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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

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BRANDON TORON, an infant, by his parent and legal  
guardian, KARYN and KARYN TORON, Individually,

TRIAL/IAS PART 24

INDEX NO. 12613/97

Plaintiff(s),

-against-

MOTION SEQUENCE  
NO. 2 & 3

MIDLAND MANUFACTURING CORP. and SELECT  
BUILDING SUPPLY INC.,

MOTION SUBMISSION  
DATE: September 7, 2000

Defendant(s).

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MIDLAND MANUFACTURING CORP.,

Third-Party Plaintiff(s),

-against-

KARYN TORON and WOLF INSTALLATIONS, INC.,

Third-Party Defendant(s).

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MIDLAND MANUFACTURING CORP.,

Second Third-Party Plaintiff(s),

-against-

T & D TILE, INC.,

Second Third-Party Defendant(s).

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MIDLAND MANUFACTURING CORP.,

Third Third-Party Plaintiff(s),

-against-

SAL'S PLUMBING & HEATING CO., INC.,

Third Third-Party Defendant(s).

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**The following papers read on this motion:**

<b>Notice of Motion</b>	<b>X</b>
<b>Notice of Cross-Motion</b>	<b>X</b>
<b>Affirmation in Opposition</b>	<b>XXX</b>
<b>Reply Affirmation</b>	<b>X</b>

Upon the foregoing papers, the motion, by second third-party defendant T & D Tile, Inc., for an Order, pursuant to CPLR 3212, dismissing the second third-party complaint brought by Midland Manufacturing Corp. against T & D Tile and for such other and further relief as this Court deems just and proper; and

a Notice of Cross-Motion, by third third-party defendant Sal's Plumbing & Heating Co., Inc., for an Order, pursuant to CPLR 3212, granting summary judgment to the moving third third-party defendant and dismissing the third third-party complaint and any cross-claims or direct complaints, are both determined as hereinafter set forth.

This personal injury action arises out of the shattering of a bathroom shower door/enclosure on a bath rub in the plaintiff parent's main hall bathroom at 47 Saddle Rock Road, North Woodmere, NY on August 9, 1996 at approximately 7:15 p.m. resulting in injury to the infant plaintiff.

The rule in motions for summary judgment has been succinctly re-stated by the Appellate Division, Second Dept., in **Stewart Title Insurance Company, Inc. v. Equitable Land Services, Inc.**, 207 AD2d 880, 616 NYS2d 650, 651 (Second Dept., 1994):

"It is well established that a party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642; *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 404 N.E.2d 718). Of course, summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue (*State Bank of Albany v. McAuliffe*, 97 A.D.2d 607, 467 N.Y.S.2d 944), but once a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572; *Zuckerman v. City of New York*, *supra*, 49 N.Y.2d at 562, 427 N.Y.S.2d 595, 404 N.E.2d 718)."

In support of the respective applications, the moving parties have submitted, amongst other things, the deposition transcripts of the plaintiff parent Karyn Toron; Salvatore Morgante of the third third-party defendant Sal's Plumbing & Heating Co., Inc. and Robert Kalberer, the president and sole employee of the second third-party defendant T & D Tile, Inc.

Prior to the date of occurrence, the plaintiff Karyn Toron had the main hall bathroom

renovated. Such renovation included the installation of the shower doors/enclosure on the bathroom tub and the mechanism by which the doors/enclosure moved on the tub to allow entrance into the tub. Subsequent to the installation, the plaintiff contends that she would encounter difficulty in moving the door(s) in that they would become stuck and she would "jiggle" the door to move it. It waswhile the plaintiff Karyn Toron was engaged in such an action that the door shattered and the infant plaintiff was cut.

A significant fact to be determined in this action is who installed the shower doors/enclosure and the mechanism by which they moved on the tub. In this regard, the Court observes that the plaintiff Karyn Toron testified at her deposition that there were two contractors who did work in the bathroom (see deposition transcript at page 12). The plaintiff Karyn Toron averred at her deposition that the shower doors/enclosure was installed by the "... man who did the tiles" which is the second third-party defendant T & D Tile, Inc. (see deposition transcript of Karyn Toron at page 12). Although Salvatore Morgante of the third third-party defendant Sal's Plumbing & Heating Co., Inc. testified at his deposition that while working at the Toron residence he did not install a shower/tub door enclosure (see Morgante deposition at page 16), Robert Kalberer of the second third-party defendant T & D Tile, Inc. averred at his deposition that the tub was installed by and work on the tub was done by the plumber (see deposition transcript of Robert Kalberer at page 27).

Based upon the Court's review of the foregoing there is a material issue of fact as to the installation of the shower doors/enclosure in issue which is best resolved by the trier of the facts. Accordingly, the second third-party defendant T & D Tile, Inc.'s application for an Order, pursuant to CPLR 3212, dismissing the second third-party complaint brought by Midland Manufacturing Corp. against T & D Tile; and the third third-party defendant Sal's Plumbing & Heating Co., Inc.'s application for an Order, pursuant to CPLR 3212, granting summary judgment to the moving third third-party defendant and dismissing the third third-party complaint and any cross-claims or direct complaints are both respectively denied.

SO ORDERED.

DATED:

11/13/2000

*Ray S. Mallos*

J.S.C.

