

**Interested Underwriters at Lloyds of London v
Filt-Rite Co., Inc.**

2015 NY Slip Op 30038(U)

January 6, 2015

Supreme Court of New York County

Docket Number: 153873/2012

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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INTERESTED UNDERWRITERS AT LLOYDS OF
LONDON a/s/o ROBERT CUILLO and
GUDRUN CUILLO,

Plaintiff,

-against-

Index No. 153873/2012

DECISION/ORDER

FILT-RITE CO., INC. and LION HEART DESIGN, INC.
and LION HEART CONSTRUCTION,

Defendants.

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LION HEART DESIGN, INC.,

Third-Party Plaintiff,

-against-

SOVEREIGN APARTMENT, INC.,

Third-Party Defendant.

-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

This is a subrogation action arising out of extensive water damage that was allegedly caused by defendant Lion Heart Design Inc.'s ("Lion Heart") defective installation of a HVAC unit. Plaintiff Interested Underwriters at Lloyds of London ("Lloyds") now moves an Order pursuant to CPLR § 3212 granting summary judgment as to liability against defendant Lion Heart. Lion Heart

cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment and dismissing this action as to it. For the reasons set forth below, both motions are denied.

The relevant facts are as follows. Plaintiff's subrogors own apartment 37D (the "Apartment") in a building located at 425 East 58th Street, New York, New York, known as Sovereign Apartment, Inc. ("Sovereign"). In 2007, the Apartment suffered a broken water supply line within the unit. Thereafter, Sovereign hired defendant Filt-Rite Co., Inc. ("Filt-Rite") to supply and install new HVAC units for the Apartment. Filt-Rite then hired Lion Heart to install the new HVAC units. Part of this installation included installing a "bleeder valve," also referred to as a "hose-bib style drain," to one of the units. While Filt-Rite provided all materials necessary for the installation, Lion Heart was responsible for selecting the specific materials from Filt-Rite's storeroom for the installation. Lion Heart installed the new HVAC units herein at issue sometime between February 11, 2009 and April 18, 2009.

On or about April 13, 2011, a water leak sprung from one of the HVAC units installed by Lion Heart causing extensive water damage in the Apartment. Plaintiff alleges that a cap on the bleeder valve failed and caused the flood. Specifically, plaintiff's expert Alan Fidellow ("Fidellow") examined the subject cap and valve after it was removed from the Apartment and found that: (1) the split cap did not have a gasket on it; (2) the split cap did not have pipe tape on it; and (3) the valve was made out of brass, while the cap was made out of aluminum zinc alloy causing a galvanic condition resulting in corrosion. Based on these findings, plaintiff's expert attests that in his professional opinion, the installing contractor used a cap that was not suitable for the system, which caused the cap to split and water to flow into the Apartment. This conclusion is directly disputed by Lion Heart's expert Daryl J. Smith ("Smith") who attests that the cause of the

flood was the fact that the bleeder valve was left open and not due to the allegedly defective cap. Specifically, Smith attests that any corrosion in the cap was caused by the dissimilar metals of the valve and the cap and the presence of the water in the cap caused by the valve being open and not the absence of a washer/gasket in the cap. Further, Smith attests that the cap “is meant to protect the threads on the [bleeder valve] and not contain the water in the system if the [bleeder] valve is open.” Additionally, according to Lion Heart’s employee Howard McCathern (“McCathern”), who was responsible for installing the HVAC units herein at issue, it was his custom to always check to make sure that a gasket or washer was in place in the cap prior to installing it and that the bleeder valve was closed upon completion of the installation. Milan Kmotras, the Resident Manager for Sovereign, also testified that he inspected the units after installation and that at that time the bleeder valve was closed. Neither side has presented evidence demonstrating conclusively whether the valve was indeed open or closed when the incident occurred. However, according to defendant’s expert Smith, “because the water flowed vigorously and did not just drip out of the incident cap, it is evident that the incident [bleeder] valve was open and not closed at the time of the incident.”

As a threshold matter, plaintiff’s assertion that this court should not consider Lion Heart’s untimely cross-motion as it was filed more than sixty days after the Note of Issue was filed and Lion Heart failed to show good cause for its delay is without merit. It is well established that a cross-motion for summary judgment made after the expiration of the applicable time period “may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief ‘nearly identical’ to that sought by the cross-motion.” *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 281 (1st Dept 2006); *Brill & Meisel v. Brown*, 113 A.D.3d 435 (1st Dept 2014). Here, Lion Heart seeks nearly identical relief as that

sought by plaintiff in its timely motion for summary judgment as they seek to dismiss the exact claim plaintiff seeks summary judgment on. As such, Lion Heart did not need to demonstrate good cause and it is proper for this court to address Lion Heart's cross-motion.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *Id.*

In the present case, summary judgment is inappropriate as neither party has made a *prima facie* showing of its entitlement to judgment as a matter of law and there are clearly disputed issues of fact as to Lion Heart's liability, if any, in this matter. Both parties have presented expert affidavits that provide different theories as to the cause of the incident. While plaintiff's expert attributes the incident to the faulty installation of an improper cap on the bleeder valve by Lion Heart, Lion Heart's expert attests that the cap, even if it was the one installed by Lion Heart, is not responsible for the leak but that the leak was caused due to the fact that the bleeder valve was left open, which the evidence establishes was not left open by Lion Heart. Based on these conflicting affidavits, this court cannot determine Lion Heart's liability or lack thereof as a matter of law. Instead, it is up to the trier of fact to resolve such disputed issues.

Accordingly, plaintiff's cross-motion and Lion Heart's cross-motion are denied. This constitutes the decision and order of the court.

Dated: 1/6/15

Enter: _____


 J.S.C.
CYNTHIA S. KERN
 J.S.C.