

**Medical Liability Mut. Ins. v United Airconditioning Corp.**

2012 NY Slip Op 31015(U)

April 10, 2012

Supreme Court, New York County

Docket Number: 100115/2011

Judge: Eileen A. Rakower

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

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_  
Justice

PART 15

Index Number : 100115/2011  
MEDICAL LIABILITY MUTUAL  
vs  
UNITED AIRCONDITIONING CORP.  
Sequence Number : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

**FILED**  
APR 17 2012  
NEW YORK COUNTY CLERK'S OFFICE  
PAPERS NUMBERED  
1, 2  
3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13  
14, 15, 16 | 17, 18

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 4/10/12

  
HON. EILEEN A. RAKOWER  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X

MEDICAL LIABILITY MUTUAL INSURANCE

Index No.  
100115/11

Plaintiff,

**DECISION  
and ORDER**

- against -

UNITED AIRCONDITIONING CORP., UNITED  
AIRCONDITIONING CORP, II, EMPIRE  
DISMANTLING, INC., BLACK BULL  
CONTRACTING, LLC, JOHNSON CONTROLS, INC.,  
STERLING INTERIORS GROUP, INC., MG  
ENGINEERING P.C., EAST COAST RESTORATION  
& CONSULTING OF NY, CORP., EAST COAST  
RESTORATION CORP., HALLEN WELDING SERVICE,  
INC., HALLEN STEEL, SKYLIFT MASTER RIGGER  
CORP., SKYLIFT CONTRACTING CORP.,  
ABSOLUTE ELECTRICAL CONTRACTING OF NY  
INC.,

Mot. Seq.  
005

**FILED**  
**APR 17 2012**  
**NEW YORK  
COUNTY CLERK'S OFFICE**

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Medical Liability Mutual Insurance Company ("MLMIC") is the lessee of office space located at 2 Park Avenue in New York County. MLMIC states that, from on or around January 11, 2008 through October 28, 2008, defendant United Airconditioning Corp. ("United") "contracted and/or subcontracted with [the building owner and management company] to conduct renovation, construction and repair work on the roof of [the building]." During this time, MLMIC alleges that United and/or its contractors or subcontractors "negligently planned and/or negligently performed renovation, construction and/or repair work on the roof" of 2 Park Avenue, causing "substantial amounts of water ... to enter into the office space of MLMIC on multiple occasions ... thereby causing MLMIC to suffer substantial damage to its office premises, property, material and work product." Among those named as

defendants are Skylift Master Riggers Corp. ("Skylift Master") and Skylift Contractor Corp. ("Skylift Contractor"). Both entities are alleged to have negligently planned and/or performed renovation work on the roof of 2 Park Avenue, causing the alleged water damage.

Skylift Contractor and Skylift Master now move for summary judgment. Skylift Contractor submits the affidavit of Brad Allecia, its vice president. Allecia affirms that Skylift Contractor "is a rigging company that is hired by various companies to assist in the placement of various objects, pieces of machinery, etc. on the roofs or in locations that require the use of rigging applications." Allecia further states that, on the project at issue in this lawsuit, Skylift Contractor was hired by United to provide rigging for the placement of Cooling Towers on the roof of 2 Park Avenue. Allecia affirms that he was personally present when the delivery was made on February 12, 2008. United was "responsible for receiving the cooling towers on the roof on the date of delivery and directed Skylift Contractor Corp. where to place the towers." Allecia states that Skylift Contractor "had no connection to or responsibility for any of the renovation, construction and/or repair work that began prior to and continued after it delivered the cooling towers."

Skylift Master submits an attorney's affirmation in support of its motion for summary judgment. Counsel for Skylift Master affirms that Skylift Master "did absolutely nothing at those premises to possibly hold it liable for the alleged damages claimed."

MLMIC and the co-defendants of the Skylift entities all submit opposition to the instant motions for summary judgment.<sup>1</sup> The parties argue that summary judgment is premature in light of the fact the action is in the early stages of discovery, and no depositions have been held. Moreover, the papers submitted in opposition to Skylift Master's motion note that Skylift Master fails to submit an affidavit from a Skylift employee with firsthand knowledge.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law. That party must produce

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<sup>1</sup>The court does note, however, that MLMIC does not oppose summary judgment in favor of Skylift Master on the condition that such dismissal be without prejudice to renew an action against it, should new facts arise during the course of discovery.

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Here, the court finds that both Skylift Contractor and Skylift Master’s motions must be denied as premature. CPLR §3212(f) provides:

Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

As previously noted, this action is in the early stages of discovery. MLMIC and the co-defendants are entitled to discovery detailing the specific nature of the work performed by Skylift Contractor at the job site. While Skylift Contractor notes that water damage is alleged to have occurred prior to the date of Skylift Contractor’s work, the court cannot hold at this early juncture that Skylift Contractor bears no responsibility for any of the alleged water damage as a matter of law.

With respect to the motion by Skylift Master, Skylift Master fails to submit proof in admissible form establishing a prima facie showing of entitlement to judgment as a matter of law. It is well settled that an attorney’s affirmation does not constitute proof in admissible form (*Batista v. Santiago*, 25 A.D.3d 326 [1st Dept. 2006]).

Wherefore it is hereby

ORDERED that Skylift Contractor and Skylift Master's motions for summary judgment are denied without prejudice.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April <sup>10</sup>/~~8~~, 2012

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
APR 17 2012  
NEW YORK  
COUNTY CLERK'S OFFICE