SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

EDWIN LEBRON,

Plaintiff(s),

DECISION AND ORDER

Index No: 307049/11

- against -

THE CITY OF NEW YORK AND BRONX LEBANON MEDICAL CENTER,

Defendant(s).

BRONX LEBANON MEDICAL CENTER,

Third-Party Plaintiff(s),

Third-Party
Index No: 83914/13

- against -

CITYWIDE MOBILE RESPONSE CORPORATION,

Third-Party Defendant(s).

In this action for alleged personal injuries arising from the negligent maintenance of the public sidewalk, third-party defendant moves seeking an order pursuant to CPLR § 3212 granting it summary judgment with respect to the third-party complaint on grounds that the third-party action is barred by the exclusivity provisions of Workers Compensation Law § 11. Specifically, third-party defendant alleges that plaintiff's injury falls outside the ambit of the indemnification provision upon which the third-party action is premised and, therefore, summary judgment is warranted. Defendant/third-party plaintiff opposes the instant motion on

grounds that it is premature and must, therefore, be denied pursuant to CPLR § 3212(f). Moreover, defendant/third-party plaintiff asserts that plaintiff's accident falls squarely within the ambit of the indemnification clause within the agreement between it and third-party defendant.

For the reasons that follow hereinafter, third-party defendant's motion is hereby granted.

The instant action is for alleged personal injuries. Within his complaint, plaintiff alleges that on April 26, 2011, he tripped and fell as he traversed the sidewalk located in front of 1265 Fulton Avenue, Bronx, NY. Plaintiff alleges that the sidewalk upon which he fell was defective, that defendants were responsible for the maintenance and repair of the sidewalk, that they were negligent in repairing the same, and that such negligence caused his accident and the injuries resulting therefrom. The third-party complaint asserts that defendant/third-party plaintiff and third-party defendant entered into an agreement whereby third-party defendant would provide ambulance services to defendant/third-party plaintiff and that as per that agreement, third-party defendant agreed to indemnify defendant/third-party plaintiff for any loses connected with the services governed by the agreement. Defendant/third-party plaintiff asserts that plaintiff's accident was the result of acts and/or omissions by third-party defendant and, thus, defendant/third-party plaintiff asserts a claim for

contractual indemnification.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Thus, a defendant seeking summary judgment must establish prima facie entitlement to such relief as a matter of law by affirmatively demonstrating, with evidence, the merits of the claim or defense, and not merely by pointing to gaps in plaintiff's proof (*Mondello v DiStefano*, 16 AD3d 637, 638 [2d Dept 2005]; *Peskin v New York City Transit Authority*, 304 AD2d 634, 634 [2d Dept 2003]). Once movant meets the initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

Pursuant to CPLR § 3212(f), a motion for summary judgment will be denied if it appears that facts necessary to oppose the motion exist but are unavailable to the opposing party. Denial is particularly warranted when the facts necessary to oppose the motion are within the exclusive knowledge of the moving party (*Franklin National Bank of Long Island v De Giacomo*, 20 AD2d 797, 297 [2d Dept 1964]; *De France v Oestrike*, 8 AD2d 735, 735-736 [2d Dept 1959]; *Blue Bird Coach Lines, Inc. v 107 Delaware Avenue*,

N.V., Inc, 125 AD2d 971, 971 [4th Dept 1986]). However, when the information necessary to oppose the instant motion, is wholly within the control of the party opposing summary judgment and could be produced via sworn affidavits, denial of a motion for summary judgment pursuant to CPLR § 3212(f), will be denied (*Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999).

A party claiming ignorance of facts critical to ~~the~~ defeat a motion for summary judgment is only entitled to further discovery and denial of a motion for summary judgment if he or she demonstrates that reasonable attempts were made to discover facts which, as the opposing party claims, would give rise to a triable issue of fact (*Sasson v Setina Manufacturing Company, Inc.*, 26 A.D.3d 487, 488 [2d Dept 2006]; *Cruz v Otis Elevator Company*, 238 AD2d 540, 540 [2d Dept 1997]). Implicit in this rationale is that the proponent of further discovery must identify facts, which would give rise to triable issues of fact. This is because, a court cannot condone fishing expeditions and as such "[m]ere hope and speculation that additional discovery might uncover evidence sufficient to raise a triable issue of fact is not sufficient" (*Sasson* at 501). Thus, additional discovery, should not be ordered, where the proponent of the additional discovery has failed to demonstrate that the discovery sought would produce relevant evidence (*Frith v Affordable Homes of America, Inc.*, 253 AD2d 536, 537 [2d Dept 1998]).

Notwithstanding the foregoing, CPLR § 3212(f) mandates denial of a motion for summary judgment when a motion for summary judgment is patently premature, meaning when it is made prior to the preliminary conference or if no discovery has been exchanged (*Gao v City of New York*, 29 AD3d 449, 449 [1st Dept 2006]; *Bradley v Ibex Construction, LLC*, 22 AD3d 380, 380-381 [1st Dept 2005]; *McGlynn v. Palace Co.*, 262 AD2d 116, 117 [1st Dept 1999]). Under these circumstances, the proponent seeking denial of a motion as premature, need not demonstrate what discovery is sought, that the same will lead to discovery of triable issues of fact or the efforts to obtain the same have been undertaken (*id.*). In *Bradley*, the court denied plaintiff's motion for summary judgment as premature, when the same was made prior to the preliminary conference (*Bradley* at 380). In *McGlynn*, the court denied plaintiff's motion seeking summary judgment, when the same was made after the preliminary conference but before defendant had obtained any discovery whatsoever (*McGlynn* at 117).

Preliminarily, the Court finds no merit to defendant/third-party plaintiff's assertion that the instant motion is premature. As noted above, a party seeking to avail itself of the remedy promulgated by CPLR § 3212(f) must either establish that (1) the party seeking summary judgment has moved prior to the exchange of *any* discovery or before having attended a preliminary conference(Gao at 449; *Bradley* at 380-381; *McGlynn* at 117); or (2)

that although some discovery has been conducted, the facts necessary to oppose the motion are nevertheless within the exclusive knowledge of the moving party, such that further discovery is warranted (*Franklin National Bank of Long Island* at 297; *De France* at 735-736; *Blue Bird Coach Lines, Inc.* at 971).

Here, while third-party defendant fails to rebut defendant/third-party plaintiff's assertion that it has failed to comply with numerous discovery requests, a review of the Court's file evince that there has been substantial discovery in the first-party action, including a preliminary conference on November 22, 2011 and a compliance conference on December 14, 2012. While these two conferences predate the third-party action, the Court's file also evinces that a compliance conference was held on October 29, 2013, after the third-party action was initiated and which ordered that the parties provide discovery to defendant/third-party plaintiff. Accordingly, this is not a case where defendant/third-party defendant can credibly argue that it has not been afforded an opportunity to conduct discovery because plainly, it has. This is particularly true here, where the salient facts regarding third-party defendant's liability can be readily resolved by reviewing plaintiff's testimony, which he provided at his 50-h hearing and the agreement between the parties, which defendant/third-party plaintiff has in its possession. Based on the foregoing, defendant/third-party plaintiff fails to establish that the facts

necessary to oppose the motion are within the exclusive knowledge of the third-party defendant. In fact, defendant/third-party plaintiff fails to identify any facts, which would, if unearthed by further discovery give rise to triable issues of fact as to third-party defendant's liability under the only viable exception to the exclusivity provision of the Workers' Compensation Law.

Substantively, third-party defendant establishes prima facie entitlement to summary judgment insofar as its evidence establishes that plaintiff's accident falls outside the ambit of the indemnification agreement between it and defendant/third-party plaintiff such that it bears no liability.

Workers' Compensation Law § 11 states, in pertinent part, that

> [t]he liability of an employer prescribed by the last preceding section shall be exclusive and in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom, except that if an employer fails to secure the payment of compensation for his or her injured employees and their dependents as provided in section fifty of this chapter, an injured employee, or his or her legal representative in case of death results from the injury, may, at his or her option, elect to claim compensation under this chapter, or to maintain an action in the courts for damages on account of such injury

Thus, the Workers' Compensation Law "evinces a legislative design

to require employers to pay workmen's compensation benefits where employees sustain injuries or meet their death in the course of hazardous employment" (*O'Rourke v Long*, 41 NY2d 219, 222 [1976]). An employer who is subject to the Workers' Compensation Law must secure and pay compensation for work related injuries without regard to fault and when he does, his liability is solely limited to paying the benefits prescribed by the Workers' Compensation Law (*id.* at 22; *Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 21 [1986]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 181 [1st Dept 2003]. Stated differently, the exclusivity of the Workers' Compensation Law "effectively precludes plaintiff from pursuing a civil remedy for his injuries" (*Liss* at 21). Whether someone is an employee and whether an employer secured the requisite coverage are questions of law for the court to decide (*O'Rourke* at 222).

The exclusivity provisions of the Workers' Compensation Law, however, are only triggered when the accident alleged is compensable under the Workers' Compensation Law, meaning when the accident both arose out of the employee's employment and was sustained in the course of the same (*Sedita v New York city Transit Authority*, 44 AD3d 741, 741 [2d Dept 2007]; *Koerner v Orangetown Police Department*, 68 NY2d 974, 974-975 [1986]; *Malacarne v City of Yonkers Parking Authority*, 41 NY2d 189, 193 [1976]; *Baldwin v City of New York*, 43 AD3d 841, 841 [2d Dept 2007]). An accident or event arises out of the an employee's employment when it is a

natural incident of the work assigned (*Malacarne* at 193) and arises in the course of an employee's employment if it occurred while the employee was doing the work for which he was employed (*id.*). Accordingly, an employee not performing the work he was asked to perform at when an accident occurs cannot be said to have been injured in the course of his employment (*Koerner* at 975).

Even when an accident is the result of an employer's negligence, Workers' Compensation Law §11 is nevertheless the employee's exclusive remedy against the employer and, therefore, bars any civil action against the employer (*Burlew v American Mutual Insurance Company*, 63 NY2d 412, 416 [1984]; *Jones v State of New York*, 33 NY2d 275, 279 [1973]; *Gagliardi v Trapp*, 221 AD2d 315, 316 [2d Dept 1995]. When an action is premised on an employer's intentional conduct, however, Workers' Compensation Law § 11 does not bar a civil action against an employer (*Burlew* at 417; *Gagliardi v Trapp*, 221 AD2d 315, 316 [2d Dept 1995]; *Estupian v Cleanerama Drive-In Cleaners, Inc.*, 38 AD2d 353, 355 [2d Dept 1972]). Even if an incident is the result of an employer's intentional acts, when an employee accepts Workers' Compensation benefits for such work-related incident, he is precluded from initiating a civil action (*Myiroie v GAF Corporation*, 55 NY2d 893, 894 [1982]; *Werner v State of New York*, 53 NY2d 346, 348-349 [1981] [The Court held that "[h]ad claimant not chosen to accept [Workers' Compensation] benefits, she would . . . have been free to maintain

her wrongful death action for intentional assault."]).

Under Workers' Compensation Law § 11, claims by third parties for indemnity and contribution against an employer who provides Workers' Compensation coverage to his employees are generally barred (Workers' Compensation Law § 11). However, an employer will nevertheless be liable to a third-party if there is (1) a contractual obligation specifically requiring the employer to indemnify the third party; (2) when the employee has suffered a "grave" injury as defined and by the statute; or (3) when the third-party agrees to procure liability insurance and fails to do so (*id.*). Absent a "grave" injury as defined by the statute, a written contract expressly mandating indemnification and/or contribution, and the breach of an agreement to procure liability insurance, an employer who provides Workers' Compensation coverage to an employee shall not be liable to a third party (*Fleming v Graham*, 10 NY3d 296, 299 [2008]; *Tonking v Port Authority of New York and New Jersey*, 3 NY3d 486, 490 [2004]; *Santos v Floral Park Lodge of Free and Accepted Masons, No. 1016*, 261 AD2d 526, 526 [2d Dept 1999]); *Giblin v Pine Ridge Log Homes, Inc.*, 42 AD3d 705, 706 [3d Dept 2007]).

"When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Tonking* at 490). Thus, unless the employer against whom

a suit is barred by the Worker's Compensation Law expressly agrees to indemnify another, any action against him for a covered event under the Workers' Compensation Law must fail (*id.*; *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]).

Here, third-party defendant submits plaintiff's 50-h hearing transcript, which evinces that on April 26, 2011, while employed by third-party defendant as an EMS worker, plaintiff, who was on duty, tripped and fell on a cracked sidewalk on Fulton Avenue. Plaintiff had just stepped out of his ambulance and was en route to pick up a patient to transport to the hospital. As he walked towards the rear of his ambulance, he tripped and fell on a crack in the sidewalk. Plaintiff testified that he was injured as a result of his fall and filed for and received workers' compensation benefits. A review of the agreement between defendant/third-party plaintiff and third-party defendant evinces that third-party defendant was retained by defendant/third-party plaintiff to provide ambulance services. The agreement also evinces that third-party defendant agreed to

> indemnify and hold harmless [defendant/third-party plaintiff] and their owners, agents and employees, from and against all claims, damages, losses, demands, liabilities and expenses, including costs and reasonable attorney's fees *arising out of any act or omission, negligent or otherwise, of [third-party defendant] which is connected or related to any services provided by [third-party defendant]* (emphasis added)

Thus, since it is well settled that an employer who provides workers' compensation benefits to an employee generally limits his liability solely to paying the benefits prescribed by the Workers' Compensation Law (*O'Rourke* at 222; *Liss* at 21; *Hynes* at 181), here, where it is clear that the accident at bar occurred while plaintiff was working and that he applied for and received workers' compensation benefits as a result, barring a "grave injury" or an indemnification agreement, third-party defendant cannot be liable to defendant/third-party plaintiff (*Fleming* at 299). While defendant/third-party plaintiff and third-party defendant were parties to such an indemnification agreement, it is clear that under the agreement, indemnification by third-party defendant was only triggered by "any act or omission" on behalf of third-party defendant. As born out by plaintiff's testimony, his accident allegedly occurred due to a defective sidewalk and in his pleadings, his cause of action is one for negligence in the maintenance of the sidewalk. Accordingly, nothing evinces that the accident alleged was caused by any act or omission by third-party defendant and, thus, third-party defendant has no obligation to indemnify defendant/third-party plaintiff, the only basis under which third-party defendant could be cast in liability. Accordingly, third-party defendant establishes prima facie entitlement to summary judgment.

Nothing submitted by defendant/third-party plaintiff raises an

issue of fact sufficient to preclude summary judgment and, thus, the instant motion must be granted. It is hereby

ORDERED that the third-party complaint be dismissed, with prejudice. It is further

ORDERED that the third-party defendant serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : May 13, 2014
Bronx, New York

MITCHELL J. DANZIGER, J.S.C.