[* 1]

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

----------x **TRIAL TERM PART: 48**

BERNARD TESSLER and SHELLEY TESSLER,

INDEX NO.:014329/06

Plaintiff,

MOTION DATE:3-6-08
SUBMIT DATE:4-24-08
SEQ. NUMBER - 001

-against-

DELTA ENVIRONMENTAL CONSULTANTS, INC., MAXONS RESTORATION,

MOTION DATE:3-27-08
SUBMIT DATE: 4-24-08
SEQ. NUMBER - 002

Defendants.

----------x

DELTA ENVIRONMENTAL CONSULTANTS, INC.,

Third-Party Plaintiff

-against-

F.E. PARKER AND ASSOCIATES and FIREMAN'S FUND INSURANCE COMPANY,

Third-Party Defendants.

----------x

The following papers have been read on this motion:

Notice of Motion, dated 2-14-08..... 1
Notice of Cross Motion, dated 3-5-08.....2
Amended Cross Motion, dated 3-21-08.....3
Reply Memorandum of Law, dated 4-24-08.....4

Motion by third-party defendant American Insurance Company sued herein as Fireman's Fund Insurance Company ("AIC"), for judgment dismissing the third-party

complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is granted.

Cross-motion by defendant/third-party plaintiff Delta Environmental Consultants Inc ("Delta") for an order pursuant to CPLR 3025 granting it leave to amend the third-party complaint, is denied.

In the main action plaintiffs allege claims for property damage and personal injuries arising out of an incident that took place on January 23, 2005 at plaintiffs' residence. Plaintiffs claim that their residence "sustained water damage due to an ice dam formation and snow/ice melting and flowing back into their home from the exterior walls and windows" (Complaint, par. 11).

Plaintiffs filed a claim with AIC, after which Delta was allegedly hired by AIC to assess the extent of the damage. In June, 2005, plaintiffs were told that their residence was infested with mold, after which they temporarily moved out. Defendant Maxons was hired to remove the mold. Plaintiffs claim that during the remediation process, fungal and bacterial organisms became airborne with wallboard particulate and entered the HVAC system, thereby spreading the mold throughout the entire residence.

In November, 2005, plaintiffs were paid $121,181.10 in full settlement of all their claims against AIC arising out of "property damage due to ice dam occurring on or about 01/23/2005" at plaintiffs' home.

Plaintiffs commenced the main action against Delta and Maxons in August, 2006. Delta served a third-party complaint alleging five causes of action, two of which are against AIC. After AIC moved to dismiss the third-party complaint against it for failure to state a

cause of action, Delta cross-moved to amend its third-party complaint in an attempt to remedy the alleged deficiencies. Delta submitted a proposed amended third-party complaint, wherein it now purports to allege four causes of action against AIC. It is this amended pleading with the four causes of action against AIC that the Court has considered as the operative pleading for the purposes of the motion and cross-motion.

The causes of action against AIC in the proposed amended third-party complaint are based upon claims for contribution, vicarious liability for the negligence of Maxons, negligent supervision of Maxons, and negligent hiring of Maxons. AIC moves for judgment dismissing the third-party complaint pursuant to CPLR 3211(a)(7).

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable inference, and the court must determine only whether the facts as alleged fit within any cognizable theory [*Arnav Indus, Inc Retirement Trust v Brown Raysman, Millstein, Felder & Steiner, LLP*, 96 NY2d 300, 303 (2001)]. Where the ground for dismissal is 3211(a)(7), and evidentiary material is submitted, the criterion is whether the pleader has a cause of action, not whether it has stated one [*Leon v Martinez*, 84 NY2d 83, 87 (1994)].

Although leave to amend should be freely granted absent prejudice or surprise [CPLR 3025(b)], there should be some proper basis for granting the motion, where as here, it was made in response to a motion to dismiss [*Darbonne v Goldberger*, 31 AD3d 693 (2nd Dept. 2006). The party seeking leave to serve an amended pleading must make some evidentiary showing that the claim can be supported [*Joyce v McKenna Assoc., Inc.*, 2 AD3d 592 (2nd

Dept. 2003)]. The proposed amendment must not be palpably insufficient or devoid of merit [*Kraycar v Monahan*, 49 AD3d 507 (2nd Dept. 2008); *Negvesky v United Interior Resources, Inc.*, 32 AD3d 530 (2nd Dept. 2006)].

The release that AIC obtained from plaintiffs relieves it from liability to joint tortfeasors for contribution [General Obligations Law 15-108(b);see *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 24 (1985) and *McDermott v City of New York*, 50 NY2d 211, 220(1980); *Tereshchenko v Lynn*, 36 AD3d 684, 685-686 (2nd Dept. 2007); *Kagan v Jacobs*, 260 AD2d 442, 443 (2nd Dept. 1999); *Hanna v Ford Motor C o*, 252 AD2d 478, 479(2nd Dept. 1998); David D. Siegel, NEW YORK PRACTICE, §176 at p.301 (4th ed. 2005)]. General Obligations Law 15-108 was designed to foster settlements in multiple party tort cases by prescribing the effects of a settlement and altering rules of law which were not conducive to the negotiating process; the effect of the statute is to permit a joint tortfeasor to buy his peace by terminating, completely, his rights and liabilities in the action [*McDermott* at 220]. The benefit to non-settling joint tortfeasors is that they reap the benefit of trying a case against "an empty chair" (here, AIC), and of reducing their own liability by the percentage of the empty chair's fault [*Dembitzer v Broadwall Management Corp.*, 6 Misc 3d 1035 (A)(Civ. Ct., City of NY, 2005)]. Based on the foregoing, Delta has no claim against AIC for contribution.

As for vicarious liability, one who hires an independent contractor is not liable for the independent contractor's negligent acts because one who hires has no right to control the manner in which the work is done [*Kleeman v Rheingold*, 81 NY2d 270, 273 (1993); *Rosenberg v Equitable Life Assurance Soc. of the United States*, 79 NY2d 663, 668 (1992);

Stagno v 143-50 Hoover Owners Corp., 48 AD3d 548 (2nd Dept. 2008); *Rokicki v 24 Hour Courier Service, Inc.*, 294 AD2d 555 (2nd Dept. 2002)]. Exceptions to the general rule are found where the employer is under a specific nondelegable duty [*Kleeman*], and where the work at issue is "inherently dangerous" [see *Rosenberg*]. A third exception for cases alleging the negligence of the employer in selecting, instructing or supervising the contractor is not a true exception, as this category concerns the employer's liability for its own acts or omissions rather than its vicarious liability for the acts and omissions of the contractor [*Kleeman* at 274]. As a matter of pure vicarious liability, the only exception available to Delta here is the exception for inherently dangerous work.

Delta alleges that AIC hired Maxons, that the remediation procedures performed by Maxons were inherently dangerous, and that AIC knew or should have known that the work was inherently dangerous (Proposed amended third-party complaint, par. 36-40).

Examples of inherently dangerous activities are blasting, certain types of construction and working with high tension wires [see *Chainani v Board of Education of the City of New York*, 87 NY2d 370, 381 (1995)]. Other examples of inherently dangerous work include work on scaffolding [*Rohlfs v Weil*, 271 NY 444 (1936), the performance of a demolition project near a public thoroughfare [*Mauro v McCrindle*, 70 AD2d 77 (2nd Dept. 1979), affd 52 NY2d 719 (1980)], and the disposal of hazardous wastes [*State v Schenechtady Chemicals, Inc.*, 103 AD2d 33 (3rd Dept. 1984)].

In contrast, the transportation of children in school buses [*Chainani*], the administering of an EKG during a stress test [*Rosenberg*], the provision of medical services by ambulance personnel [*Brown v Transcare New York, Inc.*, 27 AD3d 350 (1st Dept. 2006),

the installation of a temporary boiler [*Saini v Tonju Associates*, 299 AD2d 244 (1st Dept 2002), and the laying of underground cable [*Steel v City of New York*, 271 AD2d 435 (2nd Dept. 2000)], have been found not to involve inherently dangerous activity.

The remediation work performed by Maxons in this case is closer in nature to the conduct alleged in the latter cases. In other words, the danger is not inherent in the nature of the contract work but rather was the result of negligence [*Saini* at 246]. Under all of the circumstances of this case, Delta has no claim against AIC for vicarious liability.

Where vicarious liability is unavailable, a pleader may still allege claims for negligent supervision and hiring [see *Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159(2nd Dept.), cert. den. 522 U.S. 967 (1997); *State Farm Ins. Co. v Central Parking Systems, Inc.*, 18 AD3d 859 (2nd Dept. 2005); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept. 2004)]. A necessary element of such causes of action is that the party doing the supervising and/or hiring knew or should have known of the hired party's propensity for the conduct which caused the injury [*Kenneth R* at 161; *Carnegie v JP Phillips, Inc.*, 28 AD3d 599, 600 (2nd Dept. 2006); *State Farm Ins. Co.* at 860; *Sheila* C. at 129-130].

Here, the proposed amended third-party complaint does not contain the critical allegation that AIC knew or should have known that Maxons had a propensity for performing work in a negligent manner. Nor has Delta made any evidentiary showing that it could support such an allegation. Consequently, Delta's proposed claims for negligent supervision and negligent hiring are fatally defective.

Based on the foregoing, AIC's motion for judgment dismissing the proposed amended third-party complaint for failure to state a cause of action against it must be granted, and

Delta's motion for an order granting it leave to serve the proposed amended third-party complaint must be denied.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: May 19, 2008

HON. DANIEL PALMIERI
Acting Supreme Court Justice

TO: **Molod Spitz & Desantis, P.C.**
Attorneys for Plaintiffs
104 West 40th Street, 9th Floor
New York, NY 10018

Michael J. Roveto, Esq.
Fiedelman & McGaw
Attorneys for Defendant/Third-Party Plaintiff
Two Jericho Plaza, Ste. 300
Jericho, NY 11753

Tressler, Soderstrom, Maloney & Priess, LLP
Attorneys for American Insurance Company
22 Cortlandt Street, 17th Floor
New York, NY 10007

Callan, Koster, Brady & Brennan, LLP
Attorneys for Defendant Maxons Restorations, Inc., s/h/a
Maxons Restoration
333 Earle Ovington Boulevard
Uniondale, NY 11551

F.E. Parker and Associates
797 Malta Avenue Extension
Ballston Spa, NY 12020