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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 11

CAROLINE DIACO

- v -

K.C.R. CONSTRUCTION INC

INDEX NO. 102017/05

MOTION DATE

MOTION SEQ. NO. 2

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
JUN 18 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: June 12, 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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CAROLINE DIACO and JOSEPH DIACO, INDEX NO. 102017/05

Plaintiffs,

-against-

K.C.R. CONSTRUCTION, INC.,

Defendant.

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JOAN A. MADDEN, J.:

In this action for damages for negligence and breach of contract, defendant K.C.R. Construction, Inc. ("KCR") moves for an order pursuant to CPLR 3212 granting partial summary judgment dismissing all damages claims relating to expenses for testing and repairing gas piping. Plaintiffs Caroline Diaco and Joseph Diaco ("the Diacos") oppose the motion. Before defendant's motion was submitted, Royal Indemnity Company ("Royal") moved to intervene in this action. In order dated April 26, 2007, Royal's motion to intervene was granted, and Royal subsequently submitted papers opposing defendant's motion for summary judgment. For the reasons stated below, defendant KCR is not entitled to partial summary judgment.

It is not disputed that the Diacos reside in Apartments 1R and 1S at 145 East 15th Street in Manhattan. The complaint alleges that on or about September 12, 2003, the Diacos entered into a contract with KCR for KCR to perform construction work combining Apartments 1R and 1S into one unit. The complaint further alleges that on or about December 3, 2003, KCR was working in plaintiffs' apartment, and while cutting into a wall behind the kitchen sink in April

1R, KCR cut into a gas line located behind the wall; sparks ignited and a fire ruptured from the gas line. Plaintiffs allege that as a result of defendant's actions, all gas service to the building was shut down immediately after the fire occurred, and that 145 East 15th Street Tenants Corp. (the "Cooperative Corporation") has asserted a claim against them "alleging that the entire cost related to the shut down of gas service throughout the entire building was caused by the ruptured gas line." In a separate but related action for declaratory relief as to the Diacos's insurance coverage (Caroline Diaco f/k/a Caroline Bournos and Joseph Djaco v. Royal Indemnity Company, Index No. 604211/05, Supreme Court, New York County), the Diacos alleged that as a result of the damage and shut down of gas service to their apartment, every gas line in the building had to be pressure tested, and every gas line failing the test had to upgraded and retested.

The complaint asserts causes of action for negligence and breach of contract. The first cause of action alleges that defendant breached its duty of care and was negligent in "failing to ask for diagrams showing where gas, water and electrical lines were located; failing to do any test borings to see whether or not there were gas lines, water lines or electrical lines in the wall; and otherwise failing to take adequate precautions to avoid cutting into gas, electrical and/or water lines." The second cause of action alleges that defendants breached the contract "by cutting into the gas line and thereby causing the gas pipe fire."

Defendant is now moving for partial summary judgment dismissing "all monetary claims, including attorneys fees, arising in connection with the pressure testing and repair of the gas piping" in plaintiffs' building.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); see also JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Ayotte v. Gervasio, 81 NY2d 1062 (1993). As CPLR 3212(b) provides that a summary judgment motion "shall be supported by affidavit" of a person "having knowledge of the facts," and other admissible evidence, a conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden. Id at 384-385; 127 Restaurant Corp. v. Rose Realty Group, LLC, 19 AD3d 172 (1st Dept 2005).

In seeking partial summary judgment, defendant relies solely on an attorney's affirmation, the pleadings, this Court's decision in the separate but related action for declaratory relief as to the Diacos's insurance coverage, and an unsworn typewritten statement presumably signed by plaintiff Joseph Diaco. Such papers are insufficient to satisfy the proof required under CPLR 3212(b). Defendant submits no affidavit or other competent proof, and the affirmation of defendant's attorney is unsubstantiated as counsel lacks personal knowledge of the facts underlying the action. Absent a sufficient evidentiary showing, defendant is unable to make out a prima facie case and, as such, is not entitled to judgment as a matter of law. See JMD Holding Corp. v. Congress Financial Corp., supra; Ayotte v. Gervasio, supra.

Notwithstanding the foregoing, even if the court were to consider defendant's arguments in support of the motion, those arguments are without merit. Defendant argues that the cutting of the gas line in the Diacos's apartment was not, as a matter of law, the legal cause of the expenses incurred by the Cooperative Corporation in testing and repairing the building's gas piping

system.[1] Defendant also argues that assuming arguendo that its conduct in cutting the gas line was a legal cause of any testing and repair, its liability for foreseeable consequences should be limited to expenses incurred in connection with testing and repairing the affected section of the piping system involving the Diacos's apartment. As noted above, however, absent a legally sufficient basis for establishing the facts to support these arguments, the issues of legal cause and forseeability cannot be determined as a matter of law.

Moreover, "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all the parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination." Ugarriza v. Schmieder, 46 NY2d 471 (1979); accord McCummings v. New York City Transit Authority, 81 NY2d 923, 926 (1993); Villoch v. Lindgren, 269 AD2d 271, 272-273 (1st Dept 2000). Moreover, the issue of proximate cause is generally a matter for the jury to resolve. See Derdiarian v. Felix Contracting Corp., 51 NY2d 308, 314-315 (1980). Nevertheless, in exceptional instances, proximate cause may be determined as a matter of law where only one conclusion may be drawn from established facts, which generally occurs in cases involving independent intervening acts that are so extraordinary or far removed from defendants' conduct as to be unforeseeable, i.e. where intervening acts "operate upon but do not flow from the original negligence." Id at 315.

Here, defendant fails to establish that the circumstances of this case fall within such

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[1]The case defendant cites, 61 Jane Stree Tenant Corp. v. Great American Insurance Co., 2001 WL 40774 (SDNY), is distinguishable on the facts, as that case resolved the issue of proximate cause in the context of a dispute as to insurance coverage, which calls for a more limited inquiry than when the issue of proximate cause is determined for the purposes of a negligence claim. See Home Insurance Co. v. American Insurance Co., 147 AD2d 353 (1st Dept 1989)

exception, so warrant a determination as a matter of law as to the issues of proximate cause and foreseeability. While intervenor Royal asserts that proximate cause has already been resolved by this Court's decision in the related action for a declaratory judgment as to the Diacos's insurance coverage, "the concept of proximate case when applied to insurance policies is a limited one." Home Insurance Co. v. American Insurance Co., 147 AD2d 353 (1st Dept 1989)(citing Great Northern Insurance Co. V. Dayco, 637 FSupp 765 [SDNY 1986]; Bird v. St. Paul Fire & Marine Insurance Co., 224 NY 47 [1918]). Thus, in the context of the determining the coverage provided under the Diacos's insurance policy with Royal, "the causation inquiry stop[ed] at the efficient physical cause of the loss; it [did] not trace events back to their metaphysical beginnings." Id at 354 (citing Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F2d 989 [2nd Cir 1974]); see also Jamaica Public Service Co., Ltd v. LA Interamericana Compania de Seguros Generales S.A., 1 AD3d 130 (1st Dept 2003); Parks Real Estate Purchasing Group v. St. Paul Fire & Marine Insurance Co., 472 F3d 33 (2nd Cir 2006); Kimmins Industrial Service Corp. v. Reliance Insurance Co., 19 F3d 78, 81 (2nd Cir 1994).

Accordingly, it is hereby

ORDERED that the defendant K.C.R. Construction, Inc.'s motion for partial summary judgment is denied.

DATED: June 12, 2007

ENTER:

J.S.C.