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SHORT FORM ORDER

INDEX No. 10-21219
CAL. No. 12-02241OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN
Justice of the Supreme Court

MOTION DATE 1-24-13
ADJ. DATE 9-3-13
Mot. Seq. # 004 - MotD

NILSON W. NOVOA and ZAIDA NOVOA, Plaintiffs, - against - P.C. RICHARD & SON, LLC, A.J. RICHARD & SONS, INC., P.C. RICHARD & SON LONG ISLAND CORPORATION, AMERICAN MAINTENANCE INC. and A.C.A. INDUSTRIES, INC., Defendants.	SIBEN & SIBEN, LLP Attorney for Plaintiffs 90 East Main Street Bay Shore, New York 11706 MAURA V. LAFFAN, ESQ. Attorney for P.C. Richard & Sons, A.J. Richard & Sons & P.C. Richard & Son Long Island Corporation 221 Mineola Boulevard Mineola, New York 11501 BELLO & LARKIN Attorney for ACA Industries & American Maintenance 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108
P.C. RICHARD & SON, LLC, A.J. RICHARD & SONS, INC. and P.C. RICHARD & SON LONG ISLAND CORPORATION, Third-Party Plaintiffs, - against - AMERICAN MAINTENANCE, a Division of A.C.A. INDUSTRIES, INC., Third-Party Defendant.	

Upon the following papers numbered 1 to 72 read on this motion for renewal Notice of Motion/ Order to Show Cause and supporting papers 1 - 48 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 49 - 64; 65 - 67 ; Replying Affidavits and supporting papers 68 - 69; 70 - 72 ; Other Verified Answer, 73 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants American Maintenance and A.C.A. Industries, Inc. for leave to renew their prior motion for summary judgment, which was denied by order of this Court dated July 8, 2013, is granted; and it is further

ORDERED that, upon renewal, the motion by defendants American Maintenance and A.C.A. Industries, Inc. for summary judgment dismissing the complaint and the third-party complaint is determined as follows.

Plaintiff Nilson Novoa commenced this action to recover damages for personal injuries he allegedly sustained when he slipped and fell in an appliance store on September 11, 2008 in Southampton, New York. The alleged accident occurred in the men's restroom at premises owned by operated by defendants P.C. Richard & Son, LLC, A.J. Richard & Sons, Inc. and P.C. Richard & Son Long Island Corporation (hereinafter collectively know as the P.C. Richard defendants). His wife, plaintiff Zaida Novoa, sued derivatively for loss of services. Plaintiffs then commenced an action against defendants American Maintenance and A.C.A. Industries, Inc. By order of this Court (Baisley, J.), these two actions were consolidated. The complaint alleges that defendants American Maintenance and A.C.A. Industries, Inc. provided cleaning services at the subject store, and that they were negligent in failing to properly maintain the subject restroom by permitting a wet and slippery condition to remain on the floor. As a third-party claim, the P.C. Richard defendants seek indemnification and contribution from defendant American Maintenance.

In a prior motion, defendants American Maintenance and A.C.A. Industries sought summary judgment dismissing the complaint, arguing that they owed no duty to plaintiffs and that there is no evidence they had notice of the alleged condition. They also argued that the cross claims and third-party complaint should be dismissed because the P.C. Richard defendants failed to present any evidence to suggest that American Maintenance was negligent. By order dated July 8, 2013, this Court denied the motion as American Maintenance and A.C.A. Industries failed to include a copy of the third-party complaint with their moving papers. American Maintenance and A.C.A. Industries now move for leave to renew their prior motion, and, upon renewal, for an order granting summary judgment dismissing the complaint and third-party complaint. On this motion, American Maintenance and A.C.A. Industries have submitted a complete copy of the pleadings. Leave to renew is granted, as renewal is appropriate to correct a procedural error, as here, involving the failure to submit copies of pleadings as required by CPLR 3212 (b) (*see* ***Darwick v Paternoster***, 56 AD3d 714, 868 NYS2d 698 [2008]; ***Simpson v Tommy Hilfiger U.S.A., Inc.***, 48 AD3d 389, 850 NYS2d 629 [2008]). They also move to vacate the prior order, contending that they submitted a copy of the third-party complaint with their prior motion.

In support of their motion, American Maintenance and A.C.A. Industries submit, among other things, copies of the pleadings, the cleaning contract between American Maintenance and P.C. Richard and Son, and transcripts of the deposition testimony of plaintiff, Francis Mason, Rosa Gaudio, and Alexander Christopher Alex. In opposition, plaintiffs submit an affidavit of Nilson Novoa, and argue that American Maintenance and A.C.A. Industries failed to establish that they did not have notice of the alleged dangerous condition. The P.C. Richard defendants oppose the motion, arguing that American Maintenance and A.C.A. Industries have failed to provide sufficient proof from a person with personal knowledge of the cleaning procedures, and that questions of fact remain as to the condition of the subject area where plaintiff fell when their employee was last on the subject premises.

At his examination before trial, plaintiff Novoa testified that on the day of the accident, he went to the subject P.C. Richard and Son store at 9:30 a.m, and that four minutes after he arrived, he went to the men's restroom. He testified that he took two to three steps into the restroom and fell. He testified that

after his fall, he observed soap and foam on the floor leading from a closet in the bathroom. Plaintiff testified that the trail of soap and foam measured about three inches wide and one yard in length. He further testified that he did not see the foam until after his fall, and that there was no sign indicating the floor was wet.

At his examination before trial, Francis Mason, sales manager at the subject store, testified that he had no contact with the maintenance company, American Maintenance. He testified that an employee of American Maintenance would come three days a week to clean the interior of the store, and that if the maintenance services were not performed properly, property management would be contacted. He testified that the bathrooms are located in the rear of the showroom and that there is a closet in the bathroom. He testified that the closet is locked and contained hand soap, toilet paper, cleaning supplies, a sink, and a mop. Mason testified that the closet was stocked by an employee of American Maintenance, and that there was no inspection of the bathroom after the employee cleaned the bathroom and stocked the closet. Mason testified that while P.C. Richard employees are not responsible for maintenance of the store, if a spill or accident occurred, a P.C. Richard employee would use the cleaning supplies from the closet to clean it up.

At her examination before trial, Rosa Gaudio, the office manager at the subject P.C. Richard and Son, testified that her duties include answering the telephones, general office duties and working with the customers. She testified that she is unaware of any employees who have the responsibility to inspect the store for maintenance issues. She testified that when the employee of American Maintenance arrives at the store, he would inform the store manager, but that there was no inspection of the maintenance work after it was done. Gaudio testified that if the store manager observed something on the bathroom floor when the store is open, he would just clean it up himself. She testified that she is not aware of any complaints of water or foam on the mens' bathroom floor before the accident, and that no employee from American Maintenance went to the store on the day of the accident. She further testified that after the subject accident, plaintiff informed her that he fell and that an incident report was prepared.

At his examination before trial, Alexander Christopher Alex, President of American Maintenance, testified that the company performs janitorial services and that it had an agreement with P.C. Richard to perform those services at the subject store. He testified that Diego Alvarez serviced the subject store at the time of the accident, but is no longer employed by the company. He testified that if there were any issues related to the maintenance of the store he would discuss it with the property management, and that there were no complaints concerning cleaning services provided by its employee before the subject accident. Alex testified that American Maintenance provided all the cleaning supplies that were used to perform the cleaning services, and that P.C. Richard employees had access to the supply closet in the bathroom of the store.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be

drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept], *lv denied* 5 NY3d 704, 801 NYS2d 1 [2005]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (***Eisman v State***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Pulka v Edelman***, *supra*). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 229, 513 NYS2d 356 [1987]). Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public polices affecting the expansion or limitation of new channels of liability" (***Pulka v Edelman***, *supra*, at 586; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]).

Generally, a contractual obligation will not confer tort liability in favor of a third party (*see* ***Espinal v Melville Snow Contrs.***, *supra*; ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]; ***Church v Callanan Indus.***, *supra*). However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. Thus, tort liability for injuries to a third person may be imposed on a contractor under the following circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *supra*, at 140, 746 NYS2d 120, *quoting* ***H.R. Moch Co. v Rensselaer Water Co.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, *supra*, at 111); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, *supra*); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

As to the portion of the motion by American Maintenance and A.C.A. Industries seeking summary judgment dismissing plaintiffs' complaint, they established their prima facie entitlement to judgment as a matter of law by demonstrating that they did not assume a duty to plaintiff. Here, the deposition testimony reveals that an employee from American Maintenance goes to clean the P.C. Richard's store three times a week and that employees of the store generally conduct a "walk-through" of the store in the morning and would clean up spills if one was discovered. The maintenance and cleaning contract between American Maintenance and the P.C. Richard defendants was not of such a comprehensive and exclusive nature as to have removed the P.C. Richard defendants' duty to maintain the subject premises in a safe condition (*see* ***Palka v Servicemaster Management Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]; ***Roussos v Ciccotto***, 15 AD3d 641, 792 NYS2d 501 [2d Dept 2005]). Furthermore, the record demonstrates that there

is no evidence that the actions of American Maintenance and A.C.A. Industries "advanced to such a point as to have launched a force or instrument of harm," or that plaintiff detrimentally relied on the performance of the contractual obligations of American Maintenance and A.C.A. Industries (***Dorestant v Snow, Inc.***, 274 AD2d 542, 543, 712 NYS2d 131 [2d Dept 2000]; *see* ***Church v Callanan Indus.***, *supra*; ***Neil v City of New York***, 227 AD2d 260, 642 NYS2d 661 [1st Dept 1996]; ***Bourk v Nat'l Cleaning***, 174 AD2d 827, 570 NYS2d 755 [3d Dept 1991]).

In opposition, plaintiffs merely argued that American Maintenance and A.C.A. Industries failed to establish that they did not have notice of the alleged dangerous condition. Plaintiffs failed to raise a triable issue of fact as to whether American Maintenance and A.C.A. Industries owed a duty of care to plaintiff (*see* ***Sapone v Commercial Bldg. Maintenance Corp.***, 262 AD2d 393, 691 NYS2d 148 [2d Dept 1999]). Accordingly, the motion by American Maintenance and A.C.A. Industries for summary judgment dismissing plaintiff's complaint against them is granted.

With regard to the branch of the motion by American Maintenance and A.C.A. Industries to dismiss the cross claims and third-party complaint of the P.C. Richard defendants, triable issues of fact exist as to whose negligence, if any, caused plaintiff's accident. Thus, it would be premature to award summary judgment dismissing the counterclaim against American Maintenance (*see* ***Quiroz v Beitia***, 68 AD3d 957, 893 NYS2d 70 [2d Dept 2009]; ***D'Angelo v Builders Group***, 45 AD3d 522, 845 NYS2d 814 [2d Dept 2007]; ***Farduchi v United Artists Theatre Circuit, Inc.***, 23 AD3d 610, 804 NYS2d 788 [2d Dept 2005]). Here, while the President of American Maintenance testified that based on a review of the schedule an employee of the company serviced the subject store the morning prior to the day of the accident, his testimony is not based on personal knowledge and is insufficient to establish that American Maintenance was not negligent (*see* ***Ortiz v Fifth Ave. Bldg. Assocs.***, 251 AD2d 200, 674 NYS2d 360 [1st Dept 1998]; ***Mascoli v Mascoli***, 129 AD2d 778, 514 NYS2d 521 [2d Dept 1987]). Finally, the Court notes that while the parties mention cross claims asserted by the P.C. Richard defendants, the verified answer submitted by American Maintenance and A.C.A. Industries does not contain any cross claims. Accordingly, the branch of the motion to dismiss the cross claims and counterclaims against American Maintenance and A.C.A. Industries is denied.

Dated: JANUARY 10, 2014.

J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION