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SHORT FORM ORDER

INDEX No. 08-35947
CAL No. 12-01227CO

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 5-23-13
ADJ. DATE 7-11-13
Mot. Seq. # 007 - MotD

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EDNA LAMPKE and ROBERT LAMPKE,

Plaintiffs,

- against -

PETRO, INC., MATSON HEATING AND AIR CONDITIONING, INC. and RUG RENOVATING CO., INC.,

Defendants.

KEEGAN & KEEGAN, ROSS & ROSNER
Attorney for Plaintiffs
147 N. Ocean Avenue, P.O. Box 918
Patchogue, New York 11772

MCCABE, COLLINS, MCGEOUGH, & FOWLER, LLP
Attorney for Defendant/Second Third-Party Plaintiff Petro, Inc.
346 Westbury Avenue, P.O. Box 9000
Carle Place, New York 11514

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MATSON HEATING AND AIR CONDITIONING, INC.,

Third-Party Plaintiff,

- against -

RUG RENOVATING CO., INC.,

Third-Party Defendant.

CASCONE & KLUEPFEL, LLP
Attorney for Defendant/Third-party Plaintiff Matson Heating and Air
1399 Franklin Avenue, Suite 302
Garden City, New York 11530

ROBERT L. DOUGHERTY, ESQ.
Attorney for Defendant/Third-Party/Second Third-Party Defendant Rug Renovating
226 Seventh Street, Suite 200
Garden City, New York 11530

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PETRO, INC.,

Second Third-Party Plaintiff,

- against -

RUG RENOVATING CO., INC.,

Second Third-Party Defendant.

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Upon the following papers numbered 1 to 58 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 32 - 49; 50 - 51; Replying Affidavits and supporting papers 52 - 58; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant/third-party defendant/second third-party defendant Rug Renovating Co., Inc. for summary judgment dismissing the complaint, third-party complaint, second third-party complaint and all cross-claims against it or, in the alternative, granting judgment limiting its liability in this action based on the limitation of liability terms in its invoices is determined as set forth hereinafter.

This is an action to recover damages for personal injuries and property damage that allegedly occurred following the installation of a new oil burner on April 20, 2006 in the basement of plaintiffs' premises located at 13 Basket Neck Lane, Remsenburg, New York resulting in the discharge of petroleum products on May 1, 2006. Plaintiffs contracted with defendant Petro, Inc. ("Petro") for installation of the oil burner. The installation was performed by independent contractor defendant Matson Heating and Air Conditioning, Inc. ("Matson") pursuant to an agreement between Petro and Matson. Plaintiffs also seek to recover damages for the alleged negligent restoration and cleaning of 18 rugs by defendant Rug Renovating Co., Inc. ("Rug Renovating") after said discharge. They allege that the negligent cleaning resulted in fading, color loss, and severe color bleeding of the rugs. They further allege that plaintiffs did not accept return of the rugs in said condition but that plaintiff Edna Lampke signed a certificate of satisfaction under duress in order to obtain the release of said rugs tendered by Rug Renovating.

Petro and Matson answered asserting cross-claims against Rug Renovating for common-law contribution and indemnification. Matson then commenced a third-party action, and Petro subsequently commenced a second third-party action, against Rug Renovating for common-law contribution and indemnification against Rug Renovating with respect to the alleged improper cleaning of the rugs.

Rug Renovating now moves for summary judgment dismissing the complaint, third-party complaint, second third-party complaint and all cross-claims against it on the grounds that its liability for damages to the subject rugs is limited contractually to the amount it was paid to clean said rugs, $1,575.67, that plaintiffs' dissatisfaction with the condition of the delivered rugs is directly contradicted by documentary evidence in the form of a certificate of satisfaction signed by Edna Lampke, that Petro and Matson cannot seek common-law indemnification against Rug Renovating inasmuch as they have been found negligent by prior Order of this Court dated April 14, 2011, and that contribution is unavailable where plaintiff seeks to recover purely economic losses arising out of the alleged breach of contract by Rug Renovating. In support of the motion, Rug Renovating submits, among other things, the affidavit of its president Paul Iskyan, copies of two non-negotiable customer's contracts and receipts (invoices) signed by plaintiff Edna Lampke and the warnings on the reverse sides of said invoices, a certificate of satisfaction dated June 29, 2006, signed by plaintiff Edna Lampke, a copy of plaintiffs' damage estimate, the affidavit of the attorney for Rug Renovating, the pleadings of this action, the prior Order dated April 14, 2011,[1] and a portion of plaintiff Edna Lampke's deposition testimony.

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[1] The prior Order of this Court dated April 14, 2011 granted plaintiffs partial summary judgment against Petro and Matson on the issue of liability under Navigation Law for the discharge of petroleum.

The president of Rug Renovating, Paul Iskyan, avers by affidavit that his company cleaned, at the request of plaintiffs, 18 rugs at said premises that had been damaged by the discharge. He notes that plaintiff Edna Lampke signed two invoices for said service which invoices contain limitations on liability and warnings of color runs and fading of colors. In addition, Mr. Iskyan avers that the rugs were thoroughly cleaned and then delivered on June 29, 2006 to plaintiffs' premises at which time plaintiff Edna Lampke signed a certificate of satisfaction. He adds that Rug Renovating was paid $1,575.67 by an insurance carrier on behalf of defendants in full payment for the cleaning of the rugs. According to Mr. Iskyan, plaintiff Edna Lampke subsequently complained that 11 of the 18 rugs had color runs or color changes and Rug Renovating arranged to pick up said 11 rugs and cleaned them again after which said rugs were returned to plaintiffs' premises. He informs that plaintiffs seek to recover $22,350.00 in damages and submits a copy of plaintiffs' damage estimate, marked as defendant's Exhibit "O," indicating color loss, bleeding, fading and unauthorized tinting for eight of the rugs. Mr. Iskyan also refers to a portion of the deposition testimony of plaintiff Edna Lampke in which she acknowledged familiarity with the limitation of liability language on the invoices, having done business with Rug Renovating over the past 30 years. He asserts that the complaint be dismissed against Rug Renovating inasmuch as plaintiff Edna Lampke signed the certificate of satisfaction indicating that all work was done to her satisfaction or, in the alternative, that damages be limited to $962.90 or a maximum of $1,575.67 based on the limitation of liability in its invoices signed by plaintiff Edna Lampke.

In opposition to the motion, plaintiffs contend that damage to their various handmade oriental rugs remains to be determined, and that plaintiff Edna Lampke could not have accepted the condition of the rugs on delivery as she was not permitted to inspect the rugs prior to signing a certificate of satisfaction, which she did under duress, purportedly to enable Rug Renovating to be paid by the insurance carrier. Plaintiffs also contend that plaintiff Edna Lampke was not the customer of Rug Renovating, which was retained by an insurance carrier purportedly of Petro or its agents, such that any contractual limitation of liability does not apply to plaintiffs. Plaintiffs' submissions in support of their opposition include the affidavit of plaintiff Edna Lampke; the certificate of satisfaction and invoice documents with the delivery date of May 18, 2006 signed by plaintiff Edna Lampke for return of the rugs; invoice number 69894 dated April 5, 2007, marked as plaintiffs' Exhibit "3," signed by plaintiff Edna Lampke with the notation "Rugs accepted under protest due to discoloration. We are awaiting resolution by Rug Renovators"; and an invoice totaling $4,036.98 from their January 20, 2011 Response to Discovery and Inspection. Petro also submits opposition to the motion, adopting the arguments raised by plaintiffs. No opposition has been submitted by Matson.

By her affidavit, plaintiff Edna Lampke attests that she had collected the handmade oriental rugs over several decades and that she has a background in textile design and technology, and experience in the industry including having worked as a colorist for Karistan Carpets. She avers that she received a call from "Terri," an employee of Rug Renovating, informing her that the deliverymen were coming but would not bring the rugs into the house until plaintiff signed the documents presented to her, which included the certificate of satisfaction and invoices. Plaintiff further avers that she signed said documents under duress and coercion and did not accept the condition of the rugs, making the deliverymen immediately aware of her dissatisfaction such that they took back approximately half of the rugs and she confirmed the return of the rugs that same day with "Terri." She states that her rejection of the condition of the rugs is unequivocally confirmed by the notations on invoice number 69894 dated April 5, 2007. Plaintiff disputes the sum of $1,575.67 referenced by Rug Renovating, noting that an invoice for the total sum of $4,036.98 was submitted in plaintiffs' January 20, 2011 Response to Discovery and Inspection, and denies being a customer of Rug Renovating, stating that Rug Renovating

was retained by an insurance carrier purportedly of Petro such that contractual limitation of liability is inapplicable to her. Plaintiff concludes by stating that the damages she suffered are in excess of the payment received by Rug Renovating.

Rug Renovating submits the reply affidavit of its president, Mr. Iskyan, noting that no opposition has been submitted by Petro and Matson regarding dismissal of the contribution and indemnification claims, that on June 29, 2006 plaintiff signed the certificate of satisfaction with all of the rug cleaning work performed by Rug Renovating only to claim three-and-a-half-years later in February 2010 when she impleaded Rug Renovating that she was coerced into signing said document and suffered economic duress, and that plaintiff is bound by the limitation of liability provisions of the contract she signed. With respect to the disputed amounts, Mr. Iskyan notes that plaintiff's total of $4,036.98 included charges for providing new padding and binding the sides of the rugs, which charges were separate from the charges for cleaning the rugs. He submits a copy of said invoice with the rug cleaning charges circled to show that said charges total $1,536.74, which were paid by the insurance carrier to Rug Renovating, and argues that said sum should be the outward limit of any liability of Rug Renovating to plaintiffs based on the contractual limitation of liability. Mr. Iskyan adds that inasmuch as plaintiff only complained about the condition of 11 of the 18 rugs delivered, the damages are reduced to $962.90.

It is well-settled that the party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797,799 [2d Dept 1988]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations (*see* ***W.W.W. Assoc., Inc. v Giancontieri***, 77 NY2d 157, 162, 565 NYS2d 440 [1990]; ***Costello v Casale***, 281 AD2d 581, 583, 723 NYS2d 44 [2d Dept 2001], *lv denied* 97 NY2d 604, 737 NYS2d 52 [2001]).

Here, although plaintiff Edna Lampke did not pay for the cleaning of the rugs, she gave permission to and allowed Rug Renovating to pick up and clean her 18 rugs and thus, she was the customer of Rug Renovating, pursuant to the terms of the invoices. Based on the foregoing and her prior business with Rug Renovating, plaintiff agreed to, and admittedly was familiar with, the limitation of liability terms of the invoices. Said terms included the following:

> 4. The company shall not be liable for shrinkage, changes in texture, or for the appearance of white knots, or the running of dyes, or any other defects which may appear during, or resulting from the ordinary cleaning process. The Company does not guarantee the removal of spots, stains, discolorations or other design defects. The Company is also not liable for any existing damage present in any rugs submitted to the Company for cleaning or treatment.
>
> 5. In no event shall the Company be obligated or responsible to pay for the replacement or loss of value for any of the above conditions set forth in paragraph 4 resulting from its cleaning process. The Company shall, at its option, either refund to the customer the amounts paid by the customer for the cleaning process or credit the customer's account for the cost of the cleaning. The customer acknowledges and accepts the foregoing as the customer's sole remedy in the event the customer is dissatisfied with the cleaning process.

In addition, the adduced evidence shows that although plaintiff Edna Lampke signed a certificate of satisfaction that stated that "The insured hereby agrees that all work performed by Rug Renovating Co. has met with their complete satisfaction and authorizes Custard Insurance Adjusters to pay the entire amount of cleaning services to Rug Renovating Co.," company employees of Rug Renovating were aware that plaintiff was dissatisfied with the cleaning and in response to her dissatisfaction, attempted to further clean 11 of the 18 rugs. Based on the foregoing, the certificate of satisfaction signed by plaintiff cannot bar plaintiffs from recovering damages. However, said damages are limited under the terms of the invoices to, at most, the amounts paid by Custard Insurance Adjusters to Rug Renovating for the cleaning process of the 18 rugs which, as explained by the president of Rug Renovators in reply papers, was $1,536.74. Therefore, Rug Renovating is granted judgment limiting its liability in this action to a maximum of $1,536.74 based on the limitation of liability terms in its invoices.

Moreover, Rug Renovating met its *prima facie* burden of demonstrating its entitlement to judgment as a matter of law dismissing the causes of action seeking common-law indemnification and contribution against it (*see* ***Mack Cali Realty, L.P. v Everfoam Insulation Sys., Inc.***, ___ AD3d ___, 2013 NY Slip Op 06348 [2d Dept 2013]). The predicate for common-law indemnification is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine (*see* ***Kagan v Jacobs***, 260 AD2d 442, 687 NYS2d 732 [2d Dept 1999]; ***Henderson v Waldbaums***, 149 AD2d 461, 539 NYS2d 795 [2d Dept 1989]). Here, with respect to the common-law indemnification claims, Rug Renovating established, *prima facie*, that Petro and Matson participated in the alleged wrongdoing and were found liable for the discharge of the petroleum (*see* ***Mack Cali Realty, L.P. v Everfoam Insulation Sys., Inc.***, ___ AD3d ___, 2013 NY Slip Op 06348 [2d Dept 2013]; ***Ruiz v Griffin***, 50 AD3d 1007, 856 NYS2d 214 [2d Dept 2008]). In opposition, Petro and Matson failed to raise a triable issue of fact (*see* ***Mack Cali Realty, L.P. v Everfoam Insulation Sys., Inc.***,___ AD3d ___, 2013 NY Slip Op 06348 [2d Dept 2013]).

As to contribution, the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought, that is, the parties must have contributed to the same injury (***Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp.***, 71 NY2d 599, 528

NYS2d 516 [1988]), and the remedy may be invoked against concurrent, successive, independent, alternative and even intentional tortfeasors (*see* ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley***, 71 NY2d 21, 523 NYS2d 475 [1987]). New York law bars contribution for purely economic losses based on a breach of contract as said losses do not constitute "injury to property" within the meaning of New York's contribution statute (*see* CPLR 1401; ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 583 NYS2d 957 [1992]; ***Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley***, 71 NY2d 21, 523 NYS2d 475; *see also* ***Mar-Cone Appliance Parts Co. v Mangan***, 879 F Supp 2d 344 [WD NY 2012]). Here, Rug Renovating demonstrated that inasmuch as plaintiffs' recovery is limited to economic loss damages pursuant to the terms of the invoices, contribution is inapplicable in this matter. Petro and Matson failed to raise a triable issue of fact regarding their contribution claims. Based on the foregoing, the third-party complaint and second third-party complaint and the cross-claims against Rug Renovating are dismissed (*see* ***Mack Cali Realty, L.P. v Everfoam Insulation Sys., Inc.***, ___ AD3d ___, 2013 NY Slip Op 06348 [2d Dept 2013]; *see also* ***Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley***, 71 NY2d 21, 523 NYS2d 475).

Dated: October 25, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION