

AIG Prop. Cas. Co. v JB Constr. Concepts LLC

2022 NY Slip Op 34327(U)

December 21, 2022

Supreme Court, New York County

Docket Number: Index No. 154800/2018

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

AIG PROPERTY CASUALTY COMPANY, AS SUBROGEE
OF LAWRENCE & WENDY NADEL, AND ALL OTHER
INSUREDS UNDER POLICIES #0012936227 AND
0028407666,

Plaintiff,

- v -

JB CONSTRUCTION CONCEPTS LLC, SN
CONSTRUCTION, ALL AMERICAN CHIMNEY SWEEP,

Defendant.

-----X

JB CONSTRUCTION CONCEPTS LLC

Plaintiff,

-against-

MICHAEL DALTON

Defendant.

-----X

DECISION + ORDER ON MOTION

Third-Party
Index No. 595636/2020

The following e-filed documents, listed by NYSCEF document number (Motion 001) 142, 143, 144, 145,
146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166,
167, 234, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257,
258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278,
337, 338, 339, 340, 341

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 002) 196, 197, 198, 199,
200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220,
221, 222, 223, 224, 225, 226, 235, 236, 237, 238, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289,
290, 291, 292, 293, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362

were read on this motion to/for SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 003) 168, 169, 170, 171,
172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192,
193, 194, 195, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 322, 323, 324, 325, 326,
327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 344, 345, 346, 347

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 004) 227, 228, 229, 230, 231, 232, 233, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 342, 343 were read on this motion to/for JUDGMENT – SUMMARY.

Motion Sequence Numbers 001, 002, 003 and 004 are consolidated for disposition.

Third-party defendant's motion (MS001) for summary judgment dismissing the third-party complaint against him is denied. Defendant SN Construction ("SN")'s motion (MS002) for summary judgment dismissing the claims and cross claims against it is denied. Defendant All American Chimney Sweep ("All American")'s motion (MS003) for summary judgment is granted. Defendant JB Construction Concepts LLC ("JB")'s motion (MS004) for summary judgment is denied as it was not filed within 120 days of the filing of the note of issue.

Background

This action arises out of a fire at the home of Wendy and Lawrence Nadel in Bedford, New York on March 5, 2017. Plaintiff is the insurance carrier for the home and brings this subrogation action. The fire happened in a new fireplace installed as part of home renovations which took place during 2014 and 2015. Plaintiff contends that the fire caused over \$3 million in property damage.

Third-party defendant Dalton was a family friend of the Nadels. Apparently, both he and Lawrence Nadel are in the construction business. Dalton was hired to be the architect and design plans for the renovation, although the parties disagree about the exact extent of his involvement and control over the construction. Defendants argue that he controlled the installation and design of the fireplace while Dalton (and plaintiff) claim he only offered aesthetic opinions. The design plans involved moving the fireplace but utilizing the old flue. Allegedly, the flue from the old fireplace would be connected to the flue from the new fireplace via an elbow.

Mr. Nadel claimed that in the first year after the fireplace was installed, he smelled smoke and eventually contacted Dalton. Dalton testified that he initially contacted another entity, non-party Mr. Chimney, about the issue (NYSCEF Doc. No. 215 at 88). This entity allegedly found nothing wrong with the chimney but offered to do a full, further investigation at a cost of \$1,000 (*id.* at 89). Dalton was at this initial inspection without Mr. Nadel (*id.* at 88). Dalton decided not to do that more invasive and full inspection and instead decided to contact the entity from which the fireplace was purchased (Home and Hearth) (*id.* at 89-90).

Dalton then contacted All American in November 2016 to clean the chimney, and that is what All American did. The fireplace was used on multiple occasions thereafter. On March, 5, 2017, Mr. Nadel was cooking dinner while using the fireplace and smelled smoke. He claims he heard what sounded like a steel drum coming from the chimney and, after going upstairs, saw “the reflections of flame[s] on the trees outside my house” (NYSCEF Doc. No. 210 at 45). Mr. Nadel then ran outside his house and insists that the top of the chimney had fire shooting out of it “like the old Batmobile exhaust with Adam West” (*id.* at 46). The fire destroyed much of the attic and second floor of the home.

MS001

In this motion, Dalton moves to dismiss the third-party complaint against him on the ground that he was hired to work on the project via his company, M Dalton LLC and not in his individual capacity. Dalton argues that his company was not hired to do any construction or physical work in connection with the renovation, which included work on the kitchen as well as the relocation and installation of a new fireplace. He insists that the only entities that did any work with respect to the fireplace were JB and SN. Dalton claims he was only hired to do the kitchen renovation. Dalton also argues that the fire was caused by a creosote buildup and that

this stemmed from the use of Duraflame logs with real wood by the Nadels rather than from the installation of the fireplace.

In opposition, SN claims that Dalton was a friend of the homeowners and that he prepared the construction plans. It argues that Dalton is not shielded from liability because he participated in the tort at issue here (the allegedly deficient design and installation of the fireplace and chimney). It claims that Dalton is personally liable because he created the plans for which plaintiff asserts that the pipes from the old chimney were reused and that this caused the fire.

JB argues that it was hired by Dalton and then it hired SN to assist with making the flue connection from the new fireplace to the existing flue. It argues that Dalton came up with plans for this design and that Dalton purchased and supplied the new ductwork to make the connection between the two flues. It argues that after the work was completed, JB never received any complaints from the homeowners about the new fireplace.

According to JB, the Nadels (the homeowners) experienced smoke issues with the fireplace and then contacted All American to clean the chimney in 2016. JB argues, just as SN does, that the smoke buildup was caused by the buildup of creosote and that the Nadels caused the condition by improperly using Duraflame logs along with natural wood logs. JB insists that this causes excessive heat.

All American also opposes the motion and asserts that it merely was hired to clean the chimney and did not do any structural work or repairs.

Plaintiff also opposes the motion. It argues that the fire was caused by the faulty installation of the chimney flue and not from the creosote buildup. It blames SN for the bad installation.

As will be discussed in connection with the other motions, there are numerous issues of fact about the exact cause of the fire. The experts clearly disagree and this Court cannot make a factual determination on a motion for summary judgment.

The central question on this motion is whether Dalton can be held personally liable for causing the fire, assuming of course, that the design and installation is the cause (a fact that has not yet been determined). “[A] corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced” (*Am. Exp. Travel Related Services Co., Inc. v N. Atl. Resources, Inc.*, 261 AD2d 310, 311, 691 NYS2d 403, 404 [1st Dept 1999]).

Here, there is an issue of fact about the extent of Dalton’s involvement and whether he was responsible for overseeing the installation of the new fireplace as well as its design. JB and SN claim they simply followed Dalton’s designs and that the fire, under at least one plausible scenario, is the result of Dalton’s negligence. Defendants contend that Dalton hired the contractors, directed them regarding the work to be performed, purchased the fireplace and ensured quality control. They also contend that Dalton inspected the ductwork and helped the homeowners when they started smelling smoke soon after they began to use the newly constructed fireplace.

SN’s witness claimed that Dalton was there all the time and that the owner of JB told him to do whatever Dalton said needed done (NYSCEF Doc. No. 213 at 20). “When I was connecting the flue to the new fireplace and I came to the job, the new fireplace was already in place” (*id.* at 26). In other words, a person who worked directly on connecting the flue to the new fireplace (a potential cause of the fire), claims he did it at the direction of Dalton. If that

installation and design was faulty, then Dalton may be found liable. That raises an issue of fact sufficient to deny the instant motion.

Although Dalton contends that he should be shielded from liability based on the fact that his corporate entity contracted with the Nadels, that does not shield him from personal liability under these circumstances where he may have committed a tort. There are simply too many questions about what caused the fire for this Court to dismiss the claims against Dalton, particularly because his precise involvement is not readily clear.

That counsel for JB may have indicated in an email that he planned to make a motion for leave to amend the third-party complaint to name Dalton's corporate entity instead of Dalton is of no moment because JB never made that motion. An assertion about what someone might do is not binding. And Dalton did not make this argument in his moving papers so he cannot make it for the first time in reply.

MS002- SN's Motion

In MS002, SN moves for summary judgment.¹ It claims that it installed part of the flue for the new fireplace and simply followed the instructions of Dalton and JB. SN claims that it did not remove the old fireplace, did not remove the existing flue, did not disconnect the existing flue pipes and did not install the new fireplace. SN argues that it was Dalton who brought the materials and new flue pipe pieces to the home and that Dalton instructed SN how to do certain tasks.

The Court denies the motion as the expert affidavits raise numerous issues of fact about how the accident occurred. SN submitted the affidavit of Peter Anderson, who claims that the

¹ The Court observes that SN utterly failed to comply with the e-filing rules which require that affirmations and affidavits be filed as separate documents. The Court will overlook this error in connection with these motions.

renovation work at issue involved removing the existing fireplace and installing a new manufactured fireplace (NYSCEF Doc. No. 197, ¶ 7). Apparently, the flue pipe was to be connected to the existing flue as described in the design plans from Dalton (*id.*). Mr. Anderson emphasizes that “Duraflame does not recommend burning wood with its logs because when you add other materials to the Duraflame log, it can change the characteristics of the burn” (*id.* ¶ 28). It can cause “a sudden increased burn rate or flare up” (*id.*).

He concluded that there was no evidence that the work done by SN had anything to do with the fire and that the fire was from “combustible material, creosote, igniting in the upper part of the flue and creating excessive temperatures that ignited combustible material adjacent to the flue” (*id.* at 15).

Plaintiff submits the affidavit of George Hannigan, a fire and explosion investigator, who claims that the fire originated inside the second-floor wooden chimney chase located within the second-floor master bathroom (NYSCEF Doc. No. 280, ¶ 4). He insists that this location is “just above the first-floor flue connection within the ceiling assembly above the kitchen” (*id.*).

Also included is the affidavit of Leo Herrmann, who claims that it was improper to disconnect the type of chimney in the Nadels’ home and reuse the chimney sections (NYSCEF Doc. No. 282, ¶ 6). He added that “One elbow was found improperly connected and evidence of a heated flue gas escaping the improperly fit section was identified at the evidence exam. The dislocated pipe is an installation defect by JB Construction and SN Construction” (*id.* ¶ 5). Mr. Herrmann opined that inappropriate modifications were made with respect to the elbow sections in violation of the manufacturer’s installation instructions (*id.*).

Mr. Herrmann concludes that because only three elbows were used (he asserted that elbows come in two-piece sets and so four should have been used here), it created a “breach in

the chimney flue system that would permit heated gasses to escape the flue . . . [and] that resulted in the fire” (*id.* ¶ 14).

SN also attached the affidavit of Edward Peknic, who insists that “there was no fire damage on the elbow leaving the fire chamber” (NYSCEF Doc. No. 349, ¶ 5). Mr. Peknic claims that the “fire originated at the top of the chimney and the attic of the Premises” (*id.* ¶ 7). He explicitly disagreed with the conclusion of Mr. Hannigan as to where the fire originated. SN also attaches the affidavit of Peter Anderson who claims that SN had nothing to do with causing the fire in any way (NYSCEF Doc. No. 357, ¶ 4).

In other words, there are too many issues of fact about what happened here and which party was responsible for which task to grant the instant motion. The parties disagree about Dalton’s role with the project and the extent to which he controlled the means and methods of work. The witnesses for both JB and SN disagree about the extent to which either party was responsible for installing the new fireplace and the related duct work to connect the new fireplace with the old flue. Put another way, JB, SN, Dalton, and plaintiff - and their respective experts - all point the finger at each other. They don’t even agree on where the fire started.

And, most importantly, the parties disagree about how the accident happened. It may be that the fact finder believes SN’s experts that the fire occurred because of the design and installation, namely that the failure to include four elbows instead of the three used here, created a tinder box. The fact finder could also credit plaintiff’s experts who insist that the fire was largely the result of the Nadels use of Duraflame logs with regular wooden logs. Or the fact finder could conclude something completely different. Of course, summary judgment is not appropriate on this record.

The Court also denies the branch of SN's motion to the extent it claims that the negligence claim is duplicative of the breach of contract claim or that the breach of contract claims should be dismissed. As plaintiff points out, SN had a duty to perform the installation work in a professional manner and there are conflicting accounts of who controlled the means and methods of the work. Dalton insists he only did the design and it was up to JB and SN to install the fireplace, although Dalton claims he had no idea SN was hired by JB. Under that scenario, a fact finder could conclude that SN was liable because it controlled the means and methods of the work. On a motion for summary judgment, this Court is unable to make factual findings.

MS003

In MS003, All American, the company which cleaned the chimney, moves for summary judgment on the ground that it merely did a chimney sweep of the fireplace, brushed the interior of the chimney and removed the soot more than five months before the fire. It emphasizes that it did not do anything with respect to the structural integrity of the chimney and it received no complaints whatsoever about the job it did. All American points out that because the fireplace was used in the five months after the cleaning and before the fire, there is no causation between its work and the fire.

SN offers opposition although it mainly focuses on why it is not liable.

Plaintiff claims that there are issues of fact with respect to All American, including why its services were retained and whether All American had a duty to inform the Nadels that a level two inspection of the chimney would be required. According to plaintiff, All American should have performed this more invasive investigation once it became clear that the Nadels were

complaining about significant smoke smells when using the fireplace. Plaintiff argues that All American only did a basic inspection (level one) of the fireplace and then recommended that the fireplace and chimney be cleaned.

In reply, All American emphasizes that the Nadels (with the help of third-party defendant Dalton) contemplated having a detailed inspection of the chimney done in March 2016 by another entity, the non-party Mr. Chimney. All American observes that the Nadels declined to go forward with this inspection because it cost \$1,000 and they wanted to wait until the next fireplace season (the next fall) to deal with the issue. And instead of getting that inspection, they opted to hire All American that next fall to merely sweep the chimney.

The Court grants the motion and dismisses all claims and crossclaims against All American, the chimney sweep. There is no dispute that All American was hired to simply clean the chimney and was paid \$100 in cash for doing that task (NYSCEF Doc. No. 188 at 19). That a level 2 inspection might have been warranted is mere speculation and, in any event, irrelevant. All American was hired to clean the chimney and that is what it did.

Plaintiff had the opportunity to hire the non-party Mr. Chimney to do that inspection but decided not to pay the money- plaintiff cannot now blame All American for not doing an invasive and detailed inspection. That position is completely without merit because All American's witness testified that he has never performed a level 2 inspection (where a camera is inserted down the chimney) and he does not even offer that service (*id.* at 18-19). The Court is unable to find that All American could be liable to find a defect (assuming for purposes of this motion that there was, in fact, a defect to find) where it never offered to do that inspection, was not asked to do that inspection, did not have the experience and know-how to do that inspection and was not paid for that inspection.

Moreover, there was no testimony or evidence submitted that shows that All American constructed, altered or repaired the chimney. Plaintiff cannot somehow create a duty on All American to investigate the chimney. And even if it could, plaintiff failed to raise an issue of fact to show how a duty owed by All American caused the fire at issue. The chimney cleaning happened five months before the fire.

In addition, none of the expert affidavits submitted by the parties contends that All American's cleaning caused the fire. No one claims, for instance, that All American did a substandard job of cleaning the chimney and that was the proximate cause of the fire. Instead, as detailed above, the experts assert, essentially that the fire started either because of the way in which the new fireplace was installed and designed or because of the way in which the Nadels used the fireplace.

It is critical to point out that All American did not have a routine cleaning schedule and Mr. Nadel asserted he had never gotten the chimney cleaned before. All American was hired on a single occasion to clean the chimney and not one expert claimed that the cleaning was insufficient. On this record, there simply isn't an issue of fact to connect All American's cleaning to the massive fire that happened months later. To the extent that All American's employee may have looked around the chimney prior to cleaning it, that does not change the Court's decision. There is no evidence that All American undertook an obligation to determine the cause of the smoke condition that arose after the installation of the new fireplace or that would have prevented the fire.

MS004

This motion, filed by JB, is denied as untimely. The note of issue was filed on June 3, 2022 and this motion was filed on October 7, 2022, which is more than 120 days after the note of

issue was filed. To the extent that JB appears to argue that the Court’s order from June 7, 2022 makes the instant motion timely, that claim is without merit. The Court’s order denied the parties’ request to extend the time to make dispositive motions and explicitly observed that the note of issue was filed on June 3, 2022 (NYSCEF Doc. No. 138). That did not extend the time to file a summary judgment motion in any way.


Accordingly, it is hereby

ORDERED that third-party defendant Dalton’s motion (MS001) is denied; and it is further

ORDERED that defendant SN Construction’s motion (MS002) is denied; and it is further

ORDERED that defendant All American Chimney Sweep’s motion (MS003) for summary judgment is granted and all claims and crossclaims against this defendant are severed and dismissed; and it is further

ORDERED that JB Construction Concepts LLC’s motion (MS004) for summary judgment is denied.

<u>12/21/2022</u> DATE	 ARLENE P. BLUTH, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION		
APPLICATION:	<input type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER		
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	