SHORT FORM ORDER

INDEX # 37342-08
RETURN DATE: **9-13-11 (001)**
11-2-11 (002 & 003)
MOT. SEQ. # **002, 003 & 004**

SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:
Hon. PETER FOX COHALAN

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ELYSE SLAINE,

Plaintiff,

-against-

MAGNUM MASONRY, INC., RALPH PUCO and STEPHEN A. PUCO,

Defendants.

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MAGNUM MASONRY, INC., RALPH PUCO and STEPHEN A. PUCO,

Third-Party Plaintiffs,

-against-

ADELLCO MANAGEMENT LLC, MATTHEW ADELL and CHRISTOPHER PARKER, GABRIEL PANCRUDO and IMRE SZABO, doing business as IMI DESIGN,

Third-Party Defendants.

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CALENDAR DATE: December 7, 2011
MNEMONIC: MD; XMG; XMD

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Upon the following papers numbered 1 to 55 read on these motions for summary judgment and to amend ; Notice of Motion/Order to Show Cause and supporting papers 1-10 ; Notice of Cross-Motion and supporting papers 11-20; 33-44 ; Answering Affidavits and supporting papers 21-24; 45-48 ; Replying Affidavits and supporting papers 25-27; 28-32; 49-50 ; Other 51-55 (sur-reply) ; and after hearing counsel in support of and opposed to the motion it is,

ORDERED that this motion by the third party defendants, Adellco Management LLC and Matthew Adell, (seq. #002) for summary judgment seeking dismissal of the defendants/third party plaintiffs, Magnum Masonry, Inc., Ralph Puco and Stephen A. Puco's third party complaint pursuant to CPLR §3212 and the cross-motions on behalf of the defendants/third party plaintiffs seeking to serve an amended answer to the plaintiff Elyse Slaine's complaint and to amend their third party complaint (seq. #003) and cross-motion by third party defendant Imre Szabo d/b/a/ IMI Design and its principals, Christopher Parker, Gabriel Pancrudo and Imre Szabo, for summary judgment and dismissal of the third party complaint pursuant to CPLR §3212 are decided as follows;

ORDERED that the third party defendants, Adellco Management LLC and Matthew Adell (hereinafter collectively Adell) motion (seq. #002) seeking summary judgment and dismissal of the defendants/third party plaintiffs, Magnum Masonry, Inc., Ralph Puco and Stephen A. Puco's (hereinafter collectively Magnum) third party complaint pursuant to CPLR §3212 is denied; and it is further

ORDERED that Magnum's cross-motion (seq. 003) seeking to serve an amended answer to the plaintiff Elyse Slaine's (hereinafter Slaine) complaint and to amend its third party complaint to allege that Magnum had a contractual relationship with both Slaine and with Adell and Magnum acted as Adell's subcontractor is granted; and it is further

ORDERED that the cross-motion (seq. 004) by third party defendant, Imre Szabo (hereinafter Szabo) d/b/a/ IMI Design (hereinafter IMI), for summary judgment and dismissal of Magnum's third party complaint pursuant to CPLR §3212 is denied as there are readily identifiable issues of fact on the question of whether IMI was or was not involved in the architectural design and drawings of the pool and patio.

Slaine instituted this action for damages arising from a patio pool project at her residence located at 37 Jules Road in Southampton, Suffolk County on Long Island, New York. Slaine in her verified complaint, dated September 25, 2008, containing five (5) causes of action alleges that in or around May 2008 she entered into a contract with Magnum for masonry work for an agreed amount of $193,915.00 and that the work completed was not done in a workmanlike and satisfactory manner. Slaine claims that the stone masonry around the pool "was buckling, cracking, sinking" and not done to the specifications called for under the terms of the contract and that she brought these concerns to the attention of Magnum, who acknowledged the defects and that they would be corrected but the work was never done. Magnum served a verified answer to Slaine's complaint, dated December 1, 2008, and served a third party complaint against Adell and IMI for indemnification and/or contribution alleging that Magnum performed its work under the direction, management and control of Adell who was negligent and that Magnum used plans prepared by IMI which called for improper construction of the concrete slabs and patio stones thus undermining the work of Magnum. Ralph Puco of Magnum stated it as follows:

> "In this lawsuit, Ms. Slaine seeks to have Magnum, as well as me and my father, held legally responsible for such cracks. Magnum's position is simple and straightforward, Magnum performed all of the work on the Masonry Project strictly in accordance with IMI's revised architectural plans and the directions and instructions it received from Matthew Adell and Ms. Slaine. Any damages sustained by plaintiff [Slaine] as a result of the cracked stones was the consequence of IMI's deficient, negligently prepared revised architectural plans, and/or the improper and negligent directions and instructions, supervision and management of Magnum's work by Matthew Adell, Adellco and Ms. Slaine."

Adell and IMI filed answers to the third party complaint denying the alleged claims of Magnum.

The third party defendants, Adell, and IMI, now move for summary judgment and dismissal of Magnum's third party complaint pursuant to CPLR §3212 (though Adell stated initially the motion was pursuant to CPLR §3211 (a)(7) for failure to state a cause of action) and Magnum opposes the motions for summary judgment and by cross-motion Magnum

moves to amend its answer to assert that the contract for the masonry work around the pool by Magnum was with Adell and not Slaine.

For the following reasons, the third party defendant Adell's motion to dismiss Magnum's complaint whether couched as summary judgment pursuant to CPLR §3212 or CPLR §3211(a)(7) for failure to state a cause of action is denied. Magnum's cross-motion seeking to amend its answer and third party complaint is granted and the cross-motion by IMI for summary judgment pursuant to CPLR §3212 and dismissal of Magnum's third party complaint as against it is denied as there are issues of fact identified which preclude summary disposition as a matter of law.

As to Magnum's cross-motion, a party may amend its answer at any time by permission of the Court and leave is to be freely given. See CPLR §3025 (b). While a Court has broad discretion in deciding whether leave to amend should be granted, it is considered an improvident exercise of discretion to deny leave to amend in the absence of inordinate delay and a showing of prejudice to the opposing party. ***Gitlin v. Chirinkin***, 60 AD3d 901, 875 NYS2d 585 (2nd Dept. 2009); ***Cannon v. Milone***, 157 AD2d 695, 549 NYS2d 793 (2nd Dept. 1990); ***Williams v. Ludlow's Sand & Gravel Co. Inc.***, 122 AD2d 612, 504 NYS2d 901 (4th Dept. 1986); ***Pignataro v. Balsamo***, 108 AD2d 1086, 485 NYS2d 656 (3rd Dept. 1985). Here there is no prejudice and/or inordinate delay. Magnum seeks to amend its answer to Slaine's complaint and to amend its third party complaint to assert that it had a contractual relationship with Adell as the project manager and/or construction supervisor or general contractor and provides, *inter alia*, its proof of certificate of worker's compensation insurance for the patio pool project showing the certificate holder as Matthew Adell and not Slaine as well as showing that payments on the pool project were invoiced and paid by Adell. Further, Slaine in her affidavit in opposition to Magnum's motion states Adell "was assisting and advising Elyse Slaine with respect to hiring [Magnum] and work to be done at the premises...", thus acknowledging Adell's involvement in the construction of the patio pool project.

Magnum's cross-motion to amend its answer to the Slaine complaint and its third party complaint asserting its contractual relationship with Adell and seeking contribution and/or indemnity as against Adell and indemnification from IMI is granted. ***Heffner v. Star Farm Associates***, 304 AD2d 525, 757 NYS2d 467 (2nd Dept 2003). The amended answer and complaint attached to Magnum's cross-motion as exhibits A and B respectively contain an eighth affirmative defense as against IMI and the amended third party complaint alleges in its first two (2) causes of action claims against IMI for indemnification and in its third and fourth causes of action against Adell alleges a contractual relationship, professional negligence and indemnification. While the Court initially expressed some skepticism on Magnum's late amendment request to counter Adell's sound legal arguments on implied indemnification, the documentation submitted by Magnum seemingly contradicts Adell's claim of lack of involvement in the supervision, management and control of Magnum's work. Similarly, IMI"s claims of not being involved in the design, planning and specifications of the patio and stone placement are contradicted by the IMI plans submitted showing design and specifications for the patio and the stones.

Adell's motion for summary judgment pursuant to CPLR §3212 or under CPLR §3211 (a)(7) for failure to state a cause of action is denied. The Court notes initially that neither discovery nor depositions have been completed (though interrogatories were).

Courts have on many occasions cautioned litigants against the rush to dispositive motions where discovery has not been completed as it wastes judicial time and resources better used when a complete record is presented. New York Courts have made clear that successive motions for summary judgment should be discouraged in the absence of newly discovered evidence. ***Ralston Purina Company v. Arthur G. McKee & Company***, 174 AD2d 1060, 572 NYS2d 125 (4th Dept. 1991).

A request for summary disposition "shall be supported by affidavit, by a copy of the pleadings and by other proof, such as depositions and written admissions." See CPLR §3212 (b). Adell's motion for summary judgment is unsupported by an affidavit of facts and in light of the Court's decision to grant Magnum's cross-motion to amend its answer and its third party complaint to assert a direct contractual relationship with Adell for the work done, the motion by Adell seeking dismissal on implied indemnification grounds is moot and therefore denied with leave to renew after the imposition of the new pleadings and the completion of discovery. Magnum notes that in its answers to the interrogatories that it was directed by Adell to install the stonework in accordance with the IMI specifications and drawings and that Adell "rejected Magnum's advice that the stones should not be installed around the edge of the pool without the appropriate coping and expansion joints, or across the cold joint between the pool wall and the patio." Subsequently cracks developed giving rise to this lawsuit.

As to IMI's cross-motion seeking summary judgment pursuant to CPLR §3212 and dismissal of Magnum's complaint as against it, that motion is also denied as there are readily identifiable issues of fact especially where IMI denies it provided any design work for the patio and stones and Magnum has produced documents showing IMI's designs and specifications of the patio work and pool stones, which directly contradicts the affidavit submitted on behalf of IMI by Szabo.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the movant fails to make such a showing, then the motion must be denied, regardless of the sufficiency of the opposing papers. However once a showing has been made the burden then shifts to the party opposing the motion to produce evidentiary proof, in admissible form sufficient to establish or raise the existence of material issues of fact which would require a trial of the action and preclude summary disposition. ***Romano v. St. Vincent's Medical Center of Richmond***, 178 AD2d 467, 577 NYS2d 311 (2nd Dept. 1991); ***Barrett v. General Electric Company***, 144 AD2d 983, 534 NYS2d 632 (4th Dept. 1988); ***McCormack v. Graphic Machinery Services, Inc.***, 139 AD2d 631, 527 NYS2d 271 (2nd Dept. 1988).

Here IMI provides an affidavit from Szabo, a licensed architect, asserting he had nothing to do with the design or installation of the patio area around the pool or anything to do dealing with pool coping, expansion joints or any exterior work at all by the pool. Szabo states that IMI only provided architectural plans and specifications for interior work on the dwelling structure. He has submitted the architectural plans and specifications as exhibits E and F to his papers showing all interior renovation work on the house only and states that any exterior work performed "was totally outside the scope of any architectural services I provided for the Slaine residential project." However, in opposition to IMI's cross- motion, Magnum has produced architectural drawings and design plans for the patio project with the names, Christopher Parker, Gabriel Pancudo and IMI, clearly noted on the design plans. On a motion

for summary judgment, the party opposing the relief is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits and competing contentions of the parties. ***Nicklas v. Tedlen Realy Corp.***, 305 AD2d 385, 759 NYS2d 171 (2nd Dept. 2003). Similarly, the credibility of the parties is not a proper consideration for the Court to weigh in deciding a dispositive motion by way of summary disposition and the statements of a party in opposition must be accepted as true. See, ***Creighton v. Milbauer***, 191 AD2d 162, 594 NYS2d 185 (1st Dept. 1993).

Here the rush to dispositive motions prior to the completion of discovery or depositions of all the parties involved as to the facts of this case and the haste to resolve issues in light of the competing inferences which can be drawn from the papers is unwarranted. The claims of non-involvement by both Adell and IMI are seemingly contradicted by documents which, at the very least, raise readily identifiable issues of fact. The documentation submitted may be subject to explanation and resolution but only after discovery is concluded and depositions of all parties have been completed.

The parties initially seem to agree that there was no contractual indemnification between and among them and therefore Magnum relies on the theory of implied contractual contribution and/or indemnification for negligence which would not be applicable absent negligence by Adell or IMI. However Magnum claims, in its request to amend its pleadings, that the active negligence of both Adell and IMI resulted in the installation and completion of the stone work based upon the demands of both Adell and IMI in its design plans which were flawed and which flaws Magnum brought to their attention but was still directed to proceed anyway. In ***Board of Educ. Of City of New York v. Mars Assoc.***, 133 AD2d 800, 520 NYS2d 181 (2nd Dept. 1987) stated:

> "Moreover, if, as alleged in the pleadings, Mars-Normel and Barba are wrongdoers, their claims for common-law indemnification are not viable *(see, County of Westchester v. Welton Becket Assocs.*, supra., at 47). On the other hand, if they followed the architects' plans and specifications and exercised reasonable care and skill in the performance of their work, they will not be responsible for damages which occurred as a result of defects in the architects' plans and specifications" (citation omitted).

Thus the question of negligence by either Adell and/or IMI for directing the work to be done or by insisting that Magnum follow the designs and specifications of IMI on the patio work have not been resolved as a matter of law. See, ***Westchester County v. Welton Becket Associates***, 102 AD2d 34, 478 NYS2d 305 (2nd Dept. 1984). The Court is not prepared to determine as a matter of law summary disposition on the issues of indemnification and/or contribution on the record presently before the Court. [But see, ***Grinnell v. G. Beames and Sons, Inc.***, 19 Misc3d 1113(A), 859 NYS2d 903 (2008)]. These are all issues which must be explored and require denial of the summary judgment motions of both Adell and IMI at this time. They also support Magnum's request to amend its answer and third party complaint to better allege its claims for contribution or the apportionment of fault and/or indemnification from either or both Adell and/or IMI.

Summary judgment, being such a drastic remedy so as to deprive a litigant of his day in court, should only be employed when there is no doubt as to the absence of triable issues. ***VanNoy v. Corinth Central School District***, 111 AD2d 592, 489 NYS2d 658 (3rd Dept. 1985). Accordingly, the motion and cross-motion by Adell and IMI, respectively, are therefore denied at this time.

The foregoing constitutes the decision of the Court.

Dated: April 23, 2012

Peter Lalor

J.S.C.