Amica Mut. Ins. Co. v Grgas

2011 NY Slip Op 32917(U)

October 26, 2011

Supreme Court, Nassau County

Docket Number: 10340/09

Judge: Anthony L. Parga

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SCAN

SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK - COUNTY OF NASSAU

PRESENT: HON. ANTHONY L. PARGA

----------X

AMICA MUTUAL INSURANCE COMPANY a/s/o JUNE LONDON,

Plaintiff,

-against-

DINA GRGAS and JANET GRGAS DIORIO,

Defendants.

----------X

PART 8

Action #1
INDEX NO. 10340/09

MOTION DATE: 09/02/11
SEQUENCE NO.: 02, 03

----------X

QBE INSURANCE CORPORATION a/s/o 4 ANCHORAGE LANE OWNERS, INC.,

Plaintiff,

-against-

JANET GRGAS,

Defendant,

----------X

Action # 2
INDEX NO. 2987/11

MOTION DATE: 09/02/11
SEQUENCE NO.: 01

----------X

ENCOMPASS INSURANCE COMPANY OF AMERICA, as Subrogee of ANNE J. DIPASQUALE, ENCOMPASS PROPERTY & CASUALTY COMPANY, as Subrogee of MILDRED N. AUSTIN and ALLSTATE INSURANCE COMPANY, as Subrogee of MARY K. BONISLAWSKI,

Plaintiff,

-against-

DINA GRGAS and JANET GRGAS a/k/a JANET J. DIORIO,

Defendants.

----------X

Action #3
INDEX NO. 26253/09

MOTION DATE: 09/02/11
SEQUENCE NO.: 01

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Upon the foregoing papers, the motions for partial summary judgment on the issue of liability, pursuant to CPLR §3212, brought by plaintiff in Action #1 (Seq. 02), Amica Mutual Insurance Company a/s/o June London, by plaintiff in Action #2 (Seq. 01), QBE Insurance Corporation a/s/o 4 Anchorage Lane Owners, Inc., and by plaintiffs in Action #3 (Seq. 01), Encompass Insurance Company of America, a/s/o Anne J. Dipasquale, Encompass Property & Casualty Company a/s/o Mildred N. Austin, and Allstate Insurance Company a/s/o Mary K. Bonislawski, are granted. The cross-motion for summary judgment, pursuant to CPLR §3212, brought by defendants Dina Grgas and Janet Grgas a/k/ Janet J. Diorio, is denied.

The following facts are taken from pleadings and submitted papers and do not constitute findings of fact by this Court.

The above-captioned actions are property damage subrogation actions stemming from a fire that occurred on June 1, 2007. The fire is alleged to have begun in Apartment 3B of a two-story cooperative apartment complex located at 3 Anchorage Lane, Oyster Bay, New York, which is part of the 4 Anchorage Owners, Inc. complex. Apartment 3B was owned by defendant Dina Grgas, who lived there with her cousin, defendant Janet Grgas. It is alleged that the fire began on the deck of Apartment 3B and spread to several other apartments throughout the building, causing property damage to several apartments. All plaintiffs move for summary judgment, arguing that the sole proximate cause of the fire at issue was the negligent and careless disposal of smoking materials by the defendant Janet Grgas. In support of their motions, plaintiffs submit, *inter alia*, a certified copy of Fire Marshal Richard Maickel's Fire Origin and Cause Report; an affidavit of fire expert, Frank Johnson; the Nassau County Police Department Case Report; the deposition transcripts of defendant Janet Grgas, Dina Grgas, and Richard Maickel; as well as color photographs.

The night before the fire, on May 31, 2007, defendant Janet Grgas smoked several cigarettes on the deck of her residence at Apartment 3B. She testified at her deposition that she used a flower pot on the deck, which contained dirt but no plant, to extinguish her cigarettes

every time she smoked. Janet Grgas submitted an affidavit in opposition to the motions wherein she later stated that she used an ash collector on the barbeque grill to extinguish the cigarettes and then placed the extinguished cigarette in the flower pot. Dina Grgas also testified that Janet Grgas would smoke on the deck and put her cigarettes in the flower pot.

Sometime between six and seven o'clock in the morning of June 1, 2007, Janet Grgas was awakened by her cousin, Dina Grgas, who told her that there was a fire on the deck. They tried to extinguish the fire with wet towels, but were unsuccessful. Janet Grgas first observed the fire on the deck on the same side of the door where the flower pot was located. Fire Marshal Maickel arrived at the fire scene on June 1, 2007 at approximately 7:16 in the morning. He walked through the fire scene and spent time investigating the fire. Based upon his observations, he testified that the damage appeared to be at the rear of the building and he concluded that the fire originated on the second floor deck to the left of the door and that it was the result of careless disposal of smoking materials, which was classified as "accidental." Fire Marshal Maickel testified that his conclusion was based upon his personal observation of the extent of the damage, interviews with occupants, and his interview with the superintendent of the building, Mr. Mendozza. Mr. Mendozza reported that he saw fire on the deck that was extending up the exterior rear wall of the involved apartment. Fire Marshal Maickel also testified that he saw fire damage on the floor of the deck and the wall going up from it.

Fire Marshal Maickel testified that in the area of origin of the fire, he observed a quantity of discarded cigarette butts and that his interview with Janet Grgas indicated that she smoked in that location. Mr. Maickel testified that where people use an old flowerpot to extinguish a fire, the dried roots and vegetation can have a pyrophoric reaction, causing the flower pot to burn. In addition, Mr. Maickel eliminated the electrical causes of the fire, in part, because there were no electrical circuits in the vicinity of the area of origin and that electrical sources were remotely located. Additionally, the burn patterns that he witnessed were not consistent with a fire originating at the light fixture. He testified that had the light been the cause of the fire, the area where the light was located would have had the deepest burn and there would have been a "V" coming up from the light because fire does not normally burn downward. Fire Marshal Maickel did not come across any evidence that indicated that the source of the fire was electrical in nature.

Fire Marshal Maickel's Fire Origin and Cause Report concluded that the fire was caused by the "careless disposal of smoking materials" and stated that "it was determined the fire originated at the deck against the building to the left of the door where it was reported the plastic flowerpot and Folgers coffee container had been located. The fire was the result of a cigarette

being discarded into the involved containers."

In addition, the expert report of Frank W. Johnson, a certified fire and explosion investigator who inspected the loss site after the incident at issue, concluded that the fire originated at the wood deck of the exterior of Apartment 3b and that the fire was caused by Janet Grgas's careless disposal of smoking materials.

Lastly, plaintiffs herein argue that the court has previously addressed the issue of causation and determined that the defendants Dina Grgas and Janet Grgas were responsible for the fire on June 1, 2007. A separate subrogation action was brought in Nassau County Supreme Court with the caption, *Homesite Insurance Group a/a/o Ernst and Anita Nagel v. Dina Grgas and Janet Grgas*, bearing index number 1712/08 (hereinafter referred to as "*Homesite v. Grgas*"). Plaintiff in said action moved for summary judgment on identical grounds. Justice Adams granted plaintiff's motion on default, by order dated January 12, 2010. The defendants failed to submit opposition to said motion. As such, plaintiffs argue that liability has already been determined against the defendants herein and that the finding of summary judgment against the defendants in the *Homesite v. Grgas* case should be binding upon the defendants herein.

Accordingly, all plaintiffs contend that they are entitled to summary judgment on liability grounds.

In opposition and in support of their cross-motion for summary judgment, defendants Dina Grgas and Janet Grgas submit, *inter alia*, affidavits and also an expert report by Howard H. DeMatties, a forensic electrical engineer retained on March 6, 2009 to perform a forensic electrical investigation into this matter. While Howard H. DeMatties did not inspect the fire scene itself because he was not retained until two years after the fire, he reviewed photographs, Fire Marshal Maickel's Origin and Cause Report, reports of investigators involved in the *Homesite v. Grgas* action, the report of Frank Johnson, and the deposition transcripts of Dina Grgas, Janet Grgas, and Frank Maickel, among other evidence. He also participated in a joint examination of physical evidence which took place on May 13, 2009 with all parties to this action. Mr. DeMatties opines, based upon his review of the physical evidence and the reports of the various investigators and transcripts, that the electrical system in Apartment 3B cannot be eliminated as a source of ignition for this fire and that the fire scene investigation was not performed according to the standards established by NFPA 921. In addition, defendants contend they had no notice that potting soil could ignite, that it was not foreseeable that extinguishing a cigarette in the manner in which Janet Grgas did on the night of the incident could start a fire, and that it has not been established that Janet Grgas's actions were unreasonable under the circumstances. As such, defendants Dina Grgas and Janet Grgas argue that the plaintiffs'

motions must be denied and that their cross-motion for summary judgment should be granted.

Defendants further contend that the order of Justice Adams, dated January 12, 2010, which granted summary judgment on default to plaintiff Homesite in the *Homesite v. Grgas* action, is not binding on the instant action, as the *Homesite v. Grgas* matter was settled and a check was issued to plaintiff prior to Justice Adams's decision granting summary judgment on default. Because the action had settled prior to the motions submission, the defendants did not oppose the motion. Defendants have submitted an affirmation executed by Homesite's counsel, Frank J. Keenan, attesting to same, as well as a cover letter, dated December 3, 2009, which annexed the General Release and Stipulation of Discontinuance for said action. Accordingly, defendants argue that the doctrines of collateral estoppel and res judicata do not apply.

The Court notes that defendants' cross-motion for summary judgment was not timely filed. The latest Note of Issue filed in these three actions was filed on April 19, 2011, and the defendants' cross-motion was not filed until July 8, 2011, after the expiration of the sixty day time limit set forth in this Court's certification order. Accordingly, defendants' cross-motion is denied as untimely. (*Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004); *Andrea v. Arnone*, 5 N.Y,3d 514, 806 N.Y.S. 453 (2005); *Micelli v. State Farm Mutual Auto. Ins. Co.*, 3 N.Y.3d N.E.2d 995 (2004). Defendants have not shown good cause or provided a satisfactory explanation for their late filing. *(Brill v. City of New York*, 2 N.Y.3d 648, 814 N.E.2d 431 (2004)(concluding that CPLR §3212(a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, non-prejudicial filings, however tardy). Even if the defendants cross-motion had been timely, however, the defendants failed to demonstrate a prima facie showing of entitlement to summary judgment, as discussed in greater detail below.

To begin, the January 12, 2010 decision of Justice Adams granting summary judgment to the plaintiff and against defendants Dina Grgas and Janet Grgas on default in the prior action of *Homesite v. Grgas*, index number 1712/08, shall not be binding upon the defendants herein as they did not have a full and fair opportunity to contest the prior determination. The question of whether a litigant had a full and fair opportunity to contest a prior determination on issues litigated, as is an element of collateral estoppel, requires a case-by case analysis of the realities of the prior litigation which includes the context and other circumstances which may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him. (*Church v. New York State Thruway Authority*, 16 A.D.3d 808, 791 N.Y.S.2d 676 (3d Dept. *2005); Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 467 N.E.2d 487 (1984); *David v. Biondo*, 92 N.Y.2d 318, 703 N.E.2d 261 (1998)). It is evident, based upon

the submissions demonstrating that the action had settled prior to the issuance of Justice Adams's order, that defendants Dina Grgas and Janet Grgas did not have a full and fair opportunity to contest the prior determination. Justice Adams's decision was made upon the default of the defendant due to the settlement of the action. As such, said decision shall not be binding, and the within motions shall be decided on the merits, based upon the submissions made herein.

The plaintiffs have established a prima facie showing of entitlement to partial summary judgment on liability grounds by submitting, *inter alia*, Fire Marshal Maickel's certified Fire Origin and Cause Report, Fire Marshal Maickel's deposition testimony, the report of expert Frank W. Johnson, and the deposition transcripts of the defendants Dina Grgas and Janet Grgas. (*Andrews v. New York City Housing Authority*, 66 A.D.3d 619, 887 N.Y.S.2d 180 (2d Dept. 2009); *Delgado v. New York City Housing Authority*, 51 A.D.3d 570, 858 N.Y.S.2d 163 (1st Dept. 2008), *lv. denied*, 11 N.Y.3d 706 (2008)). Fire Marshal Maickel determined the cause of the fire to be careless disposal of smoking materials, and he eliminated other potential sources, including electrical problems, as there were no electrical sources near the area of the fire's origin. Same was confirmed by expert Frank W. Johnson. In addition, defendant Janet Grgas testified that she was smoking on the deck at issue on the night before the accident and had used the flower pot in the area of the fire's origin to extinguish her cigarettes. Accordingly, plaintiffs have demonstrated their entitlement to summary judgment on liability grounds. (*Oquendo v. Rosgro Realty Corp.*, 117 A.D.2d 528, 498 N.Y.S.2d 528 (1st Dept. 1986); *State Farm Ins. Co. v. Amana Refrigeration, Inc.*, 266 A.D.2d 372, 698 N.Y.S.2d 300 (2d Dept. 1999); *Parks v. Greenberg*, 161 A.D.2d 467, 55 N.Y.S.2d 376 (1st Dept. 1990)). The proponent of a summary judgement motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986)). Once the movant has demonstrated a prima facie showing of entitlement to judgement, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)).

In opposition, the defendants fail to raise a triable issue of fact sufficient to defeat plaintiffs' prima facie showing. While defendants submit the report of expert Howard H. DeMatties, said expert was not disclosed prior to the filing of the Note of Issue, despite being retained in March of 2009, until after the Notes of Issue were filed. Defendants have failed to offer a reasonable excuse for the delay, and accordingly, the expert report cannot be considered in opposition to plaintiff's summary judgment motion. (*Ehrenerg v. Starbucks Coffee, Co.*, 82

A.D.3d 829, 918 N.Y.S.2d 556 (2d Dept. 2011); *Gerardi v. Verizon New York, Inc.*, 66 A.D.2d 960, 888 N.Y.S.2d 136 (2d Dept. 2009); *Yax v. Development Team, Inc.*, 67 A.D.3d 1003, 893 N.Y.S.2d 554 (2d Dept. 2009); *Construction by Singletree v. Lowe*, 55 A.D.3d 861 (2d Dept. 2007)). Regardless of same, even considering the report of expert Howard H. DeMatties, it is insufficient to create a question of fact regarding the origin and cause of the fire at issue. Mr. DeMatties did not inspect the fire scene at the time of the fire, as he was not retained until two years later. While he attests that an electrical failure cannot be ruled out as a potential ignition source for the fire, he does not state that an electrical failure was, in fact, the cause of the fire or even that there is a high probability that same was the cause of the fire. He also does not state that careless disposal of cigarettes into a flowerpot on the deck at issue was not a cause of the fire or that it was not likely a cause of the fire. Mr. DeMatties's affidavit is speculative with regards to the origin of the fire and is of little probative value. (*See, Machado v. Clinton Housing Development Corp.*, 20 A.D.3d 307, 798 N.Y.S.2d 56 (1st Dept. 2005); McGarvey v. Bank of New York, 7 A.D.3d 431, 776 N.Y.S.2d 793 (1st Dept. 2004); *Figueroa v. Haven Plaza Housing Devel. Fund Co., Inc.*, 247 A.D.2d 210, 668 N.Y.S.2d 203 (1st Dept. 1998)). Expert opinions based upon speculative and conclusory assertions are insufficient to defeat a motion for summary judgment. (*Gonzalez v. 98 Mag Leasing Corp.*, 95 N.Y.2d 124, 733 N.E.2d 203 (2000); *Delgado v. New York City Housing Authority*, 51 A.D.3d 570, 858 N.Y.S.2d 163 (1st Dept. 2008), *lv. denied*, 11 N.Y.3d 706 (2008); *Andrews v. New York City Housing Authority*, 66 A.D.3d 619, 887 N.Y.S.2d 180 (2d Dept. 2009)). Mr. DeMatties affidavit is also insufficient to establish that the fire scene investigation by Fire Marshal Maickel was not performed according to NFPA 921 standards. Accordingly, even considering plaintiff's expert's affidavit, same is insufficient to create a triable issue of fact to defeat plaintiff's prima facie showing.

Lastly, plaintiffs' contentions that they had no notice that extinguishing cigarettes in a flower pot could start a fire and that the within incident was not foreseeable are without merit. It is not unforeseeable that the improper disposal of cigarettes could start a fire.

Accordingly, the motions by the plaintiffs in all three actions for partial summary judgment on the issue of liability are granted, and defendants' cross-motion for summary judgment is denied. It is well settled that where there are no genuine issues of fact, an action should be summarily decided. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 364, 320 N.E.2d 853, 854, 362 N.Y.S.2d 131, 133 (1974)).

Dated: October 26, 2011

Anthony L. Parga, J.S.C.

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OCT 31 2011
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