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| Cambridge Mut. Fire Ins. Co. v Hammond |
| 2020 NY Slip Op 31895(U) |
| June 16, 2020 |
| Supreme Court, New York County |
| Docket Number: 156418/2016 |
| Judge: David Benjamin Cohen |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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CAMBRIDGE MUTUAL FIRE INSURANCE
COMPANY a/s/o EMPIRE CONDOMINIUM
C/O HIYEE REALTY CORP.,

DECISION & ORDER

Plaintiff,

Index No. 156418/2016

-against-

Motion Sequence No. 004

JOHN HAMMOND, WILLIAM MURPHY,
and KEVIN DOLAN,

Defendants.

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HON. DAVID B. COHEN, J.S.C.:

In this subrogation action, plaintiff, Cambridge Mutual Fire Insurance Company a/s/o Empire Condominium c/o Hryee Realty Corp. (Cambridge), moves, pursuant to CPLR 3212, for an order granting it summary judgment as to liability against defendants John Hammond (Hammond), William Murphy (Murphy), and Kevin Dolan (Dolan), jointly and severally.

BACKGROUND

Cambridge was the insurance carrier for Empire Condominium, an apartment building located at 259 Elizabeth Street, New York, NY, where defendants were tenants (verified complaint, New York St Cts Elec Filing System [NYSCEF] Doc No. 7 ¶¶ 5-7). Defendants occupied a duplex apartment (Hammond deposition tr, NYSCEF Doc No. 71 at 11-12). On February 13, 2016, a fire occurred in the bedroom of the lower level of the duplex (FDNY incident report, NYSCEF Doc No. 75 at 2). It is undisputed that the fire began in Hammond's room. Hammond occupied the lower level bedroom but had left the night before and was not present at the time of the fire (NYSCEF Doc No. 71 at 21). Hammond, a college student, was away visiting his parents in Long Island when the fire began and had left the apartment the day

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before (*id.* at 24). His roommates, Dolan and Murphy, were not present at the apartment when the fire began (*id.* at 24-25). Situated within Hammond's room, among other things, was a lamp at the foot of his bed (*id.* at 16). Hammond would turn the lamp on and off with the use of a wall switch (*id.* at 98). The lamp was situated on a lip on the bedframe immediately adjacent to the wall (*id.* at 105-106). The cord ran from the outlet along the floor next to the bed, up the lamp (*id.*) Hammond's bedroom was totally charred and most of the adjacent living room was destroyed by the fire and water subsequently sprayed in an effort to extinguish it (*id.* at 25).

The following day, an FDNY Fire Marshal, CJ Kanelopoulos, inspected the scene of the fire (NYSCEF Doc No. 75). His report states that the origin of the fire is electrical in nature (*id.* at 3). He testified that the fire was caused by "some type of electrical wiring which is outside of the wall" (Kanelopoulos deposition tr, NYSCEF Doc No. 77 at 20).

AFFIDAVITS

In support of its motion for summary judgment, plaintiff submits the expert affidavit of Larry A. Wharton, an electrical engineering consultant (Wharton aff, NYSCEF Doc No. 73). Wharton avers that the building's electrical system can be eliminated as a possible cause and origin of the fire because the wiring within the receptacle device box was protected from the fire conditions (*id.* ¶ 6). Further, he found that the electrical arc activity found on the lamp power cord indicated the wall switch was "on" at the time of the fire and that power was available to the lamp (*id.* ¶ 7). It is not until Wharton's reply affidavit where he concludes that the subject fire was the result of the lamp in too close proximity to bedding material (Wharton reply aff, NYSCEF Doc No. 100 ¶ 11).

Plaintiff also submits the affidavit of Eugene J. Pietzak, a fire investigator (Pietzak aff, Doc No. 72). Pietzak states that an examination of the lamp shroud disclosed physical evidence

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of burnt cloth and melted remains of a glass light bulb and observations of the outlet and conductors showed no evidence of adverse electrical activity (*id.* at 4). It should be noted that while Pietzak's affidavit refers to a full report and photographs, said report and photographs were not a part of plaintiff's motion submission, nor was the omission cured in its reply papers (*id.* at 6). However, the court takes judicial notice of Pietzak's report and photographs that have been e-filed (*see Perez v New York City Hous. Auth.*, 47 AD3d 505, 505 [1st Dept 2008] [taking judicial notice of the court's computerized records]; *Benedetto v Hyatt Corp.*, 2020 NY Slip Op 30794[U], *4 [Sup Ct, NY County 2020] [noting that "the court may take judicial notice of previously e-filed documents"]). Pietzak concludes that the cause of the fire was "the result of apparent heat from the incandescent bulb of the desk lamp igniting combustibles on the bed, which was in close proximity to/contact with the bulb" (Pietzak expert disclosure, NYSCEF Doc No. 104 at 57).

Defendants retained Robert M. Berryman, a consulting principal engineer (Berryman aff, NYSCEF Doc No. 94). He could not ascertain whether the lamp was on or off at the time of the fire (*id.* at 17). Berryman concluded that the exact physical location of a heat source and fuel interaction and cause of that interaction resulting in the subject fire could not be identified (*id.* at 19).

DISCUSSION

"[T]he 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 issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see also Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the

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motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of a fact which require a trial of the action (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011]). On a motion for summary judgment, the role of the court is that of issue-finding, not issue-determination (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 472 [1st Dept 2008]). "To establish a prima facie claim of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]).

Plaintiff argues that the above elements of negligence are met and that it has satisfied its prima facie burden with the submission of affidavits from Pietzak and Wharton, as well as the Kaneloploulos' deposition testimony and fire marshal report. Plaintiff argues that Hammond's liability has been established since Pietzak, Wharton and Kaneloploulos ruled out the building's electrical wiring as the cause of the fire and agree that the fire originated in Hammond's room (plaintiff's affirmation in support, NYSCEF Doc No. 67 ¶ 39). In essence, plaintiff argues that it did not cause or create the condition that caused the fire. While this argument could defeat a motion for summary judgment, in this matter, plaintiff is the movant, and as such, must establish that defendants created the condition (*Associated Mut. Ins. Co. v Kipp's Arcadian II*, 298 AD2d 478, 478-479 [2d Dept 2002] ["To prove a prima facie case of negligence . . . a plaintiff is required to show that the defendant created the condition or that the defendant had actual or constructive notice of the condition"] [internal quotation marks and citations omitted]).

"Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46

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NY2d 471, 474 [1979]; see *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Here, there remains material issues of fact that preclude summary judgment in favor of plaintiff. While Pieztak and Wharton opine that the origin of the fire was the lamp in close proximity to bedding, Fire Marshal Kaneloploulos testified that the cause of the fire was electrical wiring, and, had he determined that it was a light bulb too close to combustible material, he would have noted it and used a different code on his report (NYSCEF Doc No. 77 at 73). Furthermore, there is an issue of fact as to whether or not the lamp was on at the time of the fire. Lastly, there is no testimony or evidence in the record of defendants' negligent usage of the lamp.

"[A] plaintiff will generally be entitled to summary judgment 'only in cases in which there is no conflict at all in the evidence, the defendant's conduct fell far below any permissible standard of due care, and the plaintiff's conduct either was not really involved ...or was clearly of exemplary prudence in the circumstances

(*Andre*, 35 NY2d at 365 [citation omitted]). This is not such a case.

Since plaintiff's showing was insufficient to demonstrate its entitlement to judgment, the burden never shifted to defendants to raise a triable issue of fact (see *Alvarez*, 68 NY2d at 324).

Accordingly, plaintiff's motion for summary judgment on the cause of action sounding in negligence is denied, regardless of the sufficiency of the opposing papers (see *Winegrad*, 64 NY2d at 853).

On the cause of action sounding in breach of contract, plaintiff makes no arguments, failed to attach the lease or any contracts, and does not cite to any case law. Accordingly, this portion of plaintiff's motion is also denied.

NYSCEF RECEIVED CONCLUSION
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Based upon the foregoing, it is

ORDERED that plaintiff Cambridge Mutual Fire Insurance Company a/s/o Empire Condominium c/o Hiyea Realty Corp.'s motion for summary judgment (motion sequence number 004) is denied in its entirety.

Dated: June 16, 2020

ENTER:



J.S.C.