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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

CLIFF CHAN and PRISCILLA CHAN,

Plaintiffs,

- against -

COUNTERFORCE CENTRAL ALARM SERVICES CORP., WINTECH SYSTEMS, INC., f/k/a Winner Technology, Inc., and ALLSTATE INSURANCE COMPANY,

Defendants.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 3635/08

Motion Sequence No. 004

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's 4
Defendant's / Respondent's . . . . . _____

The defendant Wintech Systems, Inc. a/k/a Winner Technology, Inc. moves pursuant to CPLR 3212 for summary judgment to dismiss the plaintiffs' claims for gross negligence against Wintech Systems, Inc. a/k/a Winner Technology, Inc. and Counterforce Central Alarm Service Corp. The defendant Wintech Systems, Inc. a/k/a Winner Technology, Inc. asserts the claims are only actionable under contract, and the conduct of Wintech Systems, Inc. a/k/a Winner Technology, Inc. and Counterforce Central Alarm Service Corp. did not constitute gross negligence as a matter of law. Wintech Systems, Inc. a/k/a Winner Technology, Inc. contends, if any negligence is found, the damage for breach of contract should be limited to $250.00. The defense attorney for Wintech Systems, Inc. a/k/a Winner Technology, Inc. states, in a March 16,

2010 affirmation and a March 16, 2010 amended affirmation, the position of the defense regarding this motion. The defense attorney for Wintech Systems, Inc. a/k/a Winner Technology, Inc. contends the plaintiffs' claim of gross negligence should be dismissed because the claim is not actionable in tort as the duty arose solely from a contract. The defense attorney for Wintech Systems, Inc. a/k/a Winner Technology, Inc. asserts, notwithstanding the alleged failures to conduct end-to-end testing, and any mistake in programming, these alleged failures would be merely ordinary negligence subject to a $250.00 contractual limitation on liability if ordinary is found.

The plaintiffs oppose this motion. The plaintiffs submit, in support of this motion, a June 17, 2009 examination before trial by John Lin, a principal and officer of Wintech Systems, Inc. a/k/a Winner Technology, Inc., a June 17, 2009 examination before trial by Philip Bair, an officer of Counterforce Central Alarm Service Corp., and an October 27, 2006 sworn statement of loss executed by the plaintiff Cliff Chan, the owner of 198 Shepard Lane, Rosalyn Heights, New York, the subject premises of the underlying action. The plaintiff's attorney requests, in a May 28, 2010 affirmation, the Court deny this motion, and submits a May 28, 2010 memorandum of law in support of the plaintiffs' opposition.

The defense counsel states, in a June 14, 2010 reply affirmation, the plaintiffs' duty solely derives from the contract, and is not imposed by law. The defense counsel contends a reasonable jury could not find gross negligence under the totality of circumstances. The defense counsel asserts there was no gross negligence as a matter of law, and adds the alleged failures by the defendant were not intentional nor reckless. The defense counsel avers the contract between the parties includes an exculpatory cause which is enforceable against the plaintiffs.

The plaintiffs purchased an alarm system from the defendant Wintech Systems, Inc. a/k/a Winner Technology, Inc. for 198 Shephard Lane, Roslyn Heights, New York, and contracted with that defendant to arrange for monitoring of the alarm system with

Counterforce Central Alarm Service Corp., and Near Net, Inc. as the provider of the backup system. The plaintiffs claim the defendant Wintech Systems, Inc. a/k/a Winner Technology, Inc. did not test the radio system to ensure signals were properly received by Central Alarm Service Corp. The plaintiffs maintain after October 15, 2004 several alarm conditions occurred at the subject premises caused by testing, false alarms, inadvertent triggering, and a fire alarm. The plaintiffs allege the subject premises was burglarized on April 22, 2005, when the alarm system was disabled such that no audible alarm sound could be heard, and the plaintiffs' telephone wires were cut so no digital alarm signal reached Counterforce Central Alarm Service Corp.

This Court carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. The Court of Appeals states:

> The court's role on a motion for summary judgment is to determine whether there is a material factual issue to be tried, not to resolve it (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 404). The motion should be granted only if the movant is entitled to judgment as a matter of law (***see, Ugarriza v Schmieder***, 46 NY2d 471, 474). Where different conclusions can reasonably be drawn from the evidence, the motion should be denied (***see***, Siegel, NY Prac, at 407 [2d ed])

Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554-555, 583 N.Y.S.2d 957 [1992].

The Second Department stated:

> As a general rule, a contractual provision absolving a party from its own negligence or limiting its liability is enforceable (***see Colnaghi, U.S.A. v Jewelers Protection Servs.***, 81 NY2d 821, 823 [1993]; ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 553 [1992]; ***Melodee Lane Lingerie Co. v American Dist. Tel. Co.***, 18 NY2d 57, 69 [1966]; ***Ciofalo v Vic Tanney Gyms***, 10 NY2d 294, 297-298 [1961]). Nonetheless, the public policy of this State dictates that "a party may not insulate itself from damages caused by grossly negligent conduct" (***Sommer v Federal Signal Corp.***, 79 NY2d at 554; ***see Colnaghi, U.S.A. v Jewelers Protection Servs.***, 81 NY2d at 823; ***Kalisch-Jarcho, Inc. v City of New York***, 58 NY2d 377, 384-385 [1983];

> ***Gross v Sweet***, 49 NY2d 102, 106 [1979]). Gross negligence "differs in kind, not only degree, from claims of ordinary negligence" (***Colnaghi, U.S.A. v Jewelers Protection Servs.***, 81 NY2d at 823). To constitute gross *747 negligence, a party's conduct must " 'smack[ ] of intentional wrongdoing' " or "evince[ ] a reckless indifference to the rights of others" (***Sommer v Federal Signal Corp.***, 79 NY2d at 554, quoting ***Kalisch-Jarcho, Inc. v City of New York***, 58 NY2d at 385). Stated differently, a party is grossly negligent when it fails "to exercise even slight care" (***Food Pageant v Consolidated Edison Co.***, 54 NY2d 167, 172 [1981]) or "slight diligence" (***Dalton v Hamilton Hotel Operating Co.***, 242 NY 481, 488 [1926]; ***see DRS Optronics, Inc. v North Fork Bank***, 43 AD3d 982, 986 [2007]; ***Gentile v Garden City Alarm Co.***, 147 AD2d 124, 131 [1989]; ***see also*** PJI 2:10A ["Gross negligence means a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others"])

Goldstein v. Carnell Associates, Inc., 74 A.D.3d 745, 746-747, [2nd Dept 2010].

So, the Second Department held:

> Contractual provisions in a burglar alarm contract absolving a party from its own negligence generally will be enforced; however, those provisions which purport to shield the burglar alarm company from gross negligence will not (***see Colnaghi, U.S.A. v Jewelers Protection Servs.***, 81 NY2d 821, 823-824 [1993]; ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 554 [1992]; ***Aphrodite Jewelry v D&W Cent. Sta. Alarm Co.***, 256 AD2d 288, 289 [1998]; ***Hartford Ins. Co. v Holmes Protection Group***, 250 AD2d 526 [1998])

Golden Stone Trading, Inc. v. Wayne Electro Systems, Inc., 67 A.D.3d 731, 732, 889 N.Y.S.2d 72 [2nd Dept 2009].

The Court of Appeals holds:

> This Court has identified several guideposts for separating tort from contract claims. In ***North Shore Bottling Co. v Schmidt & Sons*** (22 NY2d 171, 179), we recognized that "a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." A tort may arise from the breach of a

> legal duty independent of the contract, but merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort (***Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.***, 70 NY2d 382, 389; ***Rich v New York Cent. & Hudson Riv. R. R. Co.***, 87 NY, at 398, supra). A legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship. Professionals, common carriers and bailees, for example, may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties (***Rich v New York Cent. & Hudson Riv. R. R. Co.***, 87 NY, at 399, ***supra***; Prosser, ***Borderland***, op. cit., at 402-405). In these instances, it is policy, not the parties' contract, that gives rise to a duty of due care (***see***, Prosser, Torts, at 613 [4th ed])...Finally, we recently acknowledged that the labels "misfeasance" and "nonfeasance"--once dispositive--should not be controlling (***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d 220, 226). Nonfeasance (or failure to perform a duty) was traditionally viewed as breach of contract, misfeasance (or defective performance) a matter of tort (***see, Melodee Lane Lingerie Co. v American Dist. Tel. Co.***, 18 NY2d 57; ***World Trade Knitting Mills v Lido Knitting Mills***, 154 AD2d 99, 105-106, and cases cited therein [alarm cases]; Prosser, Torts, at 614-618 [4th ed]). As we noted in Eaves Brooks, this distinction is largely semantical and often illogical--negligent performance may be a result of failing to act as well as doing an affirmative act improperly (***see, Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d, at 226, ***supra***).

Sommer v. Federal Signal Corp., 79 N.Y.2d, at 551-552, ***supra***.

The Court of Appeals also held:

> Absent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced (***Melodee Lane Lingerie Co. v American Dist. Tel. Co.***, 18 NY2d 57, 69, ***supra***; ***Ciofalo v Vic Tanney Gyms***, 10 NY2d 294, 297-298). FN2 Thus, we have previously upheld contractual language in an alarm contract limiting the customer's damages to $50 (***Florence v Merchants Cent. Alarm Co.***, 51 NY2d 793), and indeed have suggested that limitations on liability help keep alarm services affordable (***Eaves Brooks Costume Co. v Y.B.H. Realty Corp.***, 76 NY2d, at 227, supra). Holmes' exculpatory clause is therefore enforceable

against claims of ordinary negligence.

Sommer v. Federal Signal Corp., 79 N.Y.2d, at 553-554, ***supra***.

The Appellate Division provided examples regarding gross negligence claims in security system installation and monitoring cases:

> In ***Colnaghi***, the Court of Appeals held that the security company's failure to wire a skylight, which allowed burglars to enter and rob the art gallery, may have been negligent but did not "evince the recklessness necessary to abrogate [the subscriber's] agreement to absolve [the security service] from negligence claims" (***id.*** at 824, 595 N.Y.S.2d 381, 611 N.E.2d 282). Delayed or inadequate response to an alarm signal, without more, is not gross negligence. This court held in ***Consumers Distributing Co. v. Baker Protective Services***, 202 A.D.2d 327, 609 N.Y.S.2d 213, ***lv. denied*** 84 N.Y.2d 811, 622 N.Y.S.2d 913, 647 N.E.2d 119, that "the failure of defendant's employee on two occasions to respond to a signal indicating a possible burglary despite hourly noise reminders, while clearly ordinary negligence, was not gross negligence," and thus the defendant was entitled to summary judgment based on the contractual limitation on liability for ordinary negligence. In ***Sanif, Inc. v. Iannotti***, 119 A.D.2d 654, 500 N.Y.S.2d 798, an exculpatory clause nearly identical to the one herein relieved the security company of liability for its alleged failure to monitor and report an alarm signal indicating an illegal entry. The same result was reached in ***Dubovsky & Sons v. Honeywell, Inc.***, 89 A.D.2d 993, 454 N.Y.S.2d 329 [failure to send competent person to ascertain cause of alarm signal], and ***Advance Burglar Alarm Systems v. D'Auria***, 110 A.D.2d 860, 488 N.Y.S.2d 416 [failure to provide timely guard response to signal]. By contrast, a triable issue of "gross negligence" is not typically found absent more outrageous acts of folly, such as giving out the security code for the store's alarm system over the phone at 4:00 AM to burglars who gave a false name (***Green v. Holmes Protection of NY***, 216 A.D.2d 178, 179, 629 N.Y.S.2d 13). Similarly, in ***Hanover Ins. Co. v. D & W Alarm Co.***, 164 A.D.2d 112, 115, 560 N.Y.S.2d 293, we found that issues of fact as to gross negligence were raised by the security company's instructing its guard to "forget the assignment" when he had difficulty getting into the building, coupled with its failure to notify the police upon receiving four alarm signals from the subscriber's premises in three hours. Unlike the conduct of the defendants in these cases, Holmes' actions herein were based on a plausible policy regarding false alarms, though made riskier by possibly negligent understaffing

Hartford Ins. Co. v. Holmes Protection Group, 250 A.D.2d 526, 527-528, 673 N.Y.S.2d 132 [1st Dept 1998].

The plaintiffs claim the gross negligence of Wintech Systems, Inc. a/k/a Winner Technology, Inc. and Counterforce Central Alarm Service Corp is due to the failure to conduct end-to end tests, and the failure to detect potential radio transmission problems in one earlier entry of the activity. The appellate decisions indicate such failures are not gross negligence as a matter of law. Thus, this Court determines there is no material issue of fact as a matter of law regarding the allegations of gross negligence against the defendants Wintech Systems, Inc. a/k/a Winner Technology, Inc. and Counterforce Central Alarm Service Corp. which requires resolution by the trier of fact (***see Golden Stone Trading, Inc. v. Wayne Electro Systems, Inc.***, 67 A.D.3d 731, ***supra***; ***see also Logan v. Empire Blue Cross and Blue Shield***, 275 A.D.2d 187, 714 N.Y.S.2d 119 [2nd Dept 2000]).

Accordingly, the motion is granted. So ordered.

Dated: September 14, 2010

ENTER:

J. S. C.

FINAL DISPOSITION NON FINAL DISPOSITION XXX