

**Farmers Fire Ins. Co. v Disaster Restoration
Serv., Inc.**

2007 NY Slip Op 31753(U)

June 7, 2007

Supreme Court, Albany County

Docket Number: 0029142/0051

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

FARMERS FIRE INSURANCE COMPANY,
as subrogee of HORACE AND CATHERINE
HALLOCK,

Plaintiff,

-against-

DECISION and ORDER
RJI NO.: 0105082362S
INDEX NO.: 2914-05

DISASTER RESTORATION SERVICE, INC.,
Individually and d/b/a SERVICEMASTER
COMPANY OF UPSTATE NY, THE
SERVICEMASTER COMPANY, VAPORTEK,
INC., ALMEGA TRU-FLEXING INC., and CABLE
TECH COMPANY LIMITED,

Defendants.

VAPORTECK, INC.,

Defendant/Third Party Plaintiff,

-against-

ALMEGA TRU-FLEX, INC.,

Third Party Defendant.

Albany County Supreme County All Purpose Term, May 8, 2007
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

Defendant, Disaster Restoration Service, Inc.(hereinafter Disaster Restoration), brings this motion for summary judgment against Plaintiffs, the Hollocks, pursuant to CPLR § 3212. Defendant, Vaportek, Inc.(hereinafter Vaportek), brings this motion for summary judgment against Plaintiffs, the Hollocks, pursuant to CPLR § 3212. Defendant, Almega Tru-Flex, Inc. (hereinafter Almega) brings a motion to dismiss claims against it by Plaintiffs, the Hollocks pursuant to CPLR §§ 3211(a)(7),(8) and for summary judgment pursuant to CPLR § 3212. Defendant, NOMA Cable Tech (hereinafter NOMA) brings motions to dismiss claims by the Hollocks pursuant to CPLR §§ 3211(a)(1), (a)(5), (a)(7) and 3211(c), (2),(7) and (8). Plaintiffs,

the Hollocks, oppose each motion. Plaintiff, Farmers Fire Insurance Company, takes no position on any of the above motions.

After fully reviewing the record, this Court grants motions by Defendants, Vaportek, Almega and NOMA, to dismiss the Hollocks' complaint, but denies Disaster Restoration's motion for summary judgment as to the Hollock's complaint. The resolution of these motions has no effect on Farmers Fire Insurance company's complaint.

On January 24, 2004 a fire broke out at the Hollocks' residence caused by a lit candle in the bathroom. The Hollocks retained Defendant, Disaster Restoration to clean and repair damage. The use of a device called Vapor Shark to remove odors allegedly caused a second fire on January 27, 2004. Subsequently, Farmers Fire Insurance Company paid the Hollocks \$139,403.55 and received a subrogation receipt from the Hollocks entitling Farmers Fire Insurance to litigate in order to recover that sum. The Hollocks commenced an action against Disaster Restoration only, on March 8, 2006. Farmers Fire Insurance commenced this action on March 16, 2006. The two actions were joined on November 3, 2006. The Hollocks proceeded to serve Defendants, Vaportek, Almega and NOMA, by sending an amended summons and complaints to the attorneys for those parties via first class mail.

Defendants, Vaportek, Almega and NOMA, contend that the Hollocks have not obtained jurisdiction over them. The Hollocks commenced suit on under a separate index number on March 8, 2006 and that case was joined with this one on November 3, 2006 by consent of all parties. However, the Hollocks did not serve Defendants, Vaportek, Almega and NOMA, with an amended summons and complaint. It appears from the lack of affidavit of service that the Hollocks neglected to personally serve the amended complaints. This Court's November 29,

2006 scheduling Order did not relieve the Hollocks from the requirements of the CPLR.

Defendant, Disaster Restoration, contends that it is entitled to summary judgment because the Hollocks are seeking damages beyond that which they are, as a matter of law, entitled.

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue” (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept 1996]). The court’s main function in granting summary judgment is issue identification, rather than issue determination (See Sillman v. Twentieth Century Fox Film Corp., 3 NY2d 395 [1957]). The party seeking summary judgment has the burden of establishing its entitlement thereto as a matter of law (See Wingrad v. New York University Medical Center, 64 NY2d 851 [1985]). The party opposing the motion will be given the benefit of every reasonable inference (See Boyce v. Vazquez, 249 AD2d 724; see also Dykestra v. Winridge Condominium One, 175 AD2d 482 [3d Dept 1991]). According to Disaster Restoration, the Hollocks are seeking to recover the replacement value of items for which they have already received fair market value. The Hollocks concede that the proper measure of damages is the difference between the actual value prior to the fire and the market value after the fire, not the replacement value. According to the Hollocks, they are seeking to recover on items not covered by the insurance policy or not sufficiently covered by the insurance company. A triable issue of fact remains.

Accordingly, this Court grants motions by Defendants, Vaportek, Almega and NOMA to dismiss the complaint based upon the Hollocks failure to obtain personal jurisdiction over them, but denies Disaster Restoration’s motion for summary judgment.

All papers, including this Decision and Order, are being returned to the attorney for the Plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR

§ 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED!

Dated: June 7 2007

Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Defendant, Vaportek, Inc.'s Notice of Motion, dated March 15, 2007 with Attached Exhibits A-G.
2. Defendant, Almega Tru-Flex, Inc.'s Notice of Motion, dated February 26, 2007 with Attached Exhibits A-G.
3. Defendant, Noma Cable Tech's Notice of Motion, dated April 18, 2007 with Attached Exhibits A-G.
4. Defendant, Noma Cable Tech's Notice of Motion, dated March 12, 2007 with Attached Exhibits A-F.
5. Defendant, Almega Tru-Flex, Inc.'s Notice of Motion, dated March 26, 2007 with attached Exhibits A-G
6. Defendant, Vaportek's Notice of Cross-Motion, dated May 4, 2007 with Attached Exhibits A-E.
7. Plaintiff's Affidavit of Daniel W. Coffey, Esq., dated April 20, 2007
8. Plaintiff's Affirmation in Opposition to Vaportek, Inc., dated May 7, 2007.
9. Plaintiff's Affidavit of Horace Hallock in Opposition to NOMA Cable Tech, dated May 7, 2007
10. Plaintiff's Affidavit of Horace Hallock in Opposition to Almega Tru-Flex, Inc, dated May 7, 2007
11. Plaintiff's Affidavit of Horace Hallock in Opposition to Disaster Restoration Services, dated May 7, 2007
12. Plaintiff's Affidavit of Horace Hallock in Opposition to Vaportek, Inc., dated May 7, 2007
13. Plaintiff's Affidavit of Horace Hallock in Opposition to Vaportek, Inc., dated May 7, 2007
14. Plaintiff's Affirmation in Opposition to Disaster Restoration Service, Inc., dated May 7, 2007
15. Plaintiff's Affirmation in Opposition to NOMA Cable Tech, dated May 7, 2007
16. Plaintiff's Affirmation in Opposition to Almega Tru-Flex, Inc., dated May 7, 2007
17. Defendant, Disaster Restoration Service, Inc.'s Reply, dated May 10, 2007 with Attached

Exhibits

18. Defendant, Almega Tru-Flex, Inc.'s Reply, dated May 4, 2007
19. Defendant, Almega Tru-Flex, Inc.'s Reply Affidavit, dated May 4, 2007 with Attached Exhibits
20. Defendant, Disaster Restoration Services, Inc., dated May 1, 2007 with Attached Exhibits A-K.
21. Plaintiff's Affirmation in Opposition to Almega Tru-Flex, Inc., dated April 30, 2007 with Attached Exhibits
22. Plaintiff's Affirmation in Opposition to NOMA Cable Tech, dated April 30, 2007 with Attached Exhibits
23. Plaintiff's Affirmation in Opposition to Vaportek, Inc., dated April 30, 2007 with Attached Exhibits