

Montalvo v CVS Pharm., Inc.
2015 NY Slip Op 31946(U)
October 20, 2015
Supreme Court, Suffolk County
Docket Number: 05-7234
Judge: Ralph T. Gazzillo
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COPY
SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 9-8-14 (#017)
MOTION DATE 10-30-14 (#018)
MOTION DATE 11-6-14 (#019)
MOTION DATE 2-19-15 (#020)
ADJ. DATE 3-12-15
Mot. Seq. # 017 - MotD # 019 - MotD
018 - MD # 020 - MD

-----X
EDWARD MONTALVO and JANINE MONTALVO,

Plaintiffs,

- against -

CVS PHARMACY, INC., JA-TO BUILDING CONTRACTORS, INC., d/b/a JATO BUILDING CONTRACTORS, and PATMAR CONSTRUCTION, INC.,

Defendants.

KUJAWSKI & KUJAWSKI, ESQS.
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-----X
JA-TO BUILDING CONTRACTORS, INC.,
d/b/a JATO BUILDING CONTRACTORS

Third-Party Plaintiff,

- against -

PATMAR CONSTRUCTION, INC.,

Third-Party Defendant.

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP
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Patchogue, New York 11772

-----X
CVS PHARMACY, INC.,

Second Third-Party Plaintiff,

- against -

JA-TO BUILDING CONTRACTORS, INC.,

Second Third-Party Defendant.

-----X
 JA-TO BUILDING CONTRACTORS, INC.,

Third Third-Party Plaintiff,

- against -

PATMAR CONSTRUCTION, INC., PATRICIA
 MONTALVO and EDWARD MONTALVO,

Third Third-Party Defendants.
 -----X

Upon the following papers numbered 1 to 1 - 73 read on these motions for summary judgment and to compel discovery; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19, 20 - 30; Notice of Cross Motion and supporting papers 31 - 45, 46 - 47; Answering Affidavits and supporting papers 48 - 54, 55 - 64, 65 - 66, 67 - 69; Replying Affidavits and supporting papers 70 - 71, 72 - 73; Other Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (017) by plaintiffs Edward Montalvo and Janine Montalvo, and the motion (018) by defendant CVS Pharmacy, Inc. are consolidated for the purposes of this determination; and it is

ORDERED that the motion by plaintiffs for, inter alia, an order pursuant to CPLR 602 consolidating this action with the action entitled *Edward Montalvo and Janine Montalvo v Greenlawn CVS, Inc.*, assigned index number 10996/2012, is granted to extent indicated herein and is otherwise denied; and it is

ORDERED that the actions are consolidated under index number 07234/2005, and the Clerk of the Court shall place the contents of the file for the action assigned index number 10996/2012 into the file for this action; and it is

ORDERED that the consolidated action shall be entitled *Montalvo and Janine Montalvo, plaintiffs, against CVS Pharmacy, Inc., Greenlawn CVS, Inc., JATO Inc., and Patmar Construction, Inc., defendants*; and it is

ORDERED that the cross motion by CVS Pharmacy, Inc. for, inter alia, summary judgment on its indemnification and breach of contract cross claims against JATO Inc. is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the cross motion by defendant JATO Inc. for summary judgment dismissing the complaint as against all defendants is denied; and it is

ORDERED that the motion by CVS Pharmacy Inc. for an order compelling JATO Inc. to comply with certain outstanding discovery demands is denied.

Plaintiff Edward Montalvo commenced this action (Action No. 1) to recover damages for personal injuries he allegedly sustained on August 12, 2003, while working on the construction of a new building located at 89 Broadway, Greenlawn, New York. Plaintiff allegedly injured himself when he fell to the ground through an opening in the roof which had been covered by a piece of plywood. Plaintiff is alleged to have suffered traumatic brain injury and other serious injuries. At the time of the accident,

plaintiff was employed by third-party defendant Patmar Construction Inc. (“Patmar”), a subcontractor hired to perform carpentry services. Defendant CVS Pharmacy, Inc., the alleged owner of the premises, hired JATO, Inc. (“Jato”) as the general contractor for the project. By way of his complaint, plaintiff alleges causes of action against defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6). The complaint also includes a derivative claim by plaintiff’s wife, Jessica Garcia, for damages related to loss of services and the payment of medical expenses.

Defendants joined issue denying plaintiff’s claims and asserting cross claims for indemnification and breach of contract. Thereafter, Jato commenced a third-party action against Patmar, and CVS Pharmacy commenced a second third-party action against Jato. On April 4, 2012, plaintiffs brought a separate action entitled *Edward Montalvo and Janine Montalvo v Greenlawn CVS, Inc.* (Action No. 2), assigned index number 12-10996, alleging that it was the actual owner of the subject premises and, as such, was also liable for plaintiff’s injuries. Greenlawn CVS subsequently joined the action, asserting, inter alia, that plaintiff’s injuries were solely the result of his own negligence. By order dated November 25, 2013, this court denied a motion by Greenlawn CVS seeking to dismiss Action No. 2 as untimely, finding that Greenlawn CVS and CVS Pharmacy shared a “unity of interest,” such that Greenlawn CVS can be charged with retroactive notice of plaintiff’s claim. Plaintiff now moves for an order consolidating both actions, and for partial summary judgment with respect to his Labor Law §240 (1) claim against both entities. Plaintiff argues that both cases involve common questions of law and fact, and would not result in jury confusion or prejudice to defendants. Plaintiff further asserts that a prima facie case for violation of Labor Law §240(1) has been established where, as here, his work exposed him to an elevation related hazard, and that defendants failed to provide him with adequate safety devices designed to prevent or break his fall. The branch of plaintiff’s motion for consolidation is unopposed. However, Jato opposes the branch of the motion for partial summary judgment on the Labor Law §240 (1) claim on the basis a triable issue exists as to whether plaintiff’s conduct, to wit, his alleged refusal to use an available safety harness, was the sole proximate cause of his injuries.

CVS Pharmacy and Greenlawn CVS (hereinafter collectively referred to as “CVS”) cross-moves for summary judgment dismissing the complaint, arguing that it neither directed or controlled plaintiff’s work, that it lacked notice of the alleged dangerous condition, and that plaintiff’s refusal to wear an available safety harness was the sole proximate cause of his injuries. CVS further asserts that it is entitled to summary judgment on its cross claims for breach of contract and indemnification, as Jato was contractually obligated to defend and indemnify it against all claims arising out of the work performed during the project. In addition, CVS contends that it is entitled to common law indemnification, since it was free of any negligence and there is no dispute that Jato controlled plaintiff’s work and the safety practices at the worksite. With respect to its breach of contract claim, CVS avers that Jato failed to procure the full amount of insurance coverage required by the parties’ contract, and that due to such breach it was justified in rejecting Jato’s tender of a defense.

Jato opposes the branch of CVS’s motion seeking summary judgment on its claim that Jato failed to procure the required amount of insurance coverage, arguing, inter alia, that the agreement is ambiguous as to the amount of insurance Jato was required to obtain. Jato further asserts that CVS failed to mitigate its damages when it refused Jato’s offer of a defense based on the spurious allegation that Jato failed to procure sufficient insurance coverage. In addition, Jato avers that the agreement’s indemnification clause is unenforceable, as it impermissibly requires Jato to indemnify CVS against its own negligence, and that CVS would, in any event, not be eligible for such indemnification, because plaintiff’s conduct was the sole proximate cause of the accident. Nevertheless, adopting the submissions

and arguments set forth in CVS's motion, Jato cross-moves for summary judgment dismissing the complaint against all defendants.

Initially, the Court grants the unopposed branch of plaintiffs' motion seeking an order consolidating Action No. 1 and Action No. 2, as both actions arise out of the same incident and involve common questions of law and fact (*Brown v Cope Bestway Exp., Inc.*, 99 AD3d 746, 748, 952 NYS2d 220, 222 [2d Dept 2012]), and no allegations of resulting prejudice have been made by any of the defendants (see *Cieza v 20th Ave. Realty, Inc.*, 109 AD3d 506, 970 NYS2d 311 [2d Dept 2013]; *Nigro v Pickett*, 39 AD3d 720, 722, 833 NYS2d 655 [2d Dept 2007]). Consolidation is appropriate, where, as here, it "will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent an injustice which would result from divergent decisions based on the same facts" (*Best Price Jewelers.Com, Inc. v Internet Data Stor. & Sys., Inc.*, 51 AD3d 839, 857 NYS2d 731 [2d Dept 2008]; see *Scotto v Kodsi*, 102 AD3d 947, 958 NYS2d 740 [2d Dept 2013]; *Badillo v 400 E. 51st St. Realty LLC*, 74 AD3d 619, 902 NYS2d 352 [1st Dept 2010]).

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 574, 774 NYS2d 792 [2d Dept 2004]). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (see *O'Neill v Town of Fishkill*, 134 AD2d 487, 488, 521 NYS2d 272 [2d Dept 1987]). 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 (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (*Zuckerman v New York*, 497 NYS2d 557, 404 NE2d 718 [1980]).

"Labor Law §240(1) imposes absolute liability upon an owner or contractor for failing to provide or erect safety devices necessary to give proper protection to a worker who sustains injuries proximately caused by that failure" (*Bland v Manocherian*, 66 NY2d 452, 459, 497 NYS2d 880 [1985]; see *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [1997]; *Greenberg v City of New York*, 81 AD2d 284, 440 NYS2d 332 [2d Dept 1981]). Specifically, Labor Law § 240(1) requires that safety devices, such as ladders, be so "constructed, placed and operated as to give proper protection to a worker" (*Klein v City of New York*, 89 NY2d 833, 834, 652 NYS2d 723 [1996]). An owner, contractor or agent who breaches this duty may be held liable for damages regardless of whether it actually exercised any supervision or control over the work giving rise to the injury (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). Moreover, the statute must be liberally construed to accomplish the purpose for which it was formed, that is to "protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are scarcely in a position to protect themselves from accident" (*Rocovich v Consolidated Edison Co.*, *supra* at 513, quoting *Koenig v Patrick Constr. Corp.*, 298 NY 313, 319, 83 NE 2d 133 [1948]).

Nevertheless, “[n]ot every worker who falls at a construction site . . . gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon . . . the failure to use, or the inadequacy of, a safety device of the kind enumerated [in the statute]” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267, 727 NYS2d 37 [2001]). Further, to prevail on a claim pursuant to Labor Law §240(1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]). While contributory negligence on the part of the worker is not a defense to a Labor Law §240(1) claim where none or inadequate safety devices are provided (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 771 NYS2d 484 [2003]), liability does not attach where a plaintiff’s conduct is the sole proximate cause of his or her own injuries, such as where adequate safety devices are available at the worksite, but the worker for no good reason either does not use or misuses them (*see Gallagher v New York Post*, 14 NY3d 83, 896 NYS2d 732 [2010]; *Robinson v East Med. Ctr., LP*, 6 NY3d 550, 554, 814 NYS2d 589 [2006]; *Montgomery v Fed. Express Corp.*, 4 NY3d 805, 795 NYS2d 490 [2005]).

Here, plaintiff failed to establish his prima facie entitlement to summary judgment on his Labor Law §240 (1) claim by eliminating triable issues from case (*see Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*). Although plaintiff testified he neither recalled safety harnesses being available at the worksite nor having a conversation with anyone from Jato or Patmar regarding the need to wear one, plaintiff’s own submissions in support of the motion, namely the deposition transcript of Jato’s foreman, Mike Hudson, raises a triable issue as to whether plaintiff refused to wear available safety harnesses and, if so, whether such refusal was the sole proximate cause of his injuries (*see Bascombe v West 44th St. Hotel, LLC*, 124 AD3d 812, 2 NYS3d 569 [2d Dept 2015]; *Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 969 NYS2d 629 [4th Dept 2013]; *Yedynak v Citnalta Constr. Corp.*, 22 AD3d 840, 803 NYS2d 705 [2d Dept 2005]). Significantly, Hudson testified that safety harnesses belonging to Patmar were available at the worksite on the morning of the accident, and that he personally informed plaintiff that he was required to wear such a harness when he was working on the roof of the building. Hudson testified that the harnesses could be anchored to the decking of the roof with screws, and that he observed Patmar employees, including plaintiff, wearing safety harnesses while working on the roof prior to the day of the accident. Hudson further testified that he specifically warned plaintiff about the existence of the subject roof opening on the morning of the accident, and that he asked him to remove debris near the opening because a hatch was going to be installed there later that day. The court notes that plaintiff testified that there was no place on the roof to anchor a safety harness, and that, in his opinion, safety harnesses were not required because the roof in question was flat.

Inasmuch as a triable issue exists as to whether plaintiff’s own conduct was the proximate cause of his injuries, the branches of the cross motions for summary judgment dismissing plaintiff’s Labor Law §§240(1) (*see Lopez v Fahs Constr. Group, Inc.*, 129 AD3d 1478, 12 NYS3d 408 [4th Dept 2015]; *Thompson v Sithe /Independence, LLC*, 107 AD3d 1385, 967 NYS2d 279 [4th Dept 2013]; *Bellreng v Sicoli & Massaro, Inc., supra*), and 241(6) claims (*see Plass v Solotoff*, 5 AD3d 365, 773 NYS2d 84 [2d Dept 2004]; *Mulcaire v Buffalo Structural Steel Constr. Corp.*, 45 AD3d 1426, 846 NYS2d 838 [4th Dept 2007]) are denied. Further, as it is undisputed that Jato’s foreman possessed the authority to control and supervise plaintiff’s work and was responsible for creating the roof opening in question, the branch of Jato’s cross motion for summary judgment dismissing plaintiff’s common law and Labor Law §200 claim is denied (*see Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47, 919 NYS2d 44 [2d Dept

2011]; *Clavijo v Universal Baptist Church*, 76 AD3d 990, 907 NYS2d 515 [2d Dept 2010]). On the other hand, the court grants the branch of CVS's cross motion for summary judgment dismissing plaintiff's common law and Labor Law §200 claims, as it is undisputed that neither of the CVS entities controlled or supervised the method or manner of plaintiff's work, or possessed actual or constructive notice of the alleged defective condition that caused the accident (*see Bennett v Hucke*, 131 AD3d 993, 16 NYS3d 261 [2d Dept 2015]; *Allan v DHL Express (USA), Inc.*, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]).

As to the branch of branch of CVS's motion for summary judgment on its contractual indemnification cross claim against Jato, the parties' agreement states, in pertinent part, as follows:

The Contractor will defend, indemnify and hold harmless CVS, its parent corporation . . . from and against all claims, damages losses and expenses, including reasonable attorneys' fees, arising from:

- (i) Any negligence or tortious act or omission on the part of Contractor or any of its agents, contractors, subcontractors, servants, employees . . .
- (ii) Any failure on the part of Contractor to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in this Contract . . .
- (iii) Operations or performance of any kind associated with and/or under the Contract by the Contractor, any subcontractor, anyone directly or indirectly employed by the Contractor or any subcontractor, or anyone else for whose acts the Contractor or subcontractor may be liable, which are caused whole or in part by any error, omission or act of Contractor, any subcontractor, or anyone directly or indirectly employed by Contractor

In any and all claims against CVS. . . the indemnification and obligation of the Contractor under this Article shall not be limited in anyway by any limitation on the amount of damages . . . In the event CVS incurs any expenses as the result of Contractor's failure to so indemnify CVS, then said costs and expenses shall be deducted from the Contract Sum for the next payment due on account thereof.

"The right to contractual indemnification depends upon the specific language of the contract" (*Roldan v New York Univ.*, 81 AD3d 625, 628, 916 NYS2d 162 [2d Dept 2011]). Although indemnification clauses which fail to include the necessary savings language to prevent a party from indemnifying itself against its own negligence may be held void and unenforceable (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, 658 NYS2d 903 [1997]), even clauses which fail to include such language may be enforced where the party to be indemnified is found to be free of any negligence (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179, 556 NYS2d 991 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408, 892 NYS2d 94 [1st Dept 2010]). Further, "[a] court may render a conditional judgment on the issue of contractual indemnity, pending

determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (see *George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). "[T]he one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of ... statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; see *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]).

Here, inasmuch as the Labor Law §200 and common law negligence claims against it have been dismissed, and its liability under Labor Law §§240(1) or 241(6), if any, is statutory, CVS is entitled to conditional summary judgment on its cross claim for contractual indemnification over and against Jato (see *Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; *Jamindar v Uniondale Union Free School Dist.*, *supra*; *Correia v Professional Data Mgt.*, *supra*). Contrary to Jato's assertion regarding the inapplicability of the indemnification clause to Greenlawn CVS, the first paragraph of the agreement explicitly states that the agreement is made between Jato and CVS Pharmacy and CVS Pharmacy's "affiliates and subsidiaries." The indemnification clause also requires indemnification of all of CVS's agents and employees. Although the agreement does not specifically name Greenlawn CVS, the Court rejects Jato's assertion where, as here, it has already determined that Greenlawn CVS is an agent and subsidiary of CVS Pharmacy. Further, the case of *Tonking v Port Auth.*, 3 NY3d 486, 787 NYS2d 708 (2004), is distinguishable, as that case sought to construe whether a "construction manager" could be considered an agent of the Port Authority within the meaning of the parties' agreement. Therefore, the branch of CVS's motion for conditional summary judgment on its contractual indemnification claim is granted.

Nevertheless, the branch of CVS's motion for summary judgment on its common law indemnification claim is denied, as premature. A party seeking common law indemnification must prove not only that it was free of negligence beyond some statutory liability, but it must also prove that the proposed indemnitor was guilty of some negligence (see *Perri v Gilbert Johnson Enter.*, 14 AD3d 681, 685, 790 NYS2d 25 [2d Dept 2005]; *Correia v Professional Data Mgt.*, *supra* at 65). Therefore, where, as here, the issue of whether some negligence on the part of Jato caused plaintiff's accident remains unresolved, an award of summary judgment on CVS's common law indemnification claim is premature at this time (see *Nenadovic v P.T. Tenants Corp.*, 94 AD3d 534, 942 NYS2d 474 [2d Dept 2012]; *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 822 NYS2d 542 [2d Dept 2006]).

As to the branch of CVS's motion for summary judgment on its breach of contract cross claim alleging that Jato failed to procure the full amount of insurance coverage required by the parties' agreement, the contract states, in pertinent part, that the insurance procured by Jato "shall be written for not less than \$3,000,000 for personal injury and 1,000,000 for property damage." Thus, by its clear terms, Jato was required to procure no less than \$3,000,000 coverage for potential personal injury claims. Further, the court finds no support within the text of the agreement which substantiates Jato's contention that an ambiguity exists as to whether the contract merely requires \$3,000,000 in aggregate coverage. Therefore, where, as here, it is undisputed that Jato procured only \$1,000,000 in coverage for personal injury claims, CVS is entitled to summary judgment on its claim that Jato breached the parties' agreement by failing to procure the correct amount of insurance coverage. Accordingly Jato will be liable to CVS for any damages it pays to plaintiff in excess of \$1,000,000 and less than \$3,000,000 (see

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e.g. Beharovic v 18 E. 41st St. Partners, Inc., 123 AD3d 953, 1 NYS3d 158 [2d Dept 2014]; *Stranz v New York State Energy Research & Dev. Auth. (NYSERDA)*, 87 AD3d 1279, 930 NYS2d 136 [4th Dept 2011]). Additionally, having determined that Jato breached the parties' agreement by failing to procure the required amount of insurance, the court also awards CVS summary judgment on its claim that Jato breached the parties' contract by failing to provide it the agreed upon defense (*see generally International Paper Co. v Continental Cas. Co.*, 35 NY2d 322, 361 NYS2d 873 [1974]). As a result, Jato will liable for all costs associated with CVS's defense of the action, including litigation costs and reasonable attorney fees.

By way of a separate motion, CVS moves for an order compelling Jato to comply with its discovery request dated May 2, 2014, which sought, among other things, copies of all of Jato's tax returns filed since 2003 until present, and the disclosure of any minority ownership interest by Jato or its principals in any CVS locations. Jato opposes the motion arguing, inter alia, that CVS failed to include an affidavit of good faith in support of the motion.

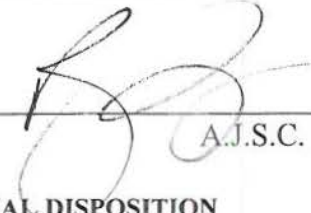
The Uniform Rules for Trial Courts (22 NYCRR) §202.7 (a) provides that a motion relating to disclosure must be supported by an affirmation that counsel "has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion." The affirmation of good-faith effort "shall indicate the time, place, and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held" (22 NYCRR §202.7 [c]). Moreover, the filing of a note of issue and certificate of readiness denotes the end of the discovery phase of litigation (*Arons v Jutkowitz*, 9 NY3d 393, 411, 850 NYS2d 345 [2007]), and a party seeking disclosure more than 20 days after its filing must show "unusual or unanticipated circumstances develop[ed] subsequent to the filing of the note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice" (22 NYCRR 202.21 [d]; *see Utica Mut. Ins. Co. v P.M.A. Corp.*, 34 AD3d 793, 826 NYS2d 138 [2d Dept 2006]; *Audiovox Corp. v Benyamini*, 265 AD2d 135, 707 NYS2d 137 [2d Dept 2000]). Moreover, litigants do not have carte blanche to demand production of documents they speculate might contain useful information (*see Geffner v Mercy Med. Ctr.*, 83 AD3d 998, 922 NYS2d 470 [2d Dept 2011]; *Foster v Herbert Slepoy Corp.*, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]). Indeed, a disclosure request will be considered palpably improper if it seeks information of a confidential and private nature that does not appear to be relevant to the issues in the case, is vague, or is overly broad and burdensome (*see Accent Collections, Inc. v Cappelli Enters., Inc.*, 84 AD3d 1283, 924 NYS2d 545; *Velez v South Nine Realty Corp.*, 32 AD3d 1017, 822 NYS2d 86 [2d Dept 2006]). The production of tax returns are generally disfavored due to their confidential and private nature (*see Altidor v State-Wide Ins. Co.*, 22 AD3d 435, 801 NYS2d 545 [2d Dept 2005]). Therefore, a party seeking to compel the production of tax returns must make a strong showing of necessity and demonstrate the inability to obtain the information contained in the returns from other sources (*see Williams v New York City Hous. Auth.*, 22 AD3d 315, 802 NYS2d 55 [1st Dept 2005]; *Samide v Roman Catholic Diocese of Brooklyn*, 5 AD3d 463, 773 NYS2d 116 [2d Dept 2004]).

Here, CVS failed to provide a sufficient affirmation of a good faith detailing its efforts to resolve the issues raised by the motion (*see* 22 NYCRR §202.7 [a]). CVS's affirmation merely sets forth its previous demands for the requested documents and does not evince any good faith effort to resolve the disclosure dispute (22 NYCRR §202.7 [c]; *see Tine v Courtview Owners Corp.*, 40 AD3d 966, 838 NYS2d 92 [2d Dept 2007]; *Cestaro v Chin*, 20 AD3d 500, 799 NYS2d 143 [2d Dept 2005]; *Barnes v NYNEX, Inc.*, 274 AD2d 368, 711 NYS2d 893 [2d Dept 2000]). CVS also failed to failed to

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demonstrate that unusual or unanticipated circumstances arose after the filing of the note of issue warranting additional pretrial proceedings to prevent substantial prejudice (*see Filippazzo v Kormoski*, 75 AD3d 618, 905 NYS2d 276 [2d Dept 2010]). Accordingly, the motion is denied.

Dated: 10/20/15



A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION