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SHORT FORM ORDER

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU

HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 7

SIMCO MANAGEMENT CO.,

Plaintiff,

INDEX NO.: 021092/2007
MOTION DATE: 1/7/2011
SEQUENCE NO .: 06

- against -

AMOCO OIL COMPANY, BP PRODUCTS NORTH AMERICA INC., and MOTOR PARKWAY ENTERPRISES, INC.,

Defendants.

AMOCO OIL COMPANY and BP PRODUCTS NORTH AMERICA INC,

Third-party Plaintiffs,

- against -

MOTOR PARKWAY ENTERPRISES INC., and STEVE KESHTGAR,

Third-party Defendants.

The following documents were read on this motion:

Motion by Amoco Oil Company and BP Products for Summary Judgment	1
Affidavit of Diana L. Bradley in Support of Motion	2
Memorandum of Law in Support of Motion	3
Rule 19-a (a) Statement of Undisputed Facts	4
Motor Parkway Enterprises, Inc. Counter Statement of Facts	5

PRELIMINARY STATEMENT

Defendants Amoco Oil Company ("Amoco") and BP Products North America Inc. ("BP") move pursuant to CPLR § 3212 for summary judgment against third-party defendants Motor Parkway Enterprises Inc. ("MPE") and Steve Keshtgar.

BACKGROUND

This action arises from fire damage at a gasoline service station located at the corner of Long Island Expressway and Motor Parkway, Brentwood, New York. The station was the subject of a lease agreement dated December 9, 1968 between Amoco (now BP) and the predecessor of Simco. The parties amended the lease as of October 13, 1987 , extending the term through December 2008. Para. 10 of the Agreement Extending and Amending Lease provided that BP was responsible for attorneys fees "arising out of the acts or omissions of the Lessee . . . under or in connection with the demised premises."

Paragraph 18 of the Agreement provided for liability in the event of loss by fire:

> In the event of a loss or damage by fire or other casualty, the Lessee agrees that it, at its own cost and expense, will promptly rebuild or repair or restore, as the case may be, the premises so damaged. In the event, however, of the failure of the Lessee to so rebuild within a reasonable time, the Lessor may, at its own expense, commence and complete the rebuilding of said buildings or structures and to charge the Lessee therefor.

The 1968 lease agreement authorized Amoco to assign the lease to a third-party, but in such event, it would remain liable at a guarantor with secondary liability. Amoco assigned the lease to MPE, an independent operator, on August 31, 2001, after which MPE operated a BP-branded service station at the premises. The assignment of lease specifically provided that the Assignee assumed all of the obligations and liabilities under the lease, whether accruing prior to or after the effective date. It also provided that MPE was to indemnified BP for any such expenses.

[* 3]

BP and MPE also entered into a Dealer Supply Agreement, authorizing MPE to operate the service station as a BP – branded operation. The Dealer Supply Agreement provided that MPE was to indemnify BP for any breach of that agreement or any other agreement MPE had with BP. Paragraph 15 provides in relevant part as follows:

> to the fullest extent permitted by law, [MPE] must indemnify, defend and hold harmless [BP] . . . From and against any and all losses, suits, claims, demands, causes of action, liabilities, costs or expenses (including reasonable attorneys' fees and costs of defense) of whatever kind or nature . . . Directly or indirectly arising in whole or in part from or as a result of :
>
> (a) Any default or breach by [MPE] of any obligation contained in this Agreement or any other agreement with [BP].
>
> (b) Any acts, all mission, fault or negligence of [MPE] or [MPE 's] agents, employees, contractors, invitees or licensees, regardless of whether caused by the joint concurrent, contributory or comparative fault, negligence , breach of warranty, strict liability or breach of any legal duty whatsoever by Supplier, unless to in whole to the sold negligence of [BP] without any contributory fault on the part of [MPE].

Among the obligations of MPE under the Dealer Supply Agreement was to maintain adequate insurance on the leased premises. Para. 23 specifically required MPE to "purchase and maintain at all times, at [MPE's] expense and in compliance with any requirements of applicable law . . . [c]ommercial general liability insurance, in an amount of at least $1,000,000 per occurrence, covering [MPE's] liability for business, operations, use and occupancy of the Facility."

BP and MPE also executed a Rider to the Dealer Supply Agreement. Third-party defendant Keshtgar acknowledged that he was the owner of all or a majority of the stock of MPE and personally guaranteed the obligations of the company. The Rider provides in part as follows:

> the parties agree that the Supply Agreement is subject to the following terms and conditions :
>
> * * *
>
> **2. Bound to Supply Agreement Terms.** [Keshtgar] is bound by

> and subject to all the terms and conditions contained in the camps ply Agreement and shall perform all the duties and covenants of [MPE close bracket therein.
>
> **3. Guarantee of Debts.** [Keshtgar] personally guarantees payment of the debts , if any, owed to [BP] by [MPE]incident to [M PE' S] use of the facility in connection with the Supply Agreement and any dealings with [BP] relative thereto.

After this agreements were executed ,MPE operated the BP service station, dealing directly with Simco. In February 2007, while MPE was operating at the premises, a fire occurred and destroyed the building. Under the terms of the lease MPE was a responsible for reconstruction of the building in the event of fire, or to reimburse landlord Simco for their costs in rebuilding the structure. The Dealer Supply Agreement required MPE to maintain appropriate insurance against loss by fire, but it failed to do so.

Although MPE initially complied with its continuing obligations under the lease to pay rent and taxes, and cooperated with Simco toward rebuilding the facility , by November 2007 Simco advised BP that MPE had ceased paying rent and real estate taxes as required under the lease. MPE also ceased funding the construction of a new service station and Simco demands that BP assume these lease obligations in the light of MPE's default.

DISCUSSION

When presented with a motion for summary judgment, the function of a court is "not to determine credibility or to engage in issue determination, but rather to determine the existence or non-existence of material issues of fact." *(Quinn v. Krumland,* 179 A.D.2d 448, 449 — 450 [1st Dept. 1992]); See also, (*S.J. Capelin Associates, Inc. v. Globe Mfg. Corp.* 34 N.Y.2d 338, 343, [1974]).

To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented. *(Stillman v. Twentieth Century-Fox Corp.,* 3 N.Y.2d 395, 404 [1957]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue. *(Moskowitz v. Garlock,* 23 A.D.2d 94 [3d Dept. 1965]); *(Crowley's Milk Co. v. Klein,* 24 A.D.2d 920 [3d Dept. 1965]).

The evidence will be considered in a light most favorable to the opposing party. (*Weill v.*

Garfield, 21 A.D.2d 156 [3d Dept. 1964]). The proof submitted in opposition will be accepted as true and all reasonable inferences drawn in favor of the opposing party. *(Tortorello v. Carlin,* 260 A.D.2d 201, 206 [1st Dept. 2003]). On a motion to dismiss, the court must " ' accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory' ". *(Braddock v. Braddock,* 2009 WL 23307 [N.Y.A.D. 1st Dept. 2009]), (*citing Leon v. Martinez,* 84 N.Y.2d 83, 87 — 88 [1994]). But this rule will not be applied where the opposition is evasive or indirect. The opposing party is obligated to come forward and bare his proof, by affidavit of an individual with personal knowledge, or with an attorney's affirmation to which appended material in admissible form, and the failure to do so may lead the Court to believe that there is no triable issue of fact. (*Zuckerman v. City of New York,* 49 N.Y.2d 557, 562 [1980]).

BP was obligated to perform under the terms of the lease as a result of MPE's default. It paid Simco $228,218.97 for rent and taxes through the December 2008 termination of the lease. BP also expanded $1,276,970.10 to rebuild the destroyed premises. This Court determined, after a hearing, that Simco was entitled to $124,592.09 for legal fees and expenses, plus interest in the amount of $129,113.10 for a total of $1,530,675.25. To date, BP has expended approximately $175,000 in legal fees and expenses regarding this matter. As a result of MPE's failure to comply with its obligations under the lease, and failure to maintain insurance to cover of loss by fire, BP has incurred payments of $1,758,894.22 in payments to Simco for rent, taxes and construction costs as well Simco's legal fees . Under the terms of the assignment of lease, MPE is obligated to indemnify BP for those costs. MPE is also required to indemnify BP under the Dealer Supply Agreement for the amount paid to Simco to date, as well as for BP's legal fees.

Third-party defendants contend that the motion for summary judgment is untimely under CPLR 3212 (a) in that such a motion must be made within 120 days of the filing of a Note of Issue, and that this was not done in this case. In addition, they contend that BP has unduly delayed in exercising its rights against MPE, and has not offered a legitimate excuse for the delay, and that, in violation of the language of CPLR § 3212, BP has not attached copies of the pleadings to the motion.

With respect to defendant Keshtgar, counsel assert that he is not a party to the action,

since no third-party action was ever commenced against him, and therefore he is not properly subject to a motion for summary judgment. They further contend that the procedural errors of BP cannot be rectified without causing prejudice to MPE.

MPE's arguments are unavailing. The language of the Lease and Dealer Supply Agreements with Rider are unambiguous and require MPE to indemnify BP for the cost of replacing the building at the premises, as well as their costs, expenses and legal fees incurred in connection with the transactions. The subject motion was, in fact, timely made by BP, since the motion papers were served within 120 days of Simco's filing of a Note of Issue in their direct claim against BP. (*Rivera v. Glen Oaks Village Owners, Inc.*, 29 A.D.3d 560 [2d Dept. 2006], citing *Russo v. Eveco Development Corp.*, 256 A.D.2d 566 [2d Dept. 1998]).

Contentions that MPE assumed only the initial 1968 lease, but not the lease amendments, is belied by the fact that they were operating the station at the time of the fire in 2007, long after the original expiration date of the lease. In addition, such claims are barred by judicial estoppel, in that MPE has alleged the assignment of the various extension agreements in pleadings in the federal court, annexed to the Reply Affirmation. (*Prudential Home Mortg. Co. v. Neildan Const. Corp.* 209 A.D.2d 394 [2d Dept. 1994]).

Movant has annexed copies of the Summons and Complaint, Answer, Counterclaim, Cross-claim and Third-party Claim of Amoco and BP, and the Answer of MPE. Counsel for MPE is correct in their assertion that CPLR § 3212, a motion on the pleadings, requires the annexation of the pleadings to the motion. Hoewever, failure to do so is most appropriately dealt with by denial of the motion without prejudice to renewal on submission with pleadings annexed. Counsel for BP has appropriately supplemented the motion by submission of the pleadings, thus avoiding an unwarranted renewal of the motion.

The motion by BP and Amoco for summary judgment against MPE and Steve Keshtgar is granted. They are entitled to judgment in the amount of $1,530,675.25, representing amounts paid to Simco for the cost of replacement of the building, legal fees incurred by counsel for Simco, rent and real estate taxes advanced on behalf of MPE, and, in addition reimbursement of counsel fees paid by Amoco or BP in connection with the defense of the main action and the prosecution of the third-party proceeding.

The matter is set down for a hearing on the amount of counsel fees incurred by Amoco and BP for March 24, 2011, which hearing shall be on notice to counsel for MPE and Keshtgar.

This constitutes the Decision and Order of the Court.

Dated: February 23, 2011

J.S.C.