

**Southwest Mar. & Gen. Ins. Co. v Covington  
Specialty Ins. Co.**

2022 NY Slip Op 33296(U)

August 1, 2022

Supreme Court, Kings County

Docket Number: Index No. 500848/2020

Judge: Larry D. Martin

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

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SOUTHWEST MARINE & GENERAL	:	Index No. 500848/2020
INSURANCE CO. and SCHER 20 <sup>TH</sup>	:	
AVENUE, LLC,	:	
	:	
Plaintiffs,	:	
	:	
– against –	:	
	:	
COVINGTON SPECIALTY INSURANCE	:	
COMPANY, RSUI GROUP, INC., and XHN	:	
PIZZERIA CORP., d/b/a LA BELLA PIZZA,	:	
	:	
Defendants.	:	
	:	
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In an underlying related action, *Marie Diano v. La Bella Pizza and Scher 20<sup>th</sup> Avenue LLC*, Index No. 506324/2019, in the NYS Supreme Court, Kings County (the “Underlying Action”), alleges that the plaintiff therein, Marie Diano (“Diano”) had a May 7, 2018 trip and fall stemming from the ground-level cellar doors entrance for premises owned by the plaintiff herein, Scher 20<sup>th</sup> Avenue, LLC (“Scher”) and leased by Defendant herein, Xhevzet Nuzi d/b/a XHN Pizzeria Corp. (“La Bella Pizza”).

Now, in this related declaratory judgment action, Scher and co-plaintiff, Southwest Marine & General Insurance Co (“Southwest”), move pursuant to CPLR §3001, for an Order declaring that co-defendant, Covington Specialty Insurance Company (“Covington”), has a primary duty to defend and indemnify Scher in connection with the Underlying Action, and reimburse costs and expenses incurred on Scher’s behalf. Covington, and co-defendants, La Bella Pizza, oppose arguing that disputed issues of fact preclude summary judgment, and cross move to strike the Note of Issue. Plaintiff has submitted an affirmation in reply and in opposition to the cross-motion.

STATEMENT OF FACTS

For purposes of the motion, it is undisputed that Covington issued a general liability policy to La Bella Pizza for the policy period April 9, 2018 to 2019 (the “Policy”). An underlying lease lets the basement to La Bella Pizza, however, it is vague and/or ambiguous as to the stairs and trap door leading up from the basement to the street (the “Lease”). Specifically, the Lease provides in pertinent part:

*No vaults, vault space or area, whether or not enclosed or covered, not within the property line of the building [is] leased hereunder.... Owner make no representation as to the location of the property line of the building. All vaults and vault space and all such areas not within the property line of the building, which Tenant may be permitted to use and/or occupy is to be used and/or occupied under a revocable license. . . . (Emphasis added).*

Thus, while making no representation as to the exact property line, the Lease *suggests* that La Bella Pizza has a revocable license for ingress and egress through the street level vault space “trap doors.” The doors themselves, however, and presumably, the stairs leading to that vault space are not leased to La Bella Pizza if they lie beyond the Scher’s yet unestablished property line, which has not yet been established.

Summary Judgment

Under well-established New York law, summary judgment should not be granted where there is any doubt as to the existence of a triable issue. When considering a motion seeking dispositive relief, the Court must construe the facts in a light most favorable to the nonmoving party. *Russell v. A. Barton Hepburn Hosp.*, 154 A.D.2d 796, 797, 546 N.Y.S.2d 239 (3<sup>rd</sup> Dep’t 1989); *see also, Moskowitz v. Garlock*, 23 A.D.2d 943, 944, 259 N.Y.S.2d 1003 (3<sup>rd</sup> Dep’t 1965).

While summary judgment is appropriate in some cases, it should not be ordered except in “unusually clear” instances. *Stone v. Aetna Life Ins. Co.*, 178 Misc. 23, 25, 31 N.Y.S.2d 615 (New

York Co. 1941). “A remedy which precludes a litigant from presenting his evidence for consideration by a jury, or even a judge, is necessarily one which should be used sparingly, for its mere existence tends to alter our jurisprudential concept of a day in court.” *Wanger v. Zeh*, 45 Misc.2d 93, 94, 256 N.Y.S.2d 227 (Albany Co. 1965), *aff’d*, 26 A.D.2d 729 (3<sup>rd</sup> Dep’t 1966). Given that summary judgment is the procedural equivalent of a trial, granting summary judgment requires that no material or triable issues of fact exist. When doubt exists or where an issue is “fairly debatable,” summary judgment must be denied. *Bakerian v. Horn*, 21 A.D.2d 714, 249 N.Y.S.2d 646 (1<sup>st</sup> Dep’t 1964); *Jones v. County of Herkimer*, 51 Misc.2d 130, 135, 272 N.Y.S.2d 925 (Herkimer Co. 1966); *Town of Preble v. Song Mountain, Inc.*, 62 Misc.2d 353, 355, 308 N.Y.S.2d 1001 (Courtland Co. 1970). *See also, Sillman v. Twentieth Century-Fox Film Corporation*, 3 N.Y.2d 395, 404, 144 N.E.2d 387, 165 N.Y.S.2d 498 (1957).

When considering a summary judgment motion, the court may not try issues in the case, but rather must determine whether there is an issue to be tried. *Esteve v. Abad*, 271 A.D. 725, 727, 68 N.Y.S.2d 322 (1<sup>st</sup> Dep’t 1947). “Issue-finding, rather than issue-determination, is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment.” *Id.*; *Sillman*, 3 N.Y.2d at 404. According to the Court of Appeals of New York, “the 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 from the case. Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers.” *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1063, 619 N.E.2d 400, 601 N.Y.S.2d 463 (1993).

Applying this standard to the facts and circumstances presented in the instant action, the bare minimum for application of summary judgement would a conclusive establishment of Scher's property line, and who is legally responsible to maintain the condition of those doors. While the facts adduced thus far may suggest that Scher and not La Bella Pizza may turn out to be responsible for the doors' upkeep, La Bella's exercise of its license in a negligent manner, *e.g.*, leaving one door unattended, a fact also not yet established, might shift responsibility.<sup>1</sup>

In light of the foregoing, plaintiff movants' Motion Seq. 1 for an Order declaring that defendant, Covington Specialty Insurance Company has a primary duty to defend and indemnify Scher in connection with the Underlying Action, and reimburse costs and expenses incurred on Scher's behalf is denied. Defendants' cross-motion to strike the note of issue, Motion Seq. 2, is granted.

This constitutes the decision and order of the Court.



Hon. Larry D. Martin, JSC

HON. LARRY MARTIN  
JUSTICE OF THE SUPREME COURT

08/01/2022

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<sup>1</sup> Testimonial evidence as to usage and reliance on access would seem largely irrelevant pursuant to, *inter alia*, the Lease and/or the Statute of Frauds. Moreover, the Lease provisions and arguments as to the "bargained-for" obligation to maintain the sidewalk also seem largely irrelevant.