

**RLI Indem. Co. v Hai**

2011 NY Slip Op 33014(U)

October 19, 2011

Sup Ct, NY County

Docket Number: 114196/08

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN  
Justice

PART 11

RLI Indemnity Company,  
Plaintiff,

- v -

Mohammad Abdul Hai, et al  
Defendant.

INDEX NO.: 114196/08  
MOTION DATE:  
MOTION CAL. NO.  
MOTION SEQ. NO. 003

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes [ ] No

Upon the foregoing papers, it is ordered that the this motion is determined in accordance with the annexed decision and order.

**FILED**

NOV 16 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: October 19, 2011

[Signature]  
J.S.C.

Check one: [ ] FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

-----X  
RLI INDEMNITY COMPANY and ESSEX  
INSURANCE COMPANY as subrogees of FOX 684  
REALTY LLC and FOX 153 REALTY LLC,

INDEX NO. 114196/08

Plaintiffs,

-against-

MOHAMMAD ABDUL HAI, AMG DESIGN BUILD  
CORP., M.I. MECHANICAL INDUSTRIES, INC.  
and AQM ENGINEERING CONSULTING, P.C.,

Defendants.  
-----X

**FILED**

**NOV 16 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

JOAN A. MADDEN, J.:

In this subrogation action, defendant AMG Design Building Corp. ("AMG") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the second amended complaint and all cross-claims as asserted against it. Plaintiffs cross-move for partial summary judgment as to liability against defendant Mohammad Abdul Hai.

The following facts are not disputed unless otherwise noted. Plaintiffs' subrogees, Fox 684 Realty LLC and Fox 153 Realty LLC (collectively "Fox"), are the owners and managers of the building located at 151 East 43<sup>rd</sup> Street, New York, New York. On December 7, 2005, Fox leased the store on the ground floor of the building to defendant Hai for the purpose of operating a pizza shop. On April 27, 2006, at approximately 9:00 p.m., a fire occurred in the premises during renovations and damaged the building. Plaintiffs' cause and origin expert conducted an investigation and concluded that the fire was caused by "the plumber who was careless in his use

and handling of the open flame torch which he was sweating the cooper water pipes inside of the back/north wall where the fire originated.” Plaintiffs paid Fox \$230,190.39 in insurance proceeds.

On October 22, 2008, plaintiffs commenced this subrogation action against Hai (the tenant), AMG (the building department work permit lists the “contractor” as Hani Gheith, and his business as “AMG Design Build Corp.”); AQM Engineering Consulting, P.C. (“AQM”) (the engineering firm listed as the “applicant of record” on the work permit application); and M.I. Mechanical Industries, Inc. (“MI”) (a plumbing contractor that performed post-accident work). Seeking reimbursement of the insurance proceeds paid to Fox, the second amended complaint alleges causes of action against defendant Hai for negligence (first), breach of contract (second) and respondent superior (third); causes of action against AMG for negligence (fourth), negligent supervision (fifth) and respondeat superior (sixth); and causes of action for negligence against defendants MI (seventh) and AQM (eight).

With the exception of defendant AQM, defendants all appeared and answered. Defendant AMG moved, and plaintiffs cross-moved for a default judgment against AQM (motion sequence 002). By a short form order dated December 8, 2010, the Hon. Louis B. York, granted the motion and cross-motion on default, with damages to be determined at trial. When discovery subsequently revealed that defendant MI’s involvement was limited to post-accident work, plaintiffs discontinued the action against MI with prejudice.

Defendant AMG is now moving for summary judgment dismissing the complaint and all cross-claims against it, on the ground the undisputed record shows that it had nothing to do with

of Buildings (“DOB”), are sufficient to raise an arguable issue as to AMG’s role with respect to the work at the premises.

Specifically, tenant Hai testified that he hired the engineer, defendant Mohammad Abdul a/k/a “Caduce” to design the renovations of the premises; to apply for a DOB work permit; and to find a contractor to perform the renovation work and who could provide the landlord with a license and insurance.<sup>2</sup> Hai testified that he paid Caduce \$12,000 cash, pursuant to an oral agreement in which Caduce agreed “to do everything,” i.e. get the permits, and hire a contractor and plumber who would do all the work and provide insurance. Hai said that prior to the fire his only discussions about the work were with the engineer Caduce, and that he neither spoke to contractor, nor knew the contractor’s name. Hai explained that after the fire, Caduce called him and said the contractor wanted to meet him and see the premises. Hai testified that two or three days after the fire, Gheith met him at the premises, looked around and took some photographs, and then the two of them sat in Gheith’s car. Hai testified that Gheith was nervous about “losing a lot of money,” and that Gheith said, ““please help me, you know. I don’t want to get my insurance high. Please, please, you know.””

At his deposition, Gheith denied that his company performed any work at the premises and denied that his company was paid any money by the engineer or anyone else, in relation to the premises. Gheith admitted, however, that in early March 2006, the engineer Mohammed Caduce called him and said he had a “small job for us that he would like us to do . . . And all we had to do was sign the application for the permit, and the job was ours . . . and we would . . . do

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<sup>2</sup>Sometime after the fire, the engineer passed away.

the work.” Gheith also admitted that at the engineer’s request, he signed the work permit application, which described the work as general construction, installation of an electric pizza oven, installation of new counters and minor plumbing work. Gheith testified that the engineer filed the permit application, and that they had an oral agreement, which was his regular practice of getting work from the engineer. Gheith explained that they did not reach an agreement as to the price, since Gheith said he would be paid by the “person opening up the store.” Gheith testified that after the permit was issued, he had no involvement with going forward to do the work, and that the engineer told him “to wait on the job” and “wait for the owners.” Gheith further testified that he received a telephone call about the fire, but could not recall when or from whom. He admitted visiting the premises within two or three days after the fire, and met with the owners of the pizza store, and that such meeting was arranged through the engineer. He testified that he met with two gentlemen, and that the purpose of the meeting was “to see what transpired, what happened.” He did not remember the conversation, but said he went inside the premises and took photographs because “basically being my permit was on the window, and the fire had already happened, I needed to have some sort of proof of what happened . . . for self protection. . . That I haven’t done anything. But it’s a permit on the wall. And just to have photos of what happened inside.” Gheith said the pizza store owners did not ask him whether AMG was working on the site, and he could not remember if they had a conversation about insurance related to the fire. Gheith also testified that the work AMG does is framing, sheet rock and floors, and he would “sub-out” other work such as plumbing, electrical, HVAC and sprinklers.

Hai also submits two affidavits in opposition to AMG’s motion. In the April 12, 2011 affidavit, Hai states that after the fire, he went to see the engineer for proof of insurance and the

[\* 6]

engineer said he would obtain the insurance certificate from the contractor and provide Hai with a copy. Hai states that a short time later, he received a telephone call from Gheith, who got his number from the engineer, asking Hai to meet him at the store. Hai explains that when he arrived at the store, Gheith called his name out and introduced himself as “contractor.” Hai states that Gheith “invited me into his van and told me he felt that he might have a large exposure to his assets if there was a claim,” and he “embraced my hands and asked me to ‘help him.’” Hai also states that he told Gheith he needed proof of insurance for the landlord, and Gheith agreed to give it to him, but after Gheith left, Hai never received the insurance from him and Gheith did not return Hai’s phone calls.<sup>3</sup> In the April 22, 2011 affidavit, Hai states that when he met with Gheith after the fire, Gheith told him “directly” that he was the contractor who performed work at the premises.

Based on the foregoing deposition testimony, affidavits and DOB records, including Gheith’s admission that he signed the work permit application and the undisputed fact that the permit lists Gheith as the “contractor,” the court cannot conclude as a matter of law that defendant AMG did not perform any work at the premises. Despite Gheith’s admission that the engineer told him he had the job, Gheith simply states that the engineer later told him to “wait,” with no explanation as to why the engineer would have hired someone else to renovate the premises. The record establishes that at the time of the fire, the renovations were nearly completed. The issue of who performed the work is especially problematic in this case, since the

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<sup>3</sup>Hai’s testimony conflicts with the testimony of the landlord’s witness, Leonard Fox. Fox testified that he specifically remembered that during the renovations and before the fire, Hai delivered to his office, a copy of the certificate of insurance from the contractor, Hani Gheith, but it was misplaced and had not been found.

engineer hired by the tenant, who hired Gheith, is deceased, and no one, including the tenant and the building superintendent, has any knowledge as to the identity of the persons working at the premises, and in particular, the person or persons working there at 9:00 in the evening when the fire started. While the building superintendent, Patrick McCormack, testified that in the afternoon, "someone" was working in the store and called to him from inside to shut-off the water, he did not enter the store and he could not see the person from outside. The superintendent also testified that he did not "see" any of the people working in the building on the day of the fire, and before that day, he saw only a carpenter, who was "there all the time," but he did not know his name. At a minimum, however, the conflicting deposition testimony, raises issues of credibility that can only be resolved by the trier of fact. See S.J. Capelin Assocs, Inc. v. Globe Mfg Corp., 34 NY2d 338, 341 (1974); Shapiro v. Boulevard Housing Corp., 70 AD3d 474, 475 (2010). Thus, defendant AMG is not entitled to summary judgment.

Turning to plaintiff's cross-motion for partial summary judgment as to liability against defendant Hai, the cross-motion is granted in the absence of opposition. As explained above, defendant Hai submits two affidavits in opposition, but neither addresses the cross-motion. Based upon the clear and express terms of the lease and the undisputed facts as to the occurrence of the fire at the leased premises, plaintiffs have made a prima facie showing of liability against defendant Hai for breach of his lease obligation to "take good care of the demised premises."

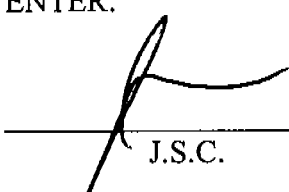
Accordingly, it is

ORDERED that the motion by defendant AMG Design Build Corp. is denied; and it is further

ORDERED that plaintiffs' motion for partial summary judgment as to the issue of liability against defendant Mohammed Abdul Hai is granted in the absence of opposition; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on December 1, 2011 at 9:45 a.m., in Part 11, Room 351 at 60 Centre Street.

DATED: October 19, 2011

ENTER:  
  
\_\_\_\_\_  
J.S.C.

**FILED**

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