

**PG Ins. Co. of New York v Witklag
Realty, LLC**

2008 NY Slip Op 32785(U)

October 6, 2008

Supreme Court, New York County

Docket Number: 102297/2003

Judge: Joan A. Madden

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: **HON. JOAN A. MADDEN**

J.C. Justice

PART 11

Index Number : 102297/2003

PG INSURANCE

vs

WITKLAG REALTY, LLC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 and cross-motion are determined in accordance with the annexed decision and order.

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

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Oct 3, 2007

[Signature]
HON. JOAN A. MADDEN 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: PART 11

-----X
PG INSURANCE COMPANY OF NEW YORK A/S/O
SUNNY NAMES LTD,

INDEX NO. 102297/2003

Plaintiff,

-against-

WITKLAG REALTY, LLC,

Defendant.

-----X
WITKLAG REALTY, LLC.,

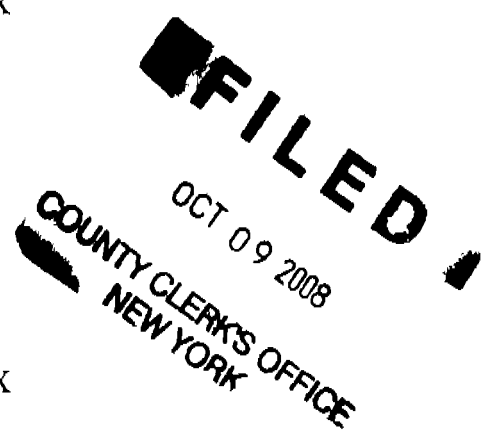
Defendant/Third-Party Plaintiff,

-against-

EASTERN JEWELRY, INC. and E.S.T.
CONTRACTING CO., INC.,

Third-Party Defendant.

-----X
JOAN A. MADDEN, J.:



In this subrogation action, plaintiff PG Insurance Company of New York ("PG Insurance") seeks reimbursement for payment in the amount of \$64,667.05 for property damage, made to its subrogor, Sunny Names Ltd ("Sunny Names"), and for the \$1,000 deductible amount on behalf of Sunny Names. Defendant Witklag Realty, LLC ("Witklag") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and granting summary judgment on its third-party claims against third-party defendants Eastern Jewelry, Inc. and E.S.T. Contracting Co., Inc. (collectively "Eastern Jewelry"). Plaintiff PG Insurance opposes the motion. Third-party defendants cross-move for summary judgment dismissing the third-party complaint, but do not oppose that branch of Witklag's motion for summary judgment dismissing

* 3]
the main complaint.

The following facts are undisputed unless otherwise noted. Defendant Witklag is the owner of a building located at 240 West 37th Street in Manhattan. Plaintiff subrogor, Sunny Names, leased the 2nd and 6th floor in the building, and third-party defendants Eastern Jewelry and E.S.T Contracting Co, Inc., leased a portion of the 7th floor. The parties do not dispute that Eastern Jewelry had an oven on its premises which was used to cast and manufacture jewelry. The parties also do not dispute that on March 3, 2000, a "malfunctioning" of the oven set off the sprinkler system, which resulted in water damage to Sunny Names' property. At the time of the incident, Sunny Names was insured by a policy issued by plaintiff PG Insurance, which contained a \$1,000 deductible. After Sunny Names submitted a claim to PG Insurance for damages allegedly sustained as a result of the March 3, 2000 incident, Sunny Names received the sum of \$64, 447.05 from PG Insurance.

On February 10, 2003, plaintiff PG Insurance commenced the instant action against the owner of the building, defendant Witklag, to recover the \$64,477.05 paid to Sunny Names and the \$1,000 deductible for which Sunny Names was responsible. Asserting causes of action for negligence and breach of contract, the complaint alleges that the March 3, 2000 incident "was caused by the carelessness, recklessness and negligence of defendant, its agents, servants and/or employees in the ownership, operation, maintenance, management and control of the building, in that defendant was otherwise careless and negligent in the premises." The complaint also alleges that on March 3, 2000, defendant breached its agreement "to properly maintain the building," when it "permitted, allowed and caused a fire to erupt in the building which activated the sprinkler system and released large quantities of water into subrogor's premises." Defendant

Witklag subsequently commenced a third-party action against Eastern Jewelry, asserting claims for indemnification, contribution and breach of contract.

Witklag is now moving for summary judgment dismissing the complaint. The motion is granted, as the undisputed evidence in the record establishes that Eastern Jewelry owned and had exclusive control over the oven, and that the malfunctioning of Eastern's oven activated the sprinkler system, which resulted in the water leaking into the premises below, occupied by Sunny Names.

The witness for Eastern Jewelry, Samuel Klagsbald, testified that in March 2000, he was employed as the manufacturing manager, and that he signed the lease for the 7th floor premises. He testified that he first became aware of the March 3, 2000 incident when received a phone call at home early in the morning that he needed "to come in." He arrived at the premises and saw "a lot of water all over the place" and "found out that the sprinkler [had] gone on . . . and caused a lot of water damage." He said that the superintendent, "Lazer," was at the building and helped him clean up the "mess." When asked what caused the sprinkler to go off, Klagsbald answered that "[t]here was an oven in that room. The room where the sprinkler has gone on, there was an oven, which we have been using for manufacturing . . . And something went wrong there that caused the sprinkler to go on." He said that he "observed" that the oven had "malfunctioned" and that the malfunctioning "caused the sprinkler to go on." Klagsbald explained that Eastern Jewelry owned the oven, and that it was used for casting jewelry and is left on overnight because "it's a slow process" and has a "certain odor." He also explained that the oven was located in a separate room for "safety" purposes and that there was a sprinkler in that room. Klagsbald testified that prior to March 3, 2000, there were no prior complaints about the oven or any malfunctioning of

the oven.

Lazar Marco, the building superintendent testified for defendant Witklag. Marco stated that he first learned of the March 3, 2000 incident when he received a telephone call early in the morning from the alarm company that monitors the sprinkler system. Marco testified that he arrived at the building, inspected each floor and discovered that “the water was coming in through the seventh floor,” so he shut down the sprinkler system. When he saw “water by the door” of Eastern Jewelry’s premises, he called an Eastern Jewelry employee. Marco testified that when the Eastern Jewelry employee arrived, he opened the door, they saw water on the floor and found that sprinkler had been activated in the “small office” used for casting. Marco testified that he also saw the oven in that office. He described the outside of the oven as “blackened” and stated, “I guess it was overheated.” When asked if there were “any visible scorch or smoke marks on the oven,” Marco answered, “smoke marks.” He also testified that he received no prior complaints about Eastern Jewelry’s oven.

Based on the foregoing testimony, defendant and plaintiff both agree that Eastern owned and operated the oven, and that the sprinkler was activated as a result of the oven’s malfunctioning. In opposing the summary judgment, plaintiff argues, however, that an issue of fact exists as to Witklag’s negligence, based on the Court of Appeals decision in Guzman v. Haven Plaza Housing Development Fund, Co. Inc., 69 NY2d 559 (1987), and several provisions of the New York City Administrative Code. Plaintiff’s reliance on Guzman is misplaced. Under Guzman and its progeny, when an out of possession owner retains a right to reenter the premises for the purpose of inspection and maintenance or repair, the owner may be liable only if a specific statutory violation exists and there is a significant structural or design defect. See

Gomez v. 192 East 151st Street Assocs. L.P., 26 AD3d 276 (1st Dept 2006); Angwin v. SRF Partnership, L.P., 285 AD2d 570 (2nd Dept 2001); Sylfa v. Stupnick, 239 AD2d 570 (2nd Dept 1997). Here, even assuming without deciding that Witklag had a right to reenter Eastern Jewelry’s premises, Guzman imposes liability on an out of possession owner only with respect to significant structural components of a building, and not an item of equipment, such as an oven, owned by and under the exclusive operation and control of the tenant, Eastern Jewelry. See Hausmann v. UMK, Inc., 296 AD2d 336 (1st Dept 2002); Angwin v. SRF Partnership, L.P., *supra*; Couvertier v. Arcuri Realty, Inc., 161 AD2d 381 (1st Dept 1990); Canela v. Foodway Supermarket, 188 AD2d 416 (1st Dept 1992).

Furthermore, three of the four Administrative Code provisions cited by plaintiff, sections 27-127, 27-128 and 26-228, are nonspecific and reflect only general duties to maintain or repair, and comply with safety requirements. The violation of such general safety provisions alone is insufficient to impose liability on an out of possession owner. See O’Connell v. L.B. Realty Co., 50 AD3d 752 (2nd Dept 2008); Reddy v. 369 Lexington Ave. Co., L.P., 31 AD3d 732 (2nd Dept 2006); Boateng v. Four Plus Corp, 22 AD3d 323 (1st Dept 2005); Dixon v. Nur-Hom Realty Corp., 254 AD2d 66 (1st Dept 1998). The only specific statutory provision plaintiff cites is section 27-966(b), which requires “protection” of sprinkler heads “subject to damage.” Plaintiff argues that Witklag violated this provision “by failing to properly protect the sprinkler head above the oven, which given its proximity to the oven, was clearly subject to damage.” Plaintiff, however, does not specifically allege or produce any evidence to show or even suggest that the sprinkler itself was actually damaged in any way by the heat from the oven, or to causally connect the allegedly improper protection of the sprinkler to the water damage. To the contrary,

it appears that the sprinkler head in this instance functioned properly, since it was activated by the smoke or heat created when the oven malfunctioned, and nothing in the record suggests otherwise.

Under these circumstances, plaintiff has failed to establish that a triable issue of fact exists as to Witklag's negligence, and Witklag is entitled to summary judgment dismissing the complaint. In light of this dismissal of the complaint in the main action, Witklag's third-party claims are rendered moot.¹

Accordingly, it is hereby

ORDERED that the portion of the motion by defendant Witklag Realty, LLC, for summary judgment dismissing the complaint, is granted and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the portion of the motion by defendant/third-party plaintiff Witklag Realty, LLC, for summary judgment on its third-party claims is denied, and the cross-motion by third-party defendants is granted to the extent the third-party claims are dismissed as moot, and the Clerk is directed to enter judgment accordingly.

DATED: October 6, 2008

FILED
OCT 09 2008
COUNTY CLERK'S OFFICE
NEW YORK
J.S.C.

¹In its motion papers, Witklag simply asserts generally that it is entitled to summary judgment on its third-party claims against Eastern Jewelry, "as pursuant to a lease agreement/and or based on common law indemnification, [third-party defendants] were obligated to defend, indemnify and save harmless Witklag." Witklag does not specify what, if any thing, it would be entitled to be indemnified for, in the event the main complaint is dismissed. Witklag also neglects to mention that the lease limits its right to indemnification to "costs and expenses for which Owner shall not be reimbursed by insurance."