

**USAA Cas. Ins. Co. v Meenan Oil Co. L.P.**

2024 NY Slip Op 35108(U)

August 20, 2024

Supreme Court, Westchester County

Docket Number: Index No, 57809/2023

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

**To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

----- X  
USAA CASUALTY INSURANCE COMPANY A/S/O KYLE  
FORTIN & ERIN WILLIAMS; KYLE FORTIN  
INDIVIDUALLY; and ERIN WILLIAMS INDIVIDUALLY,

Index No. 57809/2023

Plaintiffs,

-against-

**DECISION & ORDER  
Motion Sequence 002**

MEENAN OIL CO. L.P. doing business as BURKE ENERGY,

Defendant.

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MEENAN OIL CO. L.P. doing business as BURKE ENERGY,

Third-Party Plaintiff,

-against-

ACREI LLC and INSPECTAMERICA ENGINEERING, P.C.,

Third-Party Defendants.  
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In this action involving claims under Navigation Law § 181 and negligence which relate to an oil leak at real property owned by plaintiffs Kyle Fortin individually and Erin Williams Individually (hereinafter, homeowners), third-party defendant InspectAmerica Engineering, P.C. (InspectAmerica) moves for an order, pursuant to CPLR 3211(a)(1) & (a)(7), granting dismissal of the third-party complaint:

**Papers Considered**

**NYSCEF Doc. Nos. 31-47; 52-53**

1. Notice of Motion/Affidavit of Edwin Frank /Affirmation in Support of Glen A. Kurtis, Esq./Exhibits A-L
2. Affirmation in Opposition by Kelly A. Hodges, Esq.

[1]

3. Reply Affirmation of Glen A. Kurtis, Esq.

**FACTUAL AND PROCEDURAL BACKGROUND**

Plaintiff USAA Casualty Insurance Company A/S/O Kyle Fortin and Erin Williams (USAA) insured property owned by the homeowners located at 19 Elm Street, Pleasantville, New York. The homeowners purchased the property in August 2021. The property is serviced by an oil-fired heating system and has two 275 gallon above-ground storage tanks (AST). The homeowners entered into an agreement with defendant/third-party plaintiff Meenan Oil Co. L.P. doing business as Burke Energy (Burke) to supply heating oil for the property on an as-needed basis. The complaint alleges that Burke inspected the AST's on or before August 31, 2021 and found that they were safe to fill and that the tanks did not need to be replaced. The AST's were filled with 355 gallons of heating oil on August 31, 2021. On October 30, 2021, the heat stopped working and the homeowners contacted Burke to reinspect the AST's. On October 30 2021, Burke again inspected the AST's and filled them with ten gallons of oil. On November 1, 2021 the AST's were filled with 467 gallons of heating oil.

The complaint alleges that the homeowners contacted Burke four times after November 1, 2021 to re-inspect the AST's. On November 9, 2021, upon inspection, Burke discovered fuel leaking from either the AST's and/or the oil supply lines into the soil and groundwater beneath and surrounding the home. Approximately 300 gallons of fuel oil leaked in and around the property. USAA paid the homeowners \$451,222.74 pursuant to the terms of the policy for damages sustained. The homeowners also allege that they incurred uninsured losses in the amount of \$5,959.25 due to the oil leak.

Pursuant to a summons and complaint filed on March 10, 2023, plaintiffs commenced an action against Burke, grounded in strict liability pursuant to the Navigation Law and negligence. Burke commenced a third-party action against Acrei LLC and InspectAmerica Engineering, P.C.<sup>1</sup> InspectAmerica conducts home inspections for prospective buyers of real property within Westchester County. Burke is seeking contribution and/or common law indemnification and alleges that if plaintiffs suffered any injuries it is due to InspectAmerica's breach of contract with the homeowners and due to negligence.

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<sup>1</sup> Acrei LLC sold the property to plaintiffs and the third-party action has since been discontinued against it.

InspectAmerica now moves to dismiss the third-party complaint. InspectAmerica argues that the documentary evidence presented completely refutes any allegations of negligence. It submits the affidavit from Edwin Frank, InspectAmerica's president, and a licensed professional engineer. Frank affirms that he was retained by the homeowners and performed an inspection of the property on May 18, 2021. The letter of engagement, submitted with the record, advises plaintiffs that his report:

“should be utilized as an aid in determining the condition of the designated premises . . . [and] is intended to bring major defects to the attention of the prospective owners and it is intended that this report include only a representative portion of the premises and equipment that are readily accessible and can be visually inspected by non-dismantling and non-destructive testing methods (when dismantling and/or destructive testing and/or probing and/or repair, etc. is performed, damage may be uncovered); this report is not intended to be technically exhaustive. Specialized inspections and laboratory procedures are not performed as part of this inspection nor should you expect us to discover or evaluate any of the following items; these items include, but are not limited to discovering and/or testing for the presence of asbestos (in siding and roofing materials, in interior finishes, in insulation, in appliances, on heating components, etc.), urea formaldehyde foam insulation, lead paint, termiticides, contaminated water supply or water supply that needs conditioning, underground storage tanks, leaking oil and storage tanks . . .”

Upon inspection, Frank informed the homeowners that the oil tanks were rusted but serviceable and that repair was required for the heating unit because heat was not being delivered to two second floor bedrooms. Frank affirms that during his inspection, there were no signs of oil leakage. Frank performed a radon inspection, which resulted in normal radon levels. Specifically, the report stated:

“Both oil tanks are in a rusted but serviceable condition; cleaning and painting the tanks with Rustoleum (or similar) is recommended. Eventually these tanks may need to be replaced. . .

“The heating unit is operational and the oil burner is functioning properly. However, heat was not being delivered to the two second floor rear bedrooms; repair is required. In order to minimize oil consumption and maximize the useful life of this heating unit, the system should be tuned up on a regular basis by a competent serviceman (we recommend that a service contract be obtained with a service company).”

Frank alleges that, after the homeowners purchased the home, they entered into a contract with Burke to provide home heating oil and to inspect the oil tanks. As stated in the complaint, Burke inspected the oil tanks on August 31, 2021 and filled the tanks. Burke again inspected the

tanks and filled them on October 30, 2021 and November 1, 2021. On November 9, 2021, Burke found that an oil leak occurred.

Frank attaches a copy of the Spill Report Form, issued by the New York State Department of Environmental Conservation (NYSDEC). The Form states, for instance, that Burke had been on site in September to assess the AST's and informed the plaintiffs that the tanks were in good condition. In relevant part, the spill date was listed as October 30, 2021. The Report also states that DEC site inspection was conducted on November 18, 2021. The notes are as follows:

“Met with homeowner Erin Williams and Michael Strauss from Phoenix. Castleton Environmental removed the two ASTs from the crawl space earlier in the week, a corrosion hole was found in the bottom of one tank where it was in contact with the soil. Tanks are being kept on site, wrapped in plastic to allow access to insurance representatives. An obvious break in one of the feed lines was also located. Two separate leaks evident.”

Phoenix Consulting, L.L.C. (Phoenix), was hired to investigate and remediate the oil spill, and also issued a report to the NYSDEC. The report is submitted with the record and notes that Burke inspected the AST's several times and then made fuel deliveries. The report states the following, in relevant part:

“Phoenix inspected the ASTs and observed a small corrosion hole at the eastern end of the southern tank (closest to the street) and a split in the copper line at the bottom of the northern tank (closest to the basement). While the southern tank did have a small a corrosion hole and likely leaked some oil, Phoenix surmised, based on direct inspection, that the split copper line likely was the primary source of the sudden and accidental oil release.”

Frank affirms that he was hired to point out visible issues of concern to prospective home buyers. According to Frank, this area of the tank that was in contact with the soil would not have been visible to Frank without inspecting under the tanks. To be able to inspect under the tank, Frank would have had to dismantle the system and remove oil, which was not part of his contractual duties. Regarding the oil supply line, Frank affirms that during his inspection, there were no signs of oil leakage.

In sum, according to InspectAmerica, Burke cannot demonstrate that it was negligent in any manner. As shown through the documentary evidence, InspectAmerica performed its inspection pursuant to the terms of the contract and informed the homeowners that the tanks were rusted and needed to be serviced. The homeowners used Burke as its oil supplier, who inspected the tanks on several occasions, found them to be safe and refilled them. InspectAmerica further

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alleges that there were no signs of any oil leak upon inspection. Moreover, according to the report issued by the NYSDEC, the spill occurred on October 30, 2021, approximately five months after InspectAmerica's had been on the property.

In opposition, Burke only submits an affirmation from its attorney. Burke claims, without any support, that the motion should be denied as InspectAmerica fails to meet the standards under CPLR 3211. Burke also believes that the motion is premature, as depositions have not yet taken place.

## DISCUSSION

### Dismissal

“Upon a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail.” *Esposito v Noto*, 90 AD3d 825, 825 (2d Dept 2011) (internal quotation marks and citations omitted). The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory. *Id.* However, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration.” *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted).

“A court is, of course, permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211(a)(7).” *Sokol v Leader*, 74 AD3d 1180, 1181 (2d Dept 2010) (internal quotation marks omitted); *see* CPLR 3211 (c). “If the court considers evidentiary material, the criterion then becomes whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one.” *Id.* Dismissal of an action pursuant to CPLR 3211 (a) (1) “is warranted only if the documentary evidence utterly refutes the plaintiffs’ factual allegations, conclusively establishing a defense as a matter of law.” *Grant v DiFeo*, 165 AD3d 897, 899 (2d Dept 2018).

### Negligence

To sustain a cause of action for negligence, “a plaintiff must establish the existence of a legal duty, a breach of that duty, proximate causation, and damages.” *Luino v Katharine Gibbs*

*School N. Y., Inc.*, 737 AD3d 555, 555 (2d Dept 2007). “Negligence involves the failure to exercise the degree of care that a reasonably prudent person would exercise in the same circumstances.” *Cooper v Burt’s Reliable, Inc.*, 105 AD3d 886, 887 (2d Dept 2013) (internal quotation marks and citations omitted). Courts have held that home inspectors, as professionals, “may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties.” *Kohl v Green*, 235 AD2d 671, 671 (3d Dept 1997), quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540, 551 (1992).

Applying the standards above, the Court grant’s InspectAmerica’s dismissal motion as Burke cannot establish a cause of action for negligence. In the third-party complaint, Burke alleges any damages it sustained were due to the negligence and breach of contract on the part of InspectAmerica. However, InspectAmerica has established that it performed its obligations under the contract with the homeowners and that it exercised reasonable care when performing an inspection of the oil tanks and heating system. As noted above, pursuant to the contract, InspectAmerica advised the homeowners that the oil tanks were rusted and needed service. Frank affirmed that there were no visible signs of leakage and that the radon test did not detect any odor either. The homeowners hired Burke, an oil supplier, to then inspect and fill the tanks. Burke inspected and filled the tanks for months without finding an issue. In addition, the NYSDEC spill report form indicates that the spill occurred approximately five months after InspectAmerica was at the property.

Furthermore, InspectAmerica was charged with finding defects that would be visible upon inspection without having to dismantle or destroy any property. The leak was caused by a small hole and by a leak in the oil supply line. The hole would not have been visible upon inspection as it was on the bottom of the tank where it was in contact with the soil. The oil supply line was also not leaking at the time of inspection.

In opposition, Burke only submits unsubstantiated allegations that InspectAmerica failed to identify a defect that was within the scope of its contract and that InspectAmerica failed to conduct a reasonable inspection. *See e.g. Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 (2017) (“Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery”). Contrary to Burke’s contention, this

motion is not premature, as the documentary evidence, “utterly refutes” Burke’s factual allegations.

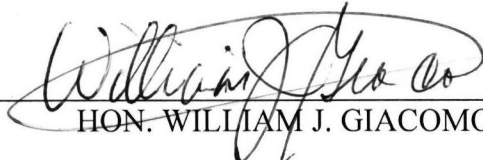
### CONCLUSION

Accordingly, it is hereby

**ORDERED** that third-party defendant InspectAmerica Engineering, P.C.’s motion, pursuant to CPLR 3211 for an order dismissing the third-party complaint is granted, and the third-party complaint is dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

Dated: White Plains, New York  
August 20, 2024

  
HON. WILLIAM J. GIACOMO, J.S.C.