

Wilczewski v Metropolitan Life Ins. Co.

2007 NY Slip Op 30831(U)

April 2, 2007

Supreme Court, New York County

Docket Number: 0111918/2003

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

MARIA WILCZEWSKI, as Administrator of the
Estate of THADEUS WILCZEWSKI,
Plaintiff,

Index No.: 111918/03

Motion Date: 10/24/06

- v -

Motion Seq. No.: 04

METROPOLITAN LIFE INSURANCE COMPANY and
METROPOLITAN INSURANCE AND ANNUITY COMPANY,
INSIGNIA RESIDENTIAL GROUP, INC., STEVE
STADMEYER, METROPOLITAN LIFE INSURANCE
COMPANY d/b/a PETER COOPER
VILLAGE/STUYVESANT TOWN and METROPOLITAN
INSURANCE AND ANNUITY COMPANY d/b/a PETER
COOPER VILLAGE/STUYVESANT TOWN,
Defendants.

Motion Cal. No.: 118

METROPOLITAN LIFE INSURANCE COMPANY and
METROPOLITAN INSURANCE AND ANNUITY COMPANY,
INSIGNIA RESIDENTIAL GROUP, INC., STEVE
STADMEYER, METROPOLITAN LIFE INSURANCE
COMPANY d/b/a PETER COOPER
VILLAGE/STUYVESANT TOWN and METROPOLITAN
INSURANCE AND ANNUITY COMPANY d/b/a PETER
COOPER VILLAGE/STUYVESANT TOWN,

Third-Party
Index No.: 590586/04

Third-Party Plaintiffs,

- v -

FRED GELLER ELECTRICAL, INC.,
Third-Party Defendant

FILED
APR 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1 - 3	_____
4, 5	_____
6, 7	_____

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall deny the motion of Third-Party Defendant
Fred Geller Electrical for summary judgment and shall deny the

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

* 2]
cross-motion of defendants/third-party plaintiffs for summary judgment.

This action is brought by the estate as a result of decedent's death in a September 1, 2001, fire in his apartment in a building owned and operated by the defendant. Plaintiff's allegations in sum are that a defective or inadequate electrical system in the decedent's apartment caused or failed to prevent the fire and was the result of defendants' negligence. The plaintiff also alleges that the lack of a "hard-wired" smoke detector in violation of the Administrative Code of the City of New York also contributed to the decedent's demise.

Third-party defendant Fred Geller performed work on the circuit breakers and electrical system in the subject premises under a contract with the defendants during the year 2000. Fred Geller now moves to dismiss the plaintiff's complaint as to the claim that the negligence of the defendants and third-party defendant in maintaining and repairing the electrical system, particularly the circuit breakers, in the decedent's apartment contributed to the decedent's death. Defendants cross-move joining in Fred Geller's application to dismiss plaintiff's claims as to the electrical system and for conditional contractual indemnification against Fred Geller. Plaintiff opposes the motion and cross-motion and Fred Geller opposes the

cross-motion to the extent conditional indemnification is sought against it.

The court shall deny the motions for summary judgment. The deposition testimony of the Fire Marshal raises an issue of fact as to whether the building's electrical system malfunctioned and thereby caused or worsened the fire. The Marshal stated that the cause of the fire was a "brown extension cord" and opined "that the wire got warm enough to combust, or have conductivity to the carpet or items around it." The Marshal further stated that "I would say the circuit breaker tripped after the room was on fire." The Marshal based this opinion on the fact that "[b]ecause if it had tripped before that, there probably wouldn't have been a fire." This testimony raises an issue of fact as to whether the circuit breakers, which were concedely installed by the third-party defendant, played a role in causing or exacerbating the fire because the deponent Fire Marshal states that had they "tripped," the fire would not have occurred.

As the movants argue, the Fire Marshal elsewhere in the testimony stated that the building electrical supply contained in the master bedroom was ruled out as a cause of the fire. However, this testimony does not necessarily contradict the previously cited statements of the Marshal because the Marshal was merely opining on the origin of the fire as being centered in the extension cord. Buttressing this interpretation is the fact

that in response to the previous deposition question the Marshal stated that "the extension cord was where it started. It's going to be up to an engineer to determine whether it was the television, the extension cord, [or] the VCR." The Fire Marshal's sworn deposition testimony thus raises an issue of fact as to whether the electrical work performed by the movants was a cause of the fire and summary judgment must be denied. See Marsden v EMLT Realty Corp., 304 AD2d 417, 418 (1st Dept 2003) ("Although the Fire Marshal stated that he could not ascertain, with complete precision, the cause of the fire, his theory that the fire was probably caused by heat from electrical wiring was based on his investigation of the premises and interviews conducted at the scene.").

Section 3.18.1 (1) of the General Conditions of the Owner-Contractor Agreement Dated as of April 30, 1998 between the third-party plaintiff and defendant provides that Fred Geller will provide contractual indemnification to the defendants for losses due to personal injuries or death "resulting from or arising out of the performance of the Work." Therefore, to the extent that a factfinder determines that the decedent's death was caused by Fred Geller's work, the defendants are entitled to contractual indemnification.

Therefore, it is

ORDERED that the motion of the third-party defendant for summary judgment is DENIED; and it is further

ORDERED that the cross-motion of the third-party plaintiffs is GRANTED only to the extent of declaring that the third-party defendant is conditionally obligated to provide contractual indemnification to the defendants/third-party plaintiffs to the extent it is determined that the damages suffered by plaintiff arose out of the third-party defendant's work under the relevant contract and the cross-motion is otherwise DENIED; and it is further

ORDERED that the parties are directed to attend the previously scheduled mediation conference before part Mediation-1 at 11:00 A.M. on May 30, 2007, and if the case is not settled thereat the parties are to appear for a pre-trial conference before this court on June 5, 2007, at 2:30 P.M. in Part 59, Room 1254, 111 Centre Street, New York, New York 10013 to set a trial date.

This is the decision and order of the court.

Dated: April 2, 2007

ENTER:

FILED
DEBRA A. JAMES J.S.C.
J.S.C.
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