

**Tower Ins. Co. of N.Y. v Metropolitan  
Restoration, Inc.**

2007 NY Slip Op 33775(U)

November 20, 2007

Supreme Court, New York County

Docket Number: 0603847/2005

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 603847/2005  
**TOWER INSURANCE**  
VS.  
**METROPOLITAN RESTORATION**  
SEQUENCE NUMBER : 001  
SUMMARY JUDGMENT

INDEX NO. 603847/05  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

n this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_


Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

**FILED**  
NOV 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11/20/07

  
**BARBARA R. KAPNICK** J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IA PART 12

-----X  
TOWER INSURANCE COMPANY OF NEW YORK  
a/s/o VALERIE RAY,

Plaintiff,

- against -

**DECISION/ORDER**  
Index No. 603847/05  
Motion Seq. No. 001

METROPOLITAN RESTORATION, INC.  
and EUROPA CONTRACTING, CORP.,

Defendants.

-----X  
METROPOLITAN RESTORATION, INC.,

Third-Party Plaintiff,

- against -

Third-Party  
Index No. 591036/06

EUROPA CONTRACTING, CORP.,

Third-Party Defendant.

-----X  
BARBARA R. KAPNICK, J.:

**FILED**  
NOV 26 2007  
NEW YORK  
COUNTY CLERKS OFFICE

This subrogation action arises out of a fire which occurred at the insured premises, 1308 Oakley Street in the Bronx, on January 28, 2004.

Plaintiff Tower Insurance Company of New York ("Tower") a/s/o Valerie Ray now moves for summary judgment against defendant Metropolitan Restoration, Inc. ("Metropolitan") in the sum of \$246,427.78, together with interest from January 28, 2004 and costs.

There is no dispute that the premises was damaged as a result of a prior fire which occurred on January 23, 2003 as a result of a defective home heating system (the "first fire").

On or about January 24, 2003, Tower's insured, Valerie Ray, entered into a contract with defendant Metropolitan to correct, repair and replace materials which had caused the first fire and to repair the resulting damage. Metropolitan specifically identified the need for the installation of a metal flue liner in the chimney and a new heating system in its estimate of repair costs.

The January 28, 2004 fire (the "second fire") occurred prior to Metropolitan completing the work called for under its contract.

Plaintiff claims that the second fire was caused by Metropolitan's failure to properly repair and replace elements of the home heating system which had caused the first fire (first cause of action) and that Metropolitan breached its contract with Ray by failing to properly repair and/or replace elements of the home heating system (second cause of action).

Metropolitan commenced a third-party action against its subcontractor, Europa Contracting Corp. ("Europa"), which was allegedly in exclusive control of the premises when the second fire occurred.

During the pendency of this motion, Metropolitan moved (under motion sequence number 002) for a default judgment against Europa based on its failure to timely serve an answer to the third-party complaint and/or to appear in the third-party action. That motion was granted on default by Decision/Order of this Court dated April 16, 2007.

In addition, plaintiff moved (under motion sequence number 003) for leave to serve an amended complaint in order to name Europa as a direct defendant. That motion was granted on default by Decision/Order dated June 15, 2007.<sup>1</sup>

Plaintiff argues that it is entitled to summary judgment on the ground that the second fire was caused by the failure to properly repair and/or replace elements of the home heating system which was the cause of the first fire. In support of the motion, plaintiff has annexed affidavits from (i) Philip Meagher, an investigator with Mamone & Co. Fire & Arson Consulting, which was retained by plaintiff to investigate the cause and origin of the second fire; (ii) Valerie Ray; and (iii) Frances Mulcahy, a recovery specialist for plaintiff.

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<sup>1</sup> Europa did not subsequently serve an answer or otherwise appear.

Plaintiff has also annexed an affidavit from Michael E. Belfi, President of Belfi HVAC Consulting, Inc., which was retained by plaintiff to investigate the cause and origin of both fires.

According to Mr. Belfi, the second fire "was caused by the very same reason that started the first fire and that the failure of the contractor to repair the cement and install a relatively inexpensive chimney flue liner was the proximate cause of the damage which resulted in January of 2004."

Defendant Metropolitan argues that plaintiff's motion for summary judgment against it must be denied on the grounds that:

a) there are issues of fact as to whether or not it negligently performed its duties and breached its contractual obligations, since Metropolitan subcontracted all fire repairs at the premises to Europa;

b) Metropolitan should not be prejudiced by the failure of Europa to appear in the action since Europa would be in possession of relevant documents; and

c) factual issues remain as to whether Ms. Ray's fuel oil company, Sentry Star, which delivered oil to the premises on the day of the second fire, performed any maintenance, repairs and/or service to the boiler in question.

However, the Construction Agreement between Ms. Ray and Metropolitan specifically provides that the "Contractor is

authorized to hire and subcontract portions of the work to others who shall nevertheless be under the direct and exclusive control of the contractor."

Moreover, defendant Metropolitan has not submitted any proof beyond mere speculation, that the second fire was caused by Sentry Star or any other entity.

Accordingly, based on the papers submitted and the oral argument held on the record on September 19, 2007, this Court finds that plaintiff is entitled to summary judgment against defendant Metropolitan.

The Clerk may enter judgment in favor of plaintiff Tower Insurance Company of New York a/s/o Valerie Ray and against defendant Metropolitan Restoration, Inc. in the sum of \$246,427.78, together with interest to be calculated by the Clerk from January 28, 2004, and costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

This constitutes the decision and order of this Court.

Date: November 20, 2007

**FILED**  
NOV 26 2007  
NEW YORK  
COUNTY CLERK'S OFFICE



BARBARA R. KAPNICK  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**