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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C.

PART 2

These Certain Underwriters

-v-

Regina, Robert

INDEX NO. 102528/10

MOTION DATE

MOTION SEQ. NO. 04

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
SEP 25 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/24/12

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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THOSE CERTAIN UNDERWRITERS AT LLOYDS, LONDON SUBSCRIBING TO POLICY NO: FTPD041549 a/s/o PETER SCHWARTZ and PETER SCHWARTZ, individually,

Plaintiffs,

-against-

ROBERT REGINA, EVK MAXIMUS CONSTRUCTION, LLC; MAXIMUS CONSTRUCTION; ABC COMPANIES 1-5; (said corporations being fictitious, the true names unknown, responsible for construction, demolition, debris removal, moving services, storage services, and delivery and services provided to the premises located at 244 Bay Walk, Fire Island Pines, New York); ABC COMPANIES 6-10 (said corporations being fictitious, the true names unknown, said corporations being the manufacturers, distributors and/or retailers of defective products located in or about 245 Bay Walk Fire Island Pines, New York and/or 244 Bay Walk Fire Island Pines, New York); and JOHN DOES 1-10,

Defendants.

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Index No.
102528/10

Motion Sequence Nos.
002, 003, and 004

LOUIS B. YORK, J:

Motion sequence numbers 002 through 004 are consolidated for disposition.

In motion sequence 002, plaintiffs seek to quash the judicial subpoena addressed to nonparty Raphael & Associates (Raphael).

In motion sequence 003, EVK Maximus Construction, LLC (EVK

Maximus) and Maximus Construction seek summary judgment dismissing plaintiffs' complaint and all cross claims as asserted against them.

In motion sequence 004, defendant Robert Regina (Regina) seeks summary judgment: (1) dismissing plaintiffs' complaint, and (2) on his cross claims against co-defendant EVK Maximus. Plaintiffs cross-move for summary judgment on their complaint against EVK Maximus, as to liability only.

For the reasons stated below, plaintiffs' motion to quash the subpoena is granted. Regina's motion is granted, only to the extent of dismissing plaintiffs' claims based upon federal law and Fire Island Pines Property Owners' Association (FIPPOA) Rules, and is otherwise denied. EVK Maximus and Maximus Construction's motion is granted, only to the extent of dismissing plaintiffs' claims based federal law and upon FIPPOA Rules, and is otherwise denied. Plaintiffs' cross motion is denied.

Background

Plaintiffs, Those Certain Underwriters At Lloyd's, London Subscribing to Policy No. FTPD041549 (Lloyds), as the subrogee of Peter Schwartz (Schwartz), and Schwartz, who owns the premises at 245 Bay Walk, Fire Island Pines, New York 11782 (the premises), commenced this action to seek monetary damages from defendants as the result of a May 20, 2009 fire that caused more than $1.4

million in damages to the premises. According to plaintiffs, the fire began on an adjacent property, owned by defendant Regina, which at that time was being renovated under a September 3, 2008 contract between Regina and defendants EVK Maximus and Maximus Construction.

Plaintiffs seek damages pursuant to causes of action under negligence and nuisance theories of liability, and allege that defendants violated federal and state statutes, as well as municipal ordinances.

EVK Maximus and Maximus Construction's answer contains cross claims against Regina, including allegations of Regina's negligence and that those defendants are entitled to common-law indemnification.

In his answer, Regina cross-claims against EVK Maximus and Maximus Construction for contractual and common-law indemnification, contribution, and for breach of contract for failure to procure insurance. *See* Plaintiffs' Cross Motion, Exh. B.

Discussion

Motion to Quash the Subpoena

Plaintiffs first move to quash the judicial subpoena issued to Raphael, based upon attorney/client and work product privilege. In the subpoena at issue, Raphael, a non-party, is commanded to appear with "[a]ny and all documents ... evidencing,

relating or referring to the adjustment of the loss incurred by Schwartz at the premises located at 245 Bay Walk, Fire Island Pines, New York 11782 under policy number FTPD041549."

In response to a preliminary conference order of this court (*see* Plaintiff's Notice of Motion, Exh. A), plaintiffs have previously provided defendants with Raphael's redacted report of its investigation of the fire. In the instant motion, plaintiffs assert that defendants are not entitled to an unredacted version of that same report because Raphael was hired to perform a cause and origin investigation solely for the purposes of the instant subrogation litigation. According to plaintiffs, prior to Raphael's engagement, Lloyds had already determined that the fire originated on Regina's property, and that coverage for Schwartz under the Lloyds policy was never in doubt.

A trial court has discretion to quash a judicial subpoena when a movant satisfies its burden that such documents at issue are privileged. *See 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486 (1st Dept 2009); *see also John Blair Communications v Reliance Capital Group*, 182 AD2d 578 (1st Dept 1992). When a party asserts privilege because certain materials are prepared in anticipation of litigation, that party must first show that such documents were prepared exclusively for that purpose. *See Commerce and Indus. Ins. Co. v Laufer Vision World*, 225 AD2d 313 (1st Dept 1996).

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Although generally, investigative insurance claim reports prepared in the ordinary course of business are considered "multipurpose" and not privileged (*see 148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.*, 62 AD3d 486, *supra*; *Westhampton Adult Home v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 AD2d 627 [1st Dept 1984]), such restriction is limited to "[r]eports made by independent investigators and adjusters, before rejection of insurance claims." *Westhampton Adult Home, Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 AD2d at 628.

Here, plaintiffs have proffered evidence that there was a single purpose of Raphael's report - to investigate the origin and cause of the fire on Regina's property. There is no evidence that Raphael was engaged to generate evidence to enable the insurer to decline Schwartz's claim. Plaintiffs' statement that Lloyds never intended to deny its insured's claim has not been refuted, and, in this way, the facts at issue herein differ from those in the decisions cited by defendants.

Defendants' additional assertions that, because Raphael was not retained by Lloyds or Schwartz, but by FTP, a wholesale broker, and, because Raphael was not a client of the plaintiffs, the documents generated by Raphael do not fall under either the attorney/client or work-product privilege are unavailing. It is uncontested that Raphael was hired by FTP (*see* Regina Affirmation

in Opposition, Exh. C, Examination Before Trial [EBT] of Michael McBain, at 27), a wholesale broker through whom Lloyds wrote business, and whom it charged with investigating the matter.

Absent evidence to contradict plaintiffs' assertions that the sole purpose of Raphael's cause and origin investigation was regarding the origin of the Regina fire, plaintiffs' motion to quash the subpoena is granted.

Motions and Cross Motion for Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. *See Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see also Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

EVK Maximus and Maximus Construction

EVK Maximus and Maximus Construction assert that they are entitled to dismissal of plaintiffs' complaint and all cross claims.

As respects plaintiffs' cause of action for negligence, EVK Maximus and Maximus Construction maintain that plaintiffs have

not proffered any evidence showing that their actions proximately caused the fire that destroyed the premises.

"To establish a cause of action sounding in negligence, a plaintiff must establish the existence of a duty on defendant's part to plaintiff, breach of the duty and damages." *Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 (2011). In their complaint, plaintiffs allege that EVK Maximus and Maximus Construction failed to maintain, repair, renovate, construct, deliver goods to, and to safely discard materials at Regina's property.

It is uncontested that EVK Maximus and Maximus Construction were engaged in renovating the Regina house (*see* Notice of Motion, Exh. G, Regina EBT, at 89; *see also* Notice of Motion, Exh. H, EBT of Eric von Kuersteiner [von Kuersteiner], at 60), or that Ryan Bell (Bell), an EVK Maximus and Maximus Construction employee, was the last known person on the property prior to the start of the fire. *See* Notice of Motion, Exh. H, von Kuersteiner EBT, at 27-28; *see also* Notice of Motion, Exh. I, Bell EBT, at 150.

It is additionally uncontested that Bell was at the Regina property until approximately 9:15 or 9:30 P.M. on the night of the fire (*see* Bell EBT, at 92), emptying boxes of furniture that he had arranged to be delivered after 6:00 P.M. on the night in question. *See* Bell EBT, at 150.

Bell attests to the fact that, after unpacking most of the furniture that he had delivered to the Regina house, he wrapped most of the furniture packing materials up in a bundle and left them in the front of the property prior to his departure. *See* Bell EBT, at 93.

EVK Maximus and Maximus Construction contend that what Bell did was not negligent or, alternatively, that his decision to have furniture delivered after hours was in his individual capacity and not as an employee of EVK Maximus and Maximus Construction.

There are material issues of fact, precluding summary judgment, as to whether Bell was acting as an employee of EVK Maximus and Maximus Construction through the entire day and evening, and, if so, whether he was negligent in his actions.

The Suffolk County Police Report generated as the result of this incident concludes that "[a]ll causes of this fire were able to be excluded except for the careless discard of smoking materials or the application of an open flame to available combustible material." *See* Notice of Motion, Exh. N.

There are several inconsistencies in Bell and other witnesses' statements regarding the condition of the Regina property and who was present on the night of the fire.

In his EBT, Bell denies that any of his workers, the delivery men, the housekeeper or the one man who assisted him in

unpacking some of the furniture smoked while on the Regina property that night (*see* Bell EBT at 24, 156). However, the County of Suffolk Police Report states that "[o]ne workman, [redacted] reports that two of the workers smoke cigarettes." Additionally, a local resident, Walter Boss (Boss), attested that at approximately 9:00 P.M., he talked to the housekeeper, who was smoking a cigarette near the gatehouse. *See* Notice of Motion, Exh. L, Boss EBT, at 25.

Further, the Police Report states that a "construction worker," ostensibly Bell, was interviewed "who was also at the residence setting up furniture prior to the fire. He confirms that the cardboard and furniture wrappings [that combusted to start the fire] were placed near the gate structure. [Redacted] reports that he was working with the housecleaner and two other men he knows [redacted]. He stated that [redacted] both smoke cigarettes."

Given the inconsistencies between the statements in Bell's EBT and the police report, there are material questions of fact as to whether or not he was negligent in discarding materials before and after the furniture was delivered, as well as whether he allowed workers or others he invited to help him work on the Regina property smoke and discard cigarettes near where he was discarding combustible materials.

Therefore, that portion of EVK Maximus and Maximus

Construction's motion to dismiss plaintiffs' negligence cause of action is denied.

EVK Maximus and Maximus Construction additionally seek to dismiss plaintiffs' allegations that "defendants violated certain federal and state statutes and municipal code ordinances relating to fire prevention, disposal of recyclables, littering, and other public health and safety laws and ordinances."

Plaintiffs, who have not set forth in their complaint any particular law or code that defendants have violated, instead state in their memorandum of law, that "[t]he New York State Legislature, through Executive Law Section 377 (1) implemented the New York Uniform Fire Prevention and Building Code which is applicable for the within matter. The Town of Brookhaven, Municipal Ordinance 3-16A and Section 30-22 has adopted the New York State Uniform Fire Prevention and Building Code."

Plaintiffs have not, in any of their pleadings or in a letter intended to amend and clarify plaintiffs' Bill of Particulars (*see* EVK Maximus and Maximus Construction's Notice of Motion, Exh. R), specified a federal statute that addresses issues of fire prevention, disposal of recyclables, littering, etc. that would be applicable here. Therefore, that portion of plaintiffs' complaint that alleges violations of federal statutes is dismissed as to all defendants.

This court takes judicial notice of the New York State 2007

Uniform Fire Prevention and Building Codes. Proof of a code violation is some evidence of negligence. *See Scala v Scala*, 31 AD3d 423 (2d Dept 2006). Because EVK Maximus and Maximus Construction have not cited and explained the applicability of these codes to this action, that portion of their motion seeking dismissal of the cause of action alleging violation of state and local statutes and codes is denied.

EVK Maximus and Maximus Construction additionally seek to dismiss plaintiffs' allegations of violations of FIPPOA rules. These rules, as set forth in Exhibit Q to Plaintiffs' Cross Motion, give information about the property association and give several admonitions, but no penalties are set forth for violating such rules. In addition, there is no proffered evidence that Regina or EVK Maximus and Maximus Construction agreed to abide by them. Therefore, that portion of EVK Maximus and Maximus Construction's motion that seeks to dismiss plaintiffs' use of the FIPPOA rules as the basis for their second cause of action is granted as to all defendants.

EVK Maximus and Maximus Construction additionally seek dismissal of plaintiffs' final cause of action sounding in nuisance.

"The elements of a common-law claim for a private nuisance are: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's

property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.'" *Berenger v 261 W. LLC*, 93 AD3d 175, 182 (1st Dept 2012), quoting *Copart Indus.v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977). Characterized by recurrent activity, plaintiffs maintain that the ongoing improper disposal of debris at the Regina property created a private nuisance.

Neighbors have stated that there was debris in front of the Regina property on a regular basis (*see* Plaintiffs' Cross Motion, Exh. M, EBT of Mark Schrader); however, defendants EVK Maximus and Maximus Construction contend that any interference that Schwartz may have sustained was not intentional.

"[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed." *Weinberg v Lombardi*, 217 AD2d 579, 579 (2d Dept 1995).

Courts have held that "[a]n interference is intentional when 'the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct.'" *Berenger v 261 W. LLC*, 93 AD3d at 183 (quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d at 571).

There are material questions of fact as to whether or not interference, if any, caused by alleged improper disposal of debris was intentional. Therefore, that portion of EVK Maximus

and Maximus Construction's motion that seeks to dismiss plaintiff's nuisance cause of action is denied.

EVK Maximus and Maximus Construction further seek dismissal of Regina's cross claims against them, including claims of entitlement to common-law indemnification and contribution, as well as contractual indemnification and breach of contract for the failure to procure insurance.

Any common-law indemnification or contribution is premature prior to a finding of liability in a tort action. *See Matthews v Trump 767 Fifth Ave., LLC*, 50 AD3d 486 (1st Dept 2008); *see also Godoy v Abamaster of Miami*, 302 AD2d 57, 61-62 (2d Dept), *lv dismissed* 100 NY2d 614 (2003) (quoting 23 NY Jur 2d, Contribution, Indemnity, and Subrogation § 24) (as respects the claims for contribution, recovery "is available [only] where 'two or more tortfeasors combine to cause an injury[,]' and is determined 'in accordance with the relative culpability of each such person.'").

Because it is unclear at this stage of the instant litigation whether or not EVK Maximus and/or Maximus Construction are liable in the instant action, dismissal of Regina's cross claims for common-law indemnification and contribution is premature. Therefore, that portion of EVK Maximus and Maximus Construction's motion that seeks dismissal of Regina's cross claims for common-law indemnification and contribution is denied.

As respects Regina's cross claim for contractual indemnification, the following provisions of the contract are applicable:

> 6.13 (a) To the fullest extent permitted by law, [Maximus Construction Company] shall indemnify and hold harmless [Regina] and [his] agents from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work to the extent caused by the acts or omissions of [Maximus Construction Company], a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Although EVK Maximus and Maximus Construction contend that the fire at issue did not arise out of[1] or result from the performance of their work, there are material questions of fact as to whether or not that is the case,[2] and, therefore, that portion of EVK Maximus and Maximus Construction's motion that

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[1] For a claim to "arise out" of a contractor's work, there must be a showing that "a particular act or omission in the performance of such work [was] causally related to the accident." *Urbina v 26 Ct. St. Assoc., LLC*, 46 AD3d 268, 273 (1st Dept 2007).

[2] This court also notes that, although it is not raised by the parties here, General Obligations Law 5-322.1 prohibits a contractor from recovering for its own negligence. However, the contractual provision at issue contains the saving verbiage, "to the fullest extent allowed by law," and thus is enforceable against Maximus Construction. *See Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 (2008); *Cabrera v Board of Educ. of City of N.Y.*, 33 AD3d 641 (2d Dept 2006); *Barros v Arthur Kill, LLC*, 2011 WL 5295029, 2011 NY Misc LEXIS 5168 (Sup Ct, NY County 2011). Thus, this indemnification paragraph meets the requirements of General Obligations Law 5-322.1.

seeks to dismiss Regina's contractual indemnification cross claim is denied.

Finally, EVK Maximus and Maximus Construction seek to dismiss Regina's cross claim for breach of contract for failure to procure insurance.

The contract provides:

> 9.1 [Maximus Construction] shall purchase from and maintain ... comprehensive general liability and public liability insurance covering claims for damages because of bodily injury ... and claims for damages to property which may arise out of or result from [Maximus Construction's] operations under this Agreement, whether such operations be by [Maximus Construction] or by a subcontractor [sic] anyone directly or indirectly employed by any of them.... Each policy shall name [Regina] as an additional insured."

Although EVK Maximus and Maximus Construction assert that Regina's cross claim under this provision should be dismissed, they have not provided any legal or factual basis for this. Therefore, that portion of EVK Maximus and Maximus Construction's motion that seeks to dismiss Regina's cross claim for breach of contract for failure to procure insurance is denied.

Regina

Regina first moves to dismiss plaintiffs' cause of action for negligence, as he was not present on the night of the fire, nor was he aware of the existence of debris on the premises.

Generally, a property owner who has engaged an independent contractor to perform construction on his premises is not liable for the independent contractor's negligence while the work is in

progress. *See Kojic v City of New York*, 76 AD2d 828 (2d Dept 1980).

> The exceptions generally recognized involve situations where the employer (1) is under a statutory duty to perform or control the work, (2) has assumed a specific duty by contract, (3) is under a duty to keep premises safe, or (4) has assigned work to an independent contractor which the employer knows or has reason to know involves special dangers inherent in the work or dangers which should have been anticipated by the employer.

Rosenberg v Equitable Life Assur. Socy. of U.S., 79 NY2d 663, 668 (1992); *see also Saini v Tonju Assoc.*, 299 AD2d 244 (1st Dept 2002).

Although it is undisputed that EVK Maximus and Maximus Construction were independent contractors, there are material questions of fact as to whether the housekeeper, who was on the grounds the evening of the fire and was seen smoking a cigarette in the general area of where the fire started, was an employee of Regina.

Therefore, that portion of Regina's motion that seeks dismissal of the negligence cause of action in plaintiffs' complaint is denied.

For the reasons stated above, plaintiffs' federal law violation and FIPPOA are dismissed as to Regina.

Further, because the status of the housekeeper as an employee is a material question of fact, that portion of Regina's motion that seeks dismissal of plaintiffs' claim of nuisance is

denied.

Finally, Regina seeks summary judgment on his cross claims against EVK Maximus. As stated above, summary judgment as to common-law indemnification, contribution and contractual indemnification under the contract is denied as premature.

Additionally, the "contractor" under the contract is Maximus Construction, not EVK Maximus. Because EVK Maximus is not bound by the contract, this court cannot and will not grant summary judgment against EVK Maximus. Thus, the remainder of Regina's motion is denied.

Plaintiffs

For the reasons stated above, plaintiffs' cross motion is denied.

Order

Accordingly, it is hereby

ORDERED that plaintiffs' motion to quash the subpoena is granted; and it is further

ORDERED that Robert Regina's motion is granted, only to the extent of dismissing those claims of plaintiffs that are based upon federal law, as well as on Fire Island Pines Property Owners' Association Rules, and is otherwise denied; and it is further

ORDERED that EVK Maximus Construction, LLC and Maximus Construction's motion is granted, only to the extent of

dismissing those claims of plaintiffs that are based upon federal law, as well as on Fire Island Pines Property Owners' Association Rules, and is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is denied.

Dated: 9/24/12

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE