

**Almodovar v Gannon Contr., LLC**

2008 NY Slip Op 32301(U)

August 12, 2008

Supreme Court, New York County

Docket Number: 0102744/2005

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN

*Justice*

PART 7

Index Number : 102744/2005

**ALMODOVAR, TOIVO**

VS.

**GANNON CONTRACTING**

SEQUENCE NUMBER : 002

DISMISS ACTION

INDEX NO. 102744/2005

MOTION DATE 1/31/08

MOTION SEQ. NO. 002

MOTION CAL. NO. 4

(And a thlr-d-party actlon)

The following papers, numbered 1 to 6 were read on this motion for summary Judgment

Notice of Motion— Affidavits — Exhiblts A-M, O

Answering Affidavits — Exhiblts A-P

Replying Affidavits — Exhiblts

PAPERS NUMBERED

1-3

4-5

6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

**FILED**

AUG 19 2008

COUNTY CLERK

**MICHAEL D. STALLMAN**  
J.S.C.

Dated: 8/12/08  
New York, New York

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 7**

-----X  
TOIVIO ALMODOVAR and JUDITH ALMODOVAR,

Plaintiffs,

- against -

GANNON CONTRACTING, LLC and ADCO  
ELECTRICAL CORP.,

Defendants.

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

**Index No. 102744/05**

**Decision and Order**

**FILED**  
AUG 19 2008  
COUNTY CLERK

Motion sequence numbers two and three are consolidated for disposition.

In this case, plaintiff, the former management employee of non-party Keefe, Bryuette & Woods, Inc. (KBW), a company that processes equity trades, alleges that he was injured when he tripped and fell in the area of KBW's office in which printers were located and construction was being performed (the Printer Area), on the fourth floor of a Manhattan building on September 3, 2004. Defendants, Gannon Contracting, LLC (Gannon) and Adco Electrical Corp. (Adco), move for summary judgment to dismiss the complaint and cross claims.

Defendant Gannon is the general contractor hired by KBW to perform renovations on the building's fourth floor. Adco is the electrical contractor that was hired by Gannon for data and electrical wiring work. Plaintiff alleges that defendants created or had actual or constructive notice of a hazard created by wires left out in and around at the work site and were negligent in, among other things, failing to relocate the printers in the Printer Area upon relocating the KBW employees and failing to create a barrier enclosing the Printer Area.

Plaintiff also alleges that defendants violated Labor Law §§ 200, 241 (6), New York State Industrial Code (Industrial Code) § 23-1.33, Administrative Code of the City of New York (Building

Code) §§ 27-127, 27-128, 27-1023 and 27-1041, and Multiple Dwelling Law (MDL) § 78. Plaintiff further claims that defendants' negligence caused his fall and injuries.

Adco argues that plaintiff may not recover under any of these statutes and codes. Adco further argues that plaintiff's common-law negligence claim fails because it was not performing work where plaintiff fell, did not own or maintain the premises or have the duty to maintain the Printer Area, and there is no evidence that it created or had actual or constructive notice of a dangerous condition at the site. Gannon adopts Adco's arguments, adding that it was not negligent and that plaintiff has not established a prima facie case of negligence.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). "Once the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*id.* at 306). In deciding a summary judgment motion, the role of the Court "is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003]).

In support of their motion, defendants provide the examination-before-trial (EBT) testimony of Steven Wissman, who testified that he was as a project manager for Gannon, which was hired by KBW to construct offices, relocate furniture, perform demolition, paint and install electrical systems and new carpeting. Wissman testified that when plaintiff fell, no one was performing construction or electrical work in the Printer Area, which was about 15 feet away from where such work had been performed. He further testified that there were no wires coming out of the floor in the Printer Area

and that had he observed any debris, he would have had a laborer clean it up, as Gannon, for the project's duration, employed laborers for such work.

According to Wissman, construction work was performed in the Printer Area only after plaintiff's accident, and approximately six weeks after the printers were relocated to another area, when the Printer Area was converted to an office. Wissman testified that when this conversion occurred, a wall, skylight and door were put in, with wiring done thereafter, but that there was no doorway when plaintiff fell, and the Printer Area was then sealed off with clear plastic sheeting hanging from ceiling as a barrier to protect KBW's machines from dust exposure.

Wissman testified that the electrician was with the project from start to finish, and that while Gannon oversaw all of the subcontractors, each subcontractor's foreman was responsible to control their own workers and make their own safety observations. When asked what type of review of Adco's work he did, Wissman responded that there was daily coordination, as Adco had a scope of work, and he would review the plans and the work when done to see if it matched the plans, but would not review the work's every detail. Wissman testified that he also kept in touch with the Adco foreman to keep Adco on schedule, observed all of the subcontractors' work on daily, weekly or routine basis, and made visual inspections of Adco and the rest of the subcontractors' work.

Defendants also submit EBT testimony of Frank Pecora, who testified that he was employed as a journeyman electrician by Adco and the only electrician working on the date of the incident. Pecora stated that with exception of the work he was doing, which was changing out power strips inside of cubicles that were outside of the Printing Area, the job was complete when the incident occurred. Pecora swore that, from a distance of about 20 to 25 feet, he witnessed plaintiff's fall through a constructed doorway, and that when he walked into the printer room to assist plaintiff, the

wire he saw was the cable that feeds the printer, with no wires hanging from the ceiling, or protruding from the floor in the general vicinity of where plaintiff fell, other than the power cords for the machines in the room. Pecora further testified that there were no ceiling tiles pushed aside or open areas in the ceiling, and no wires hanging down therefrom. He did not recall seeing any boxes or supplies on the floor on the pathway from the printer to the doorway.

Pecora stated that Adco uses a cone or boxes to cover wires protruding from a floor and that Adco had orange cones available. Pecora further stated that the general contractor did not set the safety standards, that Gannon's project manager never instructed him to use a box or cones to cover loose wires, and that instruction about the use of such materials as the method of protecting the area would have come from his supervisor, job foreman, or shop steward.

Defendants also submit the affidavit of Salvatore Lasardo, in which he swears that he was Adco's general foreman on the date of the incident, at which time Adco was setting up modular furniture in an adjacent space separated from the Printer Area by a wall and a door. Lasardo states that Adco had completed all of its work in the Printer Area prior to the date of the incident, did not leave any exposed wires extending up from the floor or down from the ceiling, or leave any of its equipment, wires, or tools in the Printer Area. Lasardo also states that on or about September 3, 2004, KBW's information technology (IT) department was installing equipment consisting of printers, fax machines and copiers in the Printer Area, that the wires present in the Printer Area were for those machines, and that Adco was not hired to install, and did not perform work in connection with, the machines.

At his earlier EBT, Lasardo testified that Adco staff generally rolled up wires protruding from the floor in a taped together coil, tying them with a piece of string up to the ceiling, and that it was

not Adco's practice to cover wires with boxes or to use safety cones. Lasardo swore that Adco put new data and power lines into the Printer Area, that the power would have come in from the ceiling, and the wires put in by taking out the ceiling tile and opening the ceiling. When Lasardo was asked "Was Adco performing any work in the printer room in September of '04," he answered "No, they were not. They may have done it in September, but not that date" (*id.* at 30). Lasardo testified that he was able to determine the dates in September that Adco worked in the Printer Area from memory because KBW was installing equipment in the Printer Area and would not have done so unless Adco had already completed its work. Lasardo also testified that he told Pecora to mind his own business regarding plaintiff's fall because Adco was out of the room, but that he did not know whether Adco was working in the Printer Area in September 2004.

Defendants also submit the EBT testimony of non-party witness Denita Rivera who testified that she was employed by KBW on September 3, 2004 and that there were no hanging wires or wires coming out of the floor, or debris thereon in the Printer Area, and that she did not see any construction workers there. Rivera also testified that there were at that time wires protruding from the floor approximately five feet from the printer that had been there for a month or more before plaintiff's fall (Wolff Aff., Exh M, at 22).

The parties all rely on plaintiff's EBT testimony to support their respective positions. Plaintiff testified that he had worked as a manager of equity operations for KBW processing the company's equity trades (Byrne Aff., Exh. J(i),<sup>1</sup> at 6). On the day before his accident, plaintiff and his co-workers had been relocated to another office area while construction was continued in the area

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<sup>1</sup> Plaintiff was deposed twice, first on October 18, 2005 and then on November 1, 2006, and there are two deposition transcripts annexed as exhibit "J" to the Byrne affidavit. The Court will refer to the October 18, 2005 transcript as "Exh. J(i)."

in which they had previously worked, to which plaintiff still had access (Byrne Aff., Exh. J, at 43). Plaintiff saw construction workers present on the morning of his fall when he came into work, and sent some documents to the printer from his computer (*id.* at 43-44). The printers remained in the area in which plaintiff and his colleagues had previously worked before being relocated, and construction was being performed there (*id.* at 44).

According to plaintiff, there was debris on the carpet around the printer, consisting of ceiling tiles and wires hanging down and almost touching the floor, with between 10 and 15 wires hanging down that he had to duck and walk around on his way to the printer. Plaintiff testified that the wires were "Romex" insulated electrical wires, and that he knew this because he had dealt with these types of wires before in his home (*id.* at 53), and that the printer cords were behind the printers. Plaintiff further stated that there was temporary lighting in the Printer Area, that it was dim, and that he had a little trouble seeing (*id.* at 54-55). At his second EBT, plaintiff testified that he did not notice wires coming out of the ceiling or debris near the printers until the morning he fell (*id.* at 83-85). At his first EBT, approximately a year earlier, plaintiff testified that he had observed debris there for days before his accident. While the transcript is not the model of clarity, it appears that plaintiff swore that he first saw the wires on September 2, 2004 (Byrne Aff., Exh. J(i), at 26-27), the day before the accident.

Plaintiff further testified that he walked to the Printer Area the morning of September 3, 2004, retrieved a 12 inches x 36 inches printout from a printer and, as trained to do, immediately started to read it, and was still looking at the printout, and perhaps walking, when his foot became entangled in wires and he tripped, twisting and hitting his back against the printer, or its base, before landing on the floor (Byrne Aff., Exh. J, at 55-60; Byrne Aff., Exh. J(i), at 24). Plaintiff stated that

he saw Romex wire wrapped around his legs or foot that he tried to get off of his leg, and that it was the same wire, or the same color wire, as that coming from the ceiling (Byrne Aff., Exh. J, at 92-93), and which as not hooked up to the printer (Byrne Aff., Exh., J(i), at 26). Plaintiff testified that his hand made contact with the wires hanging from the ceiling and with debris that was on the floor, consisting of ceiling tiles and light fixtures from “when they were knocking them down” (Byrne Aff., Exh. J, at 60).

Plaintiff testified that a Caucasian man working in a construction crew of about three, who was knocking debris down, including ceiling tiles and light fixtures, saw him fall from about seven feet away, jumped off a ladder, helped plaintiff up and assisted him thereafter (*id.* at 57-66). Thereafter, plaintiff was assisted by people he knew and went to the hospital.

Plaintiff’s expert opines that the construction work should have been kept separate from work space involving non-construction people, and that to a reasonable degree of engineering and safety construction certainty, there was a problem in planning and coordination between Gannon and Adco concerning the use of the space with KBW. He states that printers, fax machines and copiers should have been relocated with the previously relocated KBW employees so that the entire operation would have been properly set up on the day of plaintiff’s accident. Plaintiff’s expert further opines that there should have been a barricade or lock on the door and/or some signs to warn plaintiff of the debris and electrical wiring and lighting conditions and that defendants violated Industrial Code § 22-1.33 and Building Code §§ 27-1041 and 27-1023 and Labor Law § 241 (6). He states that the violations were a “competent producing cause of action of plaintiff’s accident” (Fair Aff., at 4).

Defendants are entitled to summary judgment dismissing plaintiffs’ Labor Law §§ 200 and 241 (6) claims. Plaintiff, as KBW’s management employee, was not, when he obtained and

reviewed the printout, “permitted or suffered to work on a building or structure” (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576 [1990], quoting *Whelen v Warwick Val. Civic and Social Club*, 47 NY2d 970, 971 [1979]), or performing work necessary or incidental to the erection or repair of a building or structure (see *Long v Battery Park City Auth.*, 295 AD2d 204 [1st Dept 2002]; *Spaulding v S.H.S. Bay Ridge LLC*, 305 AD2d 400 [2d Dept 2003]; see also *Valinoti v Sandvik Seamco, Inc.*, 246 AD2d 344, 345 [1st Dept 1998] [“plaintiff was not a person ‘employed’ to carry out the repairs as that term is used in section 200 (1), section 240 (1) and section 241 (6) of the Labor Law”]) as would be required to recover under the Labor Law.

Plaintiff cites to a myriad of cases regarding Labor Law §§ 200 or 241 (6) that do not address that plaintiff was simply not working on the construction project in any respect. For example, plaintiff cites to *Ramos v Champion Combustion* (1 AD3d 287 [1st Dept 2003], order recalled and vacated 12 AD3d 227 [1st Dept 2004] which involved a worker injured while working on a boiler installation project. As another example, plaintiff cites to *Ryder v Mount Loretto Nursing Home* (290 AD2d 892 [3d Dept 2002]), in which the injured plaintiff was a plumbing subcontractor’s employee who tripped, during a plumbing job, over an item previously attached to the floor by another subcontractor.

Multiple Dwelling Law § 78 is also inapplicable here, as the section applies to building owners (see *Weiss v City of New York*, 16 AD3d 680 [2d Dept 2005]), which defendants are not. Plaintiff does not contend otherwise, and defendants are entitled to dismissal of these claims. As Building Code §§ 27-127 and 27-128 also apply only to building owners (*id.*; *Beck v Woodward Affiliates*, 226 AD2d 328 [2d Dept 1996]), plaintiff may not recover based on these codes.

Industrial Code § 23-1.33 also does not apply here as it “does not apply to any city in the State of New York having a population of one million or more persons” (*Cunha v City of New York*, 18 Misc 3d 1104[A], 2007 NY Slip Op 52404 [U] [Sup Ct, NY County 2007]). Plaintiff does not dispute that the City’s population has exceeded one million for some time, including the time of his accident.

Defendants argue that in order to assert a claim under Building Code §§ 27-1023, which requires certain warning devices, and Building Code § 27-1041, which concerns safety measures during building alterations, plaintiff must, but cannot, offer the information needed to demonstrate that these provisions apply (*Byrne Aff.*, ¶ 122). Defendants ignore that it was their burden to provide admissible evidence to demonstrate that the codes do not apply, and not to merely point to gaps in plaintiffs’ case (*Falah v Stop & Shop Companies, Inc.*, 41 AD3d 638, 639 [2d Dept 2007]). Defendants’ “waiver” reply argument is unpersuasive where they have not met their summary judgment burden (*id.* at 639).

Defendants also argue that Building Code §§ 27-1023 and 27-1041 do not apply because they were not performing work in the Printer Area when plaintiff fell. This is also the ground upon which defendants move to dismiss plaintiff’s common-law negligence claim. Defendants’ contention is that the evidence demonstrates, as a matter of law, that they were not doing work in the Printer Area when plaintiff fell and that the wires there were connected to KBW’s machines. They further argue that there is no evidence that they caused the accident.

As is required on summary judgment, the Court will assume as true plaintiff’s EBT testimony that he saw debris on the floor and Romex electrical wires in the printer area coming from the ceiling, and that his foot became entangled in wires that were the same color as the electrical wires

allegedly coming down from the ceiling, and not a printer power cord. For purposes of summary judgment, the Court must also permit the inference that the wires were the cause of plaintiff's fall as he alleges, and credit plaintiff's testimony that he observed a worker working on light fixtures nearby who helped plaintiff after his fall. While defendants represent that plaintiff testified that Adco was not doing work (Byrne Aff., ¶ 139, citing to Byrne Aff., Exh. J, at 87) and that plaintiff testified that he did not see anyone from either company performing work at the site, this representation is based on plaintiff's testimony that the person who helped him immediately after his fall did not identify himself as employed by either defendant. Pecora testified, however, that he witnessed the fall, immediately thereafter assisting plaintiff. As plaintiff's EBT reveals that he knew the identity of those who assisted him, except for the worker who helped him up from the floor, for summary judgment purposes, the inference, in plaintiff's favor, that Pecora is the unidentified worker is not unreasonable. Therefore, there exists a triable factual issue as to whether or not it was Adco, and not KBW as Lasardo contends, that was working in the Printer Area and created a dangerous condition with wires or debris that caused plaintiff to fall. Accordingly, Adco's motion for summary judgment dismissing the complaint is denied.

Pointing to the testimony of Wissman, Adco's employees and Rivera, Gannon argues that it is entitled to summary judgment because all credible testimony indicates that defendants were not working and that no electrical wires were protruding either from the floor or the ceiling in the Printer Area when plaintiff fell. Thus, Gannon contends, there is no indication that it or its agent created the alleged condition, or had actual or constructive notice of its existence. Plaintiff counters that Gannon had control over the construction site, has failed to establish that it lacked notice of the wire/tripping defect around the Printer Area, and that Wissman's testimony indicates that Gannon

created or had notice of a dangerous condition or premises defect involving wires protruding from the floor.

“[I]t is not plaintiff’s burden in opposing the motions for summary judgment to establish that defendants had actual or constructive notice of the hazardous condition. Rather, it is defendants’ burden to establish the lack of notice as a matter of law” (*Giuffrida v Metro N. Commuter R.R. Co.*, 279 AD2d 403, 404 [1st Dept 2001]; *Mitchell v City of New York*, 29 AD3d 372, 374 [1st Dept 2006]).

While Wissman testified that he was frequently at the work site and that no work was being conducted on the premises in the area in which plaintiff fell,<sup>2</sup> plaintiff testified that there was construction work in that area, and that he saw work being performed in or around, and wires in, the Printer Area on the morning of his fall. Giving plaintiff the benefit of favorable inferences, the Court must credit his assertion there were hanging wires, uncovered wires or debris on the floor on the evening before his fall (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990] [“the motion court . . . should not pass on issues of credibility” but must draw all reasonable inferences in favor of the non-moving party]). In addition, Rivera testified that there were wires

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<sup>2</sup> The record testimony is unclear as to whether the Printer Area was a separate enclosed site with a door or an open area or alcove (*see* Byrne Aff., Exh. 1., at 16-17 [door and no plastic sheeting]; *but compare id.*, Exh., K [Wissman EBT]). Plaintiff contends that “Wissman testified that no electrical wiring was done until the doorway in the wall was done and then light switches and other wiring would be done at [that] time. If the wall was already built and there was a doorway as the electrician insists, the testimony of defendant Wissman is fictive” (Wolff Aff., at 8). Other than perhaps arguing that Wissman has not been truthful, the point of plaintiff’s counsel’s argument is somewhat elusive. The Court takes the argument as a challenge to defendants’ claim that work was not being performed in the Printer Area when plaintiff fell, which defendants supported with Wissman’s testimony that work was not performed in the Printer Area until after it was made into an office.

coming out of the floor five feet away from the printers.<sup>3</sup> Even where there is doubt or the existence of a triable issue of fact is debatable, summary judgment should be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]; *International Customs Assocs., Inc. v Bristol-Meyers Squibb Co.*, 233 AD2d 161, 162 [1st Dept 1996]). Plaintiff's testimony about wires and debris, coupled with Wissman's testimony concerning his presence at the site and inspections of the work, raises an issue of fact as to whether Gannon knew, or should have known of an unremedied premises defect. Thus, Gannon's motion is denied.

Turning to the cross claims, Gannon moves for summary judgment on its claims against Adco for common-law and contractual indemnification and breach of contract claim for failure to procure insurance. The indemnification provision upon which Gannon relies is located in a purchase order (PO), dated six days after the accident, which states that:

"The . . . subcontractor agrees to indemnify and save harmless Gannon . . . and other indemnitied . . . against all claims, liabilities, damages, loss, and/or expense incurred by or imposed upon the said indemnitied for any claim alleging bodily injury . . . sustained by any person . . . and however such injuries may be caused, where it is alleged that such claims, liabilities, damages, loss or expense arise from or [were] caused directly or indirectly by the work of the . . . subcontractor (regardless of negligence) its agents, or employees, in whole or in part, and regardless of any claimed or actual negligence by the indemnitied are the only negligent party. This indemnification and/or contribution shall include, but is not limited to cases where liability is imposed on the indemnitied by operation of law, negligence, for and which liability is imputed to the indemnitied."

Gannon also submits a copy of a Certificate of Liability Insurance, dated February 15, 2005, with a "Policy Effective Date" of August 8, 2004 (CLI). Gannon contends that it was not negligent, and thus is entitled to full contractual indemnification from Adco, which undertook the responsibility to install the electrical and data wires pursuant to the PO. Plaintiff contends that Adco's intention

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<sup>3</sup> While it is not clear that this is the defect that plaintiff claims caused his injury (Wolff Aff., at 8), or how far from the printers plaintiff walked, if he walked at all as opposed to falling immediately upon turning away from the printer, these are factual issues unresolvable here.

to indemnify can be clearly implied from the surrounding facts and circumstances, and the language and purpose of the PO.

In its opposition papers, Adco argues that Gannon's motion must be denied. Without having made a single argument for dismissal in its moving brief, in its opposition papers, Adco argues for the dismissal of Gannon's claims. Specifically, in opposition to Gannon's claim that it is entitled to contractual indemnification, Adco argues that: (1) there is no indemnification contract as the PO is dated after the accident and there is no evidence that it was intended to apply retroactively; (2) the indemnification provision violates General Obligations Law (GOL) § 5-322.1 as it purports to require Adco to indemnify Gannon for Gannon's own negligence, but does not state that it is enforceable only to the extent allowed by law; (3) the issue of Gannon's negligence has not been resolved; and (4) under the provision's terms, it does not apply absent proof that the alleged damages arose from Adco's work. Adco argues that Gannon is not entitled to common-law indemnification because the wires that caused plaintiff's accident did not arise from Adco's work.

Addressing the common-law indemnification claim first, to prevail on a common-law indemnification claim, Gannon must establish that it was not negligent, but nevertheless was compelled to pay damages that ought to have been paid by Adco (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1<sup>st</sup> Dept 1999]). At this juncture, Gannon has not been compelled to pay damages or established, as a matter of law, that it was not negligent and its motion is denied. The branch of Gannon's motion for contractual indemnification is also denied. Among other things, Gannon has not conclusively established retroactive application of the indemnification provision.

Also denied is Gannon's motion for summary judgment on its breach of contract claim. The C.I. states that the coverage will be effective from August 1, 2004 to August 1, 2005, and indicates

to indemnify can be clearly implied from the surrounding facts and circumstances, and the language and purpose of the PO.

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Also denied is Gannon's motion for summary judgment on its breach of contract claim. The CLI states that the coverage will be effective from August 1, 2004 to August 1, 2005, and indicates

that Gannon was to be named as an additional insured. Gannon contends that it is entitled to summary judgment on its breach of contract claim because there is no evidence that it was named as an additional insured by the carriers listed on the CLI. Adco opposes the motion, arguing that Gannon has not provided the policies with its moving papers. Gannon did not provide the policies. Gannon also did not provide a party's affidavit or deposition testimony, or any other evidence, to support its contentions.

Summary judgment may not be granted based on an attorney's affidavit (*Adam v Cutner & Rathkopf*, 238 AD2d 234, 239 [1st Dept 1997] ["attorney's affidavit is of no probative value on a summary judgment motion *unless* accompanied by documentary evidence which constitutes admissible proof"]), or by the pointing to gaps in the opposing party's evidence (*Vittorio v U-Haul Co.*, 52 AD3d 823 [2d Dept 2008] [movant on summary judgment must affirmatively demonstrate the merit of its claim or defense]). In addition, the CLI, although not dispositive as to coverage or lack thereof, constitutes some evidence that insurance was obtained, thereby raising a fact issue (*Horn Maintenance Corp. v Aetna Cas. & Surety Co.*, 225 AD2d 443, 444 [1<sup>st</sup> Dept 1996]). Because the Certificate of Insurance lists the insurers and policy numbers which purportedly provided coverage, it is not impossible, as Adco argues, for Gannon to prove whether Adco failed to obtain coverage. Both Gannon and Adco could have requested the insurers to provide copies of the policies, including the endorsements and declarations pages, to establish whether coverage was, in fact, provided to Gannon as an additional insured.

Adco's arguments for dismissal with prejudice of Gannon's indemnification and breach of contract claims are also denied. Adco did not provide admissible evidence to eliminate material issues of fact to meet its moving burden and, in fact, made no arguments for dismissal of the cross

claims in its moving papers. Adco's argument that the indemnification provision violates GOL § 5-322.1 is also not dispositive, as the statute does not bar claims by "innocent" indemnitees. While there remains a triable issue of fact regarding Gannon's negligence, no party has established Gannon's negligence on this record.

Upon its own initiative, the Court severs the fourth cause of Gannon's third-party complaint against Adco, which alleges breach of an agreement to procure insurance. "To permit this dispute to be tried before the same jury charged with determining the negligence issue would be prejudicial, since it would put before the jury the existence of liability insurance coverage" (*Smith v McClier Corp.*, 38 AD3d 322, 323 [1st Dept 2007]).

Accordingly, it is

ORDERED that defendant Adco Electrical Corp.'s motion for summary judgment (motion sequence 002) is denied; and it is further

ORDERED that defendant Gannon Contracting, LLC's motion for summary judgment (motion sequence 003) is denied; and it is further

ORDERED that the fourth cause of action of the third-party complaint against Adco Electrical Corp. is severed.

Dated: August 17, 2008  
New York, New York

ENTER:

  
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J.S.C.

**FILED**  
AUG 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

MICHAEL D. STALLMAN  
J.S.C.