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SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY
Present:
HON. ANTHONY L. PARGA
Justice
----------X PART 9

BLUE DIAMOND GROUP CORP.,

Plaintiff,

-against-

INDEX NO. 22040/08
MOTION DATE: 7/16/10
SEQ NOS: 04,05, 06,07,08,010

KLIN CONSTRUCTION GROUP, INC. and CHUNYU JEAN WANG,

Defendants/Third Party Plaintiffs.,

-against-

COLONY INSURANCE COMPANY, NORTHSIDE TOWER REALTY, LLC, THE SCHER LAW FIRM, LLP and JONATHAN L. SCHER,

Third-Party Defendants.
----------X

Notice of Motion & Cross Motion, Affs. & Exhibits X
Affirmation In Opposition&Exs X
Reply Affirmations &Exs..... X
Memorandum of Law..... X

The plaintiff, Blue Diamond Group Corp., and Third party defendants, Northside Tower Realty, LLC, the Scher Law Firm, and Jonathan L. Scher, move for an order pursuant to CPLR §3211(a)(7) dismissing the following: the First, Second, Third, Fourth, Fifth and Sixth counterclaims, interposed by defendant/third party plaintiff Wang, as well as dismissing Wang's Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth,

Tenth , Eleventh and Twelfth causes of action as contained in the Third Party Complaint, and; for an order dismissing the First, Second and Third Counterclaims interposed by defendant/third party plaintiff, Klin, as well as for an order dismissing Klin's Second Cause of action as contained in the Third Party Complaint (Sequence #04).

Defendant, Wang, cross-moves pursuant to 22 NYCRR §130-1.1, for an order sanctioning defendants, Jonathan Scher, Esq. and The Scher Law Firm (Sequence #05).

Defendant, Colony Insurance Company, moves pursuant to CPLR §2004, for an order granting it an extension of time in which to object to the evidence submitted in opposition to the motion interposed by Blue Diamond, Northside Tower Realty, LLC, the Scher Law Firm, and Jonathan L. Scher (Sequence #06).

Defendant, Colony Insurance Company, moves for the following relief: an order clarifying this Court's prior Short Form Order dated December 17, 2009 (Sequence #07); an order pursuant to CPLR §3211 (a)(7) dismissing Wang's Third Party Complaint as asserted against Colony Insurance Company (Sequence #08), and; for an order pursuant to CPLR §3211(a)(7), dismissing the Third Party Complaints, dated August 18 and October 2, 2009, as asserted by Klin (Sequence #09).

Facts:

Plaintiff, Blue Diamond Group Corp. [hereinafter Blue Diamond], entered into a contract with Third Party Defendant, Northside Tower Realty Company [hereinafter Northside], to undertake construction related improvements to the property located at 142 N. 6th Street, Brooklyn, New York (*see* Graff Affirmation in Support at Exh. A).

Northside is the owner of the subject premises (*see* Plaintiff's Memorandum of Law at p.3). In connection therewith, on or about November 27, 2007, Blue Diamond subcontracted with defendant/third party plaintiff, Klin Construction Group, Inc.[hereinafter Klin], whereby Klin would provide excavation and foundation work (*see* Graff Affirmation in Support at Exhs. A, E). Defendant, Colony Insurance Company [hereinafter Colony], issued a policy of general commercial liability insurance to Klin.

During the course of the project, Klin allegedly damaged the property adjoining the subject premises (*id.* at Exh. A).[1] As a result thereof, Blue Diamond withheld the sum of $219,762.98 from Klin in response to which Klin filed a mechanics lien against the subject premises for the amount withheld by Blue Diamond (*id.* at Exh. A). Subsequent thereto on October 3, 2008, Blue Diamond and Klin entered into a "Discharge of Lien Agreement" [hereinafter the Agreement], whereby in exchange for a payment of $110,000, Klin would execute a "Partial-Waiver of Mechanic's Lien and Release" (*id.*). In addition thereto, the terms of said Agreement provided that Blue Diamond would permit Klin an opportunity to undertake repair work on the adjoining property in exchange for which Klin would refrain from filing another mechanic's lien for the balance owed to them "through and inclusive of November 21, 2008" (*id.*).

Thereafter, Blue Diamond commenced the main action alleging, *inter alia*, that the Klin breached the aforesaid Agreement by filing a second mechanics lien on November 21,2008 (*id.*; *see also* Graff Affirmation in Support at ¶2). Blue Diamond

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[1] In or around 2008, Klin allegedly filed a claim with Colony in relation to the damage done to the adjacent property, in response to which Colony disclaimed coverage. Said disclaimer is the subject of Motion Sequence #10, discussed *infra*.

additionally alleged attorney misconduct against defendant, Chunyu Jean Wang, Esq. [hereinafter Wang], for falsifying the notary section contained thereon and for filing said mechanics lien on November 21,2008 (*id.* at ¶3; *see also* Exh. A). Wang had formally been counsel of record for Klin (*id.* at Exh. A).

In or about April of 2009, defendants' Klin and Wang, moved this Court pursuant to CPLR §3211 for an order dismissing Blue Diamond's complaint (*see* Graff Affirmation in Support at Exh. A). By Short Form Order dated June 1, 2009, this Court denied the application and granted a cross-motion interposed by Blue Diamond, which sought an order disqualifying Wang as acting as counsel for Klin (*id.* at Exh. A).

Subsequent to this Courts denial of the defendants' dismissal application, Wang and Klin, interposed an Answer, which contained various counterclaims, as well as a third party complaint, both of which were dated August 18, 2009 (*id.* at Exh. B). Thereafter, on October 2, 2009, Klin served an Amended Answer, containing several counterclaims, as well as an second Third Party Complaint, which contained two causes of action (*id.* at Exhs. C, J). Numerous applications interposed by the parties herein thereafter ensued and are determined as set forth hereinafter.

Application interposed by Colony Insurance Company for an Extension of Time

For purposes of logic and clarity, the Court will initially address that application interposed by Colony, which moves for an order pursuant to CPLR §2004 granting an extension of time in which "to object to evidence submitted in opposition to Blue Diamond's" within application for dismissal (Sequence #006).

CPLR §2004 provides that "Except where otherwise expressly prescribed by law,

the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed."

In support of the instant application, counsel for Colony contends that an extension of time in which to object to the evidence, proffered in opposition to Blue Diamond's application, should be granted as Colony was never properly served with Blue Diamond's motion to dismiss (*see* Westlye Affirmation in Support at ¶¶2,11,17). Colony's application is opposed by counsel for Klin, who states that the opposition papers to which Colony wants to respond were served upon it on November 5, 2009 (*see* Fukuda Affirmation in Opposition at ¶5; *see also* Exh. A). As for Blue Diamond, counsel for said defendant, while not opposing the application, has submitted a response and attached thereto a copy of Blue Diamond's dismissal application (*see* Graff Affirmation in Response at ¶3,6,7; *see also* Exhs. A, B).

Having reviewed the record and the submissions of counsel, the Court hereby DENIES the instant application. Initially, the Court notes that record clearly demonstrates that Colony was served with Klin's opposition papers on November 5, 2009, thus demonstrating two dispositive and salient points: that Colony was appraised of Blue Diamond's dismissal application as early as November 2009, and: that in November 2009, Colony was provided with the very opposition to which it now seeks additional time in which to respond. Notwithstanding Colony's knowledge of the application and receipt of the opposition, it has, to date, failed to file any response thereto or attempted to seek an adjournment on consent from opposing counsel.

Additionally, on January 5, 2010, counsel for Blue Diamond provided Colony with a complete copy of the dismissal application and the relevant exhibits (*see* Graff Affirmation in Support at Exhs. A, B). Again, notwithstanding Colony's possession of a full complement of papers by January 2010, this Court is still not in possession of any proposed responses to the opposition, which could have been submitted in the event this Court granted the relief herein requested. Finally, the Court notes that all of the applications *sub judice* were not fully submitted until July 16, 2010, and as of this date, there has been no proposed response filed *vis a vis* the opposition to Blue Diamonds dismissal application.

According, Colony's application is hereby DENIED (Sequence #006).

Application interposed by Blue Diamond, Northside, Jonathan Scher and the Scher Law Firm

The Court initially addresses those branches of the movant's instant application, interposed pursuant to CPLR §3211(a)(7), which seek dismissal of Wang's First, Second, Third, Fourth, Fifth and Sixth Counterclaims, as well as the Wang's Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth causes of action, all of which are contained in the "Verified Answer, Counterclaim and Third Party Complaint" dated August 18, 2009 (*see* Graff Affirmation in Support at Exhs. B, F). The application is opposed by defendant Wang, who cross-moves (Sequence #005), for an order imposing sanctions upon defendants, Jonathan Scher and the Scher Law Firm.

On an application interposed pursuant to CPLR §3211(a)(7), the complaint is to

be liberally construed and the plaintiff afforded every favorable inference which may be drawn therefrom (*Leon v Martinez*, 84 NY2d 893 [1984]). The facts as alleged are to be accepted as true, although bare legal conclusions in addition to factual assertions which are squarely contradicted by the record are not entitled to any such consideration (*Doria v Masucci* , 230 AD2d 764 [2d Dept 1996]; *Mayer v Sanders*, 264 AD2d 827 [2d Dept 1999]). In entertaining such an application, the function of the motion court is only to determine whether the facts as alleged fall within a cognizable legal theory (*id.*). "In assessing a motion to dismiss under 3211(a)(7) . . . a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d 893 [1984], *supra* at 88). When an affidavit is presented for the court's review "the criterion is whether the proponent of a pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2 268 [1977]).

Wang's Counterclaims

First:

As adduced from the pleading, the First Counterclaim asserted by Wang and against Blue Diamond sounds in breach of contract and is predicated upon Blue Diamond's "failing to pay Klin for its services performed under the contract" (*see* Graff Affirmation in Support at Exh. B at ¶5). In order to establish a cause of action sounding in breach of contract, the party so asserting must demonstrate the following: the existence of a contract between the parties; performance by the party asserting the claim; breach of the agreement by the other party; and damages resulting from said

breach (*Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009]).

In the instant matter, upon review of the relevant construction contract, defendant Wang was not a party thereto, and rather said contract was executed by and between Blue Diamond and Klin (*id.*). Accordingly, that branch of the plaintiff's application seeking dismissal of the First Counterclaim as asserted by Wang and against Blue Diamond is GRANTED and the counterclaim hereby DISMISSED.

Second

The Second Counterclaim alleges that "BDGC [Blue Diamond] breached the Discharge of Lien Agreement by failing to cooperate with Klin to apply for permits required to fix the Adjacent Property" (*see* Graff Affirmation in Support at Exh. B at ¶14). Here again, Wang was not a party to the subject Agreement, which was purportedly breached, and accordingly the Second Counterclaim as asserted by Wang against Blue Diamond is hereby DISMISSED *Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009], *supra*).

Third

The Third Counterclaim alleges that the damages done to the building adjacent to the subject premises were actually caused by another subcontractor hired by Blue Diamond and it is Blue Diamond "and/or the previous contractor" which are responsible for "any damages to the Adjacent Property under NY Gen. Constr. Law §25-b" (*see* Graff Affirmation in Support at Exh. B at ¶¶17-22).

General Construction Law §25-b, provides that " 'Injury to property' is an

actionable act, whereby the estate of another is lessened, other than a personal injury, or the breach of a contract." Such statute defines that which constitutes "Injury to Property" and does not function to create a private cause of action (97 NY Jur 2d, Statutes §143). Accordingly, that branch of the application which seeks dismissal of the Third Counterclaim is hereby GRANTED and the counterclaim is DISMISSED.

Fourth

The Fourth counterclaim sounds in Fraud and Deceit and alleges that Blue Diamond made false "representations of fact regarding the specifications of the work" so as to "induce Klin to continue working on the Project in reliance on such representations" (*see* Graff Affirmation in Support at Exh. B at ¶¶23-30).

A review of the pleadings clearly reveals that the fraud as alleged therein relates directly to the performance under the construction contract to which defendant Wang was clearly not a party. Additionally, given this Court's aforementioned decision dated June 1, 2009, defendant Wang is patently unable to assert such a claim on Klin's behalf. Therefore, the Plaintiff's application seeking dismissal of Fourth counterclaim asserted against it by defendant Wang is hereby GRANTED and same is DISMISSED.

Fifth

The Fifth Counterclaim sounds in negligence and alleges that Blue Diamond failed "to deal in good faith with Klin regarding the Discharge of Lien Agreement and the AIA Contract" and "failed to cooperate with Klin in applying for permits with the owner" of the subject property (*id.* ¶¶31-41).

Said counterclaim while cast in negligence, fails to allege facts to establish a

cause of action sounding therein and rather alleges a breach by Blue Diamond of the construction contract and Discharge of Lien Agreement. Initially, and as noted above, Wang was not party to either the contract or the Agreement and thus cannot maintain an action which alleges breach thereof (*Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009], *supra*). Additionally,

"It is a well established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987]; *see also Meyers v Waverly Fabrics, Div. of F. Schumacher & Co.*, [1985]). Such a legal duty must derive "from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382 [1987], *supra* at 389). Here, Wang has failed to allege a legal duty independent of that springing from the contract (*id.*). Thus, that branch of Blue Diamond's application, which seeks an order dismissing the Fifth Counterclaim as asserted by Wang is hereby GRANTED and said counterclaim is hereby DISMISSED.

Sixth

The Sixth Counterclaim sounds in Tortious Interference with Contractual Relations and alleges "through its representations to Klin" upon which Klin "relied", Blue Diamond caused Klin to delay filing an insurance claim with Colony (*see* Graff Affirmation in Support at ¶¶42-51). In order to establish a cause of action sounding in

Tortious Interference with Contract, Wang is required to establish a valid contract, Blue Diamond's knowledge thereof, it's intentional interference therewith and damages resulting therefrom (*Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413 [1996]).

Here, Wang cannot establish the existence of a contract to which she was a party and with which Blue Diamond tortiously interfered (*id.*). Rather, the allegations which comprise this counterclaim do not involve Wang and only implicate Blue Diamond's alleged interference with *Klin's contract* with it's insurance carrier (*id.*). Moreover, a review of the record reveals that in it's Amended Answer, which superceded that previously served, defendant Klin no longer asserts a counterclaim based upon Tortious Interference with Contractual Relations (*see* Graff Affirmation in Support at Exh. C). Thus, in consideration of this Court's Order disqualifying Wang from representing Klin, Wang may not assert such a claim on Klin's behalf and accordingly the movant's application seeking dismissal of Wang's Sixth Counterclaim is hereby GRANTED and same is DISMISSED.

Wang's causes of action

Third Cause of Action

Third Cause of action asserted by Wang alleges that Northside, as the owner of the subject premises, "is vicariously liable for any alleged negligence of Klin, its agents and employees [in relation to work] performed with respect to the Adjacent Property" (*id.* at Exh. F at ¶50).

A review of the allegations forming the basis of this action clearly reveal that Wang is asserting same on behalf of Klin. However, given this Court's prior decision

disqualifying Wang from representing Klin, the within application seeking dismissal of the Third Cause of Action as asserted by Wang is hereby GRANTED and same is DISMISSED.

Fourth Cause of Action

The Fourth cause of action alleges a breach by defendant, Northside, of the contract executed by and between Blue Diamond and Klin (*id.* at Exh. F at ¶¶53-57).

As noted above, in order to establish a cause of action sounding in breach of contract, the party so asserting must demonstrate the following: the existence of a contract between the parties; performance by the party asserting the claim; breach of the agreement by the other party; and damages resulting from said breach (*Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009], *supra*).

Neither defendant Wang nor Northside were parties to the construction contract which was purportedly breached and thus Wang cannot sustain an action sounding in breach thereof (*id.*). Accordingly, the application seeking dismissal of the Fourth Cause of Action as asserted by Wang is hereby GRANTED and same is hereby DISMISSED.

Fifth Cause of Action

In the Fifth cause of action, Wang alleges a breach by Northside of the "Discharge of Lien Agreement" (*see* Graff Affirmation in Support at F at ¶¶58-62). Specifically the allegations state that "Northside breached the * * * Agreement by failing to cooperate with BDGC [Blue Diamond] in order to allow Klin to apply for permits required to fix the Adjacent Property" (*id.* at ¶61).

Here, again, neither Wang nor Northside, were parties to the agreement alleged

to have been breached and thus an action sounding in breach of the agreement cannot be maintained by Wang against Northside (*Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009], *supra*). Thus, the application seeking dismissal of the Fifth Cause of Action as asserted by Wang is hereby GRANTED and same is DISMISSED.

Sixth Cause of Action

The Sixth cause of action is asserted against defendants, the Scher Law Firm and Jonathan Sher, Esq., and alleges professional misconduct thereby in an action to foreclose on the mechanics lien brought by Klin in Kings County Supreme Court (*see* Graff Affirmation in Support at Exh. F at ¶¶63-72).

Any remedy available for alleged misconduct must be pursued exclusively within the context of the actual lawsuit in which the purported misconduct was undertaken (*Yalkowsky v Century Apartments Associates*, 215 AD2d 214 [1st Dept 1995]; *Cramer v Sabo*, 31 AD3d 998 [3d Dept 2006]; *Melitzky v Owen*, 19 AD3d 201[1st Dept 2005]). Thus, as the allegations of misconduct should have been interposed within the context of the Kings County action, the application seeking dismissal of the Sixth Cause of Action as asserted by Wang is hereby GRANTED and same is DISMISSED.

Seventh and Eight Causes of Action

The Seventh and Eighth Cause of Action respectively assert claims for Injurious Falsehood and Defamation (*see* Graff Affirmation in Support at Exh. F at ¶¶74,81). A review of the pleading reveals that Wang alleges that within the context of the Kings County foreclosure action, Jonathan Scher and/or the Scher Law Firm ,"alleged with malice, recklessness, gross negligence, that Wang did not witness the execution of

Klin's Mechanics Lien and falsely notarized the jurat" (*id.* at ¶81).

"A counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved. * * *. Within such limit, the protection is complete, irrespective of the motive with which they are used; but such privilege does not extend to matter having no materiality or pertinency to such questions."(*Youmans v Smith*, 153 NY 214 [1897] at 219).

Here, the statements made by defendants, Jonathan Scher and the Scher Law Firm, were clearly made within the purview of the Kings County foreclosure action, and were pertinent and directly relevant to the positions counsel possessed as to validity of the jurat appearing on the mechanics lien, which was the subject of that action. Thus, any such statement made by Jonathan Scher or the Scher Law firm are privileged and cannot serve as a basis for a cause of action (*id.*). Therefore, the application interposed by Jonathan Scher and the Scher Law firm seeking dismissal of Seventh and Eighth causes of action as asserted by Wang against them is hereby GRANTED and same are DISMISSED.

Ninth Cause of Action

The Ninth Cause of Action sounds in legal malpractice as to Jonathan Scher and the Scher Law Firm and alleges that the defendants were "negligent [in] drafting the AIA contact and Discharge of Lien Agreement" and thus "foreclosed Klin's ability to file for a mechanics lien after the dates set in the contract/agreement, leaving Klin without

recourse in the event of BDGD's [Blue Diamond's] breach" (*see* Graff Affirmation in Support at Exh at F at ¶91).

"To establish a cause of action alleging legal malpractice, a plaintiff must prove, inter alia, the existence of an attorney client-relationship" (*Neslon v Roth*, 69 AD3d 912 [2d Dept 2010]). To demonstrate the existence of such a relationship, there must be evidence of "an explicit undertaking 'to perform a specific task'" (*id.* quoting *Terio v Spodek*, 63 AD3d 719 [2d Dept 2009] at 721).

In the instant matter, neither Jonathan Scher nor the Scher Law Firm represented either Klin or Wang. Therefore as there was no attorney client relationship between the moving defendants and Klin or Wang, the application seeking dismissal of the Ninth Cause of Action is hereby GRANTED and said action is DISMISSED.

Tenth Cause of Action

The Tenth cause of action alleges Tortious Interference with Contractual Relations by Scher and the Scher Law Firm (*see* Graff Affirmation in Support at Exh. F at ¶¶93-100). Specifically, it is alleged that said defendants "when drafting the Discharge of Lien Agreement * * * set dates within the contracts between BDGC [Blue Diamond] and Klin, which foreclosed Klin's ability to file for a mechanic's lien after those dates" and that the defendants "set such dates with the intent to trap Klin into an agreement with BDGC [Blue Diamond] without any recourse in the event of BDGC's breach" (*id.* at ¶¶96-97).

As noted above, in order to establish a cause of action sounding in Tortious Interference with Contract, Wang would be required to establish a valid contract, the

defendants knowledge thereof, their intentional interference therewith and damages resulting therefrom (*Lama Holding Company v Smith Barney Inc.*, 88 NY2d 413 [1996], *supra*). Here, Wang was not a party to the contract and Agreement with which the defendants allegedly interfered. Rather, the allegations which form the factual predicate of this cause of action involve the purported interference by the defendants with *Klin's contract and Agreement* with Blue Diamond (*id.*). Accordingly, the movant's application seeking dismissal of the Tenth Cause of Action as asserted by Wang is hereby GRANTED and same is DISMISSED.

Eleventh Cause of Action

The Eleventh Cause of action alleges that Scher and the Scher Law Firm "aided and abetted" Blue Diamond in breaching it's "fiduciary duty to deal in good faith under the AIA Contract by failing to pay Klin for its services performed under the contract" (*see* Graff Affirmation in Support at Exh. F at ¶104).

Here, it appears from the allegations that Klin is seeking to impose liability upon the plaintiff's attorneys for Blue Diamonds alleged breach of the terms of the contract. However, as repeatedly noted herein, Wang was not a party to this contract and thus cannot maintain a cause of action alleging a breach as to the terms thereof (*Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009], *supra*). Moreover, given this Court's Order disqualifying Wang from representing Klin, she may not maintain such an action on it's behalf. Accordingly the instant application seeking dismissal of Wang's Eleventh Cause of action is hereby GRANTED and same is DISMISSED.

Twelfth Cause of Action

The Twelfth Cause of action sounds in Fraud and Deceit and alleges that "Scher and/or Scher Law Firm were fully aware that pursuant to Klin's contract with Colony, Klin had to make an insurance claim with its insurance carrier regarding Adjacent Property" and "through its representations to Klin, Scher and/or Scher Law Firm delayed the filing of an insurance claim" to Colony Insurance Company (*id. see* Graff Affirmation in Support at ¶¶107-108).

As with the Eleventh Cause of Action, the allegations as asserted by Wang directly relate to a wrongdoing purportedly visited upon Klin by defendants, Scher and the Scher Law Firm. However, as Wang has been disqualified from representing Klin, the movants' application seeking dismissal of Wang's Twelfth Cause of action is hereby GRANTED and same is DISMISSED.

Defendant Klin

The Court now addresses that branch of the movants' application which seeks dismissal of defendant Klin's First, Second and Third Counterclaims are contained in the "Verified Amended Answer with Counterclaim" dated October 2, 2009 and Klins' Second Cause of Action (*see* Graff Affirmation in Support at Exhs. C, J).

First Counterclaim

The First Counterclaim alleged by Klin requests that this court "vacate the settlement agreement and declare that the notice of mechanics lien dated November 21, 2008 filed by Defendant, Klin * * * is valid" (*see* Graff Affirmation in Support at Exh. C at ¶23).

As to the Agreement, in opposing the application, counsel for Klin contends that

same should be set aside because the attorney who was then acting on behalf of Klin, "was not authorized to entered into" and "has never explained the agreement to the defendant" (*see* Fukuda Affirmation in Opposition at ¶13).

Stipulations of settlement are strongly favored by the courts and should "not likely be case aside" (*Perrino v Biamasco*, 234 AD2d 281[2d Dept 1996]; *see also Galasso v Galasso*, 35 NY2d 319 [1974]). Further, stipulation of settlements "will not be set aside in the absence of fraud or overreaching" (*Galasso v Galasso*, 35 NY2d 319 [1974] at 320; *see also Hallock v State of New York*, 64 NY2d 224; *Vlassis v Corines*, 247 AD2d 609 [1998]). Here, the allegations as contained in the counterclaim do not allege, in any respect, fraud or overreaching but rather state that Klin was not made aware of the substance of the Agreement as same was "never explained" to it by former counsel. Moreover, the Court notes that while Klin alleges that it was not made cognizant of the terms of the Agreement, it notwithstanding accepted and retained the $110,000 as recited therein.

As to the mechanics lien, in relation to which Klin seeks an order declaring same as "valid", by Orders issued by the Kings County Supreme Court on April 24 and May 6, 2009, the lien filed by Klin against the property owned by Northside, has been "discharged and cancelled" (*see* Graff Affirmation in Support at Exhs. G, H). Said order was predicated upon Northside's satisfaction of it's contractual obligations prior to the filing of the mechanics lien (*see* Graff Affirmation in Support at Exhs. G, H). Thus, the subject mechanics lien and the issues related thereto have already been litigated and adjudicated.

Thus, based upon the foregoing, the instant application which seeks dismissal of Klin's First Counterclaim is hereby GRANTED and same is hereby DISMISSED.

Second Counterclaim

The Second Counterclaim asserted by Klin alleged that Blue Diamond "neglected to timely notify the insurance carrier [Colony Insurance Company]" and was "negligent by failing to file an insurance claim with Colony Insurance Company"regarding the damage done to the property adjacent to the subject premises (*id.* at Exh. C at ¶¶32,42).

In order to establish a *prima facie* case sounding in negligence, the plaintiff must demonstrate the following: the existence of a duty; a breach thereof, and; that said breach was the proximate cause of the damages suffered by the plaintiff (*Marasco v C.D.R. Electronics Security & Surveillance Systems Co.,* 1 AD3d 578 [2d Dept 2003]).

A review of the record as developed herein indicates that on or about January 9, 2008, Colony issued a policy of insurance naming as the "insured" Klin Construction Group, Inc. Thus, as the evidence demonstrates that Klin was the insured under the subject policy, it clearly had a duty to inform Colony of any claims it was submitting thereunder. Thus, Klin has not demonstrated that Blue Diamond was under a duty to report a loss to Klin's own insurance carrier (*id.*). Moreover, even assuming arguendo, that Blue Diamond was an additional insured, that fact, even if proven, does not demonstrate how Klin's obligations under it's own insurance policy were obviated and thus how any breach by Blue Diamond was the proximate cause of any damages it

sustained (*id.*).

Additionally, in the opposing affidavit, it is stated that "the insurance disclaimer notice also stated that Colony Insurance Company disclaimed the coverage because * * * Klin Construction Group, Inc., agreed to repair the cracked wall of the Adjacent Property without permission or authorization from the insurer" (*see* Lin Affidavit in Opposition at ¶19). Said assertion further belies any claim that Blue Diamond's failure to notify Colony was the proximate cause of the damages it sustained (*Marasco v C.D.R. Electronics Security & Surveillance Systems Co.*, 1 AD3d 578 [2d Dept 2003], *supra*).

Therefore, the movants' application which seeks dismissal of the Klin's Second Counterclaim is hereby GRANTED and same is DISMISSED.

Third Counterclaim

The Third Counterclaim alleges that Blue Diamond "still owes the defendant in the amount of $109,762.98" and has thus is in breach of contract (*see* Graff Affirmation in Support at at Exh. C at ¶49).

Where an agreement to arbitrate a dispute is clearly and unequivocally expressed, "a subsequently resistant party will be deemed to have relinquished the right to litigate disputes in the courts and may be compelled, instead, to submit to arbitration" (*Maross Constr. Inc. v Central New York Regional Transportation Authority*, 66 NY2d 341 [1985] at 345). An agreement to submit a dispute to arbitration "must be express, direct and unequivocal as to the issues or disputes to be submitted to arbitration: anything less will lead to denial of arbitration" (*In re Newfield Central School Dist.*, 258

AD2d 845 [3d Dept 1999] quoting *Matter of Acting Superintendent of Schools of Liverpool Cent. School Dist.*, 42 NY2d 509 at 511).

In the instant matter, the contract by and between Blue Diamond and Klin contains an arbitration clause the substance of which states, in pertinent part, "Any claim arising out of or related to this Subcontract, * * *, shall be subject to arbitration" (*see* Graff Affirmation in Support at Exh. D).

Thus, given the express language in the contract, which contains a broad arbitration clause, the application seeking dismissal of the Third Counterclaim is GRANTED and same is DISMISSED.

Second Cause of Action

With respect to the Second Cause of Action, this Court, due to layers of confusion in moving counsel's submissions, is unfortunately constrained to makes these initial, but important, observations.

In the Supporting Affirmation and Memorandum of Law, counsel for Blue Diamond, Northside, and the Scher defendants, in arguing for dismissal of Klin's Second Cause of Action, states that "KLIN [is] seeking to obtain recovery from Northside through the doctrine of vicarious liability for KLIN's own conduct" (*see* Memorandum of Law at p. 4;*see* Graff Affirmation in Support at ¶84). However, in his Reply Affirmation, counsel makes reference to an altogether different cause of action, whereby Klin is seeking to hold Northside negligent for failing to notify Klin's insurance carrier with respect to the damage done to the property adjacent to the subject

premises (*see* Graff Affirmation in Reply at ¶27).

Upon review of the voluminous pleadings annexed to the moving papers, the following is revealed: a cause of action asserting Northside's vicarious liability - and based upon Klin's negligence - is indeed asserted by Klin in the "Verified Answer, Counterclaim and Third-Party Complaint" dated August 18, 2009, and; in a *second* Third Party Complaint[2], dated October 2, 2009, and filed simultaneously with an Amended Answer, a "Second Cause of Action" is asserted which alleges that Northside was negligent, and "vicariously liable for any alleged negligence of the plaintiff, BDCG [Blue Diamond], by failing to file the insurance claim regarding" the damage to the adjacent property (*see* Exh. J at ¶¶32,33). In the face of counsel's inconsistent arguments, it is not at all clear as to which cause of action is the subject of the within application.

However, given the counsel's arguments posited in the Reply Affirmation, which clearly addressed Northside's alleged negligence in failing to notify Colony of the insurance claim, this Court considers the Second Cause of Action contained the Third Party Complaint dated October 2, 2009, as being the appropriate subject of this branch of the movant's application.

As noted herein above, the Second Cause of Action contained in the Third Party complaint dated October 2, 2009, alleges that Northside, was negligent and "vicariously liable for any alleged negligence of the plaintiff, BDCG [Blue Diamond], by failing to file the insurance claim regarding" the damage to the property adjacent to the subject

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[2] It is unclear from the pleading if the second Third Party Complaint is either an amended or a supplemental pleading as same is not labeled.

premises (*see* Exh. J at ¶¶32,33). Thus, here Klin is attempting to hold Northside vicariously liable for Blue Diamonds alleged negligence.

To establish a *prima facie* case of negligence against Blue Diamond, Klin must demonstrate the following: the existence of a duty; a breach thereof, and; that said breach was the proximate cause of the damages suffered by the Klin (*Marasco v C.D.R. Electronics Security & Surveillance Systems Co., 1 AD3d 578* [2d Dept 2003], *supra*). However, even accepting as true, for purposes of argument, that Blue Diamond was under a duty to report the loss to Colony, this does not establish how Klin's was concomitantly relieved of it's independent reporting obligations, under it's own insurance policy, and therefore how any alleged breach by Blue Diamond was the proximate cause the damages it purportedly sustained (*id.*). Further, the Court notes that, in the opposing affirmation, counsel concedes that Klin "had an independent duty to notify the insurer" (*see* Fukuda Affirmation in Opposition at ¶42).

Finally, in the opposing affidavit, it is averred that "the insurance disclaimer notice also stated that Colony Insurance Company disclaimed the coverage because * * * Klin Construction Group, Inc., agreed to repair the cracked wall of the Adjacent Property without permission or authorization from the insurer" (*see* Lin Affidavit in Opposition at ¶19). Said averments militate against a finding that any breach by Blue Diamond to notify Colony was the proximate cause of the damages suffered by Klin (*Marasco v C.D.R. Electronics Security & Surveillance Systems Co.*, 1 AD3d 578 [2d Dept 2003], *supra*).

Thus, based upon the foregoing, the movants' application seeking an order dismissing the Second Cause of Action is hereby GRANTED and same is hereby

DISMISSED.

Wang's Cross-Motion for Sanctions

The Court now addresses the cross-motion interposed by Wang for an order imposing sanctions upon Jonathan Scher and the Scher Law Firm (Sequence #005).

22 NYCRR §130-1.1(a) provides the following, in relevant part: "The court, in its discretion, may award to a party or an attorney in any civil action or proceeding before the court * * * costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil proceeding who engages in frivolous conduct as defined in this Part, which shall be payable as provided in section 130-1.3 of this Subpart."

22 NYCRR §130-1.1© provides the following, in relevant part: "For purposes of this Part, conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statement that are false"

In the matter *sub judice*, having thoughtfully reviewed the submissions of counsel[3], this Court, in it's discretion, finds that the record herein does not support an order imposing sanctions upon Jonathan Scher or the Scher Law Firm (*id.*) Accordingly,

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[3] The Court notes that the supporting papers proffered by Wang are in the form of an Affirmation, notwithstanding that Wang is a party to the within action (CPLR §2106).

the application interposed by defendant Wang is hereby DENIED (Sequence #005)[4].

Application by Colony for a Clarification of this Court's Prior Decision

By Order dated December 17, 2009, this Court issued a Short Form Order, the substance of which granted Blue Diamond's application to discharge a Notice of Pendency dated August 19, 2009 (*see* Westlye Affirmation in Support at Exh. A). Included in said order was language which stated "As a subcontractor, Klin obtained liability insurance from third-party defendant Colony Insurance Company listing Klin, Blue Diamond and Northside among the insured" (*id.*).

Counsel for Colony now moves for clarification of that Order arguing that the policy issued by Colony to Klin does not list either Blue Diamond or Northside as insured and that said policy does not even mention said parties (*id.* at ¶¶4,5,6; *see also* Exhs. B, C). Counsel further argues that the application, in connection to which this Court's December 17, 2009 Order was issued, did not seek a ruling as to who or what was an insured under the policy of insurance and that such a ruling was beyond the scope of said application (*id.* at ¶¶13,14,15).

The Court has reviewed the policy of insurance issued by Colony to Klin, and nowhere therein is either Blue Diamond or Northside expressly listed as among the insured under the policy. Further, inasmuch as a determination with respect to who was an insured under the contract was not a part of the relief requested in Blue Diamond's prior motion, the instant application interposed by Colony is hereby GRANTED

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[4] The Court notes that by Order of the Honorable Arthur M. Schack, Supreme Court Justice in Kings County, Ms. Wang was sanctioned for her conduct and ordered to pay $68,036.78 in legal fees and $10,000 to the Lawyer's Fund for Client Protection (*see* Graff Affirmation in Reply dated November 25, 2009 at Exh. 1). Said sanctions were ordered in connection with the Kings County Supreme Court action, which involved the discharge of the mechanics lien filed by Klin against the property owned by Northside (*id.*).

(Sequence #007).

Accordingly, this Court's Short Form Order dated December 17, 2009 is hereby amended such that paragraph 4 on page 2 is modified to state: "It is alleged in the Third Party Complaint, dated August 18, 2009, the Verified Amended Answer with Counterclaim, dated October 2, 2009 and in the Third Party Complaint, dated October 2, 2009, that as a subcontractor, Klin obtained liability insurance from third-party defendant Colony Insurance Company (CIC) listing Klin, Blue Diamond and Northside (building owner) among the insured."

Colony's Application seeking Dismissal of Wang's Third Party Complaint

The Court now turns to Colony's application seeking dismissal of the Wang's Third Party Complaint, dated August 18, 2009. In reviewing the pleading, the Court notes that of all the actions alleged therein only those denominated First and Second as asserted against Colony.

First Cause of Action

The First Cause of Action sounds in breach by Colony of §2106 of the New York State Insurance Law and alleges, *inter alia*, that "Colony failed to acknowledge with reasonable promptness pertinent communications as to claims arising under its policies" and "failed to adopt and implement reasonable standards for the prompt investigation of claims arising under its policies" (*see* Westlye Affirmation in Reply at Exh. A at ¶¶30-31).

Second Cause of Action

The Second Cause of Action sounds in breach by Colony of the insurance contract and alleges Colony "fraudulently, negligently, or in bad faith failed to settle a

cause [sic] brought by Klin thereby imposing liability personally upon Klin"(*id.* at ¶42).

Here, both the First and Second causes of action allege actions undertaken by Colony in relation to and in violation of the policy of insurance that it issued *to Klin*. More specifically, the documents herein demonstrate that Wang is not a party to any contract with Colony and is not an individual expressly insured under the policy issued by Colony to Klin. Further, it has been held that "in order for a third-party to enforce a policy of insurance, it must be demonstrated that the parties intended to insure the interest of [the third party] who seeks to recover on the policy" (*State v Liberty Mutual Insurance Company*, 23 AD3d 1084 [4th Dept 2005] quoting *Stainless, Inc. v Employers Fire Ins. Co.*, 69 AD2d 27 [1st Dept 1979] at 33). In the instant matter, the documentary evidence clearly establishes that Wang was neither an insured under the policy issued by Colony nor an intended beneficiary thereunder and thus she cannot sustain an action in breach of the policy (*id.;Clearmont Property, LLC v Eisner*, 58 AD3d 1052 [3d Dept 2009], *supra*).

The Court notes that in opposing the application[5], Wang strenuously argues same should be denied as it is unclear at this juncture, due to a lack of discovery, as to whom was intended to be an insured under the insurance policy. In so arguing, Wang contends that the subject policy issued to Klin provides for an "additional insured" and that such is defined therein as follows: "Any person or organization that is an owner of real property or personal property on which you are performing operations or a contractor on whose behalf you are performing operations" (*see* Wang Affirmation in Opposition at ¶9).

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[5] Once again, the Court is constrained to note that, Wang, as a party herein, improperly utilizes an affirmation (CPLR §2106).

The Court has reviewed the subject policy and such a section on an "additional insured" is in fact included[6]. However, additional discovery should not be necessary for Wang to establish her causes of action. Initially, Wang is not a "contractor" upon whose behalf Klin was performing operations. Rather, the documentary evidence adduced herein clearly establishes that Klin was performing work for Blue Diamond. Additionally, if Wang was "an owner of real or personal property" upon which Klin performed operations, that information would clearly be within her knowledge and the lack of discovery would have no effect on her access thereto.

Therefore, the application interposed by Colony for an order dismissing Wang's Third Party Complaint, dated August 18, 2009, is hereby GRANTED (Sequence #008).

Colony's Motion to Dismiss Klin's Third Party Action

The Court now addresses the application interposed by Colony, which seeks dismissal of Klins Third Party Complaints dated August 18, 2009 and October 2, 2009. As to the Third Party Complaint dated August 18, 2009, Klin asserts two causes of action against Colony, each of which are identical to those mentioned above and asserted by Wang.

As noted above, the First Cause of Action alleges a breach by Colony of §2106 of the New York State Insurance Law whereby Klin claims that "Colony failed to acknowledge with reasonable promptness pertinent communications as to claims arising

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[6] In relying on this section of the insurance policy, Wang did not cite the entirety of the provision, which provides the following, in totality, entitled "Additional Insured - Owners, Lessees or Contractors": Any person or organization that is an owner of real property or personal property on which you are performing operations or a contractor on whose behalf you are performing operations and only where required by written contract or agreement that is an "insured contract", provided that "bodily injury" or "property" damage" occurs subsequent to the execution of that contract or agreement.

under its policies" and "failed to adopt and implement reasonable standard for the prompt investigation of claims arising under its policies." (*see* Westlye Affirmation in Support at Exh. A at ¶¶30,31). As to the Second Cause of Action, same alleges a breach by Colony of the insurance contract and claims that Colony "fraudulently, negligently, or in bad faith failed to settle a cause brought by Klin thereby imposing liability personally upon Klin" (*id.* at ¶42).

In addressing the substance of the within application, the Court notes that counsel for Klin only submits opposition to "Colony Insurance Company's motion to dismiss the third-party complaint dated October 2,2009" (*see* Fukuda Affirmation in Opposition at ¶1).Thus, it appears that Klin is abandoning those causes of action alleged in the Third Party Complaint dated August 18, 2009, and as a result Colony's application seeking dismissal thereof is hereby GRANTED and same are Dismissed.

Turning now the to Third Party Complaint dated, October 2, 2009, of the two causes of action therein asserted, only the First implicates Colony. Specifically, the First Cause of Action seeks a order which declares "the disclaimer of insurance coverage is void and the third-party defendant, Colony, should be compelled to indemnify the third party plaintiff pursuant to the insurance agreement" (*see* Westlye Affirmation in Support at at Exh. B at ¶¶24,25). Klin additionally asserts that Colony should be made to "reimburse the third-party plaintiff all the costs incurred in connection with the cracked wall at the Adjacent Property" (*id.*). A review of the complaint reveals that in asserting the cause of action, Klin also alleges that Blue Diamond is an insured under the subject policy and notwithstanding said status, Blue Diamond "neglected to timely notify the insurance carrier * * * about the cracked wall at the Adjacent Property" (*id.* at ¶13). Klin

additionally asserts that after learning of Blue Diamond's alleged failure to report the claim, it" duly filed an insurance claim with * * * Colony, to report the problem about the cracked wall at the Adjacent Property" (*id.* at ¶15).

In moving for dismissal, counsel for Colony argues that the Klin's allegation claiming that Blue Diamond was an insured under the subject policy, is belied by the documentary evidence warranting dismissal of the within action (*id.* at ¶¶ 12,13,14,17; *see also* Defendant's Reply Memorandum of Law at pp. 8-9). Specifically counsel posits that neither Blue Diamond nor Northside are named as an insured in either the policy or the attendant declarations (*see* Westlye Affirmation in Support at ¶12). Counsel additionally argues that as no action has been commenced against Klin by the owner of the adjacent property, Colony's duty to defend and indemnify under the policy has not been triggered and there is no case or controversy for this Court to entertain (*see* Westlye Affirmation in Support at ¶¶18,21; *see also* Defendant's Reply Memorandum of Law at pp. 1-5,11).

In opposing the motion, counsel argues that the certificates of insurance list both Blue Diamond and Northside as being insured under the policy (*see* Fukuda Affirmation in Opposition at ¶33; *see also* Exh. A). Counsel further argues that inasmuch as Blue Diamond, Northside and Klin "all worry about [a] lawsuit by the owner of the adjacent property which walls were cracked during the construction project" and "all of them really wanted * * * Colony Insurance Company to defend and indemnify them pursuant to the insurance agreement", they are parties united in interest, and as a result, Klin could rely upon Blue Diamond's notice to Colony (*id.* at ¶¶37,39).

In the matter *sub judice*, Klin's First Cause of action clearly seek a forms of

declaratory relief. CPLR §3001 provides, in relevant part, that "the supreme court may render a declaratory judgement having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." Within the particular context of a motion which seeks dismissal of an action for a declaratory judgment, the complaint be liberally construed "and deemed to allege whatever can be reasonably implied from its factual statements" (*Hallock v State*, 39 AD2d 172 [3d Dept 1972]). In addressing an application to dismiss the complaint in a declaratory judgment action, "the determinative question is not whether the plaintiff is entitled to a declaration in his favor, but whether the court's jurisdiction to render a declaratory judgement has been properly invoked" (*Hallock v State*, 39 AD2d 172 [3d Dept 1972], *supra; Nasa Auto Supplies, Inc. v 319 Main Street Corp.*, 133 AD2d 265 [2d Dept 1987]; *Staver Company v Skrobisch*, 144 AD2d 449 [2d Dept 1988]; *Metropolitan Package Store Assn. v Koch*, 89 AD2d 317 [3d Dept 1982]).

So as to withstand a motion to dismiss for lack of sufficiency, "the complaint in an action for a declaratory judgment must contain factual allegations showing the existence of a real controversy concerning jural relations, and a sufficient basis for the invocation of the court's discretionary power to pronounce judgment declaring the rights and legal relations of the parties" (*American News Co., Inc. v Avon Publishing Co.*, 283 AD 1041 [1st Dept 1954]; CPLR §3001). If the Court determines that it may properly entertain the action but ultimately decides the merits of the declaratory action against a plaintiff, "the proper course is not to dismiss the complaint but to issue a declaration in favor of the defendants" (*Maurizzio v Lumbermens Mutual Casualty Co.*, 73 NY2d 951 [1989]; *Lanza v Wagner*, 11 NY2d 317 [1962]).

Here, Klin's First Cause of Action prays for an order declaring Colony's disclaimer of coverage as "void", and compelling Colony to indemnify Klin, as well as to reimburse it for "the costs incurred in connection with the cracked wall at the Adjacent Property." Thus, the claim which precipitated the denial of coverage issued by Colony, was - as is alleged by Klin itself - based upon "the cracked wall at the Adjacent Property." However, as adduced from the record, the owner of the adjacent property has not commenced an action against Klin for any damages sustained thereto. Particularly, in response to Colony's Requests for Admissions, counsel for Klin stated "Klin Construction has not been sued by the owner of the property located at 138 North 6th Street in Brooklyn (*see* Westlye Affirmation in Support at Exhs. D, F). Accordingly, as no action has been commenced against Klin, Colony's duty to defend under the insurance policy was never triggered and thus there is an absence herein of a "real controversy concerning jural relations" between the parties herein (*American News Co., Inc. v Avon Publishing Co.*, 283 AD 1041 [1st Dept 1954], *supra*).

As a final note, as stated above it appears that Klin indeed abandoned those causes of action alleged in the August 18, 2009 Third Party Complaint given that counsel did not oppose Colony's application seeking to dismiss same. However, even if such actions were still being pursued, given that Colony's obligation to defend never arose, the First and Second causes of action - alleging breach by Colony of the insurance contract and a failure to "adopt and implement reasonable standards for the prompt investigation of claims arising under its policies" - could clearly not be sustained.

Based upon the foregoing, the application by Colony, interposed pursuant to

CPLR §3211(a)(7), which seeks dismissal of Klins Third Party Complaints dated August 18, 2009 and October 2, 2009 is hereby GRANTED and those causes of action contained therein as asserted against Colony are hereby DISMISSED (Sequence #10).

Based upon the foregoing, it is,

ORDERED, that the application interposed by Plaintiff, Blue Diamond Group Corp., and Third party defendants, Northside Tower Realty, LLC, the Scher Law Firm, LLP and Jonathan L. Scher, for an order dismissing Defendant Wang's First, Second, Third, Fourth, Fifth and Sixth counterclaims, as well as Wang's Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth , Eleventh and Twelfth causes of action as contained in the Answer/Third Party Complaint, dated August 18, 2009, is hereby GRANTED (Sequence #004); and it is further,

ORDERED, that the application interposed by Plaintiff, Blue Diamond Group Corp., and Third party defendants, Northside Tower Realty, LLC, the Scher Law Firm, LLP

and Jonathan L. Scher, for an order dismissing the First, Second and Third Counterclaims interposed by defendant/third party plaintiff, Klin, in the "Verified Amended Answer with Counterclaim" dated October 2, 2009, as well as for an order dismissing Klin's Second Cause of action as contained in the Third Party Complaint, dated October 2, 2009, is hereby GRANTED (Sequence #004); and it is further,

ORDERED, that the application interposed by Defendant, Wang, for an order

sanctioning defendants, Jonathan Scher, Esq. and The Scher Law Firm is hereby DENIED (Sequence #005); and, it is further,

ORDERED, that the application interposed by Colony Insurance Company, for an order granting it an extension of time in which to object to the evidence submitted in opposition to the motion interposed by Blue Diamond, Northside Tower Realty, LLC, the Scher Law Firm, LLP and Jonathan L. Scher, is hereby DENIED (Sequence #006); and it is further,

ORDERED, that the application interposed by Colony Insurance Company, for an order clarifying this Court's prior Short Form Order dated December 17, 2009, is hereby GRANTED and said Order is amended as recited hereinabove (Sequence #007); and it is further,

ORDERED, that the application interposed by Colony Insurance Company, for an order dismissing Wang's First and Second causes of action as contained in the Third Party Complaint dated August 18, 2009 and as are asserted against Colony Insurance Company, is hereby GRANTED (Sequence #008): and it is further,

ORDERED, that the application interposed by Colony Insurance Company, for an order dismissing Klin's First and Second causes of action as contained in the Third Party Complaint, dated August 18, 2009 and Klin's First cause of action contained in the second Third Party Complaint dated, October 2, 2009, is hereby GRANTED (Sequence

#10).

All applications not specifically addressed herein are DENIED.

Dated: September 13, 2010

Anthony L. Parga, J. S. C.