SHORT FORM ORDER

INDEX No. 05-26192
CAL. No. 09-01692-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. EMILY PINES
Justice of the Supreme Court

MOTION DATE 1-28-10
ADJ. DATE 5-13-10
Mot. Seq. # 004 - MD
Mot. Seq. # 005 - XMD

CHUBAT CANILLAS, Plaintiff, - against - HOME DEPOT U.S.A., INC., Defendant.	ROSENBERG & GLUCK, L.L.P. Attorneys for Plaintiff 1176 Portion Road Holtsville, New York 11742 LESTER SCHWAB KATZ & DWYER, LLP Attorneys for Defendant/Third-Party Plaintiff 120 Broadway New York, New York 10271-0071
HOME DEPOT U.S.A., INC., Third-Party Plaintiff, - against - LARO SERVICE SYSTEMS, INC., Third-Party Defendant.	WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP Attorneys for Third-Party Defendant 150 East 42nd Street New York, New York 10017-5639

Upon the following papers numbered 1 to 39 read on this motion and cross motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 24 ; Notice of Cross Motion and supporting papers 25 - 27 ; Answering Affidavits and supporting papers 28 - 29; 30 - 34 ; Replying Affidavits and supporting papers 35 - 37; 38 - 39; Other Memorandum of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Home Depot U.S.A., Inc. for summary judgment in its favor on the complaint and the third-party complaint is denied; and it is further

ORDERED that the cross motion by third-party defendant Laro Service Systems, Inc. for summary judgment in its favor on the third-party complaint is denied.

Plaintiff Chubat Canillas commenced this action to recover damages for personal injuries allegedly sustained at a Home Depot store on the morning of September 27, 2004. The store, located in Shirley, New York, is owned and operated by defendant Home Depot U.S.A., Inc. (hereinafter Home Depot). According to plaintiff's deposition testimony, the accident happened when his foot slipped on paper toilet seat liners scattered on the floor of a public restroom and he fell to the ground. Third-party defendant Laro Service Systems, Inc. (hereinafter Laro), an independent cleaning service contractor, was retained by Home Depot to perform janitorial services at its Shirley location. By his bill of particulars, plaintiff alleges, among other things, that Home Depot was negligent in allowing debris to accumulate on the restroom floor, that it had notice of a recurring dangerous condition in the bathroom caused by debris on the floor, and that it had constructive notice of the particular condition that caused his accident. The third-party complaint alleges that Laro is obligated under a maintenance service agreement to indemnify Home Depot for any damages arising out of plaintiff's accident, and that Laro breached a contractual obligation to name it as an additional insured on its general liability insurance policy.

Home Depot now moves for an order granting summary judgment in its favor on both the complaint and the third-party complaint. As to plaintiff's negligence claim against it, Home Depot argues that it had no actual notice of the alleged dangerous condition "and cannot be charged with constructive notice because it could have been created minutes before the accident." Home Depot further argues it is entitled to judgment in its favor as a matter of law on its contractual indemnification claim against Laro based on a written maintenance service agreement entered into on February 4, 2002. In addition, Home Depot argues Laro breached a contractual obligation to name Home Depot as an additional insured on its general liability policy. In support of its motion, Home Depot submits copies of the pleadings and plaintiff's bills of particulars; a copy of a maintenance agreement between Home Depot and Laro dated February 4, 2002; copies of memoranda, dated September 12 and October 8, 2001, issued by Home Depot to its mid-Atlantic maintenance vendors; transcripts of the deposition testimony of plaintiff, Karen Rachlin, and Paulino Portillo; and a copy of the accident report prepared by a Home Depot employee at the Shirley store following plaintiff's fall.

Plaintiff opposes the motion, arguing that the deposition transcripts of Karen Rachlin (hereinafter Rachlin), an assistant manager for Home Depot, and Paulino Portillo (hereinafter Portillo), a supervisor for Laro, are not in admissible form, and that, even it such deposition testimony is considered on the motion, Home Depot's submissions are insufficient to establish a prima facie case that it lacked notice of the alleged dangerous condition. Laro also opposes Home Depot's motion, arguing, among other things, that a triable issue exists as to whether the alleged dangerous condition was due to an omission by Laro, rather than an act by another customer at the store, and that Home Depot failed to submit proof that it was not named as an additional insured on Laro's general liability insurance policy. Further, Laro cross-moves for an order dismissing the third-party complaint against it. The cross- moving papers, however, do not set forth a legal basis for dismissing the third-party complaint.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see* ***Rotuba Extruders v Ceppos***, 46 NY2d 223, 413 NYS2d 141 [1979]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a mater of law by tendering proof in admissible form sufficient to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]).

Laro's cross motion for summary judgment dismissing the third-party complaint is denied. CPLR 3212 (a) provides that if no date for making a summary judgment motion has been set by the court, such a motion "shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." Absent a showing of good cause for the delay in filing a summary judgment motion, a court lacks the authority to consider even a meritorious, non-prejudicial application for such relief (*see* ***Miceli v State Farm Mut. Auto. Ins. Co.***, 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York***, 2 NY3d 648, 781 NYS2d 261 [2004]; ***Soltes v 260 Waverly Owners, Inc.***, 42 AD3d 565, 840 NYS2d 412 [2d Dept 2007]). The Court's computerized records show that the note of issue was filed in this action on August 18, 2009. In addition to failing to set forth a legal basis for the motion, Laro's cross motion for summary judgment was made on January 21, 2010, more than one month after expiration of the 120-day statutory period, and no reasonable explanation for the delay in seeking such relief is set forth in the moving papers (*see* ***Riccardi v CVS Pharmacy, Inc.***, 60 AD3d 838, 874 NYS2d 381 [2d Dept 2009]; ***Lofstad v S & R Fisheries, Inc.***, 45 AD3d 739, 846 NYS2d 283 [2d Dept 2007]).

As to Home Depot's motion, property owners and business proprietors have a duty to maintain their property in a reasonably safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). While they are not insurers of the safety of people on their premises (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]), owners and operators of stores or other businesses must take reasonable care to ensure that "customers shall not be exposed to danger of injury through conditions in the store or at the entrance which [it] invites the public to use" (***Miller v Gimbel Bros.***, 262 NY 107, 108, 186 NE 410 [1933]; *see* ***Hackbarth v McDonalds Corp.***, 31 AD3d 498, 818 NYS2d 578 [2d Dept 2006]).

Moreover, to establish liability in a slip-and-fall action, a plaintiff must show the existence of a dangerous or defective condition that caused his or her injuries, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Starling v Suffolk County Water Auth.***, 63 AD3d 822, 881 NYS2d 149 [2d Dept 2009]; ***Dennehy-Murphy v Nor-Topia Serv. Ctr., Inc.***, 61 AD3d 629, 876 NYS2d 512 [2d Dept 2009]; *see also* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the dangerous or defective condition must be visible and apparent, and must have existed for a sufficient length of time before the accident to permit the owner to discover and remedy it (*see* ***Gordon v American***

Museum of Natural History, *supra*; ***Hayden v Waldbaum, Inc.***, 63 AD3d 679, 880 NYS2d 351 [2d Dept 2009]; ***Britto v Great Atl. & Pac. Tea Co., Inc.***, 21 AD3d 436, 799 NYS2d 828 [2d Dept 2005]). Thus, a defendant in a slip-and-fall action establishes its entitlement to judgment as a matter of law by making a prima facie showing that it neither created the alleged dangerous condition nor had actual or constructive notice of its existence (***Yioves v T.J. Maxx, Inc.***, 29 AD3d 572, 572, 815 NYS2d 119 [2d Dept 2006]). A defendant seeking summary judgment based on a lack of constructive notice of the alleged dangerous condition must present "some evidence as to when the area in question was last cleaned or inspected relative to the time" when the plaintiff's injury occurred to meet its initial burden on the motion (***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222 [2d Dept 2008]; ***Musachio v Smithtown Cent. School Dist.***, 68 AD3d 949, 892 NYS2d 123 [2d Dept 2009]; ***Holub v Pathmark Stores, Inc.***, 66 AD3d 741, 887 NYS2d 215 [2d Dept 2009]).

Contrary to the conclusory assertions of its attorney, the evidence submitted by Home Depot is insufficient to demonstrate entitlement to judgment in its favor on the complaint (*see* ***Zambri v Madison Square Garden, L.P.***, 73 AD3d 1035, 901 NYS2d 377 [2d Dept 2010]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222; ***Musachio v Smithtown Cent. School Dist.***, 68 AD3d 949, 892 NYS2d 123). Initially, the Court notes that while Home Deport failed to show in the moving papers that the deposition transcripts of Rachlin and Portillo either were signed by such witnesses or, though forwarded to the witnesses for their review, were not signed and returned by such witnesses within 60 days (*see* CPLR 3116), it included an affidavit with its reply papers attesting to service of a copy of transcript on counsel for Laro. However, only an unsigned letter addressed to Rachlin at the Home Depot store in Shirley, New York was submitted with the reply papers to support the claim that a copy of her deposition was, in fact, forwarded to her for signature. Accordingly, while the deposition testimony of Portillo was considered on the motion (*see* ***Mazzarelli v 54 Plus Realty Corp.***, 54 AD3d 1008, 864 NYS2d 554 [2d Dept 2008]), the deposition testimony of Rachlin was not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

Home Depot failed to submit evidence showing the last time the subject bathroom at its Shirley store was cleaned or inspected (*see* (*see* ***Zambri v Madison Square Garden, L.P.***, 73 AD3d 1035, 901 NYS2d 377 [2d Dept 2010]; ***Arzola v Boston Props. Ltd. Partnership***, 63 AD3d 655, 880 NYS2d 352 [2d Dept 2009]; ***Birnbaum v New York Racing Assn., Inc.***, 57 AD3d 598, 598-599, 869 NYS2d 222; ***Britto v Great Atl. & Pac. Tea Co., Inc.***, 21 AD3d 436, 799 NYS2d 828). While Portillo testified that in 2004 and 2005 his job as a supervisor for Laro entailed conducting physical inspections of the Home Depot stores in Nassau and Suffolk County to ensure Laro employees assigned to the particular stores were performing their maintenance work properly, and that Laro employees were supposed to be working at the their assigned stores from 6:00 a.m. to 3:00 p.m., he had no direct knowledge as to when the bathroom was last cleaned or inspected before plaintiff's fall. In fact, Portillo testified that he was unsure whether he was responsible for inspecting the Shirley store in September 2004. It is noted that even if Rachlin's testimony was considered, she did not provide any direct evidence as the inspection or maintenance of the Shirley store, as she did not

begin working at that location until August 2005.

Home Depot's submissions also are insufficient to meet its burden on the application for judgment in its favor on the third-party complaint. The copy of the written agreement between Home Depot and Laro submitted with the moving papers states, in part, that "Contractor [Laro] shall furnish all requisite services and labor in order to perform maintenance and/or cleaning services at certain Home Depot locations, and services are more fully described in Schedule A which is attached hereto," and that the "locations of the stores where Work shall be performed are listed in Schedule A." The agreement states that Home Depot will supply Laro with "all equipment and materials necessary for Contractor to properly perform the Work." Further, item 4 of the agreement, entitled Indemnity, states as follows:

> Contractor agrees to indemnify, defend and hold Home Depot harmless from any and all claims, actions, demands . . . causes of action, costs and expense, including attorney's fees and settlement costs (collectively, "Claims") arising from the acts or omissions of Contractor under this Agreement which result in or are alleged to have resulted in any injury to persons . . . Notwithstanding the foregoing, Contractor will not be responsible for Claims that are solely the result of Contractor's use of any equipment or materials furnished by Home Depot pursuant to this Agreement, except to the extent such Claims are due to the negligence or willful misconduct of Contractor, its employees, subcontractors or agents.

The contract also states the Laro agrees to maintain both workers' compensation insurance and commercial general liability insurance naming Home Depot as additional insured, and to provide Home Depot with proof of such insurance coverage. In addition, the agreement contains a choice-of-law provision stating that it "shall be governed by and construed in accordance with the laws of the State of Georgia, excluding its conflict of laws provision."

Here, Home Depot failed to establish that the agreement submitted with the moving papers is relevant to this action, as the document entitled "Schedule A" immediately following the contract submitted in support of the motion identifies the location as "Home Depot Store #1256, 29-70 Cropsey Avenue, Brooklyn, New York," not the store in Shirley where plaintiff's accident occurred. Thus, it cannot be determined at this time whether Laro is contractually obligated to indemnify Home Depot. Further, absent from Home Depot's submissions in support of the motion is any evidence demonstrating that Laro breached its contractual obligation to name Home Depot as an additional insured on its commercial general liability policy. Accordingly, Home Depot's motion for summary judgment in its favor on both the complaint and the third-party complaint is denied.

Dated: 8/18/10

Emily Pines
J.S.C.
HON. EMILY PINES