

Rutgers Cas. Ins. v Pot Luck Rest.

2008 NY Slip Op 30399(U)

February 5, 2008

Supreme Court, New York County

Docket Number: 0100083/2005

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 100083/2005
RUTGERS CASUALTY INSURANCE
vs
POT LUCK RESTAURANT
Sequence Number : 002
SUMMARY JUDGMENT

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

is 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

per CWSB Memo and

decided per attached

FILED
FEB 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2/5/08

EMILY JANE GOODMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
RUTGERS CASUALTY INSURANCE COMPANY
as subrogee of 271 GRAND STREET REAL
ESTATE, INC.,

Plaintiff,

-against-

Index No. 100083/05

POT LUCK RESTAURANT, INC. and SHUANG LI
INTERNATIONAL, INC.,

Defendants.

-----X
POT LUCK RESTAURANT, INC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 591200/05

271 GRAND STREET REAL ESTATE, INC.,
SHUANG LI INTERNATIONAL, INC. and N.Y.
BUSINESS FIRE SYSTEMS, INC.,

Third-Party Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

This is an action arising out of a fire that occurred at a Chinese restaurant located at 271 Grand Street, New York, New York, on March 23, 2003. Plaintiff Rutgers Casualty Insurance Company, as subrogee of the owner 271 Grand Street Real Estate, Inc. (271 Grand), seeks to recover the amount that it paid to its insured as a result of the fire. Plaintiff is suing defendants Pot Luck Restaurant, Inc. (Pot Luck), the restaurant and tenant, and Shuang Li International, Inc. (Shuang Li)¹, Pot Luck's kitchen maintenance contractor. Before the court is defendant/third-

¹Shuang Li has not appeared in this action.

party plaintiff Pot Luck's motion for summary judgment dismissing the complaint.² For the reasons discussed below, the motion is denied.

BACKGROUND

Plaintiff commenced the instant action alleging that the fire was caused by defendants' negligence and carelessness. Specifically, plaintiff alleges that defendant Pot Luck was "negligent and careless in the maintenance of [the] metal exhaust duct which traveled between the basement kitchen and the roof by failing to clean combustible materials such as grease from the duct, which ignited and caused the ignition of adjacent combustible structural members of the building" (Bill of Particulars, ¶ 21 [a]). Pot Luck asserted cross claims against Shuang Li for indemnification, contribution, and failure to procure insurance.

Thereafter, Pot Luck brought a third-party action, seeking indemnification and contribution from third-party defendants 271 Grand, Shuang Li, and N.Y. Business Fire Systems, Inc., the company that allegedly maintained the fire suppression system at the premises.

Pot Luck moves for summary judgment, arguing that there is no evidence that it was negligent. It submits an unsworn report (without exhibits) by plaintiff's private investigator, Herbert K. Johnson, in which he concluded that "[t]his fire originated within the metal exhaust duct which extends from the basement kitchen to the roof level, involving grease and other accumulations within the duct. Subsequent heat from within the duct caused the ignition of combustible structural members of the building, insulation and duct enclosures as shown in the attached photographs" (Sessa Affirm., Exh. L, at 6). He also stated that there was no evidence

²Third-party defendant N.Y. Business Fire Systems, Inc. also cross-moved for summary judgment dismissing the third-party complaint and all cross claims asserted against it. However, N.Y. Business Fire Systems, Inc. subsequently withdrew its cross motion.

that “[p]yrophoric [a]ction [was] a contributory cause for this fire” (*id.* at 7). Johnson based his conclusions on interior and exterior examinations of the building after the fire, a Fire Department structural report, a report authored by Fire Department Marshal Robert Pinto, and statements by the owner and occupant of Pot Luck (*id.* at 1-7).

Pot Luck also provides an expert affidavit from Edward J. Cuyar, a New York State-certified arson investigator and arson consultant, whose curriculum vitae indicates that he has investigated and determined the causes and origins of over 500 fires from 1998 through the present. Based upon his review of the pre-trial testimony, cleaning records, and Herbert Johnson’s report, Cuyar opines that Pot Luck was not responsible for the fire, and that it took appropriate steps to have the exhaust duct cleaned, for three reasons (Cuyar Aff., ¶ 5). First, Pot Luck complied with the applicable building code provision, Administrative Code § 27-4275 (which only required that it clean the kitchen exhaust system once every three months), since it last cleaned the ducts on January 28, 2003, approximately two months before the fire (Cuyar Aff., ¶¶ 6-7; Sessa Affirm., Exh. M).³ Second, Cuyar relies on Herbert Johnson’s conclusion that pyrophoric action (defined by Cuyar as chemical decomposition of wood due to continuous or intermittent application of heat) was not a contributory cause of the fire (Cuyar Aff., ¶ 9). According to Cuyar, if there was evidence of pyrophoric action, it would mean that the restaurant employed poor cooking methods, permitting an excess amount of flames to continually shoot upward into the duct, or insufficiently cleaned the duct system (*id.*, ¶ 10). Since Herbert Johnson excluded pyrophoric action, Cuyar concluded that Pot Luck employed proper cooking methods

³ Kin Foo Lam, the sole shareholder of Pot Luck, also avers that the duct was cleaned “on at least a quarterly basis” (Kin Foo Lam Aff., ¶ 13).

and properly cleaned the duct system (*id.*). Third, Herbert Johnson did not state in his report that there was an excess level of grease found in the ductwork (*id.*, ¶¶ 11-14).

Plaintiff contends that there is a material issue of fact as to whether Pot Luck improperly cleaned the duct work, causing the fire. It points to Herbert Johnson's findings that burn patterns at the roof level near the metal exhaust duct and at other levels of the building were consistent with a fire that originated within the metal exhaust duct from the basement kitchen (Sessa Affirm., Exh. L, at 1-2, 3). According to a Fire Department fire and incident report, Fire Marshal Pinto determined that the fire originated in grease within the cooking-exhaust ductwork. The report states as follows:

Examination showed fire originated in the above building, in the basement kitchen, along the east wall, at ceiling level, in the metal cooking exhaust ductwork, in combustible material (grease) contained therein, via heat generated from the cooking appliances. Fire extended, via radiant heat, to the first, second and third floor wood framing which enclosed the metal duct. Fire further extended to the entire cockloft. Fire was thereto confined and extinguished.

(Gorka Affirm., Exh. A).

Plaintiff also proffers an expert affidavit and curriculum vitae from Frank W. Johnson, a certified fire and explosion investigator and assistant fire investigator, who has assisted in cause and origin investigations of fires and conducted his own cause and origin investigations. Frank Johnson states that, based upon his examination of the property, he was able to determine and "memorialize with photographs" that the fire originated when grease, which collected within the exhaust duct, ignited by heat from cooking procedures (Johnson Aff., ¶ 2; *see also* Kin Foo Lam EBT, at 37). He was unable to document the amount of grease inside the duct because of the configuration of the ductwork. However, this type of fire would not have occurred without an

excess amount of grease within the duct, given that grease was the combustible material that ignited within the ductwork (*id.*, ¶¶ 3, 4). Further, the elimination of pyrophoric action as a cause of the fire only proved that the ductwork was not installed too close to wood (*id.*, ¶ 4). In other words, the fire did not originate outside of the duct, such as on the stove below the duct (*id.*).

DISCUSSION

A party moving for summary judgment must demonstrate its entitlement thereto as a matter of law (CPLR 3212 [b]), through admissible evidence (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). To defeat summary judgment, the party opposing the motion must show, also generally through admissible evidence, that there is a material issue of fact requiring a trial (*see Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]).

The court has the discretion to determine whether a witness is qualified to testify as an expert, and this determination will not be disturbed absent a serious mistake, an error of law, or an improvident exercise of discretion (*Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941]; *McGillvery v City of New York*, 22 AD3d 537, 538 [2d Dept 2005]). An expert is qualified to proffer an opinion if he or she possesses “the requisite skill, training, education, knowledge or experience” to render a reliable opinion (*see Matott v Ward*, 48 NY2d 455, 459 [1979]). “No precise rule has been formulated and applied as to the exact manner in which such skill and experience must be acquired” (*Meiselman*, 285 NY at 398). Thus, a witness may be qualified as an expert based upon “[l]ong observation, actual experience and/or study” (*Steinbuch v Stern*, 2 AD3d 709, 710 [2d Dept 2003], quoting *McLamb v Metropolitan Suburban Bus Auth.*, 139 AD2d 572, 573 [2d Dept 1988]).

An expert’s opinion “must be based on facts in the record or personally known to the

witness'" (*Hambusch v New York City Tr. Auth.*, 63 NY2d 723, 725 [1984], quoting *Cassano v Hagstrom*, 5 NY2d 643, 646, *rearg denied* 6 NY2d 882 [1959]; *see also Lopato v Kinney Rent-A-Car*, 73 AD2d 565, 566 [1st Dept 1979]). However, an expert affidavit may rely on information not in the record, and even inadmissible evidence, where the information is derived from a "professionally reliable" source (*see Hambusch*, 63 NY2d at 725-726; *see also Schou v Whiteley*, 9 AD3d 706, 708 [3d Dept 2004]; Prince, Richardson on Evidence § 7-308 [Farrell, 11th ed]).

Here, Pot Luck has failed to meet its burden of demonstrating the absence of material issues of fact. The unsworn cause and origin report by Herbert Johnson is multiple-level hearsay, and thus cannot be considered by the court (*see Bendik v Dybowski*, 227 AD2d 228, 229 [1st Dept 1996]; *Rue v Stokes*, 191 AD2d 245, 246-247 [1st Dept 1993]; *Mittendorf v Brooklyn Union Gas Co.*, 195 AD2d 449 [2d Dept 1993]; *Vozdik v Frederick*, 146 AD2d 898, 900 [3d Dept 1989] [unsworn reports by private investigator and licensed electrical contractor with whom investigator consulted regarding cause of fire was properly disregarded as hearsay]). While Cuyar's expert affidavit and curriculum vitae indicate that he has investigated the causes and origins of fires, he relied solely, as to two of his points, on the unsworn cause and origin report. Nevertheless, this report does not qualify as a "professionally reliable" source (*see Hambusch*, 63 NY2d at 726). Indeed, Cuyar's only point which did not rely on this report is that Pot Luck cleaned the kitchen exhaust duct as required by the building code.⁴ Pot Luck, however, has not

⁴New York City Administrative Code § 27-4275 (c), entitled "Ventilation and maintenance of restaurant type cooking equipment," provides that "[t]he entire exhaust system shall be inspected at least once every three months, by qualified employees of the owner or by a cleaning agency, and cleaned to remove deposits of residue and grease in the system. A record of such inspection and cleaning shall be kept on the premises for inspection."

demonstrated that it eliminated any excessive amounts of grease within the ductwork. Cuyar also does not explain the connection between pyrophoric action and proper cleaning of the duct. Therefore, Cuyar's expert affidavit is conclusory, speculative, and insufficient to eliminate material issues of fact as to the cause of the fire (*see Zuckerman*, 49 NY2d at 562).

In any event, plaintiff's submissions, viewed in the light most favorable to it, establish that there is an issue of fact as to whether the kitchen exhaust duct was improperly cleaned by Pot Luck. The fire and incident report, which is generally admissible as a business record pursuant to CPLR 4518 (*Zohar v 1014 Sixth Ave. Realty Corp.*, 24 AD3d 125, 126-127 [1st Dept 2005]), states that the fire originated in grease in the metal cooking exhaust ductwork in the basement kitchen (Gorka Affirm., Exh. A). Plaintiff's expert, Frank Johnson, also concludes, based upon his examination of the property, that the fire was caused by the presence of excess grease within the kitchen exhaust duct, i.e., the fire did not originate outside the duct, and did not originate on the stove below the duct (Johnson Aff., ¶¶ 2-4).

Contrary to Pot Luck's contentions, Frank Johnson's affidavit is properly considered by the court. Pot Luck has not established that Frank Johnson is unqualified to render an expert opinion in a case involving a fire in a commercial kitchen exhaust duct. Indeed, his affidavit and curriculum vitae state that he has conducted cause and origin investigations for fires for over 15 years (*see e.g. Enrichment Enters. v Jempris Realty Corp.*, 272 AD2d 432, 433 [2d Dept 2000]; *Eagle Pet Serv. Co. v Pacific Empls. Ins. Co.*, 175 AD2d 471 [3d Dept 1991], *lv denied* 79 NY2d 753 [1992] [investigator's 35 years of investigating fires was sufficient to qualify him as an expert]). The weight to be accorded his opinion, once qualified, would be an issue for a jury (*see Eagle Pet Serv. Co., Inc.*, 175 AD2d at 471). And, unlike Cuyar's opinion, his opinion is based

upon an inspection of the property after the fire (*cf. Cataract Metal Finishing, Inc. v City of Niagara Falls*, 31 AD3d 1129, 1130 [4th Dept 2006]). The court need not reach Pot Luck's claim that Frank Johnson's affidavit is inconsistent with the unsworn cause and origin report, in view of the fact that the report is not in admissible form. Even if the court were to reach this argument, the cause and origin report would not be inconsistent with plaintiff's expert affidavit simply because it does not use the word "excess" to describe the amount of grease in the ductwork.

Accordingly, it is

ORDERED that the motion by defendant/third-party plaintiff Pot Luck Restaurant, Inc. for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the parties appear before this Court on March 17, 2008 to select a jury for trial.

This Constitutes the Decision and Order of the Court.

Dated: February 5, 2008

ENTER **FILED**
 FEB 13 2008
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 EMILY JANE GOODMAN