

**O'Neill v Ideal Bottle Gas, Inc.**

2011 NY Slip Op 31793(U)

June 20, 2011

Supreme Court, Suffolk County

Docket Number: 31954-09

Judge: Daniel Martin

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**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S. PART 9 SUFFOLK COUNTY**

**INDEX NO.: 31954-09**

**PRESENT:**  
**HON. DANIEL MARTIN**  
\_\_\_\_\_ x

Motion Date: 3/1/11  
Submitted: 4/26/11  
Motion Sequence Nos.: 04 - MD

**ROSA O'NEILL and WILLIAM  
O'NEILL,**

**Plaintiffs,**

**-against-**

**IDEAL BOTTLE GAS, INC., RAY  
CASIMANO and KAREN TELLES,**

**Defendants.**  
\_\_\_\_\_ x

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**The following named papers have been read on this motion:**

<b>Order to Show Cause/Notice of Motion</b>	<b>X</b>
<b>Cross-Motion</b>	
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

**ORDERED** that motion (004) by the defendants Ideal Bottle Gas, Inc. and Ray Casimano pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied.

By way of the supplemental summons and second amended verified complaint, the plaintiffs, Rosa O'Neill and William O'Neill, each seek damages, personally and derivatively, for severe burns and other personal injury sustained as a result of the alleged negligence of the defendants arising out of a propane tank gas explosion on August 13, 2009 at 1552 Potters Blvd. Bay Shore, New York. It is further claimed that the defendants violated the National Fuel Gas Code (*see* NFPA Section 54 and ANSI Section 2.223.10).

Ideal Bottle Gas, Inc. and Ray Casimano have asserted a cross claim over and against the co-defendant Karen Telles for contribution and common law and contractual indemnification. They, however, have not provided a copy of Karen Telles' answer, as required by CPLR 3212, to enable this court to determine if there is a cross claim asserted by Telles against them. Moreover, although Ideal Bottle Gas, Inc. and Ray Casimano seek summary judgment dismissing the supplemental summons and second amended complaint, they do not set forth a basis for their application.

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" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party 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 [2<sup>nd</sup> Dept 1981]).

In support of this motion, the moving defendants have submitted, inter alia, an attorney's affirmation; copies of the supplemental summons and second amended complaint, their answer and plaintiff's verified bill of particulars; a copy of a Police Department, County of Suffolk, Supplementary Report dated October 21, 2009; copies of a propane gas contract dated August 10, 2004 and work orders dated August 10, 2004 and February 17, 2009, and a propane safety check dated August 10, 2004; unsigned copies of the transcripts of the examinations before trial of Karen Telles dated March 22, 2010, Raymond Casimano dated March 25, 2010, William O'Neill dated March 22, 2010, Rosa O'Neil dated March 23, 2010, Ravi Seeram dated April 21, 2010, John Gellineau dated April 20, 2010; the affidavit of John Schumacher dated January 25, 2011; an uncertified copy of the 2008 edition of NFPA 921; copies of letters dated May 11, 2010 pursuant

to CPLR 3116; and the affidavit of Ray Casimano dated January 26, 2011.

The unsigned copies of the deposition transcripts of Karen Telles, Raymond Casimano, William O'Neill, Rosa O'Neill, Ravi Seeram and John Gellineau are not in admissible form as required by CPLR 3212 (*see, Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901, 850 NYS2d 201 [2<sup>nd</sup> Dept 2008]; *McDonald v Maus*, 38 AD3d 727, 832 NYS2d 291 [2<sup>nd</sup> Dept 2007]; *Pina v Flik Intl. Corp.*, 25 AD3d 772, 808 NYS2d 752 [2<sup>nd</sup> Dept 2006]); however, the transcripts of Karen Telles, William O'Neill, Rosa O'Neill and Ravi Seeram are accompanied by a letter sent pursuant to CPLR 3116 and an attorney's affirmation affirming that the transcripts were sent to the parties and that no changes have been made. Thus, those transcripts are considered on this motion. The unsigned copy of the transcript of John Gellineau is not in admissible form, is not accompanied by an affidavit pursuant to CPLR 3116, and is not considered on this motion. The moving defendants do not set forth why the deposition transcript of Ray Casimano is not signed by him or by the court reporter or whether there were changes to be considered by this court. The unsigned transcript submitted by Ray Casimano is, therefore, not in admissible form, and is not considered on this motion.

The affidavit submitted by Ray Casimano is insufficient to support this motion as a matter of law, as it merely sets forth that he and Ideal Bottle Gas, Inc. request that the plaintiff's request for a special trial preference be denied. Casimano's affidavit does not address any of the issues that are the subject of this action. Thus the motion of Ray Casimano and Ideal Bottle Gas, Inc. fails to comport with CPLR 3212 which requires that a motion for summary judgment be supported by an affidavit of a party having knowledge of the facts, or a deposition transcript in admissible form. Even if the motion was supported by an affidavit of a person with knowledge addressing the circumstances in dispute, or a signed copy of Casimano's deposition transcript, it is determined that movants have failed to establish prima facie entitlement to summary judgment dismissing the complaint as a matter of law.

#### KAREN TELLES

Karen Telles testified that she was the owner of the premises located at 1552 Potter Boulevard, Bay Shore. The property consisted of the main part of the home where she lived initially, a basement apartment with its own entrance rented by William and Rosa O'Neill, and a studio apartment in the garage, for a total of three apartments. When Telles purchased the house in mid-2004, there was already a basement apartment. She renovated the garage to make a studio apartment. In 2004, she resided in the house and had a stove in her apartment with natural gas provided by KeySpan. There was a gas stove in the basement where the O'Neills lived and she had a gas stove installed in the garage studio apartment sometime prior to August 10, 2004. The O'Neill's stove and the stove in the garage operated with propane gas provided by Ideal Bottle Gas, Inc. (Ideal). Telles moved out of the house prior to the accident on August 13, 2009 and rented her apartment to a woman and her two children who resided there on the date of the accident. Telles states that from the time she purchased the home until the date of the accident, she did not have service work performed on any of the gas appliances in the home, and made no changes to the gas system after 2004.

Telles testified that she purchased gas for the basement and garage apartment stoves from Ideal pursuant to a contract with Ideal and Ray Casimano on August 10, 2004. Ideal explained the

type of pipe and the height that needed to be set up, and inspected the lines to ascertain compliance with the code. She did not know if there was a manual shutoff, and testified that she did not know how to turn off the gas in case of an emergency. She knew that if there was a gas smell that she would need to notify Ideal Bottle Gas immediately. She did not recall receiving any warning literature from Ideal or giving warning literature to any of the tenants at the premises. There were no warnings on the propane tank that she recalled seeing. She stated that there was a propane safety check on August 10, 2004 conducted by Ideal, as indicated by the record, for a 200 pound or gallon propane cylinder. She did not know if the cylinder had Ideal's name or phone number on it. Mr. Casimano had inspected the pipes supplying the stoves. He raised no concerns about the plumbing or piping that had been utilized to connect the stoves in the basement apartment and the garage apartment. He did not suggest any changes in the plumbing or pipes to the stoves before he initiated service, and he did not recommend that a shut off valve be installed for the stove in the garage. The appliance form generated at the time of the inspection by Ideal indicated that there was a ten year old Kenmore range with a manual shut off in the studio apartment, and a ten year old Magic Chef in the basement with a manual shutoff. Ideal did not inspect the stove in the house, as it was not supplying gas to that stove. The Ideal work order dated August 10, 2004 indicated that a service person installed a 220 pound propane tank and hooked it up to the customer's existing gas system, and further indicated that "Safety" checked the system.

Telles further testified that several days prior to the explosion on August 13, 2009, she received two messages on her cell phone voice mail from her aunt, Rosie O'Neill, with complaints of the smell of gas at the premises. However, Telles was in the hospital for the entire weekend and was not able to listen to the voice mail on the date it was received. On about August 10<sup>th</sup> or 11<sup>th</sup>, she listened to the voice mails and learned that there was the smell of gas and that her aunt needed to cook. She returned the call, advising that she received the message and would call the gas company. She then called Ideal, before noon (or early daytime), and spoke to a man, advising him that there was the smell of gas at the premises. He mentioned that it was close to delivery again and that it was possible the gas was low. She testified that he advised her he was going to change the delivery cycle from every six months to five months and further advised her that when the gas is running out, it smells. He indicated that he would send someone out the following morning and would need access to the downstairs and side apartments. Thereafter, she went to the house and entered through the garage. She did a visual inspection to make sure that the stove was off. She did not smell gas at that time and did not turn the gas off at the tank. She notified her aunt and uncle that Ideal needed access to the basement and garage and she provided her key to the garage to her uncle. They discussed the gas smell.

#### RAYMOND CASIMANO

Raymond Casimano testified to the extent that he started his own business, Ideal Bottle Gas, Inc., in about 1996 or 1997. He stated that he performed the original installation of the tank at the Potter Boulevard address, and that the system was already there. He met Karen Telles at the house days before the installation and she signed all the paperwork. He stated that when he installed the tank, federal standards had to be met. Upon visual inspection, he felt the gas, piping, appliances, and hookups all met code to his satisfaction. Match light appliances were no longer legal, and the stove in the garage apartment complied with the code as it had an electronic ignition. He also felt that there were appropriate cutoff valves in proximity to the stoves in the basement and the garage studio apartment. Casimano stated that new tanks have to be requalified every twelve years, and that

the cylinder installed at the Telles premises was a new DOT cylinder tank. He further stated that the NFPA standards are general standard in the United States. Local code can prevail over NFPA.

Casimano stated that his safety check on August 10, 2004 did not involve a walk around the house or an inquiry concerning whether there was natural gas at the house. He testified that even if he was aware that the house was already serviced with natural gas from KeySpan or National Grid, he would have hooked up his tank to the system for the basement and garage as it was independent of KeySpan's system, the two systems were not connected, and everything met code.

On August 10, 2004, he did a visual inspection first. The tank was then installed and connected to the system. A gauge was hooked up to the regulator outside to measure the pressure. A lockup test was done wherein the tank was turned on and the pressure was measured with the appliances in the off position. The normal result is a pressure between ten and one half inches of water column and 14 inches of water column. He obtained a reading of 12.2 inches of water column, which he considered acceptable. The tank was then turned off and a quick leak test was conducted. He stated that if the needle does not hold and just drops, there is a serious problem. He dropped the pressure down to 9.6 inches of water column and it did not slowly creep back up. This, he stated, told him that the service valve was turning off completely as it held at that pressure. Although, pursuant to the code, the recommended time is five minutes to determine whether or not the pressure holds, he waits ten minutes while running the test. Casimano testified that he then did the third test to determine the operating pressure by turning the tank on and lighting up at least 50 per cent of the load capacity or four burners on one stove. It operated at 11.7 inches of water column, which was within acceptable parameters. He did not light the oven, however. He did not remember lighting the other stove in the basement. Another test, determined with a sniff device, a combustible gas detector, is run along the pipe and fittings. It sends a sound when it detects gas. However, he did not use this test as he was not searching for a leak as no leaks were detected with the previous tests. He also testified that he did not perform the soap and water bubble test along the pipes, or at the fittings, as no leak was indicated by the prior testing. Casimano testified that on August 10, 2004, he gave Telles safety brochures which she was instructed to leave for people that might use the appliances.

Casimano testified that the next date he returned to the Potter Boulevard address was on February 17, 2009 as there was an "all-out-of-gas" situation. The house was scheduled for automatic six month deliveries, and this was the first time they ran out of gas. A gas leak test was conducted at that time to determine why the gas ran out and to ascertain that there were no leaks at the premises. He did not go into the house to inspect the appliances as no one was home. Therefore, he was not able to do an operating test by lighting the burners. The lock up test result was 12.0 inches of water column and the leak test was 9.9 for 11 minutes. He stated that the system appeared to be free of leaks.

August 12, 2009 was the next time he went to the house between 8:30 and 8:45 a.m., in response to a call on August 11, 2009 from Telles advising a gas delivery was needed. He testified that Telles did not tell him that the gas ran out; that the people residing in the house smelled gas; that she had smelled gas outside the perimeter of the premises prior to that day; or that the neighbors complained to her that they could smell gas outside. He did state, however, that he told her that when the gas is running low, you will smell gas when you first light the stove or when you are cooking. He testified that Telles was upset that the gas had run out again as she had automatic

delivery. He had no answer for her concerning why the gas was running out and asked what was going on because more gas is being used. She told him that nothing had been added to the system. Casimano testified that this did not raise a red flag as a delivery was due the following week. He continued that the tank has a gauge which indicates the amount of gas in the tank. The tank is labeled in red and black with Ideal's name and phone number on it, but the label gave no instructions concerning what to do in a gas emergency.

When he arrived at the house on August 11, 2009, a man, whom he believed was Mr. O'Neill, was there with his dog. He stated O'Neill did not tell him he was out of gas, smelled gas, or that the stove was not working, however, he continued, he really did not speak to O'Neill. He testified that the tank was not empty when he arrived, but he filled it with 47.8 gallons of gas. He then went into the garage apartment and lit all four burners on the stove, which was located on the south wall. He looked around to make sure there wasn't anything else hooked up, but the apartment was completely empty except for the rug on the floor. He did not smell gas. He did not move the stove and did not look at the shutoff valve. He did not check for leaks and did not conduct a pressure test as he had tested the pressure in February. He then went with O'Neill into the basement apartment. He lit up all four burners and looked around, but did not see any changes in the system. He did not smell any gas at that point. O'Neill told him that he had smelled gas for the last day or so when he lit the stove. He did not look behind the stove. He determined that the O'Neills had been in the house for about a year and that O'Neill's wife cooked every day, and that explained the rise in gas consumption. He stated that he told O'Neill that the tank was refilled and that he should not smell gas when he lit the stove. He also showed him the gauge on the tank to determine if the gas was running low, and showed him the valve for turning the gas off at the tank. He advised that the smell of gas was due to the tank being low. He left no literature or pamphlets, but gave O'Neill the emergency number to call in the event of a leak.

On the evening of August 13, 2009, at about 9:00 p.m., Casimano received a phone call from the Brentwood Fire Department advising of an incident at the house, and asking him to respond to the location. He spoke to the Fire Chief and said he was told that it looked like the O'Neills were trying to light the stove with a rag. He also wanted to know when Casimano was there and what he did. During this deposition, he was asked about the report generated by the Arson Squad and the conclusion that the explosion occurred as a result of the electronic ignition range being turned on in a flammable propane air mix atmosphere. He was also asked about that part of the report which indicated that the reason for the propane to air concentration was most likely a failure in the propane gas plumbing or in the electric range. He was also advised that the matter was classified as an accidental fire explosion investigation. Casimano responded that he did not know what caused the explosion. He stated he lit the stove when he was there to install the tank, and whatever happened, happened after he left. He testified that he did not do a pressure test, and never checked for a leak in the system on August 12, 2009. A third page of the report was referred to during the interview with Mrs. O'Neill, wherein she stated that there was a smell of gas around the house for days, and that a gas delivery had been made, but the smell continued. She and her husband went into the apartment to check the stove, and the stove exploded. Casimano stated he did not smell gas. He also testified that he was given the tank after the Fire Department disconnected it. The gauge reading was 65 or 68 percent. In thirty six hours from the time the tank was delivered, 12 percent was left in the tank. He continued that it was hard to figure out how much was used or leaked because he did not know how much leaked out after the incident.

## WILLIAM O'NEILL

William O'Neill testified to the effect that he rented the walk-out basement apartment from Karen Telles at the premises on Potter Boulevard for about two and one half years prior to the explosion. Karen Telles is his wife's sister's daughter. The apartment had a gas stove. Telles provided no information about the stove when he rented the apartment. During the time he was living in the apartment, he remembered about two or three times that the stove did not operate as there was no gas. He would then call Karen and tell her. He could not remember exactly when, but sometime around the 5<sup>th</sup> or 6<sup>th</sup> of August, 2009, prior to the explosion, he called Karen to pick up the rent and to tell her he was smelling gas. He left a message on her voice mail and told her that the next door neighbor to the south of the house spoke to him and complained of smelling gas. He testified that he did not tell Telles that they were out of gas. He said Telles told him that the person from the gas company advised that gas could be smelled when it is low or running out.

O'Neill testified that Telles gave him a key to let the person from the gas company into the garage apartment as it also had a gas stove. When the man from Ideal arrived, he was in his yard and told him that he smelled gas. He was told that when the tank is running low it, smells. After Ideal filled the tank, they went into the basement, and Ideal turned on all four burners, then turned them off. He could smell a little gas which he typically smelled when the stove was being lit. However, he stated, the smell of the gas outside was more, was somewhat different and was there all the time. It seemed to be coming from the garage apartment. They left the basement, and he then let Ideal into the garage apartment, but did not smell the gas at that time. Ideal turned on all four burners on the stove in the garage, then turned the burners off, and left the premises without further conversation. After that delivery, his neighbor told him again that he smelled gas. He also smelled gas. The next day, his son told him he smelled a funny smell in his bedroom. He smelled gas and went to the garage apartment, followed by his wife, to investigate. Upon entering the garage, he noted a damp smell. He turned the light on and opened the window. He didn't smell gas, but he decided to check the stove like the man from Ideal did. He did not move the stove in any way. He turned one back burner on high to light it, and it went out. He thought he turned it off. He then lit the right front burner, saw blue all over, and turned off the burner. Suddenly, there was a big bang and an explosion. When asked, he responded that he did not have a match or lighter, and did not use a rag to light the stove. After the explosion, he shoved his wife out of the window and then went out the window himself, as there was no longer a door. His wife was still on fire, so he put the fire out.

## ROSA O'NEILL

Rosa O'Neill testified to the extent that she is the aunt of Karen Telles from whom she and her husband rented the basement apartment at the premises. On the date of the accident, she had been smelling gas for about two to three days, mostly in her bedroom, but did not remember if she called Karen that day or the day before to let her know. For about fifteen days prior to the accident, she could smell gas outside when she returned from work. For about two days before the accident, she could not use her stove as it would not light. Ideal came to fill the propane tank on August 11<sup>th</sup>. She did not smell gas in her bedroom after the gas delivery on August 11<sup>th</sup>, but could still smell it outside. On August 13<sup>th</sup>, they continued to smell gas. She followed her husband into the garage apartment to check out the smell. She described the smell in the garage apartment as a "weird" odor, but she did not think it was gas. Her husband lit the light in the garage apartment and then lit the

stove. She saw a blue “thing” above the stove, and everything exploded. The walls and roof started falling down.

#### RAVI SEERAM

Ravi Seeram, a nonparty witness, testified that he lived at 1550 Potter Boulevard, Bay Shore, south of his next door neighbors, the O’Neills. His house is about ten to twenty feet from the garage apartment which had the explosion. Prior to August 13, 2009, he smelled gas in his premises and his back yard for about a two week period. He spoke to his partner, Samuel Lugo, about this smell, who then notified the O’Neills. He also notified National Grid of the smell of gas as he had natural gas service provided by National Grid. National Grid came to the house and found nothing upon inspection to explain the smell.

#### DEFENDANTS’ EXPERT

John Schumacher, vice president of Advanced Engineering Investigations Corporation, has set forth in his affidavit that he is a licensed professional engineer in Arizona, California, Colorado, Illinois, New Mexico and Mississippi. While he does not base his opinion on a reasonable degree of engineering certainty, he opines that the investigation of the origin and cause of the explosion performed by the Suffolk County Police Department, did not adhere to many of the recommended procedures and industry standards for conducting a proper investigation into a gas related incident. A leak test of the lines supplying gas to the appliances, and a function test of the regulator, were required, along with testing and examining the appliances and other parts of the gas system. He continues that Detective Gellineau’s report improperly classified the cause of the explosion as accidental although the ignition source was never determined, nor was the source of the gas leak. Schumacher states that when he went to the scene of the explosion on August 27, 2009, he observed all the appliances, gas lines, and gas connections had been removed from the scene. He stated that he is not aware of any physical evidence that a propane gas leak originated in the propane lines, or that any of the work performed by Ideal Bottle Gas, Inc. caused or contributed to a propane gas leak.

#### ARSON REPORT

Detective Gellineau concludes in his supplementary report of October 21, 2009 that “[a]fter conducting a limited physical examination due to the potential hazard of continuing collapse, the undersigned finds that a gas leak in the garage resulted in a (sic) explosion when the control for the electronic ignition was physically turned to the on or ignition position.”

Based upon the foregoing, it is determined that there are factual issues which preclude summary judgment dismissing the complaint as against Raymond Casimano and Ideal. Casimano denies that Telles told him that the gas ran out; or that the people residing in the house smelled gas; that she had smelled gas outside the perimeter of the premises prior to that day; or that the neighbors complained to her that they could smell gas outside. Telles testified that she did. He testified that Telles was upset that the gas had run out again as she had automatic delivery. He had no answer for her concerning why the gas was running out and asked what was going on because more gas is being used. He testified that he did not smell gas at the premises. Casimano has not submitted evidence to demonstrate that under the circumstances, on August 11, 2009, he properly inspected the system

when he changed the tank, or reached a conclusion why there was more gas allegedly being used at the premises. The O'Neills, Telles, and Seeram all testified that there was the smell of gas outside the house. The defendant's expert raises factual issues in that he disagrees with the report and conclusions concerning the investigation into the explosion conducted by the Suffolk County Police Department Arson Squad and concludes that the investigation was conducted improperly. The defendant's expert does not provide his opinion concerning the cause of the explosion.

The affidavits submitted in the moving defendants' reply papers do not resolve the factual issues and are improperly submitted with the reply. On a motion for summary judgment, such failure to submit the affidavits with the moving papers renders the application insufficient, and such affidavits, submitted in connection with a reply, are to be given no consideration by the court entertaining the motion for summary judgment (*Canter v East Nassau Medical Group*, 270 AD2d 381, 704 NYS2d 624 [2<sup>nd</sup> Dept 2000]; *Sherrer v. Time Equities, Inc. and Emilia Grocery, Inc. v. Time Equities, Inc.*, 218 A.D.2d 116, 634 N.Y.S.2d 680 [1<sup>st</sup> Dept 1995]). The function of a reply paper is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (*In the Matter of the Application of Veronica Montgomery-Costa v The City of New York*, 2009 NY Slip Op 29461, 2009 Misc Lexis 3116 [Supreme Court of New York, New York County 2009]). Nor does it avail defendant to shift to the plaintiff, by way of a reply affidavit, the burden to demonstrate a material issue of fact at a time when the plaintiff has neither the obligation nor opportunity to respond absent express leave of court ( *see, Winegrad v City of New York*, supra; *Azzopardi v American Blower Corporation*, 192 AD2d 453, 596 NYS2d 404 [1<sup>st</sup> Dept 1992])

Accordingly, motion (004) by the defendants Ideal Bottle Gas, Inc. and Ray Casimano for summary judgment dismissing the complaint is denied.

So Ordered.

Dated: June 20, 2011  
Riverhead, NY

  
HON. DANIEL MARTIN, A.J.S.C.