

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4
Justice

LUIS CARPIO-SANCHEZ, x

Plaintiff(s)

-against-

SUSAN NAKAMURA,

Defendant(s)

SUSAN NAKAMURA, x

Third-Party Plaintiff(s)

-against-

JIM ARVANITIS, RODOS, LLC, RODOS
INTERIOR RENOVATIONS, MEK FINANCIAL
SERVICES CORP, RUTGERS CASUALTY
INSURANCE COMPANY, EUROPEAN INSURANCE
COMPANY, STATE FARM INSURANCE COMPANY,
STATE FARM FIRE AND CASUALTY INSURANCE
COMPANY.

Third-Party Defendant(s)

_____ x

The following papers numbered 1 to 108 read on this motion by third-party defendants State Farm Fire and Casualty Company and State Farm Insurance Company (collectively State Farm) pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint and all cross claims, or in the alternative pursuant to CPLR §§ 603 and

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Number 7901 2009

Motion
Date August 16, 2011

Motion
Cal. Numbers 6-11

Motion Seq. Nos. 6-11

1010, severing the third-party action against State Farm Fire and Casualty Company and State Farm Insurance Company; on the motion by third-party defendants Rutgers Casualty Insurance Company (Rutgers) and American European Group, Inc. s/h/a European Insurance Company pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint and all cross claims; on the motion by the defendant/third-party plaintiff Susan Nakamura pursuant to CPLR §3212 for summary judgment dismissing the complaint; on the motion by third-party defendant MEK Financial Services (MEK) pursuant to CPLR §3212 for summary judgment dismissing the complaint and all other claims interposed against it, or in the alternative pursuant to CPLR §603, severing the eleventh cause of action and any other claims against MEK from the main action; on the motion by the defendant/third-party plaintiff Susan Nakamura compelling third-party defendants MEK, Rutgers, European Insurance Company, State Farm Insurance Company and State Farm Fire and Casualty Company to appear for depositions and staying a decision on any motion for summary judgment made by the third-party defendants until discovery in the third-party action is complete; on the motion by the defendant/third-party plaintiff Susan Nakamura pursuant to CPLR §3212 for summary judgment for common law indemnification over Jim Arvanitis, Rodos LLC and Rodos Interior Renovations; on the cross motion by the plaintiff for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) against the defendant Susan Nakamura; on the cross motion by defendant/third-party plaintiff Susan Nakamura pursuant to CPLR §3126 striking the answer of third-party defendants Jim Arvanitis, Rodos LLC and Rodos Interior Renovations for failing to respond to third-party plaintiff’s discovery demands and for failing to appear for court ordered depositions and for willfully, contumaciously, and systemically frustrating the discovery process and setting this matter down for an assessment of costs and attorneys fees; and on the cross motion by defendant/third-party plaintiff Susan Nakamura for an order declaring that State Farm Fire and Casualty Company has a duty to defend and indemnify the defendant in the underlying action and a declaration that State Farm Fire and Casualty Company has to reimburse the defendant for the costs, expenses, attorneys’ fees incurred by her as a result of State Farm Fire and Casualty Company’s failure to defend her in the underlying action or alternatively for an order compelling State Farm Fire and Casualty Company to defend and indemnify the defendant in the underlying action, compelling State Farm Fire and Casualty Company to reimburse the defendant for costs, expenses and attorneys’ fees incurred by her as a result of their failure to defend her and setting this matter down for a hearing to determine defendant’s costs and attorneys’ fees.

	<u>Papers Numbered</u>
Notices of Motion - Affidavits - Exhibits.....	1-26
Notices of Cross Motion - Affidavits - Exhibit.....	27-39

Answering Affidavits - Exhibits.....	40-82
Reply Affidavits.....	83-108

Upon the foregoing papers it is ordered that the motions and cross motions are consolidated for purposes of this disposition and are determined as follows:

This is an action to recover money damages for injuries allegedly suffered as a result of a construction accident. The accident occurred on July 30, 2008, at the premises located at 371 Carlton Avenue, Brooklyn, NY. At the time of the accident the premises was owned by defendant/third-party plaintiff Susan Nakamura [Nakamura].

The plaintiff testified at an examination before trial. He testified that he worked as a laborer and that he was employed by Mr. Petro. He was paid by check with the name Rodos on it. He testified that the accident occurred when he was working outside. He testified that a co-worker asked him to come to the second floor balcony to help in removing blocks misplaced on the third floor balcony. To reach the third story balcony, a scaffold was erected on the second story balcony. The scaffold had a plywood platform. While he was standing on the platform of the scaffold, the platform moved, which caused him to lose his balance and fall to the ground. The plaintiff testified that the scaffold was unsecured and did not have railings.

Defendant Nakamura testified at an examination before trial that she purchased the premises in August, 2007 with her husband. At the time of the purchase the house was a two-family house with three floors and a basement. Ms. Nakamura testified that she retained Jim Arvanitis of Rodos LLC to completely renovate the structure so that her children could live in her home with her and her husband. She testified that she wanted to convert the home to a one-family green, energy efficient house. During the course of the renovation she went to the house every Wednesday to meet with Mr. Arvanitis and the architect. She testified that she did not direct or control the work of any of the workers. She testified that pursuant to her contract with Jim Arvanitis, Mr. Arvanitis was required to obtain a policy of insurance to cover the work being performed and to add her as an additional insured. Mr. Arvanitis provided her with a copy of a certificate of insurance issued by MEK which indicates that a policy of insurance was procured on behalf of Rutgers Insurance Company and defendant Nakamura was listed as an additional insured. She further testified that she used an insurance agent to procure her own homeowner's insurance.

Defendant Nakamura also testified that she first became aware of the accident in November, 2008, when she was contacted by letter from a lawyer representing the plaintiff. After receiving this letter she handed it over to Mr. Arvanitis of Rodos LLC, so he could take care of it. She believed that she was covered under an insurance policy issued to Rodos LLC

as an additional insured. Ms. Nakamura received a second letter from counsel representing the plaintiff in March of 2009. She stated that once again she gave Mr. Arvanitis the letter and testified that Mr. Arvanitis represented to her that the matter was being taken care of. She testified that she did not notify State Farm, her insurer, after receiving these letters. Ms. Nakamura testified that she was served with the summons and complaint in this action in the summer of 2009. Once again she gave it to Mr. Arvanitis. She stated that he informed her that the matter was being taken care of and had been settled. She testified that she was worried but believed she was covered under the Rodos LLC's policy. Ms. Nakamura still did not provide a copy of the summons and complaint to State Farm. She further testified that she then received a motion for a default judgment and again forwarded the documents to Mr. Arvanitis and did not forward these items to State Farm. Ms. Nakamura received notice of a default judgment against her in or around October, 2009. At that point she retained counsel. During her deposition, Ms. Nakamura reviewed and affirmed an affidavit that she submitted to vacate her default judgment. In that affidavit Ms. Nakamura further stated that she received a letter from Rutgers Insurance Company denying coverage for this action and that she was very concerned but still did not forward any information or give notice to State Farm. She contacted State Farm the first week of November, 2009.

Rutgers had issued Rodos LLC a commercial general liability policy effective October 22, 2005 through October 22, 2006. The policy was renewed two subsequent times. The renewed policy was in effect from October 2, 2007 to October 2, 2008. The policy contained an Employee Exclusion, precluding coverage for bodily injury to any employee, contractor and employees of contractor of any insured. Ms. Nakamura was added as an additional insured. Rutgers disclaimed coverage to Rodos LLC and Nakamura.

State Farm has moved for an order declaring that it is not required to provide a defense and/or indemnity to defendant/third-party plaintiff Nakamura. Under the insurance policy, the defendant was required to give notice of the occurrence as soon as practicable. "The duty to give notice arises when, based on the information available an insured 'could glean a reasonable possibility of the policy's involvement'" (*Figueroa v Utica Natl. Ins. Group*, 16 AD3d 616, 617 [2005], quoting *Paramount Ins. Co. v Rosedale Gardens*, 293 AD2d 235 [2002]). Here the evidence establishes that Ms. Nakamura did not give prompt notice of the occurrence and lawsuit to State Farm. Therefore, Ms. Nakamura did not comply with the conditions precedent and is not entitled to coverage from State Farm. Inasmuch as the notice sent by Ms. Nakamura was sent almost a year after the plaintiff received notice of the claim, it is untimely as a matter of law (*see Seneca Ins. Co. v W.S. Distrib.*, 40 AD3d 1068 [2007]; *City of New York v St. Paul Fire & Marine Ins. Co.*, 21 AD3d 978 [2005]; *Winstead v Uniondale Free School Dist.*, 201 AD2d 721 [1994]).

The opponent of a summary judgment motion must present admissible evidence that is sufficient to raise an issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Defendant Nakamura argues that her late notice should be excused based upon the representation made to her by Mr. Arvanitis. However, the belief that Mr. Arvanitis would handle the issue did not eliminate Ms. Nakamura's obligation to provide notice to State Farm (*see Leigh Constr. Group, Inc. v Lexington Ins. Co.*, 70 AD3d 1430 [2010]). Contrary to defendant Nakamura's contention, State Farm's disclaimer was proper and complied with CPLR §3420(d). Additionally, the argument by the defendant Nakamura that State Farm's motion is improper as it was barred by a stipulation staying the case, is without merit. The stipulation was not executed by counsel for all parties, was not so-ordered, and no stay was ever entered. In fact, Nakamura made two summary judgment motions herself. Furthermore, no additional discovery is necessary to resolve the coverage issue (§3212[f]). Coverage was denied based on the late notice by the defendant. There are no issues of material fact as to the time line concerning when Ms. Nakamura received notice and when she gave notice to State Farm. Any deposition of State Farm is not required. Therefore, the motion by State Farm is granted and the third-party complaint against State Farm is dismissed.

Third-party defendants Rutgers and its corporate parent American European Insurance Group have moved for summary judgment dismissing the third-party complaint. Rutgers has also validly disclaimed coverage and its summary judgment motion must be granted. An insurer's duty to defend is not triggered when the only possible interpretation of the allegations against the insured is that the factual predicate for the claim falls wholly within a policy exclusion (*Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131 [2006]; *Global Constr. Co., LLC v Essex Ins. Co.*, 52 AD3d 655 [2008]; *Bruckner Realty, LLC v County Oil Co., Inc.*, 40 AD3d 898 [2007]). Here, the plain meaning of the exclusion invoked by Rutgers was that the policy did not provide coverage for damages arising out of bodily injury sustained by an employee of any insured in the course of his or her employment (*Howard & Norman Baker, Ltd. v American Safety Cas. Ins. Co.*, 75 AD3d 533 [2010]). Since the plaintiff was an employee of one of the insureds, his injury is not covered by the policy. This exclusion does apply to Nakamura and is not, as argued by Nakamura, limited to injuries sustained by her employees. The policy exclusion states that it applies to all employees of any of the insured. Here, the plaintiff was the employee of Rodos LLC, an insured, and thus it applies to Nakamura as an additional insured (*Id.*). The argument put forth by Nakamura that such an employee exclusion should be deemed void as a matter of law as the exclusion must on its face be found to be fraudulent, is without merit. Furthermore, Nakamura never gave notice to Rutgers. Inasmuch as an additional insured has an independent obligation to give notice, Rutgers also validly disclaimed coverage to Nakamura based upon her failure to give notice, (*see 23-08-18 Jackson Realty Assoc. v Nationwide Mut. Ins. Co.*, 53 AD3d 541 [2008]).

Defendant Nakamura also opposes the motion on the same grounds as she opposed the motion by State Farm, that there was a stipulation staying the case until the completion of discovery. As discussed above, the stipulation was never executed by all parties. Furthermore, no additional discovery is necessary to resolve this motion (CPLR §3212[f]).

Defendant Nakamura has moved for summary judgment dismissing the complaint. Owners and contractors are subject to strict liability under Labor Law §§ 240(1) and 241(6) except owners of one- and two-family dwellings who contract for, but do not direct or control the work (*see Ramirez v Begum*, 35 AD3d 578 [2006]; *Uddin v Three Bros. Constr. Corp.*, 33 AD3d 691 [2006]). Here, defendant Nakamura established her prima facie entitlement to judgment as a matter of law. The house where the subject accident occurred was a single-family dwelling. Further, the evidence established that defendant Nakamura did not supervise, direct or control the work of the plaintiff and in fact she was not at the premises when the plaintiff was there. Therefore, defendant Susan Nakamura is entitled to the protection of the homeowner's exemption and is not liable under Labor Law §§ 240(1) and 241(6). In opposition, the plaintiff has failed to raise a triable issue of fact.

For an owner to be liable under Labor Law §200 or common-law negligence, the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. Defendant Nakamura established her prima facie entitlement to judgment as a matter of law dismissing these claims. The evidence submitted by defendant Nakamura established as a matter of law that she had no actual or constructive knowledge of any allegedly defective condition on the premises and exercised no control or supervision over the work of the plaintiff (*see Ortega v Puccia*, 57 AD3d 54 [2008]; *Lopez v Port Auth. of New York & New Jersey*, 28 AD3d 430 [2006]; *Parisi v Loewen Dev. of Wappingers Falls, LP*, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise a triable issue of fact.

In light of the decision granting defendant Nakamura's motion for summary judgment dismissing the complaint, the plaintiff's cross motion for summary judgment on the issue of liability is denied.

The defendant/third-party plaintiff Nakamura has also moved for summary judgment for indemnity against third-party defendants Arvanitis, Rodos LLC and Rodos Interior Renovations. However, this motion was not made within 120 days of the filing of the note of issue and the plaintiff did not seek leave of court or give a reasonable excuse for the delay in making the cross motion (*see Miceli v State Farm Mut. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648 [2004]). The motion, therefore, is untimely and must be denied as a matter of law. A court has no discretion to entertain even a meritorious summary judgment motion (*John P. Krupski & Bros., Inc. v Town Bd. of Town of Southhold*, 54 AD3d

899 [2008]). The excuse put forth by Nakamura in reply, that since she made multiple motions the second motion she put forth should be considered by this Court, is not reasonable. First, this excuse was only given in reply. Second, multiple summary judgment motions made by the same party are not permissible. In any event, inasmuch as this motion was not made on nearly identical grounds as the timely motion, it will not be considered (*see Podlaski v Long Is. Paneling Ctr. of Centereach*, 58 AD3d 825 [2009]; *Bickelman v Herrill Bowling Corp.*, 49 AD3d 578 [2008]).

Third-party defendant MEK's motion for summary judgment dismissing the third-party complaint is granted. MEK has established its prima facie entitlement to summary judgment. Insurance brokers only have a duty to their customer and do not owe a duty to any alleged additional insured (*see American Ref-Fuel of Hempstead v Resource Recycling*, 248 AD2d 420 [1998]). In opposition, Nakamura has failed to establish that she was an intended third-party beneficiary under any contract between Rodos LLC and MEK (*see Superior Ice Rink, Inc. v Nescon Contr. Corp.*, 40 AD3d 963 [2007]). Here, MEK was asked to name Nakamura as an additional insured on the Rodos LLC's existing liability policy. Based on this request, Nakamura was added to Rodos LLC's liability policy. There never was a request for any different or supplemental coverage and MEK never had any communication with Nakamura. Furthermore, as discussed above, the argument that there was a stipulation staying the case until the completion of discovery, is without merit as this stipulation was never executed and was not so-ordered.

The motion by defendant Nakamura to compel the depositions of MEK, Rutgers, European and State Farm and staying a decision on the summary judgment motions, is denied. The defendant/third-party Nakamura did not move within 20 days after the filing of the note of issue to vacate the Note of Issue (22 NYCRR 202.21). Inasmuch as she failed to show unusual or unanticipated circumstances and that she would suffer substantial prejudice without the discovery, her motion must be denied (*Tirado v Miller*, 75 AD3d 153 [2010]; *Singh v City of New York*, 68 AD3d 1096 [2009]). Additionally, the defendant has not presented evidence that the requested discovery is necessary. In fact, in light of the granting of the summary judgment motions made by State Farm, Rutgers and MEK, further discovery against those parties is unnecessary.

Next the Court turns to the cross motion by defendant/third-party plaintiff Nakamura for an order declaring that State Farm Fire and Casualty Company has a duty to defend and indemnify the defendant/third-party plaintiff Nakamura. In light of the above discussion granting summary judgment to State Farm dismissing the third-party complaint, the cross motion is denied.

Finally, the Court turns to defendant third-party plaintiff Nakamura's cross motion to strike the answers of the third-party defendants Jim Arvanitis, Rodos LLC and Rodos Interior Renovations. The drastic remedy of sanctions including striking of the pleadings or precluding offering evidence pursuant to CPLR § 3126 is not appropriate in this case as the third-party plaintiff has not shown that the third-party defendants' failure to comply with the discovery demands was willful, contumacious or in bad faith (*see Kesar v Green Ridge Enters.*, 30 AD3d 471 [2006]; *Denoyelles v Gallagher*, 30 AD3d 367 [2006]; *Foncette v LA Express*, 295 AD2d 471 [2002]).

Accordingly, the motion by third-party defendants State Farm Fire and Casualty Company and State Farm Insurance Company pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint and all cross claims is granted and the third-party complaint against third-party defendants State Farm Fire and Casualty Company and State Farm Insurance Company is dismissed.

The motion by third-party defendants Rutgers Casualty Insurance Company and American European Group, Inc. s/h/a European Insurance Company pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint and all cross claims is granted and the third-party complaint against third-party defendants Rutgers Casualty Insurance Company and American European Group, Inc. is dismissed.

The motion by defendant/third-party plaintiff Susan Nakamura pursuant to CPLR §3212 for summary judgment dismissing the complaint is granted and the complaint is dismissed.

The motion by third-party defendant MEK Financial Services pursuant to CPLR §3212 for summary judgment dismissing the complaint and all other claims interposed against it is granted and the third-party complaint against third-party defendant MEK Financial Services is dismissed.

The motion by defendant/third-party plaintiff Nakamura compelling third-party defendants MEK, Rutgers, European Insurance Company, State Farm Insurance Company and State Farm Fire and Casualty Company to appear for depositions and staying a decision on any motion for summary judgment made by the third-party defendants until discovery in the third-party action is complete, is denied.

The motion by defendant/third-party plaintiff Nakamura pursuant to CPLR §3212 for summary judgment for common law indemnification over Jim Arvanitis, Rodos LLC and Rodos Interior Renovations, is denied.

The cross motion by plaintiff for summary judgment on the issue of liability under Labor Law §§ 240(1) and 241(6) against defendant Nakamura is, denied.

The cross motion by defendant/third-party plaintiff Nakamura for an order declaring that State Farm Fire and Casualty Company has a duty to defend and indemnify defendant in the underlying action , is denied.

The cross motion by defendant/third-party plaintiff Nakamura pursuant to CPLR §3126 striking the answer of third-party defendants Jim Arvanitis, Rodos LLC and Rodos Interior Renovations for failing to respond to third-party plaintiff's discovery demands and for failing to appear for court ordered depositions and for willfully, contumaciously, and systemically frustrating the discovery process and setting this matter down for an assessment of costs and attorneys fees, is denied.

Dated: November 4, 2011

J.S.C.