

**Philadelphia Indemnity Ins. Co. v Hirsch Constr.
Corp.**

2013 NY Slip Op 30279(U)

February 4, 2013

Supreme Court, New York County

Docket Number: 116406/08

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

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PRESENT: SALIANN SCARPULLA
J.S.C.
Justice

PART 19

Index Number : 116406/2008
PHILADELPHIA INDEMNITY
VS.
HIRSCH CONSTRUCTION
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided ~~per~~ the memorandum decision dated 2/4/13
which disposes of motion sequence(s) no. 002 and 003.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

RECEIVED

FEB 06 2013

FEB 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

NOTICE CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 2/4/13

[Handwritten signature]
_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

----- X
PHILADELPHIA INDEMNITY INSURANCE
COMPANY as subrogee of Regina Vaccarella and
Steven Hruby t/a VVV Partners,

Plaintiff,

Index Number: 116406/08
Submission Date: 11/21/12

- against -

DECISION and ORDER

HIRSCH CONSTRUCTION CORP. and INTERMIX,
INC.,

Defendants.

----- X
HIRSCH CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

ELECTRICAL SOLUTIONS OF NEW YORK, INC.,

Third-Party Defendant.
----- X

FILED

FEB 06 2013

NEW YORK
COUNTY CLERK'S OFFICE

For Plaintiff:
Rosner, Nocera & Ragone, LLC
110 Wall Street, 23rd Floor
New York, NY 10005

For Defendant Intermix, Inc.:
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300 Old Country Road
Mineola, NY 11501

For Defendant Hirsch Construction Corp.:
Brody, Benard & Branch LLP
205 Lexington Avenue, 4th Floor
New York, NY 10016

For Third-Party Defendant Electrical Solutions:
Milber, Makris, Plousadis & Seiden LLP
1000 Woodbury Road, Suite 402
Woodbury, NY 11797

Papers considered in review of Third-Party Defendant Electrical Solution's motion for summary judgment (motion seq. no. 002):

Notice of Motion/Affirm. of Counsel in Supp/Memo of Law.....	1
Affirm. of Plaintiff's Counsel in Opp./Memo of Law.....	2
Reply Affirmation in Supp/Affirm. of Counsel.....	3

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FEB 05 2013

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NY'S SUPREME COURT - CIVIL

Papers considered in review of Defendant/Third-Party Plaintiff Hirsch Construction’s motion for summary judgment (motion seq. no. 003):

Notice of Motion/Affirm. of Counsel in Supp.....1
 Affirm. of Third Party Defendant’s Counsel in Partial Opp./Memo of Law.....2
 Affirm. of Plaintiff’s Counsel in Opp./Memo of Law.....3
 Reply Affirmation in Supp4

HON SALIANN SCARPULLA, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff Philadelphia Indemnity Insurance Company (“PIIC”) commenced this action, as subrogee, to recover for property damage from a fire that occurred at the building located at 125 Fifth Avenue, New York, NY (“the premises”). Defendant Hirsch Construction Corp. (“Hirsch Construction”) now moves (motion seq. no. 003) for: (1) summary judgment dismissing the complaint and all cross-claims; and (2) summary judgment on its third-party complaint and dismissing all counterclaims pursuant to CPLR § 3212. Third-party defendant Electrical Solutions of New York, Inc. (“Electrical Solutions”) also moves (motion seq. no. 002) for summary judgment dismissing the third-party complaint, and the underlying complaint, pursuant to CPLR § 3212.¹

PIIC is the insurer to Regina Vaccarella and Steven Hruby t/a VVV Partners, the owners of the premises (“the owners”). Defendant Intermix, Inc. (“Intermix”) is a commercial tenant that leases the basement, first floor, and second floor of the building from the owners. Intermix operates a clothing store on the first floor.

¹ Electrical Solutions moves for summary judgment dismissing the complaint. However, PIIC’s complaint did not allege a claim against Electrical Solutions.

In 2006, Intermix contracted with Hirsch Construction to renovate the first floor and basement. Hirsch Construction served as the general contractor for the renovation project and subcontracted all of the construction work to other companies. Hirsch Construction hired subcontractor Electrical Solutions to complete the lighting and electrical work for the project.

On March 26, 2006, a fire occurred at the premises at approximately 6:00 am. According to an FDNY Fire Incident Report, dated April 22, 2006, the fire marshal's examination "showed that the fire originated in the subject premises, on the second floor, in the front room, between the first floor ceiling and second floor flooring, approximately one foot south of the north wall and one foot east of the west wall, in the area of electrical wiring." The fire caused property damages of \$2,033,493.95. As insurer, PIIC reimbursed the owners for the property damages, and consequently became subrogated to the owners' rights and remedies related to the fire damage.

On December 4, 2008, PIIC commenced this action against Hirsch Construction alleging negligence, and against Intermix alleging negligence, breach of contract, and breach of warranty. PIIC claims that Hirsch Construction caused the fire through negligent construction work and by failing properly to install the electrical and lighting work. Hirsch Construction asserted two cross-claims against Intermix for indemnification and contribution.

Hirsch Construction also commenced a third-party action against Electrical Solutions for defense, indemnification, and contribution. Electrical Solutions asserted a

cross-claim against Intermix for apportionment, contribution, and indemnification, and a counter-claim against Hirsch Construction for contractual indemnification.

In its motion for summary judgment, Hirsch Construction argues that PIIC's complaint should be dismissed because there is no evidence that Hirsch Construction acted negligently or that it proximately caused the fire. Hirsch Construction argues that the fire originated on the second floor, and it did not cause the fire because it only performed work on the first floor and basement.

Hirsch Construction also argues that PIIC failed to present evidence rendering other possible causes sufficiently remote. Hirsch Construction claims that Intermix maintained an illuminated sign with halogen bulbs on the second floor, without a permit, which may have caused the fire. Hirsch Construction also claims that old electrical wiring on the second floor may have started the fire, not new wiring installed by Electrical Solutions. At his deposition, Devon Edwards ("Edwards"), an Electrical Solutions foreman, testified that the fire marshal tagged a burnt wire on the second floor as the origin of the fire, which was "old cloth wiring from long time ago."

Hirsch Construction also argues that it is entitled to defense and indemnification from Electrical Solutions pursuant to their subcontract. Hirsch Construction submits a copy of the signed subcontract, with an attached schedule that contains an indemnification provision and two certificates of insurance.²

² The indemnification provision states that "[s]ubcontractor shall indemnify, hold harmless and defend Contractor and all of its agents and employees from and against all claims, damages, losses and expenses including but not limited to attorney's fees arising out of or resulting from the performance of the Agreement, provided that any such claim,

Electrical Solutions moves for summary judgment dismissing the third-party complaint. Electrical Solutions argues that it does not owe indemnification to Hirsch Construction because no indemnification provision was included in the subcontract. At his deposition, Adam Hirsch, Hirsch Construction's site supervisor for the project, testified that the subcontract may have only had the certificates of insurance attached, without a schedule containing an indemnification provision.

Electrical Solutions further argues that even if the subcontract contained the alleged indemnification provision, Hirsch Construction is not entitled to indemnification because Electrical Solutions' work did not negligently cause the fire. Electrical Solutions submits an affidavit from Philip P. Meagher, a fire investigator, who opines that the "fire, which was electrical in nature did not involve wiring installed by Electrical Solutions." Meagher also states that the fire originated in two possible places on the second floor: (a) at or near floor level in an area near the front windows where an energized portable halogen light fixture was reportedly used by Intermix; or (b) in an area situated at the base of the west wall where old electric wiring showed adverse electrical activity.

PIIC opposes both motions. PIIC argues that a triable issue of fact exists as to whether Hirsch Construction acted negligently and proximately caused the fire. PIIC argues that the new wiring installed by Electrical Solutions, between the first floor ceiling and the second floor flooring, caused the fire. In support of its argument, PIIC submits a

damage, loss or expense (a) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property, including loss of use resulting therefrom and (b) is caused in whole or in part by any act or omission of Subcontractor."

copy of the FDNY Fire Incident Report, which states that the fire originated on the second floor, between the first floor ceiling and the second floor flooring, in the area of electric wiring. PIIC also submits Edwards' testimony that the wiring in the area between the first floor ceiling and the second floor flooring was installed by Electric Solutions.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

1. Negligence

In a negligence action, the plaintiff must show that: (1) the defendant owed a duty of reasonable care to the plaintiff; (2) the defendant breached that duty; (3) which caused; (4) plaintiff's injury. *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 333 (1981).

To establish a *prima facie* case of negligence based on circumstantial evidence, the plaintiff must show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred. *Schneider v. Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d 743, 743 (1986). The law does not require plaintiff's proof to positively exclude every other possible cause, but the proof must render other causes sufficiently remote to enable the jury to reach its verdict based not upon

speculation, but upon logical inferences drawn from the evidence. *Id.*; *J.E. v. Beth Israel Hosp.*, 295 A.D.2d 281, 283 (1st Dep't 2002).

Here, I find that Hirsch Construction made a *prima facie* showing of entitlement to judgment as a matter of law dismissing PIIC's negligence claim. Through the affidavits and documentary evidence it submitted, Hirsch Construction established that it was not negligent in performing its work, and that its work did not proximately cause the fire. Hirsch Construction was hired as the general contractor to renovate the first floor and basement area, and it subcontracted the electrical and lighting work to Electrical Solutions. Hirsch Construction presented evidence that the fire originated on the second floor, and that neither Hirsch Construction nor Electrical Solutions performed work on the second floor.

I also find that PIIC failed to raise a triable issue of fact. Although Electrical Solutions installed new wiring between the first floor ceiling and the second floor flooring, this evidence, standing alone, is insufficient to raise a triable issue of fact as to whether Hirsch Construction or Electrical Solutions acted negligently and proximately caused the fire. PIIC has failed to submit competent admissible evidence to show that Hirsch Construction was negligent in performing its work, or that its subcontractor Electrical Solutions installed electrical wiring and lighting in a negligent manner. *See Tower Ins. Co. of New York v. M.B.G. Inc.*, 288 A.D.2d 69, 70 (1st Dep't 2001); *Sutherland v. Thering Sales and Service, Inc.*, 38 A.D.3d 967, 968 (3rd Dep't 2007).

In addition, PIIC's evidence fails to render other possible causes of the fire sufficiently remote. The evidence submitted shows that the fire could have been caused by either the illuminated sign maintained by Intermix or the old electric wiring on the second floor. Any determination by the trier of fact as to the cause of the fire would therefore only be based on pure speculation, rather than logical inference drawn from the evidence. *J.E.*, 295 A.D.2d at 283; *Smart v. Zambito*, 85 A.D.3d 1721, 1721 (4th Dep't 2011).

Accordingly, the defendant Hirsch Construction's motion for summary judgment dismissing PIIC's complaint and all cross-claims is granted.³

2. Defense and Indemnification

Hirsch Construction moves for summary judgment on its third-party complaint for indemnification and contribution from Electrical Solutions. However, in accordance with my grant of summary judgment dismissing plaintiff's negligence claim in favor of Hirsch Construction, the indemnification and contribution claims are now moot.

Hirsch Construction also moves for summary judgment on its defense claim. In opposition, Electrical Solution argues that Hirsch Construction is not entitled to defense because the subcontract did not contain an indemnification provision. Here, I find that Hirsch Construction failed to make a *prima facie* showing that it is entitled to defense from Electrical Solutions as a matter of law. Hirsch Construction failed to submit an

³ Hirsch Construction is entitled to judgment as a matter of law dismissing all cross-claims because none were asserted against it.

affidavit demonstrating that an indemnification provision was part of its subcontract with Electrical Solutions. Moreover, Adam Hirsch testified that the subcontract may have only had certificates of insurance attached, without the schedule containing the indemnification provision. A certificate insurance is not sufficient to establish the existence of a contract to indemnify and defend. *Tribeca Broadway Associates, LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D.3d 198, 200 (1st Dep't 2004).

However, I find that Hirsch Construction made a *prima facie* showing of its entitlement to judgment as a matter of law dismissing Electrical Solutions' counterclaim for contractual indemnification. Electrical Solutions failed to introduce any evidence that Hirsch Construction contractually agreed to indemnify Electrical Solutions.

In accordance with the foregoing, it is

ORDERED that defendant Hirsch Construction's motion for summary judgment (motion seq. no. 003) dismissing the complaint and all cross-claims pursuant to CPLR § 3212 is granted; and it is further

ORDERED that plaintiff Philadelphia Indemnity Insurance Company's complaint is severed and dismissed as to defendant Hirsch Construction, and is continued as to the remaining defendant Intermix; and it is further

ORDERED that defendant Hirsch Construction's motion for summary judgment (motion seq. no. 003) on its third-party complaint and dismissing all counterclaims by Electrical Solutions pursuant to CPLR § 3212 is resolved as follows: (a) denied as moot on Hirsch Construction's indemnification and contribution claims; (b) denied on Hirsch

Construction's defense claim; and (c) granted to dismiss all counterclaims by Electrical Solutions; and it is further

ORDERED that third-party defendant Electrical Solution's motion for summary judgment (motion seq. no. 002) dismissing the third-party complaint, and the underlying complaint, pursuant to CPLR § 3212 is granted only on the indemnification and contribution claims, and denied on the defense claim; and it is further

ORDERED that defendant Hirsch Construction's third-party claims against Electrical Solutions for indemnification and contribution are severed and dismissed, and the third-party claim for defense is continued; and it is further

ORDERED that defendant Electrical Solution's counterclaim against Hirsch Construction for contractual indemnification is severed and dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of this Court.

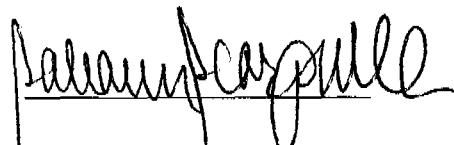
Dated: New York, New York
February 4, 2013

FILED

FEB 06 2013

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE


Saliann Scarpulla, J.S.C.