SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI
Acting Justice Supreme Court

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PATRICK DONOVAN,

Plaintiff,

-against-

ROCKLYN FUEL OIL CORP.,

Defendants.

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TRIAL TERM PART: 48

INDEX NO.: 005520/06

MOTION DATE:8-15-07
SUBMIT DATE:3-10-08
SEQ. NUMBER - 001

MOTION DATE: 1-31-08
SUBMIT DATE: 3-10-08
SEQ. NUMBER -002 & 003

The following papers have been read on this motion:

Notice of Motion, dated 8-1-07.....1
Notice of Motion, dated 12-26-07.....2
Notice of Cross Motion, dated 1-17-08.....3
Affirmation in Opposition to Cross Motion and Reply, Dated 2-24-08.....4
Reply Affirmation, dated 3-4-08.....5

Defendant's motion pursuant to CPLR §3126 to preclude (Seq. 1) is denied since said motion has been subsumed by defendant's cross motion seeking the same relief (Seq. 3). Plaintiff's motion to preclude pursuant to CPLR § 3126 is granted to the extent set forth herein and is otherwise denied. Defendant's cross motion to dismiss (Seq. 3) presumably

pursuant to CPLR §3212, dismissing this action based upon a release and alternatively to preclude based on discovery violations is denied.

Plaintiff the owner of a two family home sustained property damage and other losses when defendant a supplier of heating fuel oil negligently delivered fuel oil to a fuel tank which defendant had previously removed and or disconnected in favor of a new fuel tank which defendant was engaged to install. The incident occurred March 31, 2003 and this action was commenced in March, 2006. Issue was joined by way of an answer consisting in the main of general denials. Plaintiff recovered a sum of money from his insurer and the insurer brought a subrogation action in the United states District Court, Eastern District of New York to recover from defendant the sums paid by the insurer to the plaintiff on its insurance policy. The subrogation action was settled for the sum of $230,000 in August 2005, prior to the commencement of this action and the insurance carrier issued a General Release to the defendant for such amount. This action ensued thereafter with a complaint that seeks damages for the loss of an impending sale of plaintiff's property where the spill occurred, loss of rental income and loss of income to plaintiff's business. The answer consists of essentially a general denial with no mention of the release.

Since there has been no motion to dismiss based on the release and it is not pleaded as such in the answer, the action may not be dismissed pursuant to CPLR § 3211(a)(5). See CPLR §3211(e). However, the Court will treat defendant's motion as having been made for summary judgment pursuant to CPLR §3212

The parties have been engaged in extensive discovery and have attended numerous conferences in the Court. However, to date, defendant has failed to appear at an examination before trial.

Defendant's initial motion (Seq. 1) made in August 2007, sought compliance with defendant's discovery demand dated March 16, 2007. It appears, and it is not denied, that plaintiff has fully complied with this discovery demand and defendant's present focus is now on its later discovery demand dated October 12, 2007, which is one of the subjects of defendant's subsequent cross motion dated January 17, 2008, (Seq. 3).

This cross motion is in response to plaintiff's motion dated December 26, 2007, seeking to enforce its discovery demand dated March 22, 2007. It appears that except for appearing at an examination before trial, defendant has complied with plaintiff's other demands and has submitted an affidavit from a company official that after an exhaustive search of company records, defendant has now turned over all that it has to plaintiff. Defendant has neither addressed nor provided any reason for its failure to give testimony at an examination before trial.

If a discovery response to which plaintiff or defendant has responded that they have delivered all that is in its possession or as to which plaintiff or defendant claims does not exist is made, such party shall be precluded from introducing at trial any document or thing as to which such party made such response but did not previously deliver to the other side. The final decision on whether a party shall be so precluded is left to the discretion of the trial judge. Plaintiff and defendant are reminded of their continuing obligations to comply with discovery demands as set forth in CPLR §3101(h).

Defendant does not deny that defendant has failed to appear for an examination before trial despite previous court orders ordering defendant to do and has not offered any explanation or reason for its failure to do so.

Defendant thus has repeatedly failed to comply with demands for an examination before trial and orders of this Court directing such compliance. As the Court of Appeals stated in *Kihl v. Pfeffer*, 94 NY2d 118 (1999) on the issue of a party's noncompliance with court orders:

> "If the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity. Indeed, the Legislature, recognizing the need for courts to be able to command compliance with their disclosure directives, has specifically provided that a 'court may make such orders ... as are just,' including dismissal of an action. Finally, we underscore that compliance with a disclosure order requires both a timely response and one that evinces a good-faith effort to address the requests meaningfully" (*id.* at 123).

Wilful and contumacious conduct may be inferred from repeated failure to comply with court ordered discovery. *Rowell v. Joyce*, 10 AD3d 601 (2d Dept. 2004); *Nowak v. Veira*, 289 AD2d 383 (2nd Dept. 2001), *Poulas v. U-Haul International*, 288 AD2d 202 (2nd Dept. 2001). The Court finds that defendant's failure to appear for a deposition coupled with defendant's failure to respond to plaintiff's contentions on this issue is evidence of a manifest intentional disregard of this Court's orders and plaintiff's discovery demands and as such are deemed to be wilfull and contumacious to the extent that a sanction is appropriate.

Hence, defendant is precluded from calling at trial or from submitting evidence on a motion or any other phase of this action any present or former employee, agent or person having any knowledge or information with respect to the events described in the complaint. However, plaintiff shall, if he so chooses, have the right to require testimony from any such persons.

Based on the foregoing, plaintiff's motion (Seq. 2) is granted to the limited extent set forth above and is otherwise denied.

As to defendant's discovery demand dated October 12, 2007, a portion of that demand (demand #3) seeks discovery from a non-party of documents not claimed to be in the possession of plaintiff but rather plaintiff's unidentified accountants. This request is patently improper as methods exist to obtain discovery from a non-party. The remaining demands 1 and 2 are duplicative of demands previously made and as to which there was compliance and defendant does not by way of reply deny plaintiff's contention that there has been full compliance. Moreover, given the nature of this action, the allegations of both sides, the damages sought and the previous demands, the Court finds the demand of defendant dated October 12, 2007 is palpably improper, unduly burdensome or oppressive. *The Amherst Synagogue v. Schuele Paint Co., Inc.* 30 AD3d 1055 (4th Dept. 2006); Bell v. Cobble Hill Health Center, Inc., 22 AD3d 620 (2d Dept. 2005). The items demanded are duplicative in light of previous discovery compliance and are not reasonable and relevant to the allegations made by plaintiff. Defendant has failed to demonstrate that these items are not duplicative to other discovery which it has received or why such previous disclosure should be deemed

inadequate. Thus, that prong of defendant's cross motion which seeks to compel compliance with defendant's October 12, 2007 discovery demands is denied.

The remaining motion is that prong of defendant's cross motion (Seq. 3) which in effect seeks summary judgment based on the release issued by plaintiff's insurer in the subrogation action. In support of this motion, defendant has submitted the subrogation action complaint and the release. The complaint seeks to recover as damages the amount paid by plaintiff's insurer to plaintiff on its insurance policy *i.e.* "In excess of Two Hundred Thousand Dollars ($200,000.00)". The release is for $230,000.00. Defendant has not submitted any evidence tending to show that the items for which reimbursement was made to the insurance carrier are the same or similar to the items of damage claimed here and has failed to submit any agreement between the plaintiff and its insurance carrier with regard to rights of subrogation.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche,* 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief (*Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

The Court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*,

215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Here, defendant has failed to make a prima facie showing of entitlement to relief because defendant has not submitted any evidence that the release was intended to be binding on the plaintiff, that the release was binding on the plaintiff, that the release was intended to encompass the claims made by plaintiff in this action or that the items of damage in the subrogation action are duplicated in this action. *Dweck v. Bridge Transportation, Inc.*, 12 AD3d 560 (2d Dept. 2004).

A release is a contract, and its construction is governed by contract law. Where a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement. However, if from the recitals therein or otherwise, it appears that the

release is to be limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone. The meaning and coverage of a general release necessarily depends upon the controversy being settled and upon the purpose for which the release was given. A release may not be read to cover matters which the parties did not intend to cover. *Kaminsky v. Gamache*, 298 AD2d 361 (2d Dept. 2002) [Internal citations omitted]; *The Aetna Casualty and Surety Company v. Jackowe*, 96 AD2d 37 (2d Dept. 1983).

Absent clear and unequivocal language, a court will not strain to construe a release so as to preclude one who is not a party to the instrument from enforcing a claim or a cause of action. 19A N.Y.Jur., Compromise, Accord, and Release §77. *Persons bound by release without being parties to instrument.* Just as a release given to a tortfeasor who has knowledge of the insurer's rights will not preclude the insurer from enforcing its right of subrogation against the wrongdoer, *New York Central Mutual Fire Insurance Company v. Hildreth*, 40 AD3d 602 (2d Dept. 2007), so too should a release given by a subrogee to a tortfeasor not serve to release the tortfeasor from liability for claims to which the insurer has not been subrogated. An insurer is subrogated only to the amount paid to the insured. *Antonitti v. City of Glen Cove.*, 266 AD2d 487 (2d Dept. 1999).

Permitting an insurer to sue as an equitable subrogee for the part of the loss paid to its insured does not affect the insured's right to sue for the amount of the loss remaining unreimbursed. *Federal Insurance Company v. Arthur Andersen & Co.*, 75 NY2d 366, 374 (1990), *Winkelmann v. Hockins*, 204 AD2d 623 (2d Dept. 1994). Insurance company

subrogee did not have authority to settle claims of insured absent a showing that such claims were assigned to it and that intent was to grant such authority.

Based on the foregoing the motion and cross motion of defendant (Seqs. 1 and 3) are denied and the motion of plaintiff (Seq. 2) is granted to the extent of granting preclusion in favor of plaintiff and against defendant as set forth above and is otherwise denied.

All parties are reminded that there is a conference before the undersigned at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on April 3, 2008, at 9:30 a.m. No adjournments of this conference will be permitted absent the permission of or Order of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

This shall constitute the Decision and Order of this Court.

ENTER

DATED: March 25, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: Richard E. Gresio, Esq.
Attorney for Plaintiff
110-23 Jamaica Avenue
Richmond Hill, New York 11418

Hardin, Kundla, McKeon & Poletto, P.A.
Attorneys for Defendant
110 William Street, 25th Floor
New York, NY 10038