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

PRESENT: JOAN M. KENNEY PART 8

Justice

Index Number : 104280/2008
SMALLS, RAYMOND
VS.
ANMOL CONSTRUCTION, INC.
SEQUENCE NUMBER : 002
SEVER ACTION

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

...n this motion to/for

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

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
APR 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 4/19/10

JOAN M. KENNEY, J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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RAYMOND SMALLS,

Plaintiff,

-against-

ANMOL CONSTRUCTION, INC., DANIELLE LEE and 11 EAST 127TH STREET, LLC,

Defendants.

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ANMOL CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

KS BILLING & ASSOCIATES INC., DEMETRIOU GROUP, and COLONIAL COOPERATIVE INSURANCE COMPANY,

Third-Party Defendants.

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Index No.
104280/08

Motion Sequence Nos.
002-004

DECISION & ORDER

Index No.
590203/09

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Papers considered in review of this motion to dismiss:

Papers	Numbered
Notice of Motion, Affirmation, and Exhibits	1-6
Opposition Papers, Affirmation with Exhibits	7-14
Opposition Papers, Affirmation, Affidavit & Exhibits	15-24
Affidavit in Opposition	25
Reply Affirmation	26-29

Motion sequence numbers 002 through 004 are consolidated for disposition.

In motion sequence 002, third-party defendant Colonial Cooperative Insurance Company (Colonial) moves to sever the third-party action (CPLR 603), which seeks monetary damages against Colonial for negligence and breach of contract.

In motion sequence 003, Colonial seeks summary judgment dismissing the third-party complaint against it, as well as dismissal of all cross claims[1] (CPLR 3212).

In motion sequence 004, defendant 11 East 127th Street, LLC (127th Street LLC) seeks summary judgment dismissing plaintiff's complaint, as well as dismissal of all the cross claims and counterclaims against it[2] (CPLR 3212).

Finally, plaintiff cross-moves for summary judgment on his complaint as against defendants Anmol Construction, Inc. (Anmol) and 127th Street LLC.

For the reasons stated below, Colonial's motion seeking severance is granted. The balance of Colonial's application is denied. 127th Street LLC's dispositive motion and plaintiff's cross motion, seeking similar relief, are also denied.

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[1] No answer other than that of Colonial has been proffered to this court. Therefore, there are no cross claims to address.

[2] No counterclaims were asserted as against 127th Street LLC.

Background

This personal injury action arises out of a bicycle accident that occurred on August 18, 2006. Plaintiff alleges that he was seriously injured as he rode in the street past 11 East 127 th Street, New York, New York (the location). According to the complaint, plaintiff alleges that, in the evening, after dark, he was hit by a blue tarpaulin (tarp) that came off a dumpster that was in the street ahead of him. Plaintiff avers that, prior to the accident, he saw the tarp covering the dumpster, and believes that a gust of wind caused the unsecured tarp to come off, and hit his bicycle, as he was riding along.

Plaintiff alleges that, at the time of his accident, construction was being performed at the location, and that 127th Street LLC owned the building, Danielle Lee (Lee) hired Anmol to perform the construction duties that were taking place, and that Anmol had rented the dumpster prior to the date of the accident.

Plaintiff seeks monetary damages from all defendants, alleging that they were negligent in not properly securing the tarp to the dumpster when work was completed at the end of the day.

In 127th Street LLC's answer, it cross-claims as against Anmol for contribution, as well as for common-law and contractual indemnification. In Anmol's answer, it counterclaims against plaintiff for an apportionment of the liability based upon plaintiff's comparative negligence. Additionally, it cross-claims

against the other defendants for contribution and indemnification.

In March 2009, Anmol commenced the third-party action herein, in which it seeks monetary damages against all third-party defendants for Colonial's failure to defend and indemnify Anmol in the main action herein.

Discussion

Severance

Colonial seeks to sever its third-party action (CPLR 603), because the legal issues raised in that action, solely concern the timeliness of a notice given by an insured, to its carrier. It would be improper for the jury in the negligence action hear issues involving insurance coverage and duty to defend that is created by the contract.

CPLR 603 states: "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue."

Actions that do not involve common issues of law or fact are routinely severed. However, "even where common facts exist, it is prejudicial to insurers 'to have the issue of insurance coverage tried before the jury that considers the underlying liability claims.'" *Medick v Millers Livestock Market Inc.*, 248 AD2d 864, 865 (3d Dept 1998), quoting *Schorr Bros. Development Corp. v Continental Ins. Co.*, 174 AD2d 722, 722 (2d Dept 1991); *see also Kelly v Yannotti*, 4 NY2d 603 (1958); *Smith v McClier Corp.*, 38 AD3d

322 (1st Dept 2007).

It is undisputed that the main cause of action sounds in negligence, and in the third-party action, the sole issue involves whether or not an insured provided its carrier, with timely notice of the negligence claim, as required by the terms of the policy. The two actions do not involve common questions of law or fact. *See Cruz v Taino Constr. Corp.*, 38 AD3d 391 (1st Dept 2007).

In light of the foregoing, it would be prejudicial for the same jury to consider both the negligence and insurance claims, severance of the two actions is appropriate. Therefore, Colonial's motion to sever the third-party action is granted.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Because summary judgment is a drastic remedy, it should not be invoked where there is any doubt as to the existence of a triable issue, or when the issue is even arguable. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Colonial's Dispositive Motion

Colonial seeks summary judgment dismissing the third-party

complaint and all cross claims made against it.

Colonial issued a property and liability policy, numbered 277028270, to Anmol for the period July 19, 2006 through July 19, 2007 (the insurance policy). The declarations page of the insurance policy named 127th Street LLC as an additional insured party. Additionally, pursuant to the Comprehensive General Liability Coverage Form (LS-5) attached to the insurance policy, Section E, entitled "What *You* Must Do in Case of Loss," item 1a. states as follows: "1. Notice. a. In case of an occurrence or if you become aware of anything that indicates there might be a claim under this policy, you must give us or our agent notice (in writing if requested) as soon as practicable."

Colonial asserts that Anmol had notice of plaintiff's claim on August 29, 2006, and failed to notify Colonial until November 6, 2006. Colonial contends that the three-month delay in providing violated the "as soon as practicable" language of the policy,[3] and that therefore, Colonial communicated its denial of coverage for this loss to Anmol in a letter dated November 7, 2006.

Anmol opposes Colonial's motion, averring that it gave notice to Colonial's agent on September 11, 2006, when the Claims Manager of third-party defendant K.S. Billings & Associates (Billings),

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[3] Colonial does not contend that it was prejudiced by the delay, therefore, this Court need not address the issues relating to prejudice and the remedial nature of the amendment to Insurance Law § 3420.

telephoned the Claims Department of the non-party Davis Agency (Davis).[4]

According to Anmol, Davis was Colonial's agent, as it was affiliated with and shares office space with third-party defendant Demetriou Group (Demetriou) and non-party New Windsor Insurance Agency, Inc. (New Windsor). Anmol contends that this telephone call from Billings to Davis, was sufficient notice of plaintiff's claim to satisfy the requirements of the insurance policy.

However, Colonial maintains that neither Davis nor Demetriou was designated agent for the purposes of receiving notice of a claim in September 2006, although since that time, there has been a merger between Demetriou and New Windsor, which Colonial asserts was the only entity authorized to, *inter alia*, accept notices on its behalf. Colonial further opines that it has not been able to obtain any verification that the September 11, 2006 telephone call to Davis was ever made.

Because there are material questions of fact as to when Colonial received notice of plaintiff's claim (including whether or not Anmol properly notified Colonial's agent), as well as whether the time period within which the claim was received by Colonial was "practicable" within the meaning of the policy, Colonial's motion for summary judgment is denied.

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[4] *See* Affidavits of Harminderpal Kaur and Sukhwinder Singh (Singh), Anmol's Affirmation in Opposition.

127th Street LLC

127th Street LLC seeks summary judgment dismissing plaintiff's complaint, because (1) the dumpster at issue was not on its property, and (2) it had no control over Anmol's work, nor the dumpster, and did nothing to cause the accident.

None of the parties to this action has proffered a copy of the contract between 127th Street LLC and Anmol; however, both defendants admit that the document does exist. *See* Examination Before Trial (EBT) of Singh, at 10-12; *see also* Effie Dilmanian (Dilmanian) EBT, at 8.

Dilmanian testified that, although he was aware of the dumpster being on the street for periods of time, he did not recall whether it was there at the time of plaintiff's alleged accident. *Id.* at 12-13. Additionally, there is no evidence that 127th Street LLC had any involvement with the dumpster, or supervising Anmol, beyond a general inspection of the property on a semi-weekly basis. *Id.* at 17-18; *see also* Singh EBT, at 14-15.

An entity engaging an independent contractor is generally not liable for the independent contractor's negligence. *See Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145 (1943). "[T]here are exceptions to this rule of non-liability, including situations where the work of the independent contractor is for the benefit of the owner of a building under a non-delegable duty not to cause harm to members of the public traveling on the nearby public

sidewalk." *Emmons v City of New York*, 283 AD2d 244, 245 (1st Dept 2001).

Plaintiff does not allege that the dumpster was on the sidewalk. The pictures and all the testimony proffered indicate that the dumpster was in the street. However, although plaintiff testified that he was riding in the street at the time of his accident (*see* Plaintiff EBT, at 14), a non-party witness, Shirley Temple Paige, attested to the fact that plaintiff was riding on the sidewalk at the time of his alleged accident. *See* Paige EBT, at 28.

Because plaintiff alleges that the tarp from the dumpster flew into his bike causing him to fall off, questions of fact exist as to whether or not plaintiff was riding on the sidewalk at the time of the alleged accident, or in the street, 127th Street LLC's motion is denied. For the same reasons, that portion of 127th Street LLC's motion that seeks summary judgment dismissing all cross claims is denied as well.

Plaintiff

Plaintiff cross-moves for summary judgment against Anmol and 127th Street LLC.

Although plaintiff asserts that he is entitled to summary judgment against Anmol and 127th Street LLC because they failed to exercise reasonable care. As discussed above, material questions of fact exist to determine how plaintiff's alleged accident

occurred. Shirley Temple Paige's testimony conflicts with plaintiff's account of the events, which raises factual questions about 127th Street LLC and Anmol's alleged negligence and/or duty owed to the public's safety. Therefore, that portion of plaintiff's cross motion seeking summary judgment is denied.

Plaintiff further contends that he is entitled to summary judgment because the presence of the dumpster, in the roadbed of the street, with an unsecured tarp, created a nuisance to the general public. A public nuisance "consists of conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons." *Copart Indus., Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 568 (1977) (internal citations omitted).

Although generally prosecuted by governmental authorities, a private person "who suffers damage or injury, beyond that of the general inconvenience to the public at large, may recover for such nuisance in damages or obtain an injunction to prevent its continuance." *Graceland Corp. v Consolidated Laundries Corp.*, 7 AD2d 89, 91 (1st Dept 1958), *aff'd* 6 NY2d 900 (1959).

Whether or not plaintiff can prove "special damages," as a consequence of the nuisance, based on negligence, is considered to

be only one wrong, and negligence must be proven for a private party to recover monetary damages for that wrong. *See Copart Indus. Inc. v Consolidated Edison Co. of New York, Inc.*, 52 AD 2d at 569. Plaintiff has not yet satisfied his burden of proof that Anmol and/or 127th Street LLC were negligent. At this juncture plaintiff's cross motion seeking summary judgment based upon a theory of nuisance is denied.

Finally, plaintiff invokes the doctrine of res ipsa locquitor to support its application. Under the doctrine, there is not any "presumption in favor of the plaintiff [, rather it] merely permits the inference of negligence to be drawn from the circumstance of the occurrence." *Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 (1986).

Generally, there are three conditions that must be satisfied for the doctrine to be applied. The accident that occurred (1) "must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff." *Corcoran v Banner Super Market, Inc.*, 19 NY2d 425, 430 (1967), quoting Prosser, Torts § 39, at 218 (3d ed).

Plaintiff has set forth enough proof to satisfy the first two elements of the res ipsa loquitor doctrine; however, the contested

facts concerning plaintiff's location at the time of the accident.

The first condition has been met in that the alleged accident herein would not have occurred had there not been negligence on someone's part.

As respects the second condition, Anmol does not deny that it had possession of a dumpster at that location on the date of plaintiff's alleged accident, however, there are material questions of fact as to what 127th Street LLC's relationship to the dumpster was at the time of plaintiff's accident.

Finally, the sequence of events that occurred on the date of plaintiff's alleged accident are in question. As of this date, there are material questions of fact as to whether the third condition has been met.

Therefore, that portion of plaintiff's cross motion that seeks summary judgment based upon the doctrine of res ipsa locquitor is denied.

Because summary judgment cannot be granted on any of plaintiff's theories, his cross motion is denied in its entirety. Accordingly, it is hereby

ORDERED that Colonial Cooperative Insurance Company's motions are granted, only to the extent of severing the third-party action for purposes of trial, and are otherwise denied; and it is further

ORDERED that 11 East 127th Street LLC's motion is denied; and

it is further

ORDERED that plaintiff's cross motion is denied; and it is further

Ordered that the parties are to appear at 10:00 A.M. in Part 8 for a compliance conference on May 6, 2010.

Dated: April 19, 2010

E N T E R:

Hon. Joan M. Kenney
J.S.C.