Pacific Indem. Co. v United Hood Cleaning Corp.
2021 NY Slip Op 32238(U)
November 9, 2021
Supreme Court, New York County
Docket Number: Index No. 157326/2020
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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PACIFIC INDEMNITY COMPANY, as subrogee of CHARLES BERNHEIM

Plaintiff,

- v -

UNITED HOOD CLEANING CORP.,

Defendant.

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INDEX NO. 157326/2020

MOTION DATE 08/16/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for JUDGMENT - SUMMARY.

In this subrogation action by an insurer to recover benefits that it had paid to its insured to reimburse him for damages that he sustained as a consequence of a clothes dryer fire at his apartment, the defendant moves pursuant to CPLR 3212 for summary judgment dismissing the amended complaint. The plaintiff insurer opposes the motion. The motion is denied.

In its amended complaint, the plaintiff alleged that it had issued a homeowner's or renter's insurance policy to its subrogee, Charles Bernheim, covering casualty losses sustained at his apartment in Manhattan, including losses due to fire. It further alleged that, prior to June 15, 2018, Bernheim retained the defendant to perform cleaning, servicing, testing, maintenance, installation, and repair of a clothes dryer that was installed in his apartment, as well as its related component parts. The amended complaint asserted that the defendant negligently performed those tasks and that, as a proximate result of that negligence, the dryer caught on fire on June 15, 2018, causing significant damage to Bernheim's apartment and his personal property. According to the amended complaint, the plaintiff, upon adjusting Bernheim's claim under the policy, paid Bernheim the sum of $1,016,088.60. Under the terms of the policy, the

plaintiff was subrogated to Bernheim's right to seek recovery from any tortfeasor that caused or contributed to the fire, and it thereafter commenced this action against the defendant to recover the benefits that it had paid out under the subject policy.

Although the plaintiff served a bill of particulars on December 8, 2020, along with limited responses to several of the defendant's demands for discovery and inspection, no depositions had been conducted as of that date. Nor had the plaintiff propounded any discovery. On March 24, 2021, this court issued a preliminary conference order, fixing dates for the further service of demands for bills of particulars and responses to those demands. It directed the parties to exchange the names and addresses of witnesses, photographs, and opposing party statements on or before May 31, 2021, and to serve any further demands for discovery and inspection on or before that date as well. The order scheduled the depositions of the plaintiff's adjustor and Bernheim for on or before June 24, 2021, and the deposition of the defendant for on or before July 30, 2021. The court also set a schedule for the service of post-deposition demands and responses thereto, and fixed November 30, 2021 as the plaintiff's deadline for filing the note of issue and certificate of readiness.

Only 15 days after the court issued the preliminary conference order, and thus before any of the discovery directed therein had been conducted, the defendant made the instant motion for summary judgment, which had the effect of staying all discovery (*see* CPLR 3214[b]; *Zletz v Wetanson*, 67 NY2d 711, 713-714 [1986]; *Cantos v Castle Abatement Corp.*, 251 AD2d 40, 41 [1st Dept 1998]).

The court notes that, in connection with this motion, the defendant did not serve and file a "statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried," as required by 22 NYCRR 202.8-g(a) (eff. Feb. 10, 2021). While the failure to provide such a statement could, by itself, serve as a basis upon which to deny the motion (*see Central Mgt. Corp. v Petco Animal Supplies Stores, Inc.*, 2021 NY Slip Op 32125[U], *2-3 2021 NY Misc LEXIS 5454, *3 [Sup Ct, N.Y. County, Nov. 3, 2021]),

the court nonetheless will address the parties' contentions in light of the nature of the motion before it.

In support of its motion, the defendant submits the pleadings, the plaintiff's bill of particulars, its service contract with Bernheim, the owner's manual for the subject dryer, two expert reports, and the affidavit of its owner and president, Avi Shendy. The plaintiff's bill of particulars asserted that "[t]he venting for the dryer was improperly installed and not cleaned properly." Shendy asserted in his affidavit that, on February 24, 2016, the defendant entered into an amended contract with Bernheim, pursuant to which the defendant agreed to provide service for the dryer in Bernheim's apartment. Specifically, Shendy averred that the defendant was retained to perform dryer vent cleaning and hose replacement, along with hood and chimney cleaning services. Shendy further asserted that the service that the defendant provided to Bernheim was performed between April 18, 2016 and April 20, 2016, and that the defendant made no other service calls to Bernheim's apartment.

In an unsworn report dated December 31, 2018, professional engineer Gregory L. Deeke asserted that he inspected the dryer on August 22, 2018 and October 10, 2018 on behalf of Nelson Architectural Engineers, Inc., to "document the scene, evaluate distress patterns, and witness evidence collection." Deeke concluded, without any further explanation, that

> "Preliminary evidence evaluation indicated that the fire originated within the dryer and that the length of the duct, the number of bends, and inoperable state of the duct fan are contributing causes.
>
> "There was no evidence that the services provided by United Hood Cleaning Corporation contributed to the fire event."

In a follow-up report dated July 3, 2019, which was also unsworn, Deeke averred that "[d]estructive analysis indicated the fire originated within the lower portion of the dryer. There was no evidence of fire within the dryer." Deeke further stated that "[t]he dryer duct was approximately 345" and had five ninety-degree bends. Both the total length and the number of ninety-degree bends exceed the maximums allowed per the manufacturer's installation

guideline." Further relying upon the dryer's installation and maintenance manual, he asserted that

> "United's work in the subject dwelling unit was completed between April 18, 2016 and April 20, 2016. This is approximately 26 months prior to the date of loss. Per the manufacturer's installation and maintenance manual, the duct should be cleaned at a minimum of every 18 months. Failing to clean the ductwork in accordance with the manufacturer's requirements represents a lack of proper maintenance on behalf of the appliance owner and was not the responsibility of United.
>
> "It is Nelson's opinion that the fire originated within the dryer as a result of lint build-up and ventilation restriction. The lack of proper maintenance, length of the duct, the number of bends, and reported failure to utilize the duct fan were the primary contributing causes of the fire. It is Nelson's opinion that United's work did not contribute to the cause of the fire."

Deeke did not provide any information as to who installed the 345"-long venting duct or created the numerous 90-degree bends in the venting duct. He essentially placed the responsibility for the fire upon Bernheim for permitting the dryer to be installed in that manner and failing to keep the duct clear of lint for the two years preceding the fire and, based upon a hearsay statement that Bernheim allegedly made, for failing to engage the duct venting fan during operation of the dryer.

In opposition to the motion, the plaintiff relied upon the same documentation as the defendant, and also submitted the expert affidavit of Peter Vallas, who provides investigative engineering services and specializes in undertaking fire and explosion origin and cause investigations. Vallas asserted that he performed his investigation from June 26, 2018 through May 15, 2019. He agreed with Deeke that the exhaust duct was too long and that there were an excessive number of 90-degree bends in the duct. He added that

> "There was only an approximate 3-inch space between the rear connection exhaust which incorporated a 90 degree angle and a flexible duct to its ultimate destination. This 3-inch space from the rear of the dryer to a massive 90 degree angle resulted in the restriction of adequate ventilation and the build-up of lint."

As Vallas explained it, the number of 90-degee bends prevented adequate ventilation and promoted extreme accumulation of lint in the exhaust system and dryer, thus creating an

obvious fire hazard. Vallas averred that the defendant "was specifically retained to provide professional cleaning services to the subject dryer's lint tubes and/or ducts," and that it was his

> "professional opinion that the aforementioned deficiencies in the exhaust of the subject dryer presented an obvious fire hazard that would have alerted a dryer cleaning company to provide proper recommendations or out of service notification to the building and the Property owners."

He asserted that

> "Defendant failed to ascertain, observe, and provide the professional services to document this hazardous fire condition in the dryer. Servicing a dryer located in the center of a kitchen in a high rise apartment complex requires a contractor to follow manufacturer's recommendation as well as standards, guidelines, and New York City Codes for proper ventilation. Defendant should have recognized the open deficiencies in the dryer exhaust system.
>
> *****
>
> "The failure to warn, advise or caution the Property owners of the aforementioned deficiencies in the subject dryer is the major contributing factor of the fire incident.
>
> " . . . [Nelson Architectural Engineers, Inc.] recognizes that the cause of the fire was the result of lint buildup and ventilation restriction and these deficiencies should have been observed and documents to the building and Property owners during the servicing provided by Defendant. A simple and foreseeable resolution to prevent the fire incident would be to advise or install a ventless washer and/or dryer appliance."

It is well settled that the movant on a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [citations omitted]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions (*see* CPLR 3212). The facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). In other words, "[i]n determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Garcia v J.C.*

Duggan, Inc., 180 AD2d 579, 580 [1st Dept 1992]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Vega v Restani Constr. Corp.*, 18 NY3d at 503). A movant's failure to make a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *Medina v Fischer Mills Condo Assn.*, 181 AD3d 448, 449 [1st Dept 2020]).

"The drastic remedy of summary judgment, which deprives a party of his [or her] day in court, should not be granted where there is any doubt as to the existence of triable issues or the issue is even 'arguable'" (*De Paris v Women's Natl. Republican Club, Inc.*, 148 AD3d 401, 403-404 [1st Dept 2017]; *see Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr.*, 161 AD2d 480, 480 [1st Dept 1990]). Thus, a moving defendant does not meet its burden of affirmatively establishing entitlement to judgment as a matter of law merely by pointing to gaps in the plaintiff's case. It must affirmatively demonstrate the merit of its defense (see *Koulermos v A.O. Smith Water Prods.*, 137 AD3d 575, 576 [1st Dept 2016]; *Katz v United Synagogue of Conservative Judaism,* 135 AD3d 458, 462 [1st Dept 2016]).

The defendant failed to establish its prima facie entitlement to judgment as a matter of law, as the only admissible evidence upon which it relies is Shendy's affidavit as to when the defendant performed cleaning services on Bernheim's dryer, and the service contract that he authenticated. The defendant presented no evidence as to the extent or quality of the cleaning that it undertook in April 2016, or whether it was able to clean the entire length of the venting duct and remove all of the lint from the duct. There is no evidence concerning the condition of the dryer and duct in 2016 or how that condition compared with its condition in June 2018. The defendant submitted no evidence from a person with knowledge as to whether the cleaning services were properly or negligently performed in April 2016, only speculation that most of the lint that burned in the fire accumulated thereafter.

Moreover, the defendant's expert reports are unsworn and, thus, are not in admissible form. Hence, they are of no evidentiary value and are thus insufficient to establish the

defendant's prima facie entitlement to judgment as a matter of law (*see Wei Wen Xie v Ye Jiang Yong*, 111 AD3d 617, 618-619 [2d Dept 2013]; *Spierer v Bloomingdale's*, 43 AD3d 664, 666 [1st Dept 2007]; *Marden v Maurice Villency, Inc.*, 29 AD3d 402, 403 [1st Dept 2006]; *Mittendorf v Brooklyn Union Gas Co.*, 195 AD2d 449, 449 [2d Dept 1993]). "Even if the report[s] had been in affidavit form, [their] probative value was questionable as [their] contents were conclusory and speculative" (*Marden v Maurice Villency, Inc.*, 29 AD3d at 403). In the absence of evidence obtained from someone with personal knowledge of the condition of the vent over the more than two years between the cleaning and the fire, the expert's opinions were "without an evidentiary basis" (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 70 [1st Dept 2004]).

Since the defendant failed to make a prima facie showing of its entitlement to judgment as a matter of law, its motion for summary judgment must be denied, regardless of the sufficiency of the plaintiff's opposition papers. Moreover, "[g]iven the circumstances of the case and the total absence of any pretrial discovery, the request for summary judgment based upon the conclusory affidavits submitted by the movant was premature" (*Hall Enters., Inc. v Liberty Mgt. & Constr., Ltd.*, 37 AD3d 658, 659 [2d Dept 2007]).

Accordingly, it is

ORDERED that the defendant's motion for summary judgment dismissing the amended complaint is denied.

This constitutes the Decision and Order of the court.

11/9/2021
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE