

Utica First Ins. Co. v Vollrath Co., LLC

2019 NY Slip Op 32118(U)

July 17, 2019

Supreme Court, New York County

Docket Number: 158973/2018

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 158973/2018

UTICA FIRST INSURANCE COMPANY, AS SUBROGEE OF
WHYNOT MY WAY, LLC, D/B/A AKASHI,

MOTION DATE 07/09/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

THE VOLLRATH COMPANY, LLC, 3 STAR ELECTRIC INC.,
BALTER SALES CO. INC., and E & M ELECTRICAL NY CORP.

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36

were read on this motion to/for JUDGMENT - DEFAULT

In this subrogation action by a property insurer to recover benefits paid to its insured in connection with fire damage in the basement area of the insured's sushi restaurant, the plaintiff insurer renews its motion pursuant to CPLR 3215 for leave to enter a default judgment against the defendant E&M Electrical NY Corp. (E&M). E&M submits no opposition. The motion is granted to the extent that the insurer may enter judgment on the issue of liability against E&M, and the issue of damages is referred to a referee to hear and report.

By order dated February 11, 2019, the court denied the insurer's initial motion for leave to enter a default judgment against E&M, without prejudice to renewal upon proper papers. Specifically, the court concluded that the insurer had failed to adduce evidence constituting proof of the facts underlying its claim, inasmuch as it did not submit documentary evidence or affidavits from someone with knowledge as to how E&M's purported negligence caused or contributed to the subject fire. In its renewed motion, the insurer relies on the same submissions as on its initial motion, but now submits a report of the Bureau of Fire Investigation of the New York City Fire Department (FDNY) that contains the statements of an E&M employee and FDNY officers, investigators, and firefighters.

The report includes a statement by FDNY Lt. Thomas Breslin, who responded to the fire, and concluded that the fire was burning in the rear of the basement kitchen area in and around electrical deep fryers, and extended to wood paneling directly behind the fryers. An E&M employee reported to the FDNY that he was called to the restaurant prior to the fire because an electrical circuit repeatedly tripped. According to the report, the E&M employee stated that he

“arrived at the subject premises around 0830 hrs; that he reported electrical problem was a circuit breaker that kept tripping; that the problem appeared to be two separate wires entering the same 20 amp circuit breaker; that he separated the two wires and ran them each to their own dedicated 20 amp breaker; that he finished the work around 0900 hrs; that upon finishing the work he plugged the electrical cooking appliances (which were unplugged prior to his arrival) into their respective outlets; that he did not operate the electrical cooking appliances after plugging them in; and finally that the circuit breakers appeared to him to be functioning properly when he finished the work on the morning of the incident.”

The report further indicates that the restaurant's manager confirmed that, 30 minutes after E&M completed its work, a fire broke out in the kitchen area near the electric frying equipment. The manager, as well as the chef for the restaurant, both informed investigators that the restaurant had been closed for several days prior to the fire for the New Year's holidays, and that the fryers had been unplugged during that period, that they were again plugged in only when they reopened the restaurant, but that upon replugging the fryers into the plug socket, the electrical circuit breakers repeatedly tripped. The E&M employee interviewed by the Fire Marshal corroborated that the fryers were unplugged when he arrived to service the premises on the morning of the fire. The FDNY investigator concluded that the fire was accidental, and that he “observed fire damage to electrical appliances (electric grill, electric fryers) in cooking area” and to the “wall behind cooking area, damage originates at counter height near electric appliances and extends upwards to ceiling height, and into and around vent hood above cooking area.”

The plaintiff insurer has now satisfied the requirements of CPLR 3215(f), which provides that, on a motion for leave to enter a default judgment, the movant must file proof of service of the summons and complaint upon the nonappearing defendant, proof of the facts constituting the claim of negligence against it, and proof of the default (*see Rivera v Correction Officer L.*

Banks, 135 AD3d 621, 622 [1st Dept 2016]). "It is enough that [the plaintiff] shows facts and conditions from which the negligence of the defendant and the causation of the accident by that negligence may be reasonably inferred" (*Spett v President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 205 [1967], quoting *Dillon v Rockaway Beach Hosp.*, 284 NY176, 179 [1940]). The facts adduced by the insurer here would permit a finder of fact to draw an inference that E&M's negligence caused or contributed to the fire, inasmuch as circumstantial evidence alone, such as that adduced here, may create an inference that a defendant was negligent (*see Portec, Inc. v Gulf Oil Corp.*, 158 AD2d 806, 807 [3d Dept 1990]; *Sherman v Concourse Realty Corp.*, 47 AD2d 134, 137 [2d Dept 1975]). Moreover, the insurer initially moved for this relief less than one year after E&M defaulted in this action (*see CPLR 308[2]; 320[a], 3215[c]; Gerschel v Christensen*, 128 AD3d 455, 457 [1st Dept 2015]). In addition, the insurer satisfied the notice requirements for this motion, as articulated in CPLR 3215(g).

Accordingly, it is

ORDERED that the plaintiff's motion is granted to the extent that it is granted leave to enter a default judgment on the issue of liability against the defendant E&M Electrical NY Corp., with the full amount of damages assessed against it to be determined by a referee; and it is further,

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this Court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose: the issue of the amount of damages proximately caused by the negligence of the defendant E&M Electrical NY Corp.; and it is further,

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon which the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/suptctmanh at the

"References" link under "Courthouse Procedures"), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further,

ORDERED that counsel for the plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an Information Sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further,

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further,

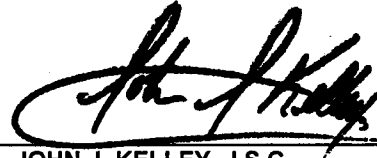
ORDERED that the hearing will be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320[a]) (the proceeding will be recorded by a court reporter, the rules of evidence apply, etc.) and, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completion; and it is further,

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts (22 NYCRR 202.44).

This constitutes the Decision and Order of the court.

7/17/2019

DATE



JOHN J. KELLEY, J.S.C.

**HON. JOHN J. KELLEY
J.S.C.**

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE