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

PRESENT: Hon. Doris Ling-Cohan Justice

PART 36

Index Number : 115616/2007

LEXINGTON INSURANCE

VS

230FA

Sequence Number : 001

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

...is motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendant is granted in accordance with the attached memorandum decision

FILED
APR 15 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/13/09

J.S.C.

JUSTICE DORIS LING-COHAN

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 36

LEXINGTON INSURANCE COMPANY as subrogee of 230 FIFTH AVENUE ASSOCIATES and all other named insured under policy number 7478058

Plaintiff,

- against -

230 FA LLC doing business as 230 FIFTH AVENUE RESTAURANT

Defendant.

Index No. 115616/07
Motion Seq. No. 001

DECISION AND ORDER

Motion Seq. No.: 001

DORIS LING-COHAN, J.S.C.:

This action arises from a fire that occurred in an elevator motor room on the roof of a building known as 230 Fifth Avenue (the building) in Manhattan, on November 17, 2006. The owner of the building is 230 Fifth Avenue Associates (230 Associates).

230 FA LLC (230 FA), doing business as 230 Fifth Avenue Restaurant, operated a club on the 20th floor and rooftop of the building, pursuant to a lease with 230 Associates.

230 Associates submitted a claim in the amount of $289,779.55, which plaintiff Lexington Insurance Company (Lexington) paid, less a deductible of $25,000. Lexington brings this subrogation action against (defendant) 230 FA, pursuant to the property and casualty policy it issued to 230 Associates, based on the allegation that 230 FA caused the fire by negligently storing flammable material in the elevator room. For purposes of this motion, 230 FA "does not dispute any factual issues raised by Lexington as to the cause and origin of the

fire" (mov. aff. at i) and thus, moves for summary judgment dismissing Lexington's complaint.

An internal incident report dated November 17, 2006, the day of the fire, conducted by the building manager, Eloy Fernandez, states that upon arrival at the building, Fernandez "was informed [that] there had been a fire in the secondary elevator motor room on B'way side, that the restaurant employee had used a standpipe hose to extinguish the fire" (ex. F to aff. in opp.). The report states that four elevators were damaged by the water.

Lexington submits a memorandum dated September 14, 2006, allegedly sent by e-mail from Morris Weisenberg, the building manager, to Steven A. Greenberg, a managing member of 230 FA, which, after acknowledging that beer kegs were removed from the elevator pressure tank room, states, "your personnel are still storing cleaning materials and other supplies in the room. Please remove all items today so that we can lock this room" (ex. E to aff. in opp.). 230 FA asserts that the e-mail was never received by Mr. Greenberg because it had the wrong e-mail address; Lexington does not dispute this.

The complaint contains one cause of action, asserting the subrogation claim on the basis that 230 FA caused the fire. 230 FA has filed an answer asserting a general denial, and stating two affirmative defenses. The first is that the fire was caused by the negligence of third parties over whom 230 FA exercised no control. The second affirmative defense states that the damages were caused in whole or in part by 230 Associates's own

negligence, and that any award against 230 FA should be reduced proportionally.

230 FA moves for summary judgment dismissing the complaint on the ground that it is barred by anti-subrogation provisions in Article 47 (D) (1) of the Rider to 230 FA's Lease with 230 Associates, which provides:

> [l]andlord agrees to include in its fire insurance policy appropriate clauses pursuant to which the insurance company or companies (i) waive the right of subrogation against tenant with respect to losses payable under such policy or policies

(ex. C to mov. aff.).

Lexington opposes the motion on the ground that 230 FA did not annex a copy of defendant's property insurance policy to its papers. It merely argues by attorney affirmation that without the policy, it cannot be determined whether the waiver of subrogation is effective.

However, in the submitted papers, defendant has satisfied its initial burden on a summary judgment motion. Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so" (Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman, 49 NY2d at 562). An affidavit or affirmation by an attorney who is without the requisite knowledge of the facts has

no probative value (DiFalco, Feild & Lomenzo v. Newburgh Dyeing Corp., 81 AD2d 560 [1st Dept 1981], aff'd 54 NY2d 715 [1981]). Thus plaintiff's attorney's conclusory and speculative affirmation is insufficient to raise any factual issues to warrant a denial of the within motion. (See GTF Marketing Inc. V. Colonial Aluminum Sales, Inc., 66 NY2D 965, 968 [1985]); Wehringer v. Hemsley Spear, 91 AD2d 585 [1st Dept 1982]). Furthermore, Lexington issued the policy that it now argues is necessary for determination of this motion. If the policy in fact contained any provision that would nullify the anti-subrogation provision in the lease, it was incumbent upon *Lexington* to come forward with that policy, which Lexington would also have received in discovery. Lexington's argument is speculative and lacks merit as it has not submitted admissible evidence refuting defendant's entitlement to summary judgment.

Lexington also opposes the motion on the ground that 230 FA allegedly did not comply with the insurance provisions in its lease, rendering the subrogation provisions inoperative.

Specifically, 230 FA's lease required it to obtain general comprehensive liability insurance with "not less than $5,000,000 single limit for ... property damage" (Lease, Art 47 (A)(1), ex. A to aff. in opp.). 230 FA obtained a policy with limits of $1,000,000/$2,000,000. In its reply papers, 230 FA submits proof that it had obtained an umbrella policy in the amount of $10,000,000. Thus, 230 FA has demonstrated that it did comply with the insurance requirements of the lease, and is entitled to

summary judgment of dismissal; in opposition, Lexington has failed to raise a factual issue which would warrant that this case proceed to trial.

Accordingly, it is

ORDERED that defendant 230 FA LLC's motion for summary judgment dismissing the complaint is granted; and it is

ORDERED that the complaint is dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated: April 13, 2009

Hon. Doris Ling-Cohan, J. S. C.

J:\Summary Judgment\Lexingtonin 230 FAllc2.wpd

JUSTICE DORIS LING-COHAN