

**Metropolitan Prop. & Cas. Ins. Co. v 116 2nd Ave.
LLC**

2023 NY Slip Op 31282(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 153316/2021

Judge: David B. Cohen

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 153316/2021

**METROPOLITAN PROPERTY AND CASUALTY
INSURANCE COMPANY,**

MOTION SEQ. NO. 003, 004

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

**116 2ND AVENUE LLC and VIA DELLA PACE
RESTAURANT,**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 146, 147, 148, 149, 150, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 186, 188, 189, 190, 191, 192, 193, 194, 202, 203, 204, 205, 206, 207

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 145, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 185, 187, 195, 196, 197, 198, 199, 200, 201, 208, 209, 210, 211

were read on this motion to/for DISMISS.

In this property damage action, defendant Via Della Pace Restaurant (Via Della) moves (Seq. 003), pursuant to CPLR 1024, 3211(a)(1), (a)(7), and (a)(8), for an order dismissing the complaint as against it. Plaintiff opposes the motion, and cross-moves, pursuant to CPLR 2001 and 3025(b), for an order granting it leave to amend its complaint. Defendant 116 2nd Avenue LLC also opposes the motion, and cross-moves, pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the complaint and all cross-claims as against it. 116 2nd Avenue also moves separately (Seq. 004), pursuant to CPLR 3211(a)(1) and (a)(7), for an order dismissing the complaint and all cross-claims as against it.

Factual and Procedural Background

On February 10, 2020, a fire occurred inside a building owned by 116 2nd Avenue and located at 48 E. 7th Street in Manhattan (the premises) (NYSCEF Doc Nos. 62, 128). The premises contained commercial and residential units, with a restaurant operated by Via Della situated on the first floor and several of plaintiff's subrogors living as tenants in apartments on the remaining floors above (Doc No. 114). After reimbursing its subrogors pursuant to insurance policies, plaintiff commenced two separate negligence actions seeking to recover money for property damage suffered by its subrogors, one against 116 2nd Avenue bearing index No. 153316/2021, and one against Via Della bearing index No. 158961/2020 (Doc No. 75).

In September 2021, plaintiff moved to consolidate the actions for discovery and trial (Doc No. 14). By decision and order of December 17, 2021, this Court granted plaintiff's motion and consolidated the actions under the instant index number (Doc No. 75).¹ Via Della and 116 2nd Avenue each move to dismiss the complaint as against it, with 116 2nd Avenue also moving to dismiss all cross-claims against it (Doc Nos. 60, 108). Plaintiff opposes, and cross-moves to amend its complaint by renaming Via Della to Via Della Pace Inc. and naming 48 E. 7th Associates Inc., a named defendant in the related matter joined only for discovery purposes, as an additional defendant (Doc No. 125).

In support of its motion, Via Della submitted, among other things, a Department of Buildings permit, several blueprints for interior renovations of the premises, a lease agreement, a report authored by fire investigation expert Thomas Karn (the Karn Report), and an affidavit from its co-owner (Doc Nos. 67-70). In support of its motion, 116 2nd Avenue submitted, among other

¹ In January 2022, the parties stipulated to joining the instant action with another action bearing index No. 155292/2020 for only the purpose of discovery, which this Court so-ordered (Doc No. 31). By order of February 14, 2023, this Court directed that such joint discovery take place under the 155292/2020 index number (Doc No. 213).

things, the same lease agreement provided by Via Della, the Karn Report, and an additional report authored by fire investigation expert Joseph Myers Jr. (the Myers Report) (Doc Nos. 118-119, 121-122).

Building Blueprints and Alternation Permits

The Department of Buildings permit was applied for in May 2002 by a company named Richard H. Lewis Architect and was issued shortly thereafter in June 2002 (Doc No. 69). The work performed included, among other things, installation of new kitchen equipment and ventilation items (Doc No. 69). The blueprints appear to align with the renovations specified in the permit as well (Doc No. 69).

Fire Investigation Expert Reports

On March 16, 2020, multiple experts investigated the post-fire remnants of the premises, and two fire investigation reports were issued (Doc Nos. 121-122). The Karn Report provided that the fire “resulted from radiated and conducted heat” from a stove igniting a combustible wall assembly in the kitchen, which consisted of a stainless steel panel placed over tiles layered on gypsum boards (Doc No. 121). In the report, Karn also concluded that the fire “originated within the combustible wall assembly on the west interior wall of the kitchen,” which he clarified as the wall “between the first-floor kitchen of Via Della Pace and the underside of the stairwell to the upper floor apartments” (Doc No. 121). However, he could not identify the party responsible for the fire and stated that “[d]ocuments regarding the construction of the kitchen and the installation of the natural gas range would have to be obtained to determine responsibility” (Doc No. 121 at 6). He also indicated that the Fire Marshal “classified the cause of th[e] fire as ‘[e]lectrical [w]iring’” and described the area of the fire as an “‘enclosed utility shaft’” in the Fire Department incident report (Doc No. 121 at 4-5). Although Karn expressly stated that a copy of such incident

report was annexed to his report, the copies of the Karn Report submitted by the parties did not include a copy of the Fire Department incident report (Doc No. 121).

The Myers Report confirmed many of the details included in the Karn Report, namely that the fire was caused by heat transferring to the combustible wall assembly on the “west perimeter wall” of the kitchen (Doc No. 122 at 4). Regarding the fire’s origin, although Myers Jr. indicated that the fire “originate[d] inside the west perimeter wall of the kitchen adjacent” to the stove, he also stated that the “area of fire origin [was] on the first floor in the ventilation shaft, on the opposite side of the wall adjacent” to the stove (Doc No. 122).

Legal Analysis and Conclusions

116 2nd Avenue’s Motion to Dismiss

116 2nd Avenue contends that the complaint should be dismissed because the documentary evidence seen in the Karn Report, the Myers Report, and its lease agreement with Via Della demonstrates that it did not cause the fire at the premises and did not have notice of any allegedly hazardous condition. It further contends that plaintiff’s inability to establish its liability for the fire means plaintiff failed to state a cause of action as required by CPLR 3211(a)(7).

Plaintiff opposes, arguing that 116 2nd Avenue’s documentary evidence does not warrant dismissal because it does not resolve all pertinent factual issues. It also argues that the motion fails to challenge the sufficiency of plaintiff’s complaint, as it does not address any of the complaint’s deficiencies. Lastly, it argues the motion is premature because no depositions have occurred and little other discovery has been conducted.²

On a motion to dismiss pursuant to CPLR 3211(a)(1) a court must “accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible inference, and

² Via Della also opposes the motion, arguing that it should be denied because the fire occurred on the portion of the premises outside its kitchen, which were allegedly controlled by 116 2nd Avenue.

determine only whether the facts as alleged fit within any cognizable legal theory” (*Kolchins v Evolution Mkts., Inc.*, 31 NY3d 100, 105-106 [2018] [internal quotation marks, brackets, and citations omitted]). Dismissal may only be granted where the documentary evidence put forth by the defendant “utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Lezama v Cedano*, 119 AD3d 479, 480 [1st Dept 2014]), with the defendant bearing the burden of making this required showing (*Kolchins*, 31 NY3d at 106). Documentary evidence, however, must still be presented in admissible form to be properly considered on a motion made pursuant to CPLR 3211 (*Advanced Global Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 317 [1st Dept 2007] [finding court erred by considering email message as documentary evidence because it was not in admissible form]).

Here, the Karn Report and the Myers Report cannot be considered documentary evidence, as “such reports are merely opinion evidence” (*New York Tel. Co. v Mobil Oil Corp.*, 99 AD2d 185, 192 [1st Dept 1984] [finding inspection reports from fire department not documentary evidence]; see *Vozdik v Frederick*, 146 AD2d 898, 900 [3d Dept 1989] [concluding fire investigator reports constituted unsworn hearsay]; see also *Zohar v 1014 Sixth Ave. Realty Corp.*, 24 AD3d 125, 126-127 [1st Dept 2005] [stating that “a Fire Department report is generally admissible under the business records exception to the hearsay rule” but holding some portions of report inadmissible because “it contain(ed) information obtained from persons under no duty to report”]; *Denicker v Rohan*, 236 AD2d 359, 359-360 [2d Dept 1997] [finding fire marshal’s report not in admissible form because not properly certified]).

However, even if the fire investigation expert reports are admissible, 116 2nd Avenue still fails to utterly refute plaintiff’s allegations, as it fails to establish that it did not play a role in

creating the conditions that led to the fire or that it lacked notice of an allegedly hazardous condition. Although the fire investigation expert reports indicate that the fire resulted from heat transferring to the combustible wall assembly on the wall of the kitchen, they provide contradictory information regarding the origin of the fire. Both reports provide that the fire originated within a wall of the kitchen, but also mention the fire's origin as a ventilation/utility shaft located outside the kitchen. The Karn Report also provides that the Fire Marshal classified electrical wiring as the cause of this fire, which differs from the conclusion seen in the fire investigation expert reports. The Karn Report, specifically, also explains that it is essentially preliminary analysis and cannot determine who was responsible for the fire, as evidenced by its statement that additional documentation was required before such a conclusion could be reached.

Therefore, giving plaintiff the benefit of every inference, it cannot be established that the fire did not occur in an area of the premises under the control of 116 2nd Avenue, and factual questions remain about whether it created an allegedly hazardous condition or had notice of such condition (*cf. Lau Tung Tsui v New Charlie Tseng Corp.*, 35 AD3d 390, 391 [2d Dept 2006] [affirming summary dismissal of complaint against landlord because it showed that it neither created hazardous condition resulting in fire or had notice of such hazardous condition]).

Via Della's Motion to Dismiss

Via Della contends that the complaint must be dismissed because the documentary evidence demonstrates that it did not cause the fire at the premises and did not have notice of any allegedly hazardous condition. It further contends that plaintiff's inability to establish its liability for the fire means plaintiff failed to state a cause of action as required by CPLR 3211(a)(7). Plaintiff opposes and advances arguments similar to those it asserted in opposition to 116 2nd Avenue's motion to dismiss. As Via Della seeks dismissal of the complaint pursuant to CPLR

3211(a)(1) and (a)(7), just as 116 2nd Avenue does, the applicable legal rules are the same as those described above (*see Kolchins*, 31 NY3d at 105-106; *Goshen*, 98 NY2d at 326; *Advanced Global Tech., LLC*, 44 AD3d at 317).

Here, Via Della fails to utterly refute plaintiff's allegations, as it fails to establish that it did not play a role in creating the conditions that led to the fire or lacked notice of a hazardous condition. As previously discussed, the Karn Report cannot be considered documentary evidence because it constitutes "opinion evidence" (*New York Tel. Co.*, 99 AD2d at 192; *see Vozdik v Frederick*, 146 AD2d at 900; *see also Zohar*, 24 AD3d at 126-127; *Denicker*, 236 AD2d at 359-360), and, even if in admissible form, it does not definitively establish that the fire occurred in an area that was not controlled by Via Della. The remaining evidence submitted by Via Della, without the help of the Karn Report, also does not refute plaintiff's allegations that Via Della was negligent. Because the cause and origin of the fire remain unresolved, the Department of Buildings permit, blueprints, and lease agreement do not resolve the factual questions regarding its creation of an allegedly hazardous condition or its notice of any such condition. Therefore, Via Della's motion to dismiss must be denied.

Plaintiff's Cross-Motion to Amend Its Complaint

"It is axiomatic that absent prejudice or surprise, . . . leave [to amend a complaint] should be freely given, except where the proposed amendment plainly lacks merit and would serve no purpose than to needlessly complicate and/or delay discovery and trial" (*Verizon N.Y. Inc. v Consolidated Edison, Inc.*, 38 AD3d 391, 391 [1st Dept 2007] [citations omitted]; *see Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).³ The decision whether to grant such leave "is committed to the sound discretion of the court" (*Davis v South Nassau Communities Hosp.*, 26

³ Via Della only argues that it would be prejudiced by amendment of the complaint, it does not contend that plaintiff's proposed amendments are patently without merit.

NY3d 563, 580 [2015] [internal quotation marks and citations omitted]), and the party opposing amendment of the complaint bears the burden of establishing prejudice (*see Kimso Apts., LLC*, 24 NY3d at 411). A delay in seeking amendment, by itself, is an insufficient rationale for denying leave to amend (*see Johnson v Montefiore Med. Ctr.*, 203 AD3d 462, 463 [1st Dept 2022]; *Greenburgh Eleven Union Free School Dist. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 298 AD2d 180, 181 [1st Dept 2002]); there must be “‘lateness coupled with significant prejudice to the other side’” (*Jacobson v Croman*, 107 AD3d 644, 645 [1st Dept 2013], quoting *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

Via Della fails to demonstrate that it would be prejudiced by amendment of the complaint to rename it as Via Della Pace Inc. and to name 48 E. 7th Associates Inc. as an additional defendant. Its assertions that the passage of time, and the costs associated with defending the motion and participating in discovery, are insufficient since “[p]rejudice does not occur . . . because a defendant has to expend additional time preparing its case” (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009] [citation omitted] [finding no prejudice where no depositions had occurred and note of issue filing deadline roughly nine months from date of motion to amend]; *accord O’Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 89 [1st Dept 2017]). Moreover, this is not an instance where a party seeking amendment had reason to believe that the defendants named in the proposed amended complaint were involved from the beginning and should have been sued initially (*cf. Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 292-294 [1st Dept 2004] [denying leave to amend where plaintiffs moved for amendment over two years after filing of third-party complaint and had prior notice that possible claims existed against additional defendants]). Therefore, plaintiff is granted leave to amend its complaint.

116 2nd Avenue's Cross-Motion to Dismiss the Complaint

It is well established that a cross-motion is “an improper vehicle for seeking relief from a nonmoving party” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013]; *accord Hennessey-Diaz v City of New York*, 146 AD3d 419, 420 [1st Dept 2017]). Here, because 116 2nd Avenue’s cross-motion to dismiss the complaint seeks relief against plaintiff, a nonmoving party, it must be denied as improper (*see Genger v Genger*, 120 AD3d 1102, 1103 [1st Dept 2014] [concluding cross-motion for sanctions against nonmoving defendants improper]; *Arango v Atlantic Westerly Co., L.L.C.*, 69 Misc 3d 1220[A] [Sup Ct, NY County 2020] [affirming denial of defendant’s cross-motion for summary dismissal of complaint because plaintiff was nonmoving party]).

In any event, 116 2nd Avenue fails to utterly refute the allegations in plaintiff’s complaint. As explained above, its documentary evidence does not eliminate the factual questions regarding whether it created an allegedly hazardous condition or had notice of such condition.

The parties remaining contentions are either without merit or need not be addressed given the findings set forth above.

Accordingly, it is hereby:

ORDERED that defendant 116 2nd Avenue LLC’s motion to dismiss the complaint as against it (Seq. 004) is denied; and it is further

ORDERED that defendant Via Della Pace Restaurant’s motion to dismiss the complaint as against it (Seq. 003) is denied; and it is further

ORDERED that defendant 116 2nd Avenue LLC’s cross-motion to dismiss the complaint as against it is denied; and it is further

ORDERED that plaintiffs’ cross-motion for leave to amend the complaint herein is granted; and it is further,

ORDERED that plaintiffs are directed to file the supplemental summons and amended complaint on NYSCEF within 10 days of the entry of this order; and it is further

ORDERED that the supplemental summons and amended complaint once filed shall be deemed served upon service of a copy of this order with notice of entry upon defendant 116 2nd Avenue LLC which has already appeared in the action; and it is further

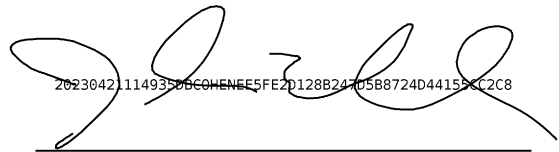
ORDERED that the supplemental summons and amended complaint shall be served, in accordance with the Civil Practice Law and Rules, upon Via Della Pace Inc. and 48 E. 7th Associates Inc. within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the parties shall appear for the status conference scheduled for May 8, 2023, at 3:00 p.m., in the matter bearing index No. 155292/2020.

4/21/2023
DATE


2023042111493506C0HENEF5FE2D128B24705B8724D44158C2C8

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART

OTHER