Atlantic Elec., Inc. v Center Moriches Fire Dist.
2014 NY Slip Op 32526(U)
September 26, 2014
Supreme Court, Suffolk County
Docket Number: 06-2495
Judge: W. Gerard Asher

[* 1]

SHORT FORM ORDER

INDEX No. 06-2495
CAL. No. 13-00097OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 1-22-14 (#007)
MOTION DATE 1-23-14 (#008)
ADJ. DATE 5-20-14
Mot. Seq. # 007 - MG
008 - MotD

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ATLANTIC ELECTRONICS, INC. and PETER KROMHOUT and MARY KROMHOUT,

Plaintiffs,

- against -

CENTER MORICHES FIRE DISTRICT, DEVENDRA K. INC. and GALLAWAY'S INC., d/b/a BUCKLEY'S IRISH PUB,

Defendants.

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Upon the following papers numbered 1 to 62 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 18, 31 - 51 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 19 - 22, 54 - 60 ; Replying Affidavits and supporting papers 23 - 28, 61 - 62 ; Other memorandum of law 52 - 53 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendant Gallaway's Inc. doing business as Buckley's Irish Pub for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted to the extent that the plaintiffs' ninth cause of action for emotional distress is dismissed; and is otherwise denied.

This is an action to recover damages for property damage, loss of business, and personal injuries allegedly suffered as a result of a fire at the building owned by the plaintiff Peter N. Kromhout. The plaintiffs Peter N. Kromhout (Kromhout) and Mary Kromhout are principals in the plaintiff Atlantic Electrics Inc. (AEI), and they operated the business of AEI out of the building owned by Kromhout located at 390 Main Street, Center Moriches, New York (the plaintiffs' building). The plaintiffs' building adjoined the building owned by the defendant Devendra K. Inc. (Devendra) located at 386 Main Street, Center Moriches, New York (386 Main), the east wall of the plaintiffs' building being a common wall with 386 Main. At the time of the fire, the defendant Gallaway's Inc. doing business as Buckley's Irish Pub (Buckley's) leased the first floor of 386 Main pursuant to a written lease with Devendra. On July 3, 2005 at approximately 4:25 a.m., a fire alarm was dispatched to the defendant Center Moriches Fire District (District) regarding a fire at 386 Main. The District responded to the alarm, and after calling in aid from other fire districts, the fire was put out approximately four to four and one-half hours later. Both 386 Main and the plaintiffs' building were ultimately destroyed by the fire.

In their complaint, the plaintiffs originally set forth nine causes of action sounding in negligence against the defendants. In the first three causes of action against the District, the plaintiffs allege that the District failed to prevent the spread of the fire to the plaintiffs' building, that the District's negligence resulted in damage to their property and that the District's negligence caused them emotional distress. The fourth, fifth and sixth causes of action repeat the aforementioned causes action against Devendra, and the seventh, eighth and ninth causes of action repeat said causes of action against Buckley. By order dated September 24, 2013, the undersigned granted the District's motion to dismiss the complaint against it for failure to state a cause of action. In their complaint, the plaintiffs make identical factual claims against the remaining defendants Devendra and Buckley including, but not limited to, allegations that they failed to install or properly install an adequate sprinkler system at 386 Main, that they failed to guard, store and maintain propane gas tanks at the premises, and that they failed to take proper precautions to prevent a fire from spreading to the plaintiffs' adjacent property.

Devendra now moves for summary judgment on the grounds that it is an out-of-possession landlord, that its alleged negligence is not the proximate cause of the fire, and that the special use doctrine is not applicable under these facts. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; ***Rebecchi v Whitmore,*** *supra*).

In support of its motion, Devendra submits, among other things, the pleadings, the deposition transcripts of the parties, the District, and a non-party witness, Buckley's lease of the premises, the police arson report, and the findings and opinions of the plaintiffs' expert. At their depositions, the plaintiffs testified in essentially similar fashion as to the ownership of the plaintiffs' building and its location, that they were told by the police that it was most likely fireworks which were set off near Buckley's and ignited cardboard stored at 386 Main which started the fire, and that they learned of the fire the next day and arrived at the site at approximately 11:00 a.m. after the fire department had left the scene. In addition, Kromhout testified that the tenant living above Buckley's told him that it was employees of Buckley's who set off the fireworks.

At his deposition, Danny D. Hebberd (Hebberd) testified that he was the chief of the District on July 3, 2005, that he received a call that night from "fire com" that there was a "structural fire to the rear of Buckley's," and that he responded to the call at approximately 4:30 a.m. He stated that, upon arriving at Buckley's, his first command was for fire fighters to hose down and keep water on two propane tanks at the rear of the building which were venting into the air "because those two tanks could have leveled the whole entire block." He indicated that he assigned some of his firefighters to watch for possible spreading of the fire to the west as the wind was blowing in that direction, that "a while into the fire" he saw black smoke coming from the eaves and back window of the plaintiffs' building, and that he directed equipment to fight the fire in that building. Hebberd further testified that he was told by the police department arson squad that there was "a good chance it could have all been set from fireworks," that he observed fireworks "debris" at the scene, and that he observed burnt remnants of "empty boxes, beer boxes" in the area where the fire had started. He stated that the propane tanks did not explode and properly vented into the air, that the fire marshal and the arson squad issued a report that the fire started in the southeast corner of 386 Main (Buckley's), and that the fire marshal would have issued any citations or violations, if any.

Richard A. Primus (Primus) was deposed on November 5, 2010, and testified that he was a volunteer firefighter with the District on the day of this fire. He stated that he was at the scene "from the beginning of the fire," and that he was ordered to "water down" the propane tanks located at the southeast corner of the building. Primus further testified that, when he arrived at the scene, the fire was "going up the wall" behind the propane tanks. He indicated that the propane tanks were "out in the open" at the building, that the relief valves on the tanks "released," and that the released gas exploded, not the tanks themselves. He stated that he did not know how the fire started or spread to the plaintiffs' building, that he did not observe anything in or about the tanks, and that he did not observe any fireworks or firework remains that evening.

At his deposition, James Cantwell (Cantwell) testified that he was a part owner of Buckley's, that the bar/restaurant opened in 2000, and that the bar leased 386 Main from Devendra pursuant to a written lease. He stated that the building was used as a bar before Buckley's rented it, that Buckley's merely made cosmetic changes to the interior of the building, and that no changes were made to the existing kitchen in the building. He indicated that the kitchen was fueled by two propane tanks located at the

southeast corner of the building, and that the tanks were approximately one foot away from the side of the building and 10 to 12 feet from the municipal parking lot at the rear of the building. He declared that the tanks were serviced by an outside company that he paid. Cantwell further testified that Buckley's was equipped with a central fire alarm system, that the health department and "fire safety" inspected the bar/restaurant twice a year, and that Buckley's always passed inspection. He stated that there was a shed and refrigerator located next to the propane tanks at Buckley's, and that the shed contained dry goods and cleaning fluids. He indicated that a garbage dumpster was located at the southwest corner of the building approximately 40 feet from the southeast corner, that recycled boxes were kept in a separate area near the dumpster, and that he did not know where boxes of empty beer bottles were kept. Cantwell further testified that Buckley's never discussed the potential for fire or held fire drills with its staff, that he never saw any fireworks at the building before this fire, and that no one from the fire department told him what caused the fire.

Nonparty witness, Jason Mazzio (Mazzio), was deposed on July 21, 2010, and testified that he was working as a bartender for Buckley's on the night of this fire. He stated that the fire started at approximately 3:30 or 4:00 a.m. as the bar was closing, and that he heard the fire alarm go off. He indicated that he ran to the back of the building and observed a fire outside the building, that he grabbed a fire extinguisher, and that he tried to fight the fire from inside the building by spraying out of the kitchen window. He expressed that he left the building when the fire got "bad enough." Mazzio further testified that he did not see anyone lighting fireworks that night, that he did not observe any fireworks "remains," and that he did not know how the fire started. He stated that recycled beer bottles in boxes were kept in an area near the propane tanks, and that other boxes were recycled "in a dumpster" located in the municipal parking lot at the rear of the building.

The report of the arson investigation by the Suffolk County Police Department failed to identify who was responsible for setting off the fireworks on the night of this incident. However, the report, in pertinent part, made the following findings:

> Examination of the fire scene revealed that the area of origin for this fire is in the southeast corner of this building. Examination of this area of the building revealed that there were two large propane cylinders, a large box refrigerator, and some exterior storage of empty bottles, card board boxes, and materials used in a bar/restaurant operation. This exterior storage area was apparently covered with a large blue plastic tarpaulin that was attached to the side of the structure.
>
> The fire began on or in this storage area and rapidly progressed up the side of the building into the overhanging eaves for the building. The fire then extended into the attic space over the building and burned the roof away. The fire also extended to an adjoining building attached to the west side of the bar operation.

> During the course of the fire on the southeast side of the building, the fire impacted the large propane cylinders causing them to overheat, vent the propane through the exterior safety vents, and then did ignite the venting propane which directly impacted the side of the building. This large fuel source also contributed heavily to the fire damage that occurred to this occupied structure.
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> * * *
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> Examination of the propane tanks failed to reveal any abnormalities ...
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> * * *
>
> Examination of the fire scene did, however, reveal the presence of large amounts of expended fireworks of all kinds in the parking lot located to the rear or south of the building ...
>
> It is apparent that the causation for this fire is the impact of fireworks into combustible materials stored on the exterior of the southeast side of this structure. The fire started at this location and as previously noted, impacted the propane tanks on the exterior of the building, spreading to the main building and heavily damaging it.
>
> A further search of the exterior of the building revealed the presence of a plastic bag containing a quantity of unexpended fireworks of all types and sizes in a large dumpster near the southeast corner of the building.

Lalita Singh (Singh) was deposed on December 1, 2009, and testified that she is an owner of Devendra, and that she manages all of the rental properties owned by the corporation. She stated that Devendra was formed in 1985 or 1986, that it owned 386 Main, and that Buckley's rented the building pursuant to a written lease. She indicated that the building was being used as a bar when Devendra purchased it, and that the tenant immediately prior to Buckley's also operated the building as a bar. Singh further testified that she visited the building one time in 2005, that Devendra did not have a policy regarding regular inspections of the building, and that Devendra did not make any repairs to the building prior to this fire. She stated that she learned that the building had burned the next day, that she never spoke with the police department or fire department, and that she never received any type of violations concerning 386 Main.

The written lease entered into by Devendra and Buckley's provides, in pertinent part: "2nd. That the Tenant shall take good care of the premises and shall, at Tenant's own cost and expense, make all repairs ... plumbing, electrical, carpentry, etc.," and "6th. The said Tenant agrees [that] said Landlord

and the Landlord's agents or representatives shall have the right to enter into and upon said premises or any part thereof, at all reasonable hours for the purpose of examining the same, and making such repairs or alterations therein as may be necessary for the safety and preservation thereof."

Generally, an out-of-possession owner or lessor is not liable for injuries that occur on the premises unless the owner or lessor has retained control over the premises or is contractually obligated to repair unsafe conditions (***Lindquist v C & C Landscape Contrs.***, 38 AD3d 616, 831 NYS2d 523 [2d Dept 2007]; ***Gibson v Bally Total Fitness Corp.***, 1 AD3d 477, 767 NYS2d 135 [2d Dept 2003]. Control of the premises may be established by proof of a promise by the owner or lessor to keep the premises in repair or by a course of conduct demonstrating that the owner or lessor has assumed responsibility to maintain a particular portion of the premises (***Ever Win, Inc. v 1-10 Indus. Assoc., LLC***, 33 AD3d 845, 827 NYS2d 63 [2d Dept 2006]; ***Gelardo v ASTHMA Realty Corp.***, 137 AD2d 787, 525 NYS2d 334 [2d Dept 1988]). They may be held liable for injuries arising from a dangerous condition on their property if they created the condition or had actual or constructive notice of it and a reasonable time within which to remedy it. (*see* ***Sowa v SJNH Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2nd Dept 2005]; ***Curiale v Sharrotts Woods, Inc.*** 9 AD3d 473, 781 NYS2d 47 [2d Dept 2004]; ***Patrick v Bally's Total Fitness***, 292 AD2d 433, 739 NYS2d 186 [2d Dept 2002]). In order to constitute "constructive notice" a defect "must be visible and apparent and it must exist for a sufficient length of time prior to the accident" to discover and remedy it (*see* ***Chianese v Meier,*** 98 NY2d 270, 746 NYS2d 657 [2002], *citing* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Negri v Stop & Shop***, 65 NY2d 625, 491 NYS2d 151 [1985]). A reservation of the right to enter the premises for the purpose of inspection and repair may constitute sufficient retention of control to permit a finding that the owner or lessor had constructive notice of a defective condition only if a specific statutory violation exists and there is a significant structural or design defect (*see* ***Rhian v PABR Associates***, 38 AD3d 637, 832 NYS2d 590 [2d Dept 2007]; ***Bouima v Dacomi, Inc.***, 36 AD3d 739 [2d Dept 2007]; ***Thompson v Port Auth. of N.Y. & N.J.***, 305 AD2d 581 [2d Dept 2003]).

A review of the submissions, including the report of the plaintiffs' expert, reveals that Devendra has established its entitlement to summary judgment herein. Devendra submits the report of Andrew R. Yarmus, P.E. (Yarmus) dated April 27, 2012, addressed to counsel for the plaintiffs, who opines, among other things, that "we have formed the opinion, with a reasonable degree of Engineering certainty, that the fire which damaged your client's premises was caused by fireworks detonating improperly stored combustible material at the neighboring premises, and that the storage of said combustible materials did not comply with the requirements of both state and local code requirements." Yarmus concludes by stating that "[c]onsequently, based upon our review of the information and applicable codes referenced herein, it is our opinion that but for the debris and garbage improperly stored in proximity to both the structure and propane tanks, in violation of the above referenced codes, the subject fire would not have spread to [the plaintiffs' building] with the speed and ferocity with which it did as a result of the same." As noted in his conclusion, said report references various code provisions which purport to support that opinion. It is determined that Yarmus' report, the code provisions cited therein, and his expert opinion do not establish, let alone adequately suggest, a basis for a finding of liability against Devendra.

To the extent that Yarmus' report can be read to imply that Devendra may be liable herein, it is speculative, conclusory and improperly attempts to define the meaning and applicability of the subject

code provisions (***Franco v Jay Cee of N.Y. Corp.***, 36 AD3d 445, 827 NYS2d 143 [1st Dept 2007]; ***Russo v Feder, Kaszovitz, Isaacson, Weber, Skala & Bass***, 301 AD2d 63, 750 NYS2d 277 [1st Dept 2002]; ***Litts v Wayne Paving Co., Inc.***, 261 AD2d 906, 689 NYS2d 840 [4th Dept 1999]). An expert "may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion" (*see* ***Shi Pei Fang v Heng Sang Realty Corp.*** *supra*). "Speculation, grounded in theory rather than fact, is insufficient to defeat a motion for summary judgment" (*see* ***Zuckerman v City of New York*** *supra*; ***Leggis v Gearhart***, 294 AD2d 543, 743 NYS2d 135 [2d Dept 2002]; ***Levitt v County of Suffolk***, 145 AD2d 414, 535 NYS2d 618 [2nd Dept 1988]). Here, to the extent that Yarmus' attempts to render an expert opinion as to Devendra, it primarily consists of theoretical allegations with no independent factual basis and it is therefore speculative, unsubstantiated, and conclusory (*see* ***Mestric v Martinez Cleaning Co.***, 306 AD2d 449, 761 NYS2d 504 [2d Dept 2003]).

Here, Devendra has established its prima facie entitlement to summary judgment on the grounds, among other things, that it did not violate any specific statutory provision and that there is no significant structural or design defect at 386 Main. The plaintiffs' allegations that debris and the storage of card board boxes near the propane tanks caused the fire to spread does not impose liability upon Devendra (***Reichberg v Lemel***, 29 AD3d 664, 814 NYS2d 712 [2d Dept 2006]; ***Enrichment Enters. v Jempris Realty Corp.***, 272 AD2d 432, 707 NYS2d 504 [2d Dept 2000], and the location of the tanks is generally not considered a structural or design defect (*see eg.* ***Sangiorgio v Ace Towing & Recovery***, 13 AD3d 433, 787 NYS2d 51 [2d Dept 2004]). Finally, there is no evidence that Devendra leased the building to Buckley's knowing that a dangerous condition existed (***McComish v Luciano's Italian Rest.***, 56 AD3d 534; 868 NYS2d 79 [2d Dept 2008]).

Based on the determination that it had no duty to prevent the spread of the fire, Devendra can have no liability pursuant to the plaintiffs' fifth and sixth causes of action for property damage and emotional distress, respectively. Thus, having established its entitlement to summary judgment dismissing the complaint and all cross claims against it, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*).

In opposition to Devendra's motion, the individual plaintiffs submit their affidavits and the affirmation of their attorney. In his affirmation, counsel for the plaintiffs contends that the Town of Brookhaven Town Code § 30-102 requires all propane equipment to be "installed and maintained in conformity with the ... appropriate standards of the [National Fire Protection Association] (NFPA)," and that NFPA Code § 6.7.2.6 requires "[t]he design of the pressure relief valve drain opening shall provide the following: direction of the pressure relief valve opening so that adjacent containers, piping or equipment are no subject to flame impingement." Counsel for the plaintiffs argues that said code provision raises a question of fact as to whether the propane tanks were negligently located too close to 386 Main by Devendra. Initially it is noted that general safety provisions do not constitute a sufficiently specific predicate for liability against an out of possession landlord (***Conte v Frelen Associates***, 51 AD3d 620; 858 NYS2d 258 [2d Dept 2008]; ***O'Connell v Allen. Buckley's. Realty Co.***, 50 AD3d 752, 856 NYS2d 165 [2d Dept 2008]; ***Nikolaidis v La Terna Rest.***, 40 AD3d 827, 828, 835 NYS2d 726 [2d Dept 2007]; ***Reddy v 369 Lexington Ave. Co., L.P.***, 31 AD3d 732, 819 NYS2d 776 [2d Dept 2006]). In

addition, a plain reading of the subject code provision indicates that it does not impose a safety obligation upon an owner of property who is not responsible for the design and manufacture of propane tanks. Counsel's conclusory statements that, based on the testimony that the tanks were located one foot away from the wall at the southeast corner of 386 Main, there is an issue of fact whether they were too close to the building is negated by Hebberd's testimony that the propane tanks "properly vented into the air." Moreover, the plaintiffs have not submitted any evidence that Devendra installed or maintained the subject propane tanks.

The plaintiffs submit essentially identical affidavits in which they swear that Kromhout saw agents of Devendra repairing the roof at Buckley's in February 2004, that a co-owner of Buckley's told him that he intended to move out of 386 Main if the roof was not repaired, and that the propane tanks were not enclosed by a fence. It is well settled that while hearsay may be used to oppose a summary judgment motion, such evidence is insufficient to warrant denial of summary judgment where it is the only evidence submitted in opposition (***Mallen v Farmingdale Lanes, LLC***, 89 AD3d 996, 933 NYS2d 338 [2d Dept 2011]; ***Stock v Otis El. Co.***, 52 AD3d 816, 861 NYS2d 722 [2d Dept 2008]; ***Candela v City of New York***, 8 AD3d 45, 778 NYS2d 31 [1st Dept 2004]; ***Murray v North Country Insurance. Co.***, 277 AD2d 847, 716 NYS2d 820 [3d Dept 2000]). Regardless, considering the terms of the lease, said affidavits do not raise an issue of fact whether the workers repairing the roof were, in fact, agents of Devendra.

Finally, the plaintiffs' contention that the special use doctrine obligated Devendra to maintain the tanks in a safe condition is without merit. The doctrine imposes liability upon an occupier of real property abutting public lands who derives a special benefit from the private use of public property and fails to maintain the property in a reasonably safe condition (***Kaufman v Silver***, 90 NY2d 204, 659 NYS2d 250[1997]; ***Doyley v Steiner***, 107 AD3d 517, 967 NYS2d 704 [1st Dept 2013]; ***Seaman v Three Vil. Garden Club, Inc.***, 67 AD3d 889, 889 NYS2d 231 [2d Dept 2009]; ***Weiskopf v City of New York***, 5 AD3d 202, 773 NYS2d 389 [1st Dept 2004]). Here, setting aside the issue whether Devendra can be held liable as it did not occupy the abutting property, the plaintiffs have failed to submit any evidence that the storage area and propane tanks were located in the municipal parking lot located 10 to 12 feet from the rear of 386 Main. It is undisputed that the tanks were located on the easterly side of the building at the southeast corner.

The motion is unopposed by Buckley's. In addition, it is determined that both the reply and sur-reply submitted by Devendra and the plaintiffs do not add any new legal arguments or raise additional issues of fact. Both sets of papers merely expand upon, or refute, facts raised in the initial papers submitted in support of and in opposition to Devendra's motion, and both parties have had an ample opportunity to respond to the other. Thus, the Court has exercised its discretion and considered both the reply and sur-reply in deciding this motion (see ***Bayly v Broomfield***, 93 AD3d 909, 939 NYS2d 634 [3d Dept 2012]; ***Whale Telecom Ltd. v Qualcomm Inc.***, 41 AD3d 348, 839 NYS2d 726 [1st Dept 2007]; ***Allstate Ins. Co. v Raguzin***, 12 AD3d 468, 784 NYS2d 644 [2d Dept 2004]; ***Barbuto v Winthrop Univ. Hosp.***, 305 AD2d 623, 760 NYS2d 199 [2d Dept 2003]). As set forth above, neither submission raises a question of fact herein. Accordingly, Devendra's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Buckley's now moves for summary judgment on the grounds that the plaintiffs' damages were caused by the intentional acts of unknown third-parties, that its alleged wrongful conduct merely furnished the condition for the occurrence of the fire, and that, because the plaintiffs were not within the zone of danger, they do not have causes of action for emotional distress. In support of its motion, Buckley's submits, among other things, the pleadings, Cantwell's affidavit, the police arson report, and the depositions of the plaintiffs, Singh and Hebberd.

In his affidavit, Cantwell swears that during the course of Buckley's tenancy it was responsible for the care and maintenance of 386 Main, that all of its equipment "was up to code and passed inspection," and that Buckley's "retained a gas company who delivered two large propane tanks, which were maintained and filled by the gas company." He states that Buckley's stored "empty beer bottles in cardboard cases, [and] crushed and folded cardboard" in the "small area" in which the propane tanks were located. He indicates that he does not know "how the fire started, but I have come to learn that the fire was probably started by fireworks ... set off by unknown people in the municipal parking lot behind Buckley's."

Here, Buckley's has failed to establish its prima facie entitlement to summary judgment dismissing the plaintiffs' seventh and eight causes of action for negligence and property damage. Whether or not Buckley's can be considered a proximate cause of the occurrence or start of the fire, there are issues of fact whether its conduct permitted the spread of the fire to the plaintiffs' building (***Artalyan, Inc. v Kitridge Realty Co., Inc.***, 79 AD3d 546, 912 NYS2d 400 [1st Dept 2010]; ***Pierre-Louis v DeLonghi Am., Inc.***, 66 AD3d 857, 888 NYS2d 100 [2d Dept 2009]; ***Strnad v Garvin***, 64 AD3d 1230, 882 NYS2d 633 [4th Dept 2009]; ***Cuevas v Quandt's Foodservice Distribs.***, 6 AD3d 973, 775 NYS2d 429 [3d Dept 2004]).

As set forth above, Yarmus opines that "but for the debris and garbage improperly stored in proximity to both the structure and propane tanks ... the subject fire would not have spread to [the plaintiffs' building] with the speed and ferocity with which it did as a result of the same." In support of his opinion, Yarmus cites a number of code provisions, and states, among other things: "Section. 304.1.1 of the [State of New York Fire Code] states that 'accumulations of....combustible or flammable waste or rubbish of any type shall not be permitted to remain...in any court, yard, vacant lot, alley parking lot, open space,....or other similar structure'. Section 304.2 of the code mandates that 'storage of combustible rubbish shall not produce conditions that will create a nuisance or a hazard to the public health, safety, or welfare'".

Here, Buckley's has failed to submit any evidence that its conduct was not a substantial factor in the spread of the subject fire as a matter of law. The failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.***, *supra*). However, the record reveals that Buckley's is entitled to summary judgment dismissing the plaintiffs' ninth cause of action for emotional distress.

It is well settled that a plaintiff cannot recover for emotional distress caused by the negligent destruction of one's property, nor for emotional distress caused by observation of damage to one's

property (***Probst v Cacoulidis***, 295 AD2d 331, 743 NYS2d 509 [2d Dept 2002]; ***General Acc. Insurance. Co. v. Black & Decker (U.S.)***, 266 AD2d 918, 697 NYS2d 420 [4th Dept 1999]; ***Couri v Westchester Country Club***, 186 AD2d 712, 589 NYS2d 491 [2d Dept 1992]; ***Jensen v Whitford Co.***, 167 AD2d 826, 562 NYS2d 317 [4th Dept 1990]). In addition, the plaintiffs' ninth cause of action seeking damages for "emotional distress, depression and anxiety" must fail because New York does not recognizes such causes of action where the plaintiff was not within the "zone of danger" (*see* ***Bovsun v Sanperi***, 61 NY2d 219, 473 NYS2d 357 [1984]; ***Kennedy v McKesson***, 58 NY2d 500, 462 NYS2d 421 [1983]). That is, recovery must be premised upon a breach of a duty owed to the plaintiff, which endangered plaintiff's physical safety or caused plaintiff to fear for his or her own safety (***Savva v Longo***, 8 AD3d 551, 779 NYS2d 129 [2d Dept 2004]; ***Johnson v New York City Bd. of Educ.***, 270 AD2d 310, 704 NYS2d 281 [2d Dept 2000]; ***Losquadro v Winthrop University Hosp.***, 216 AD2d 533, 628 NYS2d 770 [2d Dept 1995]).

Here, the plaintiffs have testified that they did not arrive at the scene of the fire until after the fire was extinguished and the fire department had left the scene. It is beyond dispute, that their safety was not endangered, and that they could not, and did not, fear for their safety. Accordingly, that branch of Buckley's motion which seeks to dismiss the plaintiffs' ninth cause of action is granted.

It is noted that Buckley's additionally contends that the plaintiffs action should be dismissed on the ground of spoliation. Under the circumstance, a ruling as to the admissibility of evidence offered and the wisdom of delivering an adverse inference charge to the jury at trial should be made at the time of trial, when a determination as to the relevance of such evidence and such charge may be made in context (*see* ***Grant v Richard***, 222 AD2d 1014, 636 NYS2d 676 [4th Dept 1995]; ***Speed v Avis Rent-A-Car***, 172 AD2d 267, 568 NYS2d 90 [1st Dept 1991]). Accordingly, the subject branch of the motion is denied, without prejudice to renewal at the time of trial.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: Sept. 26, 2014

W. Gerard Asher
J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**