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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 15

Justice

Index Number : 100115/2011
MEDICAL LIABLILITY MUTUAL
vs
UNITED AIRCONDITIONING CORP.
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits	3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16
Replying Affidavits	17,18

FILED
APR 17 2012
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/10/12

HON. EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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MEDICAL LIABILITY MUTUAL INSURANCE

Plaintiff,

- against -

UNITED AIRCONDITIONING CORP., UNITED AIRCONDITIONING CORP, II, EMPIRE DISMANTLING, INC., BLACK BULL CONTRACTING, LLC, JOHNSON CONTROLS, INC., STERLING INTERIORS GROUP, INC., MG ENGINEERING P.C., EAST COAST RESTORATION & CONSULTING OF NY, CORP., EAST COAST RESTORATION CORP., HALLEN WELDING SERVICE, INC., HALLEN STEEL, SKYLIFT MASTER RIGGERS CORP., SKYLIFT CONTRACTING CORP., ABSOLUTE ELECTRICAL CONTRACTING OF NY, INC.,

Defendants.

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Index No. 100115/11

DECISION and ORDER

Mot. Seq. 005

HON. EILEEN A. RAKOWER, J.S.C.

Medical Liability Mutual Insurance Company ("MLMIC") is the lessee of office space located at 2 Park Avenue in New York County. MLMIC states that, from on or around January 11, 2008 through October 28, 2008, defendant United Airconditioning Corp. ("United") "contracted and/or subcontracted with [the building owner and management company] to conduct renovation, construction and repair work on the roof of [the building]." During this time, MLMIC alleges that United and/or its contractors or subcontractors "negligently planned and/or negligently performed renovation, construction and/or repair work on the roof" of 2 Park Avenue, causing "substantial amounts of water ... to enter into the office space of MLMIC on multiple occasions ... thereby causing MLMIC to suffer substantial damage to its office premises, property, material and work product." Among those named as

defendants are Skylift Master Riggers Corp. ("Skylift Master") and Skylifter Contractor Corp. ("Skylift Contractor"). Both entities are alleged to have negligently planned and/or performed renovation work on the roof of 2 Park Avenue, causing the alleged water damage.

Skylift Contractor and Skylift Master now move for summary judgment. Skylift Contractor submits the affidavit of Brad Allecia, its vice president. Allecia affirms that Skylift Contractor "is a rigging company that is hired by various companies to assist in the placement of various objects, pieces of machinery, etc. on the roofs or in locations that require the use of rigging applications." Allecia further states that, on the project at issue in this lawsuit, Skylift Contractor was hired by United to provide rigging for the placement of Cooling Towers on the roof of 2 Park Avenue. Allecia affirms that he was personally present when the delivery was made on February 12, 2008. United was "responsible for receiving the cooling towers on the roof on the date of delivery and directed Skylift Contractor Corp. where to place the towers." Allecia states that Skylift Contractor "had no connection to or responsibility for any of the renovation, construction and/or repair work that began prior to and continued after it delivered the cooling towers."

Skylift Master submits an attorney's affirmation in support of its motion for summary judgment. Counsel for Skylift Master affirms that Skylift Master "did absolutely nothing at those premises to possibly hold it liable for the alleged damages claimed."

MLMIC and the co-defendants of the Skylift entities all submit opposition to the instant motions for summary judgment.[1] The parties argue that summary judgment is premature in light of the fact the action is in the early stages of discovery, and no depositions have been held. Moreover, the papers submitted in opposition to Skylift Master's motion note that Skylift Master fails to submit an affidavit from a Skylift employee with firsthand knowledge.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce

[1]The court does note, however, that MLMIC does not oppose summary judgment in favor of Skylift Master on the condition that such dismissal be without prejudice to renew an action against it, should new facts arise during the course of discovery.

sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]). "[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, 'the facts must be viewed in the light most favorable to the nonmoving party'" (*Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Here, the court finds that both Skylift Contractor and Skylift Master's motions must be denied as premature. CPLR §3212(f) provides:

> 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.

As previously noted, this action is in the early stages of discovery. MLMIC and the co-defendants are entitled to discovery detailing the specific nature of the work performed by Skylift Contractor at the job site. While Skylift Contractor notes that water damage is alleged to have occurred prior to the date of Skylift Contractor's work, the court cannot hold at this early juncture that Skylift Contractor bears no responsibility for any of the alleged water damage as a matter of law.

With respect to the motion by Skylift Master, Skylift Master fails to submit proof in admissible form establishing a prima facie showing of entitlement to judgment as a matter of law. It is well settled that an attorney's affirmation does not constitute proof in admissible form (*Batista v. Santiago*, 25 A.D.3d 326 [1st Dept. 2006]).

Wherefore it is hereby

ORDERED that Skylift Contractor and Skylift Master's motions for summary judgment are denied without prejudice.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: April 16, 2012

EILEEN A. RAKOWER, J.S.C.