Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. HOWARD G. LANE **IAS Part 6**
Justice

MC ACROPOLIS, LLC,
Plaintiff,

-against-

SUPER LAUNDRY OF CRESCENT INC. and GREATER NEW YORK MUTUAL INSURANCE COMPANY,
Defendants.

Index No. 22473/11

Motion
Date March 18, 2014

Motion
Cal. No. 129

Motion
Seq. No. 5

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Notice of Motion/Amended Notice of Motion...	1-8
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Upon the foregoing papers it is ordered that the amended motion by plaintiff, MC Acropolis, LLC ("MC Acropolis") for an order granting summary judgment pursuant to CPLR 3212 against defendant, Greater New York Mutual Insurance Company ("Greater New York") is hereby denied.

This is an action sounding in negligence and breach of contract arising out of a fire that occurred on August 11, 2010, at the premises located at 24-16 38 Avenue, Long Island City, in the County of Queens. Plaintiff owned the subject premises and, in a lease dated October 28, 1993, defendant Super Laundry of Crescent, Inc. ("Super Laundry") leased the premises where the fire occurred for the purposes of operating a laundromat facility. Defendant Greater New York provided insurance to plaintiff for the subject premises from November 24, 2009 to November 24, 2010, which policy covered loss and damage to the premises caused by fire. As a result of the fire, non-party Consolidated Edison ("Con Ed") turned off the gas distribution system to the premises and plaintiff was required to have the gas distribution system tested and repaired before it could be turned

back on. Plaintiff filed a claim for compensation for this cost and defendant Greater New York denied its claim, prompting plaintiff to commence the instant action. Plaintiff has alleged that: defendant Super Laundry was negligent in causing the fire, defendant Super Laundry breached the terms of the lease agreement by failing to indemnify and hold plaintiff harmless after Greater New York denied plaintiff's claims for damages as a result of the fire under the policy, and that defendant Greater New York breached its contractual obligations under the insurance policy by failing to make payment to or indemnify plaintiff for the costs incurred by plaintiff for the testing and repairs to the gas distribution system.

At the outset, the Court notes that while the original Notice of Motion indicates that summary judgment is instantly being sought against both defendants, an Amended Notice of Motion indicates that summary judgment is only being sought against defendant Greater New York in the instant motion.

Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (*Andre v. Pomeroy*, 32 NY2d 361 [1974]; *Kwong On Bank, Ltd. v. Montrose Knitwear Corp.*, 74 AD2d 768 [2d Dept 1980]; *Crowley Milk Co. v. Klein*, 24 AD2d 920 [3d Dept 1965]). Even the color of a triable issue forecloses the remedy (*Newin Corp. v. Hartford Acc & Indem. Co.*, 62 NY2d 916 [1984]). The evidence will be construed in a light most favorable to the one moved against (*Bennicasa v. Garrubo*, 141 AD2d 636 [2d Dept 1988]; *Weiss v. Gaifield*, 21 AD2d 156 [3d Dept 1964]). The proponent of a motion for summary judgment carries the initial burden of presenting sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the proponent has met its burden, the opponent must now produce competent evidence in admissible form to establish the existence of a triable issue of fact (*see, Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well settled that on a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Pizzi by Pizzi v. Bradlee's Div. of Stop & Shop, Inc.*, 172 AD2d 504, 505 [2d Dept 1991]). However, the alleged factual issues must be genuine and not feigned (*Gervasio v. DiNapoli*, 134 AD2d 235 [2d Dept 1987]). The role of the court on a motion for summary judgment is to determine if bona fide issues of fact exist, and not to resolve issues of credibility (*Knepka v. Tallman*, 278 AD2d 811 [4th Dept 2000]).

In an action based on an insurance claim, the insured has

the initial burden of establishing that a valid insurance policy was in full force and effect and that a loss of property occurred. The burden then shifts to the insurer to demonstrate that an exclusion contained in that policy defeats the claim (*International Paper Co. v. Continental Cas. Co.*, 35 NY2d 322 [NY 1974]).

Plaintiff established a prima facie case that there are no triable issues of fact regarding the liability of defendant Greater New York. Plaintiff established a prima facie case that defendant Greater New York breached its contractual obligations under the subject insurance policy by failing to indemnify plaintiff pursuant to the terms of the insurance policy. In support of the motion, plaintiff presents, inter alia, the examination before trial transcript testimony of Jerry Papafloratos, the managing agent of the subject premises owned by plaintiff; the examination before trial transcript testimony of Louis Evangelista on behalf of defendant Super Laundry; the examination before trial transcript testimony of Vincent Deutsch on behalf of defendant Greater New York; the examination before trial transcript testimony of non-party witness, Richard Holt, a General Adjuster who was retained to perform an assessment of a first party property insurance claim brought by defendant Super Laundry, who testified that he observed damage to "gas piping" connecting the gas dryer to a gas pipe; an affidavit of Jerry Papafloratos wherein he averred that: a flex hose connecting the gas dryer to a gas pipe was directly damaged by the fire and had soot and/or fire scorching as a result of the fire and was replaced as a result; an affidavit of Nicholas Kiouzellis, a Licensed Master Plumber in the City of New York who inspected the subject premises, wherein he averred that: the damaged flex hose "is part of the building's gas distribution system as it is part of a system of pipes which distribute gas throughout the building;" photographs of a gas flex hose; and a copy of the subject insurance policy.

Plaintiff established a prima facie case that it's claim is covered as it is an exception to the exclusion set forth by the "Gas Systems Endorsement" to the subject policy. Plaintiff established that Greater New York provided an all risks insurance policy for the period of November 24, 2009 through November 24, 2010, which policy covered physical loss and damage to the property. The subject policy excludes coverage for damage to a gas system as a result of integrity testing; but the policy also contains an exception to the exclusion whereby Greater New York would cover damage as a result of integrity testing if the gas

system was subject to "a direct loss causing physical damage to a covered gas system."

The endorsement reads in relevant part:

> **Gas Systems Endorsement**
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> *******
>
> **1. This policy will not cover the following:**
>
> **(a) costs associated directly or indirectly with the enforcement of any law or ordinance that requires the testing of a gas system for integrity or condition; or**
>
> **(b) any loss to a gas system caused by testing for integrity or condition**
>
> **This exclusion does not apply if the testing is required due to a direct loss causing physical damage to a covered gas system from Fire; Lightening; Explosion, Aircraft or Vehicles; Riot or Civil Commotion; Sinkhole Collapse, Volcanic Action; Falling Objects; Weight of Snow, Ice or Sleet that is covered by the policy.**
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> **2. This exclusionary endorsement supersedes all other forms and endorsements, including endorsements that extend coverage to losses caused by the enforcement of any law or ordinance.**

In opposition, defendant Greater New York raised a triable issue of fact. Defendant Greater New York presented evidence that the plaintiff did not suffer direct damage to its gas system as a result of the fire; and as such, there is no coverage under the subject policy for the costs of the plaintiff having to test and repair its gas system which system was shut down for safety reasons after the fire occurred. In opposition, defendant Greater New York submits, inter alia, an affidavit of Thomas McGuire, a fire inspector employed by Loss Analysis, a company which was chosen by defendant Greater New York to perform an investigation as to the cause and origin of the subject fire, who avers that: "[o]n August 25, 2010, I performed an inspection and

investigation of the cause and origin of a fire that occurred on August 11, 2010" at the subject premises; "the fire did not cause any damage to the gas system piping through which gas service to the clothes dryers was provided;" the examination before trial transcript testimony of Louis Evangelista of defendant Super Laundry, who testified, inter alia that he did not see any damage to Super Laundry's gas system after the fire, and Super Laundry's gas system failed integrity testing for unspecified reasons; the examination before trial transcript testimony of Vincent Deutsch, an independent adjuster retained by defendant Greater New York, who testified, inter alia, that: he inspected the property five days after the fire and he did not observe any damage to either the plaintiff's gas system or to Super Laundry's gas system; and the examination before trial transcript testimony of Richard Holt, who testified that, the flex hose is not part of the hard piping system, but rather is merely a connector to the machines, and he did not see any fire damage to any gas lines or meters or any gas systems that were associated with the building's gas lines.

There is an issue of fact as to whether as a result of the fire there was physical damage to a "covered gas system" as defined under the terms of the subject insurance policy. Whether the plaintiff can recover proceeds from defendant Greater New York for its claimed loss is a triable issue of fact. As triable issues of fact remain, summary judgment is unwarranted and a trial is necessary.

Accordingly, the motion is denied.

This constitutes the decision and order of the Court.

Dated: June 4, 2014

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Howard G. Lane, J.S.C.