

**Great Northern Ins. Co. v Access Self Storage**

2011 NY Slip Op 31514(U)

June 7, 2011

Supreme Court, New York County

Docket Number: 106279/2010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Index Number : 106279/2010  
**GREAT NORTHERN INSURANCE CO.**  
vs.  
**ACCESS SELF STORAGE**  
SEQUENCE NUMBER : 001  
DISMISS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUN 08 2011

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MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.

and PC scheduled 7/14/10 @ 9:30 am

Dated: JUN 07 2011

[Signature]  
HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York  
County of New York: IAS 10

-----X  
Great Northern Insurance Company a/s/o  
Susan Nagel Trust,

Plaintiff,

Decision/Order

-against-

Index # 106279/10  
Mot. Seq. # 001

Access Self Storage d/b/a  
Big Key Storage and  
Simplex Grinnell L.P.

Defendants.

**FILED**

**JUN 08 2011**

-----X  
Hon. Judith J. Gische

Pursuant to CPLR §2219(A) the following numbered papers were considered by the court in connection with this motion:

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PAPERS	NUMBERED
Notice of Motion, MRP affirm., exhibits.....	1
LSY affirm., exhibits.....	2
RDC affirm., exhibits.....	3
Reply JDC affirm., exhibit.....	4

Upon the foregoing papers, the decision and order of the court is as follows:

Defendant Simplex Grinnell L.P. ("Simplex"), moves, pre-answer, to dismiss the amended complaint for failure to state an cause of action and on documentary evidence. The motion is opposed by both plaintiff and co-defendant Access Self Storage ("Access").

The allegations, set forth in the amended complaint are as follows:

Plaintiff, Great Northern Insurance Company ("Great Northern"), is suing as the subrogee of the Susan Nagel Trust ("SN Trust"). On or about May 12, 2009 the SN Trust had property stored at a storage facility operated by Access. On that date, there

was a leak at the storage facility, causing damage to the SN Trust property being stored. As a result, Great Northern paid its insured, the SN Trust, \$213,577.67 as and for the value of the destroyed property.

The allegations against Simplex are that it was “engaged in the business of supplying, installing, repairing, maintaining and inspecting plumbing systems.” Great Northern then alleges, in a general and conclusory fashion, that both defendants were negligent and that such negligence caused the property damage sustained by the SN Trust.

Simplex claims that these general allegations are not sufficient to support a claim of negligence against it. In addition, Simplex has provided a copy of its contract with Access, which is to inspect the sprinkler system at the storage facility. Simplex claims that its duties are defined by the terms of the contract and they do not extend to the SN Trust and/or Great Northern.

In opposition Great Northern argues that it “has standing to pursue a claim against the defendant Simplex Grinnell for breaching its duty of care to Access Self Storage.” Great Northern provides a copy of the incident report it obtained from Access showing that a pipe leak occurred on May 12, 2009. It also argues that “Simplex Grinnell owed Susan Nagel Trust a duty of reasonable care that is independent of its contractual obligations.” Great Northern and Access claim that, pursuant to the contract, Simplex was at the storage facility once a month to inspect the sprinkler system. They, in not so many words, claim that Simplex failed to fulfill its obligations of inspection, which would have prevented the pipe leak from occurring.

For the reasons set forth, the motion to dismiss is granted.

In the context of a motion to dismiss pursuant to CPLR § 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiffs with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court must determine whether the allegations support the causes of action asserted Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976) and whether they fit within any cognizable legal theory Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005). Where a motion to dismiss is based upon the documentary evidence, such evidence must definitively dispose of plaintiffs' claims. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 A.D.2d 248 (1st Dept. 1995).

A necessary element of a negligence action is a legal duty to the injured party. "In the absence of a duty, there is no breach and without a breach, there is no liability." Pulka v. Edelman, 40 NY2d 781 *rearg den* 41 NY2d 901 (1977). The issue of whether a duty exists is one of law to be decided by the court. Donohue v. Copiague Union Free School Dist., 64 AD2d 29 (2<sup>nd</sup> dept 1978) *affd.* 47 NY2d 440 (1979). In this case, the contract between Simplex and Access is a service contract that imposes no duty of care to persons outside the contract. There is no duty owed to the SN Trust and, consequently, no duty to its subrogee, Great Northern. The "contract" consists primarily of a report of inspection. There are terms and conditions on the last page, which mostly serve a limitation on liability. The relevant provisions, where Access is identified as the customer and Simplex is identified as the Company, provide as follows:

1. Limitations of Liability; Limitations of Remedy. It is understood and agreed by the Customer that Company is not an insurer and that insurance coverage, if any, shall be obtained by the Customer and that amounts payable to the Company hereunder are based upon the value of the services and the scope of liability set forth in this agreement and are unrelated to the value of the Customer's property and the property of others located at the premises. Customer agrees to look exclusively to the Customer's insurer to recover for injuries of damage in the event of loss or injury and that Customer releases and waives all right of recovery against Company arising by way of subrogation. Company makes no guaranty or Warranty, including any implied warranty of merchantability or fitness for a particular purpose that equipment or services supplied by Company will detect or avert occurrences or the consequences therefrom that the equipment or services were designed to detect or avert.

It is impractical and extremely difficult to fix the actual damage, if any, which may proximately result from the failure of the Company to perform any of its obligations under the agreement. Accordingly Customer agrees that, Company shall be exempt from liability for any loss, damage or injury arising directly or indirectly from occurrences, or the consequences therefrom, which the equipment or service was designed to detect or avert. Should company be found liable for any loss, damage or injury arising from a failure of the equipment or service, in any respect, Company shall be limited to an amount equal to the agreement price..."

3. Indemnity, Customer agrees to indemnify, hold harmless and defend Company against any and all losses, damages, costs, including expert fees and costs, and expenses including reasonable defense costs, arising from any and all third party claims for personal injury, death, property damage or economic loss...arising in any way from any act or omission of Customer or Company relating in any way to this agreement, including but not limited to the Services under this agreement, whether such claims are based upon contract, warranty, tort (including but not limited to active or passive negligence, strict liability or otherwise."

Contrary to Great Northern's contention, there is no part of this contract which expressly requires Simplex to repair or maintain the sprinkler system or any other plumbing system at the storage facility.

Where, as here, there is a service contract with respect to some aspect of maintaining a premises, generally no duty of care inures to persons outside the

contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d 136 (2002). There are, however, three exceptions to this broad rule of law that will expose the contractor to liability because it has assumed a duty of care to persons outside the contract. Espinal v. Melville Snow Contractors, Inc., 98 NY2d at 139 (*citing Palka v. Service Master Mgt. Svcs. Corp.*, 83 NY2d 579, 585-6 [1990]). The exceptions are where 1) the contractor "launches a force or instrument of harm," by first undertaking a task, but then negligently creating or exacerbating a dangerous condition resulting in an injury; 2) the performance of contractual obligations has induced detrimental reliance on continued performance of those obligations; and 3) the contract is so comprehensive and exclusive that the contractor's obligations completely displace and absorb the landowner's responsibility to maintain the premises safely. Espinal v. Melville Snow Contractors, Inc., *supra*. None of those exceptions apply at bar.

On point is Eaves Brooks Costume Co. v. YBH Realty Corp., 76 NY2d 220 (1990). The Court of Appeals held that a sprinkler inspector hired by a property owners had no duty to a commercial tenant for property damage caused by a sprinkler malfunction. Since Simplex's only alleged negligence concerned a failure to identify a weakness in the plumbing system, as opposed to actively creating or causing the malfunction, Eaves, *supra*, is factually and legally indistinguishable from the case at bar. See also: Genen v. Metro -North Commuter RR, 261 Ad2d 211 (1<sup>st</sup> dept 1999); Jill Robbins, Inc. v. AFA Protective Systems, Inc., 223 AD2d 352 (1<sup>st</sup> dept 1996).

Nor is plaintiff aided by its arguments about the rights of third party beneficiaries because it has asserted only one cause of action, which sounds in negligence and not contract.

Accordingly, it is hereby

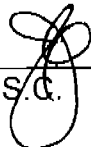
ORDERED that the motion to dismiss the Amended Complaint against Simplex Grinnell LP is granted, and it is further

ORDERED that the remainder of the case is set for a preliminary conference on **July 14, 2010 at 9:30 a.m.**, No further notices will be sent, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY  
June 7, 2010

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.G.

**FILED**

**JUN 08 2011**

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