

Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Son, Inc.

2010 NY Slip Op 30145(U)

January 13, 2010

Supreme Court, Suffolk County

Docket Number: 04-18062

Judge: John J.J. Jones

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

P R E S E N T :

Hon. JOHN J.J. JONES, JR.
Justice of the Supreme Court

MOTION DATE 8-26-09
ADJ. DATE 9-30-09
Mot. Seq. # 001 - MD
002 - XMD

-----X			NEIL H. GREENBERG & ASSOCIATES P.C.
BLANCHE, VERTE & BLANCHE, LTD.,	:		Attorneys for Plaintiff
	:		900 Merchants Concourse, Suite 214
Plaintiff,	:		Westbury, New York 11590
	:		
	:		GUARARRA & ZAITZ
- against -	:		Attorneys for Defendant Joseph Mauro & Son, Inc.
	:		100 Park Avenue, 20 th Floor
	:		New York, New York 10017
JOSEPH MAURO & SON, INC., and SHORE	:		
DRUGS, INC.,	:		WHITE, QUINLAN & STALEY
	:		Attorneys for Defendant Shore Drugs, Inc.
Defendants.	:		377 Oak Street, P.O. Box 9304
-----X			Garden City, New York 11530

Upon the following papers numbered 1 to 81 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 31; Notice of Cross Motion and supporting papers 32 - 57; Answering Affidavits and supporting papers 58 - 66; 67 - 71; Replying Affidavits and supporting papers 72 - 76; 77 - 81; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendant Joseph Mauro & Son, Inc. is denied; and it is further

ORDERED that the motion by defendant Shore Drug, Inc. is denied.

Defendant Joseph Mauro & Son, Inc. ("Mauro") moves for summary judgment pursuant to CPLR 3212 and provides copies of the pleadings, copies of various witnesses' pretrial depositions, a Suffolk County Police Department Supplemental Report, a document dated December 19, 2002 on the letterhead of Zandler Construction Corp., a copy of an insurance policy, copies of various checks, a copy of a document titled "Sworn Statement in Proof of Loss," various correspondence on First Adjustment Group, Inc. letterhead, and a copy of a Suffolk County Clerk Deed Recording page. By his affidavit, counsel for plaintiff St. Paul/Travelers opposes any "quantification, characterization or representation" by counsel for Mauro of the deposition of a St. Paul/Traveler's adjuster. St. Paul/Travelers has not otherwise appeared in the instant matter. Plaintiff Blanche, Verte & Blanche

Blanche”) opposes and defendant Shore Drug, Inc. (“Shore”) cross-moves for summary judgment and provides copies of the pleadings, and copies of deposition testimony. Both Mauro and Shore have replied. The various parties have submitted memoranda of law.

By its complaint, Blanche alleges that a fire occurred on October 24, 2002 at premises owned by it at 2 East Main Street, Bay Shore, New York. It alleges that the fire originated in an electrical panel box which was within the sole custody and care of Shore, a commercial tenant on the first floor of the premises, and was the result of improper maintenance of the electrical panel box. Blanche also alleges that Shore hired Mauro to perform work on the box “mere weeks” before the fire occurred, and that the premises have been completely destroyed requiring complete reconstruction. The causes of action alleged are the hiring of Mauro by Shore in violation of the lease agreement between Blanche and Shore, negligence and carelessness on the part of Shore in failing to ensure that the electrical panel box was properly maintained causing a dangerous and defective condition, and negligence and carelessness on the part of Mauro.

By its motion, Mauro contends that Blanche has been fully compensated by insurance proceeds for any losses it incurred as a result of the fire. Essentially, it claims that inasmuch as Travelers Insurance Company (“Travelers”), as subrogee of Blanche, has paid Blanche’s claim and that as Travelers is pursuing a separate subrogation action against it, Mauro cannot be subject to double recovery by Blanche. It points to, among other documents, a “Release and Subrogation Receipt” signed by Neil H. Greenberg, “a partial owner” of Blanche, acknowledging receipt of monies “in full payment, release and discharge of all claims and demand of the [insured] against the [insurer] arising from or in connection with any loss or damage by reason of [the fire].” Mauro also notes the receipt by Blanche of other payments from its insurer and the proceeds from the sale of the land which was the site of the damaged commercial building. It contends that based upon the insurer’s estimates, the total market value of the property was significantly less than the sums ultimately paid to Blanche. Mauro notes that the commercial building was not rebuilt. The total compensation received by Blanche, according to Mauro was \$2,352,024.63. By its complaint Blanche seeks \$3,804,507.16.

Shore, by its cross motion, contends that there is no evidence that it breached its lease agreement with Blanche, that it is entitled to summary judgment dismissing Blanche’s claim for negligence, that Blanche has been made whole and, therefore, cannot maintain the instant action and that Mauro’s cross claims should be dismissed.

Shore relies, in part, on the deposition testimony of Seymour Kirshenbaum, an employee of Shore. Kirshenbaum testified that renovation work had been performed in the store in early 2000. He indicated that he did not know whether the landlord was aware of the renovations. He also stated that prior to the fire he heard a “sizzling” sound emanating from a light switch and that an electrician thereafter performed electrical work. Kirshenbaum was unsure as to the dates of those events. Shore also relies on the deposition of John Mauro, who testified that he was a licensed electrician and that one week prior to the fire, after being advised of a sizzling noise at the site, he replaced a burned circuit breaker and two single pole light switches. He testified that he thereafter removed the cover to the electrical panel box and performed tests on the amperage level. Mauro testified he found the amperage level to be safe, but smelled a “fish” odor. He stated that after he found a breaker to be burned in the

place where it connected with the busbar, which “gives power to all the breakers,” he then informed a store employee that he intended to shut down “a couple of breakers to check it.” According to his testimony, he did so and determined that the remaining breakers were in working order. In addition, Shore points to the testimony of James White (“White”), an irrigation contractor and president of Blanche which owned the premises which was the site of the fire. According to White’s testimony, his duties with respect to Blanche included collecting rent, paying bills and performing small repairs. White testified that he was aware that Shore had performed renovation work on the premises, but did not know when. White acknowledged that Shore submitted an insurance claim for damages caused by the fire and that Blanche received insurance proceeds. He also testified that the premises were not rebuilt and, ultimately, were sold.

Shore contends that there has been no showing that it breached the terms of its contract with Blanche, that the work performed by Mauro was not complex, and that the electrical contractor was one which had long been used by tenants in the building. Shore contends that there has been no showing of negligence on its part, citing the “general rule” that one who engages an independent contractor is not liable for the latter’s negligence in performance. Shore also adopts the arguments proffered by Mauro to the extent that it claims Blanche has been fully compensated for its loss by its insurer. It also contends that it did not supervise the work performed by Mauro nor was there a contractual relationship between it and Mauro. Thus Shore asserts that any claims by Mauro for contribution and common law indemnification must fail.

Blanche, in opposition to Mauro’s motion, notes that the insurance proceeds were the result of a contractual agreement between it and its insurer, and that the language of the receipt reflects the scope of that agreement. It contends that inasmuch as Mauro is not a party to that agreement, it cannot claim any resultant benefits. Blanche also disputes Mauro’s assertion that by pursuing a claim against it, Blanche would receive double benefits citing pending subrogation actions by its insurer.

Blanche, in opposition to Shore’s cross motion, points to the lease agreement between it and Shore, specifically the requirement that all repairs “shall be at least or substantially equal in quality and class to the condition of the Demised Premises at the commencement of this Lease, reasonable wear and tear expected,” and that the adequacy of repairs to the premises “shall be measured by the standard which is appropriate for improvements of similar construction and class.” It contends that the repairs performed by Mauro were below the standard of care for the industry, and maintains that questions regarding the adequacy of the repairs are properly the province of a jury. Blanche also argues that Shore cannot shift its obligations under the lease to Mauro. As to Shore’s claim that it has been fully compensated for the alleged loss, Blanche again notes that it is seeking the difference between the alleged actual cash value of the premises and the insurance proceeds.

Mauro, in opposition to Shore’s cross motion, contends that to the extent Blanche’s complaint survives the motions against it, Mauro is entitled to press its crossclaims for common law indemnification and contribution against Shore. It relies, in part, on evidence furnished by Blanche to support its position that a question of fact exists. Mauro also relies on *Mas v Two Bridges Associates*, 75 NY2d 680 (1990) for its position that indemnification is available despite the fact that Shore did not perform the electrical work.

Summary judgment is, of course, a drastic remedy and is to be applied sparingly (*Andre v Pomeroy*, 35 NY2d 361 [1947]). The court's focus in making such determination is upon issue finding not issue solving, and all competent evidence must be viewed in the light most favorable to the party opposing the motion (*Sillman v Twentieth Century Fox Corp.* 3 NY2d 395 [1957]). To prevail on a motion for summary judgment, the movant must proffer sufficient evidence to eliminate all material issues of fact (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). A court will only entertain such motion after the moving party has established, by competent admissible evidence, that it is entitled to judgment as a matter of law. Only if movant meets this burden is the opposing party is obligated to submit evidence which raises a material issue of fact to preclude an award of summary judgment (see *Ware v Baxter Health Care Corp.*, 25 AD3d 863, 864 [2006]).

Mauro asserts that Blanche received payments in excess of the total market value of its property based on estimates provided by Blanche's insurer. It also contends that the applicable measure of damages is the market value of the property had it not been destroyed and that the sums received by Blanche fully compensate it for the loss. Blanche has elected not to rely on its insurer's estimate of the value of the property. The adjustment company retained by it determined that it would require the sum reflected in its complaint. As noted by Blanche, Mauro is not a party to its agreement with its insurer and its acknowledgment of the sums remitted to it by the insurer was predicated on seeking no further compensation from that source. It did not preclude Blanche from further action against the defendants. Mauro's motion for summary judgment is denied.

Shore asserts that it did not breach its agreement with Blanche by failing to first obtain written permission to do the electrical work or by performing such work in a substandard manner. It claims that the electrician who performed the work had done similar repairs at the premises for many years, and that the testimony of the electrician reveals that he did not "alter, add, or improve the subject premises," because he "simply changed a circuit breaker and light switches."


Shore has not proffered competent admissible evidence that it did not breach its agreement with Blanche. As noted by Shore, the terms of its lease agreement with Blanche required that any repair work to the premises be performed in accordance with "the standard which is appropriate for improvements of similar construction and class, provided that Tenant shall in any event make all repairs necessary to avoid any structural damage or injury to the building." Despite Shore's reliance on John Mauro's testimony to support its claims that it did not violate the terms of the lease, a question of fact exists as to whether the work performed comported with the industry standard. A summary determination as to that issue therefore cannot be made.

Shore's assertion that it is not liable for any alleged negligence by Mauro inasmuch the latter was acting as an independent contractor is premised upon the long held general rule that one who engages an independent contractor to do work is not liable for the latter's negligence in performance (see Restatement of Torts 2d § 49). That rule, however, is subject to a number of exceptions, including the holding that a "hirer" is responsible for a dangerous condition negligently created if the hirer had actual or constructive notice of the condition (see *Schwartz v Merola Bros. Constr. Corp.*, 290 NY 145 [1943]). Here, the testimony of Kirshenbaum has raised a question of fact as to whether such condition was known to Shore. Summary judgment as to this issue cannot be rendered. The issue raised by Shore

as to whether Blanche has been made whole has previously been found as not subject to summary determination.

The motion to dismiss the cross claims asserted by Mauro for contribution and indemnification against Shore is premised on the assertion that, in the absence of a showing that it was "actively negligent," Shore cannot be held liable for the negligence of Mauro. Common law indemnification is based on vicarious liability without actual fault which requires a party who itself participated in some measure to the wrongdoing cannot benefit from the doctrine. To prevail on a claim for common law indemnity, one must establish that it was not guilty of negligence beyond the statutory liability and that the proposed indemnitor was guilty of some negligence (*see Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681 [2005]). Contribution is applicable in those instances in which two or more tortfeasors combine to cause an injury and is determined in accordance with the relative degree of liability of each (*see Godoy v Abamaster of Miami*, 302 AD2d 57 [2003]). Thus, Shore's motion seeking dismissal of the counterclaims by Mauro is premature inasmuch as yet there has been no finding as to its possible liability to Blanche.

Dated: 13 January 2010



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION