

**L'Etoile Royale, Inc. v Campustar (U.S.A.), Inc.**

2020 NY Slip Op 31794(U)

June 5, 2020

Supreme Court, New York County

Docket Number: 158143/2015

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM**

*Justice*

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**INDEX NO. 158143/2015**

L'ETOILE ROYALE, INC., STARNET INSURANCE  
COMPANY AS SUBROGEE OF,

**MOTION DATE 01/23/2020**

Plaintiff,

**MOTION SEQ. NO. 003**

- v -

CAMPUSTAR (U.S.A.), INC., DOUGLAS ELLIMAN  
PROPERTY MANAGEMENT,

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91 were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is

ORDERED that the motion for summary judgment (Motion Seq. 003) of Defendants

Campustar (U.S.A.), Inc. and Douglas Elliman Property Management is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for plaintiff L'Etoile Royale, Inc. shall serve a copy of this

Order with Notice of Entry within 20 days of entry on all parties.

NON FINAL DISPOSITION

### **MEMORANDUM DECISION**

In this consolidated negligence action, defendants Campustar (U.S.A.), Inc. (Campustar) and Douglas Elliman Property Management (Douglas Elliman) (collectively, Defendants) move, pursuant to CPLR 3212, for summary judgment (Motion Seq. 003) dismissing the separate complaints of plaintiffs L'Etoile Royale, Inc. (L'Etoile) and StarNet Insurance Company (StarNet). For the reasons below, the Court denies the motion.

### **BACKGROUND FACTS**

Plaintiff L'Etoile is a jewelry store that leases a commercial space on the ground floor of a building located at 790 Madison Avenue, New York (the Building) owned by Campustar and managed by Douglas Elliman. L'Etoile alleges that on January 20, 2015, a steam leak occurred in the Building which damaged pieces of artwork inside its store. On the day of the incident, the store was closed as its owner, Mr. Garbis Dogramaciyanyan (Mr. Garbis) was out of town for vacation. L'Etoile claims that the steam leak was caused by Defendants' negligence in managing and/or maintaining the Building's heating system, including its related components such as the radiators and basement valves (NYSCEF doc No. 1, ¶¶ 21-26). In particular, L'Etoile maintains that Defendants either (i) broke, damaged or failed to repair a broken or damaged pipe that carried steam into the store; or (ii) negligently turned on the basement valve which controlled the steam to the store (NYSCEF doc No. 70, ¶ 4). Pursuant to the insurance policy in force at the time of loss, L'Etoile claimed and was reimbursed by plaintiff StarNet of up to the policy limit of \$100,000.

On September 6, 2015, L'Etoile commenced this action against Defendants claiming uninsured damages in excess of StarNet's payment of \$100,000. On November 12, 2016, StarNet

filed a separate subrogation suit against Campustar. The Court consolidated these two actions for joint discovery and trial on January 30, 2019. After engaging in discovery, Defendants are now moving for summary judgment on the ground that they neither caused the steam leak nor had actual or constructive notice of a defect to the heat system inside L'Etoile's store.

In support of their motion, Defendants submitted deposition testimony from the Building Superintendent, Mr. Luan Shehu, who stated that while inspecting the basement mechanical room on the day of the incident, he saw a water puddle on the floor and that the water was leaking from the ceiling just below L'Etoile's store. He allegedly checked the store from the outside and saw that it was all fogged. He therefore went back to the basement to shut off the valve providing steam to L'Etoile store and called Mr. Garbis to inform him about the incident. It was not until the following day that Mr. Garbis' son, Mr. Sevan Dogramaciyan (Mr. Sevan) was able to come to the Building and provide access to the store. According to Mr. Shehu, the plumbing company that made repairs that day, AC Klem, indicated that the steam leak was caused by a loose union connection between the radiator located inside L'Etoile's store and the steam supply pipe (NYSCEF doc No. 67 at 61). Mr. Garbis also confirmed that only he and his son had keys to the store premises (NYSCEF doc No. 65, p.41). Defendants claim that they could not have had notice of the loose union connection as they lacked access to the store (NYSCEF doc No. 56, ¶ 45).

Plaintiffs oppose the motion on the ground that Defendants rely on inadmissible, self-serving statement of Mr. Shehu that the loss originated from a loose union connection. They maintain that Defendants neither presented experts on the Building heating system nor laid a proper foundation to support that that Mr. Shehu or AC Klem have sufficient knowledge, experience and/or training with regard to heating system. Furthermore, Mr. Sevan stated that when he came to the store the day following the incident, he observed that the steam was coming from

the valve at the Building's basement. Thus, Plaintiffs maintain that there are substantial questions of fact as to the cause and origin of the loss. Plaintiffs also dispute Defendants' allegation that they had no notice of any dangerous condition of the heating system inside L'Etoile's store as they do not have access to it. First, Plaintiffs draw the attention of the Court to the lease agreement between L'Etoile and Campustar which imposes a responsibility to Campustar to maintain and repair public portions of the building – both “exterior and interior” – and grants Campustar the right to re-enter the store “in any emergency at any time, and all other reasonable times, to examine the same and to make such repairs, replacements and improvements” (NYSCEF doc No. 79, ¶ 37). Second, Plaintiffs allege that L'Etoile notified Mr. Shehu on numerous occasions about problems on the radiator inside the store (*Id.*, ¶ 44).

### DISCUSSION

Summary judgment is granted when "the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, [Ct App 2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [Ct App 1986]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [Ct App 1980]; see also *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [Ct App 1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent fails to make a prima facie showing, the court must

deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [Ct App 2008] quoting *Alvarez*, 68 NY2d at 324).

The function of a court in reviewing a motion for summary judgment "is issue finding, not issue determination, and if any genuine issue of material fact is found to exist, summary judgment must be denied" (*People ex rel. Cuomo v Greenberg*, 95 AD3d 474 [1st Dept 2012]). Where "credibility determinations are required, summary judgment must be denied" (*Id.*). Thus, on a motion for summary judgment, the court is not to determine which party presents the more credible argument, but whether there exists a factual issue, or if arguably there is a genuine issue of fact (*DeSario v SL Green Management LLC*, 105 AD3d 421, [1st Dept 2013] [holding given the conflicting deposition testimony as to what was said and to whom, issues of credibility should be resolved at trial]).

The Court finds summary judgment to be an improper remedy for Defendants as there are material issues of fact in this case that are in question. Defendants and Plaintiffs have offered different accounts as to what could have caused the steam leak and whether Defendants had notice of the dangerous condition that resulted to the leak.

On one hand, Defendants offered the testimony of Mr. Shehu, an employee of Douglas Elliman and the Superintendent of the Building. According to Mr. Shehu, repairs were made by AC Klem the day following the incident and he was told by AC Klem that "the connection that connects the radiator [inside the store], a union, like union connection that connects the radiator and the piping together was loose" (NYSCEF doc No. 67, p. 63). To prove absence of notice of any dangerous condition inside L'Etoile's store, Defendants rely on its lack of access to the store and on Mr. Shehu's testimony that prior to the date of the incident, he was not aware of any union connection problems at L'Etoile's store (*Id.*, p. 78).

Plaintiffs, on the other hand, have introduced conflicting testimony from Mr. Sevan who claims that when he arrived at the store the day following the incident, he observed steam coming from one of the valves inside the boiler room at the basement of the Building (NYSCEF doc No. 66, p. 38). Plaintiffs also dispute Mr. Shehu's account of lack of notice with conflicting testimonies. Mr. Garbis testified that he brought the rusted valve and pipe inside his store to the attention of Douglas Elliman several times (NYSCEF doc No. 65, pp. 102-104). Mr. Sevan testified that L'Etoile had issues with the radiator inside its store even prior to the incident (*Id.*, p. 57) and that these issues were brought to Mr. Shehu's attention (*Id.*, p. 58).

Summary judgment is therefore not warranted considering that the very facts that Defendants rely on their motion are disputed by Plaintiffs' evidence. While Mr. Shehu can testify on what he personally observed during the repair works, the fact that a loose union connection on L'Etoile's radiator was replaced does not foreclose the possibility that the steam leak may have been caused by something else, especially considering that Mr. Sevan testified to observing steam coming from the basement valve on the day following the incident. Even assuming that the cause of the leak was the loose union connection on L'Etoile's radiator, there remain factual issues as to whether Defendants had notice of such condition. Where "credibility determinations are required, summary judgment must be denied" (*Greenberg*, 95 AD3d 474). As there are conflicting accounts from parties regarding the circumstances of the steam leak, the Court finds that summary judgment for Defendants is premature at this stage.

### CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion for summary judgment (Motion Seq. 003) of Defendants Campustar (U.S.A.), Inc. and Douglas Elliman Property Management is denied; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for plaintiff L'Etoile Royale, Inc. shall serve a copy of this

Order with Notice of Entry within 20 days of entry on all parties.

*Carol R. Edmead*  
**HON. CAROL R. EDMÉAD**, J.S.C.  
J.S.C.

6/5/2020  
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: