[* 1]

SHORT FORM ORDER PUBLISH

INDEX No. 10-10335

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-26-16
SUBMIT DATE 7-14-16
Mot. Seq. # 15 - MD #16 - MD
17 - MG #18 - Mot D
19 - Mot D #20 - MD

EDWARD W. ALLEN and MARIA ALLEN,

Plaintiffs,

-against-

LEON D. DEMATTEIS CONSTRUCTION CORP., CONSENTINI ASSOCIATES, INC., RJR MECHANICAL, INC., COASTAL ELECTRIC CONSTRUCTION, GWATHMEY, SIEGEL & ASSOCIATES ARCHITECTS, LLC, JACOBS ENGINEERING NEW YORK, INC.,

Defendants.

STEVEN F. GOLDSTEIN, LLP
Attorney for Plaintiffs
One Old Country Road, Suite 318
Carle Place, New York 11514

WESTERMANN SHEEHY KEENAN SAMAAN & AYDELOTT LLP
Attorney for Defendant/Third-Party Plaintiff DeMatteis Construction
The Omni Building, Suite 702
333 Earle Ovington Boulevard
Uniondale, New York 11553

LEON D. DEMATTEIS CONSTRUCTION CORP.,

Third-Party Plaintiff,

- against -

RJR MECHANICAL, INC., INTERSTATE FIRE & CASUALTY COMPANY and ANRON SHEET METAL CORP.,

Third-Party Defendants.

BELLO & LARKIN
Attorney for Defendant Jacobs Engineering
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

SACKS & MUCCINI LLC
Attorney for Defendant/Third-party Plaintiff RJR Mechanical
410 Park Avenue, 15th Floor
New York, New York 10022

RJR MECHANICAL, INC.,
Second Third-Party Plaintiff,
- against -

ANRON SHEET METAL CORP., FIREMAN'S FUND INSURANCE COMPANY/ INTERSTATE FIRE INSURANCE CO., LIBERTY MUTUAL/PEERLESS INSURANCE COMPANY and THE SCHAEFER AGENCY, INC.,
Second Third-Party Defendants.

O'CONNOR, O'CONNOR, HINTZ, & DEVENEY, LLP
Attorney for Third-Party Defendant Anron Sheet Metal Corp.
One Huntington Quadrangle, Suite 3C01
Melville, New York 11747

GOLDBERG & SEGALLA LLP
Attorney for Second Third-Party Defendant Liberty Mutual/Peerless Insurance
665 Main Street
Buffalo, New York 14203

Plaintiff Edward Allen commenced this action to recover damages for personal injuries allegedly sustained on January 5, 2009, when he fell into an open shaft while performing HVAC related services in the basement of the building housing the United States' Mission to the United Nations, located in Manhattan, New York. After issue was joined, defendant/third-party plaintiff Leon DeMatteis Construction Corp. ("DeMatteis"), the general contractor for the project, brought a third-party action against several of its subcontractors, including third-party defendant/third-party plaintiff RJR Mechanical Inc. ("RJR"). Thereafter, third-party defendant/third-party plaintiff RJR, brought a third-party action against its subcontractor, third-party defendant Anron Sheet Metal Corp. ("Anron"), and its insurance carrier, third-party defendant Liberty Mutual/Peerless Insurance Company ("Peerless"), as well as Anron's insurance broker, third-party defendant the Schaefer Agency, Inc. ("Schaefer"). The third-party complaint seeks, among other things, a judgment declaring that Anron and Peerless are contractually obligated to defend and indemnify RJR in the underlying action, and that Peerless wrongfully denied RJR's demand for insurance coverage. Third-party defendant Anron was Allen's employer. Plaintiff and DeMatteis have since reached a resolution. RJR signed a Release and Assignment of Claim, dated December 3, 2015, whereby it assigned "all of its rights, title, claims, interests and remedies... in connection with the construction project" to DeMatteis.

Motion #15 and Cross Motion #16
Peerless Motion for Summary Judgment and DeMatteis Cross Motion for Summary Judgment

Peerless now moves for summary judgment dismissing the third-party complaint against it, arguing that RJR failed to provide it with notice of the underlying claim until approximately 20 months after the accident, thereby violating conditions precedent to coverage. DeMatteis opposes the motion on the grounds that Peerless was notified by Anron of the accident and that Peerless is providing a defense for Anron in this action. DeMatteis cross moves for summary judgment seeking an order that Peerless is required to provide it a defense.

On December 30, 2005, DeMatteis and RJR entered into an agreement pursuant to which RJR was to provide certain labor and services in connection with the construction project. The contract contained provisions requiring RJR to purchase insurance naming DeMatteis as an additional insured, and to defend and indemnify it against all claims arising out of its work or the work of anyone or entity directly or indirectly employed by RJR on the project. On May 24, 2006, RJR and Anron entered into a subcontract for Anron to perform sheet metal work. The subcontract states that Anron "hereby assumes full responsibility and liability for any and all damage or injury of any kind (including death resulting therefrom) to all persons, whether employees of the Subcontractor or otherwise." Peerless issued a policy of insurance to Anron bearing policy number GL8262161 with a policy period of April 1, 2008 through April 1, 2009. Section IV of the insurance policy, which is entitled "Duties In The Event Of Occurrence, Offense, Claim or Suit," states, in pertinent part, as follows:

> a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
> (1) How, when and where the "occurrence" or offense took place;
> (2) The names and addresses of any injured persons or witnesses; and
> (3) The nature and location of any injury or damage arising out of the "occurrence" or offense . . .

b. If a claim is made or "suit" is brought against any insured, you must:
(1) Immediately record the specifics of the claim or "suit" and date received; and
(2) Notify us as soon as practicable. You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:
(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit...

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

Where, as here, a policy of liability insurance requires that notice of an occurrence which may give rise to a claim be given "as soon as practicable," such notice must be provided to the carrier within a reasonable period of time (***Great Canal Realty Corp. v Seneca Ins. Co., Inc.***, 5 NY3d 742, 743, 800 NYS2d 521 [2005]; ***Donovan v Empire Ins. Group***, 49 AD3d 589, 590, 856 NYS2d 139 [2d Dept 2008]). An "insured's failure to satisfy the notice requirement constitutes 'a failure to comply with a condition precedent which, as a matter of law, vitiates the contract'" (***Columbia Univ. Press, Inc. v Travelers Indem. Co. of Am.***, 89 AD3d 667, 667, 931 NYS2d 706 [2d Dept 2011], *quoting* ***Argo Corp. v Greater N.Y. Mut. Ins. Co.***, 4 NY3d 332, 339, 794 NYS2d 704 [2005]). Failure or delay in giving notice may be excused if the insured lacked knowledge that the accident had occurred or had a good faith and reasonable belief of his or her nonliability (*see* ***Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.***, 91 AD3d 734, 736, 936 NYS2d 323 [2d Dept 2012]; ***Ponok Realty Corp. v United Natl. Specialty Ins. Co.***, 69 AD3d 596, 597, 893 NYS2d 125 [2d Dept 2010]). The insured has the burden of establishing that there was a reasonable excuse for the delay (*see* ***Ocean Gardens Nursing Facility, Inc. v Travelers Cos., Inc.***, 91 AD3d 734,736, 936 NYS2d 323 [2d Dept 2012]; ***Tower Ins. Co. of N.Y. v Alvarado***, 84 AD3d 1354, 1355, 923 NYS2d 717 [2d Dept 2011]). The reasonableness of an insured's good faith belief in nonliability is a matter ordinarily left for trial (*see* ***Deso v London & Lancashire Indem. Co. of Am.***, 3 NY2d 127, 129,164 NYS2d 689 [1957]; ***Chiarello v Rio***, 101 AD3d 793, 957 NYS2d 133 [2d Dept 2012]), and will only be determined as a matter of law where the evidence, when construed in favor of the insured, establishes that the belief was inherently unreasonable or formed in bad faith (*see* ***Zimmerman v Peerless Ins. Co.***, 85 AD3d 1021, 1024, 926 NYS2d 124 [2d Dept 2011]; ***Courduff's Oakwood Rd. Gardens & Landscaping Co., Inc. v Merchants Mut. Ins. Co.***, 84 AD3d 717, 922 NYS2d 212 [2d Dept 2011]; ***McGovern-Barbash Assoc., LLC v Everest Natl. Ins. Co.***, 79 AD3d 981, 914 NYS2d 218 [2d Dept 2010]).

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 issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; ***Gilbert Frank Corp. v Federal Insurance Co.,*** 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real

and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (***Robinson v Strong Memorial Hospital,*** 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

Here, Peerless established its prima facie entitlement to judgment as a matter of law by demonstrating that it was not provided with notice of the subject accident from RJR until approximately 20 months after it had occurred (*see* ***Deso v London & Lancashire Ind. Co.***, 3 NY2d 127, 164 NYS2d 689 [1957]; ***Hanson v Turner Constr. Co.***, 70 AD3d 641, 897 NYS2d 116 [2d Dept 2010]; ***Gershow Recycling Corp. v Transcontinental Ins. Co.***, 22 AD3d 460, 801 NYS2d 832 [2d Dept 2005]), and that DeMatteis to date has failed to provide notice of the accident to Peerless (*see* ***Vale v Vermont Mut. Ins. Group***, 112 AD3d 1011, 977 NYS2d 117 [3d Dept 2013]; ***Board of Hudson Riv.-Black Riv. Regulating Dist. v Praetorian Ins. Co.***, 56 AD3d 929, 867 NYS2d 256 [3d Dept 2008]; ***Steadfast Ins. Co. v Sentinel Real Estate Corp.***, 283 AD2d 44, 727 NYS2d 393 [1st Dept 2001]). Peerless submitted evidence that DeMatteis' project superintendent Klaus Horatschek filed an incident report on the date of the accident, that Horatschek and the assistant project manager knew that Allen's injuries required he be taken to the hospital via an ambulance, and that DeMatteis' risk manager Steven Mezick became aware of the accident no later than June 10, 2009, when he authorized payment of a $1,500 fine to OSHA after it determined that DeMatteis was liable for an "Unprotected sides and edges" violation in relation to the subject accident (*see* ***Rivera v Core Cont. Constr. 3, LLC***, 106 AD3d 636, 966 NYS2d 50 [1st Dept 2013]; ***Tower Ins. Co. of N.Y. v. Jaison John Realty Corp.***, 60 AD3d 418, 874 NYS2d 91 [1st Dept 2009]). The adduced evidence further indicates that DeMatteis was served with the underlying complaint on March 22, 2010, that the complaint alleged, among other things, strict liability under the Labor Law, and that, despite providing its own insurer with such complaint on March 31, 2010, it still failed to notify Peerless of the accident or provide it with a copy of said complaint. It is noted that where, as in this case, the subject insurance policy was issued prior to January 17, 2009, Peerless need not demonstrate that it was prejudiced by DeMatteis' failure to provide timely notice of the underlying accident to meet its prima facie burden on the motion (*see* ***Chiarello v Rio***, *supra*; ***Ponok Realty Corp. v United Natl. Specialty Ins. Co.***, *supra*).

In opposition, DeMatteis has raised a triable issue of fact as to whether Anron's notice to Peerless was sufficient notice under the terms of the policy since Peerless is defending Anron in the third-party lawsuit. Therefore Anron's motion for summary judgment is denied. DeMatteis cross motion for summary judgment is similarly denied.

Motion #17 and Cross Motion #20
Anron Motion for Summary Judgment and DeMatteis Cross Motion for Summary Judgment

Anron now moves for an order granting leave to amend its verified answer and for summary judgment dismissing the third-party complaint against it, arguing that the action is barred by the workers' compensation law and that the subcontract does not contain an express agreement to indemnify. DeMatteis opposes the summary judgment motion and cross moves for an order granting leave to amend its third-party complaint to include a claim for contractual indemnification against Anron. Anron's motion to amend its verified answer to add a workers' compensation defense is granted without opposition. The amended verified answer is deemed served upon all parties.

Anron argues that under the workers' compensation law, "when an employee is injured in the course of his employment, an employer may only be liable to third parties under theories of contribution or indemnity where there is a written contract entered into prior to plaintiff's accident in which the employer had expressly agreed to contribution or indemnification of the third-party, or where plaintiff has suffered a grave injury." Anron indicates that it did not enter into a written contract with DeMatteis in connection with this project. The plaintiff's bill of particulars indicates that he suffered soft tissue injuries to his neck and back that required multiple surgeries. These injuries do not constitute a grave injury under the workers' compensation law.

The subcontract between Anron and RJR states that Anron

> agrees to indemnify, protect and hold harmless RJR and the Owner from any and all liability, loss or damage and to reimburse RJR and the Owner for any expenses, including legal fees and disbursements, to which RJR and the Owner may be put because of claims or litigation on account of infringement or alleged infringement of any letters patent or patent rights by reason of the Work or Materials, equipment or other items used by the Subcontractor in its performance.

The subcontract does not contain any other indemnification language.

Under the circumstances of this case, even when the facts are construed in the light most favorable to the non-moving party, Anron established its prima facie entitlement to summary judgment dismissing the third-party complaint against it. DeMatteis did not rebut that presumption in its opposition by providing proof that the contract contained indemnification language related to injury of any kind. Accordingly, Anron's motion for summary judgment is granted and the third-party complaint as it relates to Anron is dismissed. DeMatteis' motion to amend the third-party complaint and for summary judgment is denied as moot.

Motion #18 and Cross Motion #19
Jacobs Motion to Amend Answer and Dismiss and DeMatteis Cross Motion to Amend Complaint

Jacobs Engineering New York, Inc., ("Jacobs") now moves for an order granting leave to amend its verified answer and to dismiss all cross-claims for contribution, common-law indemnity, and contractual indemnity by DeMatteis. DeMatteis takes no position as to Jacobs' motion to amend its answer but does oppose the motion to dismiss and cross moves for an order granting leave to amend its third-party complaint to include a claim for implied contractual indemnification against Jacobs. Jacobs' motion to amend its verified answer is granted without opposition. The amended verified answer is deemed served upon all parties.

Leave to amend pleadings "shall be freely given," absent prejudice or surprise resulting directly from the delay (CPLR 3025[b]; ***McCasky, Davies and Associates, Inc. v New York City Health & Hospitals Corp.,*** 59 NY2d 755, 450 NE2d 240, 463 NYS2d 434 [1983]). Thus, a motion to serve an amended pleading should be granted unless the party opposing the motion demonstrates substantial prejudice resulting directly from the delay (*see* ***Cutwright v Central Brooklyn Urban Dev. Corp.,*** 127 AD2d 731, 512 NYS2d 128 [2d Dept 1987]; ***Scarangello v State,*** 111 AD2d 798, 490 NYS2d 781 [2d Dept 1985]).

DeMatteis' cross motion to amend its third-party complaint to include a claim for implied contractual indemnification against Jacobs is granted without opposition. The amended third party complaint is deemed

served upon all parties.

Under CPLR 3001, "a declaratory judgment action thus 'requires an actual controversy between genuine disputants with a stake in the outcome,' and may not be used as 'a vehicle for an advisory opinion' (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3001:3)." (***Long Is. Light. Co. v Allianz Underwriters Ins. Co.***, 35 AD3d 253, 253 [1st Dept 2006].) In ***In re Workmen's Compensation Fund***, 224 NY 13, 16 [1918], the Court held that

> The function of the courts is to determine controversies between litigants (***Interstate Commerce Commission v. Brimson***, 154 U.S. 447, 475; ***Osborn v. Bank of U. S.***, 9 Wheat. 738, 819; ***Mills v. Green***, 159 U.S. 651; ***Marye v. Parsons***, 114 U.S. 325, 330; ***Am. Book Co. v. Kansas***, 193 U.S. 49). They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function (Thayer, Cases on Constitutional Law, vol. 1, p. 175; American Doctrine of Const. Law, 7 Harvard Law Review, 153).

Based upon a review of the motion papers the Court concludes that DeMatteis has not asserted any cross-claims against Jacobs for contribution, common-law indemnity, or contractual indemnity. Therefore the remainder of Jacobs requests are denied.

The foregoing shall constitute the decision and Order of this Court.

Dated: November 29, 2016

HON. JOSEPH A. SANTORELLI
J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION