

State Farm Fire & Cas. Co. v Speedy Refrig., Inc.

2011 NY Slip Op 34281(U)

August 21, 2011

Supreme Court, Suffolk County

Docket Number: 14-10199

Judge: Denise F. Molia

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

INDEX No. 14-10199

CAL. No. 16-02020OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 1-27-17 (002)

MOTION DATE 3-31-17 (003)

ADJ. DATE 4-28-17

Mot. Seq. # 002 - MD

003 - MG

-----X
STATE FARM FIRE & CASUALTY
COMPANY a/s/o HELEN MINCONE,

Plaintiff,

- against -

SPEEDY REFRIGERATION, INC. and MIKE &
MEYER CORP.,

Defendants.
-----X

MIKE & MEYER CORP.,

Third-Party Plaintiff,

- against -

PHIL'S APPLIANCE REPAIR INC.,

Third-Party Defendants.
-----X

LAW OFFICE OF STUART MARKOWITZ, P.C.
Attorney for Plaintiff
575 Jericho Turnpike, Suite 210
Jericho, New York 11753

LAW OFFICE OF STEWART FRIEDMAN
Attorney for Defendants/Third-Party Plaintiff
100 William Street, 9th Floor
New York, New York 10038

PENINO & MOYNIHAN, LLP
Attorney for Third-Party Defendant
1025 Westchester Avenue, Suite 403
White Plains, New York 10604

Upon the following papers read on these motions for summary judgment; Notices of Motion and supporting papers
1 - 27, 28 - 33; (and after hearing counsel in support and opposed to the motion) it is,

RST

ORDERED that the motion (seq. 002) by plaintiff State Farm Fire & Casualty Company, as subrogee of Helen Mincone, and the motion (seq. 003) by third-party defendant Phil's Appliance Repair, Inc., are consolidated for purposes of this determination; and it is

ORDERED that the motion by plaintiff State Farm Fire & Casualty Company, as subrogee of Helen Mincone, for partial summary judgment in its favor as to defendant Mike & Meyer Corp.'s liability is denied; and it is further

ORDERED that the motion by third-party defendant Phil's Appliance Repair, Inc., for summary judgment dismissing the third-party complaint is granted.

This action was commenced by plaintiff State Farm Fire & Casualty Company to recover monies paid, to its insured, Helen Mincone, for property damage she sustained due to a fire on November 24, 2011, as a result of defendant Mike & Meyer Corp.'s alleged negligent repair of her clothes dryer. Defendant Mike & Meyer Corp. brought a third-party claim against Phil's Appliance Repair, Inc., for common law indemnification, alleging that Phil's Appliance Repair, Inc., installed the dryer in question. Upon consent of all parties, a stipulation of discontinuance, dated July 13, 2016, was filed with the Court on September 12, 2016, discontinuing all claims against Speedy Refrigeration, Inc., with prejudice.

Plaintiff State Farm Fire & Casualty Company (State Farm) as subrogee of Helen Mincone, now moves for partial summary judgment in its favor as to Mike & Meyer Corp.'s liability. State Farm argues that Mike & Meyer Corp. (M & M) negligently performed repairs to Ms. Mincone's home clothes dryer, leading to a fire or, in the alternative, that M & M is liable pursuant to the theory of *res ipsa loquitur*. In support of its unopposed motion, State Farm submits, among other things, copies of the pleadings, an affidavit of Thomas Karn, an affidavit of J. Pablo Ross, a copy of an unsworn "fire investigation report," a copy of an unsworn forensic engineer's report, transcripts of the parties' deposition testimony, a transcript of the deposition testimony of nonparty witness Gina Titus, and a transcript of the deposition testimony of nonparty witness Terence McNally.

Third-party defendant Phil's Appliance Repair, Inc. (Phil's), also moves unopposed for summary judgment in its favor on the ground that it owed no duty to third-party plaintiff M & M. In support of its motion, Phil's submits copies of the pleadings and an affidavit of Philip Averbuch.

Helen Mincone testified that on the date in question, at approximately 9:00 a.m., she was in her home's kitchen, preparing Thanksgiving dinner while three of her six daughters watched the Macy's Thanksgiving Day parade on television. She stated that she placed a number of items in her home's clothes dryer and initiated a timed drying cycle. Mrs. Mincone indicated that the dryer was not drying her clothes completely when she set it to an automatic drying cycle, so she was forced to use a timed cycle both on the date in question, and on previous dates. She testified that the dryer in question was purchased approximately five years prior to the incident, when the home's original dryer, installed in 1994, ceased operating. She explained that prior to purchasing the dryer in question, she hired Phil's Appliance Repair, Inc., to attempt to fix the original. She stated that the needed repairs were too expensive and that Phil's recommended she purchase a new one. Mrs. Mincone testified that Phil's informed her that it could "get [the new dryer] for [her] and install it for us," so she purchased it through that repair company. She stated that "to [her] best

recollection.” Phil’s installed a new Whirlpool Dryer in her home. However, in a subsequent deposition, Mrs. Minecone testified that she believed she “told [Phil’s] what we wanted, and he said he could get a discount from P.C. Richard,” and that she “think[s] [Phil’s] purchased the dryer for us with a discount.” She indicated that she does not remember if an employee of Phil’s or P.C. Richard installed the new dryer.

Mrs. Minecone testified that at some point prior to the incident in question, the Whirlpool dryer stopped working, but that her financial situation was such that she could not afford to have it repaired. Instead, she stated, she began doing her laundry at a local laundromat. She indicated that upon learning the family’s dryer was broken, her sister-in-law, Gina Titus, hired a repair company to fix it. Mrs. Minecone testified that she did not recall the name of the repair company that Mrs. Titus hired, but that the dryer returned to functionality until a few days before the fire.

Mrs. Minecone indicated that the dryer vented to the outside through a series of ducts installed by her home’s builder, beginning with corrugated foil tubing leading from the dryer to more rigid tubing in her basement, then out through her house’s wall. She stated that she was never given any instruction on how to maintain the Whirlpool dryer, that she “had people come to clean the vents when they repaired the dryer,” and that she was never informed of the suspected cause of the fire.

Nonparty Gina Titus testified that in 2011, she learned that her sister-in-law’s dryer was no longer working. Mrs. Titus stated that she had recently hired a repair company named Mike & Meyer to do repair work on her own appliances and, since she was happy with Mike & Meyer’s work, she hired it to repair Mrs. Minecone’s broken Whirlpool dryer.

Michael Lane testified that he had been a 50% owner of defendant Mike & Meyer Corp. for approximately 13 years. He indicated that the corporation performed various appliance repairs, but ceased operations in 2016. Mr. Lane stated that he performed repairs to the subject dryer on August 29, 2011, but that he had no independent recollection of those repairs. Upon being shown an invoice for the work done on the subject dryer, Mr. Lane recalled that he replaced the dryer’s heater. He explained that to replace a dryer’s heater, he must first disconnect the vent from the dryer, but does not recall the type of vent that had been attached. He stated that a blown heater is generally caused by a clogged vent and that, despite being unable to recall the specifics of the work he performed on Mrs. Minecone’s dryer, he “check[s] [the] ventings” on all dryers he services. He testified that had he seen an obstruction in the venting ducts, he would give a recommendation to the owner that they contact a duct cleaning specialist. He indicated that since he does a test of every dryer’s venting and operation before completing the job, he would have done such a test on Mrs. Minecone’s dryer.

Nonparty Terence McNally testified that he is the Chief Fire Marshal for the Town of Huntington. He stated that he has been employed by the Town since 1997, that he has been its chief fire marshal since 2010, that he is certified as a “level two” fire investigator in the State of New York, and that he has investigated approximately 10 dryer fires in his career. He indicated that based upon his conversations with the fire chief at the scene and the homeowner, as well as his own inspection of the subject premises, the fire in question appeared to have been caused by “a blockage in the dryer vent line.” Fire Marshal McNally opined that the fire’s point of origin “appeared to be in the floor joists below the laundry room.”

Philip Averbuch testified that he is the president of Phil's, which has been in operation since 1991. He indicated that he learned his trade through on-the-job training, but that he attends 10 association meetings a year, during which developments in the field of appliance repair are discussed. He stated that there is one member present at the meetings, who owns a company called "Dryer Vent Wizard," which specializes in dryer vents. Mr. Averbuch testified he learned metal foil dryer vent tubes were "not to be used" in New York from that specialist. He explained that Home Depot sells foil tubing as a dryer vent transition, and that such tubing is Underwriters Laboratory-approved, but that it is not approved by New York State for that purpose. He indicated that if one of his customers had metal foil tubing in their home, he would inform them that it was a fire hazard and that it should be replaced.

Upon questioning, Mr. Averbuch testified that Phil's "kind of" sold appliances through P.C. Richard's wholesale division. He explained that if a dryer was too expensive to fix and a customer wanted a new one, he would contact P.C. Richard on their behalf, get a price, inform the customer of the price, then order it. He stated that P.C. Richard employees would then deliver it, install it, and collect payment from the homeowner. P.C. Richard would then send him a check for approximately \$50.00 and the amount of tax collected on the purchase. He indicated that, if asked, P.C. Richard would deny that they "hook up" dryer venting, but he is aware of an informal policy whereby P.C. Richard's delivery person would accept \$15.00 in cash for that service.

Regarding Mrs. Mincone, Mr. Averbuch testified that her washing machine had stopped working, that she sought to purchase a new one, and that she wanted a new dryer to match. Mr. Averbuch indicated that he contacted P.C. Richard on her behalf, as was his usual practice, and that P.C. Richard delivered the two appliances the next day. He stated that neither he nor Phil's had any role in installing the appliances in question, or any venting therefore.

Thomas Karn submitted an affidavit on behalf of plaintiff, stating that he is a principal of Hayden Karn Consulting, Inc., which is a New York State-licensed investigative agency that conducts investigations into the origin and cause of fires. He avers that he conducted detailed inspections of the subject premises on November 25, 2011, and December 5, 2011. Based upon his investigations, he opines that M & M's "failure to change the flexible foil duct in the rear of the Whirlpool dryer to the wall duct directly lead (sic) to the fire that originated within the dryer duct." He further opines that M & M's "failure to advise Mrs. Mincone to clean out the large accumulation of lint within the ducts or to perform the cleaning in the duct contributed to igniting and spreading the fire within the dryer duct."

J. Pablo Ross also submitted an affidavit on behalf of plaintiff, stating that he is a licensed professional engineer in New Jersey and Pennsylvania, a principal of Plick and Associates, and a certified fire and explosion investigator. He avers that Plick and Associates was hired by plaintiff to determine the cause of the dryer fire in question. He states that he conducted destructive testing of the dryer in question at his evidence storage facility in Upland, Pennsylvania. He opines that the fire originated within the dryer duct in the rear of the Whirlpool dryer. He states that the fire and smoke damage were "mostly limited to the foil vent, vent adapter and metal vent," and there were "no significant signs" of fire damage inside the dryer itself. He notes that he observed lint covering the dryer and inside its vents, and opines that the lint ignited within the exhaust system. Further, he opines that M & M should have observed the accumulation of lint in the dryer's exhaust system, removed it, and "immediately replaced the venting as per the Whirlpool

Use & Care Guide and the Mechanical Code of New York State.” Finally, he states that M & M’s failure to properly maintain the dryer in question created “a direct and foreseeable fire hazard.”

In support of Phil’s motion, Philip Averbuch submits an affidavit stating that he is the president of Phil’s Appliance Repair, Inc. He avers that in approximately 2006, Phil’s was contacted by Helen Mincone to repair a washing machine. Mr. Averbuch states that Mrs. Mincone did not want to wait for the part necessary to repair that washing machine and, instead sought to purchase a new washing machine and dryer. He states that Phil’s subsequently contacted P.C. Richards on Mrs. Mincone’s behalf, and arranged to have a washer and dryer delivered to her residence. Mr. Averbuch avers that following its coordination with P.C. Richard, Phil’s had no further involvement in the transaction. Further, Mr. Averbuch indicates that Phil’s did not install the new washer and dryer; it did not supply or install a venting system for the dryer; it never inspected any of Mrs. Mincone’s dryers; and it never made repairs to any of Mrs. Mincone’s dryers or their attendant venting systems.

A party moving for summary judgment 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 (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (see *Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Engelhart v County of Orange*, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). Whether a defendant owed plaintiff a duty of care is a question of law to be determined by the court (*Mauskopf v 1528 Owners Corp.*, 102 AD3d 930, 930, 958 NYS2d 759 [2d Dept 2013]). In the absence of a contract requiring a repairperson to routinely inspect and maintain a device, that repairperson has no duty, as an independent repairer/contractor, to inspect the device for defects unrelated to the problem it was summoned to correct, to install safety devices, or to warn the owner of any such defects (see *Merchants Mut. Ins. Co. v. Quality Signs of Middletown*, 110 AD3d 1042, 973 NYS2d 787 [2d Dept 2013]; *McMurray v P.S. El.*, 224 AD2d 668, 638 NYS2d 720 [2d Dept 1996]). To establish a defendant’s liability based on the theory of *res ipsa loquitur*, “(1) the event must be of a kind which ordinarily does not occur in the absence of someone’s negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff” (*Corcoran v Banner Super Mkt., Inc.*, 19 NY2d 425, 430, 280 NYS2d 385 [1967]).

Plaintiff has failed to establish a prima facie case of entitlement to partial summary judgment in its favor as to M & M’s liability. Plaintiff neither established that M & M owed plaintiff a duty of care to

plaintiff nor eliminated all issues of material fact (see *Merchants Mut. Ins. Co. v. Quality Signs of Middletown, supra*; see generally *Alvarez v Prospect Hosp., supra*). Specifically, some witnesses opine that the fire originated in the metal duct underneath the floor, while others contend that it began in the metal foil duct attached to the back of the dryer. Further, plaintiff has not established the lint that allegedly ignited had not been deposited in the venting ducts in the three month period between M & M's servicing of the dryer and the date of the fire. Additionally, plaintiff failed to establish, prima facie, that M & M had any duty to inspect the dryer's venting system, in addition to the work it was hired to perform—namely, restoring the dryer to functional status by replacing its heater element (see *Merchants Mut. Ins. Co. v. Quality Signs of Middletown, supra*). Plaintiff has adduced no evidence that the replaced heater was a contributing cause of the fire. Therefore, the causal connection between the service performed by M & M and the fire is simply too speculative at this juncture, considering the significant period of time that elapsed between those events. Finally, plaintiff has failed to establish, prima facie, at minimum, the second prong of a theory of res ipsa loquitur (see *Corcoran v Banner Super Mkt., Inc., supra*). As three months passed between the time of M & M's contact with the dryer in question, it certainly was not in M & M's exclusive control. Accordingly, plaintiff's unopposed motion for partial summary judgment in its favor as to M & M's liability is denied.

Third-party defendant Phil's, on the other hand, has established a prima facie case of entitlement to summary judgment. It established, through the affidavit of its president, that it acted only as an intermediary in the sale of a washer and dryer by P.C. Richard to Mrs. Mincone approximately five years prior to the incident in question. While it is true that, in strict products liability actions, a defendant in the chain of distribution may be held liable for consequences of a defective product, no such assertion is made here (see *Gorbatov v Mutfer Group*, 136 AD3d 745, 26 NYS3d 92 [2d Dept 2016]). The evidence shows that Phil's had no contact, whatsoever, with the dryer in question. Furthermore, the dryer itself is not alleged to have been defective. Finally, as counsel for Phil's correctly states, M & M sought only indemnification in its third-party complaint—not contribution. A party seeking indemnification “must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought, and must not have committed actual wrongdoing itself” (*Tiffany at Westbury Condominium by Its Bd. of Mgrs. v Marelli Dev. Corp.*, 40 AD3d 1073, 1077, 840 NYS2d 74 [2d Dept 2007], quoting *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80, 693 NYS2d 554 [1st Dept 1999]). Phil's having established a prima facie case, the burden shifted to third-party plaintiff M & M to raise a triable issue (see generally *Vega v Restani Constr. Corp., supra*).

M & M has failed to submit any opposition to the Phil's motion. Thus, it is unable to raise a triable issue. Accordingly, the motion by third-party defendant Phil's Appliance Repair Company for an order dismissing the third-party complaint is granted.

Dated: 5-21-11

~~John D. ...~~

A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION