

**DRS. LOUAPRE AND
KOKEMOR, L.L.C.**

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NO. 2002-CA-0244

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**ENTERGY CORPORATION
AND MAINLAND
DEVELOPMENT, L.L.C.**

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STATE OF LOUISIANA

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CONSOLIDATED WITH:

CONSOLIDATED WITH:

**HARTFORD INSURANCE
COMPANY AND LISA
GERMAIN, D.D.S.**

NO. 2002-CA-0245

VERSUS

**THE 2633 NAPOLEON
VENTURE, A PARTNERSHIP
AND ENTERGY
CORPORATION**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 2000-19594 C/W 2001-8549, DIVISION "N-8"
HONORABLE ETHEL SIMMS JULIEN, JUDGE**

**JAMES F. MCKAY III
JUDGE**

(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge James F. McKay III)

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AFFIRMED

This appeal concerns the trial court's grant of summary judgment to defendants, 2633 Napoleon, a Louisiana Limited Partnership and Mainland Development, L.L.C., finding that the plaintiff, Drs. Rene Louapre and John Kokemor, L.L.C., assumed responsibility for the damage claimed in its lawsuit under the terms of the lease agreement entered into with the defendant, 2633 Napoleon. We affirm.

On July 14, 1997, the plaintiff, through its representatives, Drs. Rene Louapre and John Kokemor, entered into a lease agreement with 2633 Napoleon by which 2633 Napoleon leased to the plaintiff a portion of an

office building in New Orleans for a term of seven years. Mainland was the managing general partner of the lessor and was the entity responsible for the daily operation of the office building. On May 22, 2000, Entergy Corporation, an electricity supplier, changed the transformer serving the office building, an act that allegedly caused a power surge through the electrical system in the building and destroyed a significant amount of the plaintiff's equipment.

The plaintiff sued the lessor, Mainland, and Entergy, claiming damages for, among other things, the loss of its equipment, which was destroyed when Entergy changed the transformer. The acts of negligence the plaintiff asserted against the three defendants include: the failure to adequately prevent a power surge through the building during the changeover and "going online" with a new transformer; negligently wiring the new transformer so as to cause the power surge through the building; failing to adequately isolate the building in accordance with normal procedures for change over of transformers to a commercial building; failing to isolate the building while testing the transformer; and failing to adequately and timely warn the plaintiff of the potential harm to equipment other than the computers.

In response, the lessor and Mainland filed a summary judgment

motion, asserting that under the terms of the lease at issue, the lessee specifically assumed responsibility for the damage alleged and, therefore, could not state a valid claim against them. As an exhibit to their motion, the lessor and Mainland submitted a copy of the lease.

By judgment of October 15, 2001, the trial court granted the defendants' motion for summary judgment. In its reasons for judgment, the court found that by the terms of the lease, the plaintiff lessee contractually assumed responsibility for the leased premises and agreed to hold lessor harmless from damage that may have occurred to property on the leased premises as a result of the alleged electrical surge. The plaintiff appeals this judgment, assigning as error the trial court's determinations that it assumed responsibility for the damage and that the condition of the leased premises was at issue in the lawsuit.

In Shelton v. Standard/700 Associates, 2001-0587 (La. 10/16/01) 798 So.2d 60, 64-65, the Supreme Court reiterated the appropriate standards applicable to summary judgment proceedings:

Appellate courts review summary judgments de novo. Doerr v. Mobil Oil Corp., 2000-0947 (La.12/19/00), 774 So.2d 119, 136. It is well established that a summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. LSA- C.C.P. art. 966(B). However, if the movant will not bear the burden of proof at trial on the matter

that is before the court on the motion for summary judgment, the movant's burden on the motion for summary judgment does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. LSA-C.C.P. art. 966(C)(2).

Thereafter, if the adverse party fails to produce factual support sufficient to establish that she will be able to satisfy her evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2).

To determine whether the lessor and Mainland fulfilled their burden of proof in the summary judgment proceeding, we must carefully review the pertinent language of the lease. That portion of the lease reads as follows:

Lessee assumes responsibility for the condition of the Leased Premises and agrees to save Lessor harmless from any liability arising from injury to person or damage to property on the Leased Premises, whether occasioned by any act or omission of Lessee or Lessee's agent, servants, or visitors. Lessor shall not be liable for loss of any property by theft or otherwise or any injury or death to person or damage to property sustained by Lessee or Lessee's agents, clerks, servants, or by any other person, due to the Building or any part thereof, or any appurtenances thereof, becoming out of repair, or due to the happening of any accident in or about the Building, or due to any act or neglect of any tenant or occupant of the Building, or of any other person. This provision shall apply especially (by not exclusively) to damage caused by water, frost, weather, steam, sewerage, electricity, sewer gas or odors, or by the bursting or leaking of pipes of plumbing work, and shall apply equally whether such damage be caused or occasioned by any thing or circumstance whether of a like or wholly different nature. . . . This indemnification and hold harmless agreement given by lessee shall run in favor of Lessor, its successors and

assigns and any other person or entity connected or affiliated with Lessor. . . . (emphasis added)

By submitting the lease containing this strong and unequivocal indemnification provision, the lessor and Mainland have sufficiently pointed out the absence of factual support for a valid claim against them in connection with the alleged power surge. In the summary judgment proceeding, the plaintiff failed to submit any factual support for its allegations.

In its first assignment of error, the plaintiff argues that neither the terms of the lease nor La.R.S. 9:3221 mandate a finding that it assumed responsibility for the damages it sustained. La.R.S. 9:3221 provides:

The owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

The plaintiff maintains that the statute does not apply to its claims against the defendants because it did not allege a defect in the premises but rather certain acts or omissions by Mainland. Although we agree with the plaintiff, the argument provides no basis to find error in the trial court's judgment.

The summary judgment was granted solely on the court's finding that

the plaintiff assumed responsibility for the damage alleged **under the terms of the lease**. The court cited jurisprudence and statutory law, La.R.S. 9:3221, only to support the premise that a lessee may contractually assume the lessor's responsibility for the condition of the leased premises.

We find no merit in the plaintiff's argument of trial court error in the finding that the plaintiff assumed responsibility for the damages in the lawsuit nor in its argument that the lease contains no specific language that it agreed to hold the lessor harmless for acts or omissions of lessor or lessor's agent. As clearly expressed in the lease, the parties' intention was to shift the risk of loss for a number of perils, including electricity, to the lessee, the plaintiff. The lease provision clearly and expressly releases not only the lessor, but also entities associated with the lessor like Mainland, from liability to the plaintiff for damages resulting from these perils, regardless of any fault by Mainland. Regarding the plaintiff's specific allegation, the language of the provision is sufficiently broad to include any alleged negligence of the lessor or its general partner, Mainland.

In Home Insurance Co. of Illinois v. National Tea Co., 588 So.2d 361 (La. 1991), the supreme court analyzed a release provision in a lease similar to, although not as detailed as, the indemnification provision in this case. Considering the lease provision in light of the rules governing contract

interpretation, the supreme court held that the lease expressly released the lessee from liability to the lessor for damages resulting from fire. Although the lease provision in Home generally referred to damages from “any cause” instead of specifically including the lessee’s fault as a cause, the court nevertheless determined that the lease expressly released the lessee from liability to lessor for damages resulting from fire, whether caused by the lessee’s fault or otherwise. The court reasoned:

As plainly expressed in the lease, the parties' clear intent was to shift the risk of fire loss to Lessor's fire insurer. Lessor expressly released [Lessee] from any claims for damages caused by fire. The only claims Lessor could have against [Lessee] for damages caused by fire were claims based on [Lessee's] fault. See LSA-C.C. Art. 2723. Significantly, in the release provision Lessor expressly "releases and discharges" from liability not only [Lessee], but also [Lessee's] "agents." Logic dictates that the only claims Lessor could have against [Lessee's] "agents" were claims arising out of the fault of such "agents." A finding that the release clause does not relieve [Lessee] from damages resulting from fire caused by [lessee's] fault would render the clause virtually nugatory, contrary to the applicable rules of construction. (footnote omitted)

Id. 588 So.2d at 364-65.

Considering the Home decision, we find the language in the lease provision in the case before us includes the plaintiff lessee’s agreement to hold the lessor harmless for an act or omission of the lessor or the lessor’s agent. Hence, even if the plaintiff had satisfied its burden of proof in the

summary judgment proceeding to provide factual support for its allegations of Mainland's fault, it could not have provided support for a valid claim against the lessor or Mainland in light of the indemnification provision in the lease. As it is, the plaintiff failed to provide any factual support at all for any of its allegations.

The plaintiff's second assignment, that the court erred in determining that the condition of the leased premises was at issue in this litigation, is also without merit. Again, the plaintiff is identifying as error a finding the trial court did not make. While obviously the condition of the leased premises is at issue in this litigation, the trial court's judgment was not based upon the existence of a defect or La.R.S. 9:3221. The judgment was soundly and solely based upon the indemnification provision in the lease. Once the lessor and Mainland offered the lease to support their motion for summary judgment, it was incumbent upon the plaintiff to offer factual support to contradict the motion and to establish that it could meet its evidentiary burden at trial. Because the plaintiff failed to do so, there was no genuine issue of material fact and the lessor and Mainland were entitled to summary judgment as a matter of law.

We, therefore, affirm the trial court's judgment.

AFFIRMED

