

SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

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**KEYSPAN GAS EAST CORPORATION d/b/a/
NATIONAL GRID,**

Plaintiff(s),

-against-

**110 HEMPSTEAD MANAGEMENT LLC & FIEL
FIGUARR, INC.,**

Defendant(s).

_____ **x**

110 HEMPSTEAD MANAGEMENT LLC,

Third-Party Plaintiff(s),

-against-

**LEVINE SEWELL ASSOCIATES, LAWRENCE J.
LEVINE, MARTIN LEVINE and PAR PLUMBING,
INC.**

Third-Party Defendant(s),

_____ **x**

**TRIAL/IAS, PART 40
NASSAU COUNTY**

Index No.: 10841-11

**Motion Seq. No.: 002
Motion Submitted: 6/12/14**

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition/Supporting Exhibits.....X
Reply Affirmation.....X

Third-party Defendants Levine Sewell Associates, Lawrence J. Levine and Martin

Levine (Levine) move this court for an order granting them summary judgment, pursuant to CPLR 3212, against third-party Plaintiff 110 Hempstead Management LLC (110 Hempstead). 110 Hempstead is the owner of a building it purchased from Levine nine years ago.

Plaintiff Keyspan Gas East Corporation d/b/a/ National Grid (Keyspan) served 110 Hempstead and another party with a summons and complaint dated July 22, 2011. The complaint alleges, *inter alia*, that lightning struck a negligently laid water pipe connected to 110 Hempstead's building, which then caused damage to Keyspan's gas main. 110 Hempstead then brought a third-party action against Levine and Par Plumbing, Inc. for indemnification.

Levine argues that its only connection to 110 Hempstead is having sold the building to 110 Hempstead nine years ago. In connection with the sale, Levine and 110 Hempstead entered into a contract with a merger clause, which indicated 110 Hempstead was purchasing the building "as is", that 110 Hempstead was given a reasonable amount of time to perform due diligence, and that Levine was making no warranties or representations other than what was contained in the contract. As a result, Levine claims 110 Hempstead has no action against it pursuant to the clear terms of the contract. 110 Hempstead states, in an attorney affirmation only, that Levine's liability is not a result of being the prior owner, but that it may be an owner of Par Plumbing, who may be responsible for the alleged negligently laid water pipe. 110 Hempstead argues the

motion should be denied to allow 110 Hempstead to conduct discovery to ascertain whether Levine is an owner of Par Plumbing. However, the third-party complaint makes no such allegation or connection between Levine and Par Plumbing. The complaint only asserts that Levine was the prior owner of the building.

It is well settled, that in a motion for summary judgment the moving party bears the burden of making a prima facie showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Sillman v. Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]; *Friends of Animals, Inc. v. Associates Fur Mfrs.*, 46 NY2d 1065 [1979]; *Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez V. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 579 (1st Dept.1992), and it should only be granted when there are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d

361 [1974]).

“It is well established that summary judgment should only be granted where there are no material and triable issues of fact (*see Sillman v. Twentieth Century–Fox Film Corp.*, 3 NY2d 395, 404 [1957]). It is equally well established that issue finding, as opposed to issue determination, is the key to summary judgment (*see Krupp v. Aetna Life & Cas. Co.*, 103 AD2d 252, 261 [2d Dept. 1984]) and that the papers should be scrutinized carefully in the light most favorable to the party opposing the motion (*see Ptasznik v. Schultz*, 223 AD2d 695, 696 [2d Dept. 1996]).

What 110 Hempstead’s papers allege, but the complaint does not, is that there may be grounds to pierce Par Plumbing’s corporate veil. The complaint does not even allege that Levine should be held liable for Par Plumbing’s actions much less that Levine abused the privilege of doing business in the corporate form. *Refreshment Management Services, Corp. v. Complete Office Supply Warehouse Corp.*, 89 A.D.3d 913 (2nd Dept. 2013). 110 Hempstead’s argument that discovery may lead to more information regarding Levine’s role as Par Plumbing’s principal is unpersuasive. The need for discovery will defeat a summary judgment motion only where it is likely that discovery will lead to the relevant information. *Neryaev v. Solon*, 6 A.D.3d 510 (2nd Dept. 2004); *Frouws v. Campbell Foundry Co.*, 275 A.D.2d 761 (2nd Dept. 2000). Here, 110 Hempstead merely believes it is possible discovery will lead to information regarding Levine’s role, which is not enough to defeat summary judgment. *Id.*

Levine has established entitlement to summary judgment. They have shown that they are not liable pursuant to the contract, and that the third-party complaint makes no mention of their association with Par Plumbing. The burden shifts to 110 Hempstead to produce evidence, in admissible form, indicating a triable issue of fact. *Zuckerman v. City of New York, supra*. Having scrutinized the third-party complaint and 110 Hempstead's moving papers in the light most favorable to 110 Hempstead, the court finds 110 Hempstead has failed to meet its burden. *Ptasznik v. Schultz, supra*.

Accordingly it is hereby

ORDERED, that the motion of Levine Sewell Associates, Lawrence J. Levine and Martin Levine for summary judgment is GRANTED. The third-party complaint is dismissed against them.

This constitutes the decision of the court.

Dated: July 21, 2014
Mineola, N.Y.

Hon. James P. McCormack, A. J. S. C.