SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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THE FASHION FOUNDATION, INC.,

Plaintiff,

- v -

HUDSON 38 HOLDINGS, LLC, EJMB REALTY CO., INC., GARBE ASSOCIATES, LLC, PETER ROMANO

Defendants.

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INDEX NO. 154178/2020

MOTION DATE 10/26/2023

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff's motion for summary judgment is granted as to liability only.

Background

Plaintiff leased an office suite from defendant Hudson 38 Holdings, LLC ("Landlord") for the term of September 1, 2019 through August 31, 2020. Plaintiff is a non-profit that provides school supplies to underprivileged children throughout the New York City metro area. It accepts donations from designers and retailers and uses the proceeds from selling these items to purchase supplies for local schools. Defendant EJMB Realty Co., Inc. ("EJMB") is the property manager for the building. Plaintiff says it settled with the remaining defendants.

The instant action concerns a radiator in the leased space. Prior to the start of the lease, plaintiff claims it was asked whether or not it wanted a large radiator removed and replaced with a smaller unit. Plaintiff maintains it agreed to this proposition. It insists that the removal of the old radiator and the installation of the new one occurred around the time plaintiff took possession

of the premises and that, for some reason, the water/steam feed was not properly attached to the radiator. Plaintiff alleges that as a result, on October 4, 2019 (and into the early morning hours of October 5, 2019), steam and water poured out of the water feed to the replacement radiator and drenched the premises. Plaintiff observes that the ceiling collapsed above the entry door, the drywall around a hallway began to crumble and nearly every item in plaintiff's inventory (including clothes and apparel) was destroyed. It alleges that the premises were unusable for nearly two months.

In support of the instant motion, plaintiff contends that defendants negligently installed the radiator and attaches the affidavit of its expert, Dr. Oko, who claims that the incident occurred because defendants left the radiator disconnected and uncapped while steam was flowing (NYSCEF Doc. No. 83, ¶ 14). Dr. Oko points to photographs of the radiator (as well as a video) which he insists shows that the steam/water line was left disconnected and improperly uncapped (*id*. ¶¶ 7-10).

In opposition, defendants claim that the motion should be denied because they had no actual or constructive notice of a defective condition. They insist that there is no evidence that they created a defect; they argue that the incident was caused by the failure of a cast iron pipe elbow. Defendants maintain that if there was a latent defect in the pipe elbow, they are not responsible as they did not have proper notice. They argue that when the radiator was replaced in September 2019, it passed a leak test. Defendants insist that on October 4, 2019, the building's heating system came on and that is when the pipe elbow failed and broke apart.

Defendants insist that the Court should ignore the expert affidavit because the expert was not present when the incident occurred. They also argue that the claimed value of the items that were damaged is inflated and plaintiff is not entitled to the amount it seeks.

In reply, plaintiff emphasizes that Ms. Munz (plaintiff's founder) and its expert are entitled to argue that the radiator was left disconnected as Ms. Munz was in the space every day and Dr. Oko reviewed photographic evidence. Plaintiff claims that defendants did not submit any evidence to show that a leak test was actually performed—it insists that only Mr. Bengualid (the Landlord's witness) made this assertion but he did not perform a leak test or know who did it. Plaintiff contends that the defective pipe elbow issue is merely a feigned issue of fact.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The principal issue in this motion is the cause of the leak in the leased premises. No one disputes that there was extensive damage stemming from a leak. Plaintiff met its prima facie burden to show that defendants were negligent through the affidavit of its founder, Ms. Munz, and its expert. Ms. Munz took a video of the premises right after the leak and insists that it shows that the replacement radiator and surrounding pipes were disconnected (NYSCEF Doc. No. 78, ¶ 11). And Dr. Oko, who looked at this video and photos, concludes that the leak happened because the pipes were left disconnected (NYSCEF Doc. No. 83, ¶ 14).

However, defendants did not raise a material issue of fact in opposition. Defendants' theory—that the incident was caused by a faulty pipe elbow—is not supported through an expert affidavit or by someone with personal knowledge of the incident. Defendants' version is based, primarily, on hearsay assertions from Mr. Bengualid, the property manager. For instance, defendants claim that a leak test was performed on the replacement radiator, but this assertion derives from Mr. Bengualid's testimony about his belief (not direct knowledge) that this happened (NYSCEF Doc. No. 105, at 20-21). He speculated that the radiator was tested by one of his employees, although he did not know who ran the test or when (*id*. at 22).

In fact, he observed that "It may have been the—I think it's the plumbers that changed the radiator, I'm not a hundred percent sure. And, then after the plumber does it, the super would have turned on the boiler while the plumbers were there to ensure that everything was connected correctly" (*id*.). This discussion also raises another point, although not a dispositive one. Mr. Bengualid also speculated that a non-party, plumber Raptor Mechanical LLC, took out the old radiator and put in the new one although he wasn't sure about that (*id*.). Of course, he could not

point to an invoice from this entity (Raptor) for the installation of the radiator and Raptor submitted an affidavit noting that it has no records of an invoice for a radiator installing in August or September 2019 (NYSCEF Doc. No. 95). The invoice from Raptor suggests it replaced the radiator after the incident (NYSCEF Doc. No. 94 [including an invoice dated October 15, 2019 for work done on October 8, 2019]).

And Mr. Bengualid's assertion that a faulty pipe was to blame is not sufficient to raise an issue of fact. He claimed that there was a crack because "That's what I surmised based on what I saw. And when I say "crack," it's not a crack that you and I could see visibly. After this happened, I guess whatever happened caused it to have a crack afterwards" (NYSCEF Doc. No. 105 at 34-35). He later admitted that he was never actually in the leased space (*id*. at 36-37).

In sum, defendants' theory is that there was a faulty pipe although they did not submit any evidence from someone with the expertise to make such an assertion. And defendants claim that plaintiff's version (that the radiator was left disconnected) is without merit because they think someone ran a test on the new radiator; but they do not know who ran this test or even who replaced the radiator. Mere suppositions and guesses are not sufficient to raise a material issue of fact. It was defendants' burden to have someone, ideally an expert, take a look at the radiator and offer a cogent theory of why the incident occurred.

Or defendants could have produced an employee swearing that he ran a leak test and left the radiator connected after this test, or produced proof of replacing a cracked elbow pipe, or even proof that defendants actually had the radiator installed before the incident – but defendant produced no such proof at all. Defendants cannot raise an issue of fact based upon what others (the super or Raptor) may have told Mr. Bengualid about the cause of the accident, or what Mr.

Bengualid thinks probably happened even though he did not even see the premises when the evidence was still there.

With respect to the amount due to plaintiff, defendants are correct that the Court cannot simply grant the entire amount plaintiff seeks. As plaintiff points out, most of the destroyed items were previously donated to plaintiff and many were samples. Therefore, a trial on damages is required to assess the value of the damaged items. In other words, the Court cannot simply accept plaintiff's estimates (*see* NYSCEF Doc. No. 82) for the value of the items as a matter of law; a trier of fact must do that. Moreover, plaintiff seeks to recover for lost profits, another determination that is not appropriate on a motion for summary judgment.

Summary

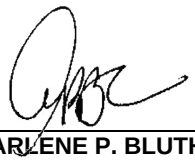
On a motion for summary judgment, the Court must consider the burden on each party. Plaintiff, the movant here, met its burden by offering an expert affidavit based on contemporaneous photos and video evidence about the cause of the accident. Defendants failed to meet their burden to raise a material issue of fact by not offering an alternative theory of how the accident occurred supported by admissible evidence. Defendants did not include affidavits from an expert or from the people who replaced the leaking radiator (in fact, there appears to be confusion about who replaced that radiator). Nor did defendants include anything from someone who actually performed the alleged leak test for the new radiator or from someone with personal knowledge about whether the radiator was left disconnected. Instead, defendants rely on a property manager, whose assertions derive exclusively from what other people may have told him—that is not sufficient to deny the instant motion.

There is no dispute in this case that defendants asked plaintiff if it wanted a new radiator and that defendants agreed to replace it for plaintiff. Whether or not defendants (or Raptor) did

the replacement is immaterial; defendants agreed to provide the service and, according to plaintiff, the faulty installation of the new radiator caused nearly their entire inventory to be destroyed.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted as to liability only and damages shall be determined at trial (plaintiff has already filed a note of issue with jury [NYSCEF Doc. No. 75]).



10/30/2023
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE