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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Chestnut

Plaintiff (s),

- v -

Kramak et al

Defendant (s).

INDEX NO. 114867/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

FILED

FEB 03 2012

COUNTY CLERK'S OFFICE

NEW YORK

The following papers, numbered 1 to ____ were read on this motion to/for ____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

Motion (s) decided in accordance with
the accompanying memorandum decision

Once media has completely
cleared for trial

Dated: February 2, 2012

Hon. Judith J. Gische, *J.S.C.*

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------x

DEBORAH CHESTNUT,

Plaintiff,

- against -

ARAMARK FACILITY SERVICES, LLC, and VILLAGE CARE OF NEW YORK, INC.,

Defendants.

----------x

Decision/ Order
Index No. 114867/08
Seq No. 001

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Village Care n/m (3212) w/MCG affirm, exhs	1
Aramark x/m w/FDT affid, exhs	2
Chestnut opp to Village w/TKM affirm, exhs	3
Village reply w/MCG affirm, exhs	4
Village opp to Aramark w/MCG affirm, exhs	5
Aramark reply and further support w/FDT affid	6
Steno minutes 10/20/12	7

Upon the foregoing papers, the decision and order of the court is as follows:

JUDITH J. GISCHE, J.:

In this action to recover monetary damages as the result of injuries plaintiff sustained in a workplace accident, defendant Village Care of New York, Inc. (Village Care) moves for summary judgment (CPLR 3212) dismissing plaintiff's complaint, as well as dismissing co-defendant Aramark Facility Services, LLC,'s (Aramark) cross claim for indemnification and contribution.

Aramark cross-moves for summary judgment (CPLR 3212): (a) dismissing plaintiff's complaint, (b) dismissing all of Village Care's cross claims against it, (c) granting summary judgment on its cross claim against Village Care, and (d) setting the matter down for an inquest on the issue of damages.

These motions were timely brought after plaintiff filed her note of issue. CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004).

For the reasons stated below, both Village Care's motion and Aramark's cross motion are denied.

Background

Plaintiff, an employee of nonparty Rivington House, alleges that on August 18, 2007, she was working as a nurse's aide at 45 Rivington Street, New York, New York (the premises), when she slipped and fell on a slippery liquid substance on the floor of unit 4E.

In her verified amended complaint, plaintiff alleges that both Aramark and Village Care operate and manage the Rivington House and were responsible for performing cleaning and maintenance services at that location; and that, further, Aramark and Village Care were grossly negligent and demonstrated a wanton and willful conscious disregard for plaintiff's safety in causing or allowing a dangerous condition to exist for some time prior to

her accident.

In its answer, Aramark cross-claimed for common-law and contractual indemnification, as well as for contribution from Village Care. Similarly, Village Care cross-claimed against Aramark for contractual and common-law indemnification, and contribution, as well as for breach of contract for the failure to procure insurance.

It is uncontested that, on January 1, 2004, Village Care entered into an Administrative Service Agreement (the Administrative Service Agreement) with Rivington House, in which Village Care was to act as the Administrator, advising and providing administrative, financial, and management consulting services to Rivington House. Additionally, all parties agree that, on January 1, 2006, Village Care entered into a Management Services Agreement (the Management Services Agreement) with Aramark.

Despite these contracts, Village Care asserts that, because, at the time of plaintiff's alleged accident, it did not exercise any of the day-to-day control of Rivington House and was not the owner, operator, lessee or manager of the premises, it is entitled to dismissal of all plaintiff's claims. Additionally, Village Care avers that it had no duty to plaintiff and did not cause or have notice of any defective condition in the premises.

Village Care further asserts that Aramark is not entitled to

indemnity or to contribution from Village Care, as Aramark has not established its own freedom from negligence arising from plaintiff's alleged accident.

In its cross motion, Aramark seeks to dismiss plaintiff's negligence claims, maintaining that it neither had a duty to plaintiff, nor did it cause or have notice of a defective condition on the premises. Additionally, Aramark contends that it is entitled to dismissal of Village Cares' cross claims, as it was not negligent in plaintiff's alleged accident. Finally, Aramark seeks indemnification and defense from Village Care in the instant action based upon the indemnity provision of the Management Services Agreement.

Discussion

Both Aramark and Village Care first seek summary judgment dismissing plaintiff's complaint in its entirety. "To maintain a negligence cause of action, [a] plaintiff must be able to prove the existence of a duty, breach [of that duty] and proximate cause." *Kenney v City of New York*, 30 AD3d 261, 262 (1st Dept 2006). The first requirement is to establish that the alleged wrongdoer owed a duty to such plaintiff. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 (2002).

However, there are three exceptions to this general rule:

(1) where a party contracts with an owner or contractor and then fails to exercise reasonable care in the performance of its duties, (2) the contractor "launche[s] a force or instrument of harm," or (3) the injured worker has an expectation that the contractor will continue to perform its duties and it does not. *Id.* at 140; *see also Church v Callanan Indus.*, 99 NY2d 104 (2002).[1]

Village Care relies on the Administrative Service Agreement, which sets forth an allegedly arm's-length contractual relationship between it and the Rivington House, to aver that it had no duty to plaintiff. However, Village Care admits that it is Rivington House's corporate parent, and that as part of its administrative duties under the Administrative Service Agreement, it took it upon itself to engage Aramark for Management Services, including cleaning. *See* Examination Before Trial (EBT) of Emma DeVito, at 8; *see also* Management Services Agreement (Exh. EVS),

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[1] [T]he court in *Church* identified those circumstances as: first, "where the promisor [sic], while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk;" second, "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation;" and third, "'where the contracting party has entirely displaced the other party's duty to maintain the premises safely.'"

Timmins v Tishman Constr. Corp., 9 AD3d 62, 66 (1st Dept), *lv dismissed* 4 NY3d 739 (2004) (internal citations omitted).

Notice of Cross Motion, Exh. D.

Further, pursuant to the Management Services Agreement, although it was Aramark that was to provide a manager who would coordinate the management and activities of the services employees at the premises, the "[s]ervice [e]mployees will be provided by, and will be employees of, Village Care for Rivington House and for Village Care Nursing Home." *See* Management Services Agreement, Exh. EVS.

All of these factors combined raise material questions of fact as to whether Village Care was an entity that had a duty to plaintiff at the time of her alleged accident.

As respects Aramark, the Management Services Agreement required Aramark to perform certain duties, including making staffing recommendations, tracking employment, conducting performance evaluations, training employees, and holding team meetings. Additionally, the cost of cleaning materials and supplies, including but not limited to toilet tissue, paper towels, and soaps, were included within the management fee paid to Aramark.[2] Finally, the Management Services Agreement contains a chart of how often certain services are to be performed by service employees, including (1) "Nurses/Doctors' Stations," which were to be sanitized seven days per week and spot cleaned

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[2] Village Care was to provide other supplies, including linens.

seven days per week, and (2) common and public corridors, which were to be sanitized five days per week and spot cleaned seven days per week. *See* Management Services Agreement, Exh. EVS, ¶ 6.

Although the Management Services Agreement clearly spells out the scope of Aramark's duties, the proffered testimony gives a conflicting picture of the nature of what Aramark actually did at the premises, as well as the actual identity of the housekeepers' employer. *See* DeVito EBT at 15, 21, 23; *see also* Gabriel Centeno EBT at 24, 25, 28.

Therefore, there remain material questions of fact as to whether Aramark had a duty to plaintiff to maintain a safe workplace.

To defeat a summary judgment motion, however, plaintiff's burden goes beyond just showing that there are material questions of fact regarding a defendant's duty. Plaintiff must also address a defendant's breach of that duty and proximate cause. Here, plaintiff not only that maintains that the floor next to the nurse's station habitually was dirty on weekends (*see* Plaintiff's EBT at 150-151) and that there was not enough cleaning staff during those days of the week. This was verified by plaintiff's co-worker, Marcia Thomas (Thomas), who also testified that she told the nurse manager the day before, as well as the morning of plaintiff's alleged accident, that the floor in the area of the nurses' station was dirty. *See* Thomas EBT at 37-

41.

These facts, in their totality, are sufficient to raise issues of actual or constructive notice of the alleged defective condition that allegedly caused plaintiff's accident.

Therefore, those portions of Village Care's motion and Aramark's cross motion that seek dismissal of plaintiff's complaint are denied.

As respects Aramark's and Village Care's cross claims for indemnification and contribution, Paragraph 6 (a) of the Management Services Agreement, entitled "Indemnity," provides:

> "Each Party will indemnify and hold the other Party ... harmless from any third party liability (including reasonable attorney's fees and court costs) by reason of the negligent acts and omissions of the indemnifying Party...; provided however, that this section will not apply if the occurrence for which the party seeking indemnification hereunder is caused by such Party's sole negligence."

Because there are material questions of fact as to whether or not either Aramark or Village Care was negligent in plaintiff's alleged accident, neither is entitled to either dismissal of the others' cross claims, nor judgment on it.

Finally, as respects the portion of Aramark's cross motion that seeks to dismiss Village Care's cross claim for breach of contract for failure to procure insurance, Paragraph 6 (b), entitled "Insurance," of the Management Services Agreement states: "ARAMARK will carry comprehensive general liability

insurance ... with limits ... of Twenty Five Million Dollars ... combined single limit per occurrence.... Village Care will be included as an additional insured on the foregoing insurance coverages."

Aramark, however, fails to proffer papers to show that it procured such insurance as required. Therefore, that portion of Aramark's cross motion that seeks dismissal of the breach of contract cross claim is denied.

Conclusion

Accordingly, it is hereby

ORDERED that Village Care of New York, Inc.'s motion is denied; and it is further

ORDERED that Aramark Facility Services, LLC's cross motion is denied; and it is further; and it is further

ORDERED that this case is in mediation; once mediation is completed, the case is ready for trial. The plaintiff shall serve a copy of this decision/order on the mediator.

Dated: New York, New York
February 2, 2012

ENTER:

Hon. Judith J. Gische J.S.C.