

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS V. POLIZZI IA PART 14
Justice

	X	
JACK ADLER and DORA ADLER, et al.,		Index Number <u>223</u> 1987
Plaintiffs,		Motion Date <u>August 19,</u> 2003
- against-		
COLUMBIA SAVINGS & LOAN ASSOCIATION, et al.,		Motion Cal. Number <u>1</u>
Defendants.		
	X	

The following papers numbered 1 to 39 were read on this motion by the defendant Wells Fargo Alarm Services, a Division of Baker Protective Services, Inc., pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims interposed against it by the defendant Columbia Savings & Loan Association, a/k/a Columbia Savings, F.A. a/k/a Columbia Federal Savings.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Answering Affidavits - Exhibits	5-31
Reply Affidavits	32-39

Upon the foregoing papers it is ordered that the motion is determined as follows:

I. The Relevant Facts

On September 9, 1977, the defendant Columbia Savings Loan Association a/k/a Columbia Savings, F.A. a/k/a Columbia Federal Savings ("Columbia"), contracted with the defendant Wells Fargo Alarm Services, a Division of Baker Protective Services, Inc. ("Wells Fargo"), for the installation and maintenance of an alarm system at Columbia's premises in Forest Hills, Queens.

The contract contained the following provision:

"It is understood that Wells Fargo is not an insurer; that insurance shall be obtained by Subscriber, if any is desired; that the sums payable hereunder to Wells Fargo by Subscriber are based upon the value of services offered and the scope of liability undertaken and such sums are not related to the value of property belonging to Subscriber or to others located on Subscriber's premises. Subscriber does not seek indemnity by this agreement from Wells Fargo against any damages or losses caused by hazards to Subscriber's property. Wells Fargo makes no warranty, express or implied, that the systems it installs or the services it furnishes will avert or prevent occurrences, or the consequences therefrom, which the systems and services are designed to detect. Subscriber agrees that Wells Fargo shall not be liable for any of Subscriber's losses or damages, irrespective of origin, to person or to property, whether directly or indirectly caused by performance or nonperformance of obligations imposed by this contract or by the negligent acts or omissions of Wells Fargo, its agents or employees. The Subscriber does hereby waive and release any rights of recovery against Wells Fargo that it may have hereunder. It is agreed that if Wells Fargo should be found liable for any losses or damages attributable to a failure of systems or services in any respect, its liability shall be limited to a sum equal to ten percent of the annual charge hereunder, or \$250.00, whichever is greater."

Pursuant to paragraph 8 of the "Terms and Conditions" of the contract, Columbia authorized and empowered Wells Fargo to perform, or cause to be performed, the work necessary to install, monitor, inspect, test and repair the systems at the premises.

Prior to executing the contract, Wells Fargo surveyed the vault and its interior, which contained safe deposit boxes. Safe deposit box customers of Columbia occasionally asked whether the vault was alarmed or protected, and would be informed that it was alarmed. Only if the customer specifically asked the name of the alarm company would the customer be told it was Wells Fargo. In addition, Wells Fargo had a decal on the entrance to the door of the bank with its name on it and, possibly, another decal near the safe deposit boxes.

The same alarm system installed by Wells Fargo at Columbia's Forest Hills branch was installed at a branch owned by the East River Savings Bank in Flushing, Queens ("East River"), and at other banks or branches. During the weekend of June 12-14, 1982, a successful safe deposit box vault burglary occurred at East River. In addition, prior to the East River burglary, there were other

burglaries in banks with the same alarm system.

Although Wells Fargo considered an "inside job" and "the human factor" following the East River burglary, as early as June 22, 1982, during the course of its investigation, Wells Fargo determined that the East River alarm system had been successfully compromised. At one of several meetings held by Wells Fargo for representative banking groups in July, 1982, Wells Fargo representatives admitted that the alarm system could be compromised; however, Columbia was not present at that meeting. At that time, Wells Fargo did recommend to the attendees that a backup or redundant alarm system be installed to thwart any attempted compromise in the future.

By letter dated September 15, 1982, from Wells Fargo to East River, Wells Fargo indicated that it had determined that its own employees had not been involved in the East River burglary, and that the alarm system at that bank had been compromised.

About eight months after the East River burglary, over the holiday weekend of February 19-22, 1983, a burglary occurred at Columbia's Forest Hills branch, and the contents of safe deposit boxes and cash, were stolen. The same method of compromising the East River alarm system was used to compromise the alarm system at Columbia's Forest Hills branch.

Prior to the Columbia burglary, Wells Fargo did not otherwise warn or inform any of its other customers using the same alarm system that burglars had the ability to compromise the system, and did not recommend any other precautions which should be taken. Three weeks after the Columbia burglary, on March 11, 1983, Wells Fargo convened a general meeting of the New York banking community to, inter alia, announce that its alarm system had been compromised. On that date and thereafter, it issued various warnings and precautions that its customers should take, and outlined a new and improved protective system that it was implementing.

The plaintiff-renters of safe deposit boxes at Columbia's Forest Hills branch, commenced this action against Columbia interposing 56 causes of action seeking damages based upon breach of contract, negligence and the bailor/bailee relationship between the parties (Index No. 00223/87). The plaintiffs also commenced a separate action against Wells Fargo, seeking damages for negligence, breach of contract based upon their status as third-party beneficiaries of the Columbia/Wells Fargo contract, negligent performance of the contract, breach of warranty and strict liability (Index No. 02608/86).

By order dated July 22, 1987, this Court (DiTucci, J.)

consolidated the two actions for all purposes under Index No. 00223/87. Columbia then interposed an amended answer which cross-claimed against Wells Fargo for common-law contribution and indemnification.¹

II. Wells Fargo's Motion

Wells Fargo moves for summary judgment dismissing all claims and cross claims interposed against it, asserting that: (1) it owes no duty to the plaintiffs who are not intended third-party beneficiaries of the Columbia/Wells Fargo contract; (2) Columbia cannot interpose a cross claim for indemnification as there is no contractual indemnification provision, it owes no duty to the plaintiffs, and if Columbia is at fault to any agree, it cannot be indemnified for its own negligence; (3) Columbia cannot seek common-law contribution in view of the exculpatory clause contained in the Columbia/Wells Fargo contract, which limits Wells Fargo's liability; (4) even assuming that Wells Fargo was grossly negligent, the exculpatory clause is binding; and, (5) in any event, the evidence demonstrates as a matter of law that Wells Fargo was not grossly negligent.

In support, Wells Fargo submits, inter alia, the affidavit of an expert who asserts, inter alia, that: (1) the alarm system had never been successfully defeated prior to the East River bank burglary in June, 1982; and, (2) in his opinion, the alarm system in place at Columbia at the time of the burglary was the best system in use at that time.

Columbia opposes the motion, contending that: (1) the exculpatory clause is not enforceable where there is gross negligence; (2) there are triable issues of fact as to whether Wells Fargo was grossly negligent; and, (3) as Columbia's right to contribution or common-law indemnification is not dependent upon any duty owed by Wells Fargo to the plaintiffs, the motion for summary judgment on the cross claims should be denied.

In support Columbia submits, inter alia, the affidavit of an expert and its former Auditor and Security Officer who assert, inter alia, that: (1) Wells Fargo should have promptly notified all

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By memorandum decision dated September 11, 1987 and entered January 26, 1988, this court (DiTucci, J.), denied a motion by Wells Fargo for partial summary judgment dismissing the first, third and fourth causes of action interposed in the complaint, without prejudice to renewal following disclosure. Apparently, the memorandum decision was never reduced to an order.

customers of the vulnerability of the alarm system once it was compromised; (2) Wells Fargo should have recommended additional mitigating measures, including a procedure for conducting remote testing on all such alarm systems to reduce, if not eliminate, the possibility of any compromise; and, (3) had Columbia been informed that the same alarm system used to protect its vault had been compromised at another bank, it would have considered other additional safeguards to protect its property and that of its customers.

The plaintiffs oppose Wells Fargo's motion, contending, inter alia, that they are third-party beneficiaries of the Columbia/Wells Fargo contract, they detrimentally relied on Wells Fargo's performance of its obligations, and Wells Fargo was negligent or grossly negligent in, inter alia, failing to warn or failing to recommend other procedures to safeguard the alarm system from compromise. In support, they annex the affidavits of experts who state, inter alia, that: (1) Wells Fargo failed to warn or provide them with adequate security once it was aware of the compromise at the East River bank; and, (2) had such steps been taken, the burglary could have been thwarted.²

Wells Fargo replies, inter alia, that as a matter of law it cannot be grossly negligent as, between the time of the East River and Columbia burglaries, it had not conclusively determined that the alarm system had been compromised.

III. Decision

A. Wells Fargo's Liability to Plaintiffs

Generally, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries (see, Eaves Brooks Costume Co. v Y.B.H. Realty Corp., 76 NY2d 220, 226). The Court of Appeals has recognized three situations where a contracting party may be deemed to have assumed a duty of care to third persons, including where the performance of the contractual obligations of the contracting party has induced the plaintiff to detrimentally rely on the contracting party's continued performance (see, Church v Callanan Indus., 99 NY2d 104; Espinal v Melville Snow Contractors, Inc.,

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In addition, the plaintiffs Lucy Yehaskel, Sam Yehaskel and Leopold Presser note that they settled their claims against Columbia and, in exchange, Columbia assigned to them its cross-claims against Wells Fargo. They urge that as Columbia's assignees, they possess direct claims against Wells Fargo.

98 NY2d 136, 142-143; Eaves Brooks Costume Co. v Y.B.H. Realty Corp., supra; Boyd v J. Hall Ltd., ___ AD2d ___, 763 NYS2d 149).

Here, there is no evidence that the plaintiffs ever had contact with Wells Fargo or its employees, or that they were aware of the nature and terms of the contract. The decals posted in the bank and the assurances by Columbia employees of the existence of an alarm system or of a Wells Fargo alarm system, are insufficient predicates to impose a duty of care on Wells Fargo that is owed to the plaintiffs, and is insufficient to support a finding that the plaintiffs reasonably relied to their detriment on the past conduct of Wells Fargo or its employees (see, Eaves Brooks Costume Co. v Y.B.H. Realty Corp., supra; Nieves v Holmes Protection, Inc., 56 NY2d 914; Boyd v J. Hall Ltd., supra).

Similarly, the plaintiffs were not owed any duty of care as intended beneficiaries of the Wells Fargo/Columbia contract. To succeed on such a theory, the plaintiffs must establish: (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for their benefit; and, (3) that the benefit to them is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate them if the benefit is lost (see, California Pub. Employees' Retirement Sys. v Shearman & Sterling, 95 NY2d 427, 434-35, quoting Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 336; Boyd v J. Hall, supra). The Wells Fargo/Columbia contract neither identifies the plaintiffs as intended beneficiaries nor implies that third parties have the power to enforce its provisions (see, Boyd v J. Hall, supra).

Accordingly, that branch of Wells Fargo's motion which seeks summary judgment dismissing the complaint interposed against it is granted, and the complaint is dismissed as to Wells Fargo.

B. Wells Fargo's Liability To Columbia

Generally, absent a statute or public policy to the contrary, a contractual provision absolving a party from its own ordinary negligence will be enforced (see, Sommer v Federal Signal Corp., 79 NY2d 540, 553-554). Nonetheless, an alarm company owes its customer a duty of reasonable care independent of its contractual obligations; as a result, and notwithstanding a contractual provision exculpating the alarm company from damages flowing from its ordinary negligence, the alarm company can be held liable in tort for its gross failure to properly perform its contractual services (see, Sommer v Federal Signal Corp., supra; see also, New York Univ. v Continental Ins. Co., 87 NY2d 308, 317).

When invoked to pierce an agreed-upon limitation of liability in a commercial contract, the alleged gross negligence must smack

of intentional wrongdoing and constitute conduct that evinces a reckless indifference to the rights of others (see, Sommer v Federal Signal Corp., supra at 554; Aphrodite Jewelry, Inc. v D&W Cent. Station Alarm Co., Inc., 256 AD2d 288). To the extent that an exculpatory agreement purports to grant an exemption for liability for willful or grossly negligent acts, it is void (see, Hanover Ins. Co. v D&W Cent. Station Alarm Co., Inc., 164 AD2d 112; Idone v Pioneer Sav. & Loan Ass'n, 159 AD2d 560).

Thus, where gross negligence is alleged, but no issue of fact is raised as a matter of law, the contractual exculpatory and limitation of liability clauses will be enforceable (see, e.g., David Gutter Furs v Jewelers Protection Servs., Ltd., 79 NY2d 1027; Hartford Ins. Co. v Holmes Protection Group, 250 AD2d 526; Guston Furs Ltd. v Comet Realty Corp., 225 AD2d 417).

Otherwise, the issue of whether gross negligence exists which, in turn, will void the exculpatory clause, is one of fact for the jury (see, Sommer v Federal Signal Corp., supra at 555; see also, Hartford Ins. Co. v Holmes Protection Group, supra; Federal Ins. Co. v Honeywell, Inc., 243 AD2d 605; Williamsburg Food Specialties, Inc. v Kerman Protection Sys., Inc., 204 AD2d 718; Hanover Ins. Co. v D&W Central Station Alarm Co., Inc., supra).

Here, there are triable issues of fact as to when Wells Fargo conclusively knew about the compromise to its alarm system, whether it should have warned customers with similar alarm systems or recommended further protective procedures earlier than it did, and whether any failure to make such earlier warnings and recommendations constituted gross negligence. The liability of Wells Fargo to Columbia for contribution or indemnification, if any, will attach only upon a finding of gross negligence by Wells Fargo (see, Sommer v Federal Signal Corp., supra at 558-560).

Accordingly, the branch of the motion by Wells Fargo for summary judgment dismissing all cross claims interposed against it by Columbia, is denied.

The court has reviewed all of the parties' related contentions and finds them to be without merit.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the branch of the motion by the defendant Wells Fargo Alarm Services, a Division of Baker Protective Services, Inc., for summary judgment dismissing the complaint is granted, and the complaint interposed against that defendant is dismissed; and

it is further

ORDERED that the branch of the motion by the defendant Wells Fargo Alarm Services, a Division of Baker Protective Services, Inc. for summary judgment dismissing all cross claims interposed against it by the defendant Columbia Savings & Loan Association, a/k/a Columbia Savings, F.A. a/k/a Columbia Federal Savings, is denied.

Dated: September 26, 2003

J.S.C.