

<b>Gallagher v Peckham Rd. Corp.</b>
2021 NY Slip Op 33757(U)
January 11, 2021
Supreme Court, Dutchess County
Docket Number: Index No. 2019-55069
Judge: Hal B. Greenwald
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At the term of the Supreme Court of the State of New York, held in and for the County of Dutchess, at 10 Market Street, Poughkeepsie, 12601 on January 11, 2021

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF DUTCHESS

-----X  
JAMES D. GALLAGHER and DANIELLA GALLAGHER,  
Plaintiffs,

v.

PECKHAM ROAD CORP., JOINTA LIME COMPANY,  
CALLANAN INDUSTRIES, INC., d/b/a IROQUOIS ROCK  
PRODUCTS, PECKHAM MATERIALS CORP.,  
THREE "D" INDUSTRIAL MAINTENANCE CORP.,  
and PAUL D. VERMILYEA

Defendants.

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DECISION AND ORDER  
(Motion Sequence1)

-----X  
JOINTA LIME COMPANY,  
Third-Party Plaintiff,

v.

PAUL D. VERMILYEA, THOMAS GALLAGHER, and  
THREE "D" INDUSTRIAL MAINTENANCE CORP.,  
Third-Party Defendants.

-----X  
PECKHAM ROAD CORP. and  
PECKHAM MATERIALS CORP.,  
Third-Party Plaintiffs,

v.

PAUL D. VERMILYEA, THOMAS GALLAGHER and  
THREE "D" INDUSTRIAL MAINTENANCE CORP.,  
Third-Party Defendants.

-----X  
Greenwald, J.

The following papers numbered 1-3 were considered by the Court in deciding Petitioner's Notice of Motion

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Affirmation of Sabrina Victor, Esq. /Exhibits A-H	1
Affirmation of Michael Brandi, Esq. Memorandum of Law in Opposition/Exhibits A-C	2
Affirmation of Stephan Orr, Jr. Esq./Memorandum of Law /Exhibit A	3
Reply Affirmation of Sabrina Victor, Esq.	4

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RELEVANT BACKGROUND

Defendant, Jointa Lime Company, commenced a third-party action against Thomas Gallagher (“TLG”), as well as Paul D. Vermilyea, Three “D” Industrial Maintenance Corp., by filing a third-party Summons and Complaint, dated February 4, 2020. Third-Party Defendant, Thomas Gallagher, appeared by service of an Answer to Third-Party Complaint, dated April 8, 2020.

Defendant Thomas Gallagher files the instant Notice of Motion for Summary Judgment, arguing that there is no basis for Third-Party Plaintiffs’ claims of negligent entrustment against him as the undisputed evidence on the record demonstrates that TLG is not liable for the occurrence of the accident, and requires a dismissal of the Third-Party Complaints.

Third-Party Plaintiff, Jointa Lime Company (“Jointa”), argues in opposition to the motion, that TLG’s motion is premature because discovery is not complete and Jointa Lime has not been afforded the opportunity to depose TLG and decipher what facts, if any are necessary to oppose TLG’s motion. Jointa argues that depositions have not been completed, and as such facts are exclusively within the knowledge and control of other parties, including TLG, the motion for summary judgment should be deemed premature. Jointa also argues that there are questions of fact as to whether Plaintiff’s use of benzodiazepine was in line with medical advice and whether TLG knew or should have known of Plaintiff’s inability to operate the motorcycle safely because of his use of prescription medication. For these reasons, Jointa requests that the motion be denied.

Third-Party Plaintiff Peckham Road Corp. (“Peckham”) joins in opposition to TLG’s motion. Peckham contends that the parties have not conducted any depositions, and there are conditions and circumstances surrounding TLG’s decision to allow Plaintiff to borrow the motorcycle that are uniquely and exclusively within the knowledge of TLG and/or Plaintiff and relevant to theory of negligent entrustment. Peckham asserts that the motion is premature and should be denied.

In reply TLG declares that the motion is not premature, as the parties have not opposed with proper evidence to raise an issue of fact or to rebut the evidence presented. TLG argues that the parties’ speculation that evidence may be uncovered during the discovery process to defeat a motion for summary judgment is an insufficient basis for denying the motion. TLG declares that it has provided admissible evidence demonstrating that there is no negligent entrustment and TLG

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should be granted a judgment in its favor against both Jointa and Peckham, third-party plaintiffs in the instant action.

### DISCUSSION

The New York cases which discuss the tort of negligent entrustment all indicate that the defendant must either have some special knowledge concerning a characteristic or condition peculiar to the plaintiff which renders the plaintiff's use of the chattel unreasonably dangerous or some special knowledge as to a characteristic or defect peculiar to the chattel which renders it unreasonably dangerous. *See, Zara v Perzan*, 185 A.D. 2d 236, 237 (2<sup>nd</sup> Dept. 1992).

It is well settled that a motion for summary judgment will be deemed premature when there has been almost no discovery, depositions are not complete, and the movant's own unchallenged account of the facts in an affidavit is the crux of the evidence presented. Especially where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion. *See, Churaman v C&B Elec., Plumbing & Heating, Inc.*, 142 A.D.3d 485, 486-87 (2<sup>nd</sup> Dept. 2016); *see also, Blake v City of New York*, 148 A.D. 3d 1101, 1107 (2<sup>nd</sup> Dept. 2017).

TLG's argument that the motion is not premature lacks merit. Here the knowledge of TLG, is at the heart of whether the claims against him have any weight. When depositions that would afford the other parties the opportunity to obtain testimony and evidence for their defenses is not complete, it not only seems unfair, but improper to grant summary judgment in TLG's favor. Discovery, in this instance is more than a mere hope or speculation that evidence may be found to defeat the motion, it is vital to the parties' claims. TLG cannot argue that the parties failed to present admissible evidence to defeat its motion, which is precisely the argument being made by the other parties, when all the evidence has not been adduced in the instant matter. Summary judgment is a drastic remedy, the procedural equivalent of a trial and it should not be granted where there is any doubt about the issue. *See, Nesbitt v Nimmich*, 34 A.D. 2d 958, 959 (2<sup>nd</sup> Dept. 1970), *aff'd*, 30 N.Y.2d 622 (1972). It would not prejudice TLG, to submit the same motion after depositions are complete. However, a grant of the motion before depositions and discovery are complete, prejudices both third-party plaintiffs. As such, in the interest of justice this motion is deemed premature and denied without prejudice.

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As depositions are to be complete by March 31, 2021, to the extent deemed appropriate and necessary TLG shall renew this application on or before April 30, 2021. Both Jointa and Peckham will have until May 21, 2021 to submit opposition to said motion, to the extent necessary. TLG's reply shall be submitted to the Court on or before June 11, 2021. In the event the briefing schedule is not needed or an adjournment is necessary, please notify the Court in writing. **A status conference shall be scheduled for June 30, 2021 at 10:00 a.m.** See, Preliminary Conference Stipulation and Order (Greenwald, J.) dated October 1, 2020.

Accordingly, it is hereby,

ORDERED, that Third-Party Defendant Thomas Gallagher's Motion for Summary Judgment is deemed premature, and denied without prejudice; and it is further

ORDERED, that the Court has set a briefing schedule to the extent necessary for the future submission of Third-Party Defendant Thomas Gallagher's Motion for Summary Judgment as such, said motion shall be submitted to the Court and served upon the necessary parties on or before April 30, 2021; opposition papers, if any shall be submitted to the Court and served upon the necessary parties on or before May 21, 2021; and reply papers, if any shall be submitted to the Court and served upon the necessary parties on or before June 11, 2021. In the event the briefing schedule is not needed, or an adjournment is necessary, please notify the Court in writing; and it is further

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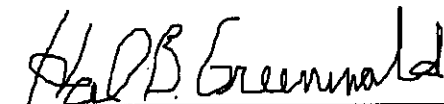
ORDERED, that this matter shall be scheduled for virtual conference for June 30, 2021 at 10:00 a.m., but may be converted to an in-person conference in the event Court procedures allow such conferences. Counsel shall ensure that the Court has their email address and contact information, on or before March 31, 2021 to be provided with the link for the virtual conference and updates.

Any relief not specifically granted herein is denied.

The foregoing constitutes the decision and order of this Court.

Dated: January 11, 2021  
Poughkeepsie, New York

ENTER:



Hon. Hal B. Greenwald, J.S.C.

CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

**When submitting motion papers to the Honorable Hal B. Greenwald's Chambers, please do not submit any copies. Please submit only the original papers.**

cc:

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