

Utica First Ins. Co. v Blanche, Verte & Blanche, Ltd.
2010 NY Slip Op 30953(U)
April 16, 2010
Supreme Court, Suffolk County
Docket Number: 04-14660
Judge: John J.J. Jones
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

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

MOTION DATE 12-22-09ADJ. DATE 2-10-10

Mot. Seq. # 001 - MD

002 - XMD

003 - XMD

-----X	UTICA FIRST INSURANCE COMPANY as	:	FAUST GOETZ SCHENKER & BLEE
	subrogee of MARY McLOUGHLIN,	:	Attorneys for Plaintiff
		:	Two Rector Street
	Plaintiff,	:	New York, New York 10006
		:	ANDREA G. SAWYERS, ESQ.
		:	Attorneys for Defendant Blanche, Verte & Blanche
		:	3 Huntington Quad., Suite 102S, P.O. Box 9028
		:	Melville, New York 11747
	- against -	:	GUARARRA & ZAITZ
		:	Attorneys for Defendant Joseph Mauro & Son
		:	100 Park Avenue, 20 th Floor
		:	New York, New York 10017
	BLANCHE, VERTE & BLANCHE, LTD.,	:	WHITE, QUINLAN & STALEY
	JOSEPH MAURO & SON, INC and SHORE	:	Attorneys for Defendant Shore Drugs
	DRUGS, INC.,	:	377 Oak Street, P.O. Box 9304
	Defendants.	:	Garden City, New York 11530
-----X			

Upon the following papers numbered 1 to 47 read on this motion and cross-motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1 - 12; Notice of Cross-Motion and supporting papers (002) 13-26; (003) 27-29; Answering Affidavits and supporting papers 30-32; 33-34; 35-37; Replying Affidavits and supporting papers 38-40; Other Mauro Mem/Law: 41-42; 43-44; 45-46; Stipulation 2/8/10 - 47; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by the defendant, Joseph Mauro & Son, Inc., pursuant to CPLR 3212 for an order dismissing the complaint and the co-defendants' respective cross-claims asserted against it is denied; and it is further

ORDERED that this cross-motion (002) by the defendant, Shore Drugs, Inc., pursuant to CPLR 3212 for summary judgment: dismissing the claims asserted by Utica First Insurance Company a/s/o Mary McLoughlin is denied; for further order dismissing the cross-claims of co-defendant Mauro & Son, Inc. is denied; and for further order dismissing the cross-claims of co-defendant Blanche, Verte & Blanche Ltd. has been rendered academic by the stipulation dated February 8, 2010 and is denied as moot; and for further order granting summary judgment in favor of Shore Drugs, Inc. on its cross-claim for indemnification over and against Mauro & Son, Inc. is denied; and it is further

ORDERED that this cross-motion (003) by Blanche, Verte & Blanche, Ltd. pursuant to CPLR 3212

dismissing the plaintiff's complaint as asserted against is denied ; and for further order dismissing all cross-claims in this or the companion actions pleaded against Blanche, Verte & Blanche, Ltd., is denied.

It is noted that pursuant to the stipulation dated February 8, 2010 that the cross-claims asserted by Blanche, Verte, & Blanche, Ltd. against Shore Drugs, Inc. have been discontinued with prejudice.

In the complaint, the plaintiff, Utica First Insurance Company (Utica) as subrogee of Mary McLoughlin (McLoughlin), claims that on October 24, 2002 the plaintiff's subrogor was the owner of the building located at 12 East Main Street, Bay Shore, New York, and that Utica insured McLoughlin for damage to her property and loss of rents under policy number BOP 1142239. On October 24, 2002, it is claimed that McLoughlin sustained damage to her property and loss of rent due to a fire which allegedly originated at the store of the defendant Shore Drugs, Inc. located at 2 East Main Street, Bay Shore. McLoughlin submitted a claim to Utica for the same, and the claim was adjusted by Utica in the amount of \$65,002.78 after application of \$1,000.00 deductible, and after payment to McLoughlin became subrogated to its insured's claim. Utica seeks judgment against the defendants in the amount of \$66,002.78 together with interest from October 24, 2002.

By way of its answer to the complaint, Mauro & Son, Inc. (Mauro) has asserted a first cross-claim against Blanche, Verte & Blanche, LTD (BVB) for contribution and judgment over; a second cross-claim against BVB for indemnification and judgment over; and a third cross-claim against BVB for full indemnification and judgment over against BVB for any verdict or judgment which plaintiff may recover against Mauro. Mauro has also asserted a first cross-claim against Shore Drug, Inc. (Shore Drug) for contribution and judgment over; a second cross-claim for full indemnification; and a third cross-claim for indemnification and judgment over for all or any verdict or judgment which plaintiff may recover against Mauro.

By way of its answer to the amended complaint, the defendant Shore Drug, Inc. (Shore Drug), has asserted a cross-claim against Joseph Mauro & Son for indemnification and contribution on the basis of proportionate responsibility.

By way of its answer to the amended complaint, Blanche, Verte & Blanche has asserted a first cross-claim against Mauro and Shore Drugs for indemnification and judgment over against them for any judgment recovered against BVB; a second cross-claim against Shore Drugs for indemnification pursuant to the lease agreement; and a third cross-claim against Shore Drugs for indemnification.¹

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact"

¹It is noted that the second and third cross-claims are asserted by "defendant Marval Co." which this court deems to be a typographical error which should read as "defendant Blanche Verte & Blanche."

(CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

In motion (001), Mauro seeks an order pursuant to CPLR 3212 dismissing the complaint and the co-defendants' respective cross-claims asserted against it, and supports its application with, inter alia, an attorney's affirmation; copies of the complaint, answers of defendants Mauro, Blanche, Verte & Blanche, and Shore Drug; a copy of plaintiff's verified bill of particulars as to defendant Mauro; a copy of plaintiff's expert disclosure pursuant to CPLR 3101(d); copies of the examinations before trial of John Mauro dated April 9, 2008, Larry Leon on behalf of Shore Drug dated March 26, 2008, and James White on behalf of BVB dated September 27, 2007.

In cross-motion (002), Shore Drugs, Inc. seeks an order pursuant to CPLR 3212 granting summary judgment dismissing the claims asserted by Utica in the complaint, dismissing the cross-claims asserted by Mauro, dismissing the cross-claims asserted by BVB, and granting summary judgment in favor of Shore Drugs on its cross-claim for indemnification against Mauro. Shore Drugs supports its motion with, inter alia, inter alia, an attorney's affirmation; copies of the summons and complaint, defendants' answers with cross-claims; a copy of defendant Mauro's expert disclosure pursuant to CPLR 3101(d); a copy of plaintiff's expert disclosure pursuant to CPLR 3101(d); a copy of the lease agreement dated June 1, 1996 between Shore Drug and Sil/Pearl Holding Company; a copy of the Traveler's Property Casualty insurance policy dated November 6, 2001 issued to Shore Drugs; and copies of the examinations before trial of John Mauro dated April 9, 2008, Larry Leon on behalf of Shore Drug dated March 26, 2008, and a partial copy of the transcript of Seymour Kirshenbaum dated July 30, 2008.

In cross-motion (003), Blanche, Verte & Blanche seeks an order granting summary judgment dismissing the complaint and dismissing all cross-claims in this or in the companion actions. It is noted that cross-motion (003) is supported with an attorney's affirmation only and does not comport with the requirements of CPLR 3212 as an affidavit or copy of a transcript of the examination before trial of a person with knowledge on the moving party's part, and copies of the pleadings and cross-claims it seeks to dismiss have not been provided with the cross-motion. Additionally, CPLR 3212 does not provide for a party on a cross-motion to incorporate the papers provided in the motion and other cross-motions into the moving cross-motion. Nor has this cross-motion been supported with an expert's affidavit concerning the cause of the fire and its point of origin. This cross-motion is therefore deemed to be insufficient as a matter of law.

Accordingly, cross-motion (003) by Blanche, Verte & Blanche is denied.

Larry Leon testified to the effect that he has been self-employed for over thirty years as a pharmacist, and is president of the corporation of Shore Drugs, Inc. which was incorporated in 1990. Shore Drugs was located at 2 East Main Street, Bay Shore on October 24, 2002. The building was described as having three floors, and two entrances. There were three units located downstairs, the pharmacy, a bar, and a bridal suite, with rentals located above. Above his pharmacy were three separate units. The third floor of the building was empty. In October 2002, Shore Drugs rented the premises at 2 East Main Street from Joe and Joseph White, pursuant to a

lease agreement entered into with Howard Silverstein and George Pearlman of Sil/Pearl Holding, the former owners of the building. He never saw an assignment of this lease from Sil/Pearl to Joe and Joseph White who allegedly purchased the premises, however, after the sale of the premises, he made his rent checks payable to Blanche, Verte & Blanche. Shore Drug occupied the first third of the building on the first floor and the store operated seven days a week. The store generally closed at 9:00 p.m. during the week, at which time the doors were locked and the alarm was set, all lights were shut except the two night lights kept on every night, which were on all the time. One was located over the pharmacy and the other by the front door. The lights were put in prior to 2002 when Shore had renovations performed at its rental space, including totally replacing the fluorescent light fixtures and placing the new light fixtures into a drop ceiling which was installed. Carpeting was also installed, a second pharmacy was created within the store, and the bathroom and the office were redone. The contractors made the renovations and hired an electrician who was supposedly licensed to install the lighting, but he did not know the electrician's name.

Mr. Leon testified that he had no idea what type of electric service was in the drug store prior to the renovations and testified that the electric service was not changed with the renovation or at any time after 1990 when his lease commenced. There was an electrical panel located in the corridor between the two pharmacies in the store. Since 1990, if fluorescent lights went out, or if there were other electrical problems, he would call the electrician, Joseph Mauro, the father, or John Mauro, the son. Joseph Mauro had retired, and the last time John Mauro had been to his store was about two to three days prior to the fire of October 24, 2002 because there was a sizzling sound coming from the light switch located on the east side of the corridor. When the switch was sizzling, the fluorescent light in the corridor began blinking. He turned off the light switch which operated the lights in the corridor. The lights were there prior to the renovation. The day before John Mauro was there, Leon heard the sizzling in the light switch in the morning when he opened the pharmacy. That light switch was located about four feet from the panel box and had been replaced during the renovations. He called John Mauro who arrived the next day and made repairs to the light switch. Although he was not at the store that day, he was advised by his employee that Mauro had been there working.

About 1:00 a.m. on October 24, 2002, Leon received three calls from his burglar alarm company. It took him about twenty minutes to get to the pharmacy, and when he arrived, he saw flames coming out of every window in the entire building except for the bar. He saw flames from his pharmacy, the apartment above and the bridal suite. The fire department was already there when he arrived. The fire was out by about 6:30 a.m. He did not know who closed the store that night, but one of his pharmacists, Mr. Kirshenbaum, had gone back to the pharmacy that evening after closing for an emergency hospice order. Usually he himself received the emergency calls from hospice, and he did not know why he was not the first to be called that night. He did not recall Mr. Kirshenbaum telling him that he heard a sizzling in the panel box near the back part of the store or having told any fire investigators the same or telling the investigators that he told the electrical contractor to check the circuit breakers and fix the problem. He did not know what circuit breaker was replaced pursuant to the Mauro invoice. He did not believe he sent any communications to his landlord, BVB, about his renovations or proposed electrical work at the premises. He maintained an insurance policy on behalf of Sil/Pearl, his former landlord, but he did not know if BVB was named as an additional insured on the insurance policy after they purchased the premises from Sil/Pearl. There were surveillance cameras set up in the pharmacy, including one in the corridor on the west wall which would show the pharmacy and the electrical panel.

Seymour Kirshenbaum testified to the effect that he is currently employed by Shore Drug as supervising pharmacist. He first became aware of the fire at Shore Drug when he received a telephone call from Mr. Leon at about 5:00 a.m. on October 24, 2002. He remembered that he heard a sizzling noise coming from a light switch and told Mr. Leon who promptly called an electrician, but he could not remember the date. The light switch

was located about five to ten feet from the panel box on the left wall behind the pharmacy counter located on the east wall. The light switch was in the on position, but he could not remember if either he or Mr. Leon turned the light switch off. He believed the electrician came either that same day or the next, but could not recall how long the electrician was there. He had been working at the pharmacy at that location for seven years prior to the fire and had never experienced a problem with crackling or sizzling in the switches or panel box.

James White testified to the effect that he is self-employed as an irrigation contractor operating the business known as Active Irrigation, a New York State corporation, of which he is president and the only officer. He purchased the building at 2 East Main Street, Bay Shore from Sil/Pearl Holding Corp. in about 1996 in his capacity as president of Blanche, Verte & Blanche, a New York corporation owned by James White, Joseph White and Sue Greenberg. When BVB purchased the premises on Main Street in 1996, there was a written lease between Sil/Pearl and Shore Drugs, it took over that lease, which he believed continued until 2010. He testified that the building that the furs were located in were not part of the structure owned by BVB. The building he owned, 2 through 8, contained Shore Drug, the Bridal Suite, and the X Club. The architect's office was on the second floor over both Shore Drug and the Bridal Suite. There was also an apartment building above Shore Drug. The third floor was vacant. At the time of the fire in October 2002, Shore Drug, the Bridal Suite, the architect's office, and restaurant were located there. It was his responsibility to collect rents, pay the bills, make small repairs to the building such as repairing a leaking roof, drainage leaks, or the boiler, and to do painting, but he did no electrical work. He became aware prior to the fire, and after he purchased the building, that Shore Drug had made renovations in its premises, consisting of changes in the air conditioning, new counters and shelves. He did not notice if the electrical system or lighting was changed and did not look for such changes. Neither he nor BVB were asked permission by Shore to make renovations and he did not consent to any. He stated that there was a provision in the lease agreement that permission had to be obtained before renovations could be made. After the building was purchased by BVB, it had not notified the tenants with respect to renovations in the respective premises and did not make any upgrades in the electrical system. BVB did not have the electrical system inspected when it purchased the building.

James White further testified that someone called him after the fire was out as he was going to work in the morning. He submitted a claim to his insurance company on behalf of BVB. Insurance proceeds were paid to BVB, but James White did not know the amount paid, but upon his memory being refreshed, stated it was \$1,406,329.24. The building was not rebuilt after the fire and the real property was sold for approximately \$600,000. He was aware that BVB was seeking \$3,800,000 from Joseph Mauro and Shore Drug, but he did not know how that amount was determined. After the fire, he paid \$100,000 to Sil/Pearl as there was a lien to be satisfied.

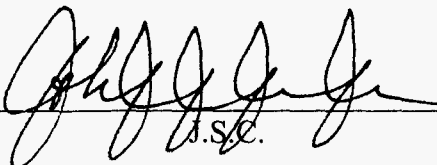
John Mauro testified to the extent that he is the president of Joseph Mauro & Son, a New York corporation formed in 1996 as a subchapter S corporation, which is in the business of electrical contracting performing commercial and residential renovations. His father, Joseph Mauro is vice president, and his wife, Annamarie Mauro is secretary. He became licensed in 1994 to perform electrical contracting. His father did work in the 1960's with the original owners, Howard Silverstein and George Pearl, of the building at 2 East Main, Bay Shore. He did not know who performed the electrical work at the building prior to 1960. He believed that in 1999, another electrical contractor performed major work at the build for Larry at Shore Drug. After that renovation, Mauro performed very little work on the electric system at the building, and the work he did was mainly on the outside of the building. Invoices were sent after work was complete, but the invoices were not numbered. As to an invoice marked as exhibit 4, he thought the date was 12-26-02 or 2000. He sent Larry three invoices, but was not paid by him, so he sent a bill. He was aware of a fire at the building on a Friday in October 2002 when he went to Bay Shore Electrical supply house on Main Street and was told about

the fire at the Shore Drug building. He stated he did work at the building on either a Wednesday or Thursday of the previous week before the fire. He testified he was called on a service call and replaced a "burnt circuit breaker" and "two single pole switches." Larry had called him and told him he heard sizzling in the panel and that the lights located across from the panel would go off.

It is determined that the moving defendant, Joseph Mauro and Son, in motion (001) has not established prima facie entitlement to summary judgment dismissing the complaint as asserted against it. The motion is unsupported by the affidavit of the moving defendant's expert regarding causation of the fire and its point of origin, and factual issues remain with respect thereto. The assertions by counsel or the parties as to the cause of the fire are conclusory and unsupported by evidentiary proof. It is further determined that Joseph Mauro & Son, Inc. has not established entitlement to the additional relief requested in motion (001) for an order dismissing the co-defendants' respective cross-claims asserted against it in that liability has not been determined, and thus issues concerning contribution and indemnification cannot be determined as a matter of law.

It is further determined that Shore Drugs, Inc. has not established prima facie entitlement to the additional relief requested in cross-motion (002) wherein it seeks summary judgment in its favor on its cross-claim for indemnification over and against Mauro & Son, Inc. as liability has not been determined and therefore issues concerning indemnification cannot be determined as a matter of law. However, it is determined that by virtue of the stipulation dated February 8, 2010 entered into between the co-defendant Blanche, Verte & Blanche Ltd and Shore Drug, the cross-claim asserted by Blanche, Verte & Blanche has been discontinued.

Since this court determined that defendants failed to meet their initial burdens and have not demonstrated prima facie entitlement to summary judgment, it is unnecessary to consider whether the opposition papers raised a triable issue of fact (*see, Facci v Kaminsky*, 18 AD3d 806, 795 NYS2d 457 [2d Dept 2005]).

Dated: 16 April 2010

J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION