

Wesco Ins. Co. v Moncrieffe

2023 NY Slip Op 33596(U)

October 13, 2023

Supreme Court, New York County

Docket Number: Index No. 151828/2019

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X

WESCO INSURANCE COMPANY,

Plaintiff,

- v -

GARFIELD S. MONCRIEFFE, DIT AUTO SALES, INC.

Defendant.

-----X

INDEX NO. 151828/2019

MOTION DATE 05/31/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72

were read on this motion to/for

JUDGMENT - SUMMARY

This action arises out of property damage resulting from a fire in an automobile shop located at 4150C Boston Post Road, Bronx, New York 10475 (the subject premises). On March 1, 2006, defendant Garfield S. Moncrieffe, the owner of defendant DIT Auto Sales, Inc. (DIT Auto Sales), leased the subject premises from owner Ferrero Properties LLC. Mr. Moncrieffe operated the subject premises as DIT Auto Sales, a mechanics shop, a body shop, and car sales business. On December 28, 2016, a fire occurred in a vehicle located inside DIT Auto Sales, causing damage to the subject premises.

Wesco Insurance Company, suing as subrogee of Ferrero Properties LLC (plaintiff), brings this action against Garfield S. Moncreiffe and DIT Auto Sales, Inc. (collectively, defendants) for negligence, negligence under the theory of *res ipsa loquitur*, and failure to procure insurance.

Defendants move for summary judgment to dismiss the complaint on all of plaintiff's claims. Plaintiff opposes.

I. Analysis

It is well-established that the "function of summary judgment is issue finding, not issue determination." *Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 (1st Dept 1989). As such, the proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v Prospect Hospital*, 68 NY2d 320, 501 (1986); *Winegrad v New York University Medical Center*, 64 NY 2d 851 (1985). Courts have recognized that summary judgment is a drastic remedy that deprives a litigant of their day in court. Therefore, "[o]n a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" *Vega v Restani Const Corp*, 18 NY3d 499, 503 (2012), quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 (2011).

A. Negligence

To establish a prima facie case of negligence, a plaintiff must demonstrate a duty owed by the defendant to the plaintiff, a breach thereof, and injury proximately resulting therefrom. *See Solomon by Solomon*, 66NY2d 1026 (1985). To carry the burden of proving a prima facie case, the plaintiff must show that defendant's negligence was a substantial cause of the events that produced the injury. *See Nallan v. Helmsley-Spear, Inc.*, 50 NY2d 507 (1980). Courts have consistently held that where the cause and/or origin of a fire cannot be determined, it is impermissibly speculative to infer negligence of a defendant merely from ownership or occupation of the premises or because a general condition existed prior to the fire. *See Travelers v Gomez Supermarket*, 195 Misc2d 876 (App Term, 2d Dept 2003).

Defendants maintain that plaintiff's negligence claims must fail because plaintiff cannot prove that defendants caused the fire giving rise to this action. Specifically, plaintiffs allege that the cause of the fire was defendants' failure to disconnect the battery within the subject vehicle

while it was at the premises for repairs. In support of their motion, defendants submit, *inter alia*, the deposition testimony of defendant Garfield Moncrieffe. *See* NYSCEF doc. no. 52. Mr. Moncrieffe testified that the car at issue was mechanically fine at the time of the accident and that he did not need to perform any electrical work on vehicle necessitating disconnecting the battery. Defendants also submit the fire department incident reports (NYSCEF doc. nos. 54, 55) and the expert affidavit of Frank Poerio, a fire investigator (NYSCEF doc. no. 64) who concluded that “the cause of the subject fire can only be classified as undetermined and that there is no evidence that the failure to disconnect electrical connections to the battery was the competent cause of the fire and that the cause could not be determined to any meaningful degree of probability.” NYSCEF doc. no. 64.

Plaintiff opposes, arguing that triable issues of material fact exist regarding the cause of the subject fire. Plaintiff submits the expert affidavit of William Hayden, a certified fire investigator, in which he attests that it is his “...opinion that the fire started in the electrical wiring of the engine compartment of the 2011 Infiniti M6 as the result of the failure to disconnect the battery and that there were no other potential ignition sources located in the area of the origin of the fire. The origination of the fire was a result of defendant’s negligence, eliminating all other possible causes.” NYSCEF doc. no. 69. Further, in the Fire Incident Report dated December 28, 2016, Fire Marshal Daniel Knoblich reported that the fire originated in the engine compartment of the car at issue in “combustible materials (electrical wiring),” indicating that there may have been an electrical issue with the subject vehicle. NYSCEF doc. no. 60. Plaintiff also argues that the doctrine of *res ipsa loquitur* applies here, because this is not the kind of accident that happens without negligence, the case was in the exclusive control of defendants, and plaintiff did not

contribute in any way to the accident. See *Ezzard v One E. Riv. Place Realty Co., LLC*, 129 AD3d 159, 162-163 (1st Dept 2015).

With respect to plaintiff's cause of action for negligence, defendants have not met their burden to eliminate all material issues of fact. The deposition testimony of Mr. Moncrieffe and Frank Poerio's expert affidavit, which take the position that the cause of the fire cannot be determined, directly conflict with the expert affidavit of William Hayden and the Fire Incident Report dated December 28, 2016, which indicate that the fire was caused by defendants' failure to disconnect the battery. Given this conflicting evidence, plaintiffs have sufficiently raised a triable issue of fact with respect to the cause of the fire, thereby precluding summary judgment on plaintiff's negligence claim. See *B.R.I. Coverage Corp. v Imperial*, 182 AD2d 529, 530 (1st Dept 1992) (holding that the conflicting affidavits presented require denial of summary judgment).

Similarly, questions of fact exist as to defendants' liability under the doctrine of *res ipsa loquitur*. Where a fire's cause cannot be determined, *res ipsa loquitur* is inapplicable. See *N. Star Contr. Corp. v Burton F. Clark, Inc.*, 214 AD2d 550 (2d Dept 1995). However, as noted above, there are material issues of fact as to the cause of the fire and whether the cause of the fire can be identified. Therefore, the Court cannot yet determine whether *res ipsa loquitur* is applicable in this matter, and summary judgment is denied.

B. Failure to Procure Insurance

Defendants also move to dismiss plaintiff's claims for defendants' failure to procure insurance based upon the contractual requirements in the lease between defendants and Ferrero Properties LLC. Defendants argue that the operative language in the lease between defendants and Ferrero Properties LLC is limited to providing insurance coverage against third party claims and is inapplicable to this action. In opposition, plaintiff argues that the lease provides that defendants

must provide property damage insurance as well as liability coverage for third party claims. Additionally, plaintiffs argue that the lease mandates that defendants must procure insurance against all claims, irrespective of whether they are made by third parties.

Plaintiff's claim for failure to procure insurance arises out of on Article 8 (a) and 8 (c) of the subject lease. *See* NYSCEF doc. no. 53.

Article 8 (a) provides that:

Tenant shall obtain and keep in full force and effect during the term of this lease, at its own cost and expense, comprehensive public and property damage insurance; such insurance to afford protection in amounts initial not less than \$2,000,000 (with respect to premises only) for each occurrence and in the aggregate *protecting Landlord and Tenant as additional named insured's against any and all claims* for personal injury, death, sprinkler leakage, water damage, or *property damage occurring in, upon, adjacent to, or connected with the premises...* NYSCEF doc. no. 53 at 4 (emphasis added).

Article 8 (c) reads:

Tenant shall additionally maintain insurance against loss or damages to tenant's property, fixtures and inventory on or about the premises by fire and such other risks and hazards as are insurable under the standard form of policy for "all risk" property insurance providing for replacement value coverage. Tenant shall additionally purchase rent insurance naming landlord, guaranteeing the payment of rent to the landlord in the event that tenant defaults under its rental obligations. NYSCEF doc. no. 53 at 4.

The Court finds that the plain language of the subject lease directs that defendants must obtain and keep comprehensive public liability insurance and property damage insurance to protect landlord and tenant as additional insureds against any and all claims. The language "any and all claims" is not limited to third-party claims and would include insurance subrogation claims, such as here. Therefore, defendants' motion for summary judgment dismissing plaintiff's claim for failure to procure insurance is denied.

The Court has reviewed the remaining contentions and finds them to be unavailing.

II. Conclusion

Accordingly, it is hereby

ORDERED that the motion of defendants Garfield S. Moncreiffe and DIT Auto Sales, Inc. for summary judgment dismissing complaint is denied in its entirety; and it is further

ORDERED that the motion of defendants Garfield S. Moncreiffe and DIT Auto Sales, Inc. for summary judgment dismissing complaint is denied in its entirety; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon 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 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.


LESLIE A. STROTH, J.S.C.

10/13/2023
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN.	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	