SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

WEISS & WEISS, P.C., LAW OFFICES OF PATRICK MCGRORY AND RUDY HIRSCHEIMER, ESQ.,

Plaintiffs,

-against-

MOTION SEQ. NO.: 004, 005, 006, 008
MOTION DATE: 1/20/2010

FP 300 OCR LLC, PHILIPS INTERNATIONAL HOLDING (A CORP.), NAI LONG ISLAND (A. Corp.), MODERN SPRINKLER CORP, and KEY COURT CONDOMINIUM, INC.,

INDEX NO.: 11457/07

Defendants.

MERCHANTS INSURANCE GROUP a/s/o BENJAMIN J. KLEMANOWICZ JR., PC.,

Plaintiffs,

ACTION II
INDEX NO.: 11391/08

-against-

MODERN SPRINKLER CORPORATION,

Defendant.

MODERN SPRINKLER CORPORATION,

Third-Party Plaintiff,

-against-

NAI LONG ISLAND and KEY COURT CONDOMINIUM, INC.,

Third- Party Defendants.

The following papers having been read on the motion (numbered 1-8):

Notice of Motion.....1
Notice of Cross Motion Seq. 005.....2
Notice of Cross Motion Seq. 006.....3
Notice of Motion Seq. 008.....4
Affirmation in Oppositions.....5
Affirmation in Opposition and in Further Support.....6
Affirmation in Opposition.....7
Reply Affirmations.....8
Stipulation of Discontinuance.....9

Motion (seq. no. 4) by the attorneys for Modern Sprinkler Corp. (Modern) defendant in Action No. 1 and defendant-third party plaintiff in Action No. 2 for an order pursuant to CPLR 3212 granting Modern summary judgment and dismissing plaintiffs' verified complaints and all cross-claims against Modern is **granted.**

Cross motion (seq. no. 5) by the attorneys for NAI Long Island (NAI) and Key Court Condominium, Inc. (Key Court) defendants in action No. 1 and third party defendants in action No. 2 for an order pursuant to CPLR 3212 granting summary judgment to defendants NAI and Key Court dismissing the complaint and all cross-claims as to NAI and Key Court is **denied**.

Cross motion (seq. no. 6) by the attorneys for the plaintiffs Weiss & Weiss, P. C., et all (Weiss) in Action No. 1 for an order pursuant to CPLR 3212 granting summary judgment against all defendants is **denied.**

Motion (seq. no. 8) by the attorneys for defendants FP 300 OCR LLC (FP 300) and Philips International Holding (Philips) for an order pursuant to CPLR 3212 dismissing the plaintiffs' complaints and all cross-claims against FP 300 and Philips has been settled and is therefore **denied.**

This is a consolidated action brought by the plaintiffs to recover property damages arising out of a flood that occurred at the premises. In Action 1 the plaintiffs are individual tenants of the premises who seek to recover for loss of property and business profits; Action 2 is a subrogation action by Merchants Insurance Group (Merchants), as subrogee of a tenant to recover insurance proceeds paid to the tenant for property damage.

Defendant, Key Court is the owner of the 6 story building located at 300 Old Country Road, Mineola, New York (building). NAI is the authorized managing agent for Key Court since May 1, 2005. James Woodring of NAI is the Senior Property Manager for Key Court. Thomas Bristol has been the site Building Manager for Key Court since approximately 1998. Under the Management Agreement between Key Court and NAI, the latter is responsible for managing, operating and maintaining the building. Some of the units of the building are owned by defendant FP 300 OCR LLC. Plaintiff Weiss & Weiss, P.C. and Law Offices of Patrick McGrory and Rudy Hirscheimer, Esq. [Weiss] are tenants of units owned by defendant FP 300. Philips International Holding is the managing agent for FP 300 and manages the units occupied by Weiss. Plaintiffs Benjamin J. Klemanowickz, Jr., P.C. is a tenant of Key Court. Fire protection for the building includes a 6 inch wet pipe automatic fire sprinkler system. A wet pipe automatic fire sprinkler system is a sprinkler system employing automated sprinklers attached to a piping system containing water and connected to a water supply so that water discharges immediately from sprinklers opened by heat from a fire. A "chiller room" is located on the rooftop of the building. The chiller room is unheated. The wet pipe automatic fire sprinkler system runs through the chiller room. The chiller room is equipped with sprinkler piping, sprinkler valves, and sprinkler heads. In order to protect the pipes from freezing secondary to exposure to the outside air, the sprinkler pipes are wrapped with heat tape and insulation. The wet pipe automatic fire sprinkler system and the heat tape were installed when the building was built in the mid 1980s. According to Mr. Bristol, the pipes had heat tape and insulation "for years." (Bristol EBT, p. 80). Heat tape (sometimes referred to as "heat wrap," "heat trace" or "heat wire") is an electrical device that provides heat to water pipes through an electric coil that is wrapped around a pipe to prevent freezing. (Bristol EBT, p. 42); (Woodring EBT, p. 56, 126). Insulation is applied over the heat tape to prevent the water pipes from losing heat.

Defendant-third party plaintiff Modern Sprinkler is in the business of inspecting and testing fire protection systems. Modern Sprinkler did not design or install the wet pipe automatic fire sprinkler system at Key Court. Modern Sprinkler was under contract with

NAI, as managing agent to Key Court, to provide NFPA 25 inspection services on the wet pipe automatic fire sprinkler system. Modern Sprinkler had been performing NFPA 25 inspections at the building since the 1990s. Prior to entering into an inspection contract for a building, Modern Sprinkler conducted an inspection of the fire protection system to ensure that the system was in compliance with the National Fire Protection Association 13 (NFPA 13). NFPA develops and publishes Codes and Standards which govern the design, installation, inspection, testing and maintenance of fire protection systems. NFPA 13 - Standard for the Installation of Sprinkler Systems is the recognized standard for the design and installation of wet pipe automatic fire sprinkler systems. NFPA 25 - Standard for the Inspection, Testing, and Maintenance of Water-Based Fire Protection Systems is the recognized standard for conducting inspection and testing activities on wet pipe automatic fire sprinkler systems. Under the Inspection Services Contract, Modern Sprinkler was required to conduct annual, quarterly, and monthly inspections in compliance with NFPA 25. The Inspection Service Contract provided:

> This Agreement is ***limited to Inspection Service only and does not include maintenance, testing, alterations, repairs or replacements*** to the automatic sprinkler and/or associated detection equipment. Any repairs, alterations and replacement shall be made by Modern upon Customer's order and acceptance by Modern.(emphasis in the original)

As part of the annual inspection, Modern Sprinkler was required to do the following inspection activity:

> Before freezing weather, inspect the building to assure exterior wall openings will not expose wet sprinkler piping for freezing temperatures.

NFPA section 2-2.5 provides:

> Buildings: Annually, prior to the onset of freezing weather buildings with wet pipes systems shall be

> inspected to verify that windows, skylights, doors, ventilators, other openings and closures, blind spaces, unused attics, stair towers, roof houses, sprinkler piping to freezing and to verify that adequate heat [minimum 40 F (4.4 C)] is available. NFPA 25, section 2-2.5.

The term "inspection" is defined by NFPA 25 as:

> "[a] inspection of water-based fire protection system or portion thereof to verify that it appears to be in operating condition and is free of physical damage" NFPA 25, p. 9. (Exhibit S, p. 9).

Key Court and its managing agent, NAI were aware that it was their responsibility to maintain the sprinkler pipes at above 40 degrees Fahrenheit.

An area protected by the sprinkler system is any area where a sprinkler pipe or a sprinkler head is located. (Bowe EBT, p. 36). The purpose of maintaining these areas above 40 degrees Fahrenheit is to prevent the sprinkler pipes from freezing. (Bowe EBT, 36-37).

Elwood Todd Odell is employed by Modern Sprinkler as a mechanic. His responsibilities included inspecting, testing and maintaining fire protection systems. He has been employed by Modern Sprinkler for 17 years. He has been performing NFPA 25 inspections of the wet pipe automatic fire sprinkler system located at Key Court since the mid-1990s. On August 1, 2006, Odell performed a NFPA 25 inspection of the wet pipe automatic fire sprinkler system at the building. As part of the annual inspection, Odell inspected the building for any pipes that were vulnerable to freezing temperatures which included the chiller room. This would involve visually inspecting the chiller room for any openings to exterior air and verifying that the sprinkler pipes were provided with at least 40 degrees Fahrenheit of heat. Odell was aware that the chiller room was not heated, that the chiller room was vented to outside air, that outside air came into the chiller room, and that

the room is cold in the winter. His visual inspection of the wet pipe automatic fire sprinkler pipes revealed that the pipes were covered with heat tape and insulation. In fact, Odell testified that on all the prior occasions he had inspected the wet pipe automatic fire sprinkler system, the pipes had always been covered with heat tape and insulation. Odell argues that if the tape and/or insulation had been in a state of disrepair, then Modern Sprinkler would have notified either the owner or the managing agent that the pipes were not being adequately protected. Upon completion of his NFPA 25 inspection, Mr. Odell generated an Inspection Report. Based on the presence of heat tape and insulation, he found that the "wet pipe areas appear properly heated" and noted that "prior to freezing season, owner is responsible for building to be in secure condition and properly heated." Since the pipes were protected with heat tape and insulation, Odell found the sprinkler system to be adequately heated and did not find any impairments in the sprinkler system. On October 18, 2006, Odell returned to Key Court to conduct another NFPA 25 inspection. This inspection encompassed a quarterly inspection and a monthly inspection. His visual inspection of the wet pipe automatic fire sprinkler again revealed that the pipes were covered with heat tape and insulation. Odell generated an Inspection Report in which he reported his findings that the "wet pipe areas appear properly heated."

Prior to the incident of January 27, 2007, recommendations had been made by Odell to the agents of Key Court about making modifications to the heat source in the chiller room and/or about replacing the wet pipe automatic fire sprinkler system with a glycol anti-freeze system. However, Key Court elected against replacing the wet pipe automatic fire sprinkler system with a glycol anti-freeze system. Modern asserts there were no prior incidents of the heat tape failing in the cooling tower at Key Court Condominium.

Some time late in the evening of January 26, 2007 to early in the morning of January 27, 2007, ADT Securities, the provider of central alarm monitoring services to Key Court, received an alarm that the fire pump went off at the building. The Mineola Fire Department responded to the alarm, inspected the building, and left after finding no evidence of fire. The fire pump was not turned off during this response. The Mineola Fire Department responded a second time on January 27, 2007. On the second inspection, the

Fire Department discovered a cracked pipe tee of the wet pipe automatic fire sprinkler system located in the chiller room which was ejecting water. At that point, the fire pump was turned off. It appears that the pipe tee froze secondary to freezing temperatures in the chiller room. The weather report for January 27,2007 showed a low of 9 degrees Fahrenheit. It was 9 degrees Fahrenheit in the chiller room.

An incident report was prepared by Modern Sprinkler. Modern Sprinkler concluded that the incident occurred due to inadequate heating of the wet pipe sprinkler pipes by the building owner and/or their managing agent.

The by-laws of the condominium set forth defendant Key Court's relavant duties and obligations; Section 6 at p. 8 of the by-laws provides that:

> All maintenance, repairs and replacement of the common elements including, but not limited to exterior walls, roof and roof members, as well as all maintenance, repairs and replacements to any pipes, wire conduits and utility lines as are located in the common elements but serve one or more units shall be made by the Board of Managers and the cost thereof shall be a common expense.

Modern submitted an expert's report by a fire protection engineer who opined that with a reasonable degree of professional engineering certainty Modern acted within the applicable standards of practice in following the requirements of the New York State Fire Code and NFPA 25 for the inspection and testing of the fire sprinkler system, and fulfilled its service obligations under the contract with NAI, as managing agent for Key Court Condominium in its performance of inspection and testing of the fire sprinkler system. Modern noted that it had made prior recommendations to Key Court to change the system to an anti-freeze system. The building owner and/or managing agent had the discretion to change the fire protection system.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v*

Twentieth Century-Fox Film Corp., 3 NY2d 395; *Bhatti v Roche*, 140 AD2d 660. It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v Desmond*, 187 AD2d 797; *Gray v Bankers Trust Co. of Albany, N.A.*, 82 AD2d 168. Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212[b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092. Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851.

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat a motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212(b); *see also GTF Marketing, Inc. v Colonial Aluminum Sales, Inc.*,66 NY2d 965; *Zuckerman v City of New York*, 49 NY2d 557. The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v Donato*, 141 AD2d 513. Conclusory allegations are insufficient (*Zuckerman v City of New York, supra*), and the defendant party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v Harvey Hutter & Co., Inc.*, 207 AD2d 380; *Toth v Carver Street Associates*, 191 AD2d 631. If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.*, 35 AD3d 519. Nor can mere speculation serve to defeat

the motion. *Pluhar v Town of Southampton*, 29 AD3d 437.

The court must draw all reasonable inferences in favor of the nonmoving party. *Nichklas v Tedlen Realty Corp.*, 305 AD2d 385; *Rizzo v Lincoln Diner Corp.*, 215 AD2d 546. The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v Barrett*, 187 AD2d 553; *Barr v County of Albany*, 50 NY2d 247, 254; *James v Albank*, 307 AD2d 1024; *Heller v Hicks Nurseries, Inc.*, 198 AD2d 330.

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned (*see Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812; *Barclays Bank of N.Y. v Sokol*, 128 AD2d 492).

Modern asserts it is entitled to summary judgment because a fire sprinkler system maintenance company does not owe a duty of care to a commercial tenant who alleged that it suffered extensive damage as a result of a flood caused by a faulty sprinkler system where the sprinkler contract was with the building owner and not with the individual commercial tenant. (see *Eaves Brooks Costume Co., Inc. v Y.B.H. Realty Corp.*, 76 NY2d 220). The question of whether a duty exists in a particular case is generally a question of law for the court. (see *Palka v Servicemaster Mgmt. Serv. Corp.*, 83 NY2d 579). New York Courts have narrowly circumscribed the situations in which an agreement or contractual relationship between two parties will be held to give rise to a tort duty to a third party such as the parties herein *vis a vis* Modern.

An inspection that fails to uncover a defect could be labeled either misfeasance for negligent performance of the inspection, or nonfeasance for failure to conduct some procedure that would have revealed the defect. However, liability does not rise or fall on such semantics. In *Eaves Brooks Costume Company, Inc., supra*, p. 226-227, the Court of Appeals stated:

> "In our view, the proper inquiry is simply whether the defendant has assumed a duty to exercise reasonable care to prevent foreseeable harm to the plaintiff. In the ordinary case, a

> contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries and mere inaction, without more, establishes only a cause of action for breach of contract (*see,* Prosser and Keeton, *op. cit.,* § 92, at 659-660). But even inaction may give rise to tort liability where no duty to act would otherwise exist if, for example, performance of contractual obligations has induced detrimental reliance on continued performance and inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury' (*Moch Co. v Rensselaer Water Co.*, 247 N.Y. 160, 167, 159 N.E. 896). In such a case, the defendant has undertaken not just by his promises but by his deeds a legal duty to act with due care."

The court definition of an orbit of duty based on public policy may at times result in an exclusion of some who might otherwise have recovered for losses or injuries if additional tort principles had applied. In *Eaves Brooks, supra*, the Court declined to impose liability on the inspection company reasoning that "The plaintiff and the owners know or are in a position to know the value of the goods stored and can negotiate the cost of the lease and limitations on liability accordingly."

Just as in *Eaves Brooks, supra*, if Modern Sprinkler were answerable for property damage sustained by one not in contractual privity with it, Modern would be forced to insure against a risk the amount of which it may not know and cannot control, and as to which contractual limitations of liability may be ineffective. The result would be higher insurance premiums passed along through higher rates to all those who require sprinkler system and alarm services. In effect, the cost of protection for those whose potential loss is the greatest would be subsidized by those with the least to lose. The Court in *Eaves Brooks, supra*, pg. 289 saw no reason to distribute the risk of loss in such a manner.

In *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, the Court recognized three situations where there may be a question of fact as to whether the duty assumed by

Modern Sprinkler extended to the plaintiffs and

> "in which a party who enters into a contract to render services may be said to have assumed a duty of care-and thus be potentially liable in tort - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launche[s] a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Espinal, supra*, 136).

Nothing in the record before this Court demonstrates that the facts herein are within one of the situations enunciated in *Espinal, supra*. The public policy considerations identified by the Court of Appeals in *Eaves, supra*, are equally applicable to the within action. The facts in the cases cited by the plaintiffs (*Glanzer v Shepard*, 223 NY236; *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579; and *Spooner v National Elevator Inspection Services, Inc.,* 161 Misc. 2d 73) can be distinguished from those in the within action and are not controlling authority to impose liability on Modern, or suggest the undermining of the underlying holding of *Eaves. See Crum & Foster Speciality Co., v Safety Fire Sprinkler Corp.,* 405 F. Supp. 2d 223. The Court has considered the affidavit submitted by Weiss' expert, a retired chief fire investigator, only in opposition to Modern's motion for summary judgment and finds it unavailing only as to Modern in light of *Eaves, supra*, and its progeny.

Motion by Modern granting summary judgment dismissing the complaint of both plaintiffs and any cross claims against Modern is **granted.**

Defendants NAI and Key argue in support of their motion for summary judgment that they cannot be held liable for damages sustained by the Weiss plaintiffs since the incident was the result of an act of God, and could not have been prevented by any degree of human care or foresight. For a loss to be considered the result of an act of God, human

activities cannot have contributed to the loss to any degree. It cannot be determined, at this juncture, whether or not the damage to Weiss plaintiffs' property was a consequence of negligence or an act of God (see *Moore v Gottlieb*, 46 AD3d 775). Defendants NAI and Key assert no liability can be attach to them because they neither created the alleged dangerous "condition" nor did they have either actual or constructive notice of the condition (*Abrams v Berelson*, 283 Ad2d 597; *Leifer-Woods v Edwards*, 281 Ad2d 462). Mr. Pirro testified at his deposition that the building was notorious for power failure - "multiple times" per year (Piro deposition pgs. 69-71). Mr. Pirro and his company have serviced the HVAC (heating, ventilating and air conditioning) in the building for over 10 years prior to the incident.

In their motion for summary judgment defendants FP 300 *et al* argue there is no issue as to the condominium unit owner's duties and responsibilities. They assert that not only did the owner of the unit not have a duty to maintain the sprinkler system on the roof of the office building, but the unit owner could not even gain access to the roof of the building.

The attorney for the Weiss plaintiffs argues that the plaintiffs sustained extensive damage to their property and that no preventative measures were taken to protect their property and mitigate the loss while the water was running. There is a question of fact as to whether the FP 300 defendants were negligent in failing to hire sufficient personnel to protect their unit so as to give timely access to the office during the emergency while the water was flowing. The motion by defendants FP 300 and Philips for summary judgment is **denied.**

Plaintiffs Weiss &Weiss also request that Modern be required to produce various documents that Modern's expert relied on in support of his opinion. These documents include "a Jerome Levine report dated February 2, 2007, report by the building's insurer, architect report and JME invoices." To the extent that these reports will be demanded by the Weiss plaintiffs in the trial of this action, as to the remaining defendants, these documents are to be delivered within 20 days after written demand is made by the Weiss attorney.

Bristol testified there was damage to the heat tape. It was "discombobulated because the pipe broke and everything goes, so yes, the tape was bobbling around"

(Bristol, pg. 174). He didn't know if the tape was in tact. Plaintiffs contend they were denied the opportunity to inspect and test the heat tape so as to ascertain its condition. Therefore, they request the answer of Modern be stricken due to spoilation. The Court finds no reason to strike the answer on the grounds of spoilation of the tape. There is insufficient proof that the section of tape was not destroyed by the flood. Mr. Bristol stated the tape was "discombobulated." Further, there is no indication as to what part of the tape is the subject of the spoilation request. The application to strike the answer on grounds of spoilation is **denied.** Subject to the "discretion of the justice presiding at the trial, a missing evidence charge may be appropriate (see *Marotta v Hoy,* 55 AD3d 1194).

Modern Sprinkler Corp. shall be deleted as a party defendant in Action No. 1 and Action No. 2. Action No. 2, Index No. 11391/08 is **dismissed** and all proceedings under index number 11391/08 are terminated. In the event that Action No. 1 is settled, counsel shall forward a copy of the Stipulation to the Court.

This Constitutes the Order of the Court.

Dated: March 10, 2010

ENTER:

J.S.C.