

<b>Cactus 4, LLC v Swisa</b>
2012 NY Slip Op 30119(U)
January 11, 2012
Sup Ct, NY County
Docket Number: 111093/09
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan  
Justice

PART 36

Index Number : 111093/2009  
CACTUS 4  
vs.  
SWISA, MAYA  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

3, 4

Upon the foregoing papers, It is ordered that this motion for partial summary judgment by plaintiffs Praetorian Insurance Company and Technology Insurance Company, Inc. & this cross-motion by plaintiff Cactus 4 for summary judgment is decided in accordance with the attached memorandum decision.

(Consolidated ~~for~~ disposition with motion sequence 006)

FILED

JAN 18 2012

Dated: 1/11/12

NEW YORK COUNTY CLERK'S OFFICE

JUSTICE DORIS LING-COHAN <sup>1 SC</sup>

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 36

**FILED**

**JAN 18 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
CACTUS 4, LLC, PRAETORIAN INSURANCE  
COMPANY and TECHNOLOGY INSURANCE  
COMPANY, INC., as Subrogees of Cactus 4  
Properties, LLC d/b/a Cactus 4, LLC,

Plaintiffs,

Index No.: 111093/09  
DECISION/ORDER

-against-

Motion Sequence No.:  
005 & 006

MAYA SWISA, MAXINE SWISA, ALLISON  
MARGETSON and CHRISTOPHER SOBEL,

Defendants.

-----X  
**HON. DORIS LING-COHAN, J.S.C.:**

This is an insurance subrogation action for damage due to a fire, alleged to have been caused by the acts of some of the defendants. Two of the plaintiffs, Praetorian Insurance Company and Technology Insurance Company, Inc., move for partial summary judgment on the complaint and to dismiss defendants' counterclaim (motion sequence number 005); plaintiff Cactus 4, LLC cross-moves for the same relief. Defendants<sup>1</sup> each cross-move to deny the plaintiffs' motions and to dismiss plaintiffs' fourth cause of action (motion sequence number 006). The motion and cross motions are disposed of as follows.

#### BACKGROUND

Plaintiff Cactus 4 Properties, LLC d/b/a Cactus 4, LLC (Cactus) is the owner of a building (the building) located at 215 East 4<sup>th</sup> Street in the County, City and State of New York. See Notice of Motion, Exhibit 22 (amended verified complaint), ¶¶ 5-6. Plaintiffs Praetorian

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<sup>1</sup> This case has been dismissed as against defendant Christopher Sobel.

Insurance Company (Praetorian) and Technology Insurance Company, Inc. (Technology) are Cactus's insurers. *Id.*, ¶40. Defendants Maya Swisa and her mother, Maxine Swisa (the Swisa defendants), were the residential tenants of record of apartment 26 in the building under a lease (the lease) that ran from September 1, 2008 through August 31, 2009. *Id.*, ¶¶ 9-13; Exhibit 4. However, Maxine Swisa never actually occupied the apartment, and was merely her daughter's co-signer on the lease. *Id.*; Exhibit 22, ¶¶ 12-13. Defendant Allison Margetson (Margetson) was Maya Swisa's roommate. *Id.*, ¶¶ 7-8. Former defendant Christopher Sobel (Sobel) was Margetson's ex-boyfriend, and this action was dismissed as against him via court order, dated June 7, 2010. *Id.*, ¶¶ 14-15; Exhibit 17.

Plaintiffs allege that, on March 12, 2009, a fire broke out in apartment 26 when Margetson placed lit candles atop a wooden wicker table in the living room, after which she (with Sobel), and Maya Swisa retired to their respective bedrooms without first putting the candles out, and that the candles eventually ignited the table and caused serious damage to the apartment. *See* Notice of Motion, Schlossberg Affirmation, ¶¶ 20-26.

All of the defendants herein were deposed on July 21, 2010. Margetson stated that there were two varieties of candles on the aforementioned wicker table - two large scented candles that were enclosed in glass containers and stood on raised metal stands, and four small "tea candles" that stood in tin trays. *See* Notice of Motion, Exhibit 5, at 24-25, 34-35, 52. Margetson averred that she had lit the two larger candles at approximately 7 pm on March 12, 2009, but denied having lit any of the small tea candles. *Id.* at 26-27, 60. She stated that she became aware of the fire at approximately 9 pm after hearing Maya Swisa call out her name, and that she responded by trying to put out the fire with a potful of water from the kitchen, to no avail. *Id.* at 29-32, 63-

64. Margetson denied that she or anyone else had consumed any alcohol that night, and claimed that there was a non-functioning fire alarm in the apartment. *Id.* at 53, 58, 81-82. Margetson also noted that, earlier that year, she and Maya Swisa had obtained a discarded second hand floor lamp from the building's basement, and opined that it might somehow have shorted out and thereby caused the fire. *Id.* at 40-42.

At her deposition, Maya Swisa acknowledged being a signatory to the lease, and stated that she had returned to the apartment on the evening of March 12, 2009, after a flight to New York from Santa Fe, New Mexico, to find Margetson and Sobel there with several of the small tea candles lit on top of the wicker table. *See* Notice of Motion, Exhibit 6, at 8-9, 20-21, 41-44, 103-108, 113-115. She also stated that she became aware of the fire when she exited the apartment's bathroom (after having taken a shower) and crossed through the living room in order to return to her bedroom. *Id.* at 30-31, 40. She confirmed that she then yelled for Margetson, who attempted unsuccessfully to douse the flames with a pot of water from the kitchen. *Id.* at 32-33.

At her deposition, Maxine Swisa also acknowledged being a signatory to the lease, but stated that she never lived in the apartment, and that she was not present when the fire occurred there on March 12, 2009. *See* Notice of Motion, Exhibit 7, at 7-8, 12-13.

Plaintiffs have also presented a copy of the incident report that was prepared by the New York City Fire Department inspectors immediately after the fire. *Id.*; Exhibit 8. That report states, in pertinent part, as follows:

Numerical Cause Code: 420

Description (Specify if Accidental): Two candles left unattended on top of a wicker table

[\* 5]

Origin and Extension: Examination showed that the fire originated in the subject premises, on the sixth floor, in apartment # 26, in the living room, along the north partition wall, at a point approximately two feet east of the west partition wall and three feet above the floor, in combustible material (wicker table). The fire extended to all four walls, ceiling, floor and contents of the living room. The fire further extended to all four walls, ceiling and contents of the two bedrooms, bathroom and kitchen. The fire was thereto contained and extinguished.

*Id.*

As previously mentioned, Cactus and the Swisa defendants executed the lease on September 1, 2008, and its term endured until August 31, 2009. The relevant portions of the lease provide as follows:

7. Warranty of Habitability ...
  - B. You will do nothing to interfere or make more difficult Owner's efforts to provide you and all other occupants of the Building with the required facilities and services. Any condition caused by your misconduct or the misconduct of anyone under your direction and control shall not be a breach by Owner.
  
8. Care of Your Apartment - End of Lease - Moving Out
  - A. You will take good care of the apartment and will not permit or do any damage to it, except for damage that occurs through ordinary wear and tear. You will ... leave the apartment ... in the same condition as it was when You first occupied it, except for ordinary wear and tear and damage caused by fire or other casualty.
  
10. Your Duty to Obey and Comply With Laws, Regulations and Lease Rules
  - C. Your Responsibility. You are responsible for the behavior of yourself, of your immediate family, your servants and people who are visiting you. You will reimburse Owner as additional rent upon demand for the cost of all losses, damages, fines and reasonable legal expenses incurred by Owner because You, members of your immediate family, your servants or people visiting you have not obeyed government laws and orders or the agreements or rules of this lease.
  
11. Objectionable Conduct

As a tenant in the building, you will not engage in objectionable conduct. Objectionable conduct means behavior which makes or will make the apartment or the building less fit to live in for you or other occupants. It also means anything which interferes with the rights of others to properly and peacefully enjoy their apartments, or causes conditions that are dangerous, hazardous, unsanitary or detrimental to other tenants in the building. Objectionable conduct by You gives Owner the right to end this lease. ...

21. Fire or Casualty

A. If the apartment becomes unusable, in part or totally, because of fire, ... this lease will continue unless ended by Owner (under C below) or You (under D below). But the rent will be reduced immediately. This reduction will be based upon the part of the apartment which is unusable.

B. Owner will repair and restore the apartment, unless Owner decides to take the actions described in paragraph C below.

C. After a fire ... in the Building, Owner may decide to tear down the Building or to substantially rebuild it. In such case, Owner need not restore the apartment but may end this lease. Owner may do this even if the apartment has not been damaged, by giving You written notice of this decision within 30 days after the date when the damage occurred. If the apartment is usable when Owner gives you such notice, this lease will end 60 days from the last day of the calendar month in which You were given the notice.

D. If the apartment is completely unusable because of fire ... and is not repaired in 30 days, You may give Owner written notice that you end the lease. If You give that notice, this lease is considered ended on the day that the fire ... occurred. Owner will refund your security deposit and the pro-rata portion of rents paid for the month in which the casualty happened.

E. Unless prohibited by the applicable insurance policies, to the extent that such insurance is collected, You and Owner release and waive all right of recovery against the other or anyone claiming through or under each applicable policy by way of subrogation.

*See Notice of Motion, Exhibit 4.*

On October 20, 2008, Cactus executed a one-year "commercial property insurance policy" with Praetorian (the Praetorian policy), the subrogation clause of which provides as follows:

[\* 7]

Commercial Property Conditions

This coverage part is subject to the following conditions, the Common Policy Conditions and applicable Loss Conditions and Additional Conditions in [the] Commercial Property Coverage Forms.

(I) Transfer of Rights of Recovery Against Others to Us.

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing ...

See Notice of Motion, Exhibit 2.

Also on October 20, 2008, Cactus executed a one-year "commercial general liability insurance policy" with Technology (the Technology policy), the subrogation clause of which provides as follows:

Commercial General Liability Coverage Form

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Section IV - Commercial General Liability Conditions

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8. Transfer of Rights of Recovery Against Others to Us

If the Insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The Insured must do nothing after loss to impair them. At our request, the Insured will bring "suit" or transfer those rights to us and help us enforce them.

See Notice of Motion, Exhibit 3.

Praetorian and Technology state that they made total payments to Cactus of \$548,711.18 pursuant to their respective insurance policies, and that, in return, Cactus sent them a number of subrogation receipts and proof of loss statements in March of 2009 to assist Praetorian and Technology in pursuing their claims against defendants. See Notice of Motion, Schlossberg

Affirmation, ¶¶ 38-44; Exhibits 12, 13.

Plaintiffs initially commenced this action on April 19, 2010, and later filed an amended complaint that includes causes of action for: 1) negligence (against Margetson); 2) negligence (against Maya Swisa and Sobel); 3) gross negligence (against Margetson); 4) gross negligence (against Maya Swisa and Sobel); 5) breach of contract (against Maya Swisa); and 6) breach of contract (against Maxine Swisa). See Notice of Motion, Exhibit 22. On September 29, 2010, the Swisa defendants filed an amended answer that includes a counterclaim against plaintiffs for failure to state a claim (gross negligence), and a cross claim against Margetson for indemnification. *Id.*; Exhibit 23. It is not clear whether Margetson ever filed an amended answer. As previously mentioned, this action was dismissed as against Sobel via court order on June 7, 2010. *Id.*; Exhibit 17.

Now before the court are: 1) Praetorian's and Technology's motion for summary judgment on the complaint and to dismiss defendants' counterclaim (motion sequence number 005); 2) Cactus's cross motion to join in with the Praetorian's and Technology's motion for the same relief (motion sequence number 006); 3) the Swisa defendants' cross motion for summary judgment to dismiss plaintiffs' fourth cause of action; and 4) Margetson's cross motion to join in with the Swisa defendants' cross motion for the same relief.

#### DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See *e.g.* *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, 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 fact which require a trial of the action. See e.g. *Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1<sup>st</sup> Dept 2003). Applying such principles herein, the court decides the within motion and cross-motion for summary judgment as follows.

Praetorian’s and Technology’s Motion

As previously mentioned, the first branch of Praetorian’s and Technology’s motion seeks summary judgment on the entire amended complaint. The first and second causes of action in that complaint set forth negligence claims against Margetson and Maya Swisa, respectively.<sup>2</sup> See Notice of Motion, Exhibit 22, ¶¶ 56-62, 63-69. Pursuant to New York law, “the traditional common-law elements of negligence” are: “duty, breach, damages, causation and foreseeability.” *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1<sup>st</sup> Dept 2005). In their motion, Praetorian and Technology do not address these elements separately. Instead, they first argue that “the candles caused the fire,” and that Margetson’s and Maya Swisa’s “negligent breach of their duties unquestionably proximately caused the fire and resulting damage” to the apartment. See Memorandum of Law in Support of Motion, at 4. This is clearly a circular and faulty argument, since it presumes the existence of both the “breach” and “causation” elements of the instant negligence claims without providing any proof of either of those elements (other than the admitted occurrence of the fire). Praetorian and Technology nonetheless cite a quantity of federal and state court decisions that, they assert, stand for the proposition that “tenants of

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<sup>2</sup> Although the second cause of action also named Sobel as a defendant (as did the fourth), this action was dismissed as against Sobel via court order dated June 7, 2010. See Notice of Motion, Exhibit 17.

residential dwellings are invariably found negligent under similar circumstances.” *Id.* However, it appears that none of these cases says any such thing. Of the federal court cases, *Allstate Ins. Co. ex rel. Lothridge v Gonyo* (2009 WL 962698 [ND NY 2009]) involved the denial of a defendant’s motion to dismiss, and *Weber v Paduano* (2003 WL 22801777, 2003 US Dist Lexis 21288 [SD NY 2003]) the denial of a defendant’s motion for summary judgment, both on the ground that there existed issues of fact as to the breach and causation elements of the respective plaintiffs’ claims. *Suthers v Amgen, Inc.* (372 F Supp 2d 416 [SD NY 2005]) is completely inapposite because it did not involve either a fire or a negligence claim. The New York State cases are similarly inapposite. *Murray v New York City Housing Auth.* (269 AD2d 288 [1<sup>st</sup> Dept 2000]) and *Green v New York City Housing Auth.* (82 AD2d 780 [1<sup>st</sup> Dept 1981]) both involved plaintiffs who were injured by falling bathroom doors that they had leaned against the walls of their apartments, after they had fallen off their hinges, and before their landlords had repaired them. Thus, none of the cases that Praetorian and Technology cite support their first argument.<sup>3</sup>

The Swisa defendants cite the general rule, set forth in the Court of Appeals holding in *Ugarriza v Schmieder* (46 NY2d 471, 474 [1979]), that:

Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination. Only if it can be concluded as a matter of law that defendant was negligent, may summary judgment be granted in a negligence action.

This rule asserts that a finding of negligence usually requires a factual determination, unless a

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<sup>3</sup> In their opposition papers, Praetorian and Technology cite *Weadock v Jewett* (39 NYS 2d 891 (NYC City Ct 1943), a City Court decision from almost 70 years ago, that found a defendant negligent who had fallen asleep while smoking, and thereby lit a couch on fire. However, it is clear that that decision was based on findings drawn from the factual record (which the court cited to extensively).

discrete scenario is specified that the law considers negligence per se. Here, however, Praetorian and Technology have simply failed to present any case law that holds that defendants herein acted negligently as a matter of law.

Further, the Fire Report is not accompanied by a certification or an affidavit from someone from the Fire Department, to attest that the document is in fact a business record. Moreover, the Fire Report itself, never unequivocally indicates the specific cause of the fire. Rather, under "Description", it provides "[t]wo candles left unattended on top of the wicker table". As to the "Origin and Extension", the Fire Report ambiguously indicates:

"Examination showed that the fire originated in the subject premises, on the sixth floor, in apartment # 26, in the living room, along the north partition wall, at a point approximately two feet east of the west partition wall and three feet above the floor, in combustible material (wicker table). The fire extended to all four walls, ceiling, floor and contents of the living room. The fire further extended to all four walls, ceiling and contents of the two bedrooms, bathroom and kitchen. The fire was thereto contained and extinguished".

See Notice of Motion, Exhibit 8. Therefore, the court rejects Praetorian and Technology's first argument.

Praetorian and Technology next argue that their negligence claims should be granted pursuant to the doctrine of *res ipsa loquitur*. See Schlossberg Reply Affirmation, ¶¶ 9, 13. The Swisa defendants respond that this is unwarranted, because the deposition testimony herein discloses issues of fact as to how the fire started. See Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 9-10. They specifically refer to Margetson's assertion that she did not light the tea candles, and her speculation about the allegedly defective floor lamp, and also argue, in the alternative, that leaving lit candles unattended for half an hour cannot be considered *per se* negligence. *Id.* The Swisa defendants further argue that the Fire Department

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incident report is inadmissible because it sets forth no basis for its conclusion that the fire was started by candles left unattended on the wicker table. *Id.* Margetson joins in the Swisa defendants' arguments. *See* Walthall Affirmation in Opposition, ¶ 4. Praetorian's and Technology's reply papers reassert their original *res ipsa loquitur* argument.<sup>4</sup> *See* Schlossberg Reply Affirmation, ¶ 13. However, after careful consideration, the court must reject that argument.

In *Kambat v St. Francis Hosp.* (89 NY2d 489, 494 [1997]), the Court of Appeals observed that, where the actual or specific cause of an accident is unknown, the doctrine of *res ipsa loquitur* allows a jury to infer negligence merely from the happening of an event and the defendant's relation to the incident. The Court further noted that, for the inference to be drawn three elements must be present: (1) the accident must be of a kind that ordinarily does not occur in the absence of negligence; (2) the instrumentality or agency causing the accident must be in the exclusive control of the defendants; and (3) the accident must not be due to any voluntary action or contribution by plaintiff. *Id.*

Here, Praetorian and Technology argue that "the fire clearly would not have occurred but for the negligence of ... Maya and Margetson, the candles were in the exclusive control of Maya and Margetson just prior to the loss, and the fire was not due to any voluntary action or contribution on the part of the plaintiffs." *See* Memorandum of Law in Support of Motion, at 5.

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<sup>4</sup> Praetorian and Technology disposed of the Swisa defendants' other argument by citing New York case law that deemed Fire Department incident reports to be admissible in negligence actions as either business records or public records. *See 244 East 78 LLC v Emerson*, 2002 WL 31520425, 2002 NY Misc Lexis 1464 (App Term 1<sup>st</sup> Dept 2002); *Wipperfurth v Smith & Mills*, 20 Misc 3d 1109(A), 2008 NY Slip Op 51294 (U) (Civ Ct NY County 2008). However, the court notes that Praetorian and Technology have not submitted a certified copy of the Fire Department incident report, nor is an authentication provided.

While this argument addresses some of the elements, defendants contend that there is no proof that the fire would not have occurred but for their negligence, because it could also have been caused by the faulty electric lamp, as Margetson suggested. *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 14.

Praetorian and Technology respond that this is merely a “feigned issue of fact” that the court should ignore as speculative. *See* Schlossberg Reply Affirmation, ¶ 11. Defendants reply that it is not a “feigned” issue, but a real one. *See* Shah Reply Affirmation, ¶ 8. The court agrees with defendants. Defendants note that the Appellate Division, First Department, decision that Praetorian and Technology rely on, *Garcia-Martinez v City of New York* (68 AD3d 428, 429 [1<sup>st</sup> Dept 2009]), holds that a “feigned issue of fact” is presented where a deponent presents an affidavit that contradicts his or her earlier deposition testimony. Defendants then also note, correctly, that Margetson’s affidavit in support of her cross motion does *not* contradict her deposition testimony as regards the possibly defective floor lamp. Thus, the law does not permit the court to deem the question of whether or not sparks from that lamp may have caused the instant fire to be a “feigned issue of fact” that can be ignored in response to Praetorian’s and Technology’s *res ipsa loquitur* argument. Further, it is clear that the viability of defendants’ lamp scenario turns on Margetson’s credibility as a witness, and it is axiomatic that issues of witness credibility are not appropriately resolved on motions for summary judgment. *See e.g. Santos v Temco Service Industries, Inc.*, 295 AD2d 218 (1<sup>st</sup> Dept 2002). Moreover, the Court of Appeals has held that since the doctrine of *res ipsa loquitur* is a form of circumstantial evidence that merely provides a permissible inference of negligence, rather than a presumption, its application may serve as a basis for an award of summary judgment, only in the *rarest* of cases, stating:

“Over the last century, the Appellate Division has held barely more than a dozen times that a plaintiff is entitled to summary judgment...in res ipsa loquitur cases”. *Morejon v Rais Const. Co.*, 7 NY3d 203, 209 (2003)(citations omitted). Here, Praetorian and Technology have failed to establish an entitlement to an award of summary judgment based upon their res ipsa loquitur argument, and their reliance on that argument as support for their negligence claims is rejected.

Accordingly, in the absence of any other viable supporting arguments, Praetorian and Technology’s motion is denied with respect to their negligence against the Swisa defendants and Margetson.

The third and fourth causes of action in the complaint assert claims of gross negligence against Margetson and Maya Swisa, respectively, for “failing to exercise slight care ... in connection with the lighting and monitoring of the subject candle(s).” See Notice of Motion, Exhibit 22, ¶¶ 70-73, 74-77. In *Lubell v Samson Moving & Storage, Inc.* (307 AD2d 215, 216 [1<sup>st</sup> Dept 2003]), the Appellate Division, First Department, observed that “‘gross negligence’ differs in kind, not only degree, from claims of ordinary negligence,” and that “[i]t is conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing [internal quotation marks and citations omitted].” The First Department also noted that “[o]rdinarily, the question of gross negligence is a matter to be determined by the trier of fact.” *Id.*

Here, Praetorian and Technology argue that “under well established precedent involving circumstances virtually identical to those at bar, tenants are found grossly negligent” as a matter of law. See Memorandum of Law in Support of Motion, at 6. However, once again, Praetorian’s and Technology’s cited case law does not support their argument. For example, *United National*

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*Specialty Ins. Co. v Barta Trading Corp.* (2008 NY Misc LEXIS 7954 [Sup Ct NY County 2008]) did not hold that a defendant, who had smoked a cigarette in a warehouse full of combustible paper, had acted grossly negligent as a matter of law. Rather, the court merely denied the defendant's motion to dismiss the gross negligence claim in favor of allowing a jury to review it. Thus, it is of no precedential value. Although Praetorian's and Technology's other cited decision, *107-109 East 88th Street LLC v Nowillo* (8 Misc 3d 1015(A), 2005 NY Slip Op 51114 (U) [Civ Ct NY County 2005]), did include a finding of gross negligence by a tenant who had left a lit stove unattended while he took a shower, that decision was rendered by the Landlord and Tenant Part of the Civil Court of the City of New York (Lebovits, J.), which does not conduct jury trials, and was after a bench trial; therefore, also of little precedential value in this court (which does). The Swisa defendants (in whose arguments Margetson joins), characterize their belated attempts to put out the fire and their contacting the Fire Department as an attempt to exercise some quantum of due care. See Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 20. Whether or not it was is clearly a question for the jury. Further, as indicated earlier in deciding whether summary judgment should be awarded on the negligence claim, the Fire Incident Report is ambiguous as to the exact cause of the fire. Therefore, the court rejects Praetorian's and Technology's argument, and their motion is denied with respect to their gross negligence claims against the Swisa defendants and Margetson.

The fifth and sixth causes of action in the complaint allege breach of contract (i.e., the lease) against Maya and Maxine Swisa, respectively. See Notice of Motion, Exhibit 22, ¶¶ 78-85, 86-93. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. See e.g. *Gordon v Dino De Laurentiis*

*Corp.*, 141 AD2d 435 (1<sup>st</sup> Dept 1988). Here, Praetorian and Technology argue that the Swisa defendants and Margetson (as their licensee) breached paragraphs 7, 8, 10, 11 and 21 of the lease by causing the fire. *See* Memorandum of Law in Support of Motion, at 7-8. They present copies of the lease, an unauthenticated copy of the Fire Department incident report and the instant deposition testimony to support their claims. *Id.* It is undisputed that the parties entered into a lease and a fire occurred in the apartment, not due to the actions of the landlord or another tenant. This would appear to constitute prima facie proof of Praetorian's and Technology's claims.

Nevertheless, the Swisa defendants raise several arguments in opposition. First, they assert that "plaintiffs have failed to proffer admissible evidence to establish the cause of this fire." *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 15. However, the issue of the precise cause of the fire is not necessarily directly relevant to plaintiffs' breach of contract claim, in contrast to the negligence claims; as indicated below, the Swissa defendants had a duty under the lease to care for the apartment and it is undisputed that they breached such duty since it is conceded that the damage to the apartment was not caused by the actions of the landlord or another tenant in the building.

The Swisa defendants next argue that "the lease provisions on which [the breach of contract claims are based] are mostly inapplicable." *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 15. The first lease provision that they cite to is paragraph 8, entitled "Care of Your Apartment - End of Lease - Moving Out," which - they assert - applies only where the lease term has expired. *Id.* However, even a cursory perusal of that provision reveals that this is not the case. Paragraph 8 has two subparagraphs, the first of which deals with "care of your apartment," and the second of which governs "end of lease - moving out." The

former subparagraph imposed obligations on the tenant by providing that:

You will take good care of the apartment and will not permit or do any damage to it, except for damage that occurs through ordinary wear and tear. You will ... leave the apartment ... in the same condition as it was when You first occupied it, except for ordinary wear and tear and damage caused by fire or other casualty.

*See* Notice of Motion, Exhibit 4. It is well settled that ““on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.” *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1<sup>st</sup> Dept 2001), quoting *Lake Construction & Development Corp. v City of New York*, 211 AD2d 514, 515 (1<sup>st</sup> Dept 1995). The foregoing language clearly contemplates that the tenant will take “good care” of the apartment by avoiding activities that might lead to “fire and other casualty.” Here, by leaving candles unattended on a wicker table or, alternatively, using a discarded lamp, the Swisa defendants and Margetson failed to take such “good care,” and thereby breached the lease.<sup>5</sup> Therefore, the court rejects the Swisa defendants’ argument.

The Swisa defendants also contend that the issue of whether their conduct violated the proscriptions against “objectionable conduct” that are set forth in paragraphs 7 and 11 of the lease presents a question of fact that must be decided by a jury. *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 16. However, the court disagrees. The lease clearly defines “objectionable conduct” as “behavior which makes or will make the apartment or the building less fit to live in for you or other occupants,” or “anything which interferes with the

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<sup>5</sup> The question of whether this breach also constitutes a negligent act or omission is separate, and reserved to the trier of fact.

rights of others to properly and peacefully enjoy their apartments, or causes conditions that are dangerous, hazardous, unsanitary or detrimental to other tenants in the building.” See Notice of Motion, Exhibit 4. As was previously discussed, the interpretation of this language in the context of a summary judgment motion is a legal matter reserved to the court, not the jury. *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d at 204. Here, it is plain and obvious that a fire constitutes a “condition[] that [is] ... dangerous, hazardous ... or detrimental to [the] other tenants in the building.” Thus, the court rejects the Swisa defendants’ argument with respect to “objectionable conduct”. The Swisa defendants’ remaining arguments are likewise unavailing. Therefore, the court concludes that Praetorian and Technology have adequately established their breach of contract claims against the Swisa defendants and Margetson. Accordingly, Praetorian and Technology’s motion is granted with respect to those claims on the issue of liability, with the issue of damages to be determined at trial.<sup>6</sup>

The second branch of Praetorian’s and Technology’s motion seeks summary judgment dismissing the Swisa defendants’ counterclaim for failure to state a claim for gross negligence. Praetorian and Technology contend that this counterclaim is precluded by this court’s order, dated August 20, 2010, that disposed of the Swisa defendants’ earlier motion to dismiss (motion sequence number 002), and specifically indicated that “plaintiff has sufficiently pleaded a cause of action for gross negligence.” See Notice of Motion, Exhibit 19. Praetorian and Technology specifically argue that the court’s prior order on this issue constitutes the law of the case, and that the Swisa defendants may not challenge it via their counterclaim. See Memorandum of Law in

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<sup>6</sup> Should plaintiff discontinue the negligence claims, the issue of damages may be decided by a referee, upon application to the court.

Support of Motion, at 9-10. The Swisa defendants respond by noting that this is a summary judgment motion, and argue that there is no evidence of gross negligence. *See* Notice of Cross Motion (the Swisa defendants), Memorandum of Law, at 17-21. However, this argument completely misses the point. The Swisa defendants' counterclaim alleges "failure to state a claim of gross negligence," and is, thus, directed to the pleadings and not to the proof. However, as Praetorian and Technology correctly observed, the court already considered the sufficiency of the pleadings when it reviewed the Swisa defendants' dismissal motion, and found that the gross negligence claims were sufficiently well pled. Thus, Praetorian and Technology are also correct in their contention that the Swisa defendants are barred by the doctrine of law of the case from raising a counterclaim for relief that was already litigated and denied. Therefore, the second branch of Praetorian and Technology's motion is granted. As to the adequacy of the proof with which Praetorian and Technology support their gross negligence claims, the court has already determined that this is a matter for the jury to decide, and that - in any case - neither party herein has presented any persuasive authority that defendants actions either did or did not constitute "gross negligence", as a matter of law.

#### Cactus's Cross Motion

Cactus's cross motion seeks to join in with Praetorian's and Technology's motion for summary judgment on the complaint (motion sequence number 006). Cactus merely asserts that "if the insurance carrier is entitled to summary judgment, then clearly the owner of the building which was damaged is entitled to summary judgment as well and the only issue that remains is the extent of plaintiff Cactus' damages." *See* Notice of Cross Motion (Cactus), Jaroslawicz Affirmation, at 2. This cross motion appears to be unopposed. None of the other parties'

motions, apart from Margetson's, even mentions it, however Margetson's papers are devoid of any legal argument against Cactus' cross motion. The court notes that Cactus has subrogated all of its claims to Praetorian and Technology, and that Praetorian and Technology have thus far only obtained summary judgment on their breach of contract claims against the Swisa defendants and Margetson. The court also notes that the subrogation clauses in the Praetorian and Technology policies both require Cactus to assist the insurers in prosecuting the subrogated claims, and that - as a signatory to the lease - Cactus is a necessary party to the breach of contract claims. Accordingly, Cactus' cross motion should be granted to the same extent as Praetorian's and Technology's - i.e., awarding partial summary judgment on the issue of liability on the fifth and sixth causes of action for breach of contract.

#### The Swisa Defendants' Cross Motion

The Swisa defendants' cross motion seeks summary judgment to dismiss plaintiffs' fourth cause of action for gross negligence. However, as was previously discussed, the court has already determined that no party has presented any case law to establish that that cause of action should succeed or fail, as a matter of law; and that the viability of said cause of action actually presents questions of fact that are commended to the jury. Accordingly, the Swisa defendants' cross motion is denied.

#### Margetson's Cross Motion

Margetson's cross motion seeks to join in with the Swisa defendants' request for summary judgment to dismiss plaintiff's gross negligence claim, and is evidently directed at plaintiffs' third cause of action (which seeks said relief against Margetson). For the reasons just discussed, the court declines to grant this relief. Accordingly, the court finds that Margetson's

cross motion is denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Praetorian Insurance Company and Technology Insurance Company, Inc. (motion sequence number 005) is granted solely with regard to liability on the fifth and sixth causes of action in the amended complaint for breach of contract, but is otherwise denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of plaintiff Cactus 4 Properties, LLC d/b/a Cactus 4, LLC (motion sequence number 006) is similarly granted solely with regard to liability on the fifth and sixth causes of action in the amended complaint for breach of contract, but is otherwise denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3212, of defendants Maya and Maxine Swisa is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendant Allison Margetson is denied; and it is further

ORDERED that the balance of this action shall continue.

Dated: New York, New York  
January 11, 2012

**FILED**

**JAN 18 2012**

NEW YORK  
COUNTY CLERK'S OFFICE

  
Hon. Doris Ling-Cohan, J.S.C.