

M3 Fuel Stop, Inc. v Gallagher
2020 NY Slip Op 32926(U)
September 4, 2020
Supreme Court, New York County
Docket Number: 654068/2018
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON **PART** **IAS MOTION 37EFM**

Justice

-----X

M3 FUEL STOP, INC.,

Plaintiff,

- v -

MAUREEN GALLAGHER, TRAVELERS INSURANCE
COMPANY

Defendant.

-----X

INDEX NO. 654068/2018

MOTION DATE 08/18/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, plaintiff's motion for partial summary judgment, on liability only, as against defendant Dr. Maureen Gallagher, is granted for the reasons stated hereinbelow.

The Players

Plaintiff, M3 Fuel Stop, Inc. (the "Spa") is a health and wellness spa offering a variety of treatments that utilize "a high-end German-made and imported Cyrochamber" (the "Cyrochamber") and is located at 200 Central Park South ("200 CPS"), Suite 102, Ground Floor in New York. Co-defendant Dr. Maureen Gallagher ("Dr. Gallagher") is a dentist who has practiced at 200 CPS in Suite 207 for at least as long as the Spa has been located at 200 CPS. Co-defendant Travelers Insurance Company ("Travelers") insures Dr. Gallagher for general liability and casualty.

Background

In the early evening of April 3, 2018, "copious amounts of smoke, and then torrents of water permeated" the Spa, which evacuated all of its clients from 200 CPS. On that same evening, the New York City Fire Department ("FDNY") entered 200 CPS and, specifically, Dr. Gallagher's Suite 207, to extinguish a fire. The Spa alleges that FDNY's work to extinguish the fire caused the aforementioned "torrents of water" that then flooded the Spa entirely. (NYSCEF Doc. 4.)

The Spa also alleges that Dr. Gallagher was the "proximate cause" of the fire. The subject "Fire Incident Report"/"Fire Marshall's Report" states that a "butane torch left too close to combustibles after use" in Dr. Gallagher's Suite 207 caused the fire (NYSCEF Doc. 33). The Spa claims that Dr. Gallagher had no formal education and/or instruction in the use of said blowtorch. Several months later, on August 21, 2018, water flooded the Spa's ceiling, and 200 CPS's superintendent apparently informed the Spa that said water arose from unauthorized work

that a contractor was performing (apparently despite instruction that he not perform it) in Dr. Gallagher's Suite 207 (NYSCEF Doc. 4, at 7).

According to the instant amended complaint, the damages from the fire total approximately \$400,000.00. The smoke and soot apparently damaged 200 CPS's lobby, professional hallway, and north hallways. The Spa claims that it suffered the following specific damages:

- a. Structural damage to ceilings, walls, baseboards, floors, and custom electrical wiring to certain equipment caused by the water, as well as substantial damage caused by smoke infiltration, *inter alia*, to fabrics and furniture;
- b. Damage to the Cyrochamber, a machine valued at \$250,000.00, causing the machine to become inoperable, as well as damage to the Hocatt Ozone Sauna, a piece of equipment valued at \$25,000.00, and damages incurred by reason of cash reimbursement to clients who had to be evacuated at the occurrence;
- c. Loss of business in the range of \$8,000-\$10,000.00 per week at least for the first week after the fire, and to a lesser degree in subsequent weeks

(NYSCEF Doc. 4).

The Spa asserts that Travelers has breached its duty to the Spa as a third-party beneficiary of Dr. Gallagher's policy by "ignoring" the Spa's requests for compensation for the aforementioned damage (NYSCEF Doc. 4, at 6-7).

On September 7, 2018, the Spa commenced the instant action against defendants. The Spa seeks a judgment (1) on its first cause of action, for gross negligence, as against Dr. Gallagher, in the amount of \$400,000.00, plus attorney's fees; (2) on its second cause of action, based on *res ipsa loquitor*, as against Dr. Gallagher, in the amount of \$400,000.00, plus attorney's fees; (3) on its third cause of action, for breach of a third party beneficiary contract, as against Travelers, in the amount of \$400,000.00, plus attorney's fees; and (4) on its fourth cause of action, for negligence, "in an amount to be determined" (NYSCEF Doc. 4, 8).

On October 26, 2018, plaintiff discontinued, without prejudice, the instant action as against Travelers (NYSCEF Doc. 8).

On November 20, 2018, Dr. Gallagher responded to the amended complaint with various admissions, denials, nine Affirmative Defenses, and various demands (NYSCEF Doc. 9).

On December 31, 2018, Dr. Gallagher requested a preliminary conference in this matter, and her counsel, Robert Varga, Esq., submitted an affidavit of good faith (NYSCEF Doc. 10 and 11). On that same day, the Spa's counsel, Louis J. Maione, Esq., opposed the request, noting that the affidavit of good faith was not true because while Mr. Varga claims that he "made a good faith effort to resolve issues contained in this request [for a preliminary conference]," Mr. Maione had never spoken to Mr. Varga (NYSCEF Doc. 13). Mr. Maione notes that Mr. Varga failed to cite to the correct index number in the subject affidavit of good faith. Mr. Maione further asserts that on December 30, 2018, he mailed "Plaintiff's Bill of Particulars, Plaintiff's Response to

Combined Demands, and a Notice of Deposition” through the U.S. Postal Service (NYSCEF Doc. 13, at 2).

In a January 29, 2019 “Preliminary Conference Order,” this Court ordered a site inspection; directed plaintiff to “provide copies of records,” repayments made “to restore/repair/replace premises/equipment,” invoices and receipts arising out of the subject damages; and directed “authorizations to obtain claim files for all applicable insurers” (NYSCEF Doc. 14).

In an April 8, 2019 letter, Dr. Gallagher’s counsel informed the Spa’s counsel: “your client’s Bill of Particulars, dated December 28, 2018, and amended Bill of Particulars, dated March 3, 2019, are not responsive to our Demand for Bill of Particulars” (NYSCEF Doc. 15).

On April 9, 2019, this Court ordered (1) the Spa to respond to the additional directives in the January 29, 2019 “Preliminary Conference Order;” and (2) Dr. Gallagher to respond to the Spa’s combined demands, both within twenty days (NYSCEF Doc. 16).

On May 14, 2019, this Court ordered (1) a site inspection to occur prior to June 21, 2019; (2) Dr. Gallagher to respond to the Spa’s demand by June 7, 2019; and (3) both parties to participate in “EBTs” (NYSCEF Doc. 18).

On September 3, 2019, this Court signed an Order stating that (1) Dr. Gallagher waived her right to an inspection for failure to comply with this Court’s April 9, 2019 Order; and (2) Dr. Gallagher must produce herself for an EBT by September 30, 2019 or this Court would strike her answer (NYSCEF Doc. 19).

In her September 30, 2019 deposition, Dr. Gallagher admitted under oath that the subject fire began in a wall cabinet in her office at 200 CPS (NYSCEF Doc. 31, at 14). When asked if the subject cabinet contained anything flammable, she replied, “almost everything” (NYSCEF Doc. 31, at 28). Dr. Gallagher also admitted that she did not attempt to put out the fire with the four fire extinguishers that she acknowledged having in her suite because, in her words, “I didn’t think it was the right time to read the directions” (NYSCEF Doc. 31, at 15 and 28). She stated that she used the “mini blazer” torch (NYSCEF Doc. 31, at 22).

On October 8, 2019, this Court ordered the parties to serve post-EBT Demands within twenty days and to respond [within] thirty days after receipt (NYSCEF Doc. 20).

On November 6, 2019, the Spa e-filed a Note of Issue demanding trial by jury (NYSCEF Doc. 21).

The Spa now moves, pursuant to CPLR 3212 (c) and (e), for partial summary judgment on liability, as against Dr. Gallagher (NYSCEF Doc. 23). The Spa requests a trial on the total damages arising out of the fire.

Discussion

CPLR 3212(c) states:

“Immediate trial.” If it appears that the only triable issues of fact arising on a motion for summary judgment relate to the amount or extent of damages, or if the motion is based on any of the grounds enumerated in subdivision (a) or (b) of rule 3211, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper.

To prevail on summary judgment, the moving party must tender sufficient evidence to demonstrate the absence of any material issue of fact, and entitlement to judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Ayotte v Gervasio, 81 NY2d 1062 (1993). Once the movant’s initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) (“The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment”).

To make out a prima facie case for negligence, “plaintiff must prove actual or constructive notice of the dangerous or defective condition and a reasonable time within which to correct or warn about its existence,” Lewis v Metropolitan Transp. Auth., 99 AD2d 246, 249 (1st Dept 1984).

This Court finds that the Spa has made out its prima facie case for negligence. The moving papers include the report of Christopher Cafiero, a representative of 200 CPS’s owner, “Park South Tenants Corporation;” Dr. Gallagher’s deposition transcript; the FDNY Incident Report; and the FDNY Marshall’s Report (NYSCEF Doc. 30, 31, 32, and 33). It is undisputed that the subject fire commenced in Dr. Gallagher’s Suite 207. The aforementioned e-filings support the Spa’s claims that the fire arose out of Dr. Gallagher’s negligence and that the Spa did not contribute to the fire. The aforementioned e-filings demonstrate that Dr. Gallagher had “constructive notice” of the hazard that caused the subject damage, as she admits in her deposition that “almost everything” in the subject cabinet was flammable. Piacquadio v Recine Realty Corp., 84 NY 2d 967, 969 (1994).

Additionally, this Court finds that the Spa has sufficiently demonstrated that it is entitled to an inquest into monetary damages, pursuant to CPLR 3212(c), as the only triable issues of fact in the instant matter are the monetary damages that the Spa suffered from the fire.

Dr. Gallagher has failed to oppose or otherwise respond to the instant motion, which became returnable on August 18, 2020 (adjourned from March 27, 2020). Thus, the instant motion became fully submitted on that date.

Conclusion

Thus, for the reasons stated herein, plaintiff’s motion for partial summary judgment, is hereby granted, on liability only, and the Clerk is hereby directed to enter judgment (1) on the issue of liability only, in favor of plaintiff, M3 Fuel Stop, Inc., and against defendant Dr. Maureen

Gallagher, based on plaintiff's negligence claims; and (2) dismissing the discontinued claim as against defendant Travelers Insurance Company.

The parties may contact the Court (by email to aengoron@nycourts.gov, copy to argreenf@nycourts.gov) with a copy to all parties to schedule an inquest into damages and attorney's fees.

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9/4/2020
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE
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