

**Stanley & Sons, Inc. v Wells Fargo Alarm Services,
Inc.**

2001 NY Slip Op 30057(U)

December 31, 2001

Supreme Court, New York County

Docket Number: 124149/97

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN, J.S.C.
Justice

PART 57

Stanley & Sons Inc
Nella Lopez Alvarez
et al

INDEX NO. 124149917
MOTION DATE _____
SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits .
notice of Cross - Motion
Answering Affidavits — Exhibit _____

PAPER NUMBER	SCANNED
1	
2	JAN 08 2002
3	
4	
5	

Replying Affidavits _____
Memo of Law

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion are
decided per accompanying decision / order
dated 12/31/07

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12/31/07

Marcy Friedman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 57

Index No. 124149/97

STANLEY & SONS, INC.,

Plaintiff,

-against-

DECISION/ORDER

WELLS FARGO ALARM SERVICES, INC., THE
 CITY OF NEW YORK and THE NEW YORK CITY
 POLICE DEPARTMENT,

Defendants.

X

In this action, plaintiff Stanley & Sons, Inc. (“Stanley”) sues to recover for property damages allegedly sustained as a result of a burglary at its premises on May 20, 1997. The complaint asserts causes of action for gross negligence and breach of contract against defendant Wells Fargo Alarm Services, Inc. (“Wells Fargo”), and for negligence against defendants. The City of New York and The New York City Police Department (“City”). Wells Fargo moves, and the City cross-moves, for summary judgment dismissing the complaint.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851,853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” (Zuckerman v. City of New York, *supra*, at 562.)

It is undisputed that, at the time of the burglary, Wells Fargo had contracted with plaintiff to provide and maintain a burglar alarm system at plaintiffs premises, a retail jewelry store. The events surrounding the burglary are also not in dispute. **An** alarm was received from plaintiffs premises at approximately 3:06 a.m. by Wells Fargo, and a second alarm was received at about 4:28 a.m. A Wells Fargo guard was dispatched at about 4:59 a.m., and arrived at the premises at about 5:31 a.m.

Wells Fargo moves to dismiss the complaint on the grounds that the limitation of liability provision of the contract exculpates it from ordinary negligence, and that its conduct as a matter of law was not grossly negligent. Wells Fargo contends that its delay in responding to the alarm was insufficient to demonstrate a “reckless indifference to the rights of others” as is required to find gross negligence. (Aff. of Andreas E. Theodosiou, Esq., ¶ 15.)

The parties’ contract provides in pertinent part:

Subscriber agrees that Wells Fargo Alarm 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 any obligation imposed by this agreement or by negligent acts or omissions of Wells Fargo Alarm, its agents or employees. It is agreed that if Wells Fargo Alarm 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 the annual charge hereunder, or \$10,000.00, whichever is less.

It is now well established that “[a]bsent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced.” (Sommer v. Federal Signal Corp., 79 NY2d 540, 553 [1992].) “Public policy, however, forbids a party’s attempt to escape liability, through a contractual clause, for damages occasioned by ‘grossly negligent conduct.’” (Colnaghi, USA, Ltd. v. Jewelers Protection Servs., Ltd., 81 NY2d 821,

823 [1993]; Sommer v. Federal Signal Corn., supra, at 554; Kalisch-Jarcho, Inc. v Citv of New York, 58 NY2d 377 [1983].) “This applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum.” (Sommer v. Federal Signal Corn., supra, at 554.) “Used in this context, ‘gross negligence’ differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing.” (Colnaghi, USA. Ltd.. v. Jewelers Protection Servs., Ltd., supra, at 823-824; Sommer v. Federal Signal Corn., supra, at 554.)

Here, plaintiff contends that Wells Fargo was grossly negligent because it failed to dispatch a guard to the premises for almost two hours after it received the first alarm, notwithstanding that plaintiffs contract required a general response time of 15 minutes. According to the deposition testimony of Timothy McEnaney, Wells Fargo’s Central Station Manager, Stanley was classified as a “double A2” customer, which entitled plaintiff to a guard response time of “15 minutes 80 percent of the time” and a preference in response time over other non double A2 customers. (McEnaney Dep [Aug. 19, 19991, at 73-74; McEnaney Dep [Oct. 18, 19991, at 24-26.) Plaintiff thus argues that Wells Fargo’s delayed response was grossly negligent in view of plaintiffs classification as a “double A2” customer.

Plaintiff also argues that Wells Fargo was grossly negligent based on its contacts with the police. It is undisputed that while Wells Fargo notified the police of the first alarm, it informed the police that Wells Fargo would respond to that alarm, but did not notify the police once it determined there was not in fact a guard available to respond. (McEnaney Dep [Oct. 18, 19991, at 7-9.) Wells Fargo did not notify the police of the second alarm. (Id., at 9-10.) Plaintiff asserts that Wells Fargo’s failure to inform the police that it was not responding to the first alarm and its

failure to notify the police of the second alarm evidences reckless indifference to its obligations to plaintiff.

Courts have repeatedly held that “[d]elayed or inadequate response to an alarm signal, without more, is not gross negligence.” In Hartford Ins. Co. v. Holmes Protection Group (250 AD2d 526,528 [1998]), this Department held that a security company’s late response on two dates to alarms and failure to notify police did not constitute gross negligence, notwithstanding that its contract required it to have security guards arrive at the premises within 15 minutes of receipt of the alarm signal. (See also, Consumers Distrib. Co. v. Baker Protective Servs., Inc., 202 AD2d 327 [1st Dept 1994], lv denied 84 NY2d 811 [failure to respond on two separate occasions to signal indicating burglary despite hourly reminders was not gross negligence]; Advance Burglar Alarm Sys., Inc. v. D’Auria, 110 AD2d 860 [2d Dept 1985][allegation of failure to provide appropriate and timely guard response stated claim for ordinary not gross negligence]; Dubovskv & Sons, Inc. v. Honeywell, Inc., 89 AD2d 993 [2d Dept 1982][complaint pleading failure to dispatch knowledgeable person to determine cause of alarm alleged ordinary not gross negligence].)

Hanover Ins. Co. v. D & W Cent. Sta. Alarm Co., 164 AD2d 112 [1st Dept 1990], on which plaintiff relies, is not to the contrary. Like the instant case, Hanover involved a lengthy delay in dispatching a guard to the premises. The guard was dispatched shortly after a third alarm, but approximately one hour from the time of the second alarm and two hours from the time of the first alarm. However, in Hanover, the court found that triable issues of fact existed as to whether defendant was grossly negligent because, in addition to the delay in responding to the alarms, defendant not only failed “to notify the police upon receipt of three alarm signals in the

span of four hours,” but directed “the guard who responded to ‘forget the assignment’ because he encountered difficulty in entering the building.” (Id., at 115.) The significance of the security company’s directive to its guard to “forget the assignment” is emphasized in this Department’s later decision in Hartford Ins. Co. v. Holmes Protection Group (supra, at 528) which, in summarizing the holding in Hanover Ins. Co., noted that a triable issue of gross negligence existed based on the company’s “instructing its guard to ‘forget the assignment’ when he had difficulty getting into the building, coupled with its failure to notify the police.’ ” The court in Hartford Ins. Co. also emphasized that “a triable issue of ‘gross negligence’ is not typically found absent more outrageous acts of folly.” (Id.)

Here, although defendant’s delay in responding to the alarms was inordinate, the delay without more is not gross negligence. (See, Hartford Ins. Co. v. Holmes Protection Group, supra.) Moreover, although plaintiff argues that defendant’s failure to inform the police that it was not responding raises an issue of gross negligence, there is no evidence that the police would have acted any differently had Wells Fargo advised the police that it was not responding to the alarm. To the contrary, the complaint against the City alleges that the City “at some time prior to May 20, 1997 determined not to respond to burglar **alarms at the Premises.**” (Verified Complaint, ¶ 27.) Thus, while Wells Fargo’s response to the alarm is “perhaps suggestive of negligence or even ‘gross negligence’ as used elsewhere, [it] does not evince the recklessness necessary to abrogate [Stanley’s] agreement to absolve [Wells Fargo] from negligence claims.” Colnaghi, USA, Ltd., v. Jewelers Protection Servs., Ltd., supra, at 824.) Wells Fargo is therefore entitled to summary judgment dismissing the first cause of action for gross negligence.

Wells Fargo also seeks to dismiss the second cause of action against it for breach of

contract. Plaintiff appears to concede that its claim against Wells Fargo sounds in tort rather than contract. (See, P's Memo. Of Law, Point II.) Moreover, the contract claim, as pleaded in the complaint, is based on the same facts and seeks the same damages as the gross negligence cause of action. It is accordingly duplicative of the gross negligence cause of action, rather than separate or independent, and should be dismissed. (See, Sage Realty Corp. v. Proskauer Rose L.L.P., 251 AD2d 35 [1st Dept 1998]; Stendig, Inc. v. Thom Rock Realty Co., 163 AD2d 46 [1st Dept 1990].)

Defendants City of New York and The New York City Police Department cross-move for summary judgment dismissing the complaint as against them on the ground that they are immune from liability because their actions in this case arose out of the performance of their governmental functions, and no special relationship or duty existed between plaintiff and the City defendants. In the absence of any opposition by the plaintiff and defendant Wells Fargo, and for good cause shown, the cross-motion should be granted.

Accordingly, the motion and cross-motion are granted to the extent that the complaint and all cross-claims are dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
December 31, 2001



MARCY FRIEDMAN, J.S.C.