Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Christopher Shaffer,

Plaintiff,

-against-

GCA Services Group, Inc., and
GCA Services of North Carolina, Inc.,

Defendants.

Clerk of the Court

Motion Sequence No.: 003; MG; CD
Motion Date: 5/27/17
Submitted: 7/26/17

Index No.: 05342/2014

Attorney for Plaintiff:

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Upon the following papers numbered 1 to 23 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 17; Answering Affidavits and supporting papers, 18 - 21; Replying Affidavits and supporting papers, 22 - 23; it is

ORDERED that the renewed motion by the defendants for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted, and the complaint is hereby dismissed.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained when he slipped and fell in the trailer of a tractor-trailer truck owned by his employer, nonparty Sysco Long Island, LLC (Sysco). It is undisputed that Sysco is in the business of providing food items to restaurants and facilities on Long Island from its 465,000 square foot warehouse and facilities located at 199 Lowell Avenue, Central Islip, New York (the premises). The defendant GCA Services Group, Inc. (GCA) is a cleaning company which had entered into a contract with Sysco to clean the exterior and interior of the warehouse and offices at the premises. In his complaint, the plaintiff alleges, among other things, that the defendants failed in their duty to keep the interior of Sysco's trailers in a reasonably safe condition, and were negligent in performing cleaning, maintenance and/or inspection of the interior of said trailers, and he sets forth causes of

action for negligence and negligent hiring.

By order dated April 13, 2017, the undersigned, noting that the defendants had failed to include a copy of the pleadings, denied the defendants' prior motion for summary judgment without prejudice to renewal upon proper papers. Now, having submitted the pleadings, the defendants renew their motion for summary judgment dismissing the complaint.

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 eliminate any material issue 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]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trail of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

In support of their motion, the defendants submit the pleadings, the contract with Sysco, and the transcripts of the depositions of the parties and five nonparty witnesses. The Court notes that four of the five depositions of the nonparty witnesses are certified but unsigned, and that the defendant has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see* CPLR 3116 [a]). It is determined that the deposition testimony of the nonparty witnesses is admissible, however, as the respective transcripts were certified by the court reporter and the plaintiff does not challenge their accuracy (***Lee v Mason***, 139 AD3d 807, 33 NYS3d 76 [2d Dept 2016]; ***Ciraldo v County of Westchester***, 147 AD3d 813, 47 NYS3d 95 [2d Dept 2017]; *contra* ***Kahan v Spira***, 88 AD3d 964, 932 NYS2d 76 [2d Dept 2011]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]).

At his deposition, the plaintiff testified that he was employed by Sysco as a "delivery agent" to drive pre-loaded tractor-trailer trucks to facilities in Nassau County, Suffolk County and Queens County on the day of his accident, that he only inspects the exterior of the truck before leaving the premises, and that he never saw an employee of GCA on a trailer. He stated that his first stop on March 1, 2013 was in Roslyn, New York, that he removed a four foot by four foot pallet of supplies for the facility from the trailer with a "pallet jack" and placed it on the ground, that he went back up onto the trailer, and that he observed a "mess" where the removed pallet had been located. He indicated that the mess was in the entire four foot by four foot area "inside the rear of the truck where the first pallet was," that the mess looked like dry oatmeal, and that he navigated around the mess to get to the rest of the items to be delivered to the facility. The plaintiff further testified that he reached the "spot ... that I have to get the pieces off of," and that, when he found the next item he needed, he turned around to place it on his hand truck and fell. He stated that when he slipped he saw that there was oil under the oatmeal, that he went inside the facility and called his boss, and that the safety manager for Sysco came and took him back to the warehouse to fill out "accident paperwork." He indicated that Sysco delivers oil and oatmeal to customers, and that he did not know if those items were being delivered that day.

Scott Penchinar testified that he is employed as the account manager for GCA at the premises, that he oversees all of the cleaning done at the premises, and that GCA cleans the entire warehouse. He stated that Sysco employees load the trucks for deliveries, that GCA entered into a contract to clean the premises which includes a scope of services to be provided, and that the contract does not provided for, nor does GCA perform, any cleaning of Sysco's trucks or trailers. He indicated that GCA does sweep and mop the docks where the trailers are loaded, that GCA records indicate an oil spill in the "cooler dock" area the night before the plaintiff's accident, and that GCA uses a product called "spit-fire" to clean oil spills in the warehouse.

At his deposition, nonparty witness Peter Jepson testified that he is employed by Sysco as the transportation supervisor at the premises, the he is responsible for the oversight of Sysco's drivers, including their safety, and that he is aware that the plaintiff had an accident but does not know the details. He stated that GCA cleans the premises, that any Sysco employee who sees a spill in a trailer should be the one to clean it up, and that he has never seen a GCA employee clean a trailer. He indicated that Sysco drivers are supposed to inspect the load and everything on their tractor-trailer before leaving the warehouse, and that they are supposed to remove all empty pallets and sweep out their trailer after completing their deliveries.

Nonparty witness James Franco testified that he was employed by Sysco as its transportation manager at the premises in March 2013, that GCA cleans the premises and keeps the facilities docks "clear," and that GCA does not load Sysco trucks or trailers, or clean the inside or outside of the trailers.

At his deposition, nonparty witness Arlan Edward Peterson testified that he is employed by Sysco as the vice president for operations at the premises, that he is responsible for the entire operations of the premises, and that trailers are loaded at night by Sysco employees. He stated that the warehouse has 26 docking bays, that a metal ramp attached to a dock connects the dock to a trailer to enable loading, and that GCA would clean a ramp if there was a spill on the ramp. He indicated that GCA is not responsible for cleaning trailers, that if a GCA employee was asked to clean a trailer and did so it "would be just a GCA employee helping out a Sysco employee, so to speak." Peterson further testified that Sysco employees use different substances, including kitty litter and oatmeal among other things, to clean oil spills.

Nonparty witness William Jordan testified that he was employed by Sysco as the night warehouse supervisor in March 2013, that he was responsible for directing the employees that build the pallets that are to be delivered the next day, and that he has occasionally witnessed the loading process and observed spills that occurred. He stated that he never saw a GCA employee clean a spill inside or at the back end of a trailer, that a Sysco employee would come into the office to report a spill, and that whoever was in the office at the time "would just get on the loudspeaker and page it." He indicated that Michael Phillips was "mostly" stationed in the office in March 2013.

Nonparty witness Michael Phillips testified that he was employed by Sysco as the night warehouse clerk in 2013, that his work was primarily a "desk job" in the office, and that he learned about the plaintiff's accident when a supervisor asked about the spill "in the truck" that occurred the night before. He stated that he gets on the loudspeaker and calls the GCA employee on duty if a

Sysco employee reports a spill near a warehouse "door," that if a spill occurred on a trailer he would call his manager or night supervisor to inspect and deal with the issue, and that he did not know where the spill that occurred the night before the plaintiff's accident was specifically located. He indicated that he received a radio call about a spill near a door on the night in question, that he contacted GCA, and that he saw a GCA employee acknowledge receipt of the message and head over to the area of the spill. Phillips further testified that he did not know what the GCA employee did that night, that if a GCA employee had to step into a trailer to clean, as opposed to just standing on a dock ramp to clean, he would not call GCA, and that GCA does not clean the "whole interior of the truck." He stated that he was told at the initial training for his job that GCA cleans the warehouse and office areas, the dock ramps, and "a foot to a foot and half into ... the truck," that he was actually told in his training that "any clean ups on the dock ... the dock [ramp] area, anything right there around that vicinity call the maintenance crew to clean it up," and that he has seen GCA employees clean "on the tail end of the truck."

The services order signed by Sysco and GCA effective May 1, 2012 (the contract) provides that it is made pursuant to the master janitorial services agreement (master agreement) between GCA and nonparty Sysco Corporation dated November 2007, and that GCA will provide the cleaning services described in the contract to Sysco Long Island LLC. The contract provides for the cleaning of ten areas within the premises on a varying time schedule. The contract and the master agreement do not include any provision for the cleaning of Sysco's trucks or trailers.

The defendants have established their prima facie entitlement to summary judgment herein. To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Although proximate cause generally is a matter for the jury, "where only one conclusion may be drawn from the established facts ... the question of legal cause may be decided as a matter of law" (***Derdiarian v Felix Constructive trust . Corp.***, 51 NY2d 308, 315, 434 NYS2d 166, 170 [1980]). The plaintiff's testimony establishes that he fell a minimum of four feet inside the trailer which he drove that day. That is, viewing the evidence in the light most favorable to the plaintiff, his fall occurred outside the area where there is an issue of fact as to whether GCA had a responsibility to clean or voluntarily undertook to clean.

In addition, because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (*see* ***Espinal v Melville Snow Contractors, Inc.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731[2001]; ***Pulka v Edelman***, 40 NY2d 781, 782, 390 NYS2d 393 [1976]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations (*see* ***Espinal v Melville Snow Contractors, Inc.***, *supra*). As a general rule, a party who enters into a contract to render services does not assume a duty of care to third parties outside the contract (*see* ***Church v Callanan Industries***, 99 NY2d 104, 111, 752 NYS2d 254 [2002]; ***Espinal v Melville Snow Contractors***, *supra*).

However, the Court of Appeals has identified three situations in which a party who enters into a contract may be held to have assumed a duty of care to non-contracting third persons. That is, tort liability for injuries to a third person may be imposed on a contractor under the following

circumstances: (1) "where the contracting party, in failing to exercise reasonable care in the performance of its duties, 'launched a force or instrument of harm'" (***Espinal v Melville Snow Contrs.***, *supra*, quoting ***H.R. Moch Cooper. v Rensselaer Water Cooper.***, 247 NY 160, 168, 159 NE 896 [1928]), thereby creating an unreasonable risk of harm to others or increasing the existing risk (***Church v Callanan Indus.***, 99 NY2d 104, 752 NYS2d 254 [2002]); (2) where a plaintiff suffered injury as a result of his or her reasonable reliance on the continued performance of the contracting party's obligations (*see* ***Eaves Brooks Costume Cooper. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226, 557 NYS2d 286 [1990]); and (3) where the contracting party undertook a comprehensive and exclusive property maintenance obligation intended to displace the landowner's duty to safely maintain the property (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817 [1994]).

The gravamen of the plaintiff's allegations against GCA is that it failed to exercise reasonable care in cleaning a spill in the subject trailer. It is well settled that launch of a force or instrument of harm has been interpreted as requiring that the contractor create or exacerbate the dangerous condition (***Fung v Japan Airlines Co., Ltd.***, 9 NY3d 351, 850 NYS2d 359 [2007]), and affirmatively left the premises in a more dangerous condition than it was found (***Santos v Deanco Servs., Inc.***, 142 AD3d 137, 35 NYS3d 686 [2d Dept 2016]; ***Rudloff v Woodland Pond Condominium Assn.***, 109 AD3d 810, 971 NYS2d 170 [2d Dept 2013]). The defendants' submission establishes that GCA did not create or exacerbate the condition that allegedly caused the plaintiff's fall.

The defendants have also established their prima facie entitlement to summary judgment dismissing the plaintiff's second cause of action for negligent hiring. "Generally, where an employee is acting within the scope of his or her employment, the employer is liable under the theory of respondeat superior, and the plaintiff may not proceed with a claim to recover damages for negligent hiring, retention, supervision, or training" (***Ambroise v United Parcel Serv. of Am., Inc.***, 143 AD3d 929, 931, 40 NYS3d 444 [2d Dept 2016]; *see also* ***Timothy Mc. v Beacon City Sch. Dist.***, 127 AD3d 826, 7 NYS3d 348 [2d Dept 2015]). The adduced evidence establishes that, even if one accepts the plaintiff's allegation that the GCA employee negligently cleaned the subject oil spill, said employee would have done so in the scope of his employment.

Upon the defendants' establishment of their prima facie entitlement to summary judgment dismissing the complaint, it is incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the motion, the plaintiff submits the affirmation of his attorney, a copy of the accident report that he completed after this incident, and four photographs of the rear end of the subject tractor-trailer. In his affirmation, counsel for the plaintiff contends, among other things, that there is an issue of fact whether GCA had the obligation to clean the "tail end" of the subject truck, and that GCA launched an instrument of harm in the performance of its duties to clean the subject trailer. The plaintiff does not submit any evidence to raise an issue of fact regarding the location of his fall as set forth in his deposition testimony.

In the accident report signed by the plaintiff completed by the plaintiff on March 1, 2013, and in the attached "associate's statement of accident/injury/illness," the plaintiff reports in both locations that "I was at the tail of trailer with liftgate up when I went to take a step I slipped on trailer

floor," and in the statement he added the phrase "and fell." The plaintiff has failed to raise issues of fact requiring a trial of this action whether he fell in an area which GCA had the obligation to clean or voluntarily undertook to clean, or that GCA created or exacerbated the dangerous condition which allegedly caused his fall. In addition, the plaintiff has failed to raise an issue of fact regarding an exception to the general rule that he does not have a cause of action for negligent hiring. Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted.

Dated: 1/29/2018

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

___X___ FINAL DISPOSITION_____ NON-FINAL DISPOSITION