Tower Ins. Co. of N.Y. v Hands Across Long Is., Inc.
2015 NY Slip Op 30100(U)
January 22, 2015
Supreme Court, Suffolk County
Docket Number: 10-7580
Judge: Joseph A. Santorelli

[* 1]

SHORT FORM ORDER

INDEX No. 10-7580
CAL. No. 14-00859OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-22-14
ADJ. DATE 9-30-14
Mot. Seq. # 002 MG; CASEDISP

TOWER INSURANCE COMPANY OF NEW YORK A/S/O Main Street L.I., Inc.,

Plaintiff,

- against -

HANDS ACROSS LONG ISLAND, INC.,

Defendant.

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Upon the following papers numbered 1 to 46 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17 - 42; Replying Affidavits and supporting papers 43 - 46; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant for summary judgment in its favor is granted and the complaint is dimissed.

Plaintiff Tower Insurance Company, as subrogee, commenced this action to recover money paid on a claim for property damage filed by its insured, Main Street L.I., Inc., following a fatal fire at an apartment complex in Central Islip, New York, known as Coventry Village Apartments. The fire occurred on the night of March 3, 2009, and originated in the apartment known as 3 Coventry Lane, which was leased by defendant Hands Across Long Island, Inc., a not-for-profit organization that provides support services for people with mental illness living in Suffolk County, Hands Across Long Island had entered into an agreement with Home Properties, L.P., to lease 3 Coventry Lane from December 8, 2007 to December 7, 2008. Pursuant to the express terms of such agreement, the apartment was sublet to Mark Wilsea, a client of Hands Across Long Island. By written agreement dated November 12, 2008, Main Street L.I., which acquired ownership of the 94-unit apartment complex in February 2008, extended Hands Across Long Island's lease for 3 Coventry Lane for an additional year. The Court notes that evidence in the record indicates that at the time of the fire, 16 of the tenants at Coventry Village Apartments were Hands Across Long Island "supported housing tenants." Sadly, Mr. Wilsea died as a result of the injuries he suffered in the fire, which destroyed or damaged 12 units at the

apartment complex.

Alleging Mr. Wilsea "was believed to be smoking in bed" before the fire, the complaint seeks to recover damages from Hands Across Long Island (hereinafter HALI) for breach of contract and negligence. More specifically, the first cause of action alleges HALI was negligent, among other things, in "failing to warn the insured of the dangerous conditions created by tenants placed by defendant, including their careless use of smoking and related combustible materials within the premises"; in "failing to conduct a proper inspection to detect the dangers associated with the unsafe use of combustibles, specifically cigarettes and/or other smoking materials, which defendant knew, or should have known, created an unreasonable risk of fire"; and in "permitting and allowing a dangerous situation to exist by the failure to supervise tenants placed by defendant and their use of cigarettes near combustible material at the aforementioned premises." The second cause of action alleges HALI created a private nuisance "by failing to supervise the tenants it placed in plaintiff's insured's premises knowing those tenants are smokers and have the propensity to abuse drugs and/or alcohol which could affect their judgment and contribute to the careless disposal of lit cigarettes resulting in fire." The third cause of action alleges HALI was grossly negligent in the placement and supervision of the subtenants it placed at the apartment complex and failed "to implement adequate safeguards to prevent the careless use and disposal of smoking materials," and the fourth cause of action alleges HALI breached its lease obligations in failing to have the subtenants preserve the leased property and in failing to indemnify plaintiff's insured for the damage sustained to its property.

HALI now moves for summary judgment dismissing the complaint, arguing that it owed no duty to plaintiff's insured to stop Mr. Wilsea from smoking cigarettes in the apartment or to monitor his conduct in the apartment to ensure he did not cause any property damage. Pointing out that the lease did not prohibit smoking in the apartment, HALI argues evidence that Mr. Wilsea smoked in the apartment is insufficient to establish a private nuisance, and that there is no basis to hold it liable for any conduct on the part of Mr. Wilsea that caused or contributed to the fire. As to the breach of contract claim, HALI asserts it was not obligated under the lease agreement to repair or to pay for property damage allegedly caused by the subtenant.

Plaintiff opposes the motion, arguing HALI failed to establish a prima facie case that it was not negligent and that it is not liable under the lease agreement for the cost of repairing the damage caused by the March 2009 fire. It further asserts evidence in the record shows HALI negligent in failing for a four-month period to perform a home visit of its client, Mr. Wilsea, and that, due to such failure, it failed to uncover "the abuse of alcohol and the use of smoking materials haphazardly." It argues the evidence also shows HALI was negligent in failing to enforce HALI's own no-smoking policy for clients placed in residential housing, in failing to notify plaintiff's insured that Mr. Wilsea had been terminated in February 2009 from his job with HALI as a peer counselor for insubordination, and in failing to conduct an "immediate follow-up" with Mr. Wilsea after his termination. In addition, plaintiff contends that, as the lease agreement identifies Mr. Wilsea as an employee of HALI, evidence that HALI did not notify its insured that Mr. Wilsea was terminated from his job raises as issue as to whether it breached its obligations under the lease agreement.

As to the tort claims asserted by plaintiff, "when an insurer pays for losses sustained by its

insured that were occasioned by a wrongdoer, the insurer is entitled to seek recovery of the money it expended under the doctrine of equitable subrogation" (***Fasso v Doerr***, 12 NY3d 80, 86, 875 NYS2d 846 [2009]; *see* ***Federal Ins. Co. v Arthur Andersen Co.***, 75 NY2d 366, 553 NYS2d 291 [1990]). However, the insurer can only recover if the insured could have recovered, and its claims as subrogee are subject to whatever defenses the alleged wrongdoer could have asserted against its insured (***Federal Ins. Co. v Arthur Andersen Co.***, 75 NY2d 366, 372, 553 NYS2d 291).

It is fundamental that to recover for negligence, a plaintiff must establish the defendant owed a duty to use reasonable care, that the defendant breached the duty of care, and that the breach of such duty was a proximate cause of its injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Pasquaretto v Long Is. Univ.***, 106 AD3d 794, 964 NYS2d 599 [2d Dept 2013]; ***Fox v Marshall***, 88 AD3d 131, 928 NYS2d 317 [2d Dept 2011]; ***Solan v Great Neck Union Free Sch. Dist.***, 43 AD3d 1035, 842 NYS2d 52 [2d Dept 2007]). A duty of reasonable care owed by the alleged tortfeasor to the plaintiff is essential to any recovery in negligence (***Eiseman v State***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]; ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393). "Absent a duty running directly to the injured [party] there can be no liability in damages, however careless the conduct or foreseeable the harm" (***532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr.***, 96 NY2d 280, 289, 727 NYS2d 49 [2001]). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]; ***Waters v New York City Hous. Auth.***, 69 NY2d 225, 229, 513 NYS2d 356 [1987]).

When the existence of duty is a matter of law for the court to resolve, the inquiry necessarily rests on considerations of whether the plaintiff's interests are entitled to legal protection against the defendant's conduct (***Eiseman v State***, 70 NY2d 175, 189-190, 518 NYS2d 608). Courts traditionally fix the duty point by balancing factors, "including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability" (***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 586, 611 NYS2d 817 [1994]; *see* ***Tagle v Jakob***, 97 NY2d 165, 737 NYS2d 331 [2001]). Thus, a determination regarding the existence of a duty and the scope thereof involves scrutiny of the wrongfulness of the alleged tortfeasor's action or inaction, and an examination of the injured party's reasonable expectation of the care owed to it by others (*see* ***Palka v Servicemaster Mgt. Servs. Corp.***, 83 NY2d 579, 611 NYS2d 817; ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Further, in determining whether a duty exists, courts must be mindful of the future effects of their rulings, and "limit the legal consequences of wrongs to a controllable degree" (***Lauer v City of New York***, 95 NY2d 95, 100, 711 NYS2d 112 [2000], *quoting* ***Tobin v Grossman***, 24 NY2d 609, 619, 301 NYS2d 554 [1969]; *see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]). Not all relationships give rise to a legal duty of care, and the existence of a moral duty to prevent injury to another does not mean there is a legal duty to act (***Pulka v Edelman***, 40 NY2d 781, 785, 390 NYS2d 393).

Summary judgment is granted in favor of HALI on the negligence and gross negligence claims.

"A defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control" (***D'Amico v Christie***, 71 NY2d 76, 88, 524 NYS2d 1 [1987]; *see* ***Hamilton v Beretta U.S.A. Corp.***, 96 NY2d 222, 233, 727 NYS2d 7 [2001]; ***Purdy v Public Admin. of Westchester County***, 72 NY2d 1, 530 NYS2d 513 [1988]). A duty to control the conduct of a third person, however, may be found where either a relationship exists (1) between the defendant and the third-party tortfeasor "that encompasses defendant's actual control of the third person's actions," or (2) between defendant and plaintiff "that requires defendant to protect plaintiff from the conduct of others" (***Hamilton v Beretta U.S.A. Corp.***, 96 NY2d 222, 233, 727 NYS2d 7; *see* ***Purdy v Public Admin. of Westchester County***, 72 NY2d 1, 530 NYS2d 513).

HALI established a prima facie case that it owed no duty to plaintiff's insured to control Mr. Wilsea's conduct, particularly stopping him from smoking cigarettes, while he was in his apartment (*see* ***Purdy v Public Admin. of Westchester County***, 72 NY2d 1, 530 NYS2d 513; ***Edwards v Mercy Home for Children & Adults***, 303 AD2d 543, 755 NYS2d 732 [2d Dept 2003]; *see also* ***Donnelly v Elling***, 85 AD3d 847, 925 NYS2d 184 [2d Dept 2011]; ***Mojica v Gannett Co., Inc.***, 71 AD3d 963, 897 NYS2d 212 [2d Dept 2010]). Initially, the Court notes that, for the purposes of this determination, HALI does not dispute plaintiff's allegation that a lit cigarette in the bedroom ignited the fire in Mr. Wilsea's apartment. HALI's submissions demonstrate that, while it arranges housing for clients and provides financial assistance so as to enable them to meet their rental obligations, it does not exercise control over how its clients live on a day-to-day basis in such housing. And while the organization has a policy of prohibiting smoking in the rental units where its clients are placed, there is no evidence in the record that plaintiff's insured relied upon, or even knew of, such policy. In fact, it is undisputed that plaintiff's insured permitted smoking in the rental units at Coventry Village Apartments. In opposition, plaintiff failed to raise a triable issue of fact as to the duty of care owed by HALI to its insured to protect against the risk of damage to its property.

Summary judgment also is granted in HALI's favor on the private nuisance claim. A party may be liable for a private nuisance upon proof of an intentional and unreasonable invasion of the use and enjoyment of another's land (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169 [1977]; ***Broxmeyer v United Capital Corp.***, 79 AD3d 780, 914 NYS2d 181 [2d Dept 2010]). To establish a cause of action for a private nuisance, a plaintiff must show an interference that is (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with the plaintiff's property right to use and enjoy the land, (5) caused by another's conduct in acting or failing to act (*see* ***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 394 NYS2d 169; ***Behar v Quaker Ridge Golf Club, Inc.***, 118 AD3d 833, 988 NYS2d 633 [2d Dept 2014]; ***Broxmeyer v United Capital Corp.***, 79 AD3d 780, 914 NYS2d 181; ***Aristides v Foster***, 73 AD3d 1105, 901 NYS2d 688 [2d Dept 2010]). However, whenever a nuisance claim has its origin in negligence, negligence must be established (***Copart Indus. v Consolidated Edison Co. of N.Y.***, 41 NY2d 564, 569, 394 NYS2d 169; ***Murphy v Both***, 84 AD3d 761, 763, 922 NYS2d 483 [2d Dept 2011]). Having failed to raise a triable issue as to whether HALI owed a duty of care to its insured, plaintiff's private nuisance claim must be dismissed (*see* ***Placide v Yadid, LLC***, 24 AD3d 529, 808 NYS2d 279 [2d Dept 2005]).

Finally, summary judgment dismissing the breach of contract action is granted. To recover

damages for a breach of contract, a plaintiff must show the existence of a contract with the defendant, the plaintiff's performance under the terms of the contract, the defendant's breach of the contract, and damages resulting from such breach (*see* ***Brualdi v IBERIA, Lineas Aereas de España, S.A.***, 79 AD3d 959, 913 NYS2d 753 [2d Dept 2010]; ***JP Morgan Chase v J.H. Elec. of N.Y., Inc.***, 69 AD3d 802, 893 NYS2d 237 [2d Dept 2010]). The nature of the obligations undertaken in a contract is to be construed in accordance with the parties' intent (*see generally* ***Greenfield v Phillies Records***, 98 NY2d 562, 569, 750 NYS2d 565 [2002]), and "the best evidence of what parties to a written agreement intend is what they say in their writing" (*see* ***Slamow v Del Col***, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). When the terms of a written contract are clear and unambiguous, the contract should be enforced in accordance with the plain meaning of its terms (*see* ***Consedine v Portville Cent. School Dist.***, 12 NY3d 286, 879 NYS2d 806 [2009]; ***Greenfield v Philles Records***, 98 NY2d 562, 750 NYS2d 565; ***W.W.W. Assoc. v Giancontieri***, 77 NY2d 157, 565 NYS2d 440 [1990]).

Furthermore, "[i]n the absence of fault or a specific contract provision to the contrary, neither the landlord nor the tenant is obligated to perform repairs after a fire" (***Preferred Mut. Ins. Co. v Pine***, 44 AD3d 636, 638, 848 NYS2d 190 [2d Dept 2007]). Here, the lease agreement between plaintiff's insured and HALI for the unit known as 3 Coventry Lane does not include a provision obligating HALI, as tenant, to pay for property damage to the premises caused by fire, which apparently was caused by Mr. Wilsea smoking a cigarette in the bedroom (*cf.* ***Preferred Mut. Ins. Co. v Pine***, 44 AD3d 636, 848 NYS2d 190).

The foregoing constitutes the decision and Order of this Court.

Dated: JAN 2 2 2015

HON. JOSEPH A. SANTORELLI
J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION