

Downing v Long Island Gen. Supp. Co.

2011 NY Slip Op 30660(U)

February 22, 2011

Sup Ct, Queens County

Docket Number: 21779/02

Judge: Kevin J. Kerrigan

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN
Justice

Part 10

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ANNE M. DOWNING, individually and as
Administratrix of the Estate of
JOHN J. DOWNING, Deceased,

Index
Number: 21779/02

Plaintiff,

Motion
Date: 1/25/11

- against -

Motion
Cal. Number: 5

LONG ISLAND GENERAL SUPPLY CO.,
ROBIN GORDON and RANDY GORDON, each
individually and d/b/a/ LONG ISLAND
GENERAL SUPPLY CO., ALEC GORDON,
PEARL GORDON, THE CITY OF NEW YORK and
NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Motion Seq No. 12

Defendants.

-----X

LONG ISLAND GENERAL SUPPLY CO.,
ROBIN GORDON and RANDY GORDON, each
individually and d/b/a/ LONG ISLAND
GENERAL SUPPLY CO. and PEARL GORDON,

Third-Party Plaintiffs,

-against-

A.O. SMITH CORPORATION,

Third-Party Defendants.

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The following papers numbered 1 to 13 read on this motion by
plaintiff to recall and vacate the Court's Order issued on November
20, 2008 and reinstate the third-party complaint against A.O. Smith
Corporation.

Papers
Numbered

Notice of Motion-Affirmation-Exhibits.....	1-4
Affirmation in Support-Exhibit.....	5-7
Affirmation in Opposition-Exhibits.....	8-10
Reply-Exhibits.....	11-13

Upon the foregoing papers it is ordered that the motion is
decided as follows:

Motion by plaintiff to recall and vacate the order of this Court issued on November 20, 2008 and to reinstate the third-party complaint against A.O. Smith, pursuant to CPLR 5015(a)(5), is granted to the extent that the Court, sua sponte, hereby recalls and vacates its order issued on November 20, 2008 granting the motion by A.O. Smith for summary judgment dismissing the third-party complaint against it, and substitutes the following order in its place and stead.

Motion by A.O. Smith for summary judgment dismissing the third-party complaint against it is denied.

Plaintiff's decedent, John J. Downing, a New York City firefighter, was fatally injured while fighting a fire in a hardware store located at 12-20 and 12-22 Astoria Boulevard, Queens, New York, when there was an explosion in the basement that caused a brick wall to collapse. The hardware store was operated by defendant/third-party plaintiff Long Island General Supply Co., Inc., and managed by defendants/third-party plaintiffs Randy Gordon and Robin Gordon, who co-owned the corporation. The store occupied two connected two-story brick buildings owned by a trust for which defendant/third-party plaintiff Pearl Gordon serves as trustee. The wall between the basements of the two buildings had a 30-inch wide opening with a horizontal sliding fire door connecting the two basements. The fire started when gasoline spilled by a 13-year-old boy in the yard behind the store flowed under the rear basement door of 12-20 Astoria Boulevard where the gasoline vapors ignited in the area of a gas-fired water heater and boiler. The fire spread to stock being stored in the basement, including numerous containers of flammable liquids, gas cylinders, and paint spray cans, and extended into the basement of 12-22 Astoria Boulevard through the opening in the wall.

According to the investigative reports of the New York City Fire Department and its consultant, as well as the deposition testimony of the investigating Fire Marshall and the consultant, the self-closing fire door did not close after the fire started as it was designed to do because wooden dowels in the floor-track of the door and a plywood ramp placed over the track prevented it from doing so. The investigators also concluded that the explosion that caused the brick wall to blow out was a severe backdraft created by a sudden flow of air into a room with high fuel vapor concentrations and low oxygen concentrations produced by the release and incomplete burning of large quantities of flammable liquids.

In the main action, plaintiffs allege that the negligence and statutory violations of defendants/third-party plaintiffs Randy Gordon, Robin Gordon, Pearl Gordon and Long Island General

Supply Co., Inc., in maintaining the premises, including acts or omissions which allowed the fire door in the basement to be in a condition that prevented it from closing, created the conditions that caused the backdraft explosion. The third-party complaint asserts causes of action against A.O. Smith, the designer and manufacturer of a hot water heater present in the basement of the fire premises, for contribution and/or indemnification based upon general allegations of negligence, breach of warranty and strict products liability. In opposition to this motion, third-party plaintiffs adopt the arguments and exhibits presented in papers submitted on behalf of the plaintiffs in another action arising out of the subject fire entitled Fahey v A.O. Smith Corporation, pending in this court under Index No. 14921/03. It is alleged by the plaintiffs in Fahey that the flammable gasoline vapors were ignited by the pilot and/or burner flame of the gas-fired hot water heater manufactured by defendant A.O. Smith. It is further alleged that the ignition occurred due to a design defect in the hot water heater, namely, the placement of the pilot and burner flames too close to floor level, and that the water heater was not reasonably safe.

In its November 20, 2008 order dismissing the third-party complaint against A.O. Smith, this Court held, essentially, that even if the water heater in question were found to be defectively designed or manufactured so as to support causes of action against A.O. Smith in strict products liability, negligence or breach of warranty, and even if sufficient evidence were proffered that the water heater was the source of the fire and explosion so as to raise a question of fact as to whether the alleged defect in the water heater was otherwise a substantial factor in causing the death of plaintiff's decedent, the failure of the automatic fire door in the basement to close because the owner of the premises intentionally obstructed its track, causing a backdraft explosion, was an independent act that operated as an intervening and superseding cause absolving A.O. Smith of liability as a matter of law.

In the related Fahey v. A.O. Smith action, as well as in two other related actions entitled Baker v. Long Island General Supply Co., Inc., Index No. 1886/04, and Hardy v. Long Island General Supply Co., Inc., Index No. 7867/04, wherein A.O. Smith was also a named defendant, a motion by A.O. Smith for summary judgment dismissing plaintiff's causes of action against it for strict products liability, negligence, breach of warranty and pursuant to General Municipal Law §205-a (the so-called "firefighter's rule") was also granted pursuant to the orders of this Court also issued on November 20, 2008. This Court dismissed plaintiffs' strict products liability, negligence and breach of warranty causes of action in those matters for the same reasons as set forth in the

underlying order in the instant matter and also dismissed their claims under General Municipal Law §205-a.

The November 20, 2008 orders of this Court in the Fahey, Baker and Hardy matters were subsequently modified pursuant to the order of the Appellate Division, Second Department, issued on October 5, 2010 (Fahey v. A.O. Smith Corp., 77 AD 3d 612). The Appellate Division affirmed that portion of this Court's orders dismissing plaintiffs' claims asserted pursuant to General Municipal Law §205-a, but deleted that portion of the orders dismissing plaintiffs' remaining causes of action and cross-claims against A.O. Smith and substituted therefor a provision denying those branches of the motion. The Appellate Division held that the alleged negligence of the Gordon defendants was not so extraordinary that it could be deemed a superseding cause that absolved A.O. Smith from liability for the foreseeable consequences of the alleged design defect of A.O. Smith's water heater as a matter of law.

The decision of this Court in the underlying motion dismissing the present complaint against A.O. Smith upon the ground that the acts of the Gordon defendants was a superseding cause is identical to those in the Fahey, Baker and Hardy motions. The Court notes that plaintiff in the present case filed a notice of appeal of the underlying order of this Court with the Appellate Division, Second Department, on December 24, 2008. The record on the underlying motion is the same as that in the Fahey, Baker and Hardy motions. A.O. Smith has failed to show how a different decision could possibly be rendered by the Appellate Division in the present matter. Therefore, the order of this Court which granted A.O. Smith's motion for summary judgment dismissing the complaint against it in the instant matter must be vacated in light of the decision of the Appellate Division, Second Department, in the aforementioned companion actions.

The Court notes that there is no basis for vacatur of the underlying order of this Court pursuant to CPLR 5015(a)(5), since the only ground for relief from an order in that section is the "reversal, modification or vacatur of a prior judgment or order upon which it is based." Here, there was no prior order upon which the subject order was based. Rather, the modification was of three orders issued in other cases on the same date. However, as heretofore stated, these other cases involve the same accident, the same essential facts and the same essential issues as does the present matter. Since A.O. Smith moved for summary judgment in those cases upon the same grounds as it did in the present matter (except that it also moved for summary judgment in those cases upon the additional basis of General Municipal Law §205-a), and since this Court issued the same decision in those cases as it did in the present matter with respect to that branch of A.O. Smith's motion

for summary judgment dismissing plaintiffs' causes of action founded upon the alleged design defect of the water heater, the modification of this Court's orders in those other cases resulting in the deletion of the provision thereof that granted that branch of the motions by A.O. Smith for summary judgment dismissing the complaint and all cross claims against it upon the ground that the Gordons' acts constituted a superseding cause requires that this Court, in the interests of justice and judicial economy, recall and vacate its prior order in this matter as well and substitute therefor the instant order denying A.O. Smith's motion for summary judgment, for the same reasons as set forth in the order of the Appellate Division, Second Department (77 AD 3d 612).

Accordingly, A.O. Smith's motion for summary judgment dismissing the third-party complaint against it is denied.

Dated: February 22, 2011

KEVIN J. KERRIGAN, J.S.C.