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

PRESENT: Hon. Doris Ling-Cohan PART 39

Index Number : 107478/2007

WIRELESS NETWORK GROUP, INC.

vs.

ARCC, INC.,

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5
Replying Affidavits	6, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant S.W. Management, LLC is granted in accordance with the attached memorandum decision.

FILED
JUL - 7 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/2/10

J.S.C.
JUDGE DORIS LING-COHAN

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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WIRELESS NETWORK GROUP, INC.,

Plaintiff,

-against- Index No. 107478/07

ARCC, INC., DEEM PLUMBING EAST, INC., and S.W. MANAGEMENT, LLC, Motion Seq. No.: 001

Defendants.

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DORIS LING-COHAN, J.:

The defendant S.W. Management, LLC (S.W. Management) moves, pursuant to CPLR 3212, for an order granting summary judgment dismissing all claims as against it.

The plaintiff Wireless Network Group, Inc. (Wireless), through its sub-contractor the defendant ARCC, Inc. (ARCC), was installing a cell phone tower on the roof of 342 East 67th Street in Manhattan, when ARCC accidentally drilled a hole into a water pipe, causing it to leak. The pipe sat directly underneath a 7,000-gallon water gravity tank. ARCC called in the defendant Deem Plumbing East, Inc. (Deem) to attempt an emergency temporary repair of the leaking pipe. Overnight, the temporary clamp failed, and Deem returned, but could not stem the flow. Three apartments below suffered water damage. The next day, after the 7,000-gallon tank completely drained, a permanent repair was affected.

Wireless does not allege that it settled all of the property damage claims made by the tenants below the leak. Rather, it is alleged that a non-party entity known as General Dynamics Network Systems, Inc. paid for the damaged apartments. The complaint alleges that a non-party

entity known as Nextel of New York Inc. (Nextel) leased the roof of the building for use as a cell phone tower, and engaged General Dynamics to install the tower. General Dynamics engaged Wireless to perform the work. Wireless, in turn, enlisted ARCC. It is alleged that General Dynamics is seeking to enforce an indemnification agreement it has with Wireless, presumably by making a demand that Wireless honor an indemnification agreement it has with General Dynamics.

The moving defendant, S.W. Management, was the managing agent of the building. The complaint states three causes of action against S.W. Management: equitable subrogation, negligence, and contribution. Wireless' theory of recovery against S.W. Management is based on an allegation that the building's superintendent, Cvetorzar Cvetkov, did not locate a valve to turn off the water supply to the leaking pipe.

In support of its motion to dismiss, the defendant S.W. Management alleges that the building superintendent, Cvetorzar Cvetkov, was employed by the owner of the building, a non-party, and that there is no written management agreement between S.W. Management and the owner. It is argued that, as the agent of a disclosed principal (the non-party owner of the building), S.W. Management, cannot be held liable for its non-feasance in the absence of a comprehensive and exclusive management agreement between the agent, S.W. Management, and the owner, which displaces the owner's duty to maintain the premises.

In opposition to the motion, the plaintiff Wireless argues that S.W. Management had sufficient responsibility, authority, and control of the building, and in fact, so imperfectly exercised its authority and control in its emergency response and decisions and participation on

the day of the accident, that it is liable for both misfeasance and nonfeasance. Also, in opposition to the motion, the co-defendant ARCC argues that the movant S.W. Management fails to offer any proof of its contention that it is an agent of a disclosed principal.

In reply, S.W. Management argues that the building superintendent, Cvetorzar Cvetkov, was employed by the non-party owner of the premises, and that there was no written management agreement between S.W. Management and the owner.

The proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact" from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). The "failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As indicated above, the complaint states three causes of action against S.W. Management: equitable subrogation, negligence, and contribution. Equitable subrogation is defined as "'the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it'" (*Federal Ins. Co. v Arthur Andersen &*

Co., 75 NY2d 366, 378 [1990], quoting *Arnold v Green*, 116 NY 566, 571-572 [1889]). The right to subrogation accrues upon payment of the loss (*Fasso v Doerr*, 12 NY3d 80 [2009]).

Negligence is a lack of ordinary care. It may arise from doing an act that a reasonably prudent person would not have done under the same circumstances, or, from failing to do an act that a reasonably prudent person would have done under the same circumstances (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]; *Caldwell v Village of Island Park*, 304 NY 268 [1952]; *Bello v Transit Authority of New York City*, 12 AD3d 58 [2d Dept 2004]). A defendant stands liable in negligence only for a breach of a duty of care owed to the plaintiff (*Pulka v Edelman*, 40 NY2d 781, 782 [1976]). The existence and scope of an alleged tortfeasor's duty is a legal question for determination by the court (*Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]).[1]

Contribution enables a joint tortfeasor that has paid more than its equitable share of damages to recover the excess from the other tortfeasors (*Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]). In an action for contribution seeking ratable or proportional reimbursement (*Rock v Reed-Prentice Div. of Package Machinery Co.*, 39 NY2d 34, 38 [1976]), the loss is distributed by requiring joint tortfeasors to pay a proportionate share of the loss to one who has discharged their joint liability (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 23 [1985]). Thus, a plaintiff may seek contribution from a party whose breach of a duty, owed either to the plaintiff or to a third party, played a part in causing or aggravating the injuries for which the

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[1] The court notes that as it has determined that there was no negligence on the part of S.W. Management, it need not address the issue of whether S.W. Management was an agent for a disclosed principal, the non-party owner of the building.

plaintiff may be held liable (*Sommer v Federal Signal Corp.*, 79 NY2d 540, *supra*). Contribution usually arises between co-defendants, but, it may also be sought in a separate action (CPLR 1403). Generally, when two or more tortfeasors share the responsibility for an injury, the rule is to apportion liability among them, based on their respective duties to the injured person, rather than shifting the entire loss through indemnification (*Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 565 [1987]).

Applying such principles herein, S.W. management has established an entitlement to summary judgment as to each of plaintiff's claims; in opposition, Wireless has failed to raise any factual issues to warrant a denial of the within motion.

As to Wireless' claim for negligence, the submissions fail to establish that S.W. Management breached a duty of care owed to Wireless. Significantly, no proof has been supplied to support Wireless' theory of negligence against S.W. Management, namely that the superintendent failed to locate a valve to stop the leak; in fact, Wireless has not offered any affirmative proof that a shut-off valve between the leak and the tank above *even existed*, to stop the water from the tank leaking to the pipe. All that is offered by Wireless is its counsel's unsupported and concluory allegation, which is not based upon personal knowledge, that the building owner's superintendent, Cvetorzar Cvetkov, should have located a valve, to stop the flow of water. On the other hand, Cvetorzar Cvetkov testified that he turned off all of the building's water supply valves, that were all located in the basement, and that it failed to stop the leak. [See EBT transcript of Cvetorzar Cvetkov, at 62 lines 16-21; at 83, lines 3-6, 19-20; at 84, lines 1-6; at 116, lines 10-25, at 117, lines 1-5; at 125, lines 13-25, at 126, line 1, Exh. N,

Notice of Motion]. Wireless has failed to submit any expert or other proof that there was anything that could have been done by S.W. Management and/or the building's superintendent, which would have alleviated the subject leak. A duty of reasonable care owed by the tortfeasor to the plaintiff Wireless is elemental to any recovery in negligence (*Eiseman v State of New York*, 70 NY2d 175, 187 [1987]). Wireless' unsubstantiated theory that it was the inability of Cvetorzar Cvetkov to locate a non-existent valve, did not create such a duty.

Similarly, S.W. Management, by responding to the building on the day of the accident, and observing that all of the building's water supply valves were turned off, and that a licensed plumber was attending to the leak, as a matter of law, exercised due care in dealing with the problem; the parties in opposition failed to raise any factual issues with respect to this issue. Moreover, it is undisputed that S.W. Management did not control or supervise Wireless' work, nor the work of Wireless' subcontractor ARCC. Thus, no valid line of reasoning permits a finding of negligence on the part of S.W. Management (*Brooks v Brooks*, 227 AD2d 195 [1st Dept 1996]); the negligence claim is therefore dismissed.

Summary judgment on a claim for common-law indemnification is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2d Dept 2005]; *Terranova v City of New York*, 197 AD2d 402 [1st Dept 1993]; *La Lima v Epstein*, 143 AD2d 886 [2d Dept 1988]). Since the issue of S.W. Management's negligence is resolved, the contribution claim must also be dismissed.

Finally, Wireless does not allege that it paid the loss. Therefore, it does not have a claim

for equitable subrogation.

Accordingly, it is

ORDERED that the motion for summary judgment is granted and the complaint and cross claims are hereby severed and dismissed as against the defendant S.W. Management, LLC and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 7/2/10

Hon. Doris Ling-Cohan, J.S.C.

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