[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____ PART _____

Justice

Index Number : 117815/2005
BEVILACQUA, OTTAVIANO
VS
BLOOMBERG
Sequence Number : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, ... _____ s motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: March 26, 2009

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Ottaviano Bevilacqua and Kathryn Bevilaxqua,

Plaintiff (s),

-against-

Bloomberg, L.P., and Scales Industries Technologies, Inc., and Quincy Compressor, Inc.,

Defendant (s).

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Bloomberg, L.P.,

3rd Party Plaintiff (s),

-against-

ABM Engineering Services,

3rd Party Defendant (s)

----------x

Scales Industrial Technologies, Inc.,

2nd- 3rd Party Plaintiff (s),

-against-

Quincy Compressor,

2nd- 3rd Party Defendant (s)

----------x

Scales Industrial Technologies, Inc.,

3rd - 3rd Party Plaintiff (s),

-against-

Coltec Industries, Inc.,

3rd - 3rd Party Defendant (s)

----------x

DECISION/ORDER
Index No.: 117815-2005
Seq. No.: 3, 4, 5, 6, 7

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
591004-2006

2nd T.P. Index No.:
590227-2008

3rd T.P. Index No.:
590683-2008

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Seq #3	
Def BB n/m (§3212) w/YLA affirm, exhs	1
Def Scales x/m (§3212) w/RMD affirm, exhs	2
Def Scales limited opp to BB motion w/RMD affirm	3
Pltf OB opp to BB, Scales & Quincy motions w/EB, exhs	4
Def Scales reply to Pltf OB w/RMD affirm	5
Def BB reply w/YLA affirm	6
Seq #4	
Def Quincy n/m (§3211 re: OB) w/TE affirm, JM, KS, EJ affids, exhs	7
Def Quincy Reply to Pltf OB opp w/TE affirm, exh	8
Seq #5	
2nd- 3rd PΔ Quincy n/m (§3211 re: Scales) w/TE affirm, JM affid, exhs	9
2nd- 3rd Pπ Scales opp w/RMD affirm, exhs	10
2nd-3rd PΔ Quincy reply w/TE affirm, exhs	11
Seq #6	
3rd-3rd PΔ Coltec n/m (§3211 re: Scales) w/TE affirm, JM affid, exhs	12
3rd- 3rd Pπ Scales opp w/RMD affirm, exhs	13
3rd -3rd PΔ Coltec reply w/TE affirm, exhs	14
Seq #7	
Pltf OB OSC (§203[f]) w/EB affirm, exhs	15
Def Quincy opp w/TE affirm, JM affid, exhs	16
Pltf OB reply w/EB affirm	17
Other	
Transcripts OA 10/30/08 and 12/18/08	18, 19

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Ottaviano Bevilacqua to recover damages for personal injuries he claims to have sustained. His wife Kathryn Bevilacqua has asserted a derivative claim.

The court has before it five (5) motions and one cross motion. Issue has been joined by the defendants seeking summary judgment dismissing plaintiff's claims against them. The other motions to dismiss are brought pre-answer and are based

upon alleged procedural/jurisdictional defects in the third party complaints. Plaintiff's motion is for permission to serve an amended summons and complaint.

Since these motions deal with inter-related issues and have over-lapping papers, they are consolidated for consideration and decision in this decision/order. The court's decision is as follows:

Arguments

Ottaviano Bevilacqua ("plaintiff" or "Bevilacqua") claims that on April 14, 2005 ("date of the accident") he slipped on oil that had leaked onto the floor of the equipment room at 560 Washington Avenue a/k/a 330 West Street, New York, New York ("the premises"). Plaintiff alleges that the oil leaked from two air compressors that were in that room. The premises are owned by and the compressors are the property of defendant/ 3rd party plaintiff Bloomberg, L.P. ("Bloomberg"). On the date of the accident, Bloomberg had a maintenance contract with plaintiff's employer, American Building Maintenance ("plaintiff's employer" or "ABM"[1]).

The compressors are "Quincy 350 Duplex" air compressors manufactured by "Quincy Compressor" ("Quincy"). According to Quincy, it is an unincorporated division of Coltec Industries, Inc. ("Coltec"). Coltec is a foreign corporation authorized to do business in the State of New York.

Scales Industries Technologies, Inc. ("Scales") is a distributor of Quincy compressors. If a compressor is under warranty, Scales also services the equipment. On the date of the accident, the compressors were still under warranty.

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[1] The claims against ABM have been settled and they are no longer a party to this action.

Plaintiff alleges in the complaint and bill of particulars that Bloomberg and Scales were negligent because both defendants had notice of or created a dangerous condition in the equipment room by failing to properly address a chronic problem with the compressors. Plaintiff alleges that both defendants knew or should have known that the compressors had a tendency to leak oil internally and that eventually the oil would leak, seep or spill out onto the floor. Plaintiff alleges that Bloomberg had a non-relegable duty to maintain the premises in a safe condition and that Scales negligently performed its services.

Scales has brought a 2nd - 3rd party action against Quincy asserting claims of products liability, and breach of express and implied warranties of merchantability (at times "the Quincy action"). Scales filed the 2nd-3rd party summons and complaint on March 26, 2008. It served the papers on the Secretary of State on April 4, 2008 pursuant to BCL § 307 and copies thereof to each of Quincy's offices in Alabama and Illinois. The statute of limitations on plaintiff's direct claims expired on April 14, 2008.

Scales subsequently brought a 3rd- 3rd party action against Coltec (at times the "Coltec action"). The claims against Coltec are virtually identical to those asserted against Quincy. The 3rd- 3rd party summons and complaint were filed on August 1, 2008, after the statute of limitations on plaintiff's claims had expired.

After Scales started its 2nd - 3rd party action, Bevilacqua served a supplemental summons and amended complaint ("amended complaint") to assert direct claims against Quincy. The amended complaint was served on April 8, 2008, before the statute of limitations had expired. Quincy's time to answer the 2nd-3rd party complaint had not yet expired when Bevilacqua served his amended complaint. Quincy did not

answer the 2nd-3rd party complaint or the amended complaint but brought a motion (served May 9, 2008) to dismiss Bevilacqua's amended complaint. Quincy then brought a separate motion (served June 12, 2008) to dismiss the 2nd-3rd party action.

The basis for Quincy's motions to dismiss Scales' 2nd - 3rd party complaint and Bevilacqua's amended complaint is that neither Scales nor Bevilacqua properly served Quincy. Quincy contends that it does not have a separate legal identity from, but is an unincorporated division of Coltec, a foreign corporation authorized to do business in New York State. According to Quincy, Scales should have served Quincy in accordance with BCL § 306, not BCL § 307. Furthermore, since BCL § 307 requires that the plaintiff file a timely "affidavit of compliance," Quincy contends that Scales' failure to comply with those time requirements necessitates the dismissal of the 2nd-3rd party action as a nullity.

Coltec joins in Quincy's motion to dismiss the 2nd-3rd party action and it has brought a separate motion to dismiss the 3rd - 3rd party complaint against it. While raising many of the same arguments as Quincy, Coltec further claims that Scales had no right to bring, and is forbidden by statute from bringing, successive 3rd party actions. Therefore, since Quincy and Coltec are the same, and Quincy is not a separate legal entity, Coltec argues the Quincy and Coltec actions are redundant.

In addition to arguments that the Scales' action is null and void (and time barred, for reasons discussed at greater length later in this decision), Quincy argues that the amended complaint Bevilacqua served on Quincy is also a nullity because he served it prematurely, before Quincy had answered the 2nd - 3rd party complaint or moved to dismiss. Quincy also alleges that Bevilacqua's amended complaint was improperly

served because he had it served upon Quincy employees at their offices in Alabama and Illinois. According to Quincy, these individuals were not authorized to accept service on Quincy's behalf. One person, Ms. Jones, a Human Resources Generalist for Quincy, states in her sworn affidavit that she "never purported *(sic)* to that person that I was an officer, director, managing or general agent, cashier or assistant cashier or that I was authorized by appointment or by law to receive said service of the summons and complaint." The other person, Ms. Schulp, employed by Quincy as an Environmental Health and Safety Specialist, states that "I did not know the nature or significance of the document when it was delivered. . . [and] I may have signed for it as if it was routine mail. . . " Neither person denies the papers were delivered. Nonetheless, Quincy argues that because the Scales action was improperly commenced, Bevilacqua had no right to amend his complaint to assert claims against Quincy and since the statute of limitations has now expired, the claims by Scales and Bevilacqua are time barred.

Quincy and Coltec contend that the Bevilacqua's products liability claims are not pled with the specificity required under CPLR § 3013, and that Bevilacqua is required to identify in detail the product or warranty at issue which he has failed to do.

Quincy and Coltec also argue that Bevilacqua failed to timely file a consent to change attorneys and he did not do so until months after he served the amended complaint. CPLR § 321 [b]. Thus, both 3rd party defendants urge the dismissal of the amended complaint for that reason as well.

Bevilacqua not only opposes both 3rd party defendants' motions to dismiss the third party actions and his amended complaint asserting direct claims against Quincy, he seeks permission to serve a second supplemental summons and amended

complaint to assert direct claims against Coltec as well.

Bevilacqua argues that assuming Scales served Quincy according to BCL § 307, the Quincy action was filed timely, before the statute of limitations expired. Bevilacqua argues further that since Coltec and Quincy are united in interest, the Coltec action "relates back" to the timely Quincy action, thereby preserving the Coltec action as well. CPLR § 203 (c). While not denying that counsel failed to timely file his consent to change attorneys, Bevilacqua argues that his "new" lawyers appeared at court conferences without any object by any other party. Moreover, he contends that everyone had actual knowledge of the substitution of counsel when it occurred in March 2008, Bevilacqua asks the court to deem the late filed consent to change attorneys timely, nunc pro tunc.

Amidst all this procedural wrangling, Bloomberg and Scales have each separately moved for summary judgment dismissing plaintiff's claims against them. Bloomberg argues it did not have notice of a dangerous condition, the oil that plaintiff claims to have slipped on was not easily detectable but a fine mist that was difficult to see, and there were no complaints prior to the date of the accident of oil leaking *outside* the compressors. Bloomberg argues further that its Facilities Manager ("Devine") did regular walk throughs of the premises and she testified at her examination before trial that she did not observe any oil leaks outside the compressors. Bloomberg contends it relied on ABM and Scales to address any problems with the compressors and relied on Scales' representation that they had been fixed.

Scales supports Bloomberg's motion, raising similar arguments about lack of notice, that the condition was not apparent or detectable, and it was not present long

enough to be corrected. However, Scales separately argues that it did not create the dangerous condition that has been alleged because Scales simply reported any problems with the compressors to Quincy which then decided the proper course of action to take, including replacement. In addition, Scales contends that Bloomberg's duty to maintain the premises is nondelegable and if Scales' motion for summary judgment is denied, Bloomberg's motion should also be denied.

Discussion

I. The 3rd party actions

It is well established law that if a plaintiff timely files the summons and complaint, but fails to serve it within 120 days of the date it was filed, the court may upon motion and in its discretion, extend the time to serve process, provided plaintiff's efforts to serve the defendant were reasonably diligent (Tinson v. 512 West 29th Street, LLC, ___ AD3d ___, 2009 NY Slip Op 02307 [1st Dept 2009]; Murphy v. Hoppenstein, 279 A.D.2d 410 [1st Dept 2001]) and there is no prejudice (Goldstein v. Columbia Presbyterian Medical Center, 1 A.D.3d 188 [1st Dept 2003]). In deciding whether to extend the time to serve, the court can take into consideration other matters, including the expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service and the promptness of a plaintiff's request for the extension of time. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95 (2001).

Here, the issue is not whether Scales failed to timely serve Quincy within the time provided under the CPLR, but whether the service of process it made was proper at all. Since the 2nd- 3rd party complaint was filed timely, if service was properly effectuated, then this not only preserves the Quincy action, but also Bevilacqua's right

to serve an amended pleading as of right or with leave of the court as per CPLR § 3025. Taking this one step further, it also preserves the Coltec action and plaintiff's direct claims against it, provided the claims against Coltec otherwise relate back to those asserted against Quincy.

Every foreign corporation authorized to do business in New York State must designate the secretary of state as its agent for service of process. BCL § 304 (a), (b). As per BCL § 306 (b) (1), once the Secretary of State is served service is complete.

Both Coltec and Quincy admit that "Quincy Compressor" is an unincorporated division of Coltec. Neither Coltec nor Quincy deny that Quincy has no separate legal identity (at least for purposes of these motions, based upon service of process). Coltec is a foreign corporation authorized to do business within New York State and subject to the service requirements of BCL § 306.

Before it set out to serve Quincy, Scales reviewed information publicly available to it on the Internet. That information identified Quincy as "Quincy Compressor, Inc." in one place, and just "Quincy Compressor" in other places. Quincy's affiliation with Coltec is only mentioned fleetingly in a section of the website entitled "history." Based upon the information available, Scales served Quincy pursuant to BCL § 307, as if Quincy was an *unauthorized* foreign corporation pursuant to BCL § 307. BCL § 307, unlike BCL § 306 has the added step of requiring the plaintiff to timely file an "affidavit of compliance" along with proof of service. The filing must be completed within 30 days of having served the summons and complaint. Until (and unless) the affidavit with proof of service is filed with the court, service is not complete. BCL § 307 (c).

Although Scales did not timely file the affidavit of compliance with proof of

service within the designated time, the court finds that Quincy was properly served in accordance with the requirements of BCL § 306 for the following reasons.

First, Coltec is a foreign corporation authorized to do business in New York State. Quincy is an unincorporated division of Coltec, and therefore, for purposes of process of service, has no separate legal identity. Thus, Scales was required to serve Quincy, and therefore Coltec, according to the requirements of BCL § 306. However, Scales, erroneously believing that Quincy was an unauthorized foreign corporation, served Quincy in accordance with BCL § 307 by delivering the 2nd-3rd party complaint to the Secretary of State on April 4, 2008 and then filing proof of service late.

Service of process on a foreign corporation authorized to do business in New York in accordance with the provisions of BCL § 307 (applicable to *unauthorized* foreign corporations) rather than in accordance with BCL § 306 (applicable to *authorized* foreign corporations) is, however, sufficient to provide personal jurisdiction over Quincy (and therefore Coltec). Marine Midland Realty Credit Corp. v. Welbilt Corp., 145 A.D.2d 84 (2nd Dept 1989). This is because the added mailing and filing requirement of BCL § 307 is essential to acquire jurisdiction over a foreign corporation, not authorized to do business in New York. Stewart v. Volkswagen of America, Inc., 81 N.Y.2d 203 (1993). BCL § 306 contains no such requirement because it the corporation authorized to do business in this state has designated the Secretary of State as its agent for service of process. Consequently, Quincy/Coltec was served by Scales in the manner required under BCL § 306, and therefore, service was completed on April 4, 2008 when the papers were served on the Secretary of State.

Having determined that the Quincy action is timely, it follows that so is the Coltec

action. CPLR § 203 (c). This is because service on Quincy is service on Coltec and their interest in the subject-matter is "such that they stand or fall together and that judgment against one will similarly affect the other . . ." Prudential Ins. Co. of America v. Stone, 270 N.Y. 154, 159 (1936); Lord Day & Lord, Barrett, Smith v. Broadwall Management Corp., 301 A.D.2d 362 (1st Dept 2003). Thus, the claims against Coltec, although asserted after the statute of limitations expired, are preserved because they relate back to the timely claims against Quincy.

The court has considered other arguments raised by Quincy and Coltec in favor of dismissing the 2nd - 3rd party action, including that the Quincy action was brought late, it is barred by the doctrine of laches, or that the Quincy action will chronically delay the trial of this case. As of the February 28, 2008 conference responses to demands for discovery and inspection were still outstanding; the Quincy action was filed shortly afterwards. Neither 3rd party defendant has not shown it will be prejudiced by allowing the new 3rd party actions to proceed.

The court also decides that plaintiff's claims against Quincy and Coltec are not time barred. The legal authority relied upon by Quincy does not stand for the proposition argued, that Bevlilacqua's amended complaint is a nullity because Bevilacqua's attorney had not been properly substituted when it was filed. Cippitelli v. County of Schenectady, 284 AD2d 823 (3rd Dept 2001). Although plaintiff changed attorneys, that new law firm appeared at and participated in court conferences without any objection by any of the other parties involved in this case. *compare* Cippitelli v. County of Schenectady, *supra (complete absence of proof that demonstrating that plaintiff was no longer pro se; ambiguity about his representation).* Bevilacqua's

attorneys' mistake of not filing its substitution of counsel is, under the facts of this case, a mere formality and Quincy has shown no prejudice. *compare* Cippitelli v. County of Schenectady, supra. The court hereby grants Bevilacqua's motion to deem the substitution of counsel dated March 12, 2008 but filed September 3, 2008, timely filed nunc pro tunc.

The has considered, but rejects any argument by Quincy and Coltec that their so ordered stipulation, setting a deadline for Bevilacqua to serve an amended complaint to name additional defendants, prohibits the amended complaint he served. It was Scales who brought in Quincy (and Coltec); the stipulation did not curtail Bevilacqua's right to assert direct claims against 3rd party defendants brought into the case.

The court also decides that Bevilacqua's amended complaint ought not be dismissed. Pursuant to CPLR § 1009, Bevilacqua was permitted to serve an amended complaint, without leave of court (as of right) to assert direct claims against Quincy (and Coltec), provided he did so within 20 days after Quincy answered the 2nd-3rd party complaint. Bevilacqua would have otherwise needed the court's permission to serve an amended complaint to add new defendants. CPLR § 3025 (b); *see* Leibman v. Schlossberg's Atlas Boiler & Welding Co., Inc., 57 AD2d 820 (1st Dept 1977).

Although Quincy timely moved to dismiss Bevilacqua's amended complaint, Quincy did not make its motion to dismiss the 2nd-3rd party action until June 12, 2008. Having decided that Scales properly served Quincy pursuant to BCL § 306, and no affidavit of compliance being required to complete service (i.e. BCL § 307), service was complete on April 4, 2008 when the Secretary of State was served. Thus, whether plaintiff's present motion is viewed under under CPLR §§ 3025 (permission to amend)

or 203 (f) (the relation back statute), Bevilacqua's direct claims against Quincy (and Coltec) are timely.

In accordance with CPLR § 311, service can be made upon any domestic or foreign corporation by delivering the papers to an officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service. They can also be served in accordance with BCL §§ 306 or 307, as the case may be. Bevilacqua served papers upon Quincy at its offices located in Alabama and Illinois. These locations were listed on Quincy's website. The people who accepted service at each office did not demur or object to accepting the papers. Neither person directed the process server to go somewhere else. Ms. Schulp states in her affidavit that she "routinely" accepts mail and other deliveries for Quincy. see Sullivan Realty Organization, Inc. v. Syart Trading Corp., 68 A.D.2d 756 (2nd Dept 1979). Both individuals are, in fact, Quincy employees.

The core objective of CPLR § 311 is that a defendant corporation actually receive the summons and complaint so that it has notice of the lawsuit. Sullivan Realty Organization, Inc. v. Syart Trading Corp, 68 A.D. 2d at 760. That objective was satisfied by how Bevilacqua served his amended complaint. Each person served had apparent authority to accept the papers and they do not deny receiving the papers.

The court has also considered the arguments by Quincy and Coltec, that Scales should not be allowed to bring successive third party actions. There is no such statutory prohibition, nor has either movant cited any legal authority to that effect. There is also no motion before the court to consolidate both actions which would streamline the litigation. This can be done by agreement or presented to the court by

further motion.

In accordance with the court's decision, that the Quincy and Coltec actions are not time barred, each third party defendant may serve the answer to its respective complaint no later than Ten (10) Days after Scales serves each of them with a copy of this decision/order with Notice of Entry.

Bevilacqua's motion for permission to serve a second amended summons and complaint asserting direct claims against Quincy and Coltec is hereby granted. Bevilacqua may serve his second amended complaint in the form proposed and within the time provided under CPLR § 1009, once Quincy and Coltec answer the Scales' 3rd party complaints against them

II. Summary Judgment

Since issue has been joined by the defendants (Bloomberg and Scales) who have moved for summary judgment dismissing the Bevilacqua complaint against them and the cross claims between them, their respective motions can be decided on the merits. Both motions are timely because the note of issue has not yet been filed and the time constraints of CPLR § 3212 have not been triggered. Brill v. City of New York, 2 NY3d 648 (2004).

A movant seeking summary judgment in its favor 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. " Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate

the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

A. Bloomberg's motion

Bloomberg is the owner of the building where the accident occurred. Bloomberg argues that it did not have notice of a dangerous condition within the equipment room where the accident occurred and that even if there was a dangerous condition, it was not easy to see or readily apparent based upon Spahn's EBT testimony that he noticed a fine mist on the floor. Bloomberg also contends there were no prior complaints made to it of oil on the floor outside the compressors. According to Bloomberg, it relied on Scales to handle any problems that arose with the compressors and Scales made several attempts to fix the problem that the compressors had with internal oil leaks.

A landowner is under a duty to maintain its property in a reasonably safe condition under existing circumstances, which includes the likelihood of injury to a third party. Perez v. Bronx Park South, 285 AD2d 402 (1st Dept 2001). This common law duty is tempered by a requirement that a plaintiff seeking recovery must establish that the landlord created or had actual or constructive notice of the hazardous condition which precipitated the injury. Pappalardo v. Health & Racquet Club, 279 AD2d 134 (1st Dept 2000). To constitute constructive notice, a defect must be visible and apparent, and it must have existed for a sufficient length of time prior to the accident for the owner to have discovered the defect and remedied it. Pappalardo, *supra*. A party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. Mas v. Two Bridges Associates by Nat. Kinney Corp., 75 N.Y.2d 680, 687 (1990); Ortiz v. Fifth Ave. Bldg. Assocs., 251

A.D.2d 200 (1998).

Bloomberg has failed to prove that it was not negligent. In any event, Bevilacqua raises a number of disputed issues of fact that require the denial of Bloomberg's motion.

Among the disputed issues of fact are whether, given the ongoing problem with the compressors leaking oil internally that Bloomberg was aware of, Bloomberg had notice (a reason to believe) that such oil might accumulate, pool and then leak or seep out of the air compressors onto the floor. Bloomberg does not deny that Scales had replaced parts of the air compressors before because of these leaks. Bloomberg does not deny that there were problems with the air compressors starting in July 2004 which resulted in parts being replaced in September 2004. The problems persisted through the beginning of 2005.

The testimony by Spahn, ABM's Chief Engineer, establishes that Bloomberg's facilities manager (Devine) did regular "walk throughs" of the premises, including the equipment room and Bloomberg closely monitored how problems with the compressors were being handled. Since Devine (Bloomberg) knew about these problems, there are issues of fact whether Bloomberg properly discharged its obligation to keep the premises in a reasonably safe condition.

Since evidence presented by Bloomberg does not satisfy its initial burden on this motion for summary judgment, and Bevilacqua has otherwise come forward with evidentiary proof sufficient to raise a triable issue of fact, Bloomberg's motion for summary judgment dismissing the complaint and Scales' cross claims against it must be, and hereby is, denied.

B. Scales' cross motion

The foundation of Scales' cross motion for summary judgment dismissing plaintiff's complaint and Bloomberg's cross claims is that it only serviced the air compressors because they were still under warranty on the date of plaintiff's accident, but it was ABM that actually performed preventative maintenance on them. Thus, Scales seeks to establish that it only replaced the units or parts of them, if such service was required and only after it notified the manufacturer about a customer's complaint. Thus, Scales seeks to make a distinction between being responsible for "servicing" the units, as opposed to "repairing" them. Like Bloomberg, Scales denies that it created or had notice of a dangerous condition. Scales contends that it only responded to complaint that were made, but did not otherwise routinely inspect the units.

Scales' employees were responsible for servicing the unit while under warranty. There is an issue of fact whether Scales properly serviced the units since even after parts of them were replaced they continued to leak oil internally. On this motion Scales had the burden of proving its defense, which is that it was not negligent. Scales has not proved that it did not have notice nor did it create the dangerous condition alleged. In any event, Bevilacqua has come forward with evidentiary proof sufficient to raise a triable issue of fact whether Scales properly serviced the units or created a dangerous condition requiring that Scales' motion for summary judgment dismissing the complaint and Bloomberg's cross claims (indemnification) against it must be denied.

Conclusion

The Quincy action was timely commenced and the Coltec action relates back to that action. The motions by Quincy and Coltec to dismiss Bevilacqua's amended

complaint and the 2nd - 3rd party and 3rd -3rd party actions commenced against them (respectively) are denied. Each 3rd party defendant is directed to answer their respective 3rd party complaints within ten (10) days of being served by Scales with a copy of this decision/order with Notice of Entry. Furthermore, Bevilacqua is permitted to serve an amended complaint in the form proposed to assert direct claims against Quincy and Coltec once the 3rd party parties have answered, as CPLR § 1009 provides.

Bloomberg's motion and Scales' cross motion for summary judgment dismissing the Bevilacqua complaint against them and the cross claims between them are each denied.

This case is presently scheduled for a status conference on April 30, 2009 in Part 10, 60 Centre Street, Room 232. That date remains unchanged and is unaffected by this decision/order.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 26, 2009

So Ordered:

Hon. Judith J. Gische, J.S.C.