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SHORT FORM ORDER

INDEX No. 12-8638
CAL. No. 15-00413OT

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 5-15-15 (#001)
MOTION DATE 5-27-15 (#002)
ADJ. DATE 7-14-15
Mot. Seq. # 001 - MG; CASEDISP
002 - MD

BLOCKWELL REALTY LLC,

Plaintiff,

- against -

J.D. KITTON, INC. d/b/a XO RESTAURANT WINE & CHOCOLATE LOUNGE,

Defendant.

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Upon the following papers numbered 1 to 47 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 7; Notice of Cross Motion and supporting papers 21 - 32; Answering Affidavits and supporting papers 8 - 18; 33 - 39; 40 - 41; Replying Affidavits and supporting papers 19 - 20; 42 - 47; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant J.D. Kitton, Inc. d/b/a XO Restaurant Wine & Chocolate Lounge for summary judgment dismissing the complaint pursuant to CPLR § 3212 is granted; and it is further

ORDERED that the cross motion by plaintiff Blockwell Realty, Inc., for partial summary judgment as to liability pursuant to CPLR §3212 is denied as moot.

Plaintiff, Blockwell Realty LLC, owner of real property located at 50 Gerard Street, Huntington, New York, commenced this action to recover damages for "loss of income" and "lost income" against its tenant, J.D. Kitton, Inc. d/b/a Wine & Chocolate Lounge, after the property was damaged by fire on April 19, 2011. Plaintiff alleges that Kitton's negligence caused the fire. The first cause of action alleges negligence by Kitton causing "a significant loss of income." The second cause of action alleges negligence by Kitton causing "lost income." Plaintiff filed this action on March 16, 2012, after defendant filed the related action *J.D. Kitton, Inc. v Blockwell Realty, LLC* Index No. 06347/2012

seeking a return of its security deposit and other damages. Defendant answered on May 25, 2012, and has asserted twenty four affirmative defenses, including the economic loss rule. The matters were joined for discovery and trial by order of this court on July 22, 2014 (Asher J.) along with *Rutgers Casualty Insurance Company a/s/o Blockwell Realty, LLC, v J.D. Kitton Inc. d/b/a XO Restaurant Wine & Chocolate Lounge* Index No. 20854/2012 .

Defendant now moves for summary judgment in its favor dismissing the complaint pursuant to CPLR §3212. In support of the motion, defendant submits, among other things, the pleadings, and the deposition transcript of Lewis Block, owner of Blockwell. In opposition, plaintiff submits among other things, various correspondence, an appraisal, and a construction contract.

Plaintiff moves for partial summary judgment in its favor on the issue of liability pursuant to CPLR §3212. In support of the motion, plaintiff submits, among other things, the pleadings, the prior orders of the court joining this matter with *J.D. Kitton, Inc. v Blockwell Realty, LLC,* Index No. 06347/2012 for discovery and trial, an affidavit of Lewis Block, the lease, the deposition transcript of Jason Kitton, owner of Kitton, Inc., the Fire Marshal's report, certified police reports, and an expert report of Frank Johnson of Arson-Fire Consultants Inc. In opposition, defendant submits the deposition transcripts of Lewis Block and Jason Kitton.

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]).

The elements of a negligence claim are the existence of a duty, a breach of that duty, and damages proximately caused by that breach of duty (***Lapidus v State***, 57 AD3d 83, 866 NYS2d 711 [2d Dept 2008]).

Defendant contends that plaintiff's loss of income and lost rent claims are speculative as the lost income or rent sought are for a third floor apartment contemplated but not built by plaintiff. It is undisputed that plaintiff received in excess of $500,000.00 for damage to real property, personal property and lost rental income from its fire insurance carrier. Plaintiff's complaint, clarified by its bill of particulars, seeks rental income for a third floor residential apartment that has not been built by plaintiff. Defendant maintains that plaintiff's building of the third floor was speculative, as is any potential profit from rental income, that plaintiff lacked the finances to build a third floor, and that the damages claim is barred by the economic loss rule.

Defendant has established its prima facie entitlement to summary judgment dismissing the complaint as a matter of law as the damages demanded are speculative. Plaintiff testified at his examination before trial that he did not have any leases for the prospective third floor residence. The

construction would cost "around a million dollars." Block testified he "thinks" Bethpage Federal Credit Union was going to finance the project. Moreover, plaintiff admitted that after April 19, 2011, there was a downturn in the residential real estate market, and there has been no showing that the proposed construction project and real estate venture would be profitable. Tort actions have well-settled rules relating to the recovery of damages:

> The person responsible for the injury must respond for all damages resulting directly from and as a natural consequence of the wrongful act ... whether the damages could or could not have been foreseen by him. The damages cannot be remote, contingent or speculative. They need not be immediate, but need to be so near to the cause only that they may be reasonably traced to the event and be independent of other causes ...

(***Steitz v Gifford***, 280 NY 15, 20, 19 NE2d 661 [1939]). Tort actions differ from contract actions as there is no requirement that the damages were contemplated by the parties, "but the principle that damages must be reasonably certain and not based on speculation is the same" (***Guard–Life Corp. v Parker Hardware Mfg. Corp.***, 50 NY2d 183, 197, 428 NYS2d 628 [1980]). That is to say, the quantum of damages must "be capable of measurement based upon known reliable factors without undue speculation" (***Ashland Mgt. v Janien***, 82 NY2d 395, 403, 604 NYS2d 912 [1993]) and "directly traceable to the breach, not remote or the result of other intervening causes" (***Kenford Co. v Erie County***, 67 NY2d 257, 261, 502 NYS2d 131 [1986]). "[A] cause of action for negligence ... seeks to provide a remedy for an individual injured because of another's violation of an obligation imposed not by contract, but by law. It does not attempt to afford the injured party the benefit of any bargain, but rather endeavors to place him in the position he occupied prior to his injury." ***Martin v Dierck Equip. Co.***, 43 NY2d 583, 589, 403 NYS2d 185 [1978].

The economic loss rule, which defendant also contends bars recovery here, provides that there can be no recovery in tort when the only damages alleged are for economic loss. In other words, a plaintiff who has sustained an economic loss, but has not sustained any injury to person or property is limited to recovery in contract. The economic loss rule was adopted by the Court of Appeals in ***Schiavone Constr. Co. v Elgood Mayo Corp.***, 56 NY2d 667, 451 NYS2d 720 (1982). Generally, it applies in tort recovery in strict products liability and negligence against a manufacturer where recovery is not available to a purchaser when the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue (*see* ***Bocre Leasing Corp v General Motors Corp.***, 84 NY2d 685, 621 NYS2d 497 [1995]; ***Weiss v Polymer Plastics Corp.***, 21 AD3d 1095, 802 NYS2d 174 [2d Dept 2005]; ***Atlas Air v General Electric Co.***, 16 AD3d 444, 791 NYS2d 620 [2d Dept 2005]; ***Amin Realty v K&R Construction Corp.***, 306 AD2d 230, 762 NYS2d 92 [2d Dept 2003]). Where a plaintiff is essentially seeking enforcement of the contractual bargain, the action should proceed under a contract theory (*see* ***Bellevue S. Assoc. v HRH Constr. Corp.***, 78 NY2d 282, 574 NYS2d 165 [1991]; ***Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.***, 70 NY2d 389, 521 NYS2d 653 [1987]). In contrast, tort recovery is allowed for personal injuries and damage to "other property" (*see* ***Shema Kolainu-Hear Our Voices v ProviderSoft, LLC***, 832 FSupp2d 194 [2010]; ***Praxair, Inc v Gen. Insulation Co.***, 611 FSupp2d 318 [2009]).

Here, plaintiff has not alleged damages regarding personal injury or any property. Undoubtably, plaintiff suffered damage to property from the fire, but it is not alleged in the damages sought in either cause of action. In fact, plaintiff admits he was fully compensated for all damages to real and personal property. The economic loss rule would therefore bar recover as no property is alleged to have been damaged and plaintiff seeks recovery only for the proposed third floor (*see* ***Bellevue S. Assoc. v HRH Constr. Corp.***, 78 NY2d 282, 574 NYS2d 165 [1991]); ***Village of Groton v Tokheim Corp.***, 202 AD2d 728, 608 NYS2d 565 [1994]).

In opposition, plaintiff has not raised any triable issues of fact. It is alleged in opposition that plaintiff, in anticipation of building the extension spent $150,862.89, lost over $1,000,000.00 increased value to the property, $49,192.00 in unreimbursed lost rents for tenants immediately after the fire, lost a deposit for construction costs of $15,000.00, and lost $8,335.50 as part of a good faith deposit to the financing company. None of these amounts are alleged as damages in either cause of action of the complaint. The first cause of action seeks "loss of income" and the second seeks "lost income." When asked at his examination before trial Lewis Block confirmed that he was suing for the loss of rents for the apartments that were going to be built on the third floor. Plaintiff has not moved to amend the complaint. Plaintiff has not shown that financing was actually approved for the project but only that he applied for the loan. The credit union's response called for twenty-two requests for additional documentation. Moreover, plaintiff has not demonstrated that the proposed apartments would be rented and has conceded that market conditions have deteriorated since the time of the fire. Critically, when Lewis Block was asked if he had ever considered going back to Bethpage Financial for the third floor expansion of the building after repairs had been made and the building is fully occupied, he responded that it was "[t]oo stressful" and the market had changed. In other words, plaintiff voluntarily terminated the expansion project because it now believed, due to a change in market conditions, that the venture would be unprofitable. Accordingly, as the damages alleged are speculative (*see* ***Greasy Spoon, Inc., d/b/a West Side Storey v Jefferson Towers, Inc.***, 75 NY2d 792, 552 NYS2d 92 [1990]), defendant's application for summary judgment is granted and the complaint is dismissed.

Plaintiff has moved for partial summary judgment with regard to liability. Plaintiff has established its prima facie entitlement to summary judgment on the issue of liability. The certified report of the Fire Marshall concluded that the fire was caused by careless discarded candles. The certified report of the Suffolk County Police Department Arson Squad determined that there was no other possible ignition source other than the tea candles deposited in the plastic garbage can located in the kitchen. Plaintiff has also submitted an expert report from Frank Johnson, a certified fire and explosion investigator, who opines that the fire was caused by the careless discard of tea candles into the garbage can by a restaurant employee. Plaintiff has demonstrated a duty of care based upon both the lease provisions to operate the restaurant in a safe and sanitary manner, as well as a common law duty that a tenant must exercise reasonable care in keeping premises in good order. That duty was violated by the accidental fire which started in the garbage pail of defendant's kitchen.

In opposition, defendant relies on the deposition testimony of Jason Kitton who told the Fire Marshall he did not believe the fire was started by the tea candles. Kitton testified that the candles last approximately two hours and when the wax is gone they are completely disposable. He testified that there is no heat. You could touch it with your hands. "Probably within a minute it is cold. There is no

emanating heat and the fact that the Fire Marshall said the fire started four hours after he left, it seems impossible that the tea candles caused the fire." The testimony is self-serving, conclusory, and not based upon any expertise (***Spodek v Park Property Development Associates*** 263 AD2d 478, 693 NYS2d 199 [2 Dept 1999] *leave to appeal denied* 94 NY2d 760, 706 NYS2d 81[1999]). Moreover, defendant has not offered any other possible alternative to the cause of the fire (***Speller v Sears, Roebuck & Co.***, 100 NY2d 38, 760 NYS2d 79 [2003]). When Kitton was asked if he had any training in determining the cause and origin of fire he admitted that he did not. Kitton's deposition testimony and opinion are insufficient to defeat plaintiff's motion on the issue of liability as no issue of fact has been raised by competent evidence. However, in light of the determination herein that plaintiff's damages are speculative and the dismissal of the complaint, the motion is denied as moot. Accordingly, plaintiff's motion for summary judgment on the issue of liability is denied.

Dated: Dec. 28, 2015

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION