All American Moving & Storage, Inc. v Andrews
2010 NY Slip Op 33860(U)
June 14, 2010
Sup Ct, Bronx County
Docket Number: 21995-2005
Judge: Dominic R. Massaro
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 17

Case Disposed	☐
Settle Order	☑
Schedule Appearance	☐

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

All American Moving & Storage Inc et al X

Index No. 21995-2005 et al

-against-

Hon. DOMINIC R. MASSARO, JSC
Justice

W. Reilly Inthrens et al X

The following papers numbered 1 to ____ Read on this motion,
Noticed on ____ and duly submitted as No. ____ on the Motion Calendar of ____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

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Upon the foregoing papers this Defendant Allstate Sprinkler Corp.'s motion for summary judgment, dismissing all causes of action against it in Actions #2 through #6, as well as all related third party claims and cross claims, is granted in part and denied, in part. Movant's motion for full indemnity against Defendant D'Agostino Supermarkets is Denied. See Decision and Order.

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 6.14.10

Hon. [signature] J.S.C.

DOMINIC R. MASSARO, JSC

FILED Jun 17 2010 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX CIVIL TERM PART IA-17

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ALL AMERICAN MOVING and STORAGE, INC. and METROPOLITAN SECURITY & STORAGE, LTD.,

Plaintiffs,

-against-

W. REILLY ANDREWS, MARY FERNANDEZ, at al.,

Defendants.

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KIM JOBB and CONSUELO JOBB,

Third-Party Plaintiffs,

-against-

JEROME ACKERMAN, et al.,

Third-Party Defendants.

----------x

MATTHEW PIERSON,

Third-Party Plaintiffs,

-against-

JEROME ACKERMAN, et al.,

Third-Party Defendants.

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Index No. 21995-2005
DECISION and ORDER
Sequence No. 10

Action No. 1

HENRY WILDER, MONIA WILDER, GLADYS RIVERA a/k/a GLADYS MARTINEZ, SHARON HELD and CARLTON WHITE, Third-Party Plaintiffs, - against- JEROME ACKERMAN, et al., Third-Party Defendants.	Third-Party Action
BAKER INTERNATIONAL INSURANCE CO., et al. Third-Party Plaintiff, - against- JEROME ACKERMAN, et al., Third-Party Defendants.	Third-Party Action
CENTURION MARKETING, INC., et al., Plaintiffs, - against- JEROME ACKERMAN, et. al., Defendants.	Index No. 21398-06 Action No. 2

JEROME ACKERMAN, BARBARA ACKERMAN, GARY ACKERMAN, and IRWIN ACKERMAN a/k/a RAMP PROPERTY COMPANY, Plaintiffs, - against- D'AGOSTINO SUPERMARKETS, INC. et. al., Defendants.	Index No. 340006-08 Action No. 3

THE CHARTER OAK FIRE INSURANCE COMPANY a/s/o Heating and Burner Supply Inc., 479 Walton LLC and Andrew Nitze, et al., Plaintiffs, - against- RAMP PROPERTY COMPANY, et. al., Defendants.	Index No. 340008-08 Action No. 4

PETER WOLFF, Plaintiff, - against- JEROME ACKERMAN, et. al., Defendants.	Index No. 303185-08 Action No. 5

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GEOGETTE BARDOWELL,

Plaintiff,

-against-

RAMP PROPERTY COMPANY, et al.,

Defendant.

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BA BA AUTO REPAIR, INC.,

Plaintiff,

-against-

METROPOLITAN SECURITY & STORAGE, LTD.,

Defendant.

----------x

PHILIP SELDON,

Plaintiff,

-against-

ALL AMERICAN MOVING & STORAGE, INC., METROPOLITAN SECURITY & STORAGE, LTD., and JOHN DOE 1-100,

Defendants.

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Index No. 303296-2008
Action No. 6

Index No. 86167-06
Index No. 86168-06
Index No. 67761-07

Action No 7

Index No. 308925-2008
Action No. 8

BEFORE: HONORABLE DOMINIC R. MASSARO

Pursuant to CPLR Rule 3212, Defendant Allstate Sprinkler Corporation (hereinafter "Allstate") seeks summary judgment dismissing all causes of action against it in Actions #2, #3, #4, #5, and #6, as well as all similar third party claims and cross claims, upon the grounds that Allstate was not negligently involved in causing the fire in issue and not liable for nuisance or in failing to procure proper insurance that covered the sprinkler system. Allstate also seeks summary judgment for full indemnity in its favor from D'Agostino Supermarkets, the actual

lessee of the property.

Undisputed Facts[1]

This litigation arises from a suspicious fire occurring on June 6, 2005, at a warehouse owned by the Ackerman Defendants d/b/a RAMP Property Company (hereinafter "RAMP") in Bronx County. The building was leased in 1985 to D'Agostino Supermarkets, Inc. and that lease remained in effect at the time of the fire. In fulfilling its obligations under the RAMP lease, D'Agostino contracted with Allstate for monthly sprinkler system inspections[2] during the period that Metropolitan Security Storage Ltd. subleased the warehouse. In turn, Metropolitan through its sister company (All American Moving) operated the warehouse as a commercial venture at the time of the fire.

According to the sprinkler company, it has no duty or liability to any Plaintiff in Actions #2 through #6, or to any Third Party Plaintiff in Action #1 or any co-defendant because its contract with D'Agostino involved inspection *only*. Further, Allstate had no obligation to maintain the sprinkler system or to make repairs and, in fact, D'Agostino agreed to indemnify Allstate for any damages a Court may determine arise from its inspection services.

Likewise, Allstate exercised "reasonable care" in performing its duties and cannot be responsible for the fire. Further, no evidence exists that any plaintiff relied upon the fact that the

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[1] At the Court's suggestion, the parties submitted a summary of their positions and agreed facts. The submission is utilized in the discussion herein.

[2] New York City Administrative Code § 27-4265(a), as then in effect, provided that covered building owners, including warehouse owners, are to maintain fire extinguishing appliances in their buildings. In New York City Administrative Code § 27-4265 (c) (1)(a) building owners were instructed to provide that automatic and non-automatic sprinkler systems shall be inspected at least once a month by a competent person, employed by the owner (Ackerman), to see that all parts of the system are in perfect working order, and that the Fire Department connections are ready for immediate use by the Department. A detailed record of each inspection was required to be kept for examination by a representative of the fire department.

inspections were performed.[3] Clearly, Allstate feels it assumed no duty to maintain the premises and did not displace the owner's obligations concerning the sprinkler system. Therefore, the contract cannot make the sprinkler company an insurer for goods, chattels, or other property destroyed in neighboring buildings (see generally, *Eaves Brooks Costume Co. v. YBH Realty Corp.*, 76 NY2d 220 [1990]).

Under the circumstances, the sprinkler company says it was not negligent because its actions were not the proximate cause of the fire. Negligence requires proof to support the essential elements of (1) duty; (2) breach; (3) causation, and (4) damages and none have been shown here (see generally, *Gordon v. American Museum of Natural History*, 67 NY2d 836 [1986]). Negligence cannot be presumed; it must be proved by the party charging it (see, *Lamb v. Camden & A R & T Co.*, 46 NY 271 [19871]). Likewise, Movant cannot be liable under Uniform Commercial Code §7-204 which only requires that Movant perform the duty required of a reasonable careful person (see generally, *Kimberly-Clark Corp. v. Lake Erie Warehouse, Div. of Lake Erie Rolling Mill, Inc.*, 49 AD2d 492 [4th Dept. 1975]).

Finally, Allstate refutes contract liability by saying its agreement with D'Agostino did not require it to warrant the position of certain valves, and Allstate assume no warranty especially where its inspector was denied access to the premises. Essentially, Movant says it performed all duties required of a reasonable careful sprinkler inspection service and nothing more.

In summary, Movant claims *prima facie* entitlement to summary judgment because it is not liable to any party (including D'Agostino) in either tort or contract. Movant was not the proximate cause (or even a substantial factor) in causing the fire *(see generally, Derdiarian v. Felix Contracting Corp.*, 51 NY2d 308 [1980]). Inability to access the premises cannot be a

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[3] Plaintiff Metropolitan Security argues that Allstate's role as inspector displaced the ability of other to inspect the sprinkler system and ensure the system's function (Abate Affirmation in Opposition to Allstate's Summary Judgment Motion).

proximate cause of the fire and the nonmoving parties failed to establish a *prima facie* case of proximate cause showing Allstate's negligence was a substantial cause of the events that produced the injury (see generally, *Maheshwari v. City of New York,* 2 NY3d 288 [2004]).

There is no factual issue regarding whether Movant proximately caused any damages in this litigation (see generally, *Burgos v. Aqueduct Realty Corp.,* 92 NY2d 544 [1998]). Allstate owed no duty to the owners of property stored at the warehouse and any duty belonged to All American Moving and Metropolitan Security under UCC §7-204 (see, *Kimberly-Clark Corp. v. Lake Erie Warehouse Div. of Lake Erie Rolling Mill, Inc., supra.*).

Opposition

In response, many of the parties in this litigation object to Movant's relief.[4]

D'Agostino

For its part, D'Agostino, who hired Allstate, opposes summary judgment claiming, among other things, that Allstate was responsible for not reporting the non functioning sprinkler system. D'Agostino argues factual issues disqualify summary judgment at this stage of the litigation.

Ackerman Defendants (RAMP)

Likewise, the Ackerman Defendants (RAMP) say summary judgment must be denied because Movant failed its *prima facie* burden. For one thing, Movant failed to negate RAMP's claim it was a third party beneficiary under the sprinkler inspection contract. According to them, D'Agostino's indemnity obligation does not establish lack of their third party beneficiary status (see generally, *Palka v. Servicemaster Management Servs. Corp.*, 83 NY2d 579 [1994]). In fact, the First Department has held a building owner can properly assert a third-party

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[4] All American and Metropolitan Storage (except in Actions #3 and #4), while opposing Allstate's summary judgment in part, concede that Allstate was not a bailee. However, both maintain that the Court should not determine their liability for the fire as those issues are not properly before the Court in the context of Allstate's motion.

beneficiary claim against a sprinkler maintenance service that contracted with the building's lessee for sprinkler maintenance services (see, *Twin City Fire Insurance Co. v. Sanitary Plumbing & Heating Corp.*, 273 AD2d 16 [1st Dept. 2000]). Thus, in light of the instant record, determination of RAMP's status as a third party beneficiary of the contract between Allstate and D'Agostino remains a factual issue.

RAMP further stresses it received no notice that Allstate was unable to access the premises or that Allstate did not notify the Fire Department about lack of access. As a result, RAMP argues, the record creates factual issues concerning notice, RAMP's third party beneficiary status, and whether Allstate breached its contractual duties.

Metropolitan Security Storage

Similarly, Metropolitan Security Storage opposes summary judgment for Actions #4 and #5, claiming among other things that Allstate negligently inspected the premises. Metropolitan Security Storage, in Actions #3 and #4, opposes Allstate's summary judgment to the extent that the motion involves Metropolitan's cross claims. Metropolitan disputes Allstate's insinuation that Metropolitan prevented Allstate from performing monthly inspections. Instead, Metropolitan argues that had Allstate properly performed its duties (including monthly inspections), the sprinkler shutdown would have been discovered. While Metropolitan presented testimony from a witness who denies Metropolitan shut the sprinkler system, a factual issue remains about whether Metropolitan was responsible for sprinkler malfunction.

Certainly, factual issues remain whether Metropolitan prevented Allstate's employees from performing monthly inspections; this includes testimony showing Metropolitan maintained a 24-hour entrance on Walton Avenue giving access to the building. Likewise, factual issues exist, according to Metropolitan, whether a properly functioning sprinkler system would have extinguished the fire. Concerning Allstate's claim that contractual obligations alone will not give rise to tort duty to Metropolitan under the Court of Appeals' teaching in *Espinal v. Melville Snow*

Contrs., 98 NY2d 136 [2002]), Metopolitan cites three applicable exceptions: (1) where the contracting party launches an instrument of harm (see, *H R Moch Co. v. Rensselaer Water Co.*, 247 NY 160 [1926]); (2) detrimental reliance (see, *Eaves Brooks Costume Co. v. YBH Realty Corp., supra.*); and (3) the contracting party has entirely displaced the other party's duty to maintain the premises safely (see, *Palka v. Servicemaster Mgt. Servs. Corp., supra.*). Each of these exceptions remains in dispute.

Other Parties

Likewise, Charter Oak Fire Insurance; Travelers Indemnity; and Automobile Insurance; on behalf of their insureds in Action #4 that owned or rented buildings adjacent to fire's site, which was at 495 Walton Avenue and 500 Gerard Avenue, oppose summary judgment. They say Allstate's summary judgment motion presents factual issues whether the sprinkler system's misfunction increased the damages caused by the fire. These insurance companies point out that Allstate submitted no expert evidence concerning conditions that caused the fire, while the insurance companies submitted expert testimony in support of their position (Exhibit A, Asp Affidavit). Further, they argue that case law allows a third party beneficiary where the violator fails to use "ordinary care" in performance of contractual duties (see generally, *Greene v. Simmons,* 13 AD3d 266 [1st Dept. 2004]) (see also, *Alsaydi v. GSL Enters.*, 238 AD2d 533 [2nd Dept. 1997]). Likewise, New York Marine and General Insurance Company, another insurer, says summary judgment must be denied because the evidence raises factual questions of Allstate's involvement with shutting the sprinkler valve and its failure to report the inoperable sprinkler system to the Fire Department. Finally, Plaintiff Georgette Bardowell, while agreeing that Allstate was denied access to perform its inspection duties, opposes summary judgment generally.[5]

[5] Movant maintains that Bardowell does not present opposition to Allstate's claims that it owed her no duty under the *Espinal, Palka* and *Eaves Brook* cases.

The Court notes that no opposing party addresses the issue of Allstate's obligation to obtain insurance coverage for their benefit.

Movant's Reply

In reply, Allstate stresses that, regardless of legal issues concerning third party beneficiaries, D'Agostino did not hire Allstate to build or maintain the sprinkler system. The contract was limited to inspection which Allstate fully performed. Allstate had no obligation to advise anyone, beside D'Agostino, of the sprinklers' condition. Allstate fulfilled its contract and therefore is protected against any third parties by reliance upon the rules considered in *Espinal v. Melville Snow Contrs.,Inc., supra.*) or *Palka v Servicemasters Mgmt. Servs. Corp.,supra.*) and *Eaves Brooks Costume Co. v. YBH Realty Corp., supra.*). Clearly, Movant had no responsibility for the fire and was not in control of the premises at that time.

Claims and Crossclaims in Actions #1 through #6

Because of lack of opposition, Movant wants all claims and cross claims against it in Actions # 2 through #6, and all third party claims in Action #1, dismissed. Specifically, Allstate points out that third party plaintiffs Kim Jobb, Consuelo Jobb, Matthew Pierson, Baker International Insurance Company, Henry Wilder, Monia Wilder, Gladys Rivera, Sharon Held, and Carlton White filed no opposition papers to Allstate's summary judgment motion. Likewise, Movant also wants the Court to dismiss it as a Third Party defendant in Action #1 together with all related cross claims. Similarly, because no plaintiffs in Action #2 (*Centurion Market, at al.)* opposed Allstate's summary judgment motion, the complaint and all cross claims against Allstate must be dismissed. Likewise, in Action #6, Peter Wolf's action and all cross claims must be dismissed for lack of opposition.

Legal Discussion

Summary judgment must be granted upon all papers and proof submitted where a

movant establishes that plaintiff has no cause of action against it or that it has a complete defense to plaintiff's causes of action. In that case, the Court is warranted, as a matter of law, to direct judgment in Movant's favor. However, a summary judgment motion must be denied where a party shows facts sufficient to require a trial of any significant factual issue (see, *Lan Duong v. City University,* 150 AD2d 349 [2nd Dept. 1989]). In determining the instant motion, the evidence must be viewed in the light most favorable to the nonmoving parties and least favorable to the Movant (see generally, *Glennon v. Mayo*, 148 AD2d 580 [2nd Dept. 1989]).

The law is clear that a 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 issue of fact from the case (see, *Winegrad v. NY University Medical Center*, 64 NY2d 851 [1985]).

It is well established that to prove negligence a plaintiff is required to show (1) the existence of a legal duty on a defendant's part to the plaintiff; (2) a breach of this duty; and (3) injuries to plaintiff proximately related to the breach (see, *Siegel v. Hofstra University,* 154 AD2d 449 [2nd Dept. 1989]).

In essence, the issue here is whether the sprinkler inspector owed the many plaintiffs, defendants, and third parties in this litigation any special duty beyond that owed to its client D'Agostino Supermarkets. Upon consideration of the entire record, and viewing the evidence in light most favorable to the nonmoving parties, the Court finds that the evidence does not support the branch of Defendant Allstate Sprinkler Corporation's motion seeking summary judgment dismissing any causes of action against it in Actions #2, #3, #4, #5, and #6, as well as all similar third party claims and cross claims, where opposed.

Based upon the record, significant factual issues remain in dispute. For instance, the fire's cause remains a mystery as shown by the fact the Fire Department's "Incident Report"

makes no conclusion about the fire's origin or cause. Likewise, the parties remain in dispute whether the sprinklers were in operation before or during the fire. In this regard, Allstate says its employees repeatedly failed to gain access to the sprinkler system, and, when able to access, found the sprinklers turned off. More significantly, Allstate says, it could not access the sprinklers for six months before the fire.

D'Agostino, RAMP, and other objecting parties adequately rebut Allstate's case to the extent that the above factual issues remain and certain other factual issues exist concerning the nature of the obligation to report upon the functioning of the sprinkler system and whether Allstate was negligent concerning conditions that caused fire damage to the warehouse (see generally, *Gantz v. Kurz,* 203 AD2d 240 [2nd Dept. 1994]).

Additionally, Ackerman Defendants show factual issues exist as to them concerning whether they were third party beneficiaries of the inspection contract (see generally, *Twin City Fire Insurance Co. v. Sanitary Plumbing & Heating Corp., supra.*). In *Twin Cities,* the First Department recognized the existence of a third party beneficiary status when it affirmed the Bronx Supreme Court's granting the City's motion for leave to amend a complaint to permit allegations that the City was an intended beneficiary of the sprinkler inspection contract between Fulton Fish Mongers Association and Sanitary Plumbing (*Id.).*

Under no circumstances should summary judgment be granted unless there is no doubt as to the absence of triable issues (see, *Andre v. Pomeroy*, 35 NY2d 361 [1974]). Under the circumstances, summary judgment in any party's favor is not appropriate here because factual issues remain. Clearly, various inferences can reasonably be drawn from the current record and that record must be viewed in the best light for the nonmoving party.

Allstate's summary judgment motion is denied in all respects except as to those parties that failed to oppose the motion. There is no other conclusion except that factual issues remain.

Failure to Oppose

As specifically noted by Movant, third party plaintiffs Kim Jobb, Consuelo Jobb, Matthew Pierson, Baker International Insurance Company, Henry Wilder, Monia Wilder, Gladys Rivera, Sharon Held, and Carlton White, among others, filed no opposition papers to Allstate's summary judgment motion. Likewise, Centurion Marketing and other Plaintiffs in Action #2, Peter Wolf, and Georgette Bardowell filed no opposition. Based upon failure to object, Allstate's summary judgment seeking summary judgment as against those parties, and any other parties not filing answering papers, is granted.

Indemnity

Turning now to the issue of indemnity, Allstate also seeks partial summary judgment for indemnity against D'Agostino Supermarkets, the actual lessee of the property, covering any damages that the Court may eventually find due from Allstate in this matter. According to Movant, its contract specifically provides that D'Agostino was to hold it harmless from all claims arising from its sprinkler inspections. This provision required that Movant was to report any deficiency to D'Agostino. The record reveals factual issues surrounding Movant's reporting to D'Agostino still exist requiring denial of this branch of Movant's motion.

BASED UPON THE FOREGOING, it is

ORDERED that the branch of Allstate Sprinkler Corporation's motion for an Order, pursuant to CPLR Rule 3212, granting summary judgment dismissing Plaintiffs' claims in Actions #2 through #6, as well as all third party claims and cross claims in Action #1, as against Allstate, is GRANTED as to third party plaintiffs Kim Jobb, Consuelo Jobb, Matthew Pierson, Baker International Insurance Company, Henry Wilder, Monia Wilder, Gladys Rivera, Sharon Held, Carlton White, Centurion Marketing and other Action #2 Plaintiffs, Peter Wolf, and

Georgette Bardowell, based upon default and/or consent, and DENIED in all other respects as to remaining parties, and it is further

ORDERED that the branch of Allstate Sprinkler Corporation's motion seeking summary judgment for full indemnity in its favor against D'Agostino Supermarkets is DENIED.

The foregoing constitutes the decision and order of this Court.

SETTLE ORDER.

Dated: Bronx, New York
June 14, 2010

Hon. DOMINIC R. MASSARO
Justice of the Supreme Court