

Aspen Am. Ins. Co. v Kolarik
2018 NY Slip Op 33301(U)
December 19, 2018
Supreme Court, New York County
Docket Number: 159327/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART IAS MOTION 12EFM

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ASPEN AMERICAN INSURANCE COMPANY as
 subrogee of 368 97th LLC,

Plaintiff,

- v -

LAURA KOLARIK,

Defendant.

INDEX NO. 159327/2015

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion for summary judgment.

Defendant moves pursuant to CPLR 3212 for an order summarily dismissing the complaint. Plaintiff opposes and, by notice of cross motion, moves for an order granting it summary judgment.

In this action, plaintiff insurance company seeks to recover the amount it paid to its insured, 368 97th LLC, for fire damage to defendant's apartment in the apartment building at issue. (NYSCEF 1).

According to defendant, there is no evidence that she caused or contributed to the fire. She relies on the New York City Fire Department (FDNY) incident report reflecting that the fire started in her apartment and that what led to its ignition is "undetermined." (NYSCEF 28). She denies that her metal hamper was touching the power cord of her fan, and argues that any claim to the contrary is speculative. (NYSCEF 21).

Plaintiff relies on the affidavit of its certified fire investigator, who conducted a physical

examination of the premises after the fire and discovered a severed power cord for a fan. He concludes that the fire started when defendant's fan cord was pinched under the weight of a metal hamper, which created electrical activity and ignited clothing next to the hamper. The investigator relates that defendant had told him that the fan was on when she left her apartment that morning and was on most of the time even when she was not home. He thus opines, based on his professional experience, that the fire was caused by defendant's negligent placement of the hamper on the cord of an appliance that was on and energized. (NYSCEF 35).

Plaintiff observes that defendant testified at her deposition that she did not know whether the hamper was touching or on top of the cord. (NYSCEF 24). It thus argues that the proffered evidence demonstrates that it was more likely than not that the fire was caused by defendant's negligence, thereby entitling it to summary judgment. (NYSCEF 33).

A defendant moving for summary judgment in an action involving a fire must submit evidence that she "committed no act from which a jury could rationally infer that [she] negligently caused the fire." (*Alomsi v 250 Dean, LLC*, 101 AD3d 1056 [2d Dept 2012]). A plaintiff seeking the same relief must prove, where there are a number of possible proximate causes of an accident, that it was more likely or more reasonable that the accident was caused by defendant's negligence than by some other agency. (*Mayorga v City Express Corp.*, 298 AD2d 563 [2d Dept 2002]).

Although the FDNY report is not certified, both parties rely on it, and thus it may be considered. (*See e.g., Tomeo v Beccia*, 127 AD3d 1071 [2d Dept 2015] [while records were uncertified and inadmissible on summary judgment, absent objection from opposing party or challenge their veracity or accuracy, and as opposing party also relied on records, they were

admissible]; *see also Cruz v Finney*, 148 AD3d 772 [2d Dept 2017] [as plaintiffs submitted unsworn police accident report, they waived objection to its admissibility]).

To the extent that defendant meets her *prima facie* burden, plaintiff raises a triable issue as to whether defendant caused the fire based on its investigator's opinion, defendant's inability to recall at her deposition whether she had placed the hamper on the cord, and FDNY's determination that the fire had originated in electrical wiring and combustible material in defendant's bedroom, thereby demonstrating that it was more likely or reasonable that the fire was caused by defendant's negligence. (*See New York Mun. Ins. Reciprocal v Casella Constr., Inc.*, 105 AD3d 1440 [4th Dept 2013] [plaintiff need only prove that it was more likely or reasonable that accident caused by defendant's negligence]).

Similarly, plaintiff's investigator's conclusion, based on his physical inspection of the premises and the cord, and the FDNY report indicating that the fire was caused by electrical wiring, demonstrate, *prima facie*, that it is more likely or more reasonable that the fire was caused by the defendant's placement of the hamper on the cord. (*See e.g., Utica First Ins. Co. v Gristmill Earth Realty Corp.*, 145 AD3d 1059 [2d Dept 2016] [defendant established that fire was caused by extension cord, and not its work, by submitting fire marshal's report and investigator's testimony]; *Andrews v New York City Hous. Auth.*, 66 AD3d 619 [2d Dept 2009] [defendant established *prima facie* entitlement to judgment through fire report and deposition testimony of investigating fire marshal, who determined that cause of fire was electrical cord that ignited combustible material]; *Delgado v New York City Hous. Auth.*, 51 AD3d 570 [1st Dept 2008], *lv denied* 11 NY3d 706 [defendant submitted evidence that fire had been caused by extension cord located in combustible material]).

Defendant submits no expert evidence to rebut plaintiff's *prima facie* showing, nor does she submit an alternative theory for the fire's cause. (*See Delgado*, 51 AD3d at 571 [plaintiff failed to raise triable issue that fire had been caused by some reason other than extension cord]).

Accordingly, it is hereby

ORDERED, that defendant's motion for summary judgment is denied; and it is further

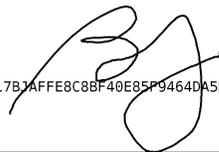
ORDERED, that plaintiff's cross motion for summary judgment on liability is granted;

and it is further

ORDERED, that an immediate trial of the issues regarding damages shall be had before the court; it is further

ORDERED, that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness and shall pay the fee therefor, and said Clerk shall cause the matter to be placed upon the calendar for such trial; and it is further

ORDERED, that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).


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12/19/2018
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE