Claudisal Rest. Corp. v Shellville Realty Co., LLC
2014 NY Slip Op 33584(U)
October 30, 2014
Supreme Court, New York County
Docket Number: 114159/10
Judge: Paul Wooten
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CLAUDISAL RESTAURANT CORP., Plaintiff, -against- SHELLVILLE REALTY CO., LLC and GARY KRIM, d/b/a SHELL MANAGEMENT CO., Defendants.	Index No.: 114159/10 **ORDER WITH NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the within is a true copy of an Order of the Honorable Paul Wooten of the Supreme Court of the State of New York for the County of New York, dated October 30, 2014 and entered with the County Clerk on November 6, 2014..

Dated: New York, New York
November 12, 2014

FILED
NOV 17 2014
COUNTY CLERKS OFFICE
NEW YORK

LAW OFFICE OF STEVEN G. FAUTH, LLC

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BA 11/6/14 FE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN **PART** 7
Justice

CLAUDISAL RESTAURANT CORP.,
Plaintiffs,

-against-

SHELLVILLE REALTY CO., LLC AND GARY KRIM d/b/a SHELL MANAGEMENT CO.,

Defendants.

INDEX NO. 114159/10

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this motion by the defendants for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3
Reply Affidavits — Exhibits (Memo)	4

Cross-Motion: ☐ Yes ■ No

This is an action commenced by Claudisal Restaurant Corp. (plaintiff) against Shellville Realty Co., LLC and Gary Krim d/b/a Shell Management Co. (collectively, defendants) for damages as the result of a fire. Before the Court is a motion by defendants for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint in its entirety. The parties have completed discovery and the Note of Issue has been filed.

BACKGROUND

This action arises from a fire that occurred in the basement of a multi-purpose building located at 202-206 Thompson Street, New York, NY (premises) on the morning of April 10, 2009. Plaintiff operated a restaurant known as Ponte Vecchio Restaurant located on the first floor of the premises. At the time of the fire, plaintiff was leasing one of three commercial spaces within the premises owned and managed by defendants pursuant to a commercial lease agreement (lease) dated May 16, 2000 (affirmation of plaintiff's counsel, exhibit C).

The fire started in the building superintendent's workshop and spread to other areas of the basement before being contained and extinguished by the fire department. As a result of the fire, plaintiff was forced to suspend restaurant operations and then operate in a limited capacity before deciding to ultimately close the restaurant in 2012 (affirmation of plaintiff's counsel, ¶ 4). There is no definitive evidence as to the source of the fire (plaintiff's exhibit F; defendants' exhibits I, J).

Plaintiff obtained and maintained Fire and Casualty insurance from QBE Insurance Company. The QBE policy provided limits in the amount of $85,000 for loss of property, $36,000 for loss of business income and $2,000,000 in liability coverage (affirmation of plaintiff's counsel, ¶ 35). Plaintiff has received payment from QBE in the amount of $3,267.77 for property damages and $12,554.24 for loss of business income resulting from the fire (affirmation of plaintiff's counsel; defendants' exhibit M, D). Plaintiff claims to have also obtained a separate insurance plan with Castlepoint Insurance Company but was unable to recover for loss under that plan (affirmation of plaintiff's counsel, ¶ 35).

Plaintiff commenced this action against Shellville to recover damages under three separate causes action for loss of customers, loss of business and business opportunities, loss of income and profits and repair costs; breach of contract; and breach of the covenant of quiet enjoyment (complaint, ¶¶ 22, 26, 29). Defendants now move for summary judgment pursuant to CPLR 3212 seeking dismissal of the entire complaint.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the defendants are entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material

issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Santiago v Filstein*, 35 AD3d 184,185-186 [1st Dept 2006]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Defendants move for summary judgment on two grounds. Firstly, the defendants argue that plaintiff has failed to submit sufficient evidence to show that the fire was caused by the negligence of the defendants. In support of this assertion, defendants submit a four paragraph affidavit of James Pryor, one of two fire experts named in the defendants' CPLR 3101(d) disclosures. (aff of Pryor; defendants' exhibits I, J). Defendants also attach two unsworn and uncertified FDNY Incident Reports (defendants' exhibits G, H). The first is a "face sheet" indicating the "fire originated in the subject premises, in the basement, in the super's workshop... on the work bench, in combustible material (electrical wiring)" (defendants' exhibit G). The second incident

report lists the various units of the FDNY that responded to the fire and the actions that each unit took to extinguish the fire (defendants' exhibit H). Additionally, defendants submit the testimony of Massimo Rellini, the sole owner and shareholder of the plaintiff-corporation, and Ivan Spasov the superintendent of the premises, both of whom testified to having no personal knowledge as to the cause of the fire (defendants' exhibits, D, F).

The affidavit states that the defendants' expert "was unable to determine a specific cause for this fire because of the fire's destruction" (Aff of Pryor). However, the affidavit does not provide any factual or scientific basis for this conclusion. The New York Court of Appeals has made clear, that where the expert states his conclusion unencumbered by any trace of facts or data, his testimony should be given no probative force whatsoever (*see Adamy v Ziriakus*, 92 NY2d 396, 402 [1998]; *Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 533 n 2 [1991]; *Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [1st Dept 2008] ["In the absence of record support, an expert's opinions is without probative force"]).

Defendants rely heavily on the expected testimony set forth by their attorney in their expert disclosures. However, these disclosures which are prepared by defendants' attorney pursuant to CPLR 3101(d) do not constitute evidentiary proof in admissible form for the purposes of summary judgment (*see Velasco v Green-Wood Cemetary*, 48 AD3d 271 [1st Dept 2008]).

The two FDNY incident reports submitted by the defendants are also ineffective at providing support for their motion for summary judgment as they have not been certified as business records and are therefore inadmissable (*see* CPLR 4518[a]; *Hernandez v Tepan*, 92 AD3d 721 [2d Dept 2012], citing *Bailey v Reid*, 82 AD3d 809 [2d Dept 2011]).

Accordingly, the Court finds the two page affidavit of defendants' expert and the hearsay testimony and uncertified inadmissable documentary evidence to be insufficient to establish the defendants' prima facie entitlement to summary judgment (*see Winegrad*, 64 NY2d 851; *Santiago*, 35 AD3d 184; CPLR 3212[b]). Thus, the sufficiency of plaintiff's evidence on this ground raised

by defendants in support of their motion for summary judgment need not be addressed.

Alternatively, the defendants argue that the claims asserted by plaintiff have been waived pursuant the waiver of subrogation clause contained within Chapter 9 of the Lease attached as defendants' exhibit E, which provides:

> (e) Nothing contained herein above shall relieve Tenant from liability that may exist as a result of fire or other casualty. Notwithstanding the forgoing, including Owner's obligations to restore under subparagraph (b) above, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty and to the extent that such insurance is in force and collectable and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery with respect to subparagraphs (b), (d) and (c) above, against the other or any one claiming through or under each of them by way of subrogation or otherwise. The release and waiver herein referred to shall be deemed to include any loss or damage to the demised premises and/or to any personal property, equipment, trade fixtures, goods and merchandise located therein. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance. Tenant acknowledges that Owner will not carry insurance on Tenant's furniture and/or furnishings or any fixtures or equipment, improvements or appliances removable by Tenant and agrees that Owner will not be obligated to repair any damage thereto or replace the same.

Defendants also submit plaintiff's insurance policy which includes coverage for both property and business losses in the event of a fire (defendants' exhibit K). It is undisputed that in compliance with this provision, plaintiff submitted a claim to the insurance company and received payment through the policy in the amount of $3,267.77 for property damages and $12,554.24 for loss of business income resulting from the fire (affirmation of plaintiff's counsel; defendants' exhibit D, M). These payments are also included in the proof of loss submitted by defendants in support of this motion (defendants' exhibit M).

Defendants have demonstrated their prima facie showing of entitlement to summary

judgment by establishing: (1) a waiver of subrogation agreement existed between the parties; (2) the waiver agreement requires each party to seek recovery from their respective insurance providers before bringing any claim for fire loss against the other party; and (3) plaintiff obtained and maintained insurance coverage for both property and business damages. Thus, the burden now shifts to plaintiff to come forward with admissible evidence establishing the existence of a material issue of fact that would make a trial necessary (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81; *Zuckerman v City of New* York, 49 NY2d 557; CPLR 3212[b]).

Plaintiff concedes that "claims made under the policies with regard to business loss and property damage would not be recoverable against the defendant without obtaining the insurance policy limits" (affirmation of plaintiff's counsel, ¶ 37). Plaintiff also admits that it first sought reimbursement from its insurance carrier and has accepted payment far lower than the policy limits in satisfaction of that claim. Instead, the plaintiff puts forth two arguments that the damages sought from the defendant are distinct from those covered by the insurance policy and are therefore not subject to the waiver (affirmation of plaintiff's counsel, ¶ 35).

In its first argument in opposition to summary judgment, plaintiff submits the insurance policy, the lease, and an attorney affirmation in opposition to summary judgment. Plaintiff asks the Court to draw a distinction between the type of damages covered under the insurance policy and the damages sought after in the complaint Plaintiff argues that the Court should distinguish the business loss damages covered by its insurance plan from "future" business losses, which according to plaintiff, fall outside the scope of insurance and are therefore not waived.

As the plaintiff has not offered any evidence or case law to support this proposition, the Court declines to draw this distinction on its own. Having offered no evidentiary or legal basis in support of its first proposition, plaintiff has failed to establish the existence of a material issue of fact as to the legal classification of damages claimed in the complaint that would require a trial for

resolution (see *Winegrad*, 64 NY2d 851; *Santiago*, 35 AD3d 184; CPLR 3212[b]). Thus, plaintiff's first argument does not succeed in opposing defendants' motion summary judgment pursuant to CPLR 3212.

In its second argument in opposition, plaintiff cites language contained within the waiver clause of the lease agreement which reads: "The release and waiver herein referred to shall be deemed to include any loss or damage to the demised premises and/or to any personal property, equipment, trade fixtures, goods and merchandise located therein" (plaintiff's exhibit C). Plaintiff argues that this language limits the application of the waiver to "loss or damage to the demised premises and the physical contents therein." (affirmation of plaintiff's counsel, ¶ 34). However, this argument has already been fully examined in *Cresvale Intl. v Reuters Am.* (257 AD2d 502 [1st Dept 1999]) and has been deemed unavailing. In *Cresvale*, the First Department unanimously held that "the use of the words 'any loss', followed by the disjunctive 'or,' requires a much broader reading" (*Cresvale Intl.*, 257 AD2d at 505, citing *Coutu v Exchange Ins. Co.*, 174 AD2d 241 [3rd Dept1992] [where two words in an exclusion clause stated in disjunctive, they must be separately considered]). In accordance with the First Department's conclusion, the Court construes the instant waiver agreement to include "any loss" covered under the insurance policy (*Coutu*, 174 AD2d 241). Thus, as plaintiff's insurance included coverage for both property damage and business losses, the claims are waived and plaintiff fails to oppose summary judgment on this argument.

Although in the notice of motion defendants state that they are seeking to dismiss plaintiff's entire complaint, defendants do not address plaintiff's causes of action for breach of the lease and breach of the covenant of quiet enjoyment but for one paragraph in their reply affirmation (reply at 7). However, upon review of the record, the Court finds that plaintiff's claims for breach of the lease and breach of the covenant of quiet enjoyment are merely a subterfuge designed to side-step the agreed upon waiver which purportedly only applies to claims for negligence. These claims,

although fashioned as contract claims, are based solely upon the theory of defendants' "carelessness, recklessness, and negligence" rather than any contractual obligation owed to plaintiff. Therefore these claims fall within the ambit of the waiver of subrogation clause (complaint, ¶ 23; *see Gap v Red Apple Cos.*, 282 AD2d 119, 125-126 [1st Dept 2001] [affirming the dismissal of contract claims asserted "to circumvent the waiver of subrogation clause"]; *see also American Motorist Ins Co v Morris Goldman Real Estate Corp*, 277 F Supp 2d 304, 307-08 [SDNY 2003] [contract claims grounded solely on defendant's negligence are subject to the waiver of subrogation clause]). Therefore, the defendants' motion seeking dismissal of the entire complaint is granted.

CONCLUSION

Accordingly it is,

ORDERED that the defendants Shellville Realty Co., LLC and Gary Krim d/b/a Shell Management Co.'s motion for summary judgment, pursuant to CPLR 3212, is granted and the complaint is hereby dismissed with costs and disbursements to the defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the defendants are directed to serve a copy of this order with Notice of Entry upon the plaintiff and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
NOV 06 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10/30/14

PAUL WOOTEN J.S.C.

Check one: ■ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**