

Insurance Co. of Greater N.Y. v Upgrade Contr. Co., Inc.
2022 NY Slip Op 30175(U)
January 20, 2022
Supreme Court, New York County
Docket Number: Index No. 162108/2019
Judge: Sabrina B. Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

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INSURANCE COMPANY OF GREATER NEW YORK AS
SUBROGEE OF 116 EAST 63RD STREET CORP.

Plaintiff,

- v -

UPGRADE CONTRACTING CO., INC.,

Defendant.
-----X

INDEX NO. 162108/2019

MOTION DATE 11/03/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion for SUMMARY JUDGMENT & PRECLUSION.

Upon the foregoing documents, the motion is denied.

BACKGROUND

Plaintiff commenced this action as subrogee of 116 East 63rd Street Corp (Coop) alleging that defendant’s negligence was responsible for a fire damaging Apartment 7A at 116 East 63rd Street (Subject Premises).

ALLEGED FACTS

Defendant entered a contract with the Coop to perform exterior masonry work at the subject building. On November 28, 2018, a fire occurred damaging the Subject Premises. Defendant was performing work on the exterior of the Subject Premises shortly before the fire started. The work included the installation of copper flashing. At the same time work was being done on the roof, approximately two floors above the Subject Premises. The work on the roof included the use of an electric grinding tool. Plaintiff also asserts that said tool was used in closer vicinity to the window of the Subject Premises, but this is disputed by defendant’s

witnesses. It is plaintiff's theory that sparks from the electric grinding tool caused the fire. Defendant disputes this theory.

THE PENDING MOTION

On October 4th, 2021, defendant moved for an order granting it summary judgment and dismissal of the complaint. Defendant also seeks an order of preclusion as regards to plaintiff's expert Gary Perischetti. For the reasons stated below, the motion is denied in its entirety.

THERE ARE MATERIAL QUESTIONS OF FACT REQUIRING A TRIAL

It is well settled law that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to summary judgment as a matter of law "tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). "(A) motion for summary judgment should be denied if any significant doubt exists as to whether a material factual issue is present or even if it is arguable that such an issue exists (*Bershaw v. Altman*, 100 A.D.2d 642, 643)". *Haner v. De Vito*, 152 A.D.2d 896(1989).

In this case, plaintiff has submitted the affidavit of its expert who opines that the fire commenced on the exterior of the building, was not caused by any electrical issue from the inside of the Subject Premises, and was likely started from sparks from an electrical machine used by defendant. Mr. Persichetti also states that based on his examination of the Subject Premises three days after the fire " ... the heat and flame patterns evidence that the fire originated in the area where a section of cement and or brick copping had been removed just below the wood windowsill and the wood window frame was exposed." The assertions of a nonmoving party are to be taken as true and a summary judgment motion is to be decided on the facts most favorable to that party (*Bershaw v. Altman, supra*, at 643).

While plaintiff also includes the hearsay statement of Fire Marshal Joe Chidichimo, a question of fact is raised by Mr. Perischetti's affidavit, even without relying on the hearsay statement. Moreover, plaintiff should have the opportunity to subpoena the Fire Marshal to testify at trial and present evidence as to his opinion of the cause of the fire.

Additional questions are raised by the testimony of the parties and witnesses. For example, in its statement of material facts defendant states it was not performing work on the exterior of the Subject Premises at the time of the fire. Mr. Guillermo testified at his deposition that he didn't know exactly what floors defendant was working on the day of the fire, because several floors were being worked on. Plaintiff states in its statement of facts that the work performed on that date only required the use of manual tools, but Mr. Guillermo testified that an electric hammer was used on the work being done on the windows on that day. Mr. Guillermo testified that the work was being done that day on the windows of the Subject Premises and that the work on the front of the building that day continued until he saw the smoke and the firemen arrived. Finally, Mr. Guillermo acknowledges he was using the grinder on the roof at the time he saw the smoke from the fire at the Subject Premises.¹

In sum the issue of the cause of the fire is a question of fact for the jury, which includes a determination of the credibility of the witnesses testifying. Based on the foregoing, defendant's motion for summary judgment is denied.

***DEFENDANT'S MOTION TO PRECLUDE THE
TESTIMONY OF GARY PERSICHETTI IS DENIED***

CPLR § 3101(d)(1) provides:

Upon request, each party shall identify each person whom the party expects to call as an expert witness at trial and shall disclose in reasonable detail the subject matter on which each expert is

¹ The court takes judicial notice from the HPD website that the Subject building is a total of nine stories.

expected to testify, the substance of the facts and opinions on which each expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion

N.Y. C.P.L.R. 3101 (McKinney).

The court agrees with defendant that plaintiff should have earlier disclosed Mr. Persichetti as its expert and provided defendant with the substance of Mr. Persichetti's testimony earlier. However, in its response to the motion for summary judgment, plaintiff satisfies the requirements of CPLR 3101(d) in that Mr. Persichetti's qualifications, the subject matter on which he will testify and the grounds for his opinion have all been laid out. While defendant claims this late disclosure is prejudicial, defendant fails to identify any actual prejudice and the disclosure is still well in advance of trial, as not trial date has yet been set in this action.

Based on the foregoing, defendant's motion to preclude is denied.

CONCLUSION

Wherefore it is hereby


ORDERED that defendant's motion for summary judgment and preclusion is denied in its entirety; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119);

and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);].

This constitutes the decision and order of the court.


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1/20/2022
DATE

SABRINA KRAUS, 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