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SHORT FORM ORDER

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INDEX No. 07-37713
CAL No. 10-02001OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Justice of the Supreme Court

MOTION DATE 2-17-11
ADJ. DATE 5-13-11
Mot. Seq. # 003 - MD

CHARTER OAK FIRE INSURANCE COMPANY, AS SUBROGEE OF ANITA DENTON,

Plaintiff,

- against -

PETRO OIL AND MASTER ALUMINUM SIDING,

Defendants.

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 17 - 25, 28 - 32; Replying Affidavits and supporting papers 33 - 34; Other memorandum of law 26 - 27; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Master Aluminum Siding for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it, is denied.

This is an action to recover damages sustained by the plaintiff, as insurer and subrogee of Anita Denton (Denton), after it was obligated to pay its insured's claim arising from a fire in the basement of her single-family home located at 107 Schneider Lane, Hauppauge, New York. The fire, which occurred on February 17, 2005, started while defendant Master Aluminum Siding (Master) was working to replace the siding on the home pursuant to an oral contract with Denton. At the time of the fire,

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defendant Petro Oil (Petro) was responsible for the maintenance and repair of the heating and hot water systems located in the basement of the home. The plaintiff alleges that the fire was caused by Petro's failure to properly service the heating system, and that the system's flue pipe failed, igniting the fire. In addition, the plaintiff alleges that the fire was caused by Master's negligent and careless manner of work at the home, and/or Master's creating vibrations which caused the flue pipe to fail. The plaintiff's claim for negligence against Master is based, in part, on the findings of the Suffolk County Police Department Arson Squad, which concluded that Master caused the fire when it hammered a nail into the east wall of the home, piercing an electrical wire.

Master now moves for summary judgment dismissing the complaint and cross claims against it on the grounds that there is no evidence that it was negligent in performing the siding work at the home, or that its conduct was causally related to the fire. The gravamen of Master's argument is that its work could not have created vibrations strong enough to dislodge the flue pipe, and that the nails it hammered into the home were not long enough to reach the wiring inside the east wall of the home. In support of the motion, Master submits the pleadings, the affidavit of a professional engineer, the affidavit of its principal, and various depositions.

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 Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

Demitrios Kayantas was deposed on March 3, 2009. He testified that he owns and operates Master as a company, and that he was present at, and in charge of, the work at the Denton home on the date of the fire. He did not remember precisely what work had been done at the home the day before the fire. On the day of the fire, which was the second day he worked at the home, he had two assistants who were in the process of nailing foam insulation onto the rear and east walls of the home. The old siding had been removed, and the nails used to hold it in place had been removed, or hammered into the respective walls before the foam insulation was installed. He stated that those nails could be two or two and one-half inches long, that the asbestos shingles sometimes crack when nails are hammered into them, and that he did not know if the plywood behind the shingles was 3/8 inch or 1/4 inch plywood. He further testified that he did not know if nailing into the walls causes vibrations, but admitted that in the past his hammering has caused pictures to fall off the walls of houses where he was working. He indicated that he spoke with someone from the fire department after the fire was extinguished, that the person showed him a wire that had allegedly been pierced by a nail, and that the wire was attached to an electrical outlet within the home.

In an affidavit dated on or about January 16, 2011, Mr. Kayantas swears that he was working on the rear wall of the Denton home on the date of the fire, that his work did not cause any vibrations in the home, and that the existing nails hammered into the east wall were two inches in length. He now states that the plywood sheathing of the home was three-eighths of an inch thick, and that given the thickness of the subject wall, a nail could not have pierced a wire in the interior of the home.

Master has submitted five additional depositions in support of its motion for summary judgment.[1] Anita Denton, plaintiff's subrogor, was deposed on July 28, 2008. Eric Cooleen, an adjuster employed by the plaintiff, was deposed on July 24, 2008. David Benincasa, an employee of Petro, was deposed on March 16, 2009. Gerasimos Tsimara, a nonparty witness was deposed on July 12, 2010. However, each of the four enumerated deposition transcripts are unsigned. The Court notes that Master has failed to submit proof that the transcripts were forwarded to the witnesses for their review (*see*, CPLR 3116 [a]). Under the circumstances, the enumerated deposition transcripts are not in admissible form (*see* ***Marmer v IF USA Express, Inc.***, 73 AD3d 868, 899 NYS2d 884 [2d Dept 2010]; ***Martinez v 123-16 Liberty Ave. Realty Corp.***, 47 AD3d 901, 850 NYS2d 201 [2d Dept 2008]; ***McDonald v Mauss***, 38 AD3d 727, 832 NYS2d 291 [2d Dept 2007]). In addition, none of the subject testimony contains admissions enabling the Court to consider the unsigned deposition transcripts submitted in support of the motion (CPLR 3117 [a][2]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]; ***Wojtas v Fifth Ave. Coach Corp.***, 23 AD2d 685, 257 NYS2d 404 [2d Dept 1965]; *see also* ***Morchik v Trinity School***, 257 AD2d 534, 684 NYS2d 534 [1st Dept 1999]; ***R.M. Newell Co. v Rice***, 236 AD2d 843, 653 NYS2d 1004 [1997]). Even if such deposition testimony was considered, nothing therein eliminates issues of fact regarding the cause of the subject fire.

The fifth deposition transcript submitted in support of the motion is the testimony of Paul Waldvogel, a detective with the Suffolk County Police Department Arson Squad (Arson Squad). Detective Waldvogel was deposed on May 7, 2010, and his deposition continued on July 22, 2010. For the reasons stated above, the testimony taken on the latter date is not in admissible form, as that transcript of the testimony of this nonparty witness is unsigned. In his deposition on May 7, 2010, Detective Waldvogel testified that, on February 17, 2005, he responded to a call about a fire at 107 Schneider Lane. He was in charge of investigating the fire, with assistance from members of the Arson Squad. He interviewed Mr. Kayantas, and the workers at the site. Mr. Kayantas stated that he was working on the east side of the home, he saw smoke, and kicked in a side door to attempt to find out where the smoke was coming from. Detective Waldvogel stated that his investigation revealed that a portion of the east wall near a wire attached to duplex outlets on the wall on the first floor and in the basement was the most damaged by the fire. The wire was in good condition except in the location of the fire. The oil fired boiler and hot water heater exhibited exterior damage. There was no heating system duct work near the damaged area. He further testified that he eliminated the heating system as a cause of the fire, and that he thought that an aluminum ground wire had become energized, was pierced

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[1] The affidavit of counsel for Master, submitted in support of the motion, indicates that the deposition transcript of Anthony Palmisciano, a Petro employee, is attached as exhibit "H" to the motion. However, a search of the record reveals that the deposition of David Benincasa, a Petro employee, is the only deposition transcript submitted within the referenced exhibit tab, and that Mr. Palmisciano's deposition transcript is not included within the submission.

by a nail hammered into the wall by Master, causing the fire. He stated that he did not see any evidence of arcing, that the wooden area where the nail would have penetrated the wall was burned away, and that the purpose of his investigation was to determine if there was any criminality involved in the fire.

In addition, Master submits the affidavit of Steven Pietropaulo, a licensed professional engineer, in support of its motion. Mr. Pietropaulo swears therein that the work performed by Master could not have caused a properly maintained flue pipe to fail, that the fire was caused by the deteriorated condition and disrepair of the flue pipe, and that a nail could not have penetrated through the materials comprising the east wall of the Denton home. He incorporates a copy of his report dated July 5, 2010, wherein he concludes that "[i]n all likelihood hot flue gasses ... ignited combustibles because ... [the] flue pipe became dislodged ...," that "[a] problem or failure with the oil fired boiler is a very viable scenario ...," and that the "fire was not caused by an electrical event." The latter conclusion is based, in part, upon the findings of an electrical engineer, Roger Boyell, P.E., whose report is not submitted herein.

The Court notes its limited reliance on the expert opinion submitted by the defendant herein. An expert's opinion can have no greater probative value than the facts or data upon which it is based (***Guldy v Pyramid Corp.***, 222 AD2d 815, 634 NYS2d 788 [3d Dept 1995]). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2nd Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2d Dept 1988]). Here, the expert opinion of Mr. Pietropaulo consisted primarily of theoretical allegations with no independent factual basis and it was therefore speculative, unsubstantiated and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]). Inasmuch as his conclusions are based upon assumptions, rather than evidentiary facts, his affidavit is without probative value (*see,* ***Busino v Meachem,*** 270 AD2d 606, 704 NYS2d 690 [3d Dept 2000]; *see also,* ***Paul v Cooper***, 45 AD3d 1485, 845 NYS2d 905 [4th Dept 2007]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]; ***Elzer v Nassau County***, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (***Chilberg v Chilberg***, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; ***Barclay v Denckla***, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]; ***Cohen v Herbal Concepts, Inc.***, 100 AD2d 175, 473 NYS2d 426 [1st Dept 1984], *affd* 63 NY2d 379, 482 NYS2d 457 [1984]).

It has been held that, "[g]enerally, issues of proximate cause are for the fact finder to resolve" (***Gray v Amerada Hess Corp.***, 48 AD3d 747, 853 NYS2d 157 [2d Dept 2008], quoting ***Adams v Lemberg Enters., Inc.***, 44 AD3d 694, 843 NYS2d 432 [2d Dept 2007]; *see also* ***Derdiarian v Felix Contractor Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]). In addition, it is well settled that a court's responsibility in considering a motion for summary judgment is issue finding, not issue determination (*see* ***Doize v Holiday Inn Ronkonkoma***, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rennie v Barbarosa Transport, Ltd.***, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). Here, there are issues of fact regarding the potential cause or causes of the subject fire including, but not limited to, whether master's hammering of nails into the home

caused the fire due to the vibrations which caused the flue pipe to fail, or the piercing of an energized wire, which caused the fire.

Master has failed to establish its entitlement to summary judgment herein. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motion by defendant Master Aluminum Siding for an order granting summary judgment dismissing the complaint and all cross claims against it, is denied.

Dated: July 25, 2011

Hon. Debra P. Molia
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**