Admiral Indemnity Co. v Chernoff
2013 NY Slip Op 32322(U)
September 27, 2013
Sup Ct, New York County
Docket Number: 111713/2010
Judge: Louis B. York

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. PART _____
Justice

Index Number : 111713/2010
ADMIRAL INDEMNITY COMPANY
vs.
CHERNOFF, MARC
SEQUENCE NUMBER : 007
_____ RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____ , were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying ~~memo~~ decision

FILED
OCT 01 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/27/13

LOUIS B. YORK, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 2

ADMIRAL INDEMNITY COMPANY A/S/O WOODBROOKE ESTATES CONDOMINIUM SECTION IIA,

Plaintiff,

-against-

MARC CHERNOFF AND LAURA CHERNOFF, ELECTROLUX HOME PRODUCTS, INC D/B/A KENMORE and QUALITY AIR, LLC,

Defendants.

INDEX NO. 111713/2010
Motion Sequence 007
DECISION & ORDER

LOUIS B. YORK, J.:

In this action for property damage, plaintiff Admiral Indemnity Company a/s/o Woodbrooke Estates Condominium Section IIA (Admiral) moves, pursuant to CPLR 2221, for leave to renew and reargue that part of the court's decision and order, dated December 12, 2012, which granted summary judgment to defendant Electrolux Home Products, Inc d/b/a Kenmore (Electrolux), dismissing the second cause of action in the complaint as against it, a claim of negligence.

Background

On January 26, 2010, a fire damaged several units in a condominium complex. It began in the clothes dryer, manufactured by Electrolux, installed in the residential unit owned by defendants Marc and Laura Chernoff (the Chernoffs). Quality Air LLC (Quality) cleaned the dryer's vents in April 2009, a practice required by the condominium association's bylaws. Admiral, the condominium association's insurer, paid the claims resulting from the fire, and commenced the instant action, as subrogor, on September 2, 2010, asserting causes of action for negligence against all defendants, and products liability against Electrolux. Wenig affirmation, exhibit A within exhibit B.

The Chernoffs moved, in motion sequence 004, to have the complaint dismissed as against them, arguing that they did not have actual or constructive notice of a hazardous condition, and that they otherwise did all that might have reasonably been expected of them in regard to maintaining the clothes dryer. The court denied their motion because of a material issue of fact regarding their knowledge of proper cleaning procedures for the clothes dryer, since there allegedly had been at least six prior clothes dryer fires in the condominium complex. Wenig affirmation, exhibit A.

In its opposition to the Chernoffs' summary judgment motion, Electrolux asked the court, pursuant to CPLR 3212 (b), to search the record and grant it summary judgment, dismissing the negligence claim as against it, without filing a cross motion to that effect. The court granted Electrolux's application in the same decision denying the Chernoffs' summary judgment motion, and dismissed the complaint's second cause of action as against Electrolux. Because Electrolux did not ask for summary judgment on the complaint's third cause of action, which alleged that Electrolux was responsible for a design defect, the Court did not address that issue.

In motion sequence 005, Electrolux moved for a default judgment against Quality in Electrolux's third-party action against Quality, which the court denied without prejudice to renew upon proper papers, on August 17, 2012. Electrolux renewed that motion, in motion sequence 006, which the court denied as moot, on December 12, 2012, as a result of the dismissal of the negligence claim against Electrolux decided in motion sequence 004.

Discussion

According to CPLR 2221 (d) (2), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." *See Kent v 534 E. 11th St.*, 80 AD3d 106, 116 (1st Dept 2010) ("A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of

matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." *See Kent v 534 E. 11th St.*, 80 AD3d 106, 116 (1st Dept 2010) ("A motion for reargument is addressed to the court's discretion and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law").

Admiral claims that, contrary to the court's finding in its December 12, 2012 decision, there had been only one prior clothes dryer fire in the Chernoffs' condominium complex before the underlying incident. Admiral cites the deposition of Dawn Carpenter (Carpenter), property manager for the condominium complex,[1] which was submitted as part of the Chernoffs' summary judgment motion. Wenig affirmation, exhibit B within exhibit B (Carpenter tr). Carpenter testified that, two years before the Chernoffs' fire, there had been a clothes dryer fire in the unit next to them. *Id.* at 13. She stated that it was "[t]he only one that I've heard in [Section] IIA and within the entire Woodbrooke Estates." *Id.* She said that she learned from the New York City Fire Department that "[t]he lint had not been cleaned out in the dryer by the unit owners which caused the fire." *Id.* at 15-16.

Carpenter asserted that Admiral responded to that fire by requiring the condominium's board to change its bylaws to oblige unit owners to keep their clothes dryers and connected vents free of lint, and that a letter was sent to all unit owners informing them of this new policy on January 12, 2009. *Id.* at 16-18. She said that this letter was the first addressing this issue. *Id.* at 17. The letter contained a reminder to the unit owners that they "must show evidence by April

[1]Woodbrooke Estates Condominium Section IIA, where the Chernoffs resided, is a 90-unit part of a larger development, Woodbrooke Estates.

motion, the court found no material issues of fact implicating Electrolux's negligence and granted its application to have the complaint dismissed as against it. "Electrolux has shown that Admiral Indemnity knew of six dryer fires that occurred prior to the one in the instant action, and despite this knowledge, it mandated that only the dryer vents be cleaned in its letter to the condominium owners." Further, the court referred to Admiral's claim that the Chernoffs were negligent in failing to follow the cleaning procedures in the owner's manual as freeing Electrolux of liability.

Electrolux opposes Admiral's present motion, because it asserts that there was no factual error or oversight in the court's view of the history of fires in the condominium complex. Carpenter began as property manager at the site on January 1, 2006, limiting the time of her direct knowledge of earlier fires. Carpenter tr at 39. She was generally aware of earlier fires that took a substantial toll. "[T]here have been fires in [Section] IIA prior to my management. I know there was a million dollar claim with five units of IIA." *Id.* at 39-40. She estimated that this fire occurred in 2004, but she only knew the street on which it started. *Id.* at 40-41. She had no knowledge of the origin of this fire, specifically whether it started in a clothes dryer or its ducting system. *Id.* at 41. She said that her office maintained no records that would provide this information. *Id.* at 41-42. She thought an insurer other than Admiral was involved in the claims from the 2004 fire. *Id.* at 47.

Carpenter's testimony does not connect the 2004 fire with one or more clothes dryers. However, Electrolux submits a letter allegedly sent by the condominium complex's board to unit owners soon after the Chernoffs' fire which states:

> "On January 25, 2010, the owners of 36 Hemlock Court [the Chernoffs] sustained severe water and smoke damage to their unit because of a dryer fire. This incident is exactly 3 years and 1 week from another dryer fire that occurred at 38 Hemlock. This now marks 7 units in the last 5 years that have sustained damage due to dryer fires."

Wenig affirmation, exhibit F. This letter continued: "The insurance company we are covered by

has mandated yearly dryer vent cleaning." Admiral, in reply, claims that this letter was only a draft. Neither party offers evidence to support its characterization of the letter.

In the challenged December 12, 2012 decision, the court stated: "Electrolux relies on the fact that before the Chernoffs' fire, there had been at least six prior dryer fires among the condominium units to support its claim that Woodbrooke Estates and Admiral Indemnity failed to appropriately instruct condominium owners to have their dryers cleaned." This statement is apparently incorrect in light of Carpenter's testimony and the letter quoted immediately above. There is evidence that there were only two clothes dryer fires before the Chernoffs', involving six residential units.

However, a mere misstatement of fact does not warrant, in itself, the application of CPLR 2221 (d) (2). It must be that "the court overlooked or misapprehended the relevant law or facts in determining the prior motion." *Luna v Port Auth. of N.Y. & N.J.*, 21 AD3d 324, 325 (1st Dept 2005). Here, there is no substantive difference between two fires causing extensive damage to six residential units and six fires, and the court's determination did not rest on the numbers alone. Admiral seems to be arguing that fewer fires increase the likelihood of Electrolux's negligence, while Electrolux seems to be arguing that more fires in its clothes dryers decreases the likelihood of being found negligent. Whatever the reason for this reversal of logic, the court does not consider the misstatement of the number of fires preceding the Chernoffs' to be relevant to its previous decision. Admiral's motion for leave to reargue is denied.

A motion for leave to renew, pursuant to CPLR 2221 (e) (2) "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." Admiral offers two cases and one on-line article that it claims demonstrate new facts pertinent to this action. In *Charter Oak Fire Ins. Co. v Electrolux Home Prods., Inc.* (882 F Supp 2d 396 [ED NY 2012]), an action to recover for fire damage allegedly caused by a defectively-designed Electrolux clothes dryer, the court denied Electrolux's summary judgment motion. Electrolux

claimed that collateral estoppel applied, based on the 2010 jury verdict in *Standard Fire Ins. Co. a/s/o Julie Newcomb v Electrolux Home Prods., Inc.* (WD Wis No 3:08–cv–00540–SLC), which "found that the dryer was not in a defective condition as to be unreasonably dangerous to the prospective user when it left the possession of Electrolux . . . ." *Id.* at 397. The *Charter Oak* court held that its "plaintiff did not have a full and fair opportunity to litigate the *Newcomb* action, and thus, collateral estoppel does not apply." *Id.* at 403.

In *Automobile Ins. Co. of Hartford, Connecticut v Electrolux Home Prods., Inc.* (Slip Copy, 2012 WL 6629238, 2012 US Dist LEXIS 180395 [SD NY 2012]), another action to recover for fire damage allegedly caused by a defectively designed Electrolux clothes dryer, the court denied Electrolux's motion to preclude the testimony of plaintiff's expert witness under the *Daubert* standard. *See Daubert v Merrill Dow Pharms., Inc.*, 590 US 579 (1993). It found that the expert's opinions about hazardous lint accumulation, and reasonable design alternatives, were "sufficiently reliable, employ methodology appropriate to the expert's field, and will be helpful to the jury." *Id.* at *4.

Finally, Admiral submits a copy of an article in the on-line publication "Law360," dated August 9, 2012, reporting that a federal judge in the Eastern District of Arkansas "denied a bid by Electrolux Home Products Inc. to toss a proposed class action alleging the company designed defective clothes dryers that are prone to fires, saying the plaintiff has adequately pled her breach of warranty case thus far." Wenig affirmation, exhibit G.

The fact that several trial courts in diverse venues have recently made procedural rulings against Electrolux in actions concerning design defects does not constitute a new fact that would change this court's prior determination. Admiral's motion for leave to renew the December 12, 2012 decision in part is denied.

Accordingly, it is

ORDERED that the motion by plaintiff Admiral Indemnity Company a/s/o Woodbrooke Estates Condominium Section IIA (Admiral), pursuant to CPLR 2221, for leave to

renew and reargue the court's decision, dated December 12, 2012, is denied.

DATED: **September 27, 2013**

ENTER:

J.S.C.

LOUIS B. YORK
J.S.C.