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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PAUL SINGH and ANDREA SINGH,
Plaintiffs,
v.
LOWE'S HOME CENTERS, LLC, and
DOES 1-50, inclusive
Defendants.

CIV. NO. 2:18-445 WBS AC

MEMORANDUM AND ORDER RE: MOTION
TO DISMISS AND MOTION TO FILE
THIRD AMENDED COMPLAINT

Plaintiffs Paul Singh and Andrea Singh initiated this action against defendants Lowe's Home Centers, LLC ("Lowe's") and Does 1 through 50, bringing claims for assault, battery, intentional infliction of emotional distress, negligence, vicarious liability, and negligent supervision, instruction, and training. (Second Amended Compl. ("SAC") (Docket No. 17).) Presently before the court is defendant Lowe's' Motion to Dismiss plaintiffs' Second Amended Complaint for failure to state a claim upon which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docket No. 18).

I. Factual and Procedural Background

According to the allegations of the SAC, on September

1 24, 2015, plaintiffs went to Lowe's and purchased 6 bags of
2 concrete mix weighing 60 pounds each. (SAC ¶ 1.) Plaintiff
3 Andrea asked an employee ("Employee") to load the bags into
4 plaintiffs' car. (Id. ¶ 2.) When Employee began loading the
5 bags, plaintiff Paul, who was sitting in the driver's seat, heard
6 Employee complain about the weight, and he suggested that
7 Employee seek assistance. (Id. ¶ 4.) Employee refused, and
8 continued to load the bags in such a way as to cause the bags to
9 burst and spew concrete dust all over the inside of plaintiffs'
10 vehicle, as well as on Paul. (Id.) Andrea also noticed that the
11 bags were breaking as Employee threw them into the vehicle.
12 (Id.) When Employee had finished loading the bags, she tapped on
13 the passenger window of plaintiffs' car, smiled, gave a thumbs
14 up, and walked away from the vehicle. (Id. ¶ 5.)

15 At this point, plaintiff Paul became very upset and
16 plaintiffs drove home. (Id. ¶ 6.) Once home, Paul called the
17 Lowe's store manager to complain. (Id. ¶ 7.) The following day,
18 Paul called the Lowe's corporate office to reassert his
19 complaint. Lowe's attempted to compensate plaintiffs by offering
20 them twenty bags of concrete mix for \$0.10 a bag, but plaintiffs
21 refused the offer. (Id.)

22 Shortly after the event, plaintiffs began sneezing and
23 coughing. (Id. ¶ 9.) On October 7, 2015, Paul visited his
24 health care provider complaining of chest pain, shortness of
25 breath, cramping in his chest and left arm, and continued
26 coughing and sneezing. (Id.) On October 23, 2015, Andrea
27 visited her health care provider as well, complaining of
28 wheezing. (Id.) Plaintiffs have continued to seek medical

1 treatment since the event. (Id. ¶ 10.)

2 Additionally, plaintiffs' car has been "deemed unsafe"
3 and totaled by their insurance carrier. (Id. ¶ 8.) On October
4 1, 2015, Jen Holt, the Detail Manager at Larry Geweke Ford,
5 informed plaintiffs that because of "the exposure of asbestos and
6 cement which is now throughout the vehicle, including the
7 headliner and the vent system, it is a health hazard for" her
8 employees to provide services on the vehicle. (Id. ¶ 12.)
9 Because the vehicle was seemingly not repairable, it had to be
10 totaled along with everything in it. (Id. ¶ 12.)

11 On March 5, 2018, Lowe's filed a Motion to Dismiss.
12 (Docket No. 4). Two weeks later, on March 21, 2018, plaintiffs
13 filed a Motion for Leave to File a Second Amended Complaint
14 (Docket No. 9) as well as a Motion to Remand (Docket No. 7). On
15 May 10, 2018, the court denied the Motion to Remand, granted the
16 Motion for Leave, and denied as moot the Motion to Dismiss.
17 (Docket No. 16.) The court ordered plaintiffs to file a Second
18 Amended Complaint within ten days. Plaintiffs complied and filed
19 their Second Amended Complaint on May 16, 2018. (Docket No. 17.)

20 II. Legal Standard

21 On a Rule 12(b)(6) motion, the inquiry before the court
22 is whether, accepting the allegations in the complaint as true
23 and drawing all reasonable inferences in the plaintiff's favor,
24 the plaintiff has stated a claim to relief that is plausible on
25 its face. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The
26 plausibility standard is not akin to a 'probability requirement,'
27 but it asks for more than a sheer possibility that a defendant
28 has acted unlawfully." Id. "A claim has facial plausibility

1 when the plaintiff pleads factual content that allows the court
2 to draw the reasonable inference that the defendant is liable for
3 the misconduct alleged." Id. Under this standard, "a well-
4 pleaded complaint may proceed even if it strikes a savvy judge
5 that actual proof of those facts is improbable." Bell Atl. Corp.
6 v. Twombly, 550 U.S. 544, 556 (2007).

7 III. Discussion

8 A. Assault and Battery

9 The elements necessary to plead a cause of action for
10 assault are: (1) defendant acted with intent to cause harmful or
11 offensive contact, or threatened to touch plaintiff in a harmful
12 or offensive manner; (2) plaintiff reasonably believed he/she was
13 about to be touched in a harmful or offensive manner or it
14 reasonably appeared to plaintiff that defendant was about to
15 carry out the threat; (3) plaintiff did not consent to
16 defendant's conduct; (4) plaintiff was harmed; and (5)
17 defendant's conduct was a substantial factor in causing
18 plaintiff's harm. So v. Shin, 212 Cal. App. 4th 652, 668-69 (2nd
19 Dist. 2013).

20 Here, plaintiffs have failed to plead any facts
21 indicating that they were in fear of an imminent harmful contact
22 or touching. Instead, they seem to allege facts demonstrating
23 that they had no fear, or even knowledge, of an imminent contact
24 or touching. Neither plaintiff exited the car for fear of
25 continued contact with the cement dust while Employee was loading
26 the bags, and in fact plaintiffs continued to drive home without
27 removing the cement bags. Moreover, there is no indication that
28 Employee intended to cause any type of harm or that she was even

1 aware that she was potentially causing harm. Accordingly, the
2 SAC fails to state a claim for assault.

3 The essential elements of a cause of action for battery
4 are similar: (1) defendant touched plaintiff, or caused plaintiff
5 to be touched, with the intent to harm or offend plaintiff; (2)
6 plaintiff did not consent to the touching; (3) plaintiff was
7 harmed or offended by defendant's conduct; and (4) a reasonable
8 person in plaintiff's position would have been offended by the
9 touching. Here, there is no allegation of a touching of
10 plaintiffs' persons, much less than one that was harmful or
11 offensive. And even if the spewing of the dust could be deemed a
12 touching, there is no allegation that it was intentional.
13 Accordingly, the SAC also fails to state a claim for battery.

14 B. Intentional Infliction of Emotional Distress

15 The elements necessary to plead a cause of action for
16 intentional infliction of emotional distress are: (1) extreme and
17 outrageous conduct by the defendant with the intention of
18 causing, or reckless disregard of the probability of causing,
19 emotional distress; (2) the plaintiff's suffering severe or
20 extreme emotional distress; and (3) actual and proximate
21 causation of the emotional distress by defendant's outrageous
22 conduct. Christensen v. Superior Court, 54 Cal. 3d 868, 903
23 (1991). A defendant's conduct is considered outrageous "when it
24 is so extreme as to exceed all bounds of that usually tolerated
25 in a civilized community. The defendant's conduct must be
26 'intended to inflict injury or engaged in with the realization
27 that injury will result.'" Hughes v. Pair, 46 Cal. 4th 1035,
28 1050-51 (2009).

1 Here, even when the court accepts plaintiffs'
2 allegations as true, defendant did not engage in any conduct that
3 could be considered so extreme as to exceed all bounds of conduct
4 tolerated in a civilized community. Accordingly, plaintiffs fail
5 to state a claim of intentional infliction of emotional distress,
6 and this claim must be dismissed.

7 C. Negligence

8 The elements necessary to plead a negligence cause of
9 action are: (1) a legal duty to use due care; (2) a breach of
10 that legal duty; and (3) the breach is the proximate or legal
11 cause of the resulting injury. Ladd v. County of San Mateo, 12
12 Cal. 4th 913, 917 (1996). The allegations of the SAC regarding
13 duty and breach are sufficient. The dispute appears to be solely
14 whether the alleged actions were the cause of the resulting
15 injury. The court concludes that the facts alleged are
16 sufficient to support the element of causation, and therefore the
17 court will deny defendant's Motion to Dismiss the negligence
18 claim.

19 D. Vicarious Liability

20 "[A]n employer may be held vicariously liable for torts
21 committed by an employee within the scope of employment." Mary
22 M. v. City of Los Angeles, 54 Cal. 3d 202, 208, 814 P.2d 1341,
23 1343 (1991). Here, Employee was clearly acting within the scope
24 of her employment as she loaded the concrete mix bags into
25 plaintiffs' vehicle. Because the court has determined that the
26 allegations are sufficient to state a cause of action for
27 negligence against Employee, it further concludes that the
28 Complaint is sufficient to hold Lowe's vicariously liable for

1 Employee's negligence in loading the concrete bags. Accordingly,
2 the court will deny defendant's Motion to Dismiss plaintiffs'
3 vicarious liability claim.

4 E. Negligent Supervision, Instruction, and Training

5 "An employer may be liable to a third person for the
6 employer's negligence in hiring or retaining an employee who is
7 incompetent or unfit." Phillips v. TLC Plumbing, Inc., 172 Cal.
8 App. 4th 1133, 1139 (4th Dist. 2009), citing Roman Catholic
9 Bishop v. Superior Court 42 Cal. App. 4th 1556, 1564-1565 (4th
10 Dist. 1996). "Negligence liability will be imposed on an
11 employer if it knew or should have known that hiring the employee
12 created a particular risk or hazard and that particular harm
13 materializes." Id. "To establish negligent supervision, a
14 plaintiff must show that a person in a supervisory position
15 over the actor had prior knowledge of the actor's propensity to
16 do the bad act." Z.V. v. County of Riverside, 238 Cal. App. 4th
17 889, 902 (4th Dist. 2015).

18 Plaintiffs have failed to plead any facts suggesting
19 that a Lowe's employee was somehow unfit or incompetent, or that
20 Lowe's knew or should have been aware of any such incompetence or
21 propensity to act in a certain way. Instead, plaintiffs simply
22 state that Lowe's owed them a duty of care to properly supervise,
23 instruct, and train Employee. (SAC ¶ 60.) This bare allegation
24 is insufficient to state a cause of action for negligent
25 supervision, instruction, or training, and thus this claim must
26 be dismissed.


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IT IS THEREFORE ORDERED that defendant's Motion to Dismiss (Docket No. 18) be, and the same here is, GRANTED as to the first, second, third, and sixth causes of action. The fourth and fifth causes of action for negligence and vicarious liability remain. Plaintiffs have twenty days from the date this Order is signed to file a Third Amended Complaint, if they can do so consistent with this Order.

Plaintiffs' Motion for Leave to File a Third Amended Complaint (Docket No. 23) is therefore moot.

Dated: July 24, 2018


WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE