January 21, 2016, in the basement of the Hilton New York& Towers in Midtown Manhattan. Angela Ordonez was employed by Hilton Worldwide Inc. as a housekeeper. She alleges that she had completed her shift and took the employee's elevator to the basement where she intended to go the employee cafeteria. She was struck by a laundry cart that had become detached from other

carts being pulled by a tow tractor, and sustained serious injuries.

Plaintiff Angela Ordonez commenced this action on June 29, 2016 against Hyster-Yale, Meese Inc. and Tingue, Brown & Co., and Meritex, LLC. The complaint alleges causes of action against all of the defendants for negligence, breach of express and implied warranty, failure to warn and strict products liability.

Defendant Hyster-Yale manufactured the subject tow tractor, model MTR005-E, serial number A902N01868D, at its plant in Greenville, North Carolina, on April 6,2006, and it was sold through a local distributor to Hilton New York & Towers,130 West 54th Street, New York, New York, with delivery on May 1, 2006. Defendants Meese. Inc. and Tingue, Brown and Co. are alleged to have manufactured and supplied the laundry carts, and to have manufactured and supplied the tow bars and pins that connected the laundry carts to each other. Defendant Meritex provides commercial laundry services solely to Hilton hotels in New York and New Jersey, including the Hilton located in Midtown Manhattan where plaintiff's accident occurred.

It is undisputed that prior to commencing this action plaintiff applied for Workers' Compensation benefits and that Hilton Worldwide has been identified as her employer. Meritex now seeks an order granting summary judgment dismissing the complaint on the grounds that it and Hilton Worldwide operated as a single entity with a common purpose, and therefore plaintiff's claims are barred by Workers' Compensation Law §§ 11 and 29. In the alternative, Meritex seeks to dismiss the complaint on the grounds that plaintiff cannot maintain a claim against it for either negligence or breach of warranty. Plaintiff opposes the motion.

Meritex's counsel states in his affirmation that at the time of the plaintiff's accident Meritex, LLC was owned by Tex, Inc., which was owned by Hilton Worldwide, Inc., now known as Park Hotels and Resorts, Inc.. He further states that Park Hotels and Resorts was owned by Hilton Worldwide Finance LLC , which was owned by Hilton Worldwide Holdings, Inc.

Jose Garcia, the plant manager at Meritex's facility in New Jersey testified at his deposition that at the time of the subject accident he was the senior production manager at said facility. He stated that, Meritex only provides laundry services for hotels within the Hilton family in New York and New Jersey, and that there were approximately 12 hotels in 2016. He stated that in 2016, his supervisor was Graham Ward, the General Manager of Meritex.

Garcia stated that Meritex did not have a president and that it was owned by Hilton;

that he is a Hilton employee and is paid by Hilton, whose name appears on his paychecks; that Meritex's and Hilton's names were on his business card; and that his employee benefits including a Hilton employee discount, medical benefits, and his 401K were all handled by Hilton's Human Resources department. He stated that his business email address ended in hilton.com. Garcia stated that Ward's operating budget for Meritex was funded by Hilton; that budget overages would be funded by Hilton; and that Hilton paid for Meritex's capital improvements. Garcia stated that Ward did not have a supervisor at Meritex and that Ward reported to employees at Hilton. Garcia also stated that Meritex received its Workers' Compensation insurance through Hilton, but he did not know if it was directly through Hilton. He also stated that Meritex conducted its own safety inspections at its facility and that yearly safety courses were mandated by Hilton.

Garcia further testified that Meritex's shift engineer Peter Aguirre was in charge of purchasing the bins used to transport the linens to and from the hotel; that Aguirre, at the direction of Ward, would order bins from Meese, Tingue Brown; that new bins would be ordered depending on Meritex's inventory; and that the bins were delivered to Meritex, and would be sent to the hotels with clean linens. The bins all had identification numbers and were none were dedicated to a particular hotel.

At his deposition, Garcia stated that the Midtown Hilton asked Ward to order the tow bars, and that Aguirre ordered them from Meese and Tingue Brown and Co. He stated that Hilton ultimately paid for the tow bars. Garcia stated that Aguirre would hand him a sealed box containing the tow bars for the Midtown Hilton, which he would then place on the truck delivering clean linens to said hotel. Garcia stated that he did not know what the tow bars were used for and that he did not know if the sealed boxes also contained pins for the tow bars.

Garcia stated that Meritex uses a "BSS system" that creates the order list for the hotels, and also creates the cart report showing the cart number, the destination and the date. He stated that Meritex's managers log into this system using the same ID and password that was given to them by Meritex. This system does not register complaints or any issues with the bins or materials associated with the bins. Garcia, at Ward's request, located the bin involved in the plaintiff's accident and moved it to Meritex's warehouse.

Garcia stated that the bins containing the linens were transported to and from Meritex in trucks leased by Meritex and driven by drivers who were employed by a third party. He stated that Meritex manually moved the bins, one at a time, and that no one at Meritex instructed anyone at the hotels as to how to move the bins. Garcia stated that Meritex has a mechanics shop and that if a bin's wheels were not working properly they would be repaired at said shop. No other bin repairs were made by Meritex. He had never heard of anyone

returning the tow bars to Meritex. Garcia stated that he had been to the Midtown Hilton several times prior to January 2016; that he only went at the manager's request; and that he and manager only discussed issues pertaining to the linens.

Graham Ward states in his Affidavit that he was the General Manager of Meritex's New Jersey facility from 1999 through 2018. He states that Meritex was a wholly owned subsidiary of Hilton Worldwide Holdings (Hilton) and that he was hired by Hilton as the general manager of Meritex. Ward states that he was responsible for Meritex's day to day operations at its New Jersey facility and that he reported to Hilton's regional managers, vice presidents, senior vice presidents, and others at Hilton but did not report to anyone at Meritex.

Ward states that Hilton maintained general operational, financial, and safety and security oversight over Meritex during his time as General Manager and that his regular performance reviews were conducted by Hilton corporate employees. He states that Meritex had an operational budget related to operating expenses and payroll, and that anytime the operating budget had a shortfall, this amount would be made up by Hilton. He further states that a separate capital expenditure budget was financed by Hilton, and that all of Meritex's capital expenditures required approval from Hilton corporate employees who were responsible for operations and finance. Ward states that he provided regular reports to Hilton related to profit and loss, and operations. He also states that in addition to written reports, he was in regular telephone contact with Hilton corporate employees who had either financial or operational oversight over Meritex. Ward further states that Hilton procured insurance, including Workers Compensation insurance, on behalf of Meritex and that Hilton handled and was responsible for any tax filings and/or corporate filings on behalf of Meritex.

Ward states that during the course of his employment as Meritex's General Manager, he considered himself a Hilton employee and that he was assigned an email address at Hilton.com. He states that Human Resources at Meritex utilized Hilton and Meritex forms interchangeably; that all new hires were subject to the Hilton Hotels Corporation Human Resources Department New Personnel File Checklist; and employees working at Meritex were subject to all Hilton Hotel Standard Practice Instructions.

Ward states that for many years, including 2016, a Hilton employee performed a yearly safety audit and inspection of the Meritex facility, and had the authority to mandate changes if needed. He further states that employees working at Meritex were required to undergo certain safety courses which were designed and offered by Hilton. Finally, Ward states that during his tenure as General Manager at Meritex, Hilton had direct intervention into the finance and overall operations at Meritex.

John Ryan, the President of Meese, commenced working for Meese at the end of 2015. He testified at his deposition that Meese is owned by Tingue Brown and Company (Tingue Brown); that Meese is a rotational plastics manufacturer; and that Tingue Brown is a supplier of various parts to the commercial laundry industry. Meese manufactures, among other things, molded plastic laundry carts for commercial use. Ryan stated that Meese also manufactured tow bars up until the latter part of 2017, and both Meese and Tingue Brown sell tow bars. Tingue Brown is a distributor for Meese for certain products. He stated that Meese stopped manufacturing tow bars when it closed its metals manufacturing department due to costs and has outsourced the manufacturing of parts.

Ryan stated that Meritex, a commercial laundry business, is a customer of Meese. Meese's cart model number 72 (the model number involved in plaintiff's accident) is made of molded plastic. Attached to the cart is a base with casters and if ordered by the customer, a tow hitch on each end. The tow hitch may be recessed, or protrude with a ball on it. The tow bar is connected to the tow hitch, permitting two carts to be joined together. Ryan stated that the tow hitches are rated for 4,000 pounds, plus a built in safety above said amount; that Meese's engineering department performed tests to determine said rating; and that he had no knowledge of actual tests performed. He stated that he was not aware of any recommendations that were made to Meritex as to how many carts could be hitched to one another, and that he did not make any recommendations.

Ryan identified a photograph of a cart with a recessed tow hitch. He stated that the tow hitch is identical at each end, underneath the cart; that it has a female opening and that the tow bar has a male opening that hooks into the hitch; and that the tow bar slides into the hitch and a locking pin is inserted to keep the tow bar from becoming dislodged from the tow hitch. Ryan stated that he has only observed a tow tugger pull attached carts in a straight line, without making any turns, and was unaware of any testing using a tow tugger and carts attached to one another with a tow hitch. He also stated that he had never heard jack knifing as it relates to the transportation of a tow tugger and Meese carts; that he not aware of any complaints relating to movement of the tow bars and carts while being pulled by a tugger; and that he was not aware of any complaints made by Meritex to Meese about the tow bars or the carts.

Ryan stated that Meese does not provide any instructions on how to use a tugger or the speed at which the carts can be moved or maneuvered. He stated that the carts did not contain any warning signs or label on the either the cart or its base, and that the tow bars do not have express warranty. Meese provides a warranty of workmanship for the cart and its base.

Ryan was present at an inspection of the cart and a tow bar at the subject hotel in

2019. He stated that said cart had two rigid casters on one end and two swivel casters on the other end, and that this does not allow for freedom of movement- specifically that the cart is not going to move from side to side. He further stated that he had not heard of any issues pertaining to movement of the carts that have tow bars and were pulled by a tugger; that he was informed that the tow bar involved in the accident was not preserved; that the tow bars he observed at the hotel were identical in appearance; and that he never heard of a pin falling out of the tow bar. He stated that he did not see the tugger in operation while he was at the hotel for the inspection.

Ryan stated that based on the invoices, only one type of tow bar was sold to Meritex. He identified invoices from Tingue Brown for a total of 16 tow bars purchased by Meritex between 2010 and 2012. He stated that Tingue Brown was a distributor of the tow bars and that he did not know why Meritex had ordered them.

It is well established that summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The party moving for summary judgment has the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law. It is equally well settled that on such a motion, the facts must be viewed in the light most favorable to the non-moving party (*see e.g. Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). Further, "the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002], *citing Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366 [1985]). Thus, the court is not to determine credibility, but whether a factual issue exists (*Capelin Assoc. v Globe Mfg.*, 34 NY2d 338 [1973]).

As the moving party, Meritex is required to show its entitlement to summary judgment as a matter of law. As a general rule, a party meets this burden by affirmatively demonstrating the merits of its claim or defense, not by pointing to gaps in the opponent's proof (*see Cox v Consol. Edison, Inc.*, 125 AD3d 923, 924 [2015]; *L & D Serv. Sta., Inc. v Utica First Ins. Co.*, 103 AD3d 782, 783 [2013]; *Englington Med., P.C. v. Motor Veh. Acc. Indem. Corp.*, 81 AD3d 223, 230 [2011]).

"The protection against lawsuits brought by injured workers which is afforded to employers by Workers' Compensation Law §§ 11 and 29(6) also extends to entities which are alter egos of the entity which employs the plaintiff" (*Batts v IBEX Constr., LLC*, 112

A.D.3d 765, 766 [2013]; *see Samuel v Fourth Ave. Assoc., LLC,* 75 AD3d 594, 594–595[2010]). " 'A defendant moving for summary judgment based on the exclusivity defense of the Workers' Compensation Law under this theory must show, prima facie, that it was the alter ego of the plaintiff's employer' " (*Moses v B & E Lorge Family Trust,* 147 AD3d 1045, 1046 [2017], *quoting Batts v IBEX Constr., LLC,* 112 AD3d at 766; *see Landaverde v Lin-Ann Enterprises, Inc.,* 177 AD3d 864, 865-66 [2019]; *Haines v Verazzano of Dutchess, LLC,* 130 AD3d 871, 872 [2015]). "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" (*Haines v Verazzano of Dutchess, LLC,* 130 AD3d at 872 [internal quotation marks omitted]; *see Samuel v Fourth Ave. Assoc., LLC,* 75 A.D.3d at 594–595). 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" (*Moses v B & E Lorge Family Trust,* 147 AD3d at 1046–1047 [internal quotation marks omitted]; *see Landaverde v Lin-Ann Enterprises, Inc.,* 177 AD3d at 865-66; *Batts v IBEX Constr., LLC,* 112 AD3d at 767; *Samuel v Fourth Ave. Assoc., LLC,* 75 AD3d at 595).

Here, although the evidence presented demonstrates the existence of a relationship between Meritex and Hilton, said evidence is insufficient to establish that Meritex was the alter ego of plaintiff's employer. Meritex has not demonstrated that Hilton controlled its day to day operations (*see Landaverde v Lin-Ann Enterprises, Inc.,* 177 AD3d at 865-66; *Moses v B & E Lorge Family Trust,* 147 AD3d at 1047; *Zhiwei Mao v Krantz & Levinson Realty Corp.,* 117 AD3d 944, 945 [2014]). In addition, although it is asserted that Meritex is a wholly owned subsidiary of Hilton, defendant has not submitted admissible evidence in support of this claim. Although defendant's counsel asserts that Meritex is owned by Tex, Inc., which is in turn owned by plaintiff's employer, Hilton Worldwide Inc., he does not claim to have personal knowledge of the relationship between these entities. It is noted that neither Ward nor Garcia made any mention of Tex, Inc.

The evidence presented is also insufficient to establish that Meritex and Hilton operated as a single integrated unit. Meritex neither claims nor has established that it shared the same Workers' Compensation insurance policy or any other insurance policy with Hilton. Although Garcia stated that he was paid by Hilton and Ward considered himself a Hilton employee, Meritex has not presented any documentary evidence pertaining to its payroll. Meritex, thus, has not established that it shared a payroll with plaintiff's employer. In addition, Meritex has not established that it and Hilton operated a single integrated human resources department. Finally, Garcia's testimony and Ward's Affidavit pertaining to Hilton's financial involvement in Meritex is general in nature and limited to operating overages and capital improvements. No other evidence has been submitted with respect to Hilton's financial involvement with Meritex. Therefore, that branch of the motion which

seeks summary judgment on the grounds that plaintiff's claims are barred by Workers' Compensation Law § 11, is denied, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

There are four separate theories under which a plaintiff may pursue a recovery based upon a claim of products liability: (1) strict liability; (2) negligence; (3) express warranty; and (4) implied warranty (*Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 106–107 [1983]; *see also Mangano v Town of Babylon*, 111 AD3d 801 [2013]). In order to establish a prima facie case with regard to any of these four theories, the plaintiff must show that the product at issue was defective and that the alleged defect was the actual and proximate cause of the plaintiff's injury (*Voss,* 59 NY2d at 107–09; *see Fahey v A.O. Smith Corp.*, 77 AD3d 612, 615 [2010]; *Beckford v Pantresse, Inc.*, 51 AD3d 958 [2008]; *Clarke v Helene Curtis, Inc.*, 293 AD2d 701 [2002]). "Unless only one conclusion may be drawn from the established facts, it is for a jury to determine the issue of proximate cause" (*Reece v J.D. Posillico, Inc.*, 164 AD3d 1285 [2018]).

"It is well settled that a manufacturer of defective products ... may be held strictly liable for injuries caused by its products, regardless of privity, foreseeability or due care" (*Finerty v Abex Corp.*, 27 NY3d 236, 241 [2016]). Strict products liability applies to sellers such as retailers and distributors "who engage in product sales in the ordinary course of their business because such sellers "may be said to have assumed a special responsibility to the public, which has come to expect them to stand behind their goods" (*Sukljian v Ross & Son Co.,* 69 NY2d 89, 95 [1986]; *Sprung v MTR Ravensburg Inc.*, 99 NY2d 468, 473 [2003]). "More generally, the burden of accidental injuries caused by defective products is better placed on those who produce and market them, and should be treated as a cost of business against which insurance can be obtained" (*Codling v. Paglia,* 32 NY2d 330 at 341; *Sprung v MTR Ravensburg Inc.*, 99 NY2d 468, 473 [2003]).

"Those same public policy considerations are inapplicable where sales of the product are not part of the ordinary course of the seller's business. Thus, "casual" or "occasional" sales are not subject to claims of strict liability" (*see Gebo v Black Clawson Co.,* 92 NY2d 387, 393 [1998]; *Stiles v Batavia Atomic Horseshoes,* 81 NY2d 950, 951 [1993]; *Sukljian,* 69 NY2d at 95–96; *Sprung v MTR Ravensburg Inc.*, 99 NY2d at 473).

Plaintiff has alleged claims against Meritex for negligence, breach of express and implied warranty, failure to warn and strict products liability. It is undisputed that Meritex did not design or manufacture the laundry carts or the tow bars allegedly involved in the plaintiff's accident. The evidence presented establishes that Meritex purchased the laundry carts for its own use at its commercial laundry facility and that they were also used to transport clean and soiled linens and towels to and from approximately 12 Hilton hotel

facilities in New York and New Jersey. Meritex provides laundry services for said Hilton hotels. Meritex, however, did not sell the laundry carts to either Hilton Worldwide or to the Midtown Hilton, the site of plaintiff's accident.

Plaintiff's counsel's assertion that Meritex was a distributor of the laundry carts and tow bars, is rejected. Black's Law Dictionary (11th ed. 2019) defines a distributor as "[any individual, partnership, corporation, association, or other legal relationship which stands between the manufacturer and the retail seller in purchases, consignments, or contracts for sale of consumer goods. A wholesaler, jobber or other merchant middleman authorized by a manufacturer or supplier to sell chiefly to retailers and commercial users". Applying said definition to the facts presented here, Meritex was not a distributor of either laundry carts or the tow bars at issue here.

As the laundry carts were owned by Meritex and used to conduct it own laundry services, and were neither sold nor distributed to Hilton for use at the Midtown Hilton, Meritex it cannot be held liable to the plaintiff for strict liability (*see Sukljian v Ross & Son Co.,* 69 NY2d at 95; *Finerty*, 27 NY3d at 241–42).

As regards the tow bars, the evidence presented demonstrates that Meritex purchased 16 tow bars purchased between 2010 and 2012, at the request of the Midtown Hilton, which were delivered to said hotel in sealed boxes, along with clean linens. Garcia testified that Hilton ultimately paid for the tow bars, but did not specify the manner of payment. Contrary to plaintiff's assertions, Meritex, at the most, was a causal seller of the tow bars, and was not engaged in the business of manufacturing, selling, supplying or distributing such parts.

Based upon the foregoing, the court finds that Meritex cannot be held liable to the plaintiff for strict products liability (*see Sprung v MTR Ravensburg Inc.*, 99 NY2d at 473; *Stiles v Batavia Atomic Horseshoes,* 81 NY2d 950; *Sukljian v Ross & Son Co.,* 69 NY2d at 95-96; *Duffy v Liberty Mach. Co., Inc.,* 219 AD2d 613, 613-14 [1995]). Thus, that branch of the motion which seeks to dismiss plaintiff's strict liability claim is granted.

Defendant Meritex has likewise established, prima facie, its entitlement to dismissal of plaintiff's claims for failure to warn and negligence. "At most, the duty of a casual or occasional seller would be to warn the person to whom the product is supplied of known defects that are not obvious or readily discernible" (*Sukljian v Charles Ross & Son Co., Inc.*, 69 NY2d at 97). Here, there is no evidence that Meritex was aware of any known defects that were not obvious or readily available as regards the tow bars or the laundry carts. Therefore, Meritex cannot be liable to plaintiff for either breach of duty to warn of an alleged defective product or for negligence. Plaintiff, in opposition, has failed to raise a triable issue

of fact.

Defendant has further established, prima facie, its entitlement to dismissal of plaintiff's claim for breach of an express and implied warranty. A cause of action to recover damages for breach of an express warranty requires proof of reliance (*see J.C. Const. Mgt. Corp. v Nassau-Suffolk Lbr. & Supply Corp.,* 15 AD3d 623 [2005]*; Gale v. International Bus. Machines Corp.,* 9 AD3d 446, 447 [2004]; *Andre Strishak & Assoc. v Hewlett Packard. Co.,* 300 AD2d 608[2002]). Here, Meritex has established that it did not make any oral or written express warranties which were relied upon by Hilton or the specific hotel where plaintiff's accident occurred (*see J.C.D. Const. Mgt. Corp. v Nassau-Suffolk Lbr. & Supply Corp.,* 15 AD3d 623 ; *Schneidman v Whitaker Co.*, 304 AD2d 642 [2003] .

In addition, defendant has established that it did not breach implied warranties of merchantability or fitness for a particular purpose (*see* UCC 2–314, 2–315). As Meritex did not sell the laundry carts to anyone, it was not a merchant with respect to said item. As regards the tow bars, even if Meritex is a merchant within the meaning of the UCC, there is no evidence that the tow bars were not fit for the ordinary purpose for which they were used (*see J.C.D. Const. Mgt. Corp. v Nassau-Suffolk Lbr. & Supply Corp.,* 15 AD3d 623;; *Saratoga Spa & Bath v Beeche Sys. Corp.,* 230 AD2d 326, 330–331 [1997]).

As for an implied warranty of fitness for a particular purpose, Meritex has established that at the time the tow bars were purchased and transported to Hilton, it did not know the particular purpose for which said goods were required and there is no evidence that the buyer was relying on Meritex's skill and judgment to select and furnish suitable goods (*see* UCC 2-315; *Saratoga Spa & Bath, Inc. v Beeche Sys. Corp.*, 230 AD2d at 331). Plaintiff, in opposition, has not raised a triable issue of fact.

In view of the foregoing, defendant Meritex's motion to dismiss the complaint is granted.

Dated: 10/20/20

FILED

10/20/2020
03:38 PM

COUNTY CLERK
QUEENS COUNTY

MARGUERITE A. GRAYS
J.S.C.