

New York Mar. & Gen. Ins. Co. v NY Firetech Inc

2024 NY Slip Op 34443(U)

December 19, 2024

Supreme Court, New York County

Docket Number: Index No. 151657/2020

Judge: David B. Cohen

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

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

NEW YORK MARINE AND GENERAL INSURANCE
COMPANY AND CERTAIN UNDERWRITERS AT LLOYD'S
A/S/O 2133 3RD AVENUE CORP.,

Plaintiffs,

INDEX NO. 151657/2020

MOTION DATE 05/10/2024

MOTION SEQ. NO. 007 008

- v -

NY FIRETECH INC, NY FIRE SERVICE & INSTALLATION
INC, GLOBAL LUXURY SERVICES INC.,

Defendants.

**DECISION + ORDER ON
MOTION**

-----X

GLOBAL LUXURY SERVICES INC.

Plaintiff,

-against-

WOK EXPRESS 2133 INC., DEJIN LIN, DE JIN LIN D/B/A
NEW WOK EXPRESS

Defendants.

Third-Party
Index No. 595538/2020

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The following e-filed documents, listed by NYSCEF document number (Motion 007) 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 238, 240, 241, 242, 243, 244, 245, 246, 247, 256, 257, 258, 259, 260, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271

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

The following e-filed documents, listed by NYSCEF document number (Motion 008) 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 239, 248, 249, 250, 251, 252, 253, 254, 255, 261, 272

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

Defendant/third-party plaintiff Global Luxury Services Inc. (Global) moves for summary judgment, pursuant to CPLR 3212, dismissing all claims and cross-claims brought against it (Motion seq. no. 007).

Defendant NY Firetech Inc. (Firetech) moves for summary judgment dismissing all claims and cross-claims brought against it (Motion seq. no. 008).

This is a subrogation action involving a fire incident that occurred on September 28, 2019 at a ground floor restaurant known as New Wok Express (New Wok), located at 2133 3rd Avenue, New York, New York (premises). The owner of the premises, 2133 3rd Avenue Corp. (2133 3rd Ave.), leased a portion of the ground floor to New Wok. The owner's insurer, plaintiff New York Marine and General Insurance Company (New York Marine), paid the owner's insurance claim and assumed the role of subrogee, commencing this negligence action against defendants.

Two of the defendants seek dismissal of all claims and cross-claims on the ground that they have not committed any acts of negligence in connection with the fire and that New Wok's negligence is the proximate cause of the fire.

I. GLOBAL'S MOTION (SEQUENCE NUMBER 007)

A. Contentions

Global is a corporate entity in the business of hood and duct cleaning for restaurants. Plaintiff alleges in its complaint that Global exacerbated the fire by negligently cleaning New Wok's hoods and ducts before the fire.

Global argues that it was not negligent in its cleaning, as it cleaned New Wok's hood only one month before the fire. However, while there was a hole in the ductwork and no access panels to clean the exhaust system, a New Wok employee allegedly told Global to clean the hood only, not the duct.

Thus, after cleaning the hood, Global sent a letter to New Wok informing it that the duct work was not up to code, that Global could not access the panels, and that the situation could be

a fire hazard. Global contends that New Wok never responded and never scheduled another cleaning by Global. Global also contends that the fire was caused by cooking oil in a pan used by a New Wok employee, that the fire suppression equipment on hand failed to operate properly, and that the fire therefore expanded.

Global relies on the following evidence:

An insurance adjuster and investigator working on behalf of New York Marine, testified at a deposition that he was assigned its insurance claim on September 30, 2019, and on October 1, 2019, he spoke to the co-owners of the premises, who told him that the fire originated in the restaurant, and traveled up the kitchen's exhaust duct, damaging a number of apartments and the roof. The adjuster was shown the site of the fire and informed that the fire suppression equipment failed to activate, allowing the fire to travel up the exhaust duct. He also testified that pursuant to the lease, New Wok was responsible for the maintenance of the exhaust system and ductwork (NYSCEF Doc. No. 194).

An employee of Firetech testified at a deposition on Firetech's behalf and stated that Firetech is in the business of the installation and servicing of kitchen fire suppression systems. She described the fire suppression system at issue as an automated system that protects kitchen equipment and the range hood, and if a fire occurs in the cooking equipment, the system is supposed to detect the fire (NYSCEF Doc. No. 195).

The employee further testified that Firetech performed work for New Wok on five occasions, the last time in March 2019. The fire suppression equipment is subject to semi-annual inspections along with service, and there are two types of inspections; one semi-annual and one separate hydro inspection, which is required if the tank cylinder is over 12 years old; the tank cylinder next to the range hood is part of the system. On February 22, 2019, while Firetech

was conducting a semi-annual inspection, New Wok was informed that the cylinder was out of date and needed to be inspected (*id.*).

On March 30, 2019, Firetech performed a hydro inspection but only after New Wok received a ticket from the New York City Fire Department (FDNY), which conducted its own inspection of the system. On March 30, 2019, the old cylinder was replaced, and a new cylinder installed, and the system was subsequently tested and passed inspection (*id.*).

A co-owner of Firetech and NY Fire testified as to the hydro inspection of New Wok's fire suppression equipment. The system has a mechanism for discharging chemicals on a fire, and there is a fusible link and if the heat spreads to the link, it causes a discharge of chemicals to dampen the fire. There is also a CO2 cartridge located in the cylinder, which must be properly set in order for it to discharge. He was shown photographs of the kitchen, and noted that a picture of the cylinder revealed that its pressure gauge was shown as "full," which indicated that the cylinder had not discharged chemicals to dampen the fire. NY Fire performed its own inspection of the equipment on August 8, 2019 (NYSCEF Doc. No. 196).

Global's president testified at a deposition that restaurants like New Wok accumulate a lot of grease and that the FDNY requires the hoods to be cleaned at least once a month. Prior to the actual cleaning, which occurred on July 19, 2019, the president visited the restaurant to examine the hood and exhaust system. He notified the restaurant owner that there were no access panels and advised New Wok that the absence of a panel would prevent a cleaning of the exhaust system. New Wok told him to clean only the hood, not the duct (NYSCEF Doc. No. 197).

After the cleaning, Global provided a certificate on the hood to certify that the hood was clean, but the ducts were not considered up to code. Global failed to complete the cleaning and never worked for New Wok again (*id.*).

A letter, dated July 20, 2019, from Global to New Wok, contains Global's concern about the lack of panels and the failure of access to the exhaust system, and the possibility of a fire hazard (NYSCEF Doc. No. 203).

New Wok's owner testified at a deposition that the cooking equipment, ducts and fire suppression system were already intact when he took over the space from a different restaurant that had previously been there. He acknowledged that he had replaced the cylinder of the fire suppression equipment and that Global cleaned the restaurant's hood, but he claimed that Global cleaned both the hood and ducts. The owner also testified that at the time of the fire, the fire suppression equipment failed to work, and he acknowledged that he did not contact Global about any additional cleaning (NYSCEF Doc. No. 198).

Co-owner of 2133 3rd Ave testified that the insurance adjuster contacted him about the fire, asking him why the exhaust system in the restaurant did not have an inspection ticket. He stated that he did not know if the FDNY inspected the system (NYSCEF Doc. No. 199).

The Fire Incident Report, dated November 6, 2019, provides that the cause of the fire was combustible material (cooking oil) on the restaurant stove and the fire expanded into the duct work and outside of the restaurant. Another report from a certified fire investigator who conducted his own inspection of the premises agrees with the conclusion in the Fire Incident Report as to the cause of the fire (NYSCEF Doc. No. 201).

A licensed Fire Protection Engineer was retained to examine the cause of the fire, and based on his professional experience, his review of relevant information and Global's evidence,

and his inspection of the restaurant, he concluded that New Wok had the sole responsibility to maintain the exhaust system, and that the fire suppressions system failed to function properly due to its improper maintenance (NYSCEF Doc. No. 202).

Global contends that based on the evidence, it has sustained its prima facie burden of showing that it was not negligent in causing or contributing to the fire, and is thus entitled to summary dismissal.

Plaintiffs oppose dismissal, relying on affidavits from their experts, in which both experts opine that there is an issue of fact as to Global providing a certificate/tag after cleaning the hood at New Wok. They observe that the certificate indicates that Global had cleaned the ducts, whereas Global subsequently notified New Wok that it was unable to clean them. Plaintiffs argue that if Global knowingly failed to complete its work, it was negligent in providing a certificate indicating it had completed it.

NY Fire argues that as there was a contractual relationship between Global and New Wok at the time of the cleaning, Global can be held liable for launching a force or instrument of harm pursuant to the rule articulated in *Espinal v Melville Snow Contractors Inc.*, 98 NY2d 136 (2002), which provides that a third- party can sue a party to a contract in certain situations. NY Fire submits a copy of an FDNY publication related to restaurants which includes department rules and regulations and also addresses the responsibilities of companies that clean restaurants, such as Global. The publication provides that such cleaning companies have a duty to notify the FDNY of deficiencies in restaurants, such as exhaust systems. NY Fire thus contends that Global's failure to notify the FDNY of New Wok's deficient exhaust system before the fire constitutes evidence of its negligence, thereby precluding the granting of summary judgment (NYSCEF Doc. No. 258).

Firetech argues that to the extent that Global suggests any negligence on Firetech's part, Firetech denies any liability based on its arguments raised in its summary judgment motion.

In reply, Global argues that the expert affidavits are deficient and conclusory, and that New Wok is liable for the fire as it failed to maintain its exhaust system, despite Global's advice that it do so. Global denies that there was a contract between it and New Wok and contends that it only worked for New Wok once. According to Global, the FDNY publication only addresses the responsibilities of restaurant owners in connection with safety measures, and there is no specific rule applicable to cleaning companies like Global.

B. Analysis

“It is axiomatic that summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues” (*Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]). “The substantive law governing a case dictates what facts are material, and ‘[o]nly disputes over facts that affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment” (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). “To prevail on a summary judgment motion, the moving party must provide evidentiary proof in admissible form sufficient to warrant the direction of summary judgment in his or her favor (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 81 [1st Dept 2013]). “Once this burden is met, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Id.* at 82).

Based on the evidence, Global only cleaned New Wok's equipment one time, and was unable to access the ductwork but notified New Wok the following day and warned that the system could be a potential fire hazard. Thus, as Global was unable to clean the ductwork but

gave notice of the issue to New Wok, it has established that it did not act negligently in relation to the cleaning.

Moreover, as there is no contractual privity between plaintiff's subrogee and Global, it could only be held liable to plaintiff if it launched a force or instrument of harm (*see Espinal*, 98 NY2d at 136). As there is no evidence that Global cleaned the system negligently, either by failing to clean it at all or, according to New Wok, not cleaning it correctly, there is no basis for finding that it launched a force or instrument of harm absent proof that it created or exacerbated the alleged dangerous condition, i.e. the cooking grease. In other words, the cooking grease which allegedly caused the fire was present in the system before Global was hired to clean it, and there is no evidence that anything it did or did not do made the condition more unsafe (*see Mariacher v LPCiminelli, Inc.*, 225 AD3d 1288 [4th Dept 2024] [party's passive omission may create or exacerbate dangerous condition if there is evidence linking failure to act to creation or exacerbation of condition; must be evidence that contractor left premises in more dangerous condition than it found them]; *see also Robles v Taconic Mgt. Co., LLC*, 173 AD3d 1089 [2d Dept 2019] [contractor not liable as it did not launch force or instrument of harm where its alleged negligence was omission of failing to perform duty of operating elevator and preventing others from doing so]).

Finally, while it is undisputed that Global did not comply with FDNY regulations requiring that it notify FDNY of any deficiencies in a cooking exhaust system, and while the violation of a regulation is some evidence of negligence (*see PJI 2:29 [2024]*), it cannot be the sole evidence of negligence, and the alleged negligence must be shown to have proximately caused the damages at issue (*id.*; *see also Schoonover v Diaz*, 222 AD3d 1244 [3d Dept 2023]

[as proof of regulatory violation is only “some evidence” of negligence, plaintiff must also show violation was proximate cause of injuries in order to prevail]).

Here, the violation is the only evidence of negligence since, as discussed above, there is no proof that Global created or exacerbated a dangerous condition. Moreover, there is no evidence in this record that Global’s failure to notify the FDNY was a proximate cause of the fire, and it would be purely speculative, in the absence of such evidence, for a jury to determine that had Global notified the FDNY as required, the FDNY would have taken some action in time to prevent the fire (*see e.g., Vavosa v Stiles*, 220 AD2d 363 [1st Dept 1995] [only evidence of breach of duty was leash law violation, which was not dispositive, and no evidence that violation was proximate cause of incident at issue]).

For all of these reasons, Global demonstrates that is entitled to summary dismissal of all claims and cross-claims against it.

II. FIRETECH’S MOTION (SEQUENCE NUMBER 008)

A. Contentions

Firetech relies on the same evidence submitted by Global, and includes a copy of the insurance policy between New York Marine and 2133 3rd Ave. Firetech argues that it did not act negligently in its maintenance and inspection of the fire suppression equipment, and that New Wok was solely negligent in its handling of the kitchen materials. Firetech also argues that routine equipment maintenance is not covered by the applicable insurance policy and that plaintiff Certain Underwriters of Lloyd’s (Lloyd’s) lacks standing in this action. Firetech maintains that any payment New York Marine made to 2133 3rd Ave. was voluntary, and that plaintiff Certain Underwriters of Lloyd’s (Lloyd’s) has no interest in this case, as it is not related to the insured and is not covered by the policy.

Firetech contends that it replaced an old cylinder in the fire suppression equipment approximately six months before the fire occurred, and an inspection of the equipment passed muster and Firetech had no further involvement with New Wok. Moreover, Firetech alleges, NY Fire inspected the equipment in the six months between Firetech's work and the fire, and did not communicate with Firetech about it before the fire.

Firetech cites Section 2(B)(3)(c)(4) of the insurance policy, which provides, in part that the [Insurer] will not pay for loss and damage caused by or resulting from ...faulty, inadequate or defective maintenance..." (NYSCEF Doc. No. 232). Firetech contends that its work at New Wok's restaurant constituted routine maintenance, and was therefore not covered under the policy. Firetech argues that any payment plaintiff New York Marine made to 2133 3rd Ave. was voluntary, and that plaintiff Lloyd's has no interest in this case, as it is not related to the insured and is not covered by the policy.

In opposition, plaintiffs rely on their experts' opinions that the fire was exacerbated by Firetech due to its failure to properly install the new cylinder. They also contend that there is an overlapping relationship between Firetech and NY Fire, based on common ownership and the sharing of the same operating license, and observe that both entities inspected the equipment prior to the fire.

Plaintiffs contend that the policy refers to the maintenance of the insured's property, with 2133 3rd Ave as the insured, and that New Wok is not covered by the policy. Plaintiffs also claim that the concept of a voluntary payment is based on a proper interpretation of policy language, and not Firetech's interpretation. As for Lloyd's standing, plaintiffs argue that New York Marine's policy has a \$50,000 deductible insured by Lloyd's, subject to the

insured's deductible, and that as Lloyd's paid the deductible, it became a subrogee with standing to sue here.

NY Fire argues that it is entitled to indemnification if Firetech is found liable and otherwise joins in plaintiffs' opposition.

In reply, Firetech argues that its maintenance of the fire suppression equipment was not inadequate and the fire was not a foreseeable act. It avers that the expert affidavits are speculative and conclusory, and fail to show in detail how it performed an inadequate job. Firetech argues that it and NY Fire are separate and distinct companies with separate functions and employees, and that the two entities have separate offices and have employed separate counsel for this action. Firetech also maintains its position that its work is not covered by the insurance policy and that payment by New York Marine was voluntary. Firetech claims that absent any proof that Lloyd's paid a deductible related to the fire at issue, it has not established standing to sue here.

B. Analysis

The first issue to be resolved is whether the exclusion clause of the insurance policy applies here. When the intention of the parties to a contract is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used (*see Slatt v Slatt*, 64 NY2d 966, 967 [1985]).

The policy does not cover inadequate maintenance on the insured's property, which is 2133 3rd Ave.'s property. Maintenance on New Wok's property, which is the case here, is not designated as an exclusion. On the Building and Personal Property Coverage Form in the policy, Section A(1)(c), provides that the exclusion covers the personal property of other entities besides the insured, provided said property is under the insured's care, custody or control. Here, New

Wok had control over the equipment in its space before and at the time of the fire. Thus, Firetech is covered by the policy for its work on New Wok's equipment.

Moreover, Firetech established that it and NY Fire are separate companies based on the deposition testimony of Firetech's employee, who testified that Firetech had a separate workforce from NY Fire and no employees in common. While Firetech inspected New Wok's equipment until late March 2019, NY Fire took over afterward.

While plaintiffs' experts opine that Firetech improperly adjusted or installed the new cylinder, they provide no detail regarding same, and thus the plaintiffs fail to raise a triable issue as to Firetech's alleged negligence. To defeat a summary judgment motion, the opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine issues of fact exist. Reliance on surmise or conclusory assertions will not suffice for this purpose (*see Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772, 773 [1st Dept 1983]; *affd* 62 NY2d 686 [1984]).

However, as there is proof that Lloyd's paid a deductible on the insurance policy at issue here (NYSCEF 224), Firetech does not demonstrate that Lloyd's lacks standing to sue here.

III. CONCLUSION

Accordingly, it is hereby

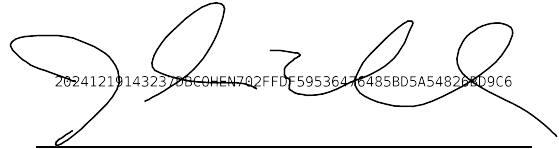
ORDERED that defendant/third-party plaintiff Global Luxury Services Inc.'s motion for summary judgment (Motion seq. no. 007) is granted as to dismissing all claims and cross-claims against it, and the complaint is severed and dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that defendant NY Firetech Inc.'s motion for summary judgment (Motion seq. no. 008) is granted as to dismissing all claims and cross-claims against it, and the

complaint is severed and dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining parties appear for a settlement/trial scheduling conference on March 26, 2025 at 10 a.m. at 71 Thomas Street, Room 305, New York, New York.



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12/19/2024
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE