

Assurance Co. of Am. v Speary

2013 NY Slip Op 30647(U)

March 29, 2013

Sup Ct, Wayne County

Docket Number: 70894/2011

Judge: Dennis M. Kehoe

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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

ASSURANCE COMPANY OF AMERICA
A/S/O BARONE HOMES, INC.

Plaintiff,

-vs-

MARC SPEARY, ROBERT BOGGS AND
SPEARY BOGGS PAINTING,

Defendants.

DECISION
AND
ORDER

Index No. 70894
2011

Clausen Miller, P.C.
Virginia M. Markovich, Esq., of Counsel
Attorney for Plaintiff

Trevett Cristo Salzer & Andolina, P.C.
Eric M. Dolan, Esq., of Counsel
Attorney for Defendants

The Defendants ("Speary/Boggs") have moved for an Order pursuant to CPLR §3212, granting summary judgment against the Plaintiff ("Assurance") and dismissing the Complaint. The Plaintiff has opposed the motion, maintaining that there are issues of fact which must await trial. The motion has been submitted on papers by counsel for both parties.

Assurance has commenced this action as subrogee of Barone Homes, Inc. The action arises out of a fire which destroyed a new house

under construction at 2729 Lake Road, Williamson, New York, on April 2, 2009. The structure, which was approximately 90% completed at the time of the fire, was insured pursuant to a policy of insurance issued by Assurance to Barone, which was acting as the general contractor pursuant to a contract with owners Jack and Christine May. Payment for the loss was ultimately issued to Barone by the Plaintiff in the amount of \$370,279.79. The Complaint sets forth four causes of action, based on theories of negligence, gross negligence/recklessness, breach of contract, and breach of warranties.

Speary and Boggs Painting was hired by Barone as a subcontractor on the project, for the purpose of painting and staining the interior and exterior of the two-story structure, pursuant to a verbal agreement and a written "Standard Subcontractor's Agreement". The deposition testimony of Mr. Boggs indicates that, on the afternoon before the fire, he used an oil-based "wiping stain" to stain the trim, door frames and baseboards in the great room, as well as a railing, which extended from the first floor to the second floor. The stain was applied with a nylon paintbrush, and excess stain was wiped from the surfaces with rags. Upon completion of the work, the Defendants threw the used rags into a plastic garbage can

located in the great room, which also contained pieces of dry wall and wood. Neither painter disposed of the contents of the garbage can in the dumpster outside of the house before they left for the day. (The Court notes that the deposition testimony of the Defendant Mr. Speary as to these matters was in substantial agreement with that of Mr. Boggs.) Other subcontractors were also working at the premises on the afternoon before the fire, including plumbers, a tile contractor, a kitchen installer, an electrician, and "maybe a mason".

Trooper Steven Mowers of the New York State Police was dispatched to the scene of the fire as an arson investigator. Trooper Mowers examined the scene on two occasions, interviewed numerous witnesses including the Defendants, and submitted a written report. After considering multiple possible causes of the fire, Trooper Mowers concluded that he was unable to determine the origin, due to the collapse of the building and the "total devastation" which resulted. The Defendants also retained W. Bryan Wydra, a certified fire investigator, who conducted an origin and cause investigation at the fire scene. He too concluded that, while the fire appears to have originated somewhere in the interior of the house, the actual cause of the fire was not capable of being determined

with any certainty.

However, the Plaintiff retained its own experts to investigate the fire. David R. Redsicker, a cause and origin investigator, visited the premises twice and took numerous photographs. Based upon his examination, Mr. Redsicker concludes that the fire originated in the great room and was likely caused by the Defendants' improper disposal of the stain-filled rags, in the garbage can, creating a condition which resulted in spontaneous combustion. The Plaintiff also retained Theodore F. Pantile, another cause and origin investigator, who conducted visual lab investigations of possible electrical causes, including the microwave, geothermal heating unit and electrical panel, and concluded that there was no evidence that these items were the cause of the fire.

It is axiomatic that a movant bears the burden of establishing entitlement to summary judgment as a matter of law. Therefore, in order to prevail, it is incumbent upon the moving party to tender evidentiary proof in admissible form sufficient to warrant the direction of summary judgment by the Court. In ruling on a motion, the facts are to be construed in the light most favorable to the non-moving party, who is not required to prove its claim in order to defeat the motion. A summary judgment motion should

be denied where there is any significant doubt as to whether a material issue of fact exists, or if there is even arguably such an issue.

Speary/Boggs maintains that the Plaintiff cannot prove that the Defendants' alleged negligence was the proximate cause of the fire. They assert that the reports of the State Police investigator and the Defendants' expert affidavit support the conclusion that it is impossible to identify any one factor as the cause of the fire to the exclusion of all others. Given the number of possible scenarios raised by the physical evidence, the Defendants argue that spontaneous combustion allegedly caused by the method of disposal of the stained rags cannot be determined with any certainty to have been responsible for the fire.

However, Assurance argues that summary judgment must be denied because it has made a *prima facie* showing that the Defendants' negligence was responsible for the fire. Assurance maintains that the fact that the experts of the respective parties have offered differing explanations for the cause of the fire establishes that the issue of causation must await determination by the trier of fact,. Further, Assurance relies on decisional law which holds that circumstantial evidence can be considered by an expert in determining the origin of a fire.

Based upon the affidavits, the deposition testimony, expert opinion and the legal arguments submitted by counsel, the Court finds that the existence of disputed issues of material fact precludes an award of summary judgment. As previously noted, both parties have submitted reports from their respective experts which differ dramatically as to their conclusions regarding the origin of the fire. Moreover, the Plaintiff is correct in its position that the circumstantial evidence presented at trial may be sufficient to establish the Defendants' negligence as the proximate cause of the fire, as well as to support a reasonable inference that the other potential causes of the fire are "sufficiently remote". (See, North America Specialty Insurance Co. v Schwanter, 39 AD3d 511 (2nd Dept, 2007)).

Therefore, the Defendants' motion for summary judgment is denied.

This Decision constitutes the Order of the Court.

Dated: *March 29, 2013*
 Lyons, New York


 Honorable Dennis M. Kehoe
 Acting Supreme Court Justice

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