

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TRACY D. CRISCO,)
)
 Plaintiff,)
)
 v.) C.A. No., 05C-05-079 MJB
)
 FRANK MANDARANO and)
 JO-ANN MANDARANO,)
)
 Defendants.)

Submitted: August 20, 2008
Decided: November 6, 2008

Upon Defendants' Motion for Summary Judgment. GRANTED.

OPINION AND ORDER

BRADY, J.

INTRODUCTION

In this action, the Court considers whether Plaintiff Tracy D. Crisco (“Crisco”), a commercial tenant, may recover against her landlords, Frank and Jo-Ann Mandarano (the “Mandaranos”), for damages resulting from a fire allegedly caused by the Mandaranos’ breach of a commercial lease agreement requiring the Mandaranos to repair and maintain the unit’s electrical and heating systems.

Crisco filed a complaint (“Complaint”) against the Mandaranos (the “Crisco Action”) alleging breach of their three year lease agreement (“Lease Agreement”) and seeks damages for losses to her property, property of others, loss of use of her business, and loss of income and profits. The leased property (“Property”) is covered by a written commercial umbrella insurance policy (“Policy”) purchased from Harleysville Mutual Insurance Company (“Harleysville”) by the Mandaranos. When Harleysville declined to provide the Mandaranos’ with a defense in the Crisco Action, the Mandaranos filed a complaint against Harleysville (the “Harleysville Action”) alleging that Harleysville breached the Policy by declining to tender the Mandaranos a defense. The Crisco and Harleysville Actions were subsequently consolidated by the Court for purposes of discovery and pretrial activity.

The Mandaranos filed a Motion for Summary Judgment in the Crisco Action. For the reasons that follow, the Court concludes that there is no genuine issue of material fact in dispute relating to the expert witnesses identified by Plaintiff in the Crisco Action, and therefore the Mandaranos are entitled to judgment as a matter of law.¹ Crisco's expert witnesses are unable to determine the cause of the fire, and there is no evidence proffered that it resulted from an act or omission of the Mandaranos. Viewing the evidence in a light most favorable to Crisco, no reasonable juror could conclude that the Mandaranos' alleged failure to maintain or repair the Property's electrical and heating systems caused the fire.

FACTS

Crisco leased the Property from the Mandaranos for the purpose of operating a motorcycle repair and parts business. On February 17, 2003, the Property, including all of Crisco's business property, was destroyed by fire. On May 6, 2005, Crisco filed the Complaint against the Mandaranos alleging breach of the three-year commercial lease agreement and seeking damages for losses to her property, property of others, loss of use of her business, and loss of income and profits. Crisco alleges in the Complaint that the fire was caused by the Mandaranos' failure to maintain and repair the heating and electric systems as required by the express terms of the lease agreement.

¹ *Emerald Partners v. Berlin*, 726 A.2d 1215, 1219 (Del. 1999).

CONTENTIONS OF THE PARTIES

Crisco alleges in the Complaint that the fire was caused by the heating or electric system which the lease required the Mandaranos to repair and maintain. She argues the Mandaranos cannot relieve themselves of liability for damages that result from their nonperformance of an express duty in the lease. Paragraph 13 of the lease reads:

13. CONDITION: This property is rented in “AS IS” condition at the time this Lease Agreement is executed, and no repairs, redecoration, cleaning, etc., not specifically acknowledged in writing by Landlord are contemplated. Landlord shall be responsible for all items of major repair, redecoration and maintenance, (including, but not limited to, roof, plumbing, electric and heating systems, etc.) not caused by Tenant abuse or neglect as covered in Paragraph 5 herein. Tenant is precluded by this Lease Agreement from ordering any materials, repairs, redecoration, or services of any kind to the property unless Tenant assumes full responsibility of the payment for same.

The Mandaranos argue that Crisco has failed to produce any evidence to support her claim that the Mandaranos are responsible for the fire. The Mandaranos note that Crisco’s only expert witnesses, Deputy State Fire Marshall Carlson and Assistant State Fire Marshall Ward,² are unable to make a determination of the cause of the fire, or its precise origin. Because fact and discovery deadlines have passed, the Mandaranos contend the record establishes that the cause of the fire is undetermined, and therefore, they cannot be liable.

² There is some question whether Crisco properly and timely identified Assistant State Fire Marshall Ward as an expert, but for purposes of this motion, the Court will consider him available.

Even if the cause of the fire were known, the Mandaranos argue summary judgment should be granted because Paragraph 15 of the lease relieves them of liability for the fire damage Crisco seeks to recover in this action.³ Paragraph 15 of the lease reads:

INSURANCE: The Tenant is aware of the special insurance responsibilities of being a Tenant. The Owner's insurance DOES NOT cover Tenant's personal property for the loss from fire, theft, burglary, additional living expenses (in case of fire, etc.) personal liability or medical payments for injury to persons on the premises. Tenant shall make no claim against Landlord or Landlord's insurance company for any loss of whatsoever nature or kind, including but not limited to loss of use of the premises or loss of profits from business interruption arising out of fire or other casualty, regardless of the cause of such fire or other casualty. Tenant shall indemnify Landlord and Owner of the premises against all liability arising during the Lease Agreement term from injury to person or customers, employees, assignees, or subleases. As greater assurance of Tenant's obligation to save harmless Landlord from any liability arising from the demised premises during the term of this Lease Agreement, Tenant shall supply Landlord with a copy of Tenant's liability insurance, which insurance must be in sufficient sums of coverage to satisfy Landlord's reasonable demands for such coverage. (emphasis added).⁴

STANDARD OF REVIEW

The standard for granting summary judgment is high.⁵ Summary judgment may be granted where the record shows that there is no genuine issue as to any

³ Crisco cannot establish that the Mandaranos caused the fire, therefore the Court need not reach the issue of whether paragraph 15 of the Lease Agreement relieves the Mandaranos for the damages Crisco suffered as a result of the fire.

⁴ Transaction Identification Number ("Trans. I.D. No.") 20747634, Ex. D.

⁵ *Mumford & Miller Concrete, Inc. v. Burns*, 682 A.2d 627 (Del. 1996).

material fact and that the moving party is entitled to judgment as a matter of law.⁶

“In determining whether there is a genuine issue of material fact, the evidence must be viewed in a light most favorable to the non-moving party.”⁷ “When taking all of the facts in a light most favorable to the non-moving party, if there remains a genuine issue of material fact requiring trial, summary judgment may not be granted.”⁸ “Nor will summary judgment be granted if, upon an examination of all the facts, it seems desirable to inquire thoroughly into them in order to clarify the application of the law to the circumstance.”⁹

ANALYSIS

In order to establish that the Mandaranos breached the Lease Agreement (i.e., the contract), Crisco must establish the following: “first, the existence of a contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resulting damage to the plaintiff.”¹⁰ The parties do not dispute the existence of a valid contract nor do they dispute that Paragraph 13 of the Lease Agreement imposes an obligation upon the Mandaranos for all “items of repair, redecoration and maintenance (including but not limited to, roof, plumbing, electric and heating systems, etc.) not caused by tenant abuse or neglect...” Therefore, the dispositive issue in this case is whether Crisco can

⁶ Super. Ct. Civ. R. 56(c).

⁷ *Muggleworth v. Fierro*, 877 A.2d 81, 83-4 (Del. Super. 2005).

⁸ *Gutridge v. Iffland*, 889 A.2d 283 (Del. 2005).

⁹ *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

¹⁰ *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

prove that the Mandaranos breached this obligation and that the breach caused Crisco's damages. Crisco must establish, through expert testimony, that the Mandaranos conduct or failure to act caused the fire.¹¹

The fire occurred on February 17, 2003, however a full investigation of the scene was not performed until February 24th of that year due to heavy snowfall blanketing the scene. Deputy Carlson examined the Property on February 24th and prepared a report. In the report, Deputy Carlson writes that he “was unable to make a determination of the origin or cause of the fire due to the lack of suppression and the intense fire caused by gasoline stored in the thirty three motorcycles parked outside.”¹² (emphasis added). The report repeatedly refers to the cause of the fire as “undetermined.”¹³ Crisco has also provided the Court with the deposition testimony of Assistant State Fire Marshall Ward. Assistant State Fire Marshall Ward testified that “[t]he fire originated in a heater in the rear portion of the building, traveling up to the ceiling. The entire roof collapsed on the building itself and was consumed.” In a letter to the Court, counsel for Crisco represented that “Fire Marshall Ward would not be in a position to offer any

¹¹ Crisco’s failure to identify an expert who can establish causation is, in and of itself, grounds to dismiss this action. The Court need not reach the issue of whether Crisco is required to produce a standard of care expert to establish the standard of care owed by the Mandaranos, as landlords, to Crisco, as a commercial tenant. It appears, however, that a standard of care expert may well be required. *Norfleet v. Mid-Atlantic Realty Co.*, 2001 WL 695547 (Del. Super. April 20, 2001).

¹² Trans. I.D. No. 20746940, Ex. B.

¹³ *Id.*

opinion regarding what inside the heater was the cause of the fire”¹⁴ Assistant State Fire Marshall Ward’s conclusion that the fire originated in the heater is not sufficient to establish causation, and Crisco has offered no other expert testimony that can do so.

CONCLUSION

The Court finds, based on a review of the facts not in dispute relating to the expert witnesses identified by Plaintiff in the Crisco Action, in a light most favorable to Crisco that the Mandaranos are entitled to judgment as a matter of law. Crisco’s expert witnesses are unable to determine the cause of the fire or to establish the fire resulted from some conduct or omission the Mandaranos were obligated to undertake pursuant to the lease. Because the Court resolves the issue on these grounds, there is no need to reach the question regarding Paragraph 15 of the lease relating to fire insurance.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

¹⁴ Trans. I.D. No. 21150977.