

Bardsley v Great Lakes Indus. Dev., LLC
2023 NY Slip Op 35316(U)
March 17, 2023
Supreme Court, Erie County
Docket Number: Index No. 814857/2019
Judge: Timothy J. Walker
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STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

DINA BARDSLEY and MICHAEL BARDSLEY,

Plaintiffs,

DECISION AND ORDER

Index No.: 814857/2019

v.

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC
and INDUSTRIAL MATERIALS RECYCLING, LLC,

Defendants.

ASHLEY TORRES, Individually, et al.,

Plaintiffs,

Index No. 800789/2021

v.

GREAT LAKES INDUSTRIAL DEVELOPMENT, LLC
and INDUSTRIAL MATERIALS RECYCLING, LLC,

Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **VINAL & VINAL, P.C.**
Jeanne M. Vinal, Esq., Of Counsel
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Attorneys for Defendant, Industrial Materials Recycling, LLC

WALKER, J.

Defendants, Great Lakes Industrial Development, LLC (“Great Lakes”) and Industrial Materials Recycling, LLC (“IMR”), have jointly applied for an order (Motion 10; Doc. 214 in *Bardsley*, and Motion 3; Doc. 55 in *Torres*) for an order granting summary judgment and dismissing the Complaints in both actions.

On May 10, 2021, this court issued a Decision and Order (Doc. 154)¹ joining these matters “for purposes of discovery and a joint trial limited to the issue of liability.” On February 2, 2022, this court issued a Decision and Order which, *inter alia*, granted Defendants’ joint application to bifurcate discovery in these actions (Doc. 208, p. 10). The February 2, 2022 Decision and Order also ordered “that all discovery related to liability shall be completed on or before June 30, 2022” (*Id.*, at p. 11).

BACKGROUND

These actions arise out of a fire that occurred on November 9, 2016 (“Fire”), at that part of the former Bethlehem Steel site known as the Steel Works Industrial Park, located at 2800 Hamburg Turnpike, City of Lackawanna, New York (“Industrial Park”).

According to the Complaints in both matters, the Fire originated upon real property “leased and/or operated” by Great Lakes and IMR (*Bardsley* Doc. 1, ¶¶ 8-9; *Torres* Doc. 1, ¶¶ 8-9). The record reflects that, despite several independent investigations, the cause of the Fire remains undetermined.

The court finds the following facts to be undisputed:

1. Non-party, Frontier Industrial Corp. (“Frontier”) is a New York State “C”

¹ Unless otherwise noted, all references are to documents filed with the NYSCEF System in *Bardsley*.

corporation, whose majority owners are David Franjoine and Dennis Franjoine.

2. Robert Zuchlewski is CEO of Frontier.

3. The Frontier Group of Companies is a branding banner, and both Defendants exist under its umbrella.

4. At the time of the Fire, Zuchlewski, Dennis and David Franjoine were the three owners of both Defendants; had minimal roles; and were passive owners of IMR.

5. Great Lakes was created to purchase and own the Industrial Park, which witnesses also refer to as "Route 5" and "Steelworks Industrial Park."

6. Great Lakes purchased the Industrial Park in 2010 for the purpose of leasing it to light industrial users.

7. From 2015, and through the time of the Fire, IMR leased space at the Industrial Park from Great Lakes ("Leased Space"), and the Leased Space was situated within a building located within the Industrial Park ("Building").

8. At the Leased Space, IMR operated on a single floor in two 60-foot bays of the Building, and the bays had concrete walls between them, with openings.

9. The Leased Space was known as the "cold mill," because that portion of the site operated as a cold mill when the former steel plant was operational.

10. The square footage of the entire Building (not just the Leased Space used by IMR), was approximately 700,000 to 1 million square feet, consisting of a large, open space².

11. The Leased Space consisted of approximately 100,000 square feet, or approximately

² While Plaintiffs dispute Fact 10 (stating "[t]he Bethlehem Steel complex is made of separate bays rented separately with walls between them with large doors separating"), Plaintiffs fail to address the Building's approximate square footage.

fifteen percent (15%) of the Building. At the time of the Fire, approximately twenty-five (25%) of the Building was empty, and the remaining sixty percent (60%) was leased to other tenants, including a pallet company, boat storage operations, metal fabricators, and a steel distributor³.

12. There was no construction performed at the Building from the date Great Lakes acquired it, until the date of the Fire⁴.

13. There was electric service at the Building. While there were no water or heat services at the Building, working fire hydrants were located outside of, and near the Building.

14. Smoking was not permitted in the Leased Space.

15. IMR based its decision to forgo plumbing, insulating, and heating the Leased Space based on cost, and its intended use of the Leased Space - for plastics recycling.

16. The restroom facilities for IMR's employees consisted of portable bathrooms and hand washing stations.

17. With respect to maintenance of the Leased Space, Section 9 of the Lease provides, in relevant part, as follows: "Tenant, during the Lease Term, will make at its sole cost and expense, if reasonably required by Landlord, all repairs, Alterations (as hereinafter defined), replacements, and improvements to the [Leased Space] . . ." (Doc. 241, p. 5).

18. There were no hard-wired smoke detectors or heat detectors in the Building, and

³ While Plaintiffs contend IMR used the entire Building, they did not provide a specific citation supporting this contention, instead referring to "[the Lease] and photos" (Doc. 267, p. 3). Furthermore, Defendants contend (and Plaintiffs failed to respond) that sixty percent (60%) of the Building was leased to other tenants.

⁴ Plaintiffs' contention that "The premises [were] cleared out" (Doc. 267, p. 4) is not responsive to Defendants' contention that there was no construction performed at the Building from the date Great Lakes acquired it, until the date of the Fire.

neither Defendant installed a sprinkler system in the Building.

19. Non-party DiVal, is a safety industrial supplier that installed fire extinguishers in the Leased Space before IMR took possession.

20. DiVal's expertise lies in fire extinguishers, and it makes recommendations for fire extinguishers based on codes and standards promulgated by the National Fire Protection Association ("NFPA"). It is within DiVal's expertise to advise the distance (in feet) between fire extinguishers being located within a facility.

21. Before IMR took possession of the Leased Space, DiVal inspected the Building and determined how many fire extinguishers were required based on the size of the Building and the materials intended to be stored therein.

22. IMR placed fire extinguishers on both walls of each of its bays, spaced every fifty (50) feet, and additional fire extinguishers were added as IMR acquired more space in the Building. IMR made its employees aware of the location of the fire extinguishers in the event of a fire.

23. IMR's general manager, Paul Kulniszewski, was trained to operate the fire extinguishers and had no trouble operating them. Likewise, Jeremy Schoepflin, an IMR employee and salesman, was trained to operate fire extinguishers, and he trained his coworkers at IMR on the use of fire extinguishers.

24. IMR also developed an evacuation plan, and performed evacuation drills at the Industrial Park.

25. When Great Lakes acquired the Building, Zuchlewski advised the City of Lackawanna ("City") that the Building would be occupied by various light industrial businesses.

26. The City inspected the Building before IMR took possession of the Lease Space. At the time of that inspection, the Building was vacant, and the inspection notice reflected its proposed use as “light industry manufacturing,” and identified the expected tenant’s (IMR) operations as “plastics and cardboard recycling.”

27. Prior to taking possession of the Leased Space, representatives of Great Lakes discussed with the City that IMR intended to operate a plastics recycling manufacturing plant at the Leased Space.

28. The City never advised Defendants or Frontier that they were required to install a sprinkler system in the Building, and Great Lakes did not understand that the Building required a sprinkler system.

29. Neither Great Lakes, nor Frontier was ever issued a code violation for lack of a sprinkler system prior to, or after, the Fire.

30. IMR’s business at the Leased Space was plastics recycling; not manufacturing⁵.

31. IMR processed multiple types of plastics, but not consumer plastic. It received plastics from producers, handlers, or distributors.

32. The plastics recycling involved grinding, and IMR’s equipment included two (2) shredders, several grinders, multiple forklifts, and a Bobcat skid steer.

33. After the plastic was ground, it was placed in double or triple corrugated cardboard boxes, measuring four (4) feet by four (4) feet each, which were then stacked onto pallets two (2) or three (3) high. The boxes did not have lids, and a pallet was placed underneath each box.

⁵ Plaintiff’s counter-statement that “IMR was not a bottle redemption center” (Doc. 267, p. 6) is not responsive to Defendants’ statement that IMR’s business was plastics recycling.

34. There were approximately one hundred (100) rows of filled cardboard boxes located throughout the Leased Premises at the time of the Fire. The boxes were stacked next to each other, with a row approximately three (3) feet wide to accommodate foot traffic between the rows.

35. Each row of boxes consisted of a different type of plastic.

36. Plastic grind was stored on-site until a buyer requested a full truckload.

37. In the bay where the Fire originated, there may have been twenty (20) rows of boxed plastics.

38. The Fire started on November 9, 2016, at approximately 7:15 a.m., in the Leased Space.

39. Fire companies from Lackawanna and Buffalo, as well as the Town of Hamburg, assisted in a joint effort to extinguish the Fire. These operations continued until the Fire was declared under control on November 12, 2016. During this time, the Buffalo Fire Department acted as lead agency. Thereafter, the Buffalo Fire Department demobilized, and turned operations over to the Lackawanna Fire Department.

40. City of Buffalo fire investigators investigated the Fire, assisted by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), the New York State Office of Fire Prevention and Control, and the Erie County Sheriffs Office (Fire Inspections Unit).

41. The City of Buffalo Fire Marshals Office issued an undated Investigative Report ("Fire Marshal Report") (Doc. 239), in which it concluded that the Fire originated in the Building.

42. According to the Fire Marshal Report, the Building was structurally destroyed and,

with minimal exceptions, its contents were also destroyed.

43. The Fire Marshal Report further indicates that,

[m]embers of the crew working inside the building stated that the Fire started in **Building B** [previously identified in the Report as the Building] and then spread to adjoining structures. Four witnesses stated that they were having a meeting in Building B when the manager noticed a fire and they then went to the scene (40' away) of the fire and assisted in either attempting to extinguish the fire or assisted in getting fire extinguishers. All these witnesses stated the fire was located in building B on top of a pile of stacked boxes which were full of shredded plastic.

(*Id.*, at p. 10) (emphasis in original).

44. Kulniszewski wrote in an IMR incident report that he first observed the Fire at approximately 7:09 a.m., in standard, open cardboard boxes containing ribbons of plastic film that had not yet been ground.

45. Kulniszewski and Schoepflin attempted to extinguish the Fire with hand-held fire extinguishers.

46. The fire investigation team ruled out every cause of the Fire, including, *inter alia*, chemical agents, cooking and/or heating equipment, heating system, smoking materials and open flames or sparks, except one - "Electrical Wiring, Distribution, and Appliances" (*Id.*, at p. 11).

47. With respect to "Electrical Wiring, Distribution, and Appliances" being a potential cause of the Fire, the Fire Marshal Report notes the following, in relevant part:

This cause is still under investigation and has not been eliminated. Maintenance supervisor stated that there were occurrences of superheated lights breaking in the past and showering the floor with hot shards. The supervisor stated that last year he had replaced 20/200 lights and that they replace them around the 15th of November each year. Supervisor (Witness V) noted that he had found shards of glass on the floor during his inspection around

the facility but that he had not witnessed any breaking. Witness stated that he heard what he thought sounded like glass breaking minutes before his safety meeting at 7 am. ... Supervisor (Witness V) also stated that these lights have no cover or housing covering the bulb.

(*Id.*).

48. The Fire Marshal Report concludes, as follows:

Through a systematic process of comparison examination and reconstruction of the fire scene, along with a detailed examination of the fire debris, the fire investigation team was able to conclude the following. The fire that occurred on 9 November, 2016, at 07:05 in the city of Lackawanna, Erie County, New York originated within **Building B: Cold Mill Bldg #2 (Bldg of Fire origin)** of the complex. Fire is declared undetermined. While ignition of plastic and cardboard boxes from the hot shards of dropdown material from an accidental light failure are suspect, this cannot be proved given the size and scope of the fire, the risk to investigators and firefighters, and the cost to the public. Case closed pending further forensic analysis from any independent agency and/or critical information directly related to case which impacts on investigation.

(*Id.*, at pp. 15) (emphasis in original).

While Plaintiffs dispute certain facts set forth in footnotes 2-5, they provided inadequate, or no citations supporting their contrary contentions. Having reviewed the record in its entirety, the court finds such facts to be undisputed.

With respect to the following disputed facts, all parties have referred to record citations to support their disputed contentions, and the court finds such facts to be disputed:

1. The height of the ceilings at the Leased Space is unclear. Joseph Kulnieszewski, IMR's operations manager, testified that the ceiling was approximately one hundred (100) feet high (Doc. 237, p. 14). Paul Kulnieszewski testified that it was approximately fifty (50) feet high (Doc.

232, p. 55). The Fire Marshal Report identified the Building as having ten (10) stories.

2. There is no basis for Defendants' statement that IMR obtained a business license from the City, because Defendants have not produced a copy of such license, and their supporting citations (namely, to witnesses testifying about what they thought or may have been told) are insufficient to support it.

3. There is no basis for Defendants' statement that, if the Building was not code compliant, one or both Defendants would have received a notice of violation from the City, because the supporting citation is insufficient (being limited to a witness asking the following at his deposition: "But if we weren't up to codes we probably would have had a violation, right?") (Doc. 234, p. 35).

4. The parties dispute whether the Building was water-tight and, thus, whether outside water reached the ceiling spaces, infiltrating the lighting/bulbs.

5. Defendants contend that the recycling process did not include burning or melting plastics, and that there was no burning of plastics to test them. Plaintiffs dispute this contention through the affidavit of Clarence Yeager (Doc. 262). Yeager was an employee of IMR for in excess of eight (8) years, and worked at the Leased Space until approximately two (2) months prior to the Fire, recycling plastics and breaking down crude oil containers. Yeager states that "[t]he bosses (not me) would burn different kinds of plastic with a torch to let us employees smell different types of chemical smells such as polyethylene, polypropylene, etc. for warning as it was known by the bosses that those chemicals were dangerous" (*Id.*, at ¶7).

Plaintiffs seek monetary damages for loss to property and personal injury related to, *inter alia*, soot, heat, and smoke related to the Fire.

DISCUSSION

Defendants contend that Plaintiffs seek to impose liability on them for damages caused by the Fire (to person and property) based on IMR's use of the Leased Space, including that IMR was in the business of recycling plastic and maintained plastic products on site before transporting them to customers. It is undisputed, however, that such recycling was performed by grinding, not by burning or melting, and that neither Defendant has been determined to have had any role in causing the Fire; such cause remaining undetermined.

Plaintiffs' theory of liability against Defendants is stated with particularity in paragraphs 11 and 17 of the Bardsley Complaint, wherein Plaintiffs allege that Defendants were reckless, careless, and negligent in numerous ways (Doc. 1, ¶¶11, 17). Similar allegations are made in the Torres Complaint (Torres Doc. 1, ¶¶40, 46).

In addition, in a letter from Plaintiffs' counsel to Defendants' counsel, dated February 9, 2021, further responding to Defendants' demands for a verified bill of particulars, counsel further alleged that "the 2010 Building Code was applicable due to a change in fire load and further the use required a DEC 360 permit which required fire suppressants" (Doc. 227).

Negligence

It is well-settled that,

it is irrelevant that the flames did not reach plaintiff's property . . .
[because] [s]moke and water damage to adjacent property are
foreseeable consequences of a fire, and plaintiff may recover for
such damage if he establishes defendants' breach of duty and
proximate cause.

(*Cuevas v. Quandt's Foodservice Distributors, Inc.*, 6 A.D.3d 973, 974 [3d Dept. 2004]).

It is further well-settled that, in order to establish a *prima facie* case of negligence, a

plaintiff must submit evidence showing: (i) the existence of a duty on defendant's part to plaintiff; (ii) a breach of such duty; and that (iii) such breach was a substantial cause of the resulting injury (*Chunhye Kang-Kim v. City of New York*, 29 AD3d 57, 59 [1st Dept 2006] [internal citations and quotations omitted]; *see also, Rand v. Finger Lakes Premier Properties, Inc.* 198 A.D.3d 1340, 1341 [4th Dept. 2021] ["Negligence is defined as the 'lack of ordinary care,' or a 'failure to use that degree of care that a reasonably prudent person would have used under the same circumstances'"] [quoting NYPJI 2:10, Negligence]).

More specifically, Defendants, as owner and occupants of the Building, may not be liable for damages caused by the Fire "without affirmative proof of negligence beyond the mere fact of the . . . [Fire]" (*Cosulich v. The Standard Oil Co. of New York*, 122 N.Y. 118, 128 [1890]. As the Court of Appeals summarized in *Cosulich*:

The fact that the injury sustained by the plaintiffs may have been a direct result of the fire which originated upon the premises of the defendant does not of itself render it liable to respond in damages therefor. The defendant was not maintaining a nuisance. Its business was lawful, and, in its conduct, the law does not impose the obligation of saving harmless others from the consequences resulting from the occurrence of inevitable accident, but rather burdens it simply with the duty of using reasonable care and caution to save others from injury. If it omitted that duty, and failed to observe that ordinary care which was incumbent upon it, then, because of such neglect, it became legally chargeable with the damages directly resulting therefrom, but not otherwise.

(*Id.*, at 123).

IMR's business at the Building "was lawful". Thus, the inquiry is whether Defendants "us[ed] reasonable care and caution to save others from injury" (*Id.*).

The Absence of a Fire Suppression Sprinkler System

Plaintiffs further contend that Defendants were negligent in having failed to maintain a fire suppression sprinkler system ("Sprinkler System"). Defendants contend none was required.

It is undisputed that, at the time Great Lakes purchased and took possession of the Industrial Park, the Building was not equipped with a Sprinkler System.

On August 9, 2014, the City inspected the Building and issued a Fire Inspection - Fire Safety Report ("Fire Inspection Report") (Doc. 242).

Defendants rely on the Fire Inspection Report as proof that the Building did not require a Sprinkler System in connection with Defendants' intended use. The Fire Inspection Report identifies Great Lakes as "NEW OWNER" (*Id.*, at p. 1) and states, in relevant part, "none at this time," regarding the presence of flammable liquids, and that hazardous materials were not present "at this time" (*Id.*, at p. 7). The "COMMENTS" section of the Fire Inspection Report states, in relevant part, "1 tenant moving in . . . Recycling Building Empty at this time" (*Id.*, at p. 8).

The Fire Inspection Report does not support Defendants' contention that, upon inspection, the City determined that the Building did not require a Sprinkler System. The Fire Inspection Report raises more questions than it answers, such as, whether the City was aware that a business intended to lease space at the building whose business involved **plastics** recycling; and whether the City was aware that such company intended to possess and/or store flammable liquids on site as part of its business operations. The reference in the COMMENTS section to "Recycling Building Empty at this time" does not definitively convey that the City was specifically aware that IMR would be recycling plastics.

Moreover, the reference to absence of flammable liquids and hazardous materials at the time of the inspection also reflects that the City did not fully appreciate Defendants' intended use of the Building at the time of the inspection. This is consistent with William Tojek, the City's fire inspector, stating the following, in relevant part:

4. I was present at the inspection on or about August 9, 2014 with Mr. Geyer [City code enforcement officer] and a representative from Great Lakes.
5. At that time, the building was vacant and there were no tenants in there at all.
6. We asked who would be moving in and they stated they were not sure, but that they were negotiating with certain businesses.
7. We specifically told them that depending on the type of business that they might have to put in a sprinkler. I checked the fire hydrants to see if there was running water there and there was.
8. We also informed them that they must file a business registration with the City before they are moving in. IMR did NOT file a business registration at any time before the fire.
9. Just before the fire, when I was at Mulberry, I saw a sign for a storage company. That was the first time I realized that anyone was in there. There was no indication that there was a plastics or recycling facility. I did not have a chance to inspect and cite them for no sprinkler before the fire.
10. The City of Lackawanna never suggested that the plastic storage was not a change in use.
11. Plastic is combustible and steel is not.
12. **A sprinkler was needed.**
13. The City of Lackawanna never suggested that they did NOT need a sprinkler and alarm system.
14. It is the property owner and tenant's duty to provide adequate

fire protection for the hazard.

15. With the change in use from steel to plastic, a fire suppression system with adequate alarms and sprinklers was needed.

(Doc. 279) (emphasis added).

The Tojek Affidavit not only confirms the City's misunderstanding of the Building's intended use at the time of the inspection, but also confirms that, had the City fully appreciated such intended use, the City's fire inspector would have mandated the installation of "a fire suppression system with adequate alarms and sprinklers." The Tojek Affidavit further belies Defendants' contention that, prior to the Fire, neither Defendant was ever issued a City code violation for lack of a Sprinkler System. Indeed, Fire Inspector Tojek clarified that, had he fully understood IMR's intended use of the Leased Space at the Building, he would have required a Sprinkler System. Had the Fire not occurred, he also intended on citing Defendants for a code violation for lack of a Sprinkler System, upon learning of IMR's use of the Leased Space after IMR moved into the Building.

The Tojek Affidavit further belies Defendants' contention that summary judgment should be granted in their favor, because they complied with all relevant statutes, codes, and regulations.

Cuevas, supra, held, in relevant part that,

[t]he fire investigation report indicated that there was no sprinkler system where the fire began. As defendants did not meaningfully address this statement, which supports plaintiff's theory that defendants' failure to install or maintain adequate fire safety devices allowed the fire to spread, a question of fact remains on that issue.

(6 A.D.3d at 974).

In contrast to the defendants in *Cuevas*, the Defendants herein did meaningfully address the Building's and Leased Space's lack of a Sprinkler System. Nonetheless, their contentions, that no Sprinkler System was required, are belied by the unambiguously contrary opinion of the City's fire inspector. Thus, at a minimum, genuine issues of material fact sufficient to preclude summary judgment exist as to whether a Sprinkler System was required and, if so, whether it would have mitigated or eliminated Plaintiff's damages by extinguishing or mitigating the Fire.

Compliance with Applicable Statutes, Codes and Regulations

Plaintiffs contend that Defendants were negligent by "violating applicable codes, statutes and ordinances relating to the inspection, construction, testing and/or work on [the Building]" and failing to maintain a "fire suppression system" (Doc. 69, pp. 4-5).

Plaintiffs submit the affidavit of Peter Klemann, the Chief Building Inspector for the City of Buffalo. Mr. Klemman opines, "to a reasonable degree of code enforcement certainty that the codes applicable at the time required the installation of a fire protection system which included sprinklers" (Doc. 112, ¶6).

In contrast, Defendants submit the affidavit and reply affidavit of Stephen M. Olenick, Principal Engineer at Combustion Science & Engineering, Inc. Mr. Olenick opines that Defendants did not violate any building codes and "no fire protection systems were required for this building, its new ownership by [Great Lakes], and its use by IMR" (Doc. 91, ¶27). Mr. Olenick confirmed his opinion in his reply affidavit. Notably absent from the reply affidavit is any response to the Tojek Affidavit, wherein City Fire Inspector Tojek stated that, had he fully appreciated the scope of work IMR intended to perform in the Leased Space at the time the Building was inspected (and empty), he would have required Defendants to install a Sprinkler

System.

The court is unable to determine, based on the conflicting opinions of the parties' respective experts, whether one, or both Defendants violated any applicable codes, rules, or regulations, mandating denial of summary judgment. As such, summary judgment cannot be granted.

Defendants' Employee Training with Respect to Fire Safety

Defendants contend that summary judgment should be granted, because their employees were sufficiently trained in fire safety with respect to the use of fire extinguishers, and that they ran fire evacuation drills. Neither topic of training bears on the issues addressed in the motions. Employees' proficiencies in the use of hand-held fire extinguishers had no bearing on the spread of the Fire and the widespread damages it allegedly caused Plaintiffs. Nor are evacuation drills relevant to this matter, as Plaintiffs have not asserted any claims related to injuries to persons within the Leased Space or Building at the time of the Fire.

The fact that Defendants' employees may not have been (or were not) negligent with respect to **starting** the Fire (through their work activities or otherwise) does not absolve Defendants from failing to "us[e] reasonable care and caution to save others from injury" (*Cosulich*, 122 N.Y. at 123) by having installed a Sprinkler System. Thus, Defendants' reliance on *Katz v. Eastern Const. Developing and Custom Homes, Inc.* (100 A.D.3d 830 [2d Dept. 2012]) (and similar opinions), holding that a contractor was not liable for alleged fire damages because it submitted evidence that the cause of the fire was unrelated to its work, is misplaced.

Proximate Cause

The Pattern Jury Instructions define “proximate cause” as:

An act or omission is regarded as a cause of an accident or occurrence if it was a substantial factor in bringing about the accident or occurrence, that is, if it had such an effect in producing the accident or occurrence that reasonable people would regard it as a cause of the accident or occurrence. There may be more than one cause of an accident or occurrence, but to be substantial, it cannot be slight or trivial. You may, however, decide that a cause is substantial even if you assign a relatively small percentage to it.

(NYPJI 2:70, Proximate Cause).

Thus, “where only one conclusion may be drawn from the established facts . . . the question of legal cause may be decided as a matter of law” (*Derdiarian v. Felix Contr. Co.*, 51 N.Y.2d 308, 315 [1980]).

In addition, and separate and apart from the issue of the Fire’s cause, the court has already determined that genuine issues of material fact exist as to whether Defendants should have installed a Sprinkler System in the Building and/or Leased Space and whether, had they done so, a Sprinkler System would have mitigated (or eliminated) Plaintiffs’ alleged damages.

Conflicting Expert Opinions Regarding the Cause of the Fire

It is undisputed that the cause of the Fire remains undetermined. The court, however, rejects Defendants’ contention that there are no facts in the record that would support a finding that any negligence on the part of Defendants caused the Fire or caused it to spread.

Plaintiffs submit affidavits on behalf of experts, including Daniel Whitcomb, an electrician with in excess of twenty-five (25) years experience “in high level industrial electric and electronics, including industrial maintenance and supervision” (Doc. 263, ¶1). Mr.

Whitcomb's CV (Doc. 264) reflects that he is an expert in the field of industrial electricity and electronics.

Mr. Whitcomb concluded, "to a reasonable degree of certainty as an electrician and as an expert in the area of commercial property maintenance" that (i) IMR's use of halide bulbs in the Leased Space "without enclosure or cover in wet conditions [due to water leaking from the roof otherwise infiltrating the Building] was negligent" and (ii) "use of that bulb in a wet area was the cause of the [F]ire" (*Id.*, at ¶23). In reaching these conclusions, Mr. Whitcomb reviewed the Fire Marshal Report, the affidavit of Stephen M. Olenick, Defendants' expert in fire protection engineering; a certified weather report for the day of the Fire; and the deposition transcripts (and related exhibits) of several witnesses regarding the origin of Fire and the bulbs IMR used at the Leased Space.

As the court would expect, Defendants vigorously oppose Mr. Whitcomb's conclusions through experts of their own, who appear equally as capable and proficient in their fields as Mr. Whitcomb. However, the court finds Mr. Whitcomb's analysis and the bases for his conclusions to be sound, and the court may not resolve issues of expert credibility in deciding a dispositive motion (*Haas v. F.F. Thompson Hosp., Inc.*, 86 A.D.3d 913, 914 [4th Dept. 2011] [conflicting opinions of the parties' respective medical experts present credibility issues that cannot be resolved on a motion for summary judgment]).

While the Fire Marshal Report ultimately concluded the cause of the Fire to be undetermined, the investigative team ruled out every potential cause of the Fire, except for electrical - related to the bulbs that underlie Mr. Whitcomb's conclusions and were known to explode, "showering the floor with hot shards" (*see* Fire Marshal Report, Doc. 239, p. 11).

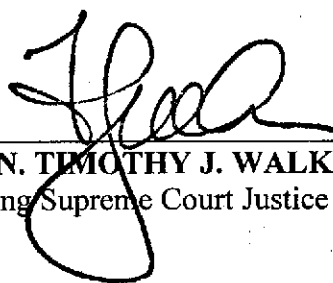
Thus, Defendants rely too heavily (and to their detriment) on the Buffalo Fire Marshal's conclusion that the cause of the Fire is undetermined, and likewise fail to acknowledge that the Fire Marshal Report leaves open the possibility (if not likelihood) that one of IMR's bulbs exploded, causing the Fire. Thus, whether an exploding bulb caused the Fire; whether the Building was water-tight; and whether IMR should have been using the types of bulbs that regularly exploded, showering the floor with hot shards of glass, are all material questions of fact to be decided by a jury.

In addition, it shall be for a jury to decide whether a Sprinkler System was required; and whether the lack of one caused and/or exacerbated Plaintiffs' damages.

In light of the foregoing, Defendants' joint application for summary judgment is denied.

This constitutes the Decision and Order of this court. Submission of an order by the parties is not necessary. The delivery of a copy of this Decision and Order by this court shall not constitute notice of entry.

Dated: March 17, 2023
Buffalo, New York



HON. TIMOTHY J. WALKER, J.C.C.
Acting Supreme Court Justice