

NYSCEF DOC. NO. 82
SHORT FORM ORDER

RECEIVED NYSCEF: 01/19/2016
INDEX No. 14-63527
CAL No. _____

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

**ORIGINAL
PUBLISH**

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 10-12-15
SUBMIT DATE 1-7-16
Mot. Seq. # 03 - MD

-----X
RICHARD FREUNDLICH,

Plaintiff,

- against -

PACIFIC INDEMNITY COMPANY and
FOA & SON CORPORATION,

Defendants.
-----X

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Upon the following papers numbered 1 to 90, read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 33; ~~Notice of Cross Motion and supporting papers _____~~; Answering Affidavits and supporting papers 34 - 69; Replying Affidavits and supporting papers 70 - 90; ~~Other _____; (and after hearing counsel in support and opposed to the motion) it is,~~

Defendant, FOA & Son Corporation, hereinafter referred to as FOA, moves for an order pursuant to CPLR 3212 granting summary judgment and dismissing the plaintiff's fourth claim for relief in his complaint. Plaintiff opposes that application in all respects, argues that discovery has not been completed and that issues of fact exist which necessitate a trial.

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]).

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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]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In support of motion, defendant FOA has submitted, inter alia, an attorney's affirmation; an affidavit of Cheryl Candrea; copies of notice of commencement, summons and complaint; copies of the insurance policy in question; copies of defendant Pacific Indemnity's answer; copies of defendant FOA's answer; copies of FOA's first set of interrogatories; copies of Richard Freundlich's response to FOA's first set of interrogatories; copies of Richard Freundlich's amended response to FOA's first set of interrogatories; copies of the pre-hearing conference statement for Manuel Escobar's Workers' Compensation action; copies of FOA's notice to admit; copies of plaintiff's response to FOA's notice to admit dated April 22, 2015; copies of plaintiff's response to FOA's notice to admit amended May 13, 2015; copies of a claim printout; and a memorandum of law. In opposition to the motion, plaintiff has submitted, inter alia, an attorney's affirmation; an affidavit of Richard Freundlich; copies of FOA's responses and objections to plaintiff's first set of document requests; copies of FOA's responses and objections to plaintiff's first set of interrogatories; copies of correspondence; and a memorandum of law.

The plaintiff commenced this action against FOA under his fourth claim for relief for its negligent failure to advise and procure the correct insurance coverage for the plaintiff. Plaintiff contends that he retained FOA to procure insurance coverage "against all reasonably foreseeable liability arising out of my ownership of my East Hampton and New York City homes, as well as the Home and my automobiles." Plaintiff further alleges that "I repeatedly advised FOA that workers maintained my prior East Hampton house, as well as the Home, which included independent contractors and domestic workers." Plaintiff also states that "I also repeatedly provided FOA with information about the workers because the workers utilized my automobiles and I repeatedly needed my automobile insurance to be amended to cover the various workers." Defendant's attorney states that a "key issue in this case is whether Plaintiff ever specifically requested coverage for liability to full-time residence employees injured while working at the Plaintiff's Home, or whether there is any factual basis for concluding that Plaintiff provided FOA with any information from which FOA could have reasonably concluded Plaintiff had any full-time residence employees or a desire or need to protect himself from liability exposure for injuries to same." FOA further alleges that the plaintiff's statements during the Workers' Compensation Hearing show that plaintiff referred to Mr. Manuel Escobar as an independent

contractor. Additionally, FOA claims that since plaintiff failed to “properly deny– and therefore is deemed to have admitted” numerous statements within FOA’s notice to admit. FOA now moves for summary judgment.

In *32nd Ave. LLC v Angelo Holding Corp.*, ___AD3d___, 20 NYS3d 420, 2015 NY Slip Op 08824, *2 [December 2, 2015], the Court held that

CPLR 3123(a) authorizes the service of a notice to admit upon a party, and provides that if a timely response thereto is not served, the contents of the notice are deemed admitted (see generally *Hernandez v City of New York*, 95 AD3d 793, 945 N.Y.S.2d 292; *Matter of Cohn*, 46 AD3d 680, 849 N.Y.S.2d 271). However, the purpose of a notice to admit is only to eliminate from contention those matters which are not in dispute in the litigation and which may be readily disposed of (see *Priceless Custom Homes, Inc. v O’Neill*, 104 AD3d 664, 960 N.Y.S.2d 455; *HSBC Bank USA, N.A. v Halls*, 98 AD3d 718, 950 N.Y.S.2d 172; *Taylor v Blair*, 116 AD2d 204, 500 N.Y.S.2d 133). A notice to admit is not to be employed to obtain information in lieu of other disclosure devices, or to compel admissions of fundamental and material issues or contested ultimate facts (see *Priceless Custom Homes, Inc. v O’Neill*, 104 AD3d at 665; *HSBC Bank USA, N.A. v Halls*, 98 AD3d at 721; *Nacherlilla v Prospect Park Alliance, Inc.*, 88 AD3d 770, 772, 930 N.Y.S.2d 643; *Tolchin v Glaser*, 47 AD3d 922, 849 N.Y.S.2d 439; *Glasser v City of New York*, 265 AD2d 526, 697 N.Y.S.2d 167; *Riner v Texaco, Inc.*, 222 AD2d 571, 635 N.Y.S.2d 658).

Here the Plaintiff timely filed a response to FOA’s Notice to Admit and amended that response. Since a response was timely served and several questions appear to request admissions to material and contested issues the Court is not deeming the answers given by the plaintiff to be admissions at this time.

Based upon a review of the motion papers the Court concludes that FOA has failed to establish entitlement to judgment as a matter of law and that there are material and triable issues of fact presented and thus the motion for summary judgment must be denied. Even assuming, arguendo that FOA sustained its initial burden the plaintiff proffered sufficient facts to necessitate a trial.

The foregoing constitutes the decision and Order of this Court.

Dated: January 14, 2016



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

___ FINAL DISPOSITION X NON-FINAL DISPOSITION

1. The first part of the document discusses the importance of maintaining accurate records of all transactions.

2. It is essential to ensure that all data is entered correctly and that the system is regularly updated.

3. The second part of the document outlines the various methods used to collect and analyze data.

4. These methods include surveys, interviews, and focus groups, each with its own strengths and weaknesses.

5. The final part of the document provides a summary of the findings and offers recommendations for future research.

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