

Fireman's Fund Ins. Co. v Vogel

2014 NY Slip Op 30252(U)

January 22, 2014

Supreme Court, New York County

Docket Number: 150142/2010

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 150142/2010
FIREMAN'S FUND INSURANCE
-VS.
VOGEL, ARIEL
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 22, 2014

J.A.M.
HON. JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
FIREMAN'S FUND INSURANCE COMPANY a/s/o
COOPER GRAMERCY ASSOCIATES,

INDEX NO. 150142/10

Plaintiff,
-against-

ARIEL VOGEL, GABRIELLE JARAGANO and
DANIELLE STUHL,

Defendants.
-----X

JOAN A. MADDEN, J.:

This is an insurance subrogation action. Plaintiff and defendant Vogel are each cross-moving for summary judgment.¹

Plaintiff Fireman's Fund was the property insurance carrier for Cooper Gramercy Associates, a rental apartment building at 401 Second Avenue, New York, New York. On March 18, 2010, a fire occurred in apartment 20D, which was leased to and occupied by the three individual defendants. Pursuant to a lease dated February 4, 2010, defendants took occupancy approximately two weeks before the fire. Plaintiff alleges the building sustained \$384,683.14 in property damages, which plaintiff reimbursed to its insured, and for which plaintiff seeks recovery in this action. The complaint asserts a first cause of action for negligence and a second cause of action for breach of contract. Plaintiff alleges that the fire originated in defendant

¹Defendants Stuhl and Taragano (incorrectly sued as Jaragano) each originally moved for summary judgment, and plaintiff and defendant Vogel responded by cross-moving for summary judgment. The complaint and all cross-claims were then discontinued as to Taragano and Stuhl, so their motions were denied as moot. Only plaintiff's and Vogel's cross-motions remain.

Vogel's bedroom as a "direct result of her misuse, abuse and improper handling" of a surge protector, which is also known as a power strip.

The proponent of a motion 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. See Alvarez v. Prospect Hospital, 68 NY2d 320, 324 (1986); JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384 (2005); Ayotte v. Gervasio, 81 NY2d 1062 (1993). Once that showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to demonstrate that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, supra at 324.

At the outset, the court notes that the parties do not dispute that the fire originated in Vogel's room.² While plaintiff's experts conclude that the ignition source of the fire was the power cord of the surge protector in Vogel's room, Vogel's expert does not agree. However, Vogel's counsel asserts that "[e]ven assuming, arguendo, that the power cord was the source of fire ignition, there is no evidence in admissible form which supports any finding of negligence as to defendant Vogel to trigger contractual indemnification." Thus, for the purposes of determining the instant cross-motions, the court will assume without deciding that the power

²Notably, the fire marshal's Fire Incident Report describes the "Origin and Extension" of the fire as follows: "Examination showed that fire originated in the subject premises on the 20th floor, in apartment 20d, in the east bedroom, in the southeast corner, at floor level, in combustible material (plastic wire insulation), in the are of electrical wiring. Fire extended to all four walls, the ceiling and contents therein. Fire further extended to the hallway walls and ceiling. Fire further extended to the bathroom walls and ceiling. Fire further extended to the windows, the window frames, the ceiling, the west and east walls, and contents therein apartment 21d via vertical auto exposure. Fire was thereto confined and extinguished."

cord of the surge protector was the source of the fire, which leaves the question of Vogel's negligence.

Turning first to defendant Vogel's cross-motion for summary judgment, the court concludes that she has sustained her burden by making a prima facie showing that she was not negligent with respect to her use of the surge protector. In support of the cross-motion, Vogel submits her deposition testimony, the deposition testimonies of plaintiff's witness Ronald Dawley and co-defendant Stuhl, and an affidavit from an electrical expert, Andrew Pietropaolo.

At her deposition Vogel testified as follows. On the day of the fire, March 18, 2010, she was the last to leave the apartment at 8:30 a.m., and she did not smell any burning odors or see any signs of smoke before she left. She first learned of the fire at approximately 10:00 a.m., while she was at work, when she received a call on her cell phone from "Manny," the superintendent. Specifically with respect to the surge protector, Vogel explained that she kept it on the floor plugged directly into the wall, and it was always in the "on" position, laying "right from the wall to the floor." She described the surge protector as "tan" in color, with five or six outlets, a "red button" safety switch, and a cord approximately two feet long that plugged directly into the wall outlet. Vogel testified that she had owned the surge protector for approximately three years, but could not recall if she or her parents purchased it. She had used the surge protector in her previous apartment and never had any problem with it prior to the fire. She explained she would occasionally plug her hair dryer, hair iron or iPod speakers into the surge protector, but on the morning of the fire only her phone charger and bedside lamp were plugged into it.

Vogel testified that no furniture or other items were placed against or in front of the outlet with the surge protector. She explained that when she was sitting down at the desk, the outlet was on the left side, the desk was under the window on right side of the outlet, and the surge protector was “underneath” the desk, which was “open below . . . so it sat on the floor below the desk.” She could not recall any time prior to the fire when she or anyone else may have stepped on the surge protector, or when she may have had clothing or other items on top of it. She testified that on the day of the fire she did not have any items “laying op top” of the surge protector. She explained she had a “cube” that she used as a chair, made of leather-like fabric, that was under the desk on the day of the fire; only the cube and the surge protector were under the desk; the cube was not “up against” the surge protector, but was “usually to the right side” of the surge protector.

Vogel testified that prior to the fire, neither she nor her roommates had any complaints about the electrical outlets or anything else in the apartment. In the two or three weeks since moving into the apartment, she never used the wall heating unit in her bedroom, and neither she nor her roommates had any portable heaters or space heaters. She testified there was a smoke detector in the apartment, which had not gone off before the fire. Also, before moving into the apartment, she did not see any items that needed to be repaired, and the building superintendent told them that the apartment just needed painting and general cleaning.

Vogel explained that the evening before the fire, she and her roommates were in the apartment, they had no guests, and she did not observe any burning odors. She went to sleep in her bedroom at approximately 11:30 p.m., she was the only one sleeping in her room that night, and at no time was she awoken by the smell of burning odors or the sound of crackling. During

the night, the phone charger and lamp were plugged into the surge protector, but she could not recall if her phone was plugged into the charger overnight. She woke up at approximately 7:30 a.m., and from the time she got up in the morning until she left the apartment, she did not plug anything else into the surge protector, she did not smell any burning odors and she did not see any smoke. Vogel did not use her hair dryer, hair iron or any other appliance that morning, such as a coffee maker or toaster; and she did not notice any appliance, such as a refrigerator, not working that day. She testified she was "sure" her roommates had borrowed her hair dryer or hair iron in the past, but they had not borrowed "any of my items that morning." She did not "believe" they had ever used their own hair dryers or hair irons in her room. When asked specifically if co-defendant Taragano had ever used her surge protector, and if Taragano was in her bedroom the morning of the fire, Vogel answered "no," but she could not recall if Taragano was in her bedroom the evening before the fire.

Vogel testified that on the day of the fire, the fire department or fire marshal asked her general questions about the night before and the morning of the fire, such as the time she left the apartment, whether she used any appliances, and whether she knew of anyone who might want to hurt her. She testified she had no discussions with anyone from the fire department or the building about the cause of the fire. She filed a property damage claim with her own insurance company, Nationwide; her father notified Nationwide on the day of the fire.

Vogel explained the only person who discussed the cause of the fire with her, was an "expert" from the building's insurance company, who called her few days after the fire and "told me that he thought it was the power strip, they believed it was the power strip." She testified the expert told her that he had "moved around the contents of my room," and "dug through the room

and found the power strip and that he had believed that was the cause of the fire.” She could not recall if he told her exactly where he found the power strip, or whether he said it was still plugged in, but he did tell her that he had removed it from her room. Vogel explained that after the fire, the building offered them the “next available apartment,” so in May 2010, Vogel, Taragano and Stuhl moved back to the building into apartment 7D.

Vogel submits the transcript of the deposition of plaintiff’s witness Ronald Dawley, the “manager” of 401 Second Avenue. Dawley testified as follows. After receiving a call about the fire from the superintendent, Dawley went to the building. When they were allowed into the building later that day, he went up to the apartment. Dawley spoke to some of the fire department personnel, and “they indicated that the one bedroom was the origination where the fire occurred because it was the worst one,” where the “fire had burned everything.” At that time no one spoke to him about the cause or origin of the fire.

Dawley explained that about two or three days after the fire, an investigator came to the building and Dawley let him into defendants’ apartment. The investigator spent two to four hours in the apartment, going through the “sludge” and “rubble” piece by piece, and “found what he said was a surge protector badly damaged,” which Dawley described as a “bunch of wires that was all black” and “melted metal, plastic and wires.” The investigator told Dawley he believed “the fire was started by a faulty surge protector.” The investigator gave Dawley “a history of the problems with surge protectors,” explaining that the “very cheap surge protectors are manufactured in China, that they are not of a good quality, and he would recommend that if I had any, that I should change them, and I did.” Dawley was not in the apartment when the investigator found the surge protector and did not remember if he saw anything was plugged into

it. The investigator removed the surge protector and did not give Dawley a receipt. Dawley testified the investigator did not mention any other cause of the fire and never discussed whether the tenants had anything to do with causing the fire. He also testified that an adjuster from the building's insurance company and a public adjuster both inspected and photographed the damage in the building. He testified that the building was responsible for the electrical outlets in the apartments.

Vogel submits the deposition testimony of one of her roommates, co-defendant Danielle Stuhl. When asked if she knew what was "plugged into outlets in Ms. Vogel's room," Stuhl could only recall a television and explained "we were there for two weeks, and I didn't spend any time in her room." She did not recall ever seeing a power strip in Vogel's room, and never used any outlets in Vogel's room. She never observed their third roommate, Taragano, using any power strips in Vogel's room, and she did not recall if Taragano was in Vogel's room the evening before the fire. Stuhl testified she had a power strip in her own bedroom, with her TV plugged into it, and had not experienced any electrical problems in the apartment prior to the fire. Stuhl explained that on the night before the fire she "went out to dinner with a friend and was home by 8:00," went to sleep "around 9:30," got up at 7:15 in the morning and was the first to leave at 7:50. That morning she did not go inside Vogel's room, she did not experience any electrical problems, and she did not observe any signs of smoke. After the fire, Stuhl notified her insurance company, Travelers. Also after the fire, they asked the building manager if other apartments in the building were available, and as a result, they signed a new lease and moved into 7D.

Vogel submits an affidavit from her expert, Andrew Pietropaolo, an electrical engineer. Pietropaolo examined the surge protector and found that “[t]here was no evidence that the power strip was misused, mishandled, or used in any inappropriate manner.” He states that “the examination of the subject power strip, the inspection of the close up photographs, and review of the x-ray images revealed that the internal current carrying parts and connection points are intact.” He states that a “single item [was] discovered plugged into the power strip” at the time of his inspection, which he identified as a “transformer commonly used as a battery charging device with a low energy output.” With the use of “x-ray image analysis,” he discovered the battery charger “still shows a connection that is intact post fire” Pietropaolo concludes as follows:

Adverse electrical activity was discovered in the room of origin. This electrical activity was noted in the building supplied device boxes as well as on the power cord of the power strip. This is not conclusive evidence of the ignition of the fire. Furthermore, the presence of adverse activity as set forth above is in no way indicative of any wrong doing on the part of Ariel Vogel.

Based on the foregoing deposition testimony and the affidavit of Vogel’s electrical expert, Vogel has made a sufficient prima facie showing that she was not negligent in the manner in which she used the surge protector. Vogel’s expert Pietropaolo examined the surge protector and found no evidence that it was misused, mishandled or handled in any inappropriate manner. Moreover, Vogel was questioned in detail about her use of the surge protector, and her testimony neither shows nor suggests that she did anything to misuse or damage it. Notably, during her deposition, Vogel was not asked directly about the condition of the power cord, whether it was damaged, and whether she had done anything to damage it. The burden, therefore, shifts to

plaintiff to establish an issue of material fact as to whether the fire was caused by negligent conduct attributable to Vogel.

In opposition, plaintiff relies on affidavits from two experts, Peter M. Rincones, a certified fire origin and cause investigator and expert, and Joseph L Caggiano, a professional engineer. Two days after the fire, Rincones personally conducted a site-inspection of the apartment and concluded that the fire originated in Vogel's bedroom at floor level, in the northeast corner within a 3' x 3' area. While "excavating the fire debris located in the exact area of fire," Rincones "uncovered and identified" a surge protector at floor level. He "observed evidence of abnormal electrical activity on the power cord for the surge protector, approximately 16" from the body of the surge protector." In one receptacle of the surge protector, he found a "single transformer plug, commonly used a battery charging device." He annexes photographs depicting the "heavily damaged surge protector" and the "melted, beaded and separated wires" of the power cord for the surge protector.

In the "general area of fire origin," Rincones found other "electrical items," including a laptop computer, an extension cord, a flat-screen TV and a desk lamp, which did not have "evidence of abnormal electrical activity" so he ruled them about as "a potential ignition source for the fire." He also ruled out the "quad wall outlet" in the northeast corner of the room based on the "burn patterns" in the room. Rincones concludes as follows:

Based upon my personal on-site investigation performed in accordance with NRPA 921, personal observation of burn patterns and specific arc damage found upon the surge protector located in the exact area of fire origin, as well as elimination of all other potential ignition sources, it is my opinion, with a reasonable degree of fire science certainty, that the fire started at the power cord for the surge protector.

The arc damage observed mid-line on the surge protector was typical of a cord which had been damaged, most likely by repeatedly being stepped on or covered by

objects, such as the cube seat which was determined to be located in the area of fire origin. Such cube seats are often made of plastic foam which would also act as a tremendous fuel source for the fire.

Given the age of the surge protector (3 years) and the fact that it was previously before being used in the subject apartment, as testified to by Ms. Vogel, it is unknown what other activities or objects may have previously damaged the power cord for the surge protector.

Plaintiff's electrical engineer, Caggiano, states that he personally examined the evidence Rincones recovered from the apartment, which included a surge protector, a wall outlet, a cell phone charger and a portion of an extension cord. He describes his observations and findings as to each item, and based on those findings, he eliminates the wall outlet and the cell phone charger as a "potential ignition source." He concludes that the "only significant sign of electrical activity was the beading and arcing damage on the copper stranded conductors of the power cord for the surge protector" and that such "adverse activity was a competent ignition source." Caggiano states his opinion as follows:

In my opinion, based upon a reasonable degree of engineering certainty and evaluation of all retained evidence in this matter, the severing arc depicted on the power cord for the surge protector acted as the ignition source in causing the subject fire.

During my personal examination and joint examination of the body of the surge protector, the unit itself was ruled out as a potential cause of the fire. In observing the internal components of the surge protector, the buses were found to be clean. There were no signs of electrical activity within the surge protector unit itself and no signs of a manufacturing defect.

It is unusual to have a mid-line cord failure of the type observed absent some sort of mechanical damage. Mid-line cord failures are virtually always a result of cutting, pinching or abrasions from misuse or abuse.

Given the age of the surge protector (at least 3 years) and the fact that it was used previously before being used in the subject apartment, as testified by to by the occupant, Ms. Vogel, it is unknown what other activities may have previously damaged the power cord for the surge protector.

Contrary to plaintiff's contention, neither Rincones' nor Caggiano's affidavit is sufficient to raise an issue of fact as to any acts or omissions by Vogel which caused or contributed to the fire. This is not a case involving a "battle of the experts," where conflicting experts' opinions present issues of fact for the jury. See Peebles v. New York City Housing Authority, 295 AD2d 189 (1st Dept 2002). Rather, a careful reading of the experts' affidavits reveals that their conclusions as to Vogel's negligence consist of nothing more than "sheer speculation," and as such, are "patently insufficient to meet the plaintiff's burden." Wang v. Alexander's Department Store, Inc., 247 AD2d 467 (2nd Dept 1998); accord New York Mutual Underwriters v. King, 85 AD3d 1645 (4th Dept 2011); Cataract Metal Finishing, Inc v. City of Niagara Falls, 31 AD3d 1129 (4th Dept 2006); Public Service Mutual Insurance Co v. 99th Plus of Fifth Avenue, Inc., 5 AD3d 276 (1st Dept 2004); Easy Shopping Corp v. Sneakers Center and Sports, Inc., 303 AD2d 361 (2nd Dept 2003); Tower Insurance Co v. M.B.G. Inc., 288 AD2d 69 (1st Dept 2001).

Despite the fact that Rincones personally inspected Vogel's room and found the surge protector, he engages in speculation when he infers that Vogel stepped on or covered the surge protector with objects, from the mere presence of the cube seat in the area where the fire originated. While Caggiano states that it is "unusual to have a midline cord failure without mechanical damage" and that cord failures "are virtually always a result of cutting, pinching or abrasions from misuse or abuse," plaintiff submits no evidentiary proof showing or suggesting that Vogel engaged in any conduct that would have resulted in damaging the power cord. Both Rincones and Caggiano speculate when they infer that Vogel damaged the power cord, from the mere fact that the surge protector was three years old and Vogel had used it before moving into the apartment. Notably, the experts give no opinion as to how many years a surge protector can

be expected to remain in good working order. The identical statement by Rincones and Caggiano as to the lack of knowledge of “what other activities may have previously damaged the power cord for the surge protector,” is insufficient to create an inference of negligence on Vogel’s part.

Plaintiff’s failure to proffer competent evidence based upon more than pure speculation, that negligence was a factor in the cause of the fire, plaintiff has not met its burden of demonstrating that the doctrine of *res ipsa loquitur* applies to create an inference of negligence. See 92 Court Street Holding Corp v. Monnet, 106 AD3d 1404 (3rd Dept 2013); Hartford Insurance Co of Midwest v. Orange and Rockland Utilities, Inc., 103 AD3d 846 (2nd Dept), lv ap den 21 NY3d 859 (2013); One Beacon Insurance Co v. CMB Contracting Corp., 84 AD3d 902 (2nd Dept 2011)

Finally, plaintiff additionally claims that Vogel breached her duties under paragraphs 19 and 24 of the lease to repair and “take good care” of the apartment. As clarified in its cross-motion for summary judgment, plaintiff alleges that Vogel breach such duties “by misusing, mishandling and/or abusing the power cord for the surge protector which resulted in the subject fire, as established by plaintiff’s experts.” Since the court has rejected those identical allegations and determined as a matter of law that Vogel bears no responsibility for the fire, any additional claims based upon those allegations are without merit as a matter of law.

Based on the foregoing, the court concludes that defendant Vogel is entitled to judgment as a matter of law dismissing the complaint in its entirety. In light of this determination, plaintiff’s cross-motion for summary judgment is denied as moot, and the court need not reach the issue raised by defendant as to whether plaintiff’s cross-motion was untimely.


Accordingly, it is

ORDERED that defendant Vogel's cross-motion for summary judgment is granted and the complaint is dismissed in its entirety as against defendant Ariel Vogel, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross-motion for summary judgment against defendant Vogel is denied as moot.

DATED: January 22, 2014

ENTER:



J.S.C.

HON. JOAN A. MADDEN
J.S.C.