

**General Acc. Ins. Co. v Gonzalez**

2008 NY Slip Op 30327(U)

February 1, 2008

Supreme Court, New York County

Docket Number: 0102105/2005

Judge: Jane S. Solomon

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

PRESENT: SOLOMON  
Justice

PART 55

Index Number : 102105/2005  
**GENERAL ACCIDENT INSURANCE**  
VS.  
**GONZALEZ, CAROL J.**  
SEQUENCE NUMBER : 003  
SUMMARY JUDGMENT

INDEX NO. 102105/2005  
MOTION DATE 10-9-2007  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for Summary judgment

PAPERS NUMBERED  
1-3  
4-5  
6-7

Answering Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

**FILED**  
FEB 06 2008  
NEW YORK  
COUNTY CLERKS OFFICE

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

Dated: 2/1/08

JAMES S. SOLOMON  
J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
GENERAL ACCIDENT INSURANCE COMPANY,  
A/S/O WILLIAM HEADLEY,

Plaintiff,

INDEX NO. 102105/2005

-against-

CAROL J. GONZALEZ a/k/a CAROL J.  
COSTELLO, RAYMOND COSTELLO, NELSON  
MARTINEAU, MIGDALIA MARTINEAU and  
NELSON MARTINEAU, JR.,

DECISION and ORDER

Defendants.

-----X  
JANE S. SOLOMON, J.

Defendants Carol J. Gonzalez a/k/a Carol J. Costello and Raymond Costello move, pursuant to CPLR § 3212(a), for summary judgment dismissing the complaint and, pursuant to CPLR § 8303 and 22 NYCRR §§ 130-1.1(c)(1) and (2), for an order awarding them costs and attorney's fees.

This action arises out of a fire that commenced in the house owned by the Costellos and that spread to the adjoining house owned by plaintiff's subrogor, William Headley. The fire, which occurred shortly after midnight on February 11, 2002, broke out in the rear second floor bedroom of movants' house. The complaint, dated November 10, 2005, alleges that the spread of the fire to Mr. Headley's house resulted from defendants' conduct, which is characterized as careless, reckless and negligent. Plaintiff's bill of particulars simply states that "Plaintiff is claiming that the defendants' negligent acts were the proximate cause of the property damage suffered by

[\* 3 ]

plaintiff's subrogor," and attaches the Preliminary Fire Investigation Report dated April 1, 2002 made by Kenneth A. Kandrac, with blurry black and white photocopies of photographs of the fire-ravaged apartment. In that report, Mr. Kandrac describes the two buildings as three story wood frame "structures utilized as two family residential occupancy buildings." He also states that he and a Fire Marshall agreed that the fire started in the rear of the second floor of the defendants' building where their tenant resided. Finally, he opines that "responsibility for this fire and its damage relates directly to the actions of the second floor tenant/occupants (e.g. careless smoking, improper use of portable heater . . .) . . .", and that discovery and reporting of the fire to the Fire Department was delayed by the absence of a smoke detector, resulting in the spread of the fire to Headley's building. (Preliminary Fire Investigation Report, dated April 1, 2002, annexed as Exhibit C to the Affirmation in Opposition, Scott J. Kantor, Esq., 4-5).

In its opposition to this motion, plaintiff submits an affidavit from Mr. Kandrac, as its expert witness. He is described as a certified forensic investigator who is as an expert in the area of fire investigations. Mr. Kandrac states in his affidavit that, three days after the fire, he inspected the two buildings, that the fire patterns in the room in which the fire commenced "were consistent with slowly intensifying fire conditions that extended to cause vertical and lateral fire spread," and that he "did not observe any battery operated smoke

[\*4]

detectors" on the second floor of defendants' house. Mr. Kandrac then offers his opinion that "this lack of smoke detector protection caused a significant delay in the discovery of the fire and/or delay in the reporting of the fire, which resulted in spread of the fire to plaintiff subrogor's adjacent building." (Kandrac Aff., paragraph 10, annexed to Aff. in Opp. at Exhibit A).

Notably, in his earlier report, Mr. Kandrac is not so certain. He states: "It was noted that no battery operated smoke detector protection was observed, explaining the apparent delayed discovery and/or delayed reporting of this fire and its subsequent spread to the adjacent dwelling". Mr. Kandrac's moving from his statement that he did not observe any smoke detector in the fire-ravaged second floor of defendants' house, to his assuming, as a fact, that there were no such detectors prior to the fire, thus establishing the defendants' negligence, is too speculative to defeat the motion. Accordingly, plaintiff cannot make a prima facie case. See Motto v New York City Tr. Auth., 13 A.D.3d 170 (1st Dep't 2004); Torres v Allied Tube & Conduit, 281 A.D.2d 243 (1st Dep't 2001); Thomas v New York City Tr. Auth., 194 A.D.2d 663 (2d Dep't 1993). The court notes that Mr. Costello states in his affidavit that in January of each year, including 2002, that is, one month before the fire, he tested and, where necessary, installed smoke alarms in every apartment in his building.

The second part of the motion is denied. Although

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plaintiff's evidence is not sufficient to defeat this motion, the preliminary fire investigation report provided a non-frivolous basis for the complaint, so sanctions under 22 NYCRR §§ 130-1.1(c)(1) and (2) are not warranted. The thin explanation of plaintiff's theory of liability given in the bill of particulars is reasonably read as an accurate description of a claim for which there is little evidence to support it, and that merits dismissal.

Finally, plaintiff has not pursued its claim against defendants Nelson Martineau, Migdalia Martineau and Nelson Martineau, Jr., who were the moving defendants' tenants at the time of the fire. No default has been sought against them. Accordingly, it hereby is

ORDERED that the motion for summary judgment is granted and the complaint is dismissed as against all defendants, with costs and disbursements to defendants Carol J. Gonzalez a/k/a Carol J. Costello and Raymond Costello as taxed, including \$100 awarded on this motion, and the Clerk is directed to enter judgment accordingly; and it further is

ORDERED that the branch of defendants' motion seeking the imposition of sanctions is denied.

Dated: February 1, 2008

ENTER:

**FILED**  
FEB 06 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

J.S.C.  
JANE S. SOLOMON