STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

LELAND JACKSON, LUCILLE APPARIUS, CAROL ARDOVINO-SHOOR, LINDA BARBER, SUSAN BATTA, MARY BEAUDOIN, TERRI BERGER, ANNE BROWN, LISA BUFFO, MICHELLE BURNS-REIDL, JULIA BUSHELL, DIANE CARLSON, LORRAINE DELAIR, MICHELLE DELAIR, DONNA DERICO-WARREN, MARY DEVICO, WALTER DICK, JOAN DONNELLY, CHRISTINE DRISCOLL, MARSHA FLINT, SHARON FOSTER, KATHY FRANK, PAULA GANNON, CLAUDI HANSEN, MAUDESTINE JACKSON, JOANNE KAMINSKI, MICHELLE KENNEDY, ANNE MARIE LAVALLE, MARTHA MAMROSH, CHERYL MARTIN, MICHAEL MAYO, LINDA MONTANA, SHARON MORGENSTERN, MARY NEWSOME, DEBRA PALMER, KATHLEEN PERREGO, BARBARA PISKUTZ, MARLA J. POWELL, GRETCHEN PUSEY, KAY REESE, ANDRIENNE REID, NANCY ROSENBLUM, SANDRA RYDER, JOAN SAWICKY, MICHELLE SCRUFF, DEBORAH SMITH, DIANE SOKAL, CHERYL SOLOMOS, DONNA SEENBURG, JOANNE TOOHEY, BARBARA ULMER, RICHARD WINNE, MARGARET WOOD, and BARBARA ZGRZEPSKI,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 6206-92
RJI NO. 0192032180

NUTMEG TECHNOLOGIES, INC., et al.,

Defendants.

Supreme Court Albany County All Purpose Term, April 8, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Cynthia S. LaFave, Esq.
Attorney for Plaintiffs
822 Delaware Avenue
Delmar, NY 12054

Thomas DeLorenzo, Esq.
Attorneys for Plaintiffs
201 Nott Terrace
Schenectady, NY 12307

McGivney & Kluger, P.C.
Kenneth S. Ross, Esq., of Counsel
Attorneys for Defendant,
Nutmeg Technologies, Inc.
One Lincoln Center, Suite 1010
110 West Fayette Street
Syracuse, NY 13202-1306

TERESI, J.:

Defendant seeks an order dismissing the complaint of plaintiffs Mary De Vico, Margaret Wood, Paula Gannon, Linda Montana and Deborah Smith (plaintiffs) pursuant to CPLR § 3126(3). Those motions are unopposed. The defendant also seeks an order pursuant to CPLR 3212 granting it summary judgment and dismissing the complaints of the remaining plaintiffs. Plaintiffs oppose the motion for summary judgment.

The plaintiffs commenced this personal injury action claiming exposure to a chemical that permeated their workplace in the form of steam at Building 8 of the Averell Harriman State Office Campus, Albany, New York. On January 1, 1992, Supreme Court issued a case Management Order and directed that the plaintiffs appear for an Examination Before Trial and to submit to an independent medical examination. On October 4, 2006, a Scheduling Order was issued and directed that all pre-trial discovery, including depositions and IME's be completed by

December 1, 2007. Defendant maintains it attempted to schedule depositions and/or physical examinations of the plaintiffs, Mary De Vico, Margaret Wood, Paula Gannon, Linda Montana, and Deborah Smith on many occasions without success. The defendant maintains it sought to depose and examine the plaintiff many times before the deadline of December 1, 2007. Defendant now seeks the dismissal of the complaint for plaintiff's failure to comply with the discovery and scheduling orders.

The nature and degree of the penalty to be imposed pursuant to CPLR § 3126 against a party who has refused to obey court orders, or willfully fails to disclose information which should be disclosed, it a matter within the discretion of the court. See, Sowereby v. Camarda, 20 AD 3d 411 (2nd Dept. 2005). Although dismissing a complaint pursuant to CPLR § 3126 is a drastic remedy, it is warranted when a party's conduct is shown to be willful and contumacious. See, Rowell v. Joyce, 10 AD 3d 601 (2nd Dept. 2004). The complaints are dismissed as the specified plaintiffs failed to comply with the discovery orders and failed to appear for depositions or physical examinations. Striking of the pleading is appropriate in this action as there is a clear showing that the failure to comply with discovery demands was willful and contumacious. See, Devito v. J & J Towing, Inc., 17 AD 3d 624 (2nd Dept. 2005). Moreover, the plaintiffs have not opposed this motion to dismiss the complaints.

Defendant also moves to dismiss the complaint of the remaining plaintiffs. The defendant alleges it provided the State of New York with a chemical known as DEAE which is an anticorrosive agent used in pipes in a building's HVAC infrastructure. The defendant alleges the failure of the HVAC system in Building 8 on the State Campus on October 21, 1991 cannot be attributed to it. The defendant alleges it had no participation or involvement with the

maintenance of the HVAC system. The defendant alleges it only acted as the supplier of the chemical to treat the water system. The defendant maintains the testimony of New York State employees at Building 8 revealed the HVAC sustained mechanical failures and the equipment was the original piping which was over 30 years old. The defendant alleges it was the State of New York that determined that DEAE was to be used in the water systems of New York State buildings. The defendant maintains the State of New York knew the HVAC system experienced leaks which released steam in the building containing the chemical. The defendant alleges it simply supplied the requested chemical. The defendant claims it had no involvement with the design, maintenance, operation or control of the HVAC system nor did it act as guarantors for the safe operation of the HVAC system. The defendant claims it owed no duty of care to the plaintiffs as third-party beneficiaries.

The plaintiffs allege the defendant was negligent in the performance of its contractual obligations and it owed a reasonable duty of care to them. Plaintiffs maintain the defendant was the sole and exclusive supplier of water treatment chemicals to the State of New York which were used in Building 8 of the Harriman Campus. Plaintiffs allege the defendant was "negligent in the training, supervising, testing, managing, evaluating, servicing and reporting of the technical and supervisory service for agency systems as it relates to the addition of chemical to the various HVAC systems used throughout the State Campus." Plaintiffs contend defendant's employees added chemicals to the Building 8 HVAC system. Plaintiffs allege the defendant as the supplier of chemicals, knew or reasonably should have known that the use of DEAE in the Building 8 HVAC system created a dangerous condition and the defendant owned a duty of reasonable care to the occupants of the building.

Plaintiffs maintain the summary judgment motion should be dismissed as it is in violation of prior procedural orders of the court. Plaintiffs allege three prior court orders required that a party would have to petition the court by order to show cause for any further relief in lieu of a motion. Plaintiffs allege the defendant is in violation of the court orders by commencing this motion for summary judgment. The defendant alleges the prior orders of the court pertained to discovery issues and pre-trial disclosure. The defendant contends the prior orders gave no specific directive for summary judgment motions and it relied on the provisions of CPLR 3212.

It appears from the prior orders of 1995, 2000 and 2001 that as a result of the complexity of this matter and the dilatory discovery process, the Court issued a directive that an order to show cause was to be utilized in lieu of motions. This appears to be a means to control the discovery process by the Court. Now that discovery is competed, the Note of Issue filed and a day certain established, the Court will entertain the motion. There is a strong public policy that favors determination of controversies on the merits. See, O'Laughlin v. Delisser, 15 AD 3d 372 (2nd Dept. 2005).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. See, Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Gilbert Frank Corp. v Federal Insurance Co., 70 NY2d 966 (1988). The burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. See, Zuckerman v City of New York, 49 NY2d 557 (1980). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination. See, Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395 (1957), and all evidence must be viewed in the light most favorable to the opponent to the motion. See, Crosland v. New York

City Transit Auth., 68 NY2d 165 (1986).

In opposing a motion for summary judgment, one must produce evidentiary proof in admissible form . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (Zuckerman v City of New York, supra, 562). It is incumbent upon the non-moving party to lay bare her proof in order to defeat summary judgment. See, O'Hara v Tonner, 288 AD2d 513 (3rd Dept. 2001). Mere conclusionary assertions, devoid of evidentiary fact, are insufficient to raise a genuine triable issue of fact on motion for summary judgment as is reliance upon surmise, conjecture or speculation. See, Banco Popular North America v. Victory Taxi Management, Inc., 1 NY3d 381 (2004).

Defendant's motion for summary judgment is denied as it has not sustained its burden of proof. From the facts presented, this court cannot determine as a matter of law that the contract between the defendant and the State of New York exonerated the defendant from any liability as a supplier of the chemical. This Court cannot determine as a matter of law that the defendant did not have some input and direction in the utilization of the chemical DEAE in the HVAC system in Building 8 on the State Campus. Nor can the Court declare as a matter of law that the occupants of the building were or were not intended third-party beneficiaries. See, Fourth Ocean Putnum Corp. v. Interstate Wrecking Co., 66 NY 2d 38 (1985). Questions of fact preclude summary judgment. Defendant has not satisfactorily demonstrated as a matter of law that it is entitled to summary judgment. See, Rosati's v. Kohl's Dept. Stores, Inc., 1 AD3d 674 (3rd Dept. 2003).

All papers, including this Decision and Order are being returned to the attorneys for plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR

2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: June 9, 2008
Albany, New York

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion dated February 7, 2008 (Deborah Smith);
2. Affirmation of Kenneth S. Ross, Esq. dated February 7, 2008 with attached exhibits A-C;
3. Notice of Motion dated February 7, 2008 (Linda Montana);
4. Affirmation of Kenneth S. Ross, Esq. dated February 7, 2008 with attached exhibits A-C;
5. Notice of Motion dated February 7, 2008 (Mary DeVico);
6. Affirmation of Kenneth S. Ross, Esq. dated February 7, 2008 with attached exhibits A-C;
7. Notice of Motion dated February 7, 2008 (Margaret Wood);
8. Affirmation of Kenneth S. Ross, Esq. dated February 7, 2008 with attached exhibits A-C;
9. Notice of Motion dated February 7, 2008 (Paula Gannon);
10. Affirmation of Kenneth S. Ross, Esq. dated February 7, 2008 with attached exhibits A-D;
11. Notice of Motion dated February 15, 2008;
12. Affirmation of Kenneth S. Ross, Esq. dated February 7, 2008 with attached exhibits A-O;
13. Affirmation in Opposition of Mark A. Myers, Esq. dated March 21, 2008 with attached exhibits A-J;
14. Reply Affirmation of Kenneth S. Ross, Esq. dated April 1, 2008.