SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 35
NASSAU COUNTY

RHONDA KRAUT,

Plaintiff,

- against -

ARAMARK UNIFORM SERVICES, A DIVISION OF ARAMARK UNIFORM & CAREER APPAREL, LLC,

Defendant.

Action 1
Index No.: 605022/14
Motion Seq. No.: 02
Motion Date: 10/14/16
XXX

AND

RHONDA KRAUT,

Plaintiff,

- against -

MTA-LONG ISLAND RAILROAD,

Defendant.

Action 2
Index No.: 602053/13
Motion Seq. No.: 02
Motion Date: 10/14/16

MTA-LONG ISLAND RAILROAD,

Third-Party Plaintiff,

- against -

ARAMARK UNIFORM SERVICES, A DIVISION OF ARAMARK UNIFORM & CAREER APPAREL, LLC, ,

Third-Party Defendant.

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Index No. 605022/14), Affirmation and Exhibits	1
Affirmation in Opposition (Index No. 605022/14) and Exhibits	2
Reply Affirmation (Index No. 605022/14)	3
Notice of Motion (Index No. 602053/13), Affirmation and Exhibits	4
Affirmation in Opposition (Index No. 602053/13) and Exhibits	5
Affirmation in Opposition (Index No. 602053/13) and Exhibits	6
Reply Affirmation (Index No. 602053/13)	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Action 1 defendant Aramark Uniform Services, a division of Aramark Uniform and Career Apparel, LLC ("Aramark") moves (Index No. 605022/14), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Complaint against it. Plaintiff Rhonda Kraut ("Kraut") opposes the motion.

Action 2 third-party defendant Aramark moves (Index No. 602053/13), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Third-Party Complaint against it. Plaintiff Kraut and defendant/third-party plaintiff MTA-Long Island Railroad ("MTA") oppose the motion.

At the outset, it is noted that this Court "So Ordered" a Stipulation and Agreement entered into by and between all named parties herein that "the above noted actions be consolidated for the purpose of discovery and joint trial. Each action shall maintain its own index number and file separate note of issues." This Order was entered on April 21, 2015. *See* Action 2 Third-Party Defendant Aramark's Affirmation in Support Exhibit C.

These actions stem from plaintiff Kraut's claim that she allegedly sustained personal injuries as a result of a slip and fall accident at the Lynbrook train station of the Long Island Railroad ("LIRR"), on August 15, 2012, at approximately 7:15 a.m. *See* Plaintiff Kraut's

Verified Bill of Particulars ¶ 1.[1] In her Verified Bill of Particulars, plaintiff Kraut claims that, "[t]he accident occurred inside the waiting room of the Lynbrook Station of the Long Island Railroad, near a floor mat located in front of the men's room and between the south side entrance between the ticket counter of the station" *Id.* at ¶ 2. Plaintiff Kraut also claims that she "slipped and fell on an oily substance." *Id.* at ¶ 11.

Notably, at her Examination Before Trial ("EBT"), plaintiff Kraut testified that, on the date of her accident, she arrived at the waiting area of the train station at approximately 7:00 a.m., as it was her intent to board the 7:21 a.m. train. *See* Action 2 Third-Party Defendant Aramark's Affirmation in Support Exhibit I p. 34. She testified that she entered the waiting room through the same set of doors where she subsequently had her accident. *Id.* at p. 35. According to plaintiff Kraut, at around 7:15 a.m., she started walking up and out of the waiting room towards the platform and, as she approached the doors of the waiting area, she slipped and fell. *Id.*

Plaintiff Kraut testified that, when she entered the area where she subsequently fell, she did not experience any slippage. *Id.* She also did not make any observations about any substance or anything slippery on the floor in the area where she fell when she entered the waiting room. *Id.* at p. 36. When asked whether she knew how long the alleged slippery substance was present before her fall, plaintiff Kraut testified, "I have no idea." *Id.* She also had no recollection of whether she noticed any of the slippery substance on her clothes or any part of her body after her fall. *Id.*

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[1]Notably, the parties fail to furnish a copy of the Verified Bill of Particulars to the Court for consideration herein. The Court retrieved the plaintiff Kraut's Verified Bill of Particulars from the Court's e-filing website.

Plaintiff Kraut testified that, prior to this accident, she would go to the Lynbrook train station "at least once a week, sometimes more." *Id.* at p. 9. She added that, prior to the date of her accident, she never made any observations that the mat, that is allegedly typically in that location, was not there. *Id.* at p. 37. Indeed, plaintiff Kraut testified that she never had any issues with any of the mats in the station prior to the accident, nor did she ever make any complaints to anybody about anything prior to her accident. *Id.* at p. 20. She added that she was also not aware of anybody who had made any complaints about the mats in the station or any Long Island Rail Road stations prior her accident. *Id.*

Plaintiff Kraut testified that, immediately after her fall, a commuter named "Larry" came to her assistance; however, she did not recall whether she had any discussions with him as to what caused her to fall that day. *Id.* at pp. 21-22. When asked whether she recalled any discussions with anybody that was present about what caused her to fall that day, plaintiff Kraut testified, "[a]t the time, I was traumatized. I don't know that I had any discussions." *Id.* at p. 22. Plaintiff Kraut also testified that, on the morning of her accident, she did not see anybody who worked for the LIRR when she was at the waiting room of the Lynbrook Train Station, either before her accident or after her fall. *Id.* at p. 23.

Plaintiff Kraut explained that, after her fall, her husband responded to the Lynbrook train station whereupon he took photographs of the area where she fell. *Id.* at p. 24. Plaintiff Kraut stated that she learned after the fact that her husband also spoke to one of the employees of the LIRR at the station "about the mat that was not there." *Id.* at pp. 24-25. Specifically, plaintiff Kraut testified as follows:

Q: Do you know if he ever spoke with anybody from the [LIRR] concerning your accident?

A: Well, I found out afterwards that he spoke to one of the employees there about the mat that was not there.

Q: What do you mean by that?

A: There was some kind of – there was no mat in the area where I fell.

Q: Before you fell, do you know if there was a mat in the area where you fell?

A: There was no mat there.

Q: Meaning the mat was never present that morning?

A: It wasn't there.

Q: As we sit here today, do you know what it was that you fell on?

A: Something very slippery. It felt like I was slipping on ice. I went right down.

Q: Did you ever see that substance?

A: I don't recall anything after the fall.

Q: Before the fall did you ever see anything?

A: No.

Q: Are you aware of anybody who ever saw the slippery substance that you fell on?

A: I wouldn't know. I don't know.

Q: Do you know if your husband saw it, when he responded?

A: When he went over to the employee and he picked up the mat. That's when he said there was some oily substance under the mat and on the floor.

Q: That is what you husband said?

A: Yes.

Q: When your said your husband picked up the mat –

A: The employee. He went to get, I don't know if he went to get the employee. I don't know if the employee came out....

MR. COYNE: I'm unclear who said there was a slippery substance under the mat whether it was Mr. Kraut or the employee.

MR. HART: Do you want me to answer that?

THE WITNESS: I'm not sure. I'm not sure who said it but my husband saw it.

MR. COYNE: He saw a slippery substance?

THE WITNESS: Yes.

Q: Under a mat?

A: Yes.

Q: Did you say there was a mat?

A: There was no mat, when I fell.

Q: The mat was picked up. Do you know were [sic] this mat was?

A: I have no idea.

Q: So, the floor, in the area where you fell, there is no mat in that area, right?

A: Right.

Q: And, the floor is comprised of what?

A: Tile.

Q: Is it white or some other color?

A: It is a light color.

Q: Did you see any stains, or darker fluids, or anything in the vicinity where you fell?

A: I fell, hit my forehead. I was traumatized. My wrist was already killing me. I was not looking or observant of anything. *Id.* at pp. 24-28.

When asked what her husband told her about the conversation that he had with an LIRR employee, plaintiff Kraut stated:

> He [the husband] wanted to find out why I fell and the employee came out, I'm assuming all this, and showed him the mat and saw there was some oily substance under the mat. *Id.* at p. 31.

Russell Fickling ("Fickling"), a cleaner for defendant/third-party plaintiff MTA, testified at his EBT that he was employed as a cleaner on the date of plaintiff Kraut's accident. *See* Action

2 Third-Party Defendant Aramark's Affirmation in Support Exhibit K p. 8. Specifically, Fickling stated that, at the time of plaintiff Kraut's accident, he was assigned to clean the waiting area at the Lynbrook train station (as well as other stations, including the Long Beach train station) on a regular basis. *Id.* at pp. 10-11. He stated that would clean five (5) days a week, Monday through Friday, at approximately 8:00 or 9:00 a.m. *Id.* at p.10. Fickling stated that he believed, though he was not sure, that the waiting area was also cleaned the night before, but, in any event, that was not his shift. *Id.* at pp. 10-11.

Fickling testified that, as part of his duties at the Lynbrook train station, he was responsible for mopping the waiting area, but only if there was a coffee spill or the like; otherwise, it was the crew/shift that followed him that was responsible for mopping the waiting room. *Id.* at p. 13. Fickling further stated that the restrooms and the areas near the restrooms were also cleaned during his shift. *Id.*

When asked whether he mopped the area in the vicinity of the restroom on August 15, 2015, Fickling testified "[n]o, I didn't." *Id.* at p. 14.

Fickling stated that he learned of plaintiff Kraut's accident from Maximo Almonte ("Almonte"), a ticket agent with defendant/third-party plaintiff MTA. *Id.* Although Fickling could not recall what Almonte told him specifically, he testified that he learned of the accident "as I was on my way to Lynbrook" from Long Beach; he was not at the Lynbrook train station when he learned of plaintiff Kraut's accident. *Id.* at pp. 14, 16.

According to Fickling, when he arrived at the Lynbrook train station, he saw plaintiff Kraut on the floor. *Id.* at p. 14. He stated that he immediately went into the waiting room, through the subject doors, and spoke with Almonte. *Id.* at p. 18. Notably, Fickling could not recall the conversation he had with Almonte. *Id.* at p. 20. He stated, however, that following said conversation, he simply "continue[d] my day" which included pulling the garbage and cleaning

the station. *Id.* Fickling testified that he did not do anything in the waiting room at that point, stating, "I would have cleaned it after everything was finished. I don't think I did anything at that point." *Id.* at p. 21. He stated that cleaning the waiting room included taking out the garbage, cleaning the bathroom, cleaning the floors and sweeping. *Id.*

Fickling testified that, in his years of working for defendant/third-party plaintiff MTA, this was the first accident scene he experienced. *Id.* at p. 27. As to the subject accident, Fickling testified as follows:

> Q: Did the area appear slippery to you when you got there? ...
>
> A: It didn't appear slippery to me.
>
> Q: Was there any substance on the floor that drew your attention to the need for mopping the floor?
>
> A: There was a wet spot. *Id.* at pp. 27-28.

According to Fickling, the "wet spot" was by the mat – "[i]n the mat." *Id.* at pp. 28, 31. He testified that "normally" the mat is placed right at the doors of the waiting area through which he had previously entered. *Id.* at p. 16. Nevertheless, despite noticing the "wet spot," Fickling confirmed that he did not replace the mat as "[i]t's a different outside company" that replaced the mats. *Id.* at p. 28.

As to the mat, Fickling stated that, when he first entered the waiting room, he saw the mat next to plaintiff Kraut. According to Fickling, Almonte moved the mat. *Id.* at pp. 29-30.

Almonte was also deposed. Almonte testified that, at the time of plaintiff Kraut's accident, he was employed by defendant/third-party plaintiff MTA as a "Ticket Agent Level I." *See* Action 2 Third-Party Defendant Aramark's Affirmation in Support Exhibit L p. 14. He explained that, generally, when he arrives at the station, he does a visual inspection of the station including the stairwells, platforms, waiting rooms, elevators and escalators. *Id.* at p. 50. He

testified that, on the morning of this accident, "[a]s far as any visual inspection, I did not see anything out of the ordinary" including outside the waiting area. *Id.*

Almonte testified that he learned of plaintiff Kraut's accident from the woman selling coffee at the station. *Id.* at pp. 15-16. He did not witness the accident. Almonte explained that he was working inside the Lynbrook ticket office, which was otherwise closed, at the time the woman brought plaintiff Kraut's accident to his attention and exclaimed that somebody had fallen. *Id.* at pp. 17-19. In response thereto, Almonte locked the office and walked over to the waiting area where he saw plaintiff Kraut "by a bench." *Id.* at p. 20. At that point, Almonte phoned the cleaner, Fickling, and told him that somebody had fallen in the waiting room. *Id.* at p. 21. From that point, Almonte stated that he never left the waiting room until plaintiff Kraut was ultimately removed. *Id.* at pp. 22, 26.

As to the mat, Almonte confirmed that typically there is a mat in front of the men's room by the doors to the waiting area. *Id.* at p. 18. However, he stated that he did not recall taking any action with respect to the mat, including picking it up, at any point either before or after plaintiff Kraut's fall. *Id.* at p. 26. He also did not recall ever inspecting the mat at the exit area where plaintiff Kraut fell. *Id.* at p. 29.

Almonte testified that, in accordance with his duties, he prepared an accident report (a form of defendant/third-party plaintiff MTA) for plaintiff Kraut's incident. *Id.* at pp. 33-35. Notably, however, he could not recall how or where he received the information to document plaintiff Kraut's accident other than to say that he "overheard" some of the information being furnished by the injured woman (plaintiff Kraut); he confirmed that "I was at a distance, writing down what I could get from the accident." *Id.* at pp. 37, 38.

Almonte testified that, while he does not recall inspecting the doormat nor recalls who provided him with the information, he admits that he described the issue on the form as "door

mat had oily substance under it" and that "I was told [the plaintiff] slipped on the doormat." *Id.* at p. 38.

Notably, Almonte testified as follows:

Q: Based on your personal inspection of the carpet that was in the waiting room that day, did you determine that there was an oily substance on the floor of the waiting room in the vicinity of the mat?

A: I don't recall.

Q: Did you determine that there was an oily substance underneath the mat?

A: No. *Id.* at pp. 40-41.

Almonte explained that the mats at the LIRR waiting rooms are delivered by an outside company that has a contract with defendant/third-party plaintiff MTA. *Id.* at p. 41. He stated that this company actually comes to the station and installs the mat, replacing it from "time to time" with another one. *Id.*

Almonte testified that, after the accident, he looked at the mat and noticed that it was away from the door. *Id.* at p. 45. He specifically testified that, when he went near the door, he did not find any substance on the floor. *Id.* He also never saw anyone remove the mat from the area. *Id.* at p. 43.

Finally, Jose Nunez ("Nunez"), who was a route sales representative for defendant/third-party defendant Aramark on the date of plaintiff Kraut's accident, stated at his EBT, that his duties included servicing customers on a daily basis including their uniforms, floor mats and dust mops. *See* Action 2 Third-Party Defendant Aramark's Affirmation in Support Exhibit M pp. 5-6.

Nunez admitted that he has never seen the contract between defendant/third-party defendant Aramark and defendant/third-party plaintiff MTA related to the servicing of the mats. *Id.* at pp. 22-23. Nevertheless, he maintained that, with respect to the provision of floors mats, the contract terms were to "go in to the station to remove the dirty mats and replace it with new,

fresh one, clean." *Id.* at p. 6.

According to Nunez, in 2012, he personally was responsible for replacing the mats at the Lynbrook station which, he explained, would be replaced every week on Tuesday. *Id.* at pp. 6-7. He specifically testified that the Tuesday before this accident (which took place on a Wednesday) he removed the existing mat and replaced it with a clean mat. *Id.* at p. 7. He added that he repeated the process again one week later on August 21, 2012. *Id.* According to Nunez, if there was any irregularity on the mat that he was about to deliver to a particular station, he would pull it out of service. *Id.* at p. 16. However, he has no specific recollection of pulling a mat out of service for irregularities on August 15, 2015. *Id.* at pp. 16-17.

Nunez described the types of mats that his company provides as black or charcoal gray, "three by four...fabric on top and..a rubber backing for anti-slip." *Id.* at pp. 8-9. He explained that the rubber backing also has suction cups. *Id.* at p. 8. Nunez said that, under normal conditions, the mat is not shiny. *Id.* at p. 9. With respect to the Lynbrook station in particular, Nunez stated that a mat is normally placed in front of each of the three entrances to the station. *Id.* at pp. 9-10.

Notably, Nunez was asked to identify a mat in a photograph; he clearly stated that the mat in the photograph did not look like a mat that the company provided to the station because "[t]hat one has a film or something on it" and was shiny. *Id.* at p. 10.

On or about September 29, 2009, defendant/third-party plaintiff MTA accepted defendant/third-party defendant Aramark's bid to provide floor mats to various LIRR locations covering a period from October 1, 2009 through September 30, 2012. *See* Defendant/Third-Party Plaintiff MTA's Affirmation in Opposition Exhibit K. This bid acceptance letter adopted by reference the terms and conditions of solicitation IT05385-GS3R, and the bid acceptance letter was signed off by defendant/third-party defendant Aramark representative Erik Bachthaler, a defendant/third-party defendant Aramark district manager. *See* Defendant/Third-Party Plaintiff

MTA's Affirmation in Opposition Exhibits K, L and M. Pursuant to these documents and others, the Terms and Conditions of defendant/third-party defendant Aramark's submission to defendant/third-party plaintiff MTA provides, in pertinent part, the following:

> The Seller shall defend, indemnify, and hold harmless the Authority and/or Indemnified Parties, the MTA, their officers, agents and employees from and against any and all claims, suits, losses or liability by reason of any damage to any property whatsoever, including but not limited to property owned by or in the care, custody or control of the Authority or Seller, Contractor or any subcontractor or any other person or entity, or by reason of bodily injury or death of any person whatsoever, including but not limited to employees or agents of the Authority or the Seller or any subcontractor as well as any other person, or any fines or penalties arising out of or in connection with Seller's or subcontractor's Work included herein, including but not limited to the operation or presence of the Seller, subcontractors, officers agents, employees, equipment or materials on or about the premises of the Authority or while in route to or from such premises, irrespective of the actual cause of the bodily injury, death or property damage and irrespective of whether it shall have been due in whole or in part to the negligence, fault, failure or omission of the Seller, except that the Seller shall not be responsible for indemnifying, defending or holding harmless the Authority for that portion of damages arising out of bodily injury, death or property damage caused by or resulting from the negligence of the Authority. *See* Defendant/ Third-Party Plaintiff MTA's Affirmation in Opposition Exhibit M p. 92.

As previously stated, upon the instant motions, defendant/third-party defendant Aramark seeks an order, pursuant to CPLR 3212, granting it summary judgment dismissal of plaintiff Kraut's Verified Complaint (in Action No. 1), as well as defendant/third-party plaintiff MTA's Verified Third-Party Complaint (in Action No. 2).

Essentially, defendant/third-party defendant Aramark asserts two (2) principal bases for its entitlement to summary judgment dismissal of both actions. One, it owed no duty to plaintiff Kraut. Two, it did not breach any duty to plaintiff Kraut or to defendant/third-party plaintiff

MTA.

Action 1 - Plaintiff Kraut's Verified Complaint

The law surrounding whether a third-party contractor owes a duty to an injured plaintiff is clear. Indeed, in 2002, the Court of Appeals, in *Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120 (2002), spelled out the seminal law on this issue. There, in affirming the appellate court's granting of the contractor's motion for summary judgment, the Court of Appeals held that a "contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." *Espinal v. Melville Snow Contrs.*, *supra* at 139. The Court of Appeals did, however, recognize the following three (3) circumstances where a party who enters into a contract may be deemed to have assumed a duty of care to third persons, and, thus, can be held liable: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm" (*see Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 (1928)); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (*see Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220, 557 N.Y.S.2d 286 (1990)); and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*see Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 611 N.Y.S.2d 817 (1994)).

Here, the issue is whether any such duty ran from Action 1 defendant Aramark to plaintiff Kraut. To that end, this Court finds that Action 1 defendant Aramark has indeed established its *prima facie* entitlement to judgment as a matter of law. That is, this Court finds that there is no evidence herein to establish that Action 1 defendant Aramark owed any duty to injured plaintiff Kraut. *See Parochial Bus Sys. v. Board of Educ. of City of N.Y.*, 60 N.Y.2d 539, 470 N.Y.S.2d 564 (1983); *Viviani v. City of Yonkers*, 303 A.D.2d 493, 757 N.Y.S.2d 306 (2d Dept. 2003); *Ciatto v. Lieberman*, 266 A.D.2d 494, 698 N.Y.S.2d 54 (2d Dept. 1999).

First, based upon the papers submitted herein, it is clear to the Court that, even under a liberal construction of the terms and conditions, the service contract between defendant/third-party defendant Aramark and defendant/third-party plaintiff MTA was not comprehensive and exclusive such that it can be held that defendant/third-party defendant Aramark entirely displaced defendant/third-party plaintiff MTA's duty to maintain the premises in a reasonably safe condition. *See Espinal v. Melville Snow Contrs.*, *supra*; *Palka v. Servicemaster Mgt. Servs. Corp.*, *supra*. On the contrary, based upon a plain and simple reading of the contractual provisions therein, as the owner and possessor of the premises, defendant/third-party plaintiff MTA retained the duty to maintain the station in a reasonably safe manner, keeping it free of hazards of which it had actual or constructive notice. *See Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976); *Sagges v. Long Is. R.R.*, 259 A.D.2d 537, 686 N.Y.S.2d 467 (2d Dept. 1999). Defendant/third-party defendant Aramark, in agreeing to pick up dirty mats and replace with clean ones on a weekly basis, simply cannot be seen as having undertaken a duty to relieve defendant/third-party plaintiff MTA of its common law duties as the owner and possessor of the Lynbrook train station, where, in any event, plaintiff Kraut testified that she slipped and fell on the floor, and not as a result of a mat, or on any mat.

Nor is there any evidence on this record that establishes that Action 1 defendant Aramark launched an instrument of harm. The fact is that, by plaintiff Kraut's own testimony and admission, there *was* no mat at the place where she fell (emphasis added). While, arguably, she may have slipped on something oily, there is no evidence that said alleged oily substance was "launched" by Action 1 defendant Aramark, which, undisputedly, just one day earlier, had replaced the subject mat as part of its limited contract with defendant/third-party plaintiff MTA. Thus, even affording plaintiff Kraut the benefit of every favorable inference, the Court finds that the only "instrument," albeit not "of harm," that may have potentially been "launched" by Action

1 defendant Aramark was a mat (that had a rubber backing and suction cups to secure its place on the floor) at the train station. However, as stated above, plaintiff Kraut neither slipped, nor fell, on a mat. Thus, by definition, plaintiff Kraut cannot hold Action 1 defendant Aramark responsible for launching an instrument of harm – the existence of said mat she denies having ever seen.

Finally, there is no evidence that plaintiff Kraut detrimentally relied on Action 1 defendant Aramark for the continued performance of its duties. *See Baratta v. Home Depot USA*, 303 A.D.2d 434, 756 N.Y.S.2d 605 (2d Dept. 2003); *Bugiada v. Iko*, 274 A.D.2d 368, 710 N.Y.S.2d 117 (2d Dept. 2000).

In the end, the Court finds that Action 1 defendant Aramark did not owe any duty to plaintiff Kraut; any duties that it owed were directly owed to defendant/third-party plaintiff MTA, the party with whom it maintains privity. *See Moch Co. v. Rensselaer Water Co.*, *supra* at 161.

In opposing Action 1 defendant Aramark's motion for summary judgment, plaintiff Kraut asserts that defendant/third-party plaintiff MTA's accident report and the applicable deposition testimony raise questions as to the applicability of the first *Espinal* exception to the facts at hand, *i.e.*, whether Action 1 defendant Aramark launched an instrumentality of harm that caused plaintiff Kraut's accident. Specifically, plaintiff Kraut argues that there remain issues of fact as to whether Action 1 defendant Aramark brought the mat into the Lynbrook station with an oily slippery substance already upon it and that it was this oily slippery mat (as opposed to an oily slippery substance on the floor under the mat) that caused the accident. In advancing this argument, plaintiff Kraut relies heavily upon the testimony of her husband, David Kraut, who maintained that Almonte told him that the oily slippery mat caused his wife's accident and that he picked up the mat and specifically showed David Kraut the oily slippery mat. This argument is

wholly meritless.

Notably, the Court dismisses, as inadmissible hearsay, the deposition testimony of David Kraut and Fickling insofar as they claim that Almonte told them that there was an oily substance under a mat. Notably, Fickling did not remember Almonte saying any such thing. Furthermore, Almonte testified that he did not remember saying anything of the sort or believing anything of the sort. In any event, it is undisputed on this record that neither David Kraut nor Fickling witnessed the accident. In fact, Almonte also testified that he, too, did not see the accident; rather, he learned of plaintiff Kraut's accident by being informed of it by the woman who sells coffee at the station. Almonte stated that, upon learning of the accident, he exited the work area and went to where plaintiff Kraut was being helped by other commuters. Furthermore, Almonte testified that he could remember doing nothing with the mat, and did not remember holding it or ever determining that there was an oily substance even on the floor. Similarly, Fickling was even further removed than Almonte. Fickling also did not see the accident and has no competent basis upon which to testify about it. Indeed, he was not even at the station when the accident happened.

Thus, in light of plaintiff Kraut's failure to present any admissible evidence raising a triable issue of fact as to whether Action 1 defendant Aramark owed a duty of care to her, much less that Action 1 defendant Aramark breached any such duty or, for that matter, that the breach of any such duty was the proximate cause of her accident, Action 1 defendant Aramark's motion to dismiss plaintiff Kraut's Verified Complaint is herewith granted in its entirety. The Verified Complaint in Action 1 (Index No. 605022/14) is herewith dismissed.

Action 2 - Defendant/Third Party Plaintiff MTA's Verified Third-Party Complaint

Notably, Action 2 third-party defendant Aramark also seeks summary judgment dismissal of the Verified Third-Party Complaint asserted by defendant/third-party plaintiff MTA.

Specifically, in its Verified Third-Party Complaint, defendant/third-party plaintiff MTA

advances five (5) causes of action against Action 2 third-party defendant Aramark; to wit, (1) common law contribution; (2) contractual indemnification; (3) failure to procure insurance; (4) breach of express warranty; and, (5) breach of implied warranty.

In seeking summary judgment against defendant/third-party plaintiff MTA, while Action 2 third-party defendant Aramark arguably concedes that it owed a duty of care to defendant/third-party plaintiff MTA, it nevertheless asserts that it did not breach any duty to defendant/third-party plaintiff MTA and, thus, cannot be held liable to defendant/third-party plaintiff MTA. Action 2 third-party defendant Aramark's core argument in support of its motion for summary dismissal of defendant/third-party plaintiff MTA's Verified Third-Party Compliant is that, in view of the complete lack of any competent evidence that a mat laundered and delivered by Action 2 third-party defendant Aramark was involved in plaintiff Kraut's accident, or that anything done by Action 2 third-party defendant Aramark delivering mats over twenty-four (24) hours before an accident, which plaintiff Kraut herself says did not involve a mat, could have a proximate cause relationship to such an incident, renders defendant/third-party plaintiff MTA's argument based upon the contract between it and Action 2 third-party defendant Aramark entirely meritless. This Court disagrees.

The standards for summary judgment are well-settled. "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Summary judgment is a drastic remedy, to be granted only where the moving party has tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact, and then only if, upon the moving party's meeting of this burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action. The moving party's [f]ailure to make [a] *prima facie* showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Vega v. Restani Constr. Corp.*, 18 N.Y.3d

499, 942 N.Y.S.2d 13 (2012).

The fact is that, on these papers, Action 2 third-party defendant Aramark has failed entirely to address any of the claims asserted by defendant/third-party plaintiff MTA in its Verified Third-Party Complaint (including claims of contribution and common law indemnification), much less meet its *prima facie* burden of establishing judgment as a matter of law.

In light of the foregoing, Action 2 third-party defendant Aramark's motion seeking to dismiss defendant/third-party plaintiff MTA's Verified Third-Party Complaint is herewith denied.

Therefore, in summary, Action 1 defendant Aramark's motion (Index No. 605022/14), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Complaint against it, is hereby **GRANTED**.

Action 2 third-party defendant Aramark's motion (Index No. 602053/13), pursuant to CPLR § 3212, for an order granting summary judgment dismissing the Verified Third-Party Complaint against it, is hereby **DENIED**.

The parties in Action 2 shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on January 17, 2017, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
January 4, 2017