MARY REILLY and RICHARD REILLY, Her Husband,	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY
Plaintiffs	:	CIVIL ACTION – LAW
	:	NO. 15 CV 1250
vs.	:	
MAIN AVENUE REALTY DEVELOPMENT, LP, S.J.H. DISTRIBUTION, INC. a/k/a S.J.H. DISTRIBUTING, INC., TOBACCO ROAD VII, INC., TOBACCO ROAD VII, INC. d/b/a TOBACCO ROAD SMOKE SHOP, and PAUL COSNER t/a COSNER CONSTRUCTION,	:	
Defendants	:	

MEMORANDUM AND ORDER

NEALON, J.

In this premises liability action arising from an alleged fall on ice on commercial property in 2013, the contractor, who was hired by the landowner to remove snow, clear the sidewalks, and salt the parking lot and walkways, has filed a motion for summary judgment asserting that he did not owe a duty of care as a matter of law. The contractor contends that his written service agreement, which was executed in 2009, obligated the contractor to provide the foregoing services whenever there was an accumulation of one

inch of snow, and that "there is no evidence of any recent weather event" that would have required the contactor to clear and salt the property.

The parties' submissions reflect that although the original written agreement required the contractor to plow, shovel and salt in the event of one inch of snow, his course of performance subsequent to 2010 demonstrates that he assumed the duty to perform those services even if there was merely "a dusting" of snow. Since the non-moving parties' materials indicate that there were dustings or trace amounts of snowfall in the six day period leading up to the fall, and it is undisputed that the contractor did not visit the property to provide plowing, clearing or salting services during that time, there are triable issues of fact as to whether the contractor (1) should have attended to and inspected the property prior to the fall and (2) would have discovered and treated the patch of ice if he had done so. Consequently, it cannot be declared as a matter of law that the contractor did not breach a duty of care under the circumstances, and for that reason, his motion for summary judgment will be denied.

I. FACTUAL BACKGROUND

Plaintiffs commenced this slip-and-fall action against defendants on February 4, 2015, after Plaintiff, Mary Reilly ("Reilly"), allegedly "fell on ice on the premises located on and under the control of defendants at 330 Main Street," Dickson City, on February 4, 2013. (Docket Entry No. 1 at ¶¶ 21-22, 24). Reilly has averred that the property in question was owned by defendant, Main Avenue Realty Development, LP ("Main Avenue Realty"), and leased to defendants, S.J.H. Distribution, Inc. a/k/a S.J.H. Distributing, Inc., Tobacco Road VII, Inc., and Tobacco Road VII, Inc. d/b/a Tobacco Road Smoke Shop

("Tobacco Road Smoke Shop"). (Id. at ¶¶ 5, 7-17). Reilly contends that she "was a business invitee of the retail outlet, Tobacco Road Smoke Shop, located at 330 Main Street" at the time of her fall, and that defendant, Paul Cosner t/a Cosner Construction ("Cosner"), "was responsible for the maintenance, including, but not limited to, snow and ice removal, of the property...sidewalks, walkways, paved areas and parking areas located at 330 Main Street." (Id. at ¶¶ 19, 22).

On October 18, 2016, Cosner filed a motion for summary judgment on the ground "that there is no evidence of liability produced to date against [Cosner]." (Docket Entry No. 51 at ¶ 20). Cosner submits that "[t]he evidence and discovery secured to date confirm that [Reilly] allegedly slipped and fell on [an] isolated patch that was tempora[ri]lly located under dripping overhang from the roof of the premises." (Id. at ¶ 8). Cosner argues that "there is no evidence of any recent weather event that would have required [Cosner] to come out and clear the area of any ice and/or snow." (Id. at ¶ 9).

By notice dated October 21, 2016, counsel for the parties were advised by the Deputy Court Administrator that "pursuant to Lacka. Co. R.C.P. 211c," any parties who wished to oppose Cosner's motion for summary judgment were required to file their responsive brief by "no later than November 30, 2016."[1] (Docket Entry No. 55). On November 30, 2016, Tobacco Road Smoke Shop filed a response to Cosner's motion, as well as a brief in opposition to Cosner's request for summary judgment. (Docket Entry

[1]Local Rule 211(c) provides that "[t]he Court Administrator shall assign motions and petitions to the judges of the court on a rotating basis and shall establish a briefing schedule for the parties." Lacka. Co. R.C.P. 211(c). Local Rule 1035.2, which governs motions for summary judgment, states that "[t]he filing of briefs, assignment of the motion for summary judgment, and scheduling of oral argument, if necessary, shall be governed by Lacka. Co. R.C.P. 211(c)-(g)." Lacka. Co. R.C.P. 1035.2(a). If the non-moving party "fails to timely file and serve a brief, that party may be deemed not to oppose the motion or petition and may not be allowed to present oral argument." Lacka. Co. R.C.P. 211(f).

Nos. 60-61). Main Avenue Realty subsequently filed a written joinder "to the response and brief in opposition" of Tobacco Road Smoke Shop. (Docket Entry No. 65). According to Cosner, Reilly does not object to the dismissal of Cosner as a named defendant. (Docket Entry No. 51 at pp. 36-37).

Examining the summary judgment record in the light most favorable to the non-moving parties, it reflects that Main Avenue Realty had a long-standing contractual relationship with Cosner to perform snow plowing and salting services, as well as general repairs, at Main Avenue Realty's properties, including the subject premises at 330 Main Street. Those defendants originally executed a "service agreement" on December 1, 2009, pursuant to which Cosner agreed to perform "general contracting at the physical plant" on 330 Main Street upon request by Main Avenue Realty, and Cosner would "be permitted a reasonable amount of time to respond to and complete the task requested." (Deposition of Stephanie Bewick dated 3/3/16, attached to Docket Entry No. 52 as Exhibit E, at Bewick Exhibit No. 1). Under that agreement, Cosner also agreed to provide the following snow removal services at 330 Main Street:

> All snow plowing, sidewalk clearing and salting will be initially done within two hours of weather events occurring after 12:00 pm (noon) and 8am for weather events occurring after hours as per the following schedule:
>
> a. plowing, sidewalk snow removal when there is accumulation of one (1) inch and for every 3 inches thereafter. Upon subsequent accumulation of 3 inches, [Cosner] will re-snowplow and sidewalk clearing (*sic*) at the charge as outlined below.
> b. salting will be done as needed and billed as described under payments.

(Id. at p. 2). The Main Avenue Realty-Cosner contract had an express term of "one year beginning January 1, 2010 – December 31, 2010," and could "be cancelled within ninety (90) days written notice from [Cosner] or [Main Avenue Realty]." (Id.).

Although the parties' submissions do not indicate whether Main Avenue Realty and Cosner ever renewed their "service agreement" in writing, Cosner testified that their contractor-customer relationship continued, albeit upon modified terms that developed from their course of conduct. Specifically, while the original written contract required Cosner to plow the parking lot, clear the sidewalks and salt those areas whenever there was an accumulation of one inch of snow, their arrangement that was in effect at the time of Reilly's fall obligated Cosner to perform those services even if there was only a "dusting" of snow. In that respect, Cosner testified:

> Q. Let me ask you this, how did you know to come out and perform snow removal...at Main Avenue Realty where the Tobacco shop is?
>
> A. I am contracted to do it whenever it does snow because of the amount of people that go in and out there, *so my previous contracts were an inch or more*, but seeing though that there are so many lawsuits anymore about it, *that it has to be done no matter what.*
>
> Q. Okay. So you come out even if it's less than an inch?
>
> A. *Anything. A dusting.*
>
> Q. Is that the case both in the Scranton Orthopedics lot as well as the Tobacco - -
>
> A. Correct.
>
> Q. - - shop lot?
>
> A. It's all one lot, yeah.

(Deposition of Paul Cosner dated 8/11/16, attached to Docket Entry No. 60 as Exhibit A, at pp. 9-10) (emphasis added).

Cosner was further questioned regarding the amount of precipitation that triggered his duty to visit 330 Main Street to perform snow removal, sidewalk clearing and salting

services.[2] Upon being advised that the daily weather reports reflected "precipitation of .28 inches on [January] 28th and the 29th, .24 inches," and that Cosner's invoices confirmed that he "went out and salted the parking lot on both of those date," Cosner agreed that those amounts were "enough precipitation" to require him to visit 330 Main Street in order to remove snow, clear the sidewalks and salt those areas. (Cosner depo. at p. 19). In fact, Cosner thereafter testified that he would furnish those services even in the absence of any precipitation, and stated:

> Q. Would that be a typical amount that would bring you out to perform snow removal?
>
> [Cosner's counsel]: Object to the form.
>
> A. Yes, and I would be there probably even if it didn't snow just to check the parking lot because they are a very good client and a good customer.

(Id. at pp. 19-20).

On the early evening of February 4, 2013, Reilly travelled to the Tobacco Road Smoke Shop to purchase merchandise. (Deposition of Mary Reilly dated 12/22/15, attached to Docket Entry No. 51 as Exhibit B, at pp. 91-92; Reilly depo., attached to Docket Entry No. 52 as Exhibit B, at pp. 18-19). As she exited the store, she traversed the store's sidewalk to its parking lot, and slipped and fell on a "rough and bumpy" patch of ice that was present "right in front of the walkway" and "on the blacktop" of "the parking lot." (Id. at pp. 20-21, 92-93, 97). An eyewitness, Jamie Richardson, stated that it appeared as though precipitation had dripped from an awning overhanging the walkway

[2]It is undisputed that Cosner provided such services on January 29, 2013, and February 5, 2013, but did not perform any snow removal, sidewalk clearing or salting at 330 Main Street on January 30, 2013, January 31, 2013, February 1, 2013, February 2, 2013, February 3, 2013, and February 4, 2013. (Bewick depo. at p. 8 and Bewick Exhibit No. 2; Cosner depo. at pp. 29-30 and Cosner Exhibit No. 3).

and later refroze on the blacktop to form the icy patch. (Deposition of Jamie Richardson dated 8/11/16, attached to Docket Entry No. 52 as Exhibit C, at pp. 17-20, 23-24). The Tobacco Road Smoke Shop cashier, Melissa Price, prepared an incident report on February 4, 2013, in which she stated that the patch of ice formed "due to water drip from overhang of the roof." (Deposition of Melissa Price dated 3/3/16, attached to Docket Entry No. 51 as Exhibit C, at p. 26).

Main Avenue Realty's representative, Stephanie Bewick, testified that if there "was a leak" or other comparable problem "with the physical structure or the common areas" at 330 Main Street, Main Avenue Realty would "call Mr. Cosner as its contractor to come in and do the repairs that were needed" if "it was a job that would fall under our interpretation of his scope of work." (Bewick depo., at p. 14). Tobacco Road Smoke Shop's cashier admitted that prior to Reilly's fall, she "knew of that issue with the dripping and potential for it freezing into the parking lot," but she never contacted Cosner, nor did she inform any other person, regarding that condition. (Price depo., at pp. 27-30, 45-46, 48). The summary judgment record is devoid of any evidence that Main Avenue Realty, the Tobacco Road Smoke Shop or any other person ever contacted Cosner concerning precipitation dripping from the awning or roof and freezing in the area used by customers to enter or exit the Tobacco Road Shop.

In seeking summary judgment, Cosner argues that "[u]nder his service contract, [he] was required to come out to clear the premises in response to winter weather events," but that the parties' pre-trial discovery "confirms that there was no recent snow fall in the area on the days leading up to [Reilly's] alleged slip and fall incident on February 4, 2013." (Docket Entry No. 52 at pp. 3-4). He further alleges that he was never "requested

to remedy any alleged isolated patch of ice allegedly created under the dripping overhang at any time leading up to [Reilly's] alleged slip and fall." (Id. at p. 4). As a result, Cosner submits that "neither a legal duty on the part of [Cosner] nor a breach of any duty has been established." (Id. at p. 9).

Cosner conceded during his discovery deposition that the official weather reports reflect .31 inches of precipitation on January 30, 2013, and .45 inches of precipitation on January 31, 2013, and that on February 1, 2013, February 2, 2013, February 3, 2013, and February 4, 2013, there were trace amounts of snowfall. (Cosner depo., at pp. 36-37, and Cosner Exhibit Nos. 4-5). The Tobacco Road Smoke Shop maintains that based upon Cosner's admission that he was obligated to service 330 Main Street even for a "dusting" of snow, triable issues of fact exist as to whether Cosner breached his duty of care under the circumstances. (Docket Entry No. 61 at pp. 6-7). It further asserts that since Cosner replaced the roof shingles in August 2010, "a fact finder could determine that Mr. Cosner's actions contributed to" the water effluent that refroze on the blacktop. (Id. at p. 6).

On December 13, 2016, Cosner filed a motion "To Strike Untimely Response to Motion for Summary Judgment" that had been filed by the Tobacco Road Smoke Shop. (Docket Entry No. 63). The gist of Cosner's second motion is that the Tobacco Road Smoke Shop's response should have been filed within thirty days of service of Cosner's motion for summary judgment, but was not filed until November 30, 2016. (Id. at ¶¶ 4-5). In Tobacco Road Smoke Shop's answer to Cosner's motion to strike, it notes that it fully complied with the Deputy Court Administrator's directive of October 21, 2016, by filing a timely brief in opposition on November 30, 2016. (Docket Entry No. 66 at ¶ 5). It further

asserts that Cosner was not prejudiced by the filing of a response on November 30, 2016, forty (40) days prior to the scheduled oral argument on January 9, 2017. (Id. at ¶¶ 2-3).

II. DISCUSSION

(A) STANDARD OF REVIEW

Summary judgment is appropriate only where there is no genuine issue as to any material fact and it is clear that the moving party is entitled to judgment as a matter of law. Eisbacher v. Maytag Corporation, 2017 WL 947606, at *4 (Pa. Super. 2017) (trial court erred in granting summary judgment in premises liability action brought by a business invitee who allegedly slipped and fell on ice). The party moving for summary judgment bears the burden of proving the absence of a genuine issue of material fact and the entitlement to judgment as a matter of law. Stimmler v. Chestnut Hill Hospital, 602 Pa. 539, 554, 981 A.2d 145, 154 (2009); AJT Properties, LLC v. Lexington Ins. Co., 26 Pa. D. & C. 5th 302, 313 (Lacka. Co. 2012). When considering a motion for summary judgment, the record must be viewed in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Feleccia v. Lackawanna College, 2017 WL 727844, at *5 (Pa. Super. 2017); Brogan v. Rosenn, Jenkins & Greenwald, LLP, 35 Pa. D. & C. 5th 500, 512 (Lacka. Co. 2014).

For Cosner to be found liable in this negligence action, the evidence must establish that: (1) Cosner owed a duty of care to Reilly; (2) Cosner breached that duty; (3) Cosner's breach was a factual cause of Reilly's injury; and (4) Reilly suffered actual damage as a result. Walters v. UPMC Presbyterian Shadyside, 144 A.3d 104, 113 (Pa. Super. 2016);

Brown v. Leger, 40 Pa. D. & C. 5th 569, 574 (Lacka. Co. 2014). The existence of a duty on the part of an alleged tortfeasor is a question of law for the court to decide, but if "the plaintiff makes a *prima facie* showing of a duty, the applicable standard of care, whether it was breached, and whether the breach was a cause in fact of the injury are questions of fact for the jury." Walters v. UPMC Presbyterian Shadyside, 144 A.3d 104, 113 (Pa. Super. 2016) (citing K. H. ex rel. H. S. v. Kumar, 122 A.3d 1080, 1094 (Pa. Super. 2015), *app. denied*, 135 A.3d 586 (Pa. 2016)). However, if the plaintiff fails to make a *prima facie* showing of a duty, and is thereby unable to establish one of the essential elements of actionable negligence, the alleged tortfeasor is entitled to the entry of summary judgment. *See* McMahon v. Pleasant Valley West Association, 952 A.2d 731, 735 (Pa. Cmwlth. 2008), *app. denied*, 599 Pa. 702, 961 A.2d 860 (2008); Sedor v. Community Medical Center, 16 Pa. D. & C. 5th 193, 202 (Lacka. Co. 2010).

(B) UNTIMELY RESPONSE TO MOTION FOR SUMMARY JUDGMENT

Cosner first seeks to strike Tobacco Road Smoke Shop's response to the motion for summary judgment on the basis that it was not filed within thirty (30) days of the service of Cosner's motion. (Docket Entry No. 63). Cosner filed his motion for summary judgment on October 18, 2016, and as per the accompanying Certificate of Service, Cosner forwarded that motion to counsel for the opposing parties by ordinary mail. (Docket Entry No. 54). Assuming *arguendo* that Cosner's summary judgment motion was received by counsel for the Tobacco Road Smoke Shop prior to October 30, 2016, Cosner asserts that the response filed by the Tobacco Road Smoke Shop on November 30, 2016, was untimely and must be stricken.

Pennsylvania Rule of Civil Procedure 1035.3 addresses responses to motions for summary judgment, and generally provides that any party opposing a motion for summary judgment "must file a response within thirty days after service of the motion." Pa.R.C.P. 1035.3(a). Although Rule 1035.3 empowers a court to enter judgment in favor of the moving party if the non-moving party neglects to file a timely response to a motion for summary judgment, the court is not required to do so. Devine v. Hutt, 863 A.2d 1160, 1169 (Pa. Super. 2004); Com. ex rel. Fisher v. Jash Intern., Inc., 847 A.2d 125, 130 (Pa. Cmwlth. 2004); Wells Fargo Equipment Finance, Inc. v. Knitney Lines, Inc., 34 Pa. D. & C. 5th 46, 52-53 (Lacka. Co. 2013). Furthermore, under Rule 126, "[t]he court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." Pa.R.C.P. 126. "Procedural rules are not ends in themselves, and rigid application of the Rules does not always serve the interests of fairness and justice." Green Acres Rehabilitation and Nursing Center v. Sullivan, 113 A.3d 1261, 1272 (Pa. Super. 2015).

Cosner has not identified any prejudice that he allegedly suffered as a result of the Tobacco Road Smoke Shop's filing of its response approximately one week late and forty days prior to the scheduled oral argument. Not unlike many responses to motions for summary judgment, the Tobacco Road Smoke Shop's response consists largely of general denials or claims that Cosner's averments constitute conclusions of law to which no response is required. (Docket Entry No. 60). The Tobacco Road Smoke Shop's opposing brief is of much greater value in that it delineates the Tobacco Road Smoke Shop's responses and arguments with more detail and clarity, and even attaches Cosner's deposition transcript and deposition exhibits which Cosner presumably did not file due to

the Nanty-Glo Rule barring the moving party from securing judgment based upon the movant's own testimonial affidavit or deposition. *See* LSF8 Master Participation Trust ex rel. Caliber Home Homes, Inc. v. Tanana, 37 Pa. D. & C. 5th 414, 422 (Lacka. Co. 2014). Therefore, the *de minimus* untimeliness of the Tobacco Road Smoke Shop's response does not warrant the entry of summary judgment against it, and Cosner's motion to strike will be denied so that the merits of the summary judgment motion will be addressed.

(C) DUTY OF CARE

Cosner contends that he is entitled to summary judgment since, as a matter of law, he did not breach any duty under the Main Avenue Realty–Cosner service agreement. A contract may create a duty of care that requires a party to the agreement to use due care in performing a contract for the benefit of the other party to the agreement, as well as for third parties who are strangers to the contract. *See* Gilbert v. Korvette's, Inc., 457 Pa. 602, 616-617, 327 A.2d 94, 102 (1974) (under an agreement with a building owner, an escalator company owed a duty of care to all persons using the escalator); Heath v. Huth Engineers, Inc., 279 Pa. Super. 90, 92, 420 A.2d 758, 759 (1980) (based upon its contract with a sewer authority to supervise and inspect work and to assist in safeguarding the authority against potential hazards, an engineering company owed a duty to a contractor's employee who was killed as a result of the collapse of a trench). The duty of care does not arise directly from the contract itself, but, rather, is imposed by law as a result of the nature of the undertaking in the contract. Cantwell v. Allegheny County, 506 Pa. 35, 40, 483 A.2d 1350, 1353 (1984); Hawthorne v. Dravo Corp., Keystone Division, 313 Pa. Super. 436, 442, 460 A.2d 266, 269 (1983).

The parties' course of performance is always relevant in interpreting the provisions of a contract. Com. ex. rel. Kane v. UMPC, 129 A.3d 441, 464 (Pa. 2015); Matthews v. Unisource Worldwide, Inc., 749 A.2d 219, 222 (Pa. Super. 2000), *app. denied*, 568 Pa. 664, 795 A.2d 977 (2000). In fact, "the course of conduct of a party...may be the strongest indication of the intention of the parties to the agreement." Snook v. I. W. Levine & Co., Inc., 800 A.2d 374, 378 (Pa. Cmwlth. 2002). A written agreement may always be modified by subsequent conduct of the parties indicating a new or different intent. *See* ADP, Inc. v. Morrow Motors, Inc., 969 A.2d 1244, 1249-1250 (Pa. Super. 2009); Brinich v. Jencka, 757 A.2d 388, 399 (Pa. Super. 2000), *app. denied*, 565 Pa. 634, 771 A.2d 1276 (2001). "Moreover, irrespective of the presence or absence of a contractual duty, a defendant may assume a duty by a course of conduct" pursuant to Sections 323 and 324A of the Restatement (Second) of Torts which have both been adopted in Pennsylvania.[3] Boyanoski ex rel. Estate of Kane v. Gould, Inc., 46 Pa. D. & C. 4th 164, 171-172 (Lacka. Co. 1999) (citing Henry v. First Federal Savings & Loan Association, 313 Pa. Super. 128, 134 n.3, 459 A.2d 772, 775 n.3 (1983) and Cantwell, supra).

Under the service agreement, Cosner was retained to perform "general contracting" at 330 Main Street upon specific request by Main Avenue Realty, which agreed to afford

[3] Section 323 provides that one who undertakes, gratuitously or for consideration, to render services to another which [s]he should recognize as necessary for the protection of the other's person or things, may be liable to that person for physical harm resulting from the failure to exercise reasonable care to perform the undertaking if (a) the failure to exercise such care increases the risk of harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. Hill v. Slippery Rock University, 138 A.3d 673, 677 (Pa. Super. 2016), *app. denied*, 2017 WL 36397 (Pa. 2017). Section 324A contains language identical to Section 323, except that it extends the negligent actor's potential liability to third persons. *See* Malanchuk v. Sivchuk, 148 A.3d 860, 868-869 (Pa. Super. 2016) (*en banc*).

Cosner "a reasonable amount of time to respond to and complete the task requested." Main Avenue Realty's representative confirmed that if there "was a leak" or similar problem involving "the common areas" at 330 Main Street, Main Avenue Realty would "call Mr. Cosner as its contractor to come in and do the repairs that were needed." (Bewick depo., at p. 14). Thus, pursuant to the language of the service contract and the parties' course of performance, Cosner was not obligated to undertake any repairs unless he was contacted by Main Avenue Realty and requested to do so. There is no indication whatsoever in the summary judgment record that Main Avenue Realty, the Tobacco Road Smoke Shop or any other entity or person ever contacted Cosner to request that he remedy or address the issue involving the leakage of precipitation from the sidewalk awning. As a consequence, Cosner did not have a duty to repair the roof at issue to prevent water from dripping onto the sidewalk.

The same cannot be said, however, with respect to Cosner's duty to clear ice from the walkway and parking lot and to salt those areas. Although the original 2010 service agreement obligated Cosner to plow, clear and salt the parking lot and sidewalk whenever there was an accumulation of one inch of snow, Cosner's own testimony reflects that his post-2010 course of performance required him to provide those services even if there was only a "dusting" of snow. The weather reports contained in the record indicate that there were at least trace amounts of snowfall on January 30, 2013, January 31, 2013, February 1, 2013, February 2, 2013, February 3, 2013, and February 4, 2013. Notwithstanding that fact, Cosner did not visit 330 Main Street on any of those days to remove snow, clear the sidewalks and salt those areas.

Based upon the record submitted by the parties, a triable issue of fact exists as to whether Cosner would have observed and treated the ice patch at issue if he had visited the property on February 4, 2013, to address the "dusting" of snowfall from January 30, 2013, through February 4, 2013. The prospect of such a finding by the jury is enhanced by Cosner's admission during his deposition testimony that he previously "observed melting of the snow from the roof area" at 330 Main Street. (Cosner depo., at p. 14). When the record is viewed in the light most favorable to the non-moving parties, and all doubts concerning the existence of a genuine issue of material fact are resolved against Cosner, it cannot be declared as a matter of law that he did not breach a duty of care under the circumstances. Accordingly, Cosner's motion for summary judgment will be denied.

MARY REILLY and RICHARD REILLY, Her Husband, Plaintiffs vs. MAIN AVENUE REALTY DEVELOPMENT, LP, S.J.H. DISTRIBUTION, INC. a/k/a S.J.H. DISTRIBUTING, INC., TOBACCO ROAD VII, INC., TOBACCO ROAD VII, INC. d/b/a TOBACCO ROAD SMOKE SHOP, and PAUL COSNER t/a COSNER CONSTRUCTION, Defendants	:	IN THE COURT OF COMMON PLEAS OF LACKAWANNA COUNTY CIVIL ACTION – LAW NO. 15 CV 1250

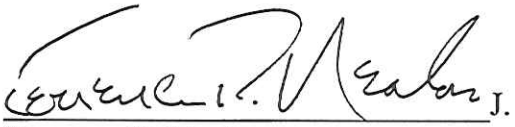
ORDER

AND NOW, this 31st day of March, 2017, upon consideration of the "Motion for Summary Judgment of Defendant, Paul Cosner t/a Cosner Construction," the "Motion of Defendant, Paul Cosner t/a Cosner Construction, to Strike Untimely Response to Motion for Summary Judgment filed by Co-Defendant, S.J.H. Distribution a/k/a S.J.H. Distributing, Inc., S.J.H. Distribution, Inc., a/k/a/ S.J.H. Distributing, Inc. t/b/a Tobacco Road Smoke Shop, Tobacco Road VII, Inc., Tobacco Road VIII, Inc. d/b/a Tobacco Road Smoke Shop, and Tobacco Road Smoke Shop," the memoranda of law submitted by the parties, and the oral argument of counsel, and based upon the reasoning set forth in the foregoing Memorandum, it is hereby ORDERED and DECREED that:

1. The "Motion of Defendant, Paul Cosner t/a Cosner Construction, to Strike Untimely Response to Motion for Summary Judgment filed by Co-defendant, S.J.H. Distribution a/k/a S.J.H. Distributing, Inc., S.J.H Distribution, Inc. a/k/a S.J.H. Distributing, Inc. d/b/a Tobacco Road Smoke Shop, Tobacco Road VIII, Inc., Tobacco Road VIII, Inc. d/b/a Tobacco Road Smoke Shop, and Tobacco Road Smoke Shop" is DENIED; and

2. The "Motion for Summary Judgment of Defendant, Paul Cosner t/a Cosner Construction," is DENIED.

BY THE COURT:



J.
Terrence R. Nealon

cc: *Written notice of the entry of the foregoing Memorandum and Order has been provided to each party pursuant to Pa. R. C. P. 236 (a)(2) and (d) by transmitting time-stamped copies via electronic mail to:*

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