of New York, held in and for the Sixth Judicial District at the Tompkins County Courthouse, in the City of Ithaca, New York on the 6th day of September, 2019.

STATE OF NEW YORK
SUPREME COURT:: COUNTY OF TOMPKINS

STATE FARM FIRE & CASUALTY COMPANY
a/s/o YOLANDA CLARKE,
Plaintiff

vs

REAL WOOD FABRICATING, LLC,
Defendant

DECISION & ORDER
Index No. EF2018-0343

GERALD A. KEENE, Acting J.S.C.

On April 17, 2018, the Plaintiff, State Farm Fire & Casualty Company (hereinafter referred to as "State Farm" or "Plaintiff") as subrogee of Yolanda Clarke (hereinafter referred to as "Clarke"), commenced this action to recover for the negligently sanded, stained and/ or stored sanding and staining supplies and equipment at Clarke's premises and/or the failure to supervise the sanding and/or staining at the premises by the defendant, Real Wood Fabricating, LLC (hereinafter referred to as "Real Wood" or "Defendant"). Real Wood is owned by Miles McCarty (hereinafter referred to as "McCarty"). McCarty had one part time worker, Chris Cummings (hereinafter referred to as "Cummings" or "employee"). In this case, Clarke entered into an agreement with Real Wood to refinish and re-stain some of the wood floors in Clarke's property located at 114 Concord Place, Ithaca, New York. The property is a split level house and was insured by State Farm.

On March 13, 2017, Real Wood began the work at the Clarke's house. Clarke, her husband, and her mother temporarily moved out of the residence while the defendant worked on the floors at the house. On March 17, 2017 McCarty and Cummings began staining the floors of

the house. They wore gloves and used disposable rags to apply the stain and mineral oil to the floor. They put the used gloves and rags in a garbage bag. On that day around 4:30 pm, McCarty and Cummings finished working for the day and put the used gloves and rags in a bag and removed them to his shop. McCarty stored the polyurethane and unused stain in the breeze way area of the house. The breeze way is between the house and the garage and on the far left side of the garage. McCarty left unused gloves and rags, remaining stain, polyurethane, mineral spirits, and various tools and equipment in the rear of Clarke's garage. On that date, Clarke was advised that the staining was complete so she and her husband went to the property to look at the floors and saw that the property was on fire. The fire was in Clarke's garage and spread to the house.

The fire at Clarke's property was investigated by Investigator Erik Holter from the New York State Division of Homeland Security and Emergency Services of Fire Prevention and Control (hereinafter referred to as " Office of Fire Prevention" or "OFP"). The plaintiff alleges the State Investigator from OFP concluded that the fire originated in the back left hand corner of Clarke's garage in the area of the breeze way and was caused by rags that were left behind by the defendant that spontaneously combusted.

State Farm retained NEFCO, fire origin experts, to inspect the scene to determine where and how this fire occurred. NEFCO fire investigator, Kevin A. Thomas, observed that the area of origin was the left rear corner of the attached garage. Thomas concluded that the fire was caused by spontaneous heating and the ignition of stain or thinner soaked rags that were inadvertently left behind by the floor restoration company, defendant. The fire was classified as accidental.

As a result of the fire, State Farm paid Clarke $383,954.07 for the property damage caused by the fire. State Farm is seeking to recover against the defendant for any and all sums of money paid to Clarke. State Farm claims that Real Wood breached their agreement with Clarke since they failed to properly and safely perform sanding and/or staining , thereby causing fire damage to the property. Under the contract State Farm paid the insurance claims submitted by Clarke for damages to her property as a result of the fire damage.

On June 4, 2018, the defendant filed an answer and a demand for a bill of particulars. The defendant denies the allegations of the verified complaint. The defendant alleged that the

damages were caused or contributed to by the culpable conduct the plaintiff, agents and/or plaintiff's subrogor and that the amount of damages must be diminished in the proportion which such culpable conduct, including contributory negligence and assumption of the risk, is attributable to the plaintiff. The defendant's second defense is that the damages occurred as a result of the negligence of third persons over whom the defendant had no control, supervision or direction, and for whom the defendant had no legal authority. Further, the defendant alleges that the plaintiff failed to mitigate its damages. The defendant argues that the plaintiff negligently and/or intentionally failed to properly protect, preserve and maintain evidence critical to the defense and due to spoliation of the evidence. Further, the defendant alleged that if the defendant is held liable that its liability is fifty percent or less of the total liability.

On May 30, 2019, plaintiff filed a motion for summary judgment pursuant to CPLR § 3212 against the defendant on the issue of liability and seeking a judgment in the amount of $383,954.07 on the grounds that there are no material issues of fact regarding the negligence causing this loss to occur. The plaintiff alleges that the defendant failed to exercise reasonable care when he admittedly left his flammable wood staining materials in the garage five hours before the fire. State Farm contends that it is entitled to summary judgment since it is clear from all of the evidence that the defendant was negligent in performing its duties by negligently leaving ignitable wood staining materials overnight in the garage which caused the fire to occur. In the alternative, the plaintiff argues that it is entitled to summary judgment as it can be reasonably inferred through circumstantial evidence that the defendant's negligence was the proximate cause of the fire in Clarke's home. Further, plaintiff argues that they are entitled to summary judgment on its breach of contract claims as the overwhelming evidence establishes that Real Wood breached its contract with Clarke by failing to use reasonable care in the performance of its contractual obligations resulting in fire damage to Clarke's home. The plaintiff submitted an affidavit of Kevin A. Thomas, exhibits A-U, and a memorandum of law in support of its Motion for Summary Judgment.

On June 9, 2019, the defendant filed an affirmation in opposition to plaintiff's motion for summary judgment. Further, the defendant filed a cross-motion for summary judgment pursuant

to CPLR § 3212 dismissing the plaintiff's action, with prejudice. The defendant submitted an affidavit of Jason Karasinski with attached exhibits and a memorandum of law. The defendant submits that there is no negligence in the record and therefore the plaintiff's action must be dismissed. Therefore, the defendant argues that the plaintiff failed to make a prima facie case and submits that the plaintiffs's motion for summary judgment must be denied. Further, the defendant argues that there is no evidence of any negligence on the part of the defendant to cause the fire and therefore the plaintiff's action should be dismissed.

The defendant's retained Jason Karasinski, who is the President and Owner of Fire Research & Technology Inc. Karasinski reviewed the fire investigation that occurred and reviewed the field notes and reports of OFC and NEFCO as well as the deposition transcripts. Karasinski submits that the investigation and analysis that was conducted for the fire was incomplete, substandard, deficient, and not performed in accordance with the National Fire Protection Association (hereinafter referred to as "NFPA") standards. Further, Karasinski contends that the conclusion and opinion of the underlying cause of the fire was purely speculative, without support, and does not follow the scientific method set by the NFPA.

On June 19, 2019, the plaintiff submitted a Reply Affirmation in Further Support of the plaintiff's motion for summary judgment and opposition to the defendant's cross-motion for summary judgment with an exhibit. The plaintiff argues that the sole basis of the defendant's opposition is the Affidavit of Jason Karasinski. Further, the plaintiff states the sole basis for the defendant's cross-motion for summary judgment is the Affidavit of Jason Karasinski and that the Court should ignore the opinions and conclusions of the OFC and NEFCO investigations. Further, the plaintiff argues that the defendant has not complied with Expert disclosure rules or CPLR §3101 (d)(1) since the defendant never responded to the plaintiff's demand for Expert Information on August 23, 2018. Therefore, the plaintiff submits that the Court should preclude the defendant from offering the Affidavit of Karasinski since the defendant failed to provide the plaintiff with any Expert notice. The plaintiff submitted an additional affidavit of the NEFCO Fire Investigator Kevin Thomas concerning Karasinski's affidavit that was submitted. Therefore, the plaintiff argues that the Court should reject the affidavit of Karasinski on procedural and

substantive grounds. On June 26, 2019, the defendant filed a Reply to the plaintiff's opposition to its cross motion for summary judgment.

CONCLUSIONS OF LAW

It is well settled that "[t]he proponent of a motion for summary judgment is required to tender sufficient, competent, admissible evidence establishing a prima facie entitlement to judgment as a matter of law so as to demonstrate the absence of any material issue of fact."(Holly v. Morgan, 2 A.D.3d 1170, 1171 (3rd Dept., 2003), *citing* Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003)). "Only when this burden is met is the opponent required to produce competent admissible evidence establishing the existence of a material issue of fact which would preclude a grant of summary judgment." (Id. at 1171, *citing* Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980)).

Summary judgment is a drastic remedy as it is the procedural equivalent of a trial (Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974)). "When considering a motion for summary judgment, courts must view the evidence in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof, without making any credibility determinations."(Black v. Kohl's Dept. Stores, Inc., 80 A.D.3d 958, 959 (3rd Dept. 2011), *citing* Gadani v. Dormitory Auth. of State of N.Y., 43 A.D.3d 1218, 1219 (3rd Dept., 2007); Tenkate v. Tops Mkts., LLC, 38 A.D.3d 987, 989 (3rd Dept. 2007)). "Summary judgment should be denied where there is any doubt, at least any significant doubt, whether there is a material, triable issue of fact" (Phillips v. Kantor & Co., 31 N.Y.2d 307, 311 (1972)). In order for the court to "grant summary judgment it must clearly appear that no material and triable issue of fact is presented" (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 (1957) *citing* Di Menna & Sons v. City of New York, 301 N.Y. 118 (1950). Therefore, this "drastic remedy should not be granted where there is any doubt as to the existence of such issues."(Id.).

Based upon the arguments of the parties, there is a sharp dispute in the record and it is obvious that there are still issues of fact, including but not limited to the credibility of the parties and witnesses involved and rationale and basis for the determinations and conclusions of the

investigations. These unresolved issues are not for the Court to make on a motion for summary judgment. "The credibility of witnesses, the reconciliation of conflicting statements, a determination of which should be accepted and which rejected, the truthfulness and accuracy of the testimony, whether contradictory or not, are issues for the trier of the facts"(Lelekakis v. Kamamis, 41 A.D.3d 662 (2nd Dept. 2007); Healy v. Williams, 30 A.D.466 (2006)). Summary judgment is not appropriate where the parties present experts with conflicting opinions; such credibility issues are properly left to the trier of fact for resolution. (*see* Roca v. Perel, 51 A.D.3d 757 (2nd Dept. 2008); Barbuto v. Winthrop Univ. Hosp., 305 A.D.2d 623 (2nd Dept. 2003)). Here, there is conflicting expert testimony regarding the place of origin of the fire, the cause of the fire, and the role of the defendant's alleged negligence in the incident. Therefore, the plaintiff's application for summary judgment must be denied. Further, the defendant's cross-motion for summary judgment must also be denied. The above-mentioned issues of fact are issues which warrant denial of the motion. Therefore, this matter will proceed accordingly.

Furthermore, the plaintiff argues that the defendant has not complied with Expert disclosure rules or CPLR § 3101 (d)(1) since the defendant never responded to the plaintiff's demand for Expert Information on August 23, 2018. Therefore, the plaintiff submits that the Court should preclude the defendant from offering the Affidavit of Karasinski since the defendant failed to provide the plaintiff with any Expert notice of Karasinki. Expert disclosure is governed by CPLR § 3101(d). Compliance with CPLR § 3101(d) requires timely disclosure of expert witnesses but sets no specific time limitations. The Court has broad discretion to excuse untimely disclosure and will consider whether the untimely disclosure was intentional or creates prejudice. (Phillips v Lepow, 2008 N.Y. Slip Op. 32359[U] [N.Y. Sup Ct, Albany County 2008) *citing* Washington v. Albany Housing Authority, 297 A.D. 2d 426 (3rd Dept. 2002)). The Appellate Division - Third Department has held that even where a party disclosed their expert's report four months before the scheduled trial, it was not an abuse of discretion to allow the untimely discovery. (*see* Silverberg v. Community General Hosp., 290 AD2d 788 (3d Dept. 2002)). The Court finds that the plaintiff has not suffered substantial prejudice due to the late expert disclosure. It appears that the plaintiff has already retained an expert to oppose defendants' expert and will not be prejudiced by the late disclosure.

ORDERED, that plaintiff's motion for summary judgment is hereby denied; and it further

ORDERED, that defendant's cross-motion for summary judgment is hereby denied; and it is further

All applications not specifically addressed herein are denied.

This constitutes the decision and order of the court.

Dated: September 6, 2019

Hon. Gerald A. Keene
Acting Supreme Court Justice

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