SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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PACIFIC EMPLOYERS INSURANCE COMPANY,
Plaintiff,

-against-

NEW YORK PROFESSIONAL DRYWALL CORP.,
Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.
Index No. 9063/2011
Motion Date: September 4, 2012

The following papers numbered 1 to 7 were read on plaintiff's motion for summary judgment:

Notice of Motion-Affirmation-Affidavit-Exhibits 1-4

Affirmation in Opposition-Affidavit-Exhibits. 5-7

Upon the foregoing papers, it is ORDERED that the motion is disposed of as follows:

As a preliminary matter, this Court received plaintiff's reply affirmation on September 5, 2012, one day after the motion was marked fully submitted. According to the Court's Part Rules, Section IV(C):

> Opposition and reply papers on motions are to be directed to chambers and filed at the Supreme Court Civil window and **not** filed with the County Clerk. The filing of any opposition or reply papers with the County Clerk **will not** be considered or read. Additionally, all papers filed on a motion **must be received by chambers NO LATER than 5:00 p.m. on the return date.** Papers received thereafter will not be read or considered.

Plaintiff's reply was due to be in hand no later than 5:00 p.m. on September 4, 2012. It was not,

and therefore will not be considered by this Court.

This is an action in which plaintiff seeks additional workers' compensation insurance premiums from defendant. According to plaintiff's affidavit, plaintiff issued a workers' compensation insurance policy to defendant and based the estimated premium upon the payroll and job descriptions supplied by defendant. Defendant payed the estimated premium. Plaintiff subsequently audited defendant's payroll and ascertained that additional work was performed and that certain employees were initially classified incorrectly resulting in a higher premium due plaintiff by defendant. Plaintiff claims it is owed an additional $12,766.00 plus interest from July 21, 2010.

Defendant specifically denies that it owes any additional premiums and submits the affidavit of one of its officers who claims that the plaintiff misclassified certain employees and used incorrect payroll calculations. Moreover, defendant states that it has been awaiting document discovery and depositions, the answers to which have been outstanding since November, 2011. No discovery has occurred in this case to date.

CPLR §3212(f) states: "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." In *Government Employees Insurance Co. v Desiderio*, 104 AD2d 791 (2nd Dept. 1984), the Court held that the a demonstrated a need to conduct additional discovery proceedings in order to ascertain pertinent facts which pending discovery would reveal warrants a denial of summary judgment. So long as a party demonstrates that facts necessary to justify opposition may exist, that party is to be afforded the opportunity to

conduct such discovery as will permit him to avail himself of such information. *Bingham v Wells, Rich, Greene, Inc.*, 34 AD2d 924, 925 (1st Dept. 1970); *Golden v Wickhardt Co., Inc.*, 33 AD2d 652, 652 (4th Dept. 1969).

The rationale behind this rule is that in order to defeat a motion for summary judgment, a party is required to produce proof, in admissible form, that would warrant a trial of the material questions of fact upon which plaintiff's causes of action rest. If such evidence is within the exclusive control of the moving party, summary judgment must be denied to permit the plaintiff an opportunity to obtain the very admissible evidence needed to oppose a summary judgment motion. *Yu v Forero*, 184 AD2d 506, 507 (2nd Dept. 1992).

Furthermore, in *Brown v County of Nassau*, 226 AD2d 492 (2nd Dept. 1996) the Court held that where substantial discovery in an action remains outstanding, granting summary judgment is premature. *See, Hoxha v City of New York*, 265 AD2d 379 (2nd Dept. 1999). In *Rosa v Colonial Transit, Inc.*, 276 AD2d 781 (2nd Dept. 2000), the Court ruled that where the prime actor, the defendant driver, had not yet been deposed for a court-ordered deposition, the plaintiffs were deprived of an "opportunity to obtain evidence pertinent to the cause of the accident."

Based upon defendant's representations, no discovery has been had in this matter. Defendant served discovery demands dating back as far as November, 2011 which have yet to be answered. Furthermore, none of the parties have been deposed. Accordingly, plaintiff's motion for summary judgment is denied in its entirety due to the defendant's inability to effectively oppose same without any discovery or the ability to cross-examine the very witnesses whose affidavits are submitted in support of the motion for summary judgment.

Moreover, "[s]ummary judgment is a drastic remedy that 'should not be granted where

there is any doubt as to the existence of a triable issue' (citations omitted). In its analysis of such a motion, a court must construe the facts in a light most favorable to the nonmoving party so as not to deprive that person his or her day in court (citations omitted)." *Russell v A. Barton Hepburn Hosp.*, 154 AD2d 796, 797 (3rd Dept. 1989); *See also, Moskowitz v Garlock*, 23 AD2d 943, 944 (3rd Dept., 1965).To grant summary judgment it must clearly appear that no material and triable issue of fact is presented . . .This drastic remedy should not be granted where there is any doubt as to the existence of such issues,...or where the issue is 'arguable'...; 'issue finding, rather than issue-determination, is the key to the procedure.'" *Pirrelli v Long Island Railroad,* 226 AD2d 166 (1st Dept. 1996)(quoting *Sillman v Twentieth Century-Fox,* 3 NY2d 395, 404). In making this determination, the court must view the evidence in the light most favorable to the non-moving party, and accord the non-moving party the benefit of every reasonable inference. *See, Negri v Stop and Shop, Inc.,* 65 NY2d 625 (1985); *Rizzo v Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995); *Rose v De ECIB USA,* 259 AD2d 258, 259 (1st Dept. 1999). The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *See, Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

While summary judgment is an available remedy in some cases, its dire effects preclude its use except in "unusually clear" instances. *Stone v Aetna Life Ins. Co.*, 178 Misc. 23, 25 (Sup. Ct., New York County,1941). "A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a 'day in court.'" *Wanger v Zeh*, 45 Misc2d 93, 94 (Sup. Ct., Albany County, 1965), *aff'd* 26 AD2d 729 (3rd Dept.1966).

Given the fact that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is arguable, or "fairly debatable," summary judgment must be denied. *Bakerian v H.F. Horn*, 21 AD2d 714 (1st Dept. 1964); *Jones v County of Herkimer*, 51 Misc2d 130, 135 (Sup. Ct., Herkimer County, 1966); *Town of Preble v Song Mountain, Inc.*, 62 Misc2d 353, 355 (Sup. Ct., Courtland County, 1970); *See also, Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 404 (1957).

Courts are not authorized to try issues in a case, but rather to determine whether there is an issue to be tried. *Esteve v Abad*, 271 AD 725, 727 (1st Dept. 1947). "Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." *Id.; Sillman*, 3 NY2d at 404.

Based upon the defendant's affidavit and the evidence submitted therewith, an issue of fact is created necessitating denial of summary judgment.

Furthermore, it is well settled that successive motions for summary judgment should be denied where the motion is based upon grounds and factual assertions which could have been raised on the first motion. *See, Manning v Turtel*, 135 AD2d 511, 511-512 (2nd Dept. 1987); *Taylor v Brooklyn Hospital*, 187 AD2d 714, 715 (2nd Dept. 1992; *Baron v Charles Azzue, Inc.*, 240 AD2d 447, 449 (2nd Dept. 1997). Unless a party is able to demonstrate that the evidence it is submitting is newly discovered, successive summary judgment motion are proscribed. *See, Davidson Metals Corp. v Marlo Development Co.*, 262 AD2d 599 (2nd Dept. 1999); *Staib v City of New York*, 289 AD2d 560, 561 (2nd Dept. 2001); *Broer v Smith*, 240 AD2d 528, 529 (2nd Dept.

1997). Due to plaintiff's decision to refuse to participate in discovery and then move for summary judgment against defendant while at the same time attempting to deprive defendant of its ability to effectively oppose the motion, necessitates the decision that the plaintiff made its one summary judgment motion in this case. The plaintiff got its "one bite at the apple", albeit a poisonous one.

Therefore, plaintiff's motion is denied in its entirety. The parties shall appear on September 27, 2012 at 9:00 a.m. in Courtroom #6 for a preliminary conference.

The foregoing constitutes the decision and order of the Court.

Dated: September 11, 2012 E N T E R
Goshen, New York

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HON. CATHERINE M. BARTLETT, A.J.S.C.