Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES J. GOLIA IA Part 33
Justice

x

CHARLENE J. WAGNER

-against-

WALDBAUM, INC., etc., et al.

x

CYNAMIC INDUSTRIES, LLC

-against-

DUNWELL MAINTENANCE INC.

x

Index Number 18686 2008

Motion Date July 8, 2010

Motion Cal. Numbers 34 and 35

Motion Seq. Nos. 2 and 3

The following papers numbered 1 to 24 read on this motion by defendant/third-party plaintiff Cynamic Industries, LLC (Cynamic Industries) for an order compelling third-party defendant Dunwell Maintenance (Dunwell Maintenance) to defend and indemnify it and for attorney's fees, and for summary judgment dismissing plaintiff's complaint against it; on the motion by defendants Waldbaum, Inc., doing business as Waldbaum's, and The Great Atlantic & Pacific Tea Company, Inc. (collectively referred to as the Waldbaum's defendants) for summary judgment dismissing the complaint and all cross claims against them, or, in the alternative, for an order compelling Cynamic Industries to defend and indemnify them and for attorney's fees; and on the cross motion by plaintiff Charlene J. Wagner (plaintiff) for leave to amend her complaint and for an order striking the answer of Dunwell Maintenance and/or precluding Dunwell Maintenance from offering any evidence at the time of trial.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1-8
Notice of Cross Motion - Affidavits - Exhibits.....	9-12
Answering Affidavits - Exhibits.....	13-17
Reply Affidavits.....	18-24

Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

This is an action to recover for personal injuries plaintiff allegedly sustained in a slip-and-fall incident on July 10, 2008. Plaintiff allegedly fell on premises owned by nonparty Cord Meyer Development Company, leased to the Waldbaum's defendants, and operated by them as a grocery store. The Waldbaum's defendants had hired Cynamic Industries, a cleaning management company, to provide cleaning services in its stores. Cynamic Industries subcontracted the performance of the cleaning work at the subject premises to Dunwell Maintenance.

Cynamic Industries has moved for summary judgment on the issue of its liability and has argued that it did not create the alleged condition which caused plaintiff's fall and did not have actual or constructive notice of it. However, Cynamic Industries was not the owner of the premises at the time of the incident, but was, undisputedly, "a party who enter[ed] into a contract [with the Waldbaum's defendants] to render services" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). While a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party, there are three exceptions to this rule (*id.* at 138-140). Cynamic Industries may potentially be liable to third persons, such as plaintiff, where it either (1) launched a force or instrument of harm while failing to exercise reasonable care in the performance of a contractual duty, (2) where the injured party detrimentally relied upon Cynamic Industries' continuing performance of a contractual obligation, or (3) where Cynamic Industries has entirely displaced another party's duty to maintain the premises safely (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Espinal v Melville Snow Contrs.*, 98 NY2d at 140).

In support of this branch of their motion, Cynamic Industries has relied upon, among other things, plaintiff's deposition testimony and the testimony of Gregory Hill (Hill), Cynamic Industries' vice-president, and the assistant manager of the Waldbaum's defendants' store at the subject premises, Michael McCredo (McCredo). Plaintiff testified that, as she was walking in an aisle of the grocery store, she slipped on a clear liquid and fell to the ground. Hill testified that he was not present at the premises on

the date of the incident and that, while Cynamic Industries provided the machine used to clean the floors at the subject premises, Dunwell Maintenance's employees operated the machine. He further testified that any machine used to clean floors would normally leave a small amount of water behind and that Cynamic Industries instructed Dunwell Maintenance to have its employees mop up any such water when using the machine. Hill also testified that there were several problems reported with the machine at the subject premises, including, that the machine was leaving puddles behind when it was used and that it was leaking, all of which were addressed by Cynamic Industries when it serviced the machine and repaired it.

McCredo testified that an employee of Dunwell Maintenance was cleaning the floors around the time of the incident and that the machine used to clean the floors usually left a puddle when it turned a corner. He further testified that he observed liquid on the floor where plaintiff fell and that he had determined that this liquid had come from the machine used to clean the floors.

Based upon this evidence, Cynamic Industries has failed to satisfy its prima facie burden of eliminating any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Pursuant to a contract, Cynamic Industries was the provider of all of the Waldbaum's defendants' requirements for cleaning and maintenance, which included providing the equipment required to complete the work on the floors. Therefore, an issue of fact exists, at least, as to whether Cynamic Industries launched an instrument of harm that may have caused or contributed to plaintiff's injury (*see Espinal v Melville Snow Contrs.*, 98 NY2d at 140). Thus, the opposition papers to this branch of Cynamic Industries' motion need not be considered (*see Edwards v Great Atl. & Pac. Tea Co., Inc.*, 71 AD3d 721 [2010]).

Cynamic Industries has also moved for an order compelling Dunwell Maintenance to defend, indemnify and reimburse it for attorney's fees. However, since there has been no determination made as to whether Cynamic Industries was negligent, a decision on this branch of its motion would be premature (*see Martinez v City of New York*, 73 AD3d 993, 999 [2010]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808-809 [2009]).

The Waldbaum's defendants have moved for summary judgment dismissing the complaint and all cross claims and have argued that they did not create the condition or have actual or constructive notice of it. In support of their motion, they have relied upon, among other things, the testimony of McCredo. "In a slip-and-fall case, [a] defendant moving for summary judgment has the burden of demonstrating, prima facie, that it did not create the alleged hazardous condition or have actual or constructive notice of its existence for a sufficient length of time to discover and remedy it" (*Edwards v Great Atl. & Pac. Tea Co.,*

Inc., 71 AD3d at 721). "A defendant may be liable for injuries resulting from a recurrent dangerous condition it creates or leaves unattended" (*Erikson v J.I.B. Realty Corp.*, 12 AD3d 344, 345 [2004]). "Even absent proof that a defendant has actual knowledge of the condition on the date of the accident, a defendant's actual knowledge of the recurrent condition constitutes constructive notice of each specific recurrence of it" (*id.*; *see Edwards v Great Atl. & Pac. Tea Co., Inc.*, 71 AD3d at 721).

McCredo testified that an employee of Dunwell Maintenance was cleaning the floors around the time of the incident, that the machine used to clean the floors normally left a puddle consisting of approximately two cups of liquid and that he observed liquid on the floor where plaintiff fell. Based upon this evidence, the Waldbaum's defendants have failed to demonstrate that they did not have actual knowledge of the recurring condition which may have caused or contributed to plaintiff's injury. Thus, they are not entitled to the relief sought.

In the alternative, the Waldbaum's defendants have moved for an order compelling Cynamic Industries to defend and indemnify them and for attorney's fees. Since there has been no determination made as to whether the Waldbaum's defendants were negligent, a decision on this branch of their motion would be premature (*see Martinez v City of New York*, 73 AD3d at 999; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d at 808-809), and they are not entitled to this relief.

Plaintiff has cross-moved for leave to amend her complaint to add Dunwell Maintenance as a party defendant. "Leave to amend pleadings should be freely given provided that the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit" (*Gitlin v Chirinkin*, 60 AD3d 901, 901-902 [2009]; CPLR 3025 [b]). Where there is a lengthy delay in seeking leave to amend a pleading, the party seeking the amendment must proffer a reasonable excuse for the delay and submit an affidavit showing the merit of the proposed amendments (*see Schreiber-Cross v State of New York*, 57 AD3d 881, 884 [2008]; *Delahaye v Saint Anns School*, 40 AD3d 679, 685 [2007]; *Scott v General Motors Corp.*, 202 AD2d 570 [1994]).

Plaintiff now seeks to amend her complaint after the completion of the deposition of Dunwell Maintenance. Her counsel explained that plaintiff learned that it was a Dunwell Maintenance employee who was allegedly operating the machine which may have created the condition which caused her fall at the deposition of Dunwell Maintenance earlier this year. Plaintiff has provided a reasonable excuse for her delay and her attorney's statements in his affidavit has demonstrated that the proposed amendment is not patently devoid of merit, palpably insufficient and does not prejudice or surprise Dunwell Maintenance. Thus, under these circumstances and inasmuch as

Dunwell Maintenance has not opposed this branch of plaintiff's cross motion, she is entitled to the relief sought.

Plaintiff has also cross-moved for an order striking the answer of Dunwell Maintenance and/or precluding Dunwell Maintenance from offering any evidence at the time of trial. Plaintiff has argued that she sought various items of discovery from Dunwell Maintenance and that no response had been received. "The drastic remedy of striking a pleading or dismissal pursuant to CPLR 3126 for failure to comply with court-ordered disclosure should be granted only where the conduct of the resisting party is shown to be willful and contumacious" (*Moray v City of Yonkers*, 76 AD3d 618 [2010]; *Tornheim v Blue & White Food Prods. Corp.*, 73 AD3d 749, 750 [2010]). Plaintiff has failed to make such a showing. In addition, the lesser sanction of precluding Dunwell Maintenance from offering any evidence at trial is inappropriate under the circumstances.

Accordingly, the branch of the motion by Cynamic Industries for an order compelling Dunwell Maintenance to defend and indemnify it and for attorney's fees, is denied. The branch of the motion by Cynamic Industries for summary judgment dismissing plaintiff's complaint against it is denied. The branch of the motion by the Waldbaum's defendants for summary judgment dismissing the complaint and all cross claims against them is denied. The branch of the motion by the Waldbaum's defendants for an order compelling Cynamic Industries to defend and indemnify them and for attorney's fees is denied. The branch of the cross motion by plaintiff for leave to amend her complaint is granted. The branches of the cross motion by plaintiff for an order striking the answer of Dunwell Maintenance and/or precluding Dunwell Maintenance from offering any evidence at the time of trial are denied.

Dated: October 27, 2010

J.S.C.