Hayes v Akam Asso., Inc.
2019 NY Slip Op 32853(U)
September 25, 2019
Supreme Court, New York County
Docket Number: 156457/2013
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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PATRICK HAYES and CARMEN PACHECO,

Index No. 156457/2013

Plaintiffs,

-against-

AKAM ASSOCIATES, INC., NAZIM TAIPOVIC, THE 350 EAST 62ND STREET CONDOMINIUM a/k/a 350 EAST 62ND STREET ASSOCIATES and WINFIELD SECURITY CORPORATION,

Defendants.

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Robert D. Kalish, J.S.C.:

In this action seeking damages for property damage, as well as damages for emotional distress and loss of companionship of a family pet, defendants Akam Associates, Inc. (Akam), Nazim Taipovic (Taipovic), The 350 East 62nd Street Condominium, and 350 East 62nd Street, Inc. s/h/a The 350 East 62nd Street Condominium a/k/a 350 East 62nd Street Associates (collectively, the Condo) together move for summary judgment dismissing the complaint as against them. Defendant Winfield Security Corporation (Winfield) also moves separately for summary judgment dismissing the complaint and all cross claims as against it.

Factual and Procedural Background

On July 16, 2012, a fire occurred in apartment 1A located at 350 East 62nd Street, New York, New York. The apartment is owned by plaintiff Carmen Pacheco (Pacheco) and her mother. Plaintiff Patrick Hayes (Hayes) is Pacheco's husband who also lives in the apartment. Defendants Akam and the Condo jointly managed and maintained the building. Defendant Taipovic[1] is the

[1] Akam, the Condo, and Taipovic are collectively referred to as the "Akam defendants."

building's superintendent, and defendant Winfield provides security for the building. Non-party Cesar Peralta (Peralta), a Winfield employee, was providing security services for the building at the time of the fire.

Hayes and Pacheco were not home at the time of the fire, but upon their return, they learned that their 14-year-old dog, Toto[2], died as a result of the smoke condition from the fire. Toto was lying on the street under a white sheet when the plaintiffs approached their building. Hayes claims that Toto was a member of the family who went on vacations and to restaurants and football games.

Plaintiffs commenced this action on September 25, 2013 (see Moore affirmation, exhibit A). In their first cause of action, plaintiffs allege that defendants failed to inspect, maintain, supervise, operate or control the building allowing Toto to die, and they seek damages for the death of Toto. Plaintiffs' second cause of action seeks damages resulting from the emotional distress they suffered due to defendants' disregard of the fact that their apartment might be on fire, and that said negligence was the cause for the death of Toto. Plaintiffs' third cause of action also seeks damages for the emotional distress suffered by the death of Toto. Plaintiffs' fourth cause of action seeks damages for Taipovic, Akam, and Winfield's fraudulent acts of forging records and reports regarding the fire. Plaintiffs' fifth cause of action seeks damages for the loss of companionship of

[2] Pacheco adopted Toto in 1999 from the American Kennel located on Lexington Avenue, New York, New York, for a cost of approximately $1,200.00. Plaintiffs' complaint is styled as being brought by them "individually and as guardians of TOTOLOVE HAYES (deceased)," who is referred to in the complaint as "Toto." As a non-human does not have standing to bring an action or be a party to an action, nor be a member of a guardian/ward legal relationship of any type recognized in the State of New York, that portion of the caption is stricken and shall be amended accordingly. (*See generally Nonhuman Rights Project, Inc.* ex rel *Tommy v Lavery*, 152 AD3d 73 [1st Dept 2017].)

Toto. Plaintiffs' sixth cause of action seeks damages for defendants' breach of a duty to plaintiffs to have properly trained personnel to handle the fire emergency. In their seventh cause of action, plaintiffs seek damages for defendants' failure to notify plaintiffs that their employees were not "fire trained and did not possessed [sic] the appropriate license." In their eighth cause of action, plaintiffs seek damages for the emotional distress they suffered when seeing Toto lying dead on the street under a white sheet. In their ninth and tenth causes of action, plaintiffs seek damages for the fact that Taipovic did side work during regular working hours, thereby breaching a duty to plaintiffs. In their eleventh cause of action, plaintiffs seek damages for the expenses they continually incur due to the loss of Toto's companionship. Plaintiffs' also assert, as styled, a second tenth cause of action (a "twelfth" cause of action) seeking damages for the fact that Winfield knew or should have known that Taipovic was doing side work and failed to report it to the Akam defendants, and that Taipovic's side work was a theft of services, and that such actions breached a duty to plaintiffs (See Moore affirmation, exhibit A).

Issue was joined by the Akam defendants on October 16, 2013, and by defendant Winfield on October 22, 2013.

The Akam defendants now move for summary judgment dismissing the complaint on the ground that they are not liable for the fire and therefore are not responsible for any resulting damages. The Akam defendants argue that the fire was caused by plaintiffs placing clothing or other material on or too close to the light bulb in an overcrowded bedroom closet and then leaving the light on when they left the apartment. The Akam defendants argue that there is no proof of any defects in the electrical system or fixtures in the building, and that the building was safe and regularly inspected. Further, the Akam defendants argue that they did not commit fraud, and that

they acted with proper diligence and haste once the fire was detected. Finally, the Akam defendants argue that New York does not recognize a claim for emotional distress for the loss of a pet, but rather, that pets are considered personal property in the State of New York.

Winfield also moves for summary judgment dismissing the complaint on the ground that it did not owe a duty to the plaintiffs at the time of the fire. Winfield argues that, pursuant to its contract with the Condo, it was to provide security services to the Condo. Further, the language of the contract states that no other person is an intended third-party beneficiary under the agreement and that Winfield was not assuming a duty to protect any other persons or property. Therefore, according to Winfield, it owed no duty to safeguard plaintiffs from a fire or to insure plaintiffs' property, Toto, from harm. Moreover, Winfield argues that a security company does not have a common-law duty to protect the public from acts of third parties. Winfield also argues that it cannot be held liable for negligent training or hiring of security guards because Peralta's conduct did not cause plaintiffs' damages.

Winfield also argues that, even if Peralta altered the logs at the direction of Taipovic regarding the fire, such act would fail to satisfy any element of a cause of action for fraud. Winfield further argues that plaintiffs have not alleged how such an act, upon which they relied, caused them injury. Winfield argues that plaintiffs have not alleged how their reliance on an alleged after-the-fact altering of a log caused them injury.

Finally, Winfield argues that plaintiffs' claims for wrongful death, loss of companionship, and emotional distress as to Toto must be dismissed because pets are treated as property and no such causes of actions exist in New York.

In opposition to the motions, plaintiffs argue the Akam defendants have failed to

demonstrate prima facie entitlement to summary judgment. In support of that argument, plaintiffs contend that defendants had a common law duty to maintain the property in a reasonably safe condition, which they did not.

Plaintiffs submit the affidavit of nonparty Juan Erik Hernandez (Hernandez), who testified that he worked as a cook in the basement kitchen of Neely's restaurant located in the building (see Lugo affirmation, exhibit 14). At about 10:00 a.m., Hernandez smelled smoke in the basement kitchen and searched for its source. He then sent a co-worker, Alberto, to get Taipovic and bring him downstairs. When Taipovic did not appear after 10 minutes, Hernandez went upstairs and found Taipovic in the building lobby. Taipovic then accompanied Hernandez downstairs, looked inside a ceiling duct with a flashlight, and said that he saw smoke but did not know its origin. Hernandez states that Taipovic thought the smoke was coming from a cable or short. Taipovic told Hernandez to call the "company" and have them check the cable. Hernandez stated that, while he continued to look for smoke, the smell became stronger. He then spoke with Peralta, the security guard, who told Hernandez that he also smelled smoke and called Taipovic. Taipovic then walked outside the building and again told Hernandez to call the "company." Hernandez then had a co-worker, Cipriano, get Taipovic, but Taipovic told him they were crazy and to stop bothering him.

Hernandez, and the workers of Neelys, became increasingly concerned about the smoke odor and again sought out Taipovic. Hernandez saw Taipovic in the lobby of the building opening the door to the first-floor apartment. According to Hernandez, when Taipovic opened the door to the apartment, black smoke came out. Taipovic immediately closed the apartment door and yelled at Hernandez to get out of the building and leave. Hernandez then saw firefighters enter apartment 1A and saw them carry out a small dog. A firefighter tried but failed to resuscitate the dog.

Plaintiffs also rely on the affidavit of nonparty Lulu Silva (Silva), a building resident, who arrived at the building at about 10:30 a.m. (see Lugo affirmation, exhibit 14). When she arrived, she mentioned to Peralta that the building smelled of smoke. Peralta told her he also smelled smoke and had spoken to Taipovic.

As she walked to the elevators, she saw Taipovic and told him that she smelled smoke. Silva claims that Taipovic ignored her requests to investigate the smoke and entered the elevator. A while later, Silva saw Taipovic running down the hallway yelling that there was a fire on the first floor. Silva saw Taipovic open the door to the first-floor apartment and then observed smoke coming out of the apartment. Silva then called 911 from the building's front desk phone. According to Silva, Peralta requested that she make the 911 call because he was too nervous.

Silva also observed firefighters take a dog out of 1A and attempt to resuscitate it.

Plaintiffs also rely on the deposition testimony of Peralta (see Lugo affirmation, exhibit 4). At his deposition, Peralta testified that, when the men from the restaurant told him that they smelled smoke, he called Taipovic. He then saw Taipovic walking around outside and going to buy coffee. When the men from the restaurant returned to say they still smelled smoke, Peralta again called Taipovic. Peralta claims that he insisted Taipovic call the fire department, but Taipovic told him that the smoke was coming from electrical wires from the restaurant, which was the responsibility of the restaurant. At this time, Peralta did not smell smoke.

Peralta testified that Silva then told Peralta that there was smoke in the elevator and spoke to Taipovic who was now in the lobby. At some point, Peralta saw Taipovic open the door to apartment 1A and saw smoke coming out of that apartment. The fire department was then called.

Peralta testified that Toto was a quiet dog, but that on the day of the fire, he was barking.

Peralta also testified that Taipovic told him not to tell plaintiffs that Toto was barking. Peralta also testified that Taipovic told him, in the incident report, not to mention how many times the workers from the restaurant came to complain about smelling smoke.

Plaintiffs also rely on the deposition testimony of nonparty witness Andy Cabrera (Cabrera) (see Lugo affirmation, exhibit I). At his deposition, Cabrera testified that, at the time of the fire, he was the handyman/porter for the Building, and his supervisor was Taipovic. Cabrera testified that Taipovic did side work painting and plumbing for tenants while also working as the superintendent of the Building. On the day of the fire, Cabrera was working in the laundry room on the sixth floor. Cabrera smelled smoke but thought it was coming from the restaurant and ignored it. Cabrera then got a call from Peralta telling him that there was a fire on the first floor of the building. When he arrived on the first floor, he saw lots of smoke.

Plaintiffs also rely on the deposition testimony of Taipovic (see Lugo affirmation exhibit 6). At his deposition, Taipovic testified that, at the time he got the first call from Peralta, he was in apartment 2-O. He then went directly to the lobby and smelled smoke coming from the restaurant. He then searched the building looking for the fire. Taipovic stated that the tenant in 2-F told him there was smoke in the hallway and behind the building. He went into 2-F and looked out the window and saw smoke coming from apartment 1A. Taipovic then got the emergency key for 1A, opened the door, saw the smoke, and called the fire department. Taipovic stated that he only received one call from Peralta. Taipovic also testified that he did not tell Peralta or Cabrera what to put in their reports.

Based on this evidence, plaintiffs argue that Taipovic attempted to cover up his delay in calling the fire department and failing to respond timely to the fire emergency. Plaintiffs argue

that, even though there were complaints of smoke, it took Taipovic and Peralta 45-55 minutes to find the fire and call the fire department. Plaintiffs argue that their property damage and the loss of Toto could have been prevented had Taipovic and Peralta acted sooner.

Plaintiffs also argue that Winfield owed them a duty of care. Plaintiffs refer to a contract rider between Winfield and the Condo which states that plaintiffs were intended third-party beneficiaries of that contract (see Lugo affirmation, exhibit 8). Plaintiffs refer to the following rider language: "[Winfield] shall furnish unarmed uniformed protection services for the proper protection of the Premises and Persons" (see Lugo affirmation, exhibit 8). Plaintiffs argue that this language clearly establishes that it was the intent of Winfield and the Condo to have Winfield protect the tenants. Plaintiffs argue further that the "Post Instructions" for the position for which Peralta was employed (see Lugo affirmation, exhibit 9), clearly state that, as a Winfield security officer, it was Peralta's responsibility to detect, deter, and report criminal activity, fire hazards, and safety hazards at the Condo. Further, the "Post Instructions" provided a detailed procedure for security guards to follow during a fire emergency that, plaintiffs argue, Peralta failed to follow.

Plaintiffs argue that Winfield failed to submit any evidence to establish that Peralta responded in a proper and timely manner to the fire emergency in their apartment. Plaintiffs argue that Peralta's negligence created and/or exacerbated the fire condition which caused their damages. Further, plaintiffs argue that Winfield owed them a duty to provide fire-trained personnel.

Plaintiffs argue that they have a valid claim of fraud against all the defendants because there is evidence that Taipovic and Peralta failed to enter the information about the fire in the logs properly. Plaintiffs claim that Taipovic and Peralta intentionally failed to document that the Neely's employees complained of smoke on three separate occasions. Instead, the logs indicate

that the Neely's employees complained of smoke on one occasion.

Plaintiffs argue that they have a valid claim for wrongful death, loss of companionship, and emotional distress regarding their loss of Toto. In support of this argument, plaintiffs argue that, while it is not the standard law in New York to permit such a recovery for the loss of a pet, other jurisdictions such as California, Texas, Hawaii, Alaska, and Florida have allowed it.

Finally, plaintiffs argue that there are issues of fact regarding whether Taipovic was performing side jobs as the fire burned, thereby allowing the fire to cause additional damages and the loss of Toto.

Discussion

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor [CPLR 3212, subd. (b)], and he must do so by tender of evidentiary proof in admissible form. On the other hand, to defeat a motion for summary judgment the opposing party must show facts sufficient to require a trial of any issue of fact [CPLR 3212, subd (b)]" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks omitted], quoting *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). If the movant fails to establish entitlement to summary judgment as a matter of law, summary judgment must be denied, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

Winfield's Motion for Summary Judgment

Based upon the papers submitted and the May 14, 2019 oral argument (discussed further infra), the court finds that Winfield has established prima facie entitlement to summary judgment

as a matter of law by submitting its contract with the Condo which expressly states that no other person or entity is intended to be a third-party beneficiary of the agreement. Moreover, Winfield has established that the facts of this case do not fall into the three situations in which a party who enters into a contract for services may be liable to third parties: (1) Winfield did not launch a force or instrument of harm, (2) the plaintiffs did not detrimentally rely on the continued performance of Winfield's duties, and (3) Winfield did not entirely displace the Condo's duty to maintain the premises in a safe condition. In opposition, plaintiffs fail to raise an issue of fact precluding summary judgment in Winfield's favor.

Generally, a nonparty to a contract cannot impose tort liability upon a party to a contract for breach thereof (*see Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168-169 [1928]). However, there are three exceptions where the contracting party may be liable to a nonparty to the contract for the contracting party's performance of the contractual obligations: (1) where the contracting party launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely or securely (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Church*, 99 NY2d at 111-112; *Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]).

Here, the express language of the agreement between Winfield and the Condo indicates that no other person is intended to be a third-party beneficiary to the contract (*see Walton v Mercy Coll.*, 93 AD3d 460, 461 [1st Dept 2012] [dismissal of the complaint as against security provider was proper where the contract to provide security services indicated it owned no duty to third

parties]). Paragraph 7 (a) of the contract states, "[n]othing else in the contract withstanding, the security services hereunder are only being provided to the Customer and its employees, and no other person or entities" shall be third-party beneficiaries to the agreement (see Lugo affirmation, exhibit 8). Nevertheless, plaintiffs argue that a rider to the service agreement which states that Winfield "shall furnish unarmed uniformed protection services for the proper protection of the Premises and Persons" (see Lugo affirmation, exhibit 8) unequivocally establishes that they are third-party beneficiaries to the service agreement. Reading paragraph 7 (a) of the contract together with the rider, the court finds that Winfield and the Condo agreed that Winfield would provide security services for the Condo and its employees, and not third-party beneficiaries such as tenants or guests of the building (*see Walton*, 93 AD3d at 461; *Dabbs v Aron Sec. Inc.*, 12 AD3d 396, 397 [2d Dept 2004] [holding that injured students were not third-party beneficiaries of contract between security firm and school]; *Murshed v New York Hotel Trades Council & Hotel Assn. of N.Y. City Health Ctr.*, 71 AD3d 578, 579 [1st Dept 2010]). As such, Winfield has established, prima facie, it owed no duty to plaintiffs.

Moreover, there is no evidence that Peralta caused or exacerbated the fire that caused the plaintiffs damages. Plaintiffs claim that Peralta failed to respond timely and properly to the smell of smoke and acted improperly when he called Taipovic rather than 911 upon receiving complaints. Nevertheless, the Appellate Division, First Department has rejected such an argument in *Rahim v Sottile Sec Co.*, (32 AD3d 77 [1st Dept 2006]). In *Rahim*, a security guard effectively abandoned his post at a Duane Reade by leaving from work early, and thereafter, an assailant entered the Duane Reade and assaulted the plaintiff store manager. In dismissing plaintiff's claims against the security company that had supplied the security guard to Duane Reade, the Court

indicated that, however negligently the security guard may have performed his job, he did not launch the force or instrument of harm that effected the assault (*id.* at 81). The Court held that the "force or instrument of harm" was the assailant, who acted independently and without the security guard's knowledge (*id.*). The Court stated that, while the security guard may have been negligent in failing to discover the assailant before she acted, the dangerous condition represented by her presence was not created or exacerbated by the security guard (*id.*). The Court, citing *Moch Co. v Rensselaer Water Co.*, (247 NY 160, 168 [1928]), held that the security guard's inaction was at most a refusal to become an instrument for good, and such inaction provides no basis for holding his employer liable to a person with whom it was not in contractual privity (*id.*). Here, similarly, Peralta did not start the fire, nor did he affirmatively do anything to exacerbate the fire.

Moreover, even if there were evidence that Peralta's negligence in the performance of his duties contributed to the exacerbation of the fire, Winfield would still be entitled to dismissal of the complaint given the absence of any evidence that it owned plaintiffs a duty of care (*see Williams v Stevenson Commons Assoc.*, 31 AD3d 289, 290 [1st Dept 2006]).

Further, there is no evidence that plaintiffs relied upon the contract between the Condo and Winfield as, by their own admission, they were not aware of the provisions of the contract (*see Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234 [1st Dept 2013]). At his deposition, Hayes testified that he was not sure what Peralta's duties were at the building (see Lugo affirmation, exhibit D). At her deposition, Pacheco testified that she was unaware of any of Peralta's duties with respect to fire safety and procedures (see Lugo affirmation, exhibit F).

Finally, there is no evidence that Winfield entirely displaced the Condo's duty to maintain the premises in a safe condition.

Plaintiffs' claim for negligent hiring and training with regard to Winfield's hiring and training of Peralta must also be dismissed because, based on the foregoing analysis, Winfield owed no duty to plaintiffs (*see Doe v Madison Third Bldg. Cos., LLC,* 121 AD3d 631, 632 [1st Dept 2014] [security company cannot be liable for negligent hiring where it owed no duty to plaintiff]).

Winfield has also established prima facie entitlement to dismissal of plaintiffs' claim that Peralta fraudulently misrepresented material information in the logs. The elements of a fraud cause of action consist of: a misrepresentation or material omission of fact; that was false, and known to be false by defendant; made for purpose of inducing other party to rely upon it; justifiable reliance of the other party on the misrepresentation or material omission; and injury (*see Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). Here, plaintiffs have failed to establish how they relied upon the alleged fraudulent log entries or how they were injured by those entries. To succeed on a claim of fraud, plaintiffs must demonstrate that they relied upon the alleged fraudulent statements, and in the absence of such evidence the claim must be dismissed (*id.* at 829).

Accordingly, Winfield's motion for summary judgment dismissing the complaint must be granted. Further, there being no opposition submitted to the motion of Winfield by the Akam Defendants, the cross claim of the Akam defendants against Winfield for common-law indemnification and contribution is also dismissed, and the action is dismissed in its entirety with prejudice as against Winfield.

The Akam Defendants' Motion for Summary Judgment

With respect to plaintiffs' first, second, third, fifth, eighth, and eleventh causes of actions, plaintiffs seek damages under the theories of wrongful death, loss of companionship, and emotional distress for the loss of Toto.

It is well settled in the State of New York that pets are personal property and the loss of a dog by reason of negligence will not permit the animal's owners to recover for resultant emotional injury (*see Schrage v Hatzlacha Cab Corp.*, 13 AD3d 150, 150 [1st Dept 2004]; *Johnson v Douglas*, 289 AD2d 202 [2d Dept 2001]; *Jason v Parks*, 224 AD2d 494 [2d Dept 1996]).

Plaintiffs, who are attorneys, nevertheless argue that this court should rely on decisions from other states, including California, Texas, Hawaii, Alaska and Florida, and two New York civil court cases, and find contrary to the prevailing common law that they are entitled to recovery. As this court stated at oral argument, while other jurisdictions might recognize such claims, there are no New York Appellate Division decisions permitting the relief sought by plaintiffs (see transcript, page 37).

Plaintiffs maintain that this court should rely upon *Brousseau v Rosenthal* (110 Misc2d 1054 [Civ Ct, NY County 1980, Taylor, J.]), in which a civil court judge awarded the plaintiff $550.00 for the lost value of a dog who died while at a pet boarding facility. Notably, the court did not award plaintiff any damages for emotional distress. The other New York case relied upon by plaintiffs is *Mercurio v Weber*, (2003 NY Slip Op 51036 [U] [Nassau Dist Ct, 2003, Fairgrieve, J.]). In *Mercurio*, the Nassau County District Court awarded the plaintiff the cost of replacing one of her dogs, who was killed by a dog groomer, and the veterinary costs associated with her second dog, who was also injured by the dog groomer. The *Mercurio* court awarded plaintiff the purchase price of the dog, $675.00, together with the cost of housebreaking. When determining the value of the companionship the dog provided plaintiff, the court stated, "[p]ricing companionship is inherently difficult, but since plaintiff has presented us with a figure that reasonably approximates the cost of replacing Dexter ($1,513.58), the court accepts that as the *fair market price* of Dexter.

Even though it is substantially higher than what plaintiff paid for Dexter, the court presumes that it encompasses the loss of companionship as well" (*id.* at *5 [emphasis added]).

Initially, the court notes that both *Brousseau* and *Mercurio* are of no precedential value on the law and of little persuasive value on the facts. Neither case has been cited by any Supreme Court for the proposition that a pet owner may properly recover damages, as claimed in the instant case, for wrongful death, lack of companionship, or emotional distress. While the cases cited seem to consider the value of the loss of companionship in setting a value for a pet, this court declines to follow them. This court will follow the reasoning set forth in *Schrage* (13 AD3d at 150), namely, the well-settled proposition that "the loss of a dog by reason of negligence will not support claims by the animal's owners to recover for their emotional injury" (*id; Feger v Warwick Animal Shelter*, 29 AD3d 515 [2d Dept 2006]). As such, to the extent that plaintiffs seek damages for emotional injuries due to the loss of Toto, their second, third, fifth, eighth, and eleventh causes of action are dismissed.

As to plaintiffs' fraud claim in their fourth cause of action, the court finds that the Akam defendants have established prima facie entitlement to the dismissal of plaintiffs' claim that Peralta fraudulently misrepresented material information in the logs. As previously discussed, the elements of a fraud cause of action consist of: a misrepresentation or material omission of fact; that was false, and known to be false by defendant; made for purpose of inducing other party to rely upon it; justifiable reliance of the other party on the misrepresentation or material omission; and injury (*see Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). Here, plaintiffs have failed to establish how they relied upon the alleged fraudulent logs or how they were injured by those entries. To succeed on a claim of fraud, plaintiffs must demonstrate that

they relied upon the statements, and in the absence of such evidence the claim must be dismissed (*id.* at 829).

With respect to plaintiffs' seventh cause of action seeking damages for the Akam defendants' failure to notify them that their personnel was not fire trained or did not have the "appropriate license," the Akam defendants have demonstrated prima facie entitlement to summary judgment by submitting the deposition testimony of Michael Berenson, Akam's president, who testified that there is no requirement that a building superintendent be fire trained or required to attend fire training instruction (see Moore affirmation, exhibit H). Nor, according to Berenson, is a superintendent required to have any type of related license. Rather, the superintendent was required to locate the source of any smoke and call 911, which Taipovic did. In opposition, plaintiffs do not address any of the Akam defendants' arguments regarding a building superintendent's fire training requirements or licensing. As such, the court finds that the seventh cause of action must be dismissed.

As to plaintiffs' first cause of action alleging that the Akam defendants failed to maintain, operate or inspect the building properly, resulting in the fire, and as to plaintiffs' sixth, ninth, tenth, and twelfth causes of actions asserting that Taipovic negligently delayed looking into the source of the fire because he was improperly trained or because he was performing side work, the Akam defendants argue that Taipovic's actions are irrelevant because the fire was caused by plaintiffs placing clothing either too close or on top of a closet light bulb. Based upon this argument, the court finds that the Akam defendants have failed to sustain their burden of establishing prima facie entitlement to summary judgment. As the court noted at the oral argument, this contention was raised at the deposition of Michael Berenson, Akam's president, who testified that he had heard

that the fire was caused by clothing stacked high in the closet near, the closet light (see transcript page 7; Brill affirmation exhibit H). While hearsay statements can be used to deny a motion for summary judgment, they cannot form the basis for the granting of summary judgment (*see Borough Hall-Oxford Tobacco Corp. v Central Office Alarm Co.*, 35 AD2d 523 [2d Dept 1970]).

Further, the fire department's report states that the fire was caused by electrical wiring in the apartment's closet (see Lugo affirmation, exhibit 7). While the Akam defendants maintain that plaintiffs are responsible for such wiring, they have failed to establish affirmatively by proof in admissible form who is responsible for the electrical wiring in plaintiffs' closet, or that the Akam defendants are not responsible (see oral argument transcript page 9-10). Nor have the Akam defendants demonstrated that they are not responsible for any of the electrical wiring in plaintiffs' apartment. Further, there is evidence in the record that Taipovic performed electrical work in the subject apartment in the months preceding the accident (see Lugo affirmation, exhibit 5 at 16-19 [indication by Cabrera that Taipovic worked in apartment 1A on an "electrical box"]). Contrary to the Akam defendants' argument, the court finds that there is no definitive proof regarding the proximate cause of the fire or what the Akam defendants' responsibilities were as to the electrical wiring in the apartment, whether they had notice of a dangerous condition by virtue of the work done by Taipovic in the apartment, or whether said work caused or created a dangerous condition that proximately caused this fire (*see* oral argument transcript at 5-12).

Likewise, the Akam defendants have not established that Taipovic was not negligent in his alleged delay in calling 911. Plaintiffs have submitted evidence which indicates that Taipovic was notified on three occasions, by the Neely's employees, that they smelled smoke. Further, plaintiff submitted the Silva affidavit indicating that she had also informed Taipovic of the smoke smell.

Further, plaintiffs have submitted evidence to suggest that Taipovic was doing side work at the time the fire started which Taipovic prioritized over responding to the smoke complaints. Plaintiffs have also submitted evidence suggesting that it took Taipovic 45-60 minutes to locate the source of the smoke and to call 911.

Based upon the foregoing, the court finds that there are questions of fact and credibility regarding whether the Akam defendants caused or created or had actual or constructive notice of a dangerous condition that was the proximate cause of the fire and whether Taipovic acted reasonably under the circumstances on the day of the accident. As such, the Akam defendants have not established prima facie entitlement to summary judgment dismissing the first, sixth, ninth, tenth, or twelfth causes of action.

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CONCLUSION

Accordingly, it is

ORDERED that defendant Winfield Security Corporations' motion for summary judgment dismissing the complaint and the cross claim of the Akam defendants is granted in its entirety, and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Akam defendants' motion for summary judgment dismissing the complaint is granted in part with respect to the second, third, fourth, fifth, seventh, eighth and eleventh causes of action, and the motion is otherwise denied; and it is further

ORDERED that movants shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, each serve a copy of this order with notice of entry on all parties and on the clerk, who is directed to enter judgment accordingly.

DATED: September 25, 2019

ENTER:

J.S.C.
HON. ROBERT D. KALISH
J.S.C.