

**One Beacon Ins. Co. v French Inst. Alliance Francais
NYC**

2011 NY Slip Op 32941(U)

November 3, 2011

Sup Ct, NY County

Docket Number: 113997/05

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA
Justice

PART 19

Index Number : 113997/2005
ONE BEACON INSURANCE
VS.
FRENCH INSTITUTE ALLIANCE
SEQUENCE NUMBER : 010
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

FILED PAPERS NUMBERED
Exhibits ... _____

Answering Affidavits — Exhibits _____

NOV 07 2011

Replying Affidavits _____

Cross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion and motion sequence No 11 are decided in accordance with the accompanying memorandum decision.

Dated: 11/7/11

Saliann Scarpulla
SALIANN SCARPULLA

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 PART 19

-----X
ONE BEACON INSURANCE COMPANY a/s/o
Dooney Bourke, Inc. and other interested insureds
under the policy of insurance,

Plaintiffs,

Index # 113997/05

-against-

Decision and Order

FRENCH INSTITUTE ALLIANCE FRANCAIS
NYC, LEHR CONSTRUCTION CORP. and
REACT TECHNICAL, INC.,

Defendants.

-----X
FRENCH INSTITUTE ALLIANCE FRANCAIS NYC,

Third Party Plaintiff,

FILED

NOV 07 2011

-against-

REACT TECHNICAL, INC.

NEW YORK
COUNTY CLERK'S OFFICE

Third Party Defendant.

-----X
SALIANN SCARPULLA, J.S.C.:

Motion sequence numbers 010 and 011 are consolidated for disposition.

In this subrogation action, defendant/third party defendant React Technical, Inc.
("React Technical") moves, pursuant to CPLR 3212, for summary judgment dismissing

both the complaint and the third-party complaint against it. In addition, it seeks an order, pursuant to CPLR 8303-a, awarding it costs and attorneys' fees (motion sequence 10).¹

By separate motion (motion sequence 011), defendant/third party plaintiff French Institute Alliance Francais NYC ("FIAF") moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and any cross claims against it or, in the alternative, for conditional summary judgment/contractual indemnity over and against defendant Lehr Construction Corp. (motion sequence 011).²

Background

Plaintiff One Beacon Insurance Company's ("One Beacon") insured, Dooney and Bourke, Inc. ("D&B"), a retailer of luxury items, leased ground floor commercial space in a building located at 22 East 60th Street in New York City (the Building) owned by FIAF. FIAF occupied portions of the second and third floors of the Building and, at the time of incident at issue, some portion of FIAF's second floor space was being renovated by Lehr Construction Corp., as general contractor. Lehr's subcontractor, React Industries, Inc., a nonparty to this action, was installing new heating and air conditioning ("HVAC") equipment in the building as part of the renovation.

¹ React has withdrawn, without prejudice, the branch motion sequence 10 which seeks relief against Lehr Construction Corp.

² That branch of motion sequence 011 seeking judgment against Lehr is denied, as claims against Lehr are subject to an automatic stay in bankruptcy now in effect (Chapter 11 petition attached as Ex. A to Kelly Aff.in opp.).

[* 4]

- On January 23, 2005, a sprinkler pipe in FIAF's second-floor library, which is located above D&B's retail store, froze and burst. As a result, water entered D&B's retail store and damaged D&B's property. There is no dispute that the thermostat in FIAF's second-floor library had been turned off at the time the pipe froze and burst.

The thermostat for FIAF's HVAC equipment in the second-floor library was located on the wall near the circulation desk. The thermostat could be turned on and off with a push button that was located on the thermostat. After the incident, Frank Amerosa ("Amerosa"), director of technical services for React Technical, the company that maintained the HVAC system, came to inspect the premises. Upon entering the library, he discovered that the room was cold and that the library thermostat was set in the "OFF" position. When Amerosa turned the thermostat on, the temperature in the library rose significantly (Matlin Aff., Ex. G at 68, 77; *see also* deposition of Michael Lasorsa, Lehr Construction Corp.'s construction manager, Ex. M at 61-63).

One Beacon paid D&B for its loss under its insurance policy, then commenced this action in 2005 seeking to recoup its payment to D&B from FIAF, Lehr Construction Corp. and React Technical, the parties allegedly responsible for the loss. FIAF then commenced a third-party action against React Technical for indemnification, contribution and breach of contract based on React Technical's alleged negligence.

In 2007 FIAF moved for summary judgment dismissing the complaint on the ground that the lease between FIAF and D&B contained a valid "waiver of subrogation"

clause. That summary judgment motion was initially granted on that ground, however the trial court's decision was reversed by order of the Appellate Division, First Department, in *One Beacon v. French Inst. Alliance Francais NYC*, 50 AD3d 388, 389 (1st Dept. 2008). In reversing the denial of summary judgment, the First Department held that there was a question of fact as to "whether the cause of Dooney and Bourke's loss arose from a condition in FIAF's premises, or from a building-wide condition for which FIAF was responsible in its capacity as landlord [citation omitted]".

React Technical's Motion for Summary Judgment

Following the installation of the HVAC system in 2000, React Technical was retained by FIAF to provide preventive maintenance, on a quarterly basis. The preventive maintenance contract was renewed from year to year from 2001 through 2005 (*id.*, Exs. J and K).

When each preventive maintenance inspection was completed, the technician who performed the inspection generated a "work ticket" detailing the work that was performed on the system. The last inspection performed by React Technical, and the last time React Technical visited FIAF's premises before the incident, was on November 3, 2004, more than 3 months before the pipe froze and burst (*id.*, Ex. L).

Based on these and the other, above-described undisputed facts, React Technical argues that it is entitled to judgment as a matter of law because there is no evidence that it acted negligently. It contends that, in fact, the evidence demonstrates that React

[* 6]

Technical had not been on FIAF's premises for more than three months before the pipe froze and burst and, therefore, someone employed or associated with a party other than React Technical must have manually turned off the electronic thermostat that controlled the temperature in the room.

React Technical also argues that it is entitled to costs and attorneys' fees because the third-party action against it is frivolous in that it was "commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument" (CPLR 8303-a [c] [ii]).

In opposition, FIAF claims that there are questions of fact regarding React Technical's negligence because React Technical was the party that was responsible for the defective unit and it failed to produce evidence that its negligence in overseeing, maintaining and repairing that unit did not cause or contribute to D&B's damages.

One Beacon does not oppose React Technical's motion for summary judgment dismissing the main complaint as against it, thus this part of React Technical's motion for summary judgment is granted..

Further, React Technical has set forth its prima facie case of entitlement to summary judgment dismissing the third-party complaint as against it by submitting: 1) its contract with FIAF, which shows that it was only responsible for quarterly maintenance of the HVAC equipment (Matlin Aff., Exs. J&K); 2) a work slip, which establishes that React Technical last visited the premises and performed quarterly maintenance on the

second and third floor HVAC units on November 3, 2004, more than three months before the incident (Maitlin Aff, Ex. L); 3) testimony by one of FIAF's librarians, Ronda Murdock (Murdock), and its vice president of operations, Brad Phillips (Phillips), that Lehr Construction, Inc.'s employees and FIAF's employees had access to FIAF's second-floor library after React Technical's last maintenance visit and that the librarian knew how to turn the thermostat on and off (*id.*, Ex. I at 21-22; Walthall Aff., Phillips Dep., Ex. G at 90); 4) testimony by Amerosa, Lasorsa and William Steele, the independent adjuster hired by One Beacon, that the pipe burst because it was frozen (Matlin Aff., Ex. G at 64, 68, 77, Ex. M at 62-63, Ex. N at 64, 67); and 5) Amerosa's testimony that the HVAC system was not defective—rather, the pipe froze and burst because someone had manually turned the thermostat off and, when he turned the thermostat back on, the heating system immediately started to work and the temperature rose significantly within the hour (*id.*, Ex. G at 77, *see also*, *id.*, Ex M at 62-63). Moreover, the evidence establishes that no repair or mechanical work was performed on the HVAC unit following the incident (*id.*, Ex. G at 81; Ex. M at 62-63 and Ex. O).

In contrast to React Technical's specific evidentiary showing, FIAF has failed to come forward with a scintilla of evidence to raise a question of fact about whether React Technical's alleged negligence caused or contributed to D&B's loss. FIAF's general and conclusory allegations of negligence are an insufficient basis on which to deny React Technical's motion (*Remigio v City of New York*, 291 AD2d 262, 263 [1st Dept 2002]).

Accordingly, the branch of React Technical's motion seeking summary judgment dismissing the third-party complaint is also granted.

However, that branch of React Technical's motion which seeks costs and attorneys' fees based on FIAF's allegedly frivolous conduct is denied. To find an action or claim frivolous pursuant to CPLR 8303-a, the action or claim must have been continued in bad faith to delay resolution or to harass or maliciously injure one's adversary or it must have been continued in bad faith without any basis in law or fact (CPLR 8303-a [c][i][ii]). The outcome of a motion is not determinative of whether it can be characterized as frivolous. *Mazo v. NYRAC, Inc.*, 191 A.D.2d 617, 618 (2d Dept. 1993).

Sanctions are within the sound discretion of the trial court and are reserved for serious transgressions. In this case, the court does not find that FIAF engaged in frivolous conduct by refusing to discontinue its claims against React Technical. There is no evidence that FIAF continued to litigate against React Technical in bad faith simply to delay resolution of the action or to harass or maliciously injure React Technical.

FIAF's Motion For Summary Judgment

According to FIAF, in March 2004, it had moved almost all of its employees out of the 60th Street Building so that the renovations could proceed. Although no major

renovations were planned for the library³, the librarians were temporarily relocated to a building on 64th Street. They had keys to the library and would come back about once a week to pick-up and return books. Murdock testified that the librarians' visits were brief and that, as far as she knows, they did not manipulate the thermostat (Walthall Aff., Ex. H at 28, 39). Phillips testified that Lehr had control of the building during the time that it was under construction, and that Lehr's employees were the only ones going into the library on a regular basis during the construction (*id.*, Ex. G at 61). Phillips also stated that at some point the lock on the library door had been removed (*id.*, Ex. G at 88-90).

Based on these facts, FIAF contends that the complaint must be dismissed because: 1) there is no evidence that FIAF caused the thermostat to be turned off or that it had actual or constructive notice that the thermostat had been turned off; and 2) the lease agreement between D&B and FIAF contains a valid waiver of subrogation clause.

In opposition, One Beacon and React Technical both argue that the motion must be denied because FIAF made a prior summary judgment motion which was denied and that this motion violates the doctrine prohibiting successive motions for summary judgment. One Beacon and React Technical further argue that the branch of the motion that seeks dismissal based on the waiver of subrogation clause must be dismissed because it violates the doctrine of law of the case.

³ Work in the library was limited to running new IT cables and hooking up the fire system to the lobby panel (Deposition of Brad Phillips, Vice President of Operations for FIAF, Walthall Aff., Ex. G at 32-33)

Alternatively, both One Beacon and React Technical contend that there is a question of fact regarding whether FIAF caused or had actual or constructive knowledge that the thermostat had been turned off. Specifically, One Beacon claims that FIAF maintained control of the premises throughout the renovations and it cites the testimony of Lehr's construction manager, Lasora, who stated that the door to the library was always locked (Sheps Aff., Ex. B at 42), that the only time it was unlocked was when someone from FIAF was there (*id.*, Ex. B at 44) and that the only people he saw going into the library prior to freeze-up were FIAF employees.

“Successive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification.” *Jones v. 636 Holding Corp.*, 73 A.D.3d 409, 409 (1st Dept. 2010)(citation omitted). Here, FIAF seeks summary judgment based on, inter alia, the waiver of subrogation clause in the lease between FIAF and D&B. This waiver of subrogation clause was the subject of a prior summary judgment motion wherein the Appellate Division, First Department held that there was a question of fact about “whether the cause of Dooney and Bourke’s loss arose from a condition in FIAF’s premises, or from a building-wide condition for which FIAF was responsible in its capacity as landlord [citation omitted]” *One Beacon Ins. Co. v. French Inst. Alliance Francais NYC*, 50 A.D.3d at 389. FIAF has offered no new factual assertions or evidence regarding the cause of the loss—that is, whether it arose from a condition on FIAF’s premises or whether it arose from a building wide condition. In

addition, it has not come forward with any other reason that would justify a second motion for summary judgment *11 Essex St. Corp. v. Tower Ins. Co. of N. Y.*, 81 A.D.3d 516, 517 (1st Dept. 2011). Accordingly, the court will not consider FIAF's summary judgment motion to the extent that it is based on the waiver of subrogation clause.

However, FIAF's prior motion for summary judgment was submitted before discovery was completed and it did not raise the questions of FIAF's negligence, causation and notice. In *W. Joseph McPhillips, Inc. v. Ellis*, 8 A.D.3d 782, 783 (3d Dept. 2004), the court stated, "supreme Court has discretion to consider a subsequent summary judgment motion, particularly where, as here, the second motion is made following discovery and the ground for relief is different" (citations omitted). Therefore, this court will address the questions of FIAF's alternate grounds for relief.

FIAF has failed to establish its prima facie case that it is entitled to judgment dismissing the complaint and all cross claims against it as a matter of law because its own witnesses testified that, throughout the renovation of the second floor of the Building, up until the date of the incident, FIAF's employees had access to the library and the thermostat (Walthall Aff., Murdock Dep, Ex. H at 15-16, 41-43; Phillips Dep, Ex. G at 30-33, 67, 88). Moreover, the testimony establishes that the cause of the pipe bursting was that someone had turned off the thermostat in the library where the pipe was located (Walthall Aff, Ex. M at 61-62, Ex. G at 46-47; Matlin Aff., Ex F at 64 and 77, Ex. K, § 5). Accordingly, material questions of fact exist as to whether the negligent actions or

omissions of FIAF's employees resulted in the pipe freezing and bursting, thus causing the loss. Even in cases, such as this one, where there is no direct evidence that the defendant affirmatively created the dangerous condition, circumstantial evidence may be sufficient to create an issue of fact. *See Healy v ARP Cable*, 299 A.D.2d 152, 154 (1st Dept. 2002) "To establish a prima facie case of negligence based wholly on circumstantial evidence, it is enough that [One Beacon] show facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may reasonably be inferred." *Schneider v. Kings Hwy. Hosp. Ctr.*, 67 N.Y.2d 743, 744 (1986)(quotations and citation omitted).

Accordingly, FIAF's motion seeking summary judgment dismissing the complaint and all cross claims against it is denied.

In accordance with the foregoing, it is

ORDERED that defendant/third party defendant React Technical, Inc.'s motion for summary judgment dismissing the complaint as against it is granted without opposition and the complaint is severed and dismissed as against React Technical Inc.; and it is further

ORDERED that the branch of the motion in which React Technical Inc. seeks dismissal of the third-party complaint is granted and the third-party complaint is severed and dismissed as against React Technical, Inc. with costs and disbursements; and it is further

13] ORDERED that the branch of React Technical Inc.'s motion in which it seeks sanctions and attorneys' fees pursuant to CPLR 8303-a is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, as to motion sequence 011, French Institute Alliance Francais NYC's motion for summary judgment dismissing the complaint and all cross claims against it and/or in the alternative granting it conditional summary judgment based on contractual indemnity over and against Lehr Construction, Inc. is denied in its entirety.

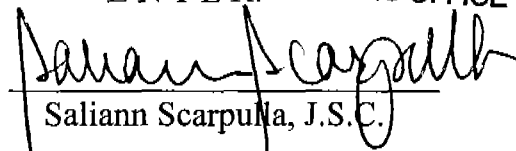
This constitutes the decision and order of the Court.

Dated: New York, New York
November 3, 2011

FILED

NOV 07 2011

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Saliann Scarpulla, J.S.C.