

American Intl. Group v Choice Logistics

2009 NY Slip Op 31967(U)

August 11, 2009

Supreme Court, New York County

Docket Number: 106781/05

Judge: Marcy S. Friedman

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SCANNED ON 8/17/2009
1
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 106781/2005
AMERICAN INTERNATIONAL GROUP
vs.
CHOICE LOGISTICS
SEQUENCE NUMBER : 004
DISMISS

INDEX NO. 106781/05

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

- VanDorn
this motion to/for summary judgment

PAPERS NUMBERED

1
2, 3
4, 5

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-11-09

[Signature]
MARCY S. FRIEDMAN
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

AMERICAN INTERNATIONAL GROUP,
Plaintiff,

Index No.: 106781/05

- against -

DECISION/ORDER

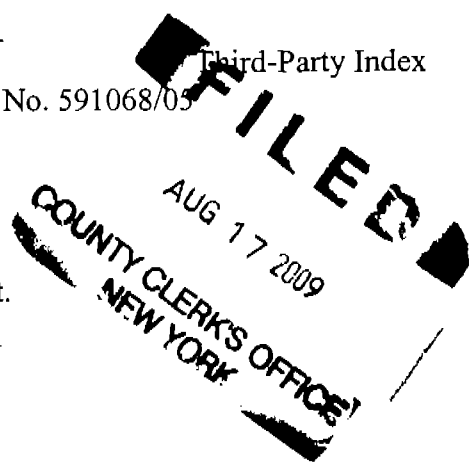
CHOICE LOGISTICS,
Defendant.

CHOICE LOGISTICS,
Third-Party Plaintiff, No. 591068/05

Third-Party Index

- against -

VAN DORN REALTY,
Third-Party Defendant.



MARCY S. FRIEDMAN, J.:

In this action, plaintiff American International Group (AIG), a tenant in a building owned by third-party defendant Van Dorn Realty Corporation (Van Dorn or the owner), sues for property damages sustained as a result of water leaking from a ruptured pipe in a premises leased by defendant Choice Logistics (Choice) on the floor above AIG. Choice brought a third-party action against Van Dorn, and subsequently commenced a second third-party action against Rimco Air Conditioning Company, Inc.¹ Choice now moves (motion seq. # 005) for summary judgment dismissing the complaint or, in the alternative, for conditional summary judgment on its common-law indemnification claim against Van Dorn. By separate motion, Van Dorn moves (motion seq. # 004) for summary judgment dismissing the third-party complaint. The motions are consolidated for disposition.

¹At the time that the instant motions were submitted, Rimco Air Conditioning Company, Inc. had not appeared in the action. It has now appeared, but submitted no opposition to these motions.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” CPLR 3212 (b); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).” *Zuckerman*, 49 NY2d at 562.

The facts giving rise to the incident at issue are largely undisputed. In January 2004, plaintiff AIG occupied the third and fourth floors of a building located at 733 Third Avenue, New York, New York (the building), pursuant to a lease with third-party defendant Van Dorn, the owner of the building. Defendant Choice was also a tenant in the building at that time, occupying office space on the fifth floor, pursuant to a lease with Van Dorn dated February 14, 1991 (*see Choice Lease, Ex. 4 to Ryan Aff. in Support of Van Dorn Motion*). On January 11, 2004, a sprinkler pipe in Choice’s premises froze and then ruptured, flooding Choice’s fifth floor office and leaking into the third and fourth floors, causing considerable damage to AIG’s property. The sprinkler pipe was located above the ceiling of a room described by Choice as the PC lab, where its IT staff worked (*see Iuzzini Dep., Ex. G to Walthall Aff. in Support of Choice Motion, at 35-37*). At the time of the incident, Choice had a supplemental air conditioning system in its premises, which included an air handler unit located above the PC lab in the vicinity of the sprinkler pipe at issue (*see id. at 43-48; Austin Dep., Ex. I to Walthall Aff. in Support, at*

49-51; *see also* Photograph, Ex. F to Szalyga/AIG's Aff. in Opp. to Choice Motion).²

Van Dorn, as owner of the building, maintained, inspected, and tested the sprinkler system in the building, and provided and regulated the heat in the building (Austin Dep. at 86-87; 24-25; Calderone Dep., Ex. H to Walthall Aff. in Support, at 92-95). Heat was provided to tenants in the building from 8 a.m. to 6 p.m. on business days, Monday through Friday (Austin Dep. at 24; Calderone Dep. at 32-33). No heat was provided after 6 p.m. or on weekends, although tenants could request heat during the off hours, for an additional fee. (Austin Dep. at 24; Calderone Dep. at 34; Iuzzini Dep. at 21). It is not disputed that the incident involving the frozen sprinkler pipe occurred on an unusually cold Sunday night, at a time when building heat was not provided.

Choice, pursuant to its lease with Van Dorn, was responsible for maintaining and repairing its fixtures, equipment and property in its space, including the supplemental air conditioning system, and was responsible for any damages arising out of the use of such equipment and property (*see* Choice Lease, ¶ 4). The air conditioning unit located above the PC lab was not connected to the building's heating/cooling system, and was not controlled or maintained by Van Dorn or its building staff (Calderone Dep. at 38-39, Austin Dep. at 154; Iuzzini Dep. at 76). Choice retained Rimco Air Conditioning Co. to service and repair the unit (Iuzzini Dep. at 45-46, 48), which had been installed before Choice leased the space in 1991.

While there is no dispute that water flooded the premises of Choice and AIG as a result of

²The court notes that, in its opposition to Choice's motion, AIG submits several photographs, annexed as Exhibits D, F, and G, which were apparently used and referred to during the depositions of Iuzzini, Calderone, and Austin. However, for the most part, the photographs are not clear, or self-explanatory; nor does the deposition testimony adequately explain what is depicted in the copies submitted.

the sprinkler pipe freezing and then rupturing, the parties dispute the cause of the ruptured pipe. Choice contends that Van Dorn's failure to maintain heat in the building and its failure to maintain the sprinkler system, together with the extremely cold weather, caused the pipe to freeze. Van Dorn and AIG contend that cold air entering the building through a louver in Choice's air conditioning unit, as a result of Choice's failure to maintain its equipment and fixtures, caused the sprinkler pipe to freeze.

In support of its motion, Choice submits weather data showing that on January 11, 2004, the temperature in New York City averaged about 18 degrees, with a low temperature of 7-8 degrees, which was well below normal (see Jan. 2004 Local Climatological Data, Ex. E to Walthall Aff. in Support, at 1, 4). Based on this evidence, Choice argues that Van Dorn's negligence caused the pipe to freeze and burst, because it owned and controlled the sprinkler pipe system and, despite the freezing temperatures, failed to maintain heat in the building. Choice also argues that Van Dorn had notice that there was a problem based on Choice's numerous complaints to Van Dorn. Choice further argues that it is entitled to summary judgment in its favor because there is no evidence that it caused or created the condition that resulted in the pipe freezing, or that it had any notice that it needed to do anything about its equipment.

Choice fails, however, to address evidence, submitted by AIG and Van Dorn, that cold air coming through its air conditioning unit may have caused the pipe to freeze. Van Dorn's building manager, Kenneth Calderone, and building engineer, David Austin, both testified that, after observing the broken sprinkler pipe at the time of the incident, they concluded that a draft coming from the air cooling unit froze the sprinkler head (Calderone Dep., at 113-114; Austin Dep., at 173; see Incident Report, Ex. I to AIG/Szalyga Aff. in Opp. to Choice). Austin explained that Choice's air cooling unit was part of a back-up system, which provided cool air to

an interior computer room through ductwork, took in outside air, when needed, through a damper that opened and closed, and allowed air to exit through a louver, an opening that did not close (Austin Dep., at 59-62). Austin further explained that outside air could come in, even when the unit was not operating, through the louver, if the opening was not properly sealed (*id.* at 62-63).

AIG submits an affidavit from Russell P. Fleming, P.E., who, after inspecting the premises and the unit in question, opined that the unit was not equipped with a damper to prevent cold air from entering the unit, that the unit was not properly sealed, and that cold air entering through the unit caused water in the nearby sprinkler pipe to freeze, expand, and rupture (Fleming Aff., Ex. K to AIG/Szalyga Aff. in Opp.). Van Dorn also submits an affidavit from Ingemar B. Asp, P.E., who similarly concludes, based on his inspection of the unit and the broken sprinkler pipe, that the rubber sleeve on the duct work on the air cooling unit had deteriorated, allowing cold air from the outside to come in through the unit's louver opening and causing the pipe to freeze (Asp Aff., Ex. 1 to Ryan Aff. in Opp.).

As Choice points out, these affidavits are based on inspections that occurred years after the incident, and do not set forth factual details in support of the experts' conclusions. However, assuming arguendo that the experts' opinions are not competent evidence on this motion (*see e.g. Amatulli v Delhi Constr. Corp.*, 77 NY2d 525 [1991]), the testimony of Van Dorn's building personnel, based on contemporaneous inspections, raises a triable issue of fact as to whether the the air cooling unit, undisputedly owned and controlled by Choice, caused the sprinkler pipe to freeze. Nor does Choice submit any evidence to demonstrate as a matter of law that the sprinkler pipe was negligently maintained or that the lack of heat in the building caused the pipe to freeze. Notably, Choice submits no expert testimony as to the cause of the frozen pipe.

To the extent that Choice argues that it had no notice of a defective condition of the air

cooling unit, and was not advised by building staff that there might be a problem with cold air coming into the building through the unit, it is undisputed that Choice was aware that there was a cold draft emanating from the area where its unit was located, and that the unit was under its control. Choice made numerous complaints to the building staff about the temperature in its office, including complaints about a cold draft in the PC lab. Van Dorn acknowledges that it received Choice's complaints, and addressed them by sending building engineers to check the temperature (Austin Dep., at 74-76). According to Austin, assistant chief engineer at the time, starting in early 1993, Choice complained that there was a cold draft coming from the ceiling in the PC lab (*id.* at 77-79), in the vicinity of the air cooling unit. Van Dorn employees, including building engineers and the building manager, addressed the complaints by checking the area in the ceiling identified as the source of cold air, by adjusting the heat for the office, and by placing insulation in the area (*see* Austin Dep., at 77-82; Calderone Dep., at 43-44, 47-52, 56-57). Despite the added insulation, the cold condition, and Choice's complaints, continued, and the building took no additional measures (Calderone Dep., at 60-61, 152-154). Even if the building engineers, in their attempts to resolve the problem of cold air coming into Choice's office, did not identify the air conditioning unit as the source of the cold draft, and did not expressly advise Choice to further investigate its air conditioning unit, Choice retained the obligation to maintain and repair the air conditioning unit.

In view of the above, the court finds that triable issues of fact exist as to Choice's negligence, and its motion for summary judgment dismissing the complaint is denied. As Choice has not demonstrated as a matter of law that it was not negligent, the branch of the motion seeking summary judgment on its claim against Van Dorn for common-law indemnification also is denied (*see infra*, at 14-15).

The court now turns to Van Dorn's motion. This motion seeks summary judgment dismissing the third-party complaint in which Choice alleges causes of action against Van Dorn for contractual and common-law indemnification, contribution, and breach of contract for failure to procure insurance. Van Dorn moves for dismissal on the grounds that, in view of the insurance coverage which Choice had for this incident, the claims for contractual indemnification and contribution are barred by the terms of the parties' lease; Choice has no common-law indemnification claim because its liability is not vicarious; and there is no claim for breach of contract for failing to procure insurance because the lease did not require the procurement.

With respect to the contractual indemnification and contribution claims, the parties' lease provides, in pertinent part:

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys' fees, paid, suffered or incurred as a result of negligence or improper conduct of the Tenant, Tenant's agents, contractors or employees. ...
Owner shall indemnify and save harmless Tenant against and from all liabilities, obligations, damages, penalties, claims, costs and expenses for which Tenant shall not be reimbursed by insurance, including reasonable attorneys' fees, paid, suffered or incurred as a result of the negligence or improper conduct of Owner or of Owner's agents, contractors or employees.

(Lease, Ex. 4 to Ryan Aff. in Support of Motion, ¶ 8).

The lease further provides, in paragraph 9:

Nothing contained hereinabove shall relieve Tenant or Owner from liability that may exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or

other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or any one claiming through or under each of them by way of subrogation or otherwise. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance.

(*Id.*, ¶ 9).

Van Dorn contends that paragraph 8 precludes Choice's claims for contractual indemnification and contribution because Choice had insurance coverage which, it is not disputed, was sufficient to cover AIG's claim against it (*see* Choice Response to PC Order, Ex. 7 to Ryan Aff. in Support of Motion; Choice Response to Interrogatories, Ex. 8 to Ryan Aff. in Support, Response No. 2). Further, Van Dorn contends that, pursuant to paragraph 9, the parties agreed to seek coverage from their own insurers and to waive subrogation and other claims against each other, as long as each had sufficient insurance coverage.

In opposition to Van Dorn's motion, AIG and Choice³ argue that paragraph 8 violates General Obligations Law § 5-321, and therefore is void and unenforceable. General Obligations Law § 5-321 provides:

Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable.

³In its opposition papers, Choice expressly adopts AIG's legal arguments and recitation of facts. *See* Walthall Aff. in Opp., ¶ 4.

Section 5-321 was enacted, at least in part, in response to “the widespread use in New York City of ... contracts[] resulting in unequal bargaining power between lessor and lessee.” *Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 160 (1977) (internal quotation marks and citations omitted). It prohibits agreements in which landlords exculpate themselves from all responsibility for their own negligence, and thus compels landlords “at their own peril to retain the incentive to act prudently.” *Id.* at 160-161; *Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 (2006). Notwithstanding § 5-321, courts have held that a lease negotiated by sophisticated business entities may include a provision requiring a tenant to indemnify a landlord for the landlord’s own negligence, where the lease contains an insurance provision requiring the parties to procure insurance (*see Hogeland*, 42 NY2d at 160; *Great N. Ins. Co.*, 7 NY3d at 419) or a provision allocating the risk of liability to a third-party insurer. *See Gary v Flair Beverage Corp.*, 60 AD3d 413, 414-415 [1st Dept 2009]; *Arteaga v 231/249 W. 39th St. Corp.*, 45 AD3d 320, 321 (1st Dept 2007). When “a lessor and lessee freely enter into an indemnification agreement whereby they use insurance to allocate the risk of liability to third parties between themselves, General Obligations Law § 5-321 does not prohibit indemnity.” *Great N. Ins. Co.*, 7 NY3d at 419; *Walsh v Celwyn Co., Inc.*, 22 Misc 3d 127(A), 2009 NY Slip Op 50013(U) (App Term, 1st Dept 2009). In such circumstances, no public policy is undermined, as the injured party has “adequate recourse for the damages it suffered.” *Great N. Ins. Co.*, 7 NY3d at 419. Thus, a lease provision, in which “both parties choose to allocate the risk of loss to an insurer for their mutual benefit” (*Graphic Arts Supply, Inc. v Raynor*, 91 AD2d 827, 828 [4th Dept 1982]) is valid and enforceable. *See Great N. Ins. Co.*, 7 NY3d at 419; *Gary*, 60 AD3d at 414-415; *Arteaga*, 45 AD3d at 321.

In this case, the lease between Choice, as tenant, and Van Dorn, as owner, included reciprocal indemnification obligations, limited to costs not reimbursed by insurance (see Lease, ¶ 8). By its terms, this lease provision does not exempt the owner from liability for its own negligence, but allocates the risk of liability to insurers.

Choice and AIG acknowledge that courts have enforced similar lease provisions but argue that such a provision is enforceable only when it is coupled with an insurance procurement provision. However, while courts, in enforcing broad indemnification provisions, have cited the existence of insurance procurement provisions (see *Great N. Ins. Co.*, 7 NY3d at 419; *Hogeland*, 42 NY2d at 161), the absence of a lease provision requiring insurance procurement is not determinative where, as here, it is undisputed that both sides procured adequate insurance to cover the claims against them. See *Arteaga*, 45 AD3d at 321; see also *Diaz v Lexington Exclusive Corp.*, 59 AD3d 341 (1st Dept 2009) (failure of tenant to procure required insurance did not void indemnification provision where landlord purchased its own insurance); *Wilson v Haagen Dazs Co., Inc.*, 201 AD2d 361 (1st Dept 1994) (same). As in *Great N. Ins. Co.* (7 NY3d at 419), Choice's insurer, not Choice itself, "will bear ultimate responsibility for the indemnification payment, which is precisely the result contemplated by the parties when they entered into the lease." The court thus finds that this provision is valid. As the existence of insurance is not disputed in this case, the court need not reach the question of the validity of the parties' indemnification agreement in the absence of insurance.

To the extent that Choice and AIG argue that paragraph 8 of the lease is ambiguous, the court finds no inconsistency regarding the respective liabilities of the tenant and the owner. As noted above, the provision does not exempt the owner from liability for its negligence but, rather,

allocates the risk of its liability, as well as the risk of the tenant's liability, to the insurers. Van Dorn is entitled to summary judgment dismissing Choice's claim for contractual indemnification.

Van Dorn is also entitled to dismissal of Choice's claim for common-law indemnification. Common-law indemnification permits one held vicariously liable who has been compelled to pay for the wrong of another to shift the entire burden of loss to the actual wrongdoer. *See D'Ambrosio v City of New York*, 55 NY2d 454, 460 (1982); *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80 (1st Dept 1999); *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 (1st Dept 1985). However, common-law indemnification is warranted only where a party "is held vicariously liable solely on account of the negligence of another." *Id.* at 453; *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671 (2d Dept 2007); *Bedessee Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 796 (2d Dept 2007); *see generally Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 (1990). A party which has actually participated to some degree in the wrongdoing is not entitled to indemnification. *17 Vista Fee Assoc.*, 259 AD2d at 80; *Trustees of Columbia Univ.*, 109 AD2d at 453.

Here, Choice's liability, if any, is not merely vicarious. Any finding of liability against it would be based on its "own participation in the acts giving rise to the loss, that is, as an actual wrongdoer, and, alternatively, if [Choice] did perform its duties properly by exercising due care ... [it] would be free from liability." *Trustees of Columbia Univ.*, 109 AD2d at 454. In either event, it would not be entitled to common-law indemnification from Van Dorn.

Choice also cannot seek contribution from Van Dorn, pursuant to the lease provisions. Unlike indemnification, which shifts the entire burden of loss from one held legally liable to the actual wrongdoer, in contribution the loss is equitably distributed among joint tortfeasors in

proportion to their liability to the injured party. See *Mowczan v Bacon*, 92 NY2d 281, 284-285 (1998); *Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 23 (1985); *Garrett v Holiday Inns, Inc.*, 58 NY2d 253, 258-259 (1983). This rule of apportionment, however, "may be modified by a valid agreement for contractual indemnity." *Rogers v Dorchester Assoc.*, 32 NY2d 553, 564 (1973). Here, the parties' lease expressly provides that each party shall look first to its insurer before making any claim against the other party, and to the extent that insurance is available, each waives the right of recovery against the other (see Lease, ¶ 9).

As to the branch of Van Dorn's motion to dismiss the cause of action for breach of contract for failure to procure insurance on behalf of Choice, neither Choice nor AIG identifies a lease provision requiring Van Dorn to procure such insurance, or otherwise offers any opposition. This branch of Van Dorn's motion therefore is granted without opposition.

Accordingly, it is ORDERED that the motion of defendant Choice Logistics for summary judgment is denied in its entirety; and it is further

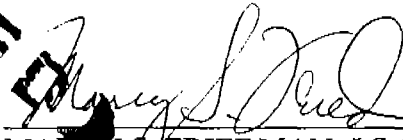
ORDERED that the motion of third-party defendant Van Dorn for summary judgment is granted to the extent of dismissing the third-party complaint; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly, with costs and disbursements to third-party defendant as taxed by the Clerk, upon submission of an appropriate bill of costs; and it is further

ORDERED that the remaining claims are severed and shall continue.

Dated: New York, New York
August 11, 2009

FILED
AUG 17 2009
COUNTY CLERK'S OFFICE
NEW YORK


MARCY S. FRIEDMAN, J.S.C.