SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
NASSAU COUNTY - PART 17

PRESENT:
Hon. WILLIAM R. LaMARCA,
Justice

Scan

HERBERT PASTERNAK and ANNE PASTERNAK,

Plaintiffs,

-against-

ARROW EXTERMINATING CO., INC.,

Defendant.

Motion Sequence # 5, # 6
Submitted November 21, 2007

INDEX NO: 2039/06

The following papers were read on these motions:

Notice of Motion.....1
Affirmation in Opposition.....2
Notice of Cross-Motion.....3
Reply Affirmation.....4
Affirmation in Reply.....5

Requested Relief

Defendant, ARROW EXTERMINATING CO., INC. (hereinafter referred to as "ARROW"), moves for an order, pursuant to CPLR §3212, granting it summary judgment dismissing plaintiffs' complaint. Plaintiffs, HERBERT PASTERNAK and ANNE PASTERNAK, oppose the motion and cross-move for an order, pursuant to CPLR §3025(b), granting plaintiffs leave to serve an amended complaint to assert a cause of action for gross negligence. The motion and cross-motion are determined as follows:

Background

Plaintiffs commenced this action for property damages sustained in their residence located at 854 Briar Place, Woodmere, N.Y. (hereinafter referred to as the "premises"), due to termite infestation. Plaintiffs allege that, from December 1989 until January 1, 2005, ARROW had been contracted to control/stop any termite infestation at the premises. Plaintiffs allege that, if ARROW had conducted the careful and thorough inspections it claims to have performed, the plaintiffs' premises would not have sustained the extensive damages that occurred therein, culminating in plaintiff ANNE PASTERNAK's foot going through the dining room floor at the premises, allegedly due to termite infestation. Plaintiffs allege that the termite damage is so extensive that the plaintiffs can no longer safely reside in the premises, and that the cost to repair the termite damage is approximately $900,000.00.

In support of the motion to dismiss the complaint, ARROW contends that the operative agreement between ARROW and the plaintiffs, over the seventeen (17) year span, only requires ARROW to supply additional treatment if termite damage is found. (Exhibit "G" to the moving papers). ARROW contends that any negligence on its part does not make it responsible for structural damages to plaintiffs' premises. ARROW alleges the plaintiffs' claim for negligence on the part of ARROW is barred by the terms of the parties agreement.

A review of the one (1) page contract of the parties, executed on December 12, 1989, reflects that in ¶C, it was agreed that "[f]or each succeeding year, upon payment of the fee as outlined hereafter on or before the anniversary date, Arrow will inspect the building to check for the presence of termites, and supply labor and materials to treat any

area where any new termite infestation has been detected. If such inspection reveals termite reinfestation in an area previously treated by Arrow, additional treatment will be made by Arrow during the year covered by such fee at no additional charge to the Customer". In ¶H, the agreement provides that "[n]o representation is made at any time as to the structural soundness of the building, and the services of Arrow are only for treatment or additional treatment as called for by the terms herein. Other than as provided herein, this agreement does not cover and Arrow is not responsible for any termite damage to the premises which occurred before or after Arrow's treatment". Additionally, in ¶G, the agreement states that "[w]ater leakage in treated areas, and leakage in interior areas or through the roof or exterior walls of the identified property, may destroy the effectiveness of Arrow"s treatment and is conducive to new infestation. It is ARROW's position that it made no warranty of merchantability or fitness with respect to goods sold or used per the agreement, that the PASTERNAKS had a flood in their basement sometime between 1991 and 1995, and that the agreement exempts them from liability for any termite damage to the premises. Counsel cites *Anunziatta v Orkin Extermination Co., Inc.*, 180 F. Supp.2d 353 (NDNY 2001), for the proposition that exculpatory clauses in contracts are enforceable, provided such clauses are clear, unambiguous and understandable. Moreover, counsel for ARROW argues that plaintiffs' cause of action for negligence must fail because the agreement exculpates ARROW from damages caused by termites and to recover, notwithstanding said exclusion, plaintiffs must show that ARROW was grossly negligent, a claim that has not been asserted in the complaint.

In opposition to the motion to dismiss and in support of the cross-motion, plaintiffs submit the affidavit of Thomas A. Parker, PhD. an entomologist who claims to be an expert

in the areas of wood destroying organism identification, damage recognition, inspections, treatment control and prevention. Mr. Parker relates that the premises was initially treated for subterranean termites by ARROW in 1988 and was purchased by the PASTERNAKS in 1989. He states that plaintiffs later discovered extensive damage and termite activity at the premises which had taken place over many years. Mr. Parker inspected the premises on February 1, 2007, and found that ARROW had ample opportunities to find active termites over the years if ARROW had performed proper inspections. Mr. Parker claims that some of the baiting system used by ARROW was useless in eliminating the termite presence. It is plaintiffs' position that ARROW is guilty of gross negligence in performing its termite treatment over the years and argue that they should be permitted to amend their compliant to reflect the alleged gross negligence of ARROW.

The Law

Contracts may not be construed to exempt parties from the consequences of their own negligence in the absence of express language to that effect (*Lago v Krollage,* 78 NY2d 95, 571 NYS2d 689, 575 NE2d 107 [C.A. 1991]). New York law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and the provisions of the contract will be strictly construed against the drafter. However, absent a statute or public policy to the contrary, a contractual provision absolving a party from its own ordinary negligence will be enforced (*Anunziatta v Orkin Exterminating Co., Inc., supra;* (*Lago v Krollage, supra*). However, a party may not insulate itself from damages caused by grossly negligent conduct (*Sommers v Federal Signal Corp.*, 79 NY2d 540, 583 NYS2d 957, 593 NE2d 365 [C.A. 1992]; *Amica Mutual Insurance Co. v Hart Alarm*

Systems, Inc., 218 AD2d 835, 629 NYS2d 874 [3rd Dept. 1995]; *Anunziatta v Orkin Exterminating Co., Inc., supra; Lago v Krollage, supra*).

In *Somers,* the Court found that a burglar alarm agreement which contained an exculpatory clause shielded the burglar alarm company from liability only for ordinary negligence, but not for gross negligence. Gross negligence is conduct which smacks of intentional wrongdoing or evinces a reckless indifference to the rights of others (*Sommers v Federal Signal Corp., supra; Adler v Columbia Savings and Loan Association*, 26 AD3d 349, 811 NYS2d 737 [2nd Dept. 2006]).

Thus, gross negligence when invoked to pierce an agreed-upon limitation of liability in a commercial contract must smack of intentional wrongdoing (*Kalish-Jarcho, Inc. v City of New York*, 58 NY2d 377, 461 NYS2d 746, 448 NE2d 413 [C.A. 1983]). An exculpatory agreement, no matter how flat and unqualified its terms, will not exonerate a party from liability under all circumstances. Under announced public policy, it will not apply to the exemption of wilful or grossly negligent acts (*Kalish-Jarcho, Inc. v City of New York, supra*). Thus, although New York law generally enforces contractual provisions in contracts absolving a party from its own negligence, public policy prohibits a party's attempt to escape liability, through a contractual clause, for damages occasioned by grossly negligent conduct (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Services Ltd.,* 81 NY2d 821, 595 NYS2d 381, 611 NE2d 282 [C.A. 1993]; *Federal Insurance Co. v Honeywell, Inc.*, 243 AD2d 605, 663 NYS2d 247 [2nd Dept. 1997]).

It is well settled on a motion for summary judgment that, after movant has made a *prima facie* showing that they are entitled to judgment as a matter of law, the other party

must establish the existence of material facts of sufficient import to create a triable issue of fact. *See, Hellinger v Law Capital, Inc.,* 124 AD2d 182, 509 NYS2d 50 (2nd Dept. 1986); *Shaw v Time-Life Records,* 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975).

Discussion

After a careful reading of the submission herein, it is the judgment of the Court that plaintiffs have raised a triable issues of fact exist as to whether ARROW was grossly negligent in treating plaintiffs' residence for termites which precludes granting ARROW's motion for summary judgment. Based on the record before the Court, a dispute as to the appropriate level of negligence to be imputed to ARROW precludes the granting of summary judgment (*see, United B International Corp. v UTI United States, Inc.,* 798 NYS2d 714, 2004 NY Misc. LEXIS 2136 (Supreme Kings Co. 2004]). Whether or not ARROW's conduct amounted to gross negligence is a question for the trier of fact to determine.

As to the Cross-Motion

Authority to grant leave to amend pleadings is committed to the discretion of the court (*Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 471 NYS2d 55, 459 NE2d 164 [C.A. 1983]; *Selective Insurance Co. v Northeast Fire Protection Systems, Inc.*, 300 AD2d 883, 752 NYS2d 145 [3rd Dept. 2002]). Leave to amend pleadings shall be freely granted unless the amendment sought is palpably improper or insufficient as to a matter of law, or unless prejudice or surprise directly results from delay in seeking such amendment (*Amica Mutual Ins. Co. v Hart Alarm Systems, Inc., supra*). Mere lateness in seeking to amend pleadings is not a bar to amend; it must be lateness coupled with

significant prejudice to the adversary (*Harding v Filancia,*144 AD2d 538, 534 NYS2d 219 [2nd Dept. 1988]).

Plaintiffs note that the note of issue herein has been vacated and, thus, the case is not now certified ready for trial. The Court finds that ARROW's "lateness" argument is unavailing. Nor has ARROW articulated any viable "prejudice" that would befall it if plaintiffs are allowed to amend their complaint. Prejudice and surprise mean the loss of some special right, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended pleading seeks to add (*Smith v Industrial Leasing Corp.*, 124 AD2d 413, 507 NYS2d 511 [3rd Dept. 1986]; *Barstow v Hospital for Special Surgery,* 169 AD2d 385, 563 NYS2d 418 [1st Dept. 1991]). Prejudice is not found in the mere exposure of the defendant to a greater liability. For prejudice to be present, there must be some indication that the defendant has been hampered in the preparation of his case or has been prevented from taking some measure in support of his position (*Loomis v Civetta Corinno Construction Corp.* 54 NY2d 18, 444 NYS2d 571, 429 NE2d 90 [C.A. 1981]). Based on the foregoing, it is hereby

ORDERED, that ARROW's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED, that plaintiffs' cross-motion for permission to amend the complaint to assert a claim for gross negligence is granted. The proposed amended complaint, (Exhibit "A" annexed to the cross motion) shall be deemed served upon service of a copy of this order upon ARROW, with notice of entry.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: January 28, 2008

WILLIAM R. LaMARCA, J.S.C.

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