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SHORT FORM ORDER

INDEX No. 05-29487
CAL No. 10-00254-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 4-5-10
ADJ. DATE 9-9-10
Mot. Seq. # 005 - MotD
Mot. Seq. # 006 - XMotD

TYRONE STANTON,	:	GRUENBERG & KELLY
	:	Attorneys for Plaintiff
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Plaintiff,	:	Ronkonkoma, New York 11779
	:	
	:	WILSON ELSER MOSKOWITZ EDELMAN
- against -	:	Attorneys for Defendant Briarcliffe
	:	150 East 42nd Street
	:	New York, New York 10017
BRIARCLIFFE COLLEGE, INC., and	:	
EXCEL COMMERCIAL MAINTENANCE,	:	CASCONE & KLEUPFEL
	:	Attorneys for Defendant Excel
	:	1399 Franklin Avenue, Ste. 302
Defendants.	:	Garden City, New York 11530

Upon the following papers numbered 1 to 52 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers 18 - 41; Answering Affidavits and supporting papers 42 - 46; Replying Affidavits and supporting papers 47 - 48; 49 - 50; 51 - 52; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Excel Commercial Maintenance for summary judgment dismissing the complaint and any cross claims against it is granted to the extent of granting summary judgment dismissing the complaint against it, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Briarcliffe College, Inc. for summary judgment dismissing the complaint and all "cross complaints" against it is granted to the extent of dismissing the cross claim for common-law indemnification and contribution asserted by defendant Excel Commercial Maintenance against it, and is otherwise denied.

The plaintiff in this action seeks to recover damages for personal injuries sustained on October

18, 2005 when he slipped and fell on a clear substance that was present on a hallway floor at Briarcliffe College in Patchogue, New York. According to the plaintiff, the substance he slipped on was located on the floor outside of the first floor men's room and in proximity to a closet. When he observed the area after his fall, the substance appeared to be a curve of water coming from the closet and around the corner. The closet at issue contains both a sink and the ejector pump for the building's plumbing. At the time of the incident, defendant Excel Commercial Maintenance was engaged by defendant Briarcliffe College, Inc. to perform cleaning services on the premises. The plaintiff alleges that the defendants are liable for his injuries based on their negligent ownership, operation, maintenance, repair, inspection and control of the premises. The bill of particulars specifies that the defendants were negligent, *inter alia*, in causing and/or creating a wet floor, in permitting an accumulation of water on the floor, in failing to properly inspect and maintain the floors, in causing and/or permitting water to leak from the closet, in failing to mop or clean the water present on the floor, and in failing to warn the plaintiff of the hazardous condition of the wet floor.

Excel now moves for summary judgment on the grounds that it did not owe a duty of care to the plaintiff for services performed pursuant to its agreement with Briarcliffe. In any event, it argues that it is entitled to summary judgment because it did not create the purported dangerous condition. Briarcliffe cross-moves for summary judgment on the grounds that it did not have actual or constructive notice of the purported dangerous condition.

The proponent of a summary judgment motion must make a*prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

In support of its motion, Excel submitted, *inter alia*, a copy of its service agreement, the plaintiff's deposition testimony, the deposition testimony of Briarcliffe's comptroller Robert Daniels, the deposition testimony of Excel owner James O'Rourke, the deposition testimony of Excel employee Miguel Gonzalez, the deposition testimony of Excel employee Reynoldo Bonilla, the deposition testimony of Excel employee Maritza Torres, and the deposition testimony of security guard Daniel Schleinig. This evidence establishes Excel's *prima facie* entitlement to summary judgment by demonstrating that the plaintiff was not a party to its agreement with Briarcliffe and that such agreement did not give rise to tort liability in favor of the plaintiff (*see*, ***Parker v 2001 Marcus Ave.***, 60 AD3d 1024, 877 NYS2d 123 [2009]; *see also*, ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2010]). "A contractor's limited contractual undertaking to provide cleaning services generally does not give rise to a duty of care in tort to persons not a party to the contract, absent evidence that the contractor assumed a comprehensive and exclusive maintenance obligation, that the contractor launched a force or instrumentality of harm, or that the plaintiff detrimentally relied on the contractor's continued

performance of its obligation" (***Wilson v Hyatt Corp.***, 72 AD3d 939, 900 NYS2d 325 [2010]; *see*, ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 140, 746 NYS2d 120 [2002]; ***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]). Here, the plaintiff does not contend that he relied to his detriment upon Excel's continued performance of its duties (*see*, ***Wilson v Hyatt Corp.***, *supra*; *cf.*, ***Foster v Herbert Slepoy Corp.***, *supra*). Additionally, the evidence demonstrates that Excel did not assume a comprehensive and exclusive maintenance obligation under its agreement with Briarcliffe and did not entirely displace Briarcliffe's duty to maintain the building (*see*, ***Wilson v Hyatt Corp.***, *supra*; ***Torchio v New York City Hous. Auth.***, 40 AD3d 970, 836 NYS2d 674 [2007]; ***McCord v Olympia & York Maiden Lane Co.***, 8 AD3d 634, 779 NYS2d 542 [2004]; *see also*, ***Church v Callanan Indus.***, *supra*). Rather, it appears that Excel was contracted to perform only basic cleaning services and that Briarcliffe retained control, supervision, and responsibility for the overall maintenance, repair, and safety of the building (*see*, ***Lehman v North Greenwich Landscaping***, 65 AD3d 1291, 887 NYS2d 136 [2009]; ***Brenner v Johnson Controls***, 277 AD2d 412, 716 NYS2d 715 [2000]; *compare*, ***Palka v Servicemaster Mgt. Servs.***, 83 NY2d 579, 611 NYS2d 817 [1994]). Similarly, the evidence demonstrates that the plaintiff's injury was not the result of Excel, upon undertaking to render services pursuant to the contract, launching a force or instrumentality of harm on the premises (*see generally*, ***McCord v Olympia & York Maiden Lane Co.***, *supra*; ***Dappio v Port Auth.***, 299 AD2d 310, 749 NYS2d 150 [2002]). In this regard, it is evident that Excel employees neither created the wet condition which precipitated the plaintiff's fall (*see*, ***Wilson v Hyatt Corp.***, *supra*; ***Georgotas v Laro Maintenance***, 55 AD3d 666, 865 NYS2d 651 [2008]; *compare* ***Haracz v Cee Jay***, 74 AD3d 1145, 903 NYS2d 515 [2010]) nor exacerbated such condition (*see*, ***Foster v Herbert Slepoy Corp.***, *supra*; ***Fung v Japan Airlines***, 9 NY3d 351, 850 NYS2d 359 [2007]).

In opposition to Excel's *prima facie* showing, the plaintiff failed to submit sufficient evidence to raise a triable issue of fact as to whether Excel bears liability for his injuries (*see*, ***Parker v 2001 Marcus Ave.***, *supra*; ***Wilson v Hyatt Corp.***, *supra*; ***Torchio v New York City Hous. Auth.***, *supra*). Indeed, the plaintiff failed to submit any evidence which supports his conclusory contentions that Excel is liable because it assumed a comprehensive and exclusive maintenance obligation or launched a force or instrumentality of harm. To the extent that the plaintiff's expert affidavit addressed the issue of Excel's liability, it is speculative, conclusory and insufficient to raise a triable issue of fact (*see*, ***Walker v First Tr.***, 35 AD3d 452, 825 NYS2d 526 [2006]; ***McCord v Olympia & York Maiden Lane Co.***, *supra*).

Accordingly, summary judgment is granted dismissing the complaint against Excel, and Excel's own cross claim against Briarcliffe for common-law indemnification and contribution is dismissed as academic. However, since the Court has not been provided with a copy of a pleading containing any cross claims which Excel seeks to have dismissed against it, the remaining branch of its motion is denied (*see*, CPLR 3212 [b]).

To the extent Briarcliffe seeks summary judgment dismissing the complaint, the cross motion is denied. In support of its cross motion, Briarcliffe submitted, *inter alia*, a copy of its service agreement, the plaintiff's deposition testimony, the deposition testimony of Briarcliffe's comptroller Robert Daniels, the deposition testimony of Excel owner James O'Rourke, the deposition testimony of Excel employee Miguel Gonzalez, the deposition testimony of Excel employee Maritza Torres, the deposition testimony of Briarcliffe security guard Daniel Schleinig, the deposition testimony of Briarcliffe assistant to campus

director Helene Siegel, the deposition testimony of Excel employee Paula Hernandez, and the deposition testimony of plumber Neil A. Devino. This evidence was insufficient to establish Briarcliffe's *prima facie* entitlement to summary judgment.

To impose liability against a defendant for a slip-and-fall injury a defendant must have either created the dangerous condition which caused the fall, or had actual or constructive notice of it, and a reasonable time to undertake remedial action (*see*, ***Hartley v Waldbaum***, 69 AD3d 902, 893 NYS2d 272 [2010]; ***Kohout v Molloy Coll.***, 61 AD3d 640, 876 NYS2d 505 [2009]; ***Ruic v Roman Catholic Diocese of Rockville Ctr.***, 51 AD3d 1000, 858 NYS2d 761 [2008]; *see also*, ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). A defendant who has actual knowledge of an ongoing and recurring dangerous condition can be charged with constructive notice of each specific reoccurrence of that condition (*see*, ***Kohout v Molloy Coll.***, *supra*; ***Garcia v U-Haul***, 303 AD2d 453, 755 NYS2d 900 [2003]). Thus, a question of fact regarding a recurrent dangerous condition can be established by offering evidence that an ongoing and recurring dangerous condition existed in the area of the accident, which was routinely left unaddressed (*see*, ***Mauge v Barrow St. Ale House***, 70 AD3d 1016, 895 NYS2d 499 [2010]).

The evidence submitted here is insufficient to establish that Briarcliffe did not have constructive notice of the alleged dangerous condition of the hallway floor (*see*, ***Parker v 2001 Marcus Ave.***, *supra*). To the contrary, the evidence presents a triable issue of fact as to whether Briarcliffe had knowledge of a recurrent dangerous condition with respect to the hallway floor and, therefore, whether it could be charged with constructive notice of each specific recurrence of the condition (*see*, ***Kohout v Molloy Coll.***, *supra*; ***Thomas v Hempstead Union Free School Dist.***, 56 AD3d 759, 868 NYS2d 142 [2008]; ***Garcia v U-Haul***, *supra*). In this regard, the evidence submitted included testimony by O'Rourke that on at least one occasion the ejector pump located in the closet overflowed and caused water to come onto the hallway floor. It included the testimony of Hernandez that there were a lot of problems with the bathrooms at Briarcliffe, that she observed the bathroom toilets back up at least twice a month, that when the bathrooms backed up water would overflow onto the floor from the toilets and the floor drains, and that she observed water on the hallway floor outside of the first floor bathrooms twice a month. It included the testimony of Siegel that she had learned of a leak in the plumbing, had heard about it for a period of time through 2006, and that she had contacted a plumber on behalf of Briarcliffe in order to rectify the problem. Lastly, it included the testimony of Davino that his plumbing company performed repairs to the plumbing system at Briarcliffe in June of 2006. According to Davino, Briarcliffe had long-standing plumbing and drainage issues at the building. At the time he was called, there was a blockage in the plumbing system, which was causing water to come out of the floor drains in the bathrooms and some water to leak out of the ejector pump. Davino testified that the ejector pump leaked as a result of its inability to move the water and sewage past the blockage that was present in the system. Briarcliffe's specific knowledge of a recurrent water condition in the hallway is qualitatively different from a mere general awareness that a dangerous condition may be present (*see*, ***Mauge v Barrow St. Ale House***, *supra*; ***McLaughlan v Waldbaums Inc.***, 237 AD2d 335, 654 NYS2d 406 [1997]; *compare* ***Pinto v Metropolitan Opera***, 61 AD3d 949, 877 NYS2d 470 [2009]; ***Perlongo v Park City 3 & 4 Apts.***, 31 AD3d 409, 818 NYS2d 158 [2006]; ***Onley v Shopwell***, 16 AD3d 565, 792 NYS2d 156 [2005]).

Inasmuch as the evidence submitted by Briarcliffe failed to establish its *prima facie* entitlement to judgment as a matter of law, it is unnecessary to consider whether the plaintiff's opposition papers were sufficient to raise a triable issue of fact.

The Court directs that the claims as to which summary judgment was granted are hereby severed and that the remaining claims shall continue (*see*, CPLR 3212 [e] [1]).

Dated: December 15, 2010

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**