[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART 10

Justice

Index Number : 105179/2008
GREAT NORTHERN INSURANCE
vs
ZEN RESTORATION
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO. 004
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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED

MAY 25 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAY 23 2012

JUDITH J. GISCHE, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

---x

Great Northern Insurance Company
a/s/o Margaret Summers,

Plaintiff (s),

-against-

Zen Restoration, Inc., and
Patrick Gallagher,

Defendant (s).

---x

DECISION/ ORDER
Index No.: 105179-2008
Seq. No.: 004

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Gallagher's n/m (CPLR 3212) w/TC, SR affirms, exhs	1
Great Northern opp w/ PAT affirm, exhs	2
Gallagher reply w/TBC, SCR affirms, exhs	3
Various stips of adj	4

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action by Great Northern Insurance Company ("plaintiff") as subrogee of its insured, Margaret Summers ("Summers") to recoup monies it paid in connection with her property damage claim. Presently before the court is a post-note of issue motion by defendant Patrick Gallagher ("Gallagher") for summary judgment dismissing plaintiff's complaint. Gallagher also seeks summary judgment on his cross claims against co-defendant Zen Restoration, Inc. ("Zen") and an order setting this matter down for an inquest on the issue of legal fees and expenses. Gallagher's cross claims are for indemnification (common law and contractual, additional insured status and

reimbursement of certain payments he has made. Zen has asserted no cross claims against Gallagher[1]. Plaintiff and Zen each separately oppose Gallagher's motion.

Since this motion is timely and brought in compliance with the requirements of CPLR 3212, summary judgment relief is available (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The court's decision and order is as follows:

Facts

Unless otherwise stated, the following facts are established, unrefuted or undisputed:

Summers, plaintiff's insured, is the owner of cooperative[2] apartment #8R at 43 West 13th Street, New York, New York ("plaintiff's apartment"). Gallagher is the owner of cooperative apartment #9PH, located in the same building ("Gallagher's apartment"). Summers' apartment is directly below Gallagher's terrace.

Desirous of renovating his apartment, Gallagher, in 2004, sought and obtained board approval for the proposed project by entering into an alteration agreement with The Glass House Cooperative Corporation ("alteration agreement"). Once he was approved, Gallagher vetted bids by prospective contractors and chose Zen to do the work. Gallagher and Zen entered into a renovation contract made as of October 23, 2004 ("renovation contract"). The alteration agreement is incorporated by reference in the renovation agreement and each of the agreements contain indemnification

---

[1]Pursuant to this court's prior order of October 6, 2011 ("preclusion order"), the court granted Gallagher's motion for an order of preclusion against Zen, precluding it from introducing certain documents as evidence at trial.

[2]The complaint erroneously identifies this and the Gallagher apartment as being condominiums.

provisions discussed later in this decision.

While Zen was renovating Gallagher's apartment, there were two or more water leaks from his apartment into Summers' apartment. The first leak was on August 13, 2005 while Gallagher was away on vacation. The second leak occurred on December 9, 2005. During the course of the renovation work, other tenants experienced property damages, ostensibly caused by Zen. After those tenants threatened legal action, Gallagher made certain payments to them resolving their claims. Gallagher also paid the coop a sum of money for damage to certain common elements and it is claimed by Gallagher that the property damage was caused by Zen's shoddy work. Following the leaks into her apartment, Summers submitted a claim to her insurance provider (Great Northern, plaintiff herein). Plaintiff paid her the sum of $234,930.44, thereby becoming subrogated to Summers' rights against the defendants.

There is only one cause of action asserted in the complaint which is for negligence. Plaintiff claims that:

> Zen and Gallagher, their agents...failed and neglected to:
>
> A. Perform, manage, monitor, operate, control, inspect, regulate and supervise the work and activities of themselves, their agents, servants, employees and/or representatives in the renovation work, labor and services in the Gallagher premises so as to prevent, limit or eliminate the entry of water into the property and premises of Summers ...
>
> B. Exercise reasonable care and control over the renovation work in the Gallagher premises so as to eliminate the water from within the Gallagher premises ...
>
> E. Adequately and properly train, supervise, monitor, control, regulate and otherwise instruct their agent, servants, employees and representatives in the renovations at the Gallagher premises ...

Gallagher has asserted seven (7) cross claims against Zen each of which pertains to indemnification, contribution, breach of contract (failure to obtain insurance) and for reimbursement. The renovation contract contains the following indemnity provision:

> To the fullest extent permitted by law, Contractor (Zen) shall indemnify, defend with counsel reasonably acceptable to Owner (Gallagher), and hold harmless Owner, the Cooperative Owner's Representative and Owner's architects...from and against all claims, damages, losses and expenses, including without limitation, reasonable attorneys' fees and disbursements, arising out of or resulting from (i) a breach of any of Contractor's warranties or representations set forth herein, (ii) any default by Contractor in its obligations hereunder, (iii) the negligence of Contractor, any employee or agent of Contractor, any of its subcontractors, or anyone directly employed by any of them.
> *Article 5, Renovation Contract*

Article 10 of the renovation contract separately provides that Zen has to obtain and maintain insurance for the protection of the owner (Gallagher), the coop and its managing agent:

> Contractor...shall purchase and maintain such insurance as will protect it from claims...for damages to property which may arise out of or result from Contractor's operations under the Contract Documents... Contractor... shall maintain insurance coverage–pursuant to, and without limitation, a general liability policy and an owner's contract protective policy–for property damage, liability and personal injury for the subject project (i.e coverage not to be share with Contractor's other projects) in the sum of at least $2,000,000 for each occurrence and $5,000,000 aggregate. The insurance coverage referred to in the two preceding sentences shall name as additional insured parties Patrick Gallagher, The Glass House Cooperative, J&C Lamb Management Corp. ...
> *Article 10, Renovation Contract*

Gallagher's alteration agreement with the coop contains the following provision:

> By executing this Agreement, I agree to undertake and hold harmless the Corporation, the Managing Agent and the tenants and occupants in the Building, on an after tax basis against any claims for damage to persons or property suffered as a result of the Alterations, whether or not caused by negligence and any expenses (including, without limitation, attorneys fees and disbursements) incurred by the Corporation in connection therewith. If requested, I shall procure a bond or agreement from an insurance company, acceptable to the Corporation, insuring performance by me of the provisions of this paragraph...
> *Para. 9, Alteration Agreement*

There are several riders to the alteration agreement. The alteration agreement requires that before any contractor is permitted to work in an apartment, the unit owner must "3.(d) have each of the contractor(s) and subcontractor(s) execute the Indemnity and Insurance Rider (the "Rider") annexed hereto as Rider III and the Rider shall be expressly incorporated by reference into and become a part of any an all agreement(s) made with my contractor..." The Rider also has to executed by the contractor and an executed copy provided to the coop as proof it was actually signed.

Rider III was signed by Gallagher and Bernard Sobus, Zen's President. The rider provides that "the following provisions are hereby expressly incorporated by reference into and hereby form a part of the agreement between Patrick Gallagher and Zen General Construction dated 10/23/04 (the "Agreement")." Rider III contains the following indemnity clause:

> **A. INDEMNITY**
> To the fullest extent permitted by law, _____ (the "Contractor") agrees to indemnify, defend and hold harmless The Glass House Cooperative (the "Cooperative") and the additional parties listed at the end

> of this paragraph as additional Indemnitees, if any, their officers... (hereinafter collectively, "Indemnitee" on an after-tax basis from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to...property damage...against any of the Indemnitee (sic) by any person or firm, arising out of or in connection with or as a consequence of the performance of the work of the Contractor under the Agreement...
>
> * * *
>
> The parties expressly agree that this indemnification agreement contemplates 1) full indemnity in the event of liability imposed against the indemnitee without negligence on the part of the indemnitee and solely by reason of statute, operation of law or otherwise; and 2) partial indemnity in the event of actual negligence on the part of the Indemnitee or any one of them, either causing or contributing to the underlying claim in which case, indemnification for the negligent Indemnitee will be limited to any liability imposed over and above that percentage attributable to actual fault, whether by statute, operation of law, or otherwise. Where partial indemnity is provided under this agreement, costs, professional fees, attorneys' fees, expenses, disbursements, etc., shall be indemnified on a pro rata basis.
>
> The Contractor will purchase and maintain such insurance as will protect it from any costs and expenses relating to the foregoing, including without limitation, contractual coverage including the foregoing indemnity and shall provide Owner (Gallagher) with a policy or policies evidencing same. Such indemnification shall operate whether or not Contractor has placed and maintained the insurance specified in this indemnification clause.

Section B of Rider III sets forth the type of insurance to be provided by the contractor, which includes a commercial general liability policy of "at least $2,000,000 per occurrence and in the aggregate per location."

Arguments

Gallagher argues that he is entitled to summary judgment with respect to plaintiff's complaint and his cross claims against Zen because: 1) he was not negligent, 2) Zen was negligent (and has admitted its negligence), 3) plaintiff has not pleaded, nor can she prove, how Gallagher was negligent, 4) the only claim in the complaint is for negligence; there is no claim for claim against Gallagher for contractual indemnification, 5) he is not vicariously liable for Zen's negligence and 6) under the renovation contract, Zen is obligated to indemnify him and hold him harmless.

To support his motion Gallagher provides the EBT testimony of Gregory Langer, Zen's on-site supervisor. Langer testified that water penetrated a beam supporting the French door in Gallagher's apartment. According to Langer, "[the beam] was waterproofed, but not good enough to stop the water..." When asked whether he was "aware of anything Patrick Gallagher did that may have caused or contributed to leaks in Ms. Summers' apartment?" Langer answered: "No." Langer also testified that after the first leak, Zen took certain remedial measures to prevent a leak from happening again. One measure was raising their "curbs." Thus, Gallagher argues he was not negligent in the happening of the leak.

Other deposition testimony relied upon by Gallagher includes that of a non-party tenant in the building who claims someone working on Gallagher's apartment damaged the compressor to her air conditioning unit and the testimony of Sobus, Zen's president. Gallagher claims that Sobus' testimony is little more than "feigned issues of denial" because he testified that Summers "made up" her claim of property damage, Sobus denies Zen did any of the work that Langer testified that Zen performed. Sobus also claims that correspondence "sent" by a Zen employee is not authentic because the

employee was fired before October 21, 2005, the date on the letter. The letter, on Zen stationary, is unsigned but has the name of Lukasz Dynia, Zen's project manager printed at the bottom.

The letter states: "By this time you must think we take a special delight in causing damage to your apartment. It is embarrassing to inconvenience any customer. Red faced and contrite, I ask your forgiveness and offer you our best interior workers to fix your apartment...I am very sorry about the whole situation. We will do our best to minimize the negative impact of the leaks..." Gallagher claims the letter is an admission of liability by Zen's employee/agent.

Gallagher argues that Zen was obligated to procure and maintain liability insurance for his benefit and, despite a certificate of insurance naming him as an additional insured, Zen has refused to provide him with a defense. Consequently, Zen has, according to Gallagher, breached Article 10 of the renovation contract (*supra*) and, therefore, Gallagher seeks summary judgment on his contractual

In opposition, Zen argues that the renovation contract contains conflicting indemnity provisions and Gallagher is choosing the provision which most favors him. Zen points out that under the alteration agreement, Zen only has to indemnify the coop "and the additional parties listed as indemnitees..." in Rider III. The only additional party listed is "J&C Lamb Management Corp.," a non-party to this action. Thus, according to Zen, it has no contractual obligation to indemnify Gallagher under the alteration agreement since he is not a qualified indemnitee.

Zen separately argues that even under the indemnity provision in the renovation contract, which Gallagher relies on, Zen must first be found negligent before its

indemnification obligation is triggered. Zen argues that, although Gallagher has moved for summary judgment on his cross claims for indemnification, Zen has not been found negligent nor has Gallagher met his burden of eliminating any triable issues of fact about Zen's negligence.

Zen points out that Dynia's letter is an unsworn, unsigned document and, therefore, not evidence in admissible form. Zen also discounts Langer's deposition testimony about improper waterproofing causing the first leak into Summers' apartment because his statements are merely opinion and, therefore, speculative. Zen argues that, in any event, Langer did not testify about what might have caused the second incursion of water in December 2005 and there is a triable issue of fact whether a clogged terrace drain caused the leak.

Zen provides an unsworn memorandum dated August 15, 2005. The memorandum, signed by Sobus, Zen's president, states that "because of [the] flood condition caused by severed rain and insufficient drain capacity on the North part of the roof terrace, we would recommend revising the original drain design and adding [an] additional outlet to prevent such a situation from happening in the future..." Zen points out that at his EBT, Langer also testified about there being a clogged drain pipe on Gallagher's terrace.

Sobus, Zen's president, states in his sworn affidavit that the leaks were due to "pre-existing problems not properly addressed by the building and due to the work of [non-party] DNA Contracting, a roofer hired not by Zen, but by Gallagher and/or the building." Sobus references email correspondence from Gallagher about "credit" for the roof deck since apparently it will be done by another contractor.

Plaintiff contends the defendants were negligent in the performance, management, operation and control of themselves, their agents and employees in the renovation work. Like Zen, plaintiff contends that Gallagher is disregarding the indemnification provisions in the alteration agreement and she claims that Gallagher is liable to her under that agreement. She claims further that at his EBT, Gallagher acknowledged his responsibility to her for her damages. According to plaintiff, there were more than just two incursions of water from Gallagher's apartment into hers and, not only was he was aware of this, it was his responsibility to repair those damages.

Gallagher contends he is an additional insured under Zen's insurance policy and he believes the contractor secured a policy, as required under the renovation contract, but when he tendered his defense to Zen, Zen did not take any action. Thus, Gallagher contends Zen has breached its contractual obligation to him by assuming his defense. Zen argues that it is not an insurance company, it cannot defend Gallagher and, in any event, Zen does not have a contractual obligation to have Gallagher named as an additional insured because under the alteration agreement, the only additional insured is the managing agent. Notwithstanding those arguments, Zen provides copies of two insurance policies each showing that Gallagher is a named insured.

Gallagher contends he made payments to various tenants in the building and the coop itself to settle claims that he expected would have otherwise have been the subject of lawsuits against him. He provides copies of checks showing these payments. He contends that the payments were necessitated by Zen's negligence and that he must be reimbursed for those payments.

Discussion

On a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case " [Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). Once met, this burden shifts to the opposing party who must submit evidentiary facts to controvert the allegations set forth in the movant's papers to demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]).

"A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint" (Ostrov v. Rozbruch, 91 A.D.3d 147, 154 [1st Dept 2012]). Plaintiff's complaint alleges that the defendants were negligent. There is no mention in the complaint or bill of particulars about any of the indemnity provisions, nor does plaintiff raise its current claim, that the indemnification provisions are inconsistent. Arguments by plaintiff and Zen, that Gallagher is focusing on the renovation agreement because it is favorable to him, are raised for the very first time in opposition to Gallagher's motion for summary judgment. Although Zen has asserted several affirmative defenses in its answer, those defenses include lack of standing, contributory negligence on the part of the subrogor and failure to mitigate damages. The indemnification provisions of alteration agreement and renovation contract were not raised. Therefore, plaintiff's new

theory of recovery and Zen's new defense cannot and do not defeat Gallagher's motion for summary judgment.

Even were the court persuaded that these are not new theories of liability, the interpretation of the indemnity provisions propounded by the plaintiff and Zen is unpersuasive. On a motion for summary judgment, it is for the court to decide any issues of law that are raised (Hindes v. Weisz, 303 A.D.2d 459 [2nd Dept 2003]). The issue of whether a written contract is ambiguous is an issue of law that should be decided on summary judgment (Janos v. Peck, 21 A.D.2d 969 [1st Dept 1964]). For the reasons that follow, the court agrees with Gallagher, that there is no inconsistency among the indemnity provisions, they are easily harmonized, and plaintiff is not entitled to indemnification by Gallagher.

Whereas the alteration agreement indemnity provision is for the benefit of the coop and Rider III protects the coop's interests and the interests of others affiliated with or living in the coop, the indemnity provisions in the renovation contract (Articles 5 and 10, set forth *supra*) are for Gallagher's protection and benefit. Summers is not a party to either of these agreements. Gallagher, as a proprietary lessee, sought and obtained permission from the coop for the renovation work, provided "[he] agree[d] to undertake and hold harmless the Corporation, the Managing Agent and the tenants and occupants in the Building... **against** any claims for damage to persons or property suffered as a result of the Alterations, whether or not caused by negligence...incurred by the Corporation in connection therewith." (Para. 9, Alteration Agreement) (*emphasis added*).

Examining this provision in context and considering the language used ("hold harmless...tenants...against any claims for damage to... property...incurred by the Corporation in connection therewith"), clearly it is for the benefit of the corporation, although Summers, a tenant, might be a third party beneficiary thereof. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 [2000]). There are no facts in the complaint to support the latter two requirements. Therefore, plaintiff has not raised any triable issues of fact assuming the issue of indemnification was even properly raised before the court.

Turning to the claim for negligence, as pleaded in the complaint, a party cannot be held liable for the negligence of an independent contractor, if the party did not exercise actual or constructive control over the performance and manner in which the work was performed (Leeds v. D.B.D. Services, Inc., 309 A.D.2d 666 [1st Dept 2003]). Gallagher has established that Zen is an independent contractor hired pursuant to a renovation contract. He has also established that he personally did not cause the leak. There is no evidence that Gallagher directed, controlled or supervised the work that Zen was doing when the leak occurred not does the plaintiff or Zen allege such facts. Assuming Gallagher has a duty of care to the other tenants, Gallagher has, proved he did not breach that duty and he was not negligent. Plaintiff has not come forward with any triable issues of fact that Gallagher was negligent. Therefore, Gallagher's motion

for summary judgment dismissing the complaint against him is granted. The claims against Gallagher are hereby severed and dismissed.

Gallagher's cross-claims against Zen are for indemnification (common law and contractual) and breach of contract. The indemnification provision in the renovation contract is triggered and Zen must indemnify him "from and against all claims, damages, losses and expenses" when such claims, etc., "[arise] out of or [result] from (i) a breach of any of Contractor's warranties or representations set forth herein, (ii) any default by Contractor in its obligations hereunder, (iii) the negligence of Contractor..." In order for Gallagher to establish a claim for common-law indemnification against Zen, he must prove that not only was he not guilty of any negligence but also that the "proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Correia v. Professional Data Mgmt., 259 A.D.2d 60, 65 [1st Dept 1999] and Priestly v. Montefiore Med. Ctr./Einstein Med. Ctr., 10 A.D.3d 493, 495 [1st Dept 2004]).

Gallagher has already established his freedom from negligence. He has also established that Zen was present at the building and working on the project when the leaks occurred. Through the testimony of Langer, Gallagher also establishes that Zen's negligence may have caused the leak because a certain beam was improperly waterproofed. This does not, however, meet Gallagher's burden of establishing his entitlement to summary judgment, as a matter of law, on his indemnification claims. Gallagher has not successfully demonstrated the absence of any material issues of fact (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). This issue awaits trial.

The court precluded Zen from presenting certain evidence at trial and a motion

for summary judgment seeks relief equivalent to a trial. Consequently, the documents Zen relies upon in opposition to Gallagher's motion may not be considered. However, Langer's testimony is evidence in admissible form. He testified that the beam Zen installed was not watertight. That statement is, however, disputed by Sobus' president. Langer is not an expert, but a fact witness. He believes this is the cause of one leak, but his statement is simply his personal opinion. Sobus testified and contends in his sworn statement that the building had pre-existing problems that Zen is being blamed for. Sobus contends that there was a problem with a narrow, clogged drain on the roof which may have proximately caused the leaks. Sobus also points out that another contractor, non-party DNA, did roof on the work and although Zen had contracted with Gallagher for that work, the scope of the work was later revised by Gallagher.

In an effort to discredit Sobus, Gallagher calls his deposition testimony, sworn affidavit and arguments raised in opposition to his motion "shameless," "humorous," "unsubstantiated," little more than a "fantasy" and "feigned." These attacks go to the veracity of Sobus' statements, his credibility and underscore the disputed issues. It is hornbook law that the court's function in deciding a motion for summary judgment is issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [1957]). Thus, the issue of whether Sobus is being "truthful" or whether Langer's factual testimony is a correct recitation of how these leaks happened is for the trier of fact to decide. The letter that Gallagher relies on, ostensibly from Dynia, is not proof in admissible form (Currie v. Wilhouski, 93 A.D.3d 816 [2nd Dept 2012]). The letter is simply a typed, unsigned, unsworn document which cannot be considered.

Other comments by Gallagher, that most of the tenants were angry about the shoddy work Zen was doing, merely convey certain facts as he believes them to be. Having failed to prove that Zen was negligent, the indemnity provision has not been triggered and, therefore, Gallagher's motion for summary judgment on his indemnification claims is denied.

Gallagher also seeks reimbursement for payments he made to other tenants and the coop to avoid litigation. The cancelled checks only proves the payments were made, but not the reason why. There are disputed issues of fact about why Gallagher made these payments and Zen contends the payments were wholly gratuitous. Thus, while Gallagher claims these payments were liquidated damages that he paid on account of Zen's negligence, Zen's negligence has not been established. Therefore, summary judgment on his reimbursement claim must be denied as there are triable issues of fact.

Gallagher's 1st cross claim is for breach of contract, but can also be construed as a claim for a declaratory judgment since he seeks a "decision" that he has additional insured status and Zen has defaulted under the terms of the renovation contract. Gallagher has established that under Article 10 of the renovation contract, Zen was obligated to procure and maintain insurance naming him, the coop and the managing agent as additional insureds. He has also established that he notified Zen that claims had been made against him and that wrote a "tender letter" to Zen, asking it to contact its insurance carrier.

Although Zen initially claims that it has no obligation to provide Gallagher with a

defense because Gallagher is not an additional insured under Rider III of the alteration agreement (see *supra*), Zen has nonetheless provided copies of two consecutive insurance policies identifying Gallagher as an additional insured. One policy is for the period of November 15, 2004 through November 15, 2005. The other is effective from November 15, 2005 through November 15, 2006.

Gallagher argues that the documents should not be considered by the court because they were not produced in discovery. The court agrees (see Ostrov v. Rozbruch, *supra*). Gallagher demanded the full insurance policies but they were not provided. Zen only provided Gallagher with certificates of insurance. A certificate of insurance is not, however, conclusive evidence that a contract exists and not, in and of itself, a contract to insure (Horn Maintenance Corp. v Aetna Cas. & Sur. Co., 225 AD2d 443 [1st Dept. 1996]). Therefore, although Zen previously provided the certificates of insurance and now provides the policies, these productions do not defeat Gallagher's motion.

Evidently Zen mistakenly believed its insurance carrier did not have to tender a defense, based upon the insurance provisions in the alteration agreement. The renovation contract, however, is the operative document. It clearly provides that "Contractor...shall purchase and maintain such insurance as will protect it from claims...for damages to property which may arise out of or result from Contractor's operations under the Contract Documents." Such insurance is for the protection of Gallagher, the coop and the coop's management company. Furthermore, unlike Gallagher's other cross claims against Zen, the absence of negligence, by itself, is

insufficient to establish that an accident did not "arise out" of an insured's operations; rather, "the focus of an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained" (Hunter Roberts Const. Group, LLC v. Arch Ins. Co., 75 A.D.3d 404, 408 [1st Dept 2010.]).

Zen defaulted in it contractual obligations by resisting, if not ignoring, Gallagher's request that Zen notify its insurance provider that a claim had been made against Gallagher arising out of Zen's operations. By failing to take this necessary step, Zen did not fulfill its contractual obligation to make sure Gallagher, an additional insured under its insurance policy, was provided with a defense, or at least a response to his tender. Consequently, Gallagher's motion for summary judgment on his breach of contract cross claim is granted. To the extent that Gallagher seeks a decision that he has an additional insured status, the insurance carrier is not a party to this action and the court cannot make such determination.

Conclusion

Gallagher's motion for summary judgment is granted dismissing the plaintiff's complaint against him; those claims are hereby severed and dismissed. Gallagher's motion for summary judgment on his cross claim against Zen for breach of contract is granted. However, summary judgment is denied with respect to his indemnification claims and claim for reimbursement.

This case is ready to be tried since the note of issue was filed. Plaintiff shall

serve a copy of this decision and order upon the Office of Trial Support so it can be scheduled. Such service shall be no later than Twenty (20) Days after a copy of this decision/order appears in SCROLL (the Supreme Court Records On Line Library).

Any relief requested but not specifically addressed is hereby denied. This constitutes the decision and order of the court.

Dated: New York, New York
May 23, 2012

So Ordered:

Hon. Judith J. Gische, JSC