

Blanco v Prada USA Corp.

2014 NY Slip Op 31267(U)

May 13, 2014

Supreme Court, New York County

Docket Number: 101644/07

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

Index Number : 101644/2007
BLANCO, ROBERT
vs.
PRADA USA
SEQUENCE NUMBER : 009
PRECLUDE

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 decided in accordance with
the answered Memorandum Decision + Order.

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

FILED
MAY 16 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
MAY 15 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: May 13, 2014

[Signature], J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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
ROBERT BLANCO,

Plaintiff,

INDEX NO. 101644/07

-against-

PRADA USA CORP., AMERICAN EAGLE OUTFITTERS,
INC., 575 BROADWAY LLC, 575 BROADWAY
ASSOCIATES L.P. and 575 BROADWAY CORPORATION,

Defendants.

-----X
AMERICAN EAGLE OUTFITTERS, INC.

Third-Party Plaintiff,

INDEX NO. 590289/09

-against-

INTEGRATED SYSTEMS AND POWER, INC.
and AFA PROTECTIVE SYSTEMS, INC.,

MAY 16 2014

Third-Party Defendants

FILED
NEW YORK
COUNTY CLERK'S OFFICE

-----X
575 BROADWAY ASSOCIATES, L.P. i/s/h/a
575 BROADWAY LLC and 575 BROADWAY
CORPORATION,

INDEX NO. 590462/09

Second Third-Party Plaintiffs,

-against-

REZA KHANBILVARDI, ETNA CONSULTING
STRUCTURAL ENGINEERING, PERIFIDO WEISKOPF
WAGSTAFF & GOETTEL and THE SOLOMON R.
GUGGENHEIM FOUNDATION,

Second Third-Party Defendants.

-----X

-----X
THE SOLOMON R. GUGGENHEIM FOUNDATION,

INDEX NO. 591122/09

Second Third-Party Defendant/
Third Third-Party Plaintiff,

-against-

REGELE BUILDERS, INC.

Third Third-Party Defendant.

-----X
REGELE BUILDINGS, INC.

INDEX NO. 590180/10

Fourth Third-Party Plaintiff,

-against-

PERFECTAIRE CO., INC.,

Fourth Third-Party Defendant.

-----X
THE SOLOMON R. GUGGENHEIM FOUNDATION,

INDEX NO. 590244/10

Second Third-Party Defendant/
Third Third-Party Plaintiff/
Fifth Third-Party Plaintiff,

-against-

THOMAS W. HUT,

Fifth Third-Party Defendant.

-----X

JOAN A. MADDEN, J.:

Motion sequence numbers 009 and 010 are consolidated for disposition.

In the main action under index number 101644/07 (Main Action), firefighter Robert Blanco (Firefighter Blanco) seeks damages for personal injuries sustained on January 21, 2006,

while searching for the origin of a fire at the building located at 573-575 Broadway in Manhattan (Building). The Building is six stories with multiple occupancy use. Occupancy at the relevant time, included use as retail and office space and for a restaurant. American Eagle leased retail space on the first floor. Defendants 575 Broadway LLC, 575 Broadway Associates L.P., and 575 Broadway Corporation (together, 575 Broadway) own the Building. Defendants Prada USA Corp. (Prada) and American Eagle Outfitters, Inc. (American Eagle) are commercial tenants that occupied separate, street-level retail stores in the Building. Firefighter Blanco's complaint asserts one cause of action for negligence, and one cause of action under section 205-a of the General Municipal Law (GML), against 575 Broadway, Prada, and American Eagle. The GML claim is based upon alleged violations of the New York City Administrative Code, and the New York State Fire and Building Codes.

American Eagle commenced a third-party action for indemnification and contribution against: Integrated Systems and Power, Inc. (ISPI), the company that maintained the fire alarm system; and AFA Protective Systems, Inc. (AFA), the company that installed the alarm in the Building and served as the central station that monitored the Building.¹

ISPI now moves (in motion sequence number 009) for an order precluding the September 2011 inspection and testing of the fire alarm system at the Building, and the report and testimony of American Eagle's expert, Jeffrey Zwirn (Zwirn). 575 Broadway cross-moves for the same

¹American Eagle named ISPI as a third-party defendant in the separate action, *Atlantic Specialty Ins. v AE Outfitters Retail Co.*, commenced in the United States District Court for the Southern District of New York, under case number 07 Civ. 8508 (Federal Action), which arose out of the same fire incident as the instant action. The plaintiffs in the Federal Action are subrogees of tenants and occupants of the Building, and they assert claims for property damage against American Eagle.

preclusion order as ISPI, adopting and incorporating all of ISPI's arguments and exhibits.²

In motion sequence number 010, ISPI moves to dismiss the third-party action for failure to comply with court-ordered discovery, and for summary judgment dismissing the third-party action. Alternatively, ISPI moves for summary judgment dismissing Firefighter Blanco's claims.

I. Preclusion of Zwirn's Report and Testimony (motion sequence number 009)

With respect to the admissibility of expert testimony, "New York courts adhere to the so-called *Frye* standard of admissibility" *Kelly v Metro-North Commuter R.R.*, 74 AD3d 483, 485 n 1 (1st Dept 2010). "[T]he test pursuant to *Frye v United States* (293 F 1013) poses the more elemental question of whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." *People v. Wesley*, 83 NY2d 417, 422 (1994).

New York law does not permit the court to accept assertions that are "'speculative or unsupported by any evidentiary foundation.'" *Buchholz v Trump 767 Fifth Ave., LLC*, 5 NY3d 1, 9 (2005); *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 534 n 2 (1991) (expert conclusion "'unencumbered by any trace of facts or data . . . should be given no probative force whatsoever'"). "[T]he *Frye* inquiry is separate and distinct from the admissibility question

²In the Federal Action, ISPI and 575 Broadway moved to preclude "an inspection and testing of the building's fire alarm system that was conducted by [American Eagle's] proposed expert witness, Jeffrey Zwirn, in September 2011," and to "preclude Zwirn's testimony and expert report." *Atlantic Specialty Ins. v AE Outfitters Retail Co.*, 2013 WL 5289013, *1, 2013 US Dist LEXIS 134963, **7 (SD NY, Sept. 20, 2013). The preclusion motion in the Federal Action addressed the same report of Zwirn, dated January 31, 2012 (Zwirn Report), that is at issue on ISPI's instant motion. *Id.* at *1, **8. The federal court granted the motion, precluding Zwirn's testimony, and the opinions and conclusions of the Zwirn Report. *Id.* In reaching its decision, the federal court applied section 702 of the Federal Rules of Evidence and *Daubert v Merrell Dow Pharmaceuticals, Inc.* (509 US 579 [1993]). *Id.* at *5-6, **19-22.

applied to all evidence—whether there is a proper foundation—to determine whether the accepted methods were appropriately employed in a particular case.” *Parker v. Mobil Oil Corp*, 7 NY3d at 447. In a foundational inquiry, “[t]he focus moves from the general reliability concerns of Frye to the specific reliability of the procedures followed to generate the evidence proffered and whether they establish a foundation for the reception of the evidence at trial.” *Id.*, quoting, *People v. Wesley*, 83 NY2d at 429. Most recently, the Court of Appeals has written with respect to this distinction:

Frye focuses on principles and methodology, but these are “not entirely distinct from one another” see *General Electric Co. v. Joiner*, 522 U.S. 136, 146 [1997]). Thus, even though the expert is using reliable principles and methods and is extrapolating from reliable data, a court may exclude the expert's opinion if “there is simply too great an analytical gap between the data and the opinion proffered” (*id.* ... see also *Marso v. Novak*, 42 A.D.2d 377 [1st Dept 2007] [remarking that a “ ‘methodology-only, ignore-the-conclusion’ approach would circumvent the rationale for the Frye doctrine”]). We have sometimes expressed this precept in terms of the general foundation inquiry applicable to all evidence (see *Wesley*, 83 N.Y.2d at 422, 611 N.Y.S.2d 97, 633 N.E.2d 451; *Parker*, 7 N.Y.3d at 447, 824 N.Y.S.2d 584, 857 N.E.2d 1114).

Cornell v. 360 West 51st Street Realty, LLC, __ N.Y. 3d ___, 2014 WL 1237483 (N.Y.), 2014 N.Y. Slip Op. 02096 (March 14, 2014).

In the instant motion, as defined by the parties’ arguments, Frye issues with respect to methodology and principles are not directly implicated. Rather, the inquiry here is foundational and the central issue is whether a legally sufficient foundation exists for admissibility of Zwirn’s testimony and Report. This in turn, depends upon whether the procedures Zwirn employed were appropriately applied to generate Zwirn’s opinions and conclusions. American Eagle, as the

proponent of Zwirn's testimony and Report, has the burden of establishing the evidentiary foundation for admissibility. *Frye v Montifiore Medical Center*, 100 AD3d 28,38 (1st Dept. 2012); (citations omitted).

At issue is Zwirn's opinion that on the night of the fire two alarms sounded, an initial alarm that Zwirn concludes was terminated by 575 Broadway's security guard, who was the building evacuation supervisor, and who was responsible for monitoring the fire alarm system. Zwirn opines that the security guard terminated an initial alarm and prevented its transmission to the central monitoring station by use of a certain switch on the fire panel or through the disconnection of certain contact wires, and that it was a second alarm that was transmitted to the central monitoring station and then to the Fire Department. Zwirn bases his opinion on his inspection and testing of the fire alarm system as it existed in 2011, and on reports of interviews and deposition testimony of persons present in the Building at the time of the fire, including American Eagle employees and an employee of a restaurant located in the Building. The information from these employees indicated that they heard an alarm, which stopped, and then, some time later, they heard another alarm.

ISIP and 575 Broadway challenge Zwirn's testimony and Report on the grounds that the fire alarm system in place in 2006 was substantially damaged in the fire and was subsequently modified with the replacement of significant components. Zwirn's opinions and conclusions are based on his inspection and testing of the fire alarm system in place in 2011, five years after the fire. ISIP and 575 Broadway argue that Zwirn's opinions lack the evidentiary foundation for admissibility as there is no evidence that the fire alarm system in place in 2011 operated and was configured and wired in the same way as the fire alarm system in 2006. In addition, ISIP and 575

Broadway contend that one of the switches, the central station activation switch, could not have been used to terminate an alarm and prevent its transmission.

The fire alarm system in the Building on January 21, 2006, the night of the fire, was a Simplex 4100 Fire Alarm System installed in 1996 and monitored by AFA. Kenneth Garside, (Garside), 575 Broadway's expert and a professional engineer described the general functional characteristics of the system as configured "so that building common area detection devices as well as tenant alarm system signals are transmitted to the 575 Broadway building fire alarm systems. In turn, the building system processes the tenant signal and transmits an alarm signal to the offsite central station monitoring service that in this case is AFA Protective Systems, Incorporated (AFA). When a building fire alarm system signal is transmitted to and received by AFA, it is processed and a fire alarm is immediately transmitted to the FDNY."

As noted above, in this litigation testing was performed in 2011 on the Simplex 4100 System that was in place on that date. Garside states that the fire alarm system tested "included a fire command station in the building first floor lobby that housed a Simplex 4100 fire panel that received and transmitted signals from/to various interfacing devices and tenant space fire alarm systems. In part, smoke detectors spaced throughout the building common floor areas on all floor levels would, in the presence of smoke act to transmit an alarm to the fire panel that, in turn, would contemporaneously: (1) command/execute transmission of a fire alarm signal to the central station monitoring company AFA Protective Systems for immediate transmission to the FDNY; (2) command /effect operation of audible alarm and strobe flashing to all floor levels; (3) command/effect illumination of 'Fire' lamp and panel contained zone blinkers, audible panel beeping and local strobe lamp at the command station."

American Eagle contends that based on Zwirn's opinions, that ISIP's security guard turned off a "first" alarm to prevent a recurrence of a situation which had taken place six days prior to the fire. At that time, fire sensors in the Building were triggered due to water leaks which caused shorts, resulting in the transmission of an alarm, and, a response by the fire department to what has been characterized as a false alarm. In support of this contention, American Eagle points to ISIP's employees's testimony that shortly before the fire he was investigating a water leak and other evidence that leaks and electric shorts had been occurring in various areas from the basement up to the third floor in the days before the fire.

In his Report Zwirn states he is an active Certified and Licensed Fire Alarm Contractor in the States of New Jersey, New York, and Florida.³ and that he is an instructor to the technical community of the fire alarm industry and a designated expert instructor in Alarm Systems by the New York State Department of State, the New York City Police Department, and State Fire Marshals of the FDNY. Zwirn further states that he has served as an instructor to the National Burglar and Fire Alarm Association and the Electronic Security Association, and that he has authored and created training curriculum for 38 state-certified continuing education courses.⁴ The Report contains 38 pages, roughly divided into four sections, of which the first three sections

³In addition. Zwirn states he is a Certified Fire Protection Specialist and a National Institute for Certification in Engineering Technologies ("NICET") Level IV, Senior Engineering Technician in Fire Protection Engineering Technology/Fire Alarm Systems. He states he has been appointed by the National Fire Protection Association as a Principal Technical Committee Panel member and a designated Special Expert in Fire Alarm Systems by the National Fire Alarm Code, NFPA 72, and by the National Fire Alarm Signaling Code

⁴Zygmunt Staszewski, ISIP's expert, points out that while Zwirn is qualified as a Senior Engineering Technician, he does not have an engineering degree, and under New York law is not qualified to design a fire alarm system as New York requires that such a system be designed by a licensed professional engineer.

are relevant to this motion.⁵ The first section of the Report, pages 1-15, consists of a summary of deposition testimony and other evidence gathered as part of the litigation process. The second section, pages 16-23, while entitled “Scientific and Technical Methodology,” contains no discussion of methodology and consists of Zwirn’s previously described qualifications and certain statements applicable to fire alarm systems generally. The third section, “Conclusions” pages 24-35, contains Zwirn’s observations and conclusions with respect to the opinions he reaches as to the operation of the Fire Alarm System on the night of the fire.

As stated above, Zwirn bases his opinion on his inspection and testing of the fire alarm system in place in 2011 and on the inference he draws from the testimony of a number of the American Eagle employees and one restaurant employee. In his Report, Zwirn describes deposition testimony of American Eagle’s employees that, although they heard a fire alarm go off in the store before employees discovered the fire, since the alarm stopped, they continued to work until alerted to the fire by an American Eagle employee named H. Brandon Demoranville (Demoranville). Similarly, the restaurant employee stated he heard an alarm, which did not continue, and later heard an alarm sound again. The employees testified to various estimations as to the amount of time which elapsed between the sounding of the alarm and their notification of the fire. Their testimony varied from a few minutes to 15 to 20 minutes. Demoranville testified that after he discovered the fire, he alerted American Eagle employees on the first floor, and while on his way to alert other employees he passed through the lobby. He testified that while in the lobby, where the fire alarm system was placed, he heard the security guard and evacuation

⁵The fourth section, pages 35-37 refers to “Spoilation of Evidence” and page 38 is the signature page.

supervisor, Gani Haxhaj, whose responsibilities included monitoring and operating the master fire alarm control panel of the system, saying into the telephone that the fire was a false alarm, and that he had shut off the alarm. Demoranville further testified he told Haxhaj that it was a real fire and that Haxhaj needed to call the police. Haxhaj denies making this statement and testified at his deposition, that on the night of the fire, he never touched the master fire alarm panel or heard a fire alarm before being told of the fire by the American Eagle employee.

The record reflects that only one alarm was transmitted to the FDNY at 10:02:54 p.m., and that the FDNY responded within minutes of receiving the alarm. Zwirn assumes, apparently based on the testimony of the employees and the statement he attributes to Haxhaj, that there were two alarms, and since only one alarm was transmitted, Zwirn concludes that Haxhaj shut off the "first" alarm, and that only after Demoranville told Haxhaj the fire was real did an alarm sound, which alarm was transmitted to the FDNY.

Demoranville's testimony regarding Haxhaj's alleged statement is clearly hearsay and an issue exists as to its admissibility, although Haxhaj may properly be questioned as to whether he made the statement for credibility purposes.⁶ Moreover, ISIP and 575 Broadway raise issues as to Demoranville's credibility with respect to this statement and point to a report of Demoranville's initial interview with Fire Marshall Hennelly where there is no mention of Haxhaj's statement.

As to Zwirn's assumption based on the employees' statements and testimony that there were two alarms, ISIP's expert, Zygmunt Staszewski (Staszewski), suggests that the testimony of the employees could be explained by nature of the alarm signals emitted by the system and the

⁶Zwirn also points to a statement that Haxhaj made to a fire marshall that he does not recall saying there was a false alarm. While Zwirn and American Eagle attach significance to this statement, it is of limited, if any, evidentiary value.

sequencing of its cycles. Staszewski is a professional engineer licensed in the State of New York, Connecticut and Colorado, who has a Masters in Electrical Engineering and 29 years of experience in the design and inspection of fire alarm systems in New York. According to Staszewski's Report, the Fire Alarm System in 2006 was programmed "to sound a fire alarm 'slow loop' on the fire floor and one floor above for 30 seconds, shut off that tone for 10 seconds, then sound the inquiry tone 'steady tone' through the rest of the building, then cycle between 30-second alarm and 10-second inquiry tones, as indicated above, until the alarm is acknowledged at the Fire Command Station." Staszewski explains that "[b]ecause Simplex 4100 is a single - channel system, it was not capable to provide an alarm tone on two floors and a steady "inquiry tone" throughout the rest of the building simultaneously." Staszewski suggests an inference can be drawn that due to the sequencing and nature of the cycles, the employees did not hear all the cycles, since admittedly the American Eagle employees were playing loud music.

It must be emphasized that whether an inference is to be drawn is a determination to be made by the trier of facts and this court make no determination as to whether a sufficient factual basis exists for either inference. However, in order to analyze whether a sufficient foundation exists for Zwirn's opinions and conclusions, Zwirn's inference that there were two alarms will be assumed.

In the part of his Report where Zwirn attempts to explore the reason for the termination of the "first" alarm, Zwirn states that an activation and sudden termination of an alarm is not "technically consistent with the normal and expected code required operation of any Commercial Fire Alarm System..." In reaching his opinion as to the reason for the termination, Zwirn states that he employed the "methodology" of "determining the potential technical reasons AFA's

central monitoring station did not receive a signal during the first fire alarm,” and that he excluded as causes, defective equipment, central station transmitter telephone failure, the Fire Alarm System was not turned on, and equipment problems at AFA’s central station. Having excluded these causes, Zwirn concludes, in this part of his Report, that “the only reasonable technical conclusion is that the system was intentionally disabled from functioning, by use of the “Central Station Activation Switch” being turned off, which mechanically and electronically disconnected the Central Station Transmitter from being able to detect an alarm condition from the Simplex 4100 Fire Alarm Control Unit Alarm Output Terminals. Moreover, this had to have occurred by someone having access to the Fire Command Center at 575 Broadway and the switch.”

The central station activation switch is also mentioned in another part of his Report, in which Zwirn opines that there were three “illegal” modifications of the fire alarm system as it existed in 2011, which he refers to as “instrumentalities of harm.” Zwirn speculates that these three modifications involve wiring the system to prevent the transmission of an alarm to the central monitoring station; that these modifications were present on the fire alarm system in 2006; and any one of them could have been used to terminate the first alarm. The modifications include the previously mentioned central station activation switch, a power switch and the disconnection of trouble output connectors. According to Zwirn, the central station activation switch, was used “to control the operation of the dialer from transmitting alarm signals to AFA [the central monitoring station], unless it was manually turned to the on position.” Zwirn states that this switch “had the capability of stopping alarms from being reported to the central monitoring station at the time of the fire.” The power switch, which he describes as “secreted” in the housing within the fire command center, Zwirn asserts, when switched to the off position, cut offs all a/c power to

the alarm panel, and, thus, would prevent the transmission of alarm signals. As to the trouble output connectors, Zwirn asserts if they are disconnected, “this would enable the operator to bypass or disable points (e.g. smoke alarm heads) on the alarm system without notification to the Central Monitoring Station, here, AFA.”

At the outset, it must be noted, that although in his Report Zwirn references an inspection on January 24, 2006, three days after the fire, it is clear from his deposition testimony that on this date he only photographed certain parts of the system, and that he did not inspect or test the fire alarm system. Significantly, Zwirn did not inspect or photograph the wiring of the system or of the central station activation switch or of the trouble connectors. Nor did he observe a power switch in the system in 2006. Thus, Zwirn’s conclusions and opinions are based on the result of his inspection and testing of the System as it existed in September 2011.

Turning to Zwirn’s opinions with respect to the means he theorizes were available to Haxhaj to prevent the transmission of the “first” alarm, the “instrumentalities of harm,” since Zwirn’s opinion is specific as to the use of the power station activation switch and more general as to the other two modifications, this switch will be discussed first. Zwirn’s opinion is fatally flawed based on the lack of foundation for his assumption that the central station activation switch in 2006 functioned to cut off the transmission of an alarm to AFA’s central monitoring station. The record shows that this switch is required pursuant to NYC Building Code 27-975(b) (5) as a “means to manually transmit a fire alarm signal to the fire department via a central station of a franchised operating company.” This switch sends a signal to the communicator separate and independent of the alarm panel at the command station. The record also reflects that 575 Broadway received a Letter of Defect dated on March 18, 1996 from the FDNY, because, inter

alia, the system did not have “a central station trip switch.” To correct this defect, a switch was installed in the system and the FDNY issued a letter of approval with respect to its installation.⁷ Zwirn admits that the purpose of the switch is to manually transmit an alarm as backup to the fire alarm control panel, and that it sends a signal to the communicator at the central monitoring station which signal is separate and independent of the alarm panel.

Significantly, ISIP points out that Zwirn’s theory that the central station activation switch, when in the off position, could be used to prevent the transmission of an alarm to AFA’s central monitoring station, was not validated in testing he performed in 2011. ISIP relies in part on the report of Staszewski, who was present at the testing, that an alarm was transmitted irrespective of the position of the central station activation switch. ISIP also points to Zwirn’s apparent attempt to explain this result by stating in a footnote in his Report that in 2011, at the time of the testing, that the switch must have been rewired. Zwirn also attempts to support his theory with selective testimony of Larry McCarthy (McCarthy), 575 Broadway’s fire safety director, that the switch would prevent the transmission of an alarm to the central monitoring station in the off position. This argument is not compelling when McCarthy’s entire testimony is considered, as he clearly states that the switch would not prevent the transmission of an alarm. In addition, The Building manager of 575 Broadway, Peter Zanelli (Zanelli), was also a certified fire safety director. Zanelli testified that the switch does not affect the panel or the alarm’s ability to send an alarm signal to the central station or the fire department, and that, once the alarm is sounding within the Building, there is no switch that can “shut off its ability to send an electronic message to the central station.” McCarthy’s testimony as a whole and Zanelli’s testimony are consistent with the purpose of the

⁷The record does not reflect any other violations for the alarm system or component parts.

switch, to provide manual backup independent of the system where the system fails to transmit an alarm. Their testimony is also consistent with the test results as reported by Staszewski.

In addition to the lack of verification, Zwirn's conclusion with respect to the central station activation switch is without foundation in the absence of any evidence as to how the switch was wired in 2006. Moreover, the lack of foundation that the fire alarm system in 2006 was configured and wired in the same way as the system in 2011, bars the admissibility of Zwirn's conclusions as to the power switch and the trouble output connectors.

The record shows that the fire alarm system sustained substantial damage during the fire in 2006, and that its major components were replaced. Zanelli testified that after the fire, there was water in the lobby and that "water was dripping everywhere, in between the walls, inside the electric panels," and in "the circuit boards and the CPU in the bottom of the splice boxes." He further testified that it "took months" to fix the equipment and that "Circuit boards and CPU units" were replaced. In addition, Thomas Ruggeri (Ruggeri), who testified on behalf of ISPI, testified that "none of the electronics remained, just the actual metal housing that houses each one of these switches." Ruggeri also testified that "most of the wiring was replaced" and when asked about tenants affecting the number of alarms and detectors on the system, Ruggeri responded that "tenant needs and architectural design and engineering would add or delete devices." Finally, ISIP's expert, Staszewski, conducted a search on NYC Department of Buildings records and found filings of six modifications of the alarm system after the January 21, 2006 fire.

Based on the foregoing, the record reflects substantial modifications to the System. American Eagle argues the sufficiency of this evidence pointing to the lack of invoices or identification of the specific boards which were replaced. This argument is unavailing as both

Zanelli and Ruggeri testified to the replacement of the boards based on personal knowledge.

American Eagle also points to Zwirn's Report and testimony concerning the replacement of the circuit boards. Zwirn alleges that at the 2011 inspection, with the exception of one board which bore a date of March 24, 2006, two months after the fire, he observed dates on the board which pre-dated the fire, and, because the software on the panel has an issue date of 1998, the system's configuration remains the same as in 2006. While the foregoing observations are not without evidentiary value, Zwirn's conclusion, based on observations of certain limited number of components, that the entire system, including the power switch and the wiring of the trouble output connectors, was the same in 2006 as in 2011 is without foundation. As discussed above, American Eagle, as the proponent of Zwirn's testimony and Report, has the burden of the establishing the evidentiary foundation for admissibility. American Eagle has not met its burden and Zwirn's conclusions fail, absent evidence, inter alia, that if the board and software were the originals, then all components of the system, including the wiring remained the same. This conclusion also fails absent evidence that replacement boards would not have contained such dates or that replacement software, although issued in 1998, was not updated, and was in fact, the same as in the 2006.

American Eagle argues that the applications for the modifications are not in evidence and asserts that the applications are for peripherals on the system, such as smoke detectors, and not for physical modifications. However, as the applications are not in evidence, and as American Eagle concedes that the applications were made, American Eagle has not established that the applications are irrelevant to the issues with respect to the modifications to the System.

Based on the foregoing, the evidence shows that the original fire alarm system suffered

serious and extensive damage as a result of the fire in 2006, and that its components were substantially modified between 2006 and 2011. Moreover, Zwirn first mentions the power switch and trouble output connectors after his testing and inspection in 2011. As to the power switch, Zwirn's assertion that the switch is illegal, and that at the inspection in 2011 it was caked with dirt, indicating that it was present in the system for a long period of time, is not competent evidence that the fire alarm system in 2006 contained such a switch. Thus, the record is devoid of any admissible evidence that the fire alarm system in 2006 contained a power switch or that the trouble output connectors were disconnected in 2006 as postulated by Zwirn. Zwirn's theories as to the power switch and trouble output connectors are based on pure speculation.

Accordingly, as American Eagle has not met its burden of establishing the necessary foundation for Zwirn's opinions and conclusions as to the fire alarm system as it existed at the time of the fire, ISIP and 575's motions to preclude Zwirn's testimony and Report are granted. See *Cornell v. 360 West 51st Street Realty, LLC*, supra; *Parker v. Mobil Oil Corp*, supra; *People v. Wesley*, supra.

II. ISPI's Motion for Summary Judgment (motion sequence number 010)

American Eagle's third-party complaint against ISPI asserts two causes of action. The first cause of action asserts claims for common-law indemnification and contribution. The second cause of action seeks "judgment over and against [ISPI]," based upon ISPI's "sole, primary, and active negligence . . . in breach of [its] contractual obligations pursuant to contracts . . . between [American Eagle] and [ISPI]." ISPI moves for summary judgment dismissing American Eagle's third-party complaint, arguing that ISPI owed no duty that would support a negligence-based claim.

The sole contract out of which ISPI's alleged duty arose is an "Annual Service Agreement" entered into between ISPI and nonparty A.R.I. Investors, the Building manager, executed on July 26, 2001. Under the Annual Service Agreement, ISPI agreed to provide "Fire Alarm System Services" for five years, beginning September 1, 2001, and that ISPI was "the exclusive provider of maintenance and related services of all covered equipment and systems."

A. Existence of Duty Owed By ISPI

A critical requirement of both common-law indemnification and contribution is the breach of a duty owed to the aggrieved party. *Albino v New York City Hous. Auth.*, 78 AD3d 485, 492 (1st Dept 2010). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." *Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 (2002).

However, the following exceptions exist, whereby

a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties[;] and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely.

Id. at 140 (internal quotation marks and citations omitted).

1. Instrument of Harm

"[A] defendant who undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury," for having "launched a force or instrument of harm." Id. Here, American Eagle's contention that ISPI launched a force or

instrument of harm is based upon the Zwirn Report with respect to the three previously discussed “instrumentalities of harm,” the central station activation switch, an illegal power switch, and the disconnection of the trouble output terminals. American Eagle claims that ISPI “fail[ed] to detect and remedy the presence and use of toggle switches and/or other mechanisms, that could be operated to disable the fire alarm system from sounding, within the premises, and from reporting the occurrence of a fire to a monitoring station and to emergency services.” American Eagle also claims that ISPI “fail[ed] to prevent the use of [such] toggle switches” thereby “creat[ing] and/or exacerbat[ing] the risk of harm and danger to life and property” at the Building.

ISPI submits the deposition testimony of McCarthy and Zanelli, who are, as previously stated, respectively the fire safety director and building manager of 575 Broadway. Zanelli is also a certified fire safety director. ISIP relies on McCarthy’s testimony that the alarm signal went through to the central monitoring station regardless of the position of the switch, and Zanelli’s testimony that the switch does not affect the panel or the alarm’s ability to send an alarm signal to the central station or the fire department, and that, once the alarm is sounding within the Building, there is no switch that can “shut off its ability to send an electronic message to the central station.”

According to American Eagle’s own fire expert, the fire alarm was activated at 10:03 p.m., and the fire department arrived at the Building at 10:07 p.m. This is consistent with witness statements of several American Eagle employees, who stated that the fire alarm went off at 10:00 p.m. It is also consistent with AFA’s “System Event Report” from the month of January 2006, which shows that, on the night of the fire, January 21, 2006, the fire department was dispatched to the Building at approximately 10:06 p.m. This evidence makes a prima facie showing that there were no switches that could disable the fire alarm system or prevent the alarm from being reported

to a central monitoring station and emergency services. ISPI's evidence also makes a prima facie showing that the alarm system actually sent a signal to the central station and that the fire department responded to the fire, thereby undermining any claim that an alarm system malfunction constituted an instrument of harm.

In support of its argument that the alarm system malfunctioned, American Eagle submits fire department interview reports of several American Eagle employees and the testimony of its employee, Demoranville. As previously discussed, these witnesses claim that the fire alarm sounded, then shut off, then sounded again. The witnesses testified to various timeframes between the time they heard the initial alarm and when they again heard an alarm. In addition, Demoranville testified that he heard Haxhaj the security guard and on the telephone saying, "it was a false alarm, I turned the alarm off."

As a preliminary matter, Demoranville's testimony concerning the security guard's alleged statement is hearsay, as it is an "[o]ut-of-court statement[] offered for the truth of the matter[] . . . assert[ed]," and it cannot be said at this point that American Eagle has shown that this statement "fall[s] within one of the recognized exceptions to the hearsay rule" *Nucci ex rel. Nucci v Proper*, 95 NY2d 597, 602 (2001) (citations omitted). However, the inquiry does end there, as hearsay may be considered in opposition to a summary judgment motion provided it is not the only evidence submitted. *Rugova v Davis*, 112 AD3d 404 (1st Dept. 2013). To the extent American Eagle relies on Zwirn's opinions and conclusions, that evidence has been precluded. As to the testimony of American Eagle's employees, even if this testimony is considered together with the alleged statement, it is insufficient to raise a triable issue of fact in the absence of evidence that an alarm was terminated by use of switch or the disconnection of the trouble output

connectors on the night of the fire.

American Eagle's evidence is consistent with ISPI's showing that the alarm sounded at 10:00 p.m. initially. Even assuming that the alarm sounded initially and then stopped before sounding again, ISPI's evidence demonstrates that the alarm could not be prevented from sending a signal to the central station. This conclusion is further supported by the undisputed fact that the alarm system actually notified the central station, and that the fire department arrived at the Building within minutes of the initial alarm. Therefore, American Eagle's evidence fails to raise a factual issue. Without the precluded Zwirn Report, American Eagle's claim that ISPI launched an instrument of harm is based upon "mere conclusions, expressions of hope [and] unsubstantiated allegations [and] assertions," which are insufficient to defeat ISPI's summary judgment motion. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); see also *Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 (1st Dept 1993) ("[a] party opposing a motion for summary judgment must "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions [internal quotation marks omitted]"). Accordingly, American Eagle fails to raise a factual issue as to whether ISPI launched an instrument of harm.

2. Detrimental Reliance

In *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, the owners of a commercial building entered into a contract with the defendants to "install and maintain a central station fire alarm system in the building," and "to inspect the [fire] sprinkler system and to report all service needs" to the owners. 76 NY2d 220, 223 (1990). The system malfunctioned, causing a flood that damaged the plaintiff tenant's inventory stored in the building. *Id.* at 224. The Court of Appeals

acknowledged the possibility that tort liability may arise if “performance of contractual obligations has induced detrimental reliance on continued performance and inaction would result not merely in withholding a benefit, but positively or actively in working an injury.” 76 NY2d at 226 (internal quotation marks and citation omitted). The Court, nevertheless, held that the defendants owed “no cognizable duty” to the plaintiff. *Id.* at 227.

The Court reasoned that the building owners and the plaintiff tenant were “both in a position to insure against [the] losses,” and that they “[knew] or [were] in a position to know the value of the goods stored and [could] negotiate the cost of the lease and limitations on liability accordingly.” *Id.* at 227. The Court stated that “[i]f . . . [the defendants] were answerable for property damage sustained by one not in contractual privity with them, they would be forced to insure against a risk the amount of which they may not know and cannot control, and as to which contractual limitations of liability may be ineffective.” *Id.* The Court also examined the building owners’ contract with the defendants, whereby “the risk of loss remained with the building’s owners.” *Id.* The Court acknowledged that the plaintiff was “not bound by the provisions of a contract to which it [was] not a party,” but stated that “the limited scope of defendants’ undertaking [was] nonetheless relevant in determining whether a tort duty to others should arise from their performance of the contractual obligations.” *Id.* The Court found that the parties’ contract “suggest[ed] the need to contain liability within the limits envisioned in the contract in order to keep the[defendants’] services available at an affordable rate.” *Id.*

Here, it is undisputed that American Eagle was not a party to the Annual Service Agreement. Moreover, there was no “inaction” by ISPI that “positively or actively . . . work[ed] an injury” (*id.* at 226) because, as discussed above, the evidence shows that the alarm system

actually sent a signal to the central station and that the fire department responded to the fire. Furthermore, the Annual Service Agreement stated that “ISPI is not an insurer, and does not guaranty that no damage or injury to persons will occur.” Thus, the parties to the Annual Service Agreement expressly agreed that ISPI was not insuring against losses sustained by third parties, thereby demonstrating the limited scope of ISPI’s undertaking. Accordingly, no duty arose under a theory of detrimental reliance in the instant action. *Eaves Brooks Costumer Co.*, 76 NY2d at 227. American Eagle is not “preclude[d] from seeking damages from the building’s owners” (id.), as it has done by asserting direct claims against 575 Broadway in the Federal Action.

3. Displacement of Duty to Maintain the Premises

In *Palka v Servicemaster Mgt. Servs. Corp.*, the plaintiff nurse was injured at a hospital when a wall-mounted fan fell on her from its wooden mount. 83 NY2d 579 (1994). Prior to this incident, the hospital entered into a service contract with the defendant, whereby the defendant became “the sole privatized provider for a safe and clean hospital premises,” receiving biweekly payments of \$91,207 from the hospital. Id. at 589. The Court held that “when a party contracts to inspect and repair and possesses the exclusive management and control of real or personal property which results in negligent infliction of injury, its assumed duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended safety services.” Id. The Court reasoned that the service contract “was comprehensive and exclusive,” and required the defendant “to train, manage, supervise and direct all support services employed in the performance of daily maintenance duties” (id. at 588), thereby “displac[ing] entirely the hospital’s prior in-house maintenance program.” Id. at 584.

Here, the Annual Service Agreement was not a contract “to inspect and repair and

possesses the exclusive management and control of real or personal property” (*Palka*, 83 NY2d at 589), but rather, it was a limited undertaking by ISPI to maintain the alarm system only.

Moreover, Zanelli and McCarthy, as the Building manager and security and fire safety director for 575 Broadway, testified that they performed monthly testing on the fire alarm system. This evidence makes a prima facie showing that ISPI could not have “displaced entirely” 575 Broadway’s in-house maintenance of the fire alarm. *Id.* at 584. American Eagle fails to raise a factual issue concerning ISPI’s displacement of 575 Broadway’s duty to maintain the premises safely.

4. Gross Negligence

The court notes American Eagle argues that ISPI’s acts and omissions constituted “gross negligence,” thereby warranting denial of summary judgment despite an exculpatory clause in the Annual Service Agreement. Although the Annual Service Agreement contained several clauses exculpating ISPI and limiting its liability, the court’s holding is not based upon this language. Rather, it is based upon the lack of a cognizable negligence duty owed by ISPI under any of the Espinal exceptions discussed above. 98 NY2d 136. American Eagle’s assertions of gross negligence fail for the same reason. *East Meadow Driving School v Bell Atl. Yellow Pages Co.*, 273 AD2d 270, 271 (2d Dept 2000) (“the existence of a duty is necessary to state a cause of action for gross negligence”).

Moreover, American Eagle’s pleading fails to allege “conduct evincing a reckless disregard for the rights of others or smacking of intentional wrongdoing,” and, therefore, fails to plead gross negligence. *Mancuso v Rubin*, 52 AD3d 580, 583 (2d Dept 2008). American Eagle raises gross negligence for the first time in its bill of particulars, which is dated April 22, 2013 and

annexed to American Eagle's opposition papers on the instant motion. This bill of particulars was submitted nearly seven months after ISPI's October 1, 2012 demand, and, pursuant to this court's September 27, 2012 discovery order, six months after it was due. Accordingly, American Eagle's gross negligence argument fails for the additional reason that it is raised for the first time in American Eagle's untimely bill of particulars. *O'Leary v Greenport Fire Dept.*, 276 AD2d 539, 539-540 (2d Dept 2000) (summary judgment dismissal affirmed where "plaintiffs failed to plead gross negligence").

5. Conclusion

For the foregoing reasons, American Eagle fails to identify any duty that would support its claim for indemnification or contribution arising out of ISPI's alleged negligence. Nor does American Eagle identify any code violation attributable to ISPI that would support American Eagle's indemnification claim with respect to Firefighter Blanco's cause of action under section 205-a of the GML. Accordingly, ISPI's motion for summary judgment is granted and the third-party complaint (under index number 590289/09) is dismissed as against ISPI.

B. Court-Ordered Discovery & Summary Judgment on Firefighter Blanco's Claims

As ISPI's motion for summary judgment dismissal is granted, the court does not address its motion to dismiss based upon American Eagle's alleged failure to comply with court-ordered discovery. For the same reason, the court does not address ISPI's alternative request for summary judgment dismissing Firefighter Blanco's claims.

Accordingly, it is hereby

ORDERED that the motion of third-party defendant Integrated Systems and Power, Inc. (motion sequence number 009) to preclude the testimony and expert report of Jeffrey Zwirn is

granted, and the cross motion of defendants and second third-party plaintiffs 575 Broadway LLC, 575 Broadway Associates L.P., and 575 Broadway Corporation, for the same relief, is granted; and it is further

ORDERED that the motion of third-party defendant Integrated Systems and Power, Inc. (motion sequence number 010) for summary judgment is granted to the extent that the third-party complaint under index number 590289/09 is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and the motion is otherwise denied; and it is further

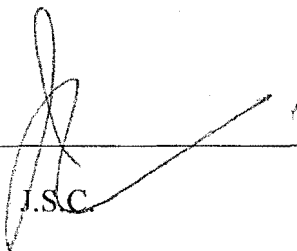
ORDERED that the third-party action is severed and continued against the remaining third-party defendant under index number 590289/09; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the main action and third-party actions shall continue.

Dated: May 13, 2014

FILED
MAY 16 2014
NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.