Caution
As of: Jan 15, 2014

GREYHOUND EXHIBITGROUP, INC., Plaintiff-Appellee, -v.- E.L.U.L. REALTY CORP., Defendant-Appellant, ANTHONY GALLINA d/b/a GALLINA SPRINKLER SYSTEMS, and A. GALLINA SPRINKLER SYSTEMS and A. GALLINA HEATING AND MECHANICAL SPRINKLER CORP., Defendants.

Docket No. 92-7545

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

973 F.2d 155; 1992 U.S. App. LEXIS 19738

July 14, 1992, Argued
August 24, 1992, Decided

SUBSEQUENT HISTORY: As Corrected October 23, 1992.

PRIOR HISTORY: [**1] Appeal from the final judgment of the United States District Court for the Eastern District of New York, Honorable I. Leo Glasser, Judge, substantially adopting Magistrate Judge John L. Caden's report and recommendation and awarding plaintiff $ 1,496,425.82 in damages. The sum was calculated by means of a post default judgment inquest conducted in the course of plaintiff's action for property and other damages suffered as a result of a fire in defendant's warehouse.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant lessor appealed a judgment of the United States District Court for the Eastern District of New York, which substantially adopted a magistrate's report and recommendation awarding plaintiff lessee $ 1.4 million for property damages that plaintiff suffered as a result of a fire in defendant's warehouse.

OVERVIEW: Plaintiff lessee filed a negligence action against defendant lessor for property damages as a result of a fire in defendant's warehouse in which plaintiff was a tenant. The district court issued a default judgment against defendant for failing to timely answer plaintiff's complaint. The magistrate conducted an inquest and awarded plaintiff $ 1.4 million in damages. The district court adopted the magistrate's report and recommendation. On appeal, the court affirmed the judgment, ruling that during a post-default inquest, the defaulting party could not seek mitigating damages by interposing set-off claims. The court ruled that the district court acted within its discretionary power in withholding consideration of defendant's lease payments claim pending defendant's landlord/tenant action. The court concluded that defendant's claims were without merit.

OUTCOME: The court affirmed the award of damages in favor of plaintiff lessee because defendant lessor's claims were without merit. The court held that the district court acted within its discretionary power to manage its docket by withholding consideration of defendant's lease payments claim.

COUNSEL: KENNETH A. BLOOM, New York, New York (Douglas B. Lang, Cozen and O'Connor, of counsel), for Plaintiff-Appellee.

NOEL W. HAUSER, New York, New York (Stephen H. Penn & Associates, of counsel), for Defendant-Appellant.

JUDGES: Before: ALTIMARI, MAHONEY, and WALKER, Circuit Judges. Judge Altimari concurs in part and dissents in part in a separate opinion.

OPINION BY: WALKER

OPINION

[*156] WALKER, *Circuit Judge:*

This is an appeal from the final judgment of the United States District Court for the Eastern District of New York, Honorable I. Leo Glasser, *Judge,* adopting the report and recommendation of Magistrate Judge John L. Caden. The case involves plaintiff-appellee's, Greyhound Exhibitgroup, Inc. ("GEX"), claim for damages allegedly caused [**2] by the defendant-appellant's, E.L.U.L. Realty Corp. ("ELUL"), negligence in conjunction with a warehouse fire. During the relevant period, GEX was a tenant in ELUL's warehouse.

The particular dispute before us stems from the fact that ELUL defaulted in this action by failing to timely answer GEX's complaint. Upon the district court's entry of default against ELUL, the case was referred to the magistrate judge to conduct an inquest into the actual amount of financial injury that GEX suffered. *See* 28 U.S.C. § 636(b)(2); Fed. R. Civ. P. 53. At the close of the inquest, the magistrate judge recommended to the district court that ELUL be ordered to pay GEX $ 1,496,425.60 in damages. The district court adopted the magistrate judge's report and recommendation substantially in its entirety, and entered judgment against ELUL for $ 1,496,425.82, along with costs and interest at the New York State statutory rate of 9%.

On appeal ELUL raises a host of issues, all of which we find to be without merit.

[*157] BACKGROUND

This litigation has an extremely knotted procedural and factual history which we need not fully untangle in order to address the issues raised on this appeal. The following discussion [**3] will suffice for the purposes of our analysis.

GEX is a Delaware corporation, with its principal place of business in Elk Grove Village, Illinois. It is engaged in the production, assembly and storage of exhibits used in trade sales. ELUL is a New York corporation, with its principal place of business in Brooklyn, New York. Among other properties, ELUL owns and operates a warehouse (the "warehouse") located at 14 Whale Square, Brooklyn, New York. In January 1983, the parties entered into a lease agreement whereby GEX rented a substantial portion of the warehouse in which to conduct its business. On February 13, 1988, a fire broke out on the premises causing considerable property damage to GEX and other tenants.

In September 1988, GEX commenced this diversity action against ELUL, and others, alleging, *inter alia,* that the fire damage it suffered resulted from ELUL's negligent failure to maintain the warehouse's sprinkler system in good working order. GEX sought $ 1,500,000 in compensatory damages. On November 22, 1988, after ELUL failed to timely appear, answer, or otherwise make a motion with respect to GEX's complaint, the district court adjudged ELUL to be in default and ordered [**4] that an inquest be scheduled in order to determine the appropriate damage award. Over four months later, on April 12, 1989, ELUL moved the district court to vacate its entry of default. The district court referred the question of vacatur to Magistrate Judge Caden for a report and recommendation.

On September 12, 1989, Magistrate Judge Caden entered an order and recommendation requiring that ELUL give written notice to all parties regarding any change in status as to ELUL's ownership or encumbrance of the warehouse property, and recommending that the default be set aside upon that condition. GEX filed objections to the recommendation. The district court was informed that ELUL had, in bad faith, violated the recommendation's notice condition by mortgaging the warehouse property for an additional $ 4.5 million on

January IS, 1990 without advising either the court or GEX. Accordingly, the district court recommitted ELUL's vacatur motion to Magistrate Judge Caden for further consideration.

Upon reconsideration, the magistrate judge found that:

The history of this case leaves little room for doubt that an unconditional vacatur would provide [ELUL] with an opportunity for fraud and [**5] could seriously prejudice [GEX]. The red flag of caution is amply supported by the combination of [ELUL's] consistent failure to observe court-imposed deadlines, the evidence of its attempts to secrete or dissipate a substantial asset, and the extended discourse over the existence and extent of insurance.

Nevertheless, Magistrate Judge Caden determined that ELUL should have the opportunity to litigate this sizeable claim on the merits. So as to allay his concern that GEX's ability to collect on any potential judgment might be prejudiced by ELUL's intervening actions, on July 23, 1990, he recommended that the entry of default be vacated upon the condition that ELUL post a $ 1 million bond within thirty days after issuance of the district court's order. By order dated November 7, 1990, the district court adopted Magistrate Judge Caden's recommendation.

Consistent with its previous conduct, ELUL failed to timely post the $ 1 million bond. In a letter dated December 13, 1990, ELUL asserted, *inter alia,* that it was unable to satisfy the bond requirement. On March 20, 1991, the district court denied ELUL's application for relief from its prior order requiring ELUL to post bond, entered [**6] judgment for GEX, and again ordered that an inquest be held to set plaintiff's damages. In what had become a familiar refrain, ELUL moved to vacate the district court's March 20th order. The district court reiterated the magistrate's findings in stating that:

[*158] It is readily apparent that Elul holds little regard for rules of civil procedure and for orders of the court. The court lacks confidence that Elul would observe an order to maintain the status quo. A vacatur would simply provide Elul with an opportunity for further wrongdoing, at the expense of GEX.

The court thereupon denied ELUL's motion to vacate its entry of default judgment.

In December 1991, Magistrate Judge Caden conducted an inquest to assess GEX's damages. He received evidence regarding the costs that GEX incurred as a result of fire damage to trade exhibit works under construction, to supplies, goods and other materials, and to rental properties, as well as additional freight and storage charges that flowed from the loss of warehouse space. During the inquest, ELUL attempted to introduce evidence regarding comparative negligence of GEX that allegedly contributed to the warehouse fire. Furthermore, ELUL tried to [**7] argue that any damage award should be generally off-set by the $ 1 million amount of fire insurance which GEX was contractually obligated to provide under the lease but failed to obtain, and, more specifically, that the award for additional freight and storage costs should be off-set by the $ 250,000 in rental payments that GEX withheld from ELUL after the fire. ELUL contended that these factors should be considered in mitigation of damages.

The magistrate judge refused to consider any evidence with regard to ELUL's proposed set-offs. Upon conclusion of the inquest, he recommended to the district court that ELUL pay GEX $ 1,496,425.60 in damages. On April 22, 1992, the district court adopted the magistrate's report and recommendation substantially in its entirety (merely correcting a slight mathematical error), and entered final judgment against ELUL in the amount of $ 1,496,425.82. ELUL moved in the district court to stay the enforcement of GEX's judgment pending appeal, which motion was denied. Ordering that ELUL post a $ 200,000 supersedeas bond, as well as furnish a note and supporting mortgage on the property to GEX for the amount of the judgment, a panel of this Court stayed [**8] its enforcement. This appeal followed.

DISCUSSION

The core of ELUL's argument on appeal is that during the post-default inquest, both the magistrate judge and the district court erroneously refused to consider evidence in "mitigation of damages." ELUL contends that GEX's: (1) alleged comparative negligence with respect to the warehouse fire; (2) failure to provide fire insurance as required by lease; and (3) withholding of rental payments, represent valid set-off claims regarding the extent of GEX's damages and, thus, should have been addressed by the court at the inquest. In response, GEX argues that ELUL is merely attempting to reopen the question of its substantive liability, which had been

definitively closed by ELUL's failure to answer its complaint. We believe that the rule governing the scope of damage mitigation at a post-default inquest is not as clear cut as either ELUL or GEX would have it.

While a party's default is deemed to constitute a concession of all well pleaded allegations of liability, it is not considered an admission of damages. *See Flaks v. Koegel,* 504 F.2d 702, 707 (2d Cir. 1974); Fed. R. Civ. P. 8(d). Damages, which are neither susceptible [**9] of mathematical computation nor liquidated as of the default, usually must be established by the plaintiff in an evidentiary proceeding in which the defendant has the opportunity to contest the amount. *See Flaks,* 504 F.2d at 707; *see also U.S. v. Di Mucci,* 879 F.2d 1488, 1497 (7th Cir. 1989); *cf.* Fed. R. Civ. P. 55(b)(2). The question before us now is whether and to what extent at a post-default inquest, a defaulting party may seek to mitigate damages by interposing set-off claims.

1) *GEX's Comparative Negligence*

Concerning the scope of damage recovery pursuant to a default judgment, we have stated that:

The outer bounds of recovery allowable are of course measured by the principle [*159] of proximate cause. The default judgment did not give [plaintiff] a blank check to recover from [defendant] any losses it had ever suffered from whatever source. It could only recover those damages arising from the acts and injuries pleaded and in this sense it was [plaintiff's] burden to show "proximate cause." On the other hand, there was no burden on [plaintiff] to show that any of [defendant's] acts caused the well-pleaded injuries, except as we [**10] have indicated that it had to for the purpose of establishing the extent of the injury caused [plaintiff], in dollars and cents.

Trans World Airlines, Inc. v. Hughes, 449 F.2d 51, 70 (2d Cir. 1971), *rev'd on other grounds,* 409 U.S. 363, 34 L. Ed. 2d 577, 93 S. Ct. 647 (1973).

ELUL reads our statement in Hughes to mean that "default or not, a plaintiff must show that the actions of the defendant were the proximate cause of the damages claimed by the plaintiff." ELUL's argument continues that because New York law (which presumably controls the outcome of this diversity case) permits the apportionment of damages based upon the percentage of culpability attributable to each party, *see* N.Y. Civ. Prac. L. & R. 1411 (McKinney 1976 & Supp. 1992), it should have been allowed at the inquest to prove GEX's relative fault with respect to the warehouse fire, and mitigate its damages accordingly. Judge Altimari, in his dissent from this portion of the majority opinion, adopts ELUL's argument. We think that both ELUL and the dissent read *Hughes* too broadly.

There is a categorical distinction between the element "proximate cause," as it pertains to the assignment of liability in [**11] the first instance, and "proximate cause" as it relates to the ministerial calculation of damages in the context of a default judgment. With regard to liability, the concept of proximate cause supplies the legal nexus between act and injury, and provides a necessary basis for awarding compensation. Where it is properly alleged in a complaint, proximate cause--going to liability--is completely and irrefutably established upon the defendant's default. *See Flaks,* 504 F.2d at 707; *see also Benny v. Pipes,* 799 F.2d 489, 495 (9th Cir. 1986), *cert. denied,* 484 U.S. 870, 98 L. Ed. 2d 149, 108 S. Ct. 198 (1987); Fed. R. Civ. P. 8(d). However, as employed in *Hughes,* the concept of proximate cause was merely used to set the limits of recovery according to the injuries that were conceded by default. Thus, in the *Hughes* context, the application of proximate cause presumes that liability has been established, and requires only that the compensation sought relate to the damages that naturally flow from the injuries pleaded. 449 F.2d at 70.

In its complaint, GEX sufficiently alleged that ELUL's negligence was the proximate cause of the fire damage. [**12] Those allegations were deemed admitted upon ELUL's failure to timely answer. ELUL's contention, that it should have been permitted to introduce evidence of GEX's comparative negligence, effectively contests settled issues of liability, i.e., who in fact caused the fire damage. If accepted, ELUL's position would undermine both our decision in *Hughes* as well as the general policy governing default. To permit ELUL to argue comparative fault under the guise of damage mitigation now, at the inquest stage of the proceedings, would deny GEX the benefit of Rule 8(d). *But cf. Fehlhaber v. Indian Trails, Inc.,* 425 F.2d 715, 717 (3d Cir. 1970) (where third-party complaint, *inter alia,* requested the court to determine relative fault, default by third-party defendant did not preclude the court from assessing damages according to comparative negligence).

2) *GEX's Failure to Acquire Fire Insurance*

According to ELUL, GEX breached its lease obligation to furnish $ 1 million in fire insurance. Citing New York law, *see, e.g., Kinney v. G.W. Lisk Co.,* 76 N.Y.2d 215, 219, 557 N.Y.S.2d 283, 285-86, 556 N.E.2d 1090 (1990) (per curiam), ELUL claims that GEX is liable [**13] for the amount of insurance that it failed to provide and, as a result, the district court should have offset GEX's damage award by $ 1 million. GEX responds that, post-default, [*160] ELUL was procedurally barred from raising a claim for an insurance set-off. We agree with GEX.

The essential facts concerning GEX's alleged failure to indemnify ELUL by supplying fire insurance were "'so logically connected [to GEX's claim against ELUL for fire damage] that considerations of judicial economy and fairness dictated that all the issues be resolved in one lawsuit.'" *United States v. Aquavella,* 615 F.2d 12, 22 (2d Cir. 1979) (quoting *Harris v. Steinem,* 571 F.2d 119, 123 (2d Cir. 1978)). On this score, ELUL's claim against GEX was a compulsory counterclaim. *See id.;* Fed. R. Civ. P. 13(a). By failing to assert it in a timely responsive pleading, ELUL is now foreclosed from raising it in any subsequent proceeding--including the post-default damages inquest presently under review. *See Taylor v. City of Ballwin,* 859 F.2d 1330, 1333 n.7 (8th Cir. 1988) ("By choosing not to respond, [defendants] will not now be heard to deny this claim; [**14] nor will they be allowed to raise a counterclaim for set-off."); *Carteret Sav. & Loan Ass'n v. Jackson,* 812 F.2d 36, 38 (1st Cir. 1987) ("when a defendant is defaulted for failure to file a pleading, the default applies to whatever the party should have pleaded"); 6 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1417 (1990).

3) *GEX's Additional Freight and Storage Costs*

As part of its overall damage award, the district court ordered ELUL to pay GEX $ 90,857.44 for certain freight and storage costs incurred as a result of GEX's loss of warehouse space. At the inquest, the magistrate judge refused to consider ELUL's claim that GEX had already made itself whole in this regard by reducing its warehouse rental payments. ELUL argues that the district court's award reimbursing GEX for these costs effectively granted GEX partial double recovery. While we hold that ELUL's default did not deny it the right to assert its claim for withheld lease payments against GEX, we agree with the district court's decision to defer consideration of this claim until the disposition of the separate landlord/tenant action commenced by ELUL.

In asserting its right [**15] to a set-off for withheld lease payments, ELUL is not seeking to litigate issues of liability that were determined in GEX's favor as a result of the default. Rather, ELUL proffered the evidence at issue in order to establish that GEX had mitigated its freight and storage cost damages by withholding lease payments that GEX was contractually obligated to make to ELUL under the lease. Because the evidence of lease payments allegedly owed and not paid by GEX concerned issues of damages--not liability--Rule 8(d) did not preclude ELUL from asserting and the district court from considering this evidence at the inquest. Indeed, if the district court's decision to refuse to consider evidence of alleged withholdings by GEX foreclosed ELUL's ability to assert its right to recover withheld lease payments from GEX, the decision would have been in error. GEX bore the burden of proving "in dollars and cents" each item of damage it claimed, *Hughes,* 449 F.2d at 70, and ELUL had a right to proffer evidence rebutting each damage claim, including by introducing evidence of mitigation of damages by GEX.

However, ELUL has not lost its ability to assert its alleged right to payments [**16] under the lease as a result of the district court's decision to deny consideration of the setoff claim. The district court's decision to deny any set-off was premised upon the fact that ELUL has independently asserted its lease payment claim in a separate pending landlord/tenant action against GEX. For reasons of efficiency, the district court chose to defer consideration of ELUL's alleged right to the withheld lease payments until hearing the lease-related action. *Greyhound Exhibitgroup, Inc. v. ELUL Realty Corp.,* No. CV-88-3039, 1992 U.S. Dist. LEXIS 14353 slip op. at 7 (E.D.N.Y. May 11, 1992). The district court apparently was concerned that resolution of ELUL's lease-related claim might involve consideration of a range of factual and legal issues unrelated to GEX's tort claims and thus unduly delay disposition of this action. Moreover, the outcome of the landlord/tenant action could undo any set-off ELUL might achieve were it permitted [*161] to assert its claim for lease payments at the inquest.

We believe that the district court is in the best position to determine the most efficient and expeditious

means of resolving the procedurally and factually complicated litigations arising from the warehouse fire. [**17] And, given that ELUL remains free to assert--and GEX remains free to challenge--the withheld lease payments claim in the pending landlord/tenant action, we can find no error in the district court's refusal to consider the lease payments claim at the inquest.

CONCLUSION

While at times the repercussions of default may seem harsh, "the purpose behind default judgments . . . is to allow district courts to manage their dockets efficiently and effectively." *Merrill Lynch Mortgage Corp. v. Narayan,* 908 F.2d 246, 253 (7th Cir. 1990). If we were to allow a defaulting party to contest liability and interpose general set-offs at the damages inquest, we would eviscerate the rule governing defaults, and for all practical purposes deprive the district courts of this important case management tool. On the other hand, a defaulting party must be permitted to contest the actual compensatory amount claimed with respect to any particular item of damages, including through proof of mitigation of damages. ELUL--through its claim for withheld lease payments--may be able to establish that GEX mitigated its freight and storage cost damages. And this damage-related claim was not foreclosed [**18] by ELUL's default. However, the district court acted within its discretionary power to manage its docket in withholding consideration of ELUL's lease payments claim until hearing of ELUL's pending landlord/tenant action.

We have considered all of ELUL's other arguments and find them to be without merit.

Affirmed.

CONCUR BY: ALTIMARI (In Part)

DISSENT BY: ALTIMARI (In Part)

DISSENT

ALTIMARI, *Circuit Judge,* concurring in part and dissenting in part:

It is clear that a default judgment has the effect of conclusively establishing two elements of a plaintiff's case: whether a defendant's acts or omissions were negligent and whether those acts or omissions proximately caused an injury to a plaintiff. *See Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 69-70 (1971), *rev'd on other grounds,* 409 U.S. 363, 34 L. Ed. 2d 577, 93 S. Ct. 647 (1973). However, *Trans World Airlines* was equally clear in holding that a default does not alleviate plaintiff's burden of establishing that the injury was the proximate cause of all of the damages claimed by the defendant. *Id; see also Fehlhaber v. Indian Trails, Inc.,* 425 F.2d 715, 717 (3d Cir. 1970) (holding that a default judgment did not preclude [**19] the court from assessing damages according to comparative negligence). Put differently, a default judgment establishes *whether* a plaintiff suffered damage; it does not, however, establish the *amount* of those damages. The holding in *Trans World Airlines* is both binding and sensible, but the majority pays it no heed. Because the majority's opinion is at odds with binding circuit precedent, I must respectfully dissent from that portion of the majority's decision which holds that where the damages "naturally flow from the injuries pleaded", a default removes from a plaintiff the burden of establishing that the amount of damages claimed was proximately caused by the injury suffered.

As the majority indicates, the underlying action in this case stemmed from a fire on February 13, 1988, at a warehouse owned by appellant Elul Realty Cop. ("Elul"). Appellee Greyhound Exhibitgroup, Inc. ("GEX") was a tenant in the building, and suffered significant property damage as a result of the fire. In its complaint, GEX did not allege that Elul's negligence caused the fire. Rather, the complaint asserts that the fire spread as a result of Elul's negligence in maintaining a sprinkler system.

[**20] At the hearing on damages, the magistrate refused to allow the Supervising Fire Marshall in attendance at the fire to testify in Elul's behalf. The Fire Marshall had previously submitted an investigative report [*162] in which he described how the fire originated through "horseplay" among a few of GEX's employees. In an affidavit, the Fire Marshall concluded that even if the sprinkler system had been fully operational it would have had a negligible effect in controlling the fire. As the Fire Marshall noted, the sprinkler head above the point of origin of the fire was in the roof. Therefore, according to the Fire Marshall, even if the sprinkler system had been fully operational, by the time sufficient heat had risen to activate it, the fire would have already reached the flammable liquid stored by GEX, and the sprinkler system could not have controlled the fire. However, the

Fire Marshall's testimony was deemed irrelevant by the magistrate, since it did not speak to the amount of damages caused by the fire.

The district court did not question the exclusion of this testimony; neither does the majority. Indeed, according to the majority, to permit the introduction of evidence of GEX's contributory [**21] negligence "effectively contests settled issues of liability, i.e. who in fact caused the fire damage." This statement makes clear that the majority's decision, by inflating the admission of liability to encompass damages as well as injury, has *sub silentio* relieved the plaintiff of the burden of proving "those damages arising from the acts and injuries pleaded", *Trans World Airlines,* 449 F.2d at 70, in direct contravention of *Trans World Airlines'* holding that a default judgment only proves "the fact of . . . the injury", not the extent thereof. *Id.* The end result of this compression is that the plaintiff is relieved of its burden of showing that the breach of the duty of care, for which defendant is liable, proximately caused the damages alleged. *See Trans World Airlines,* 449 F.2d at 70.

Elul's default established its liability only as to the fact of the injury alleged, not the extent of the damages proximately caused by that injury. *Id.* at 69. This is because when a defendant defaults, the "burden of establishing proximate cause is satisfied *as to liability* if proximate cause is adequately alleged in the [**22] complaint." *Id.* at 70 (emphasis in original). However, the default judgment did not relieve GEX of establishing that the injury proximately caused by Elul's negligence was in turn the cause of the "damages arising from the acts and injuries pleaded and in this sense it was [plaintiff's] burden to show 'proximate cause.'" *Id.* In other words, Elul's default established the existence of its liability, not the extent of its liability. *Id.* at 70; *see also* Restatement (Second) of Torts § 454 cmt b. (1965) (proof of proximate cause is necessary for the establishment of liability, as well as for the establishment of the amount of damages where liability is admitted).

Under *Trans World Airlines,* Elul's default precluded it from grounding its defense on a assertion that it properly maintained the sprinkler system. The default also established that Elul's negligent act proximately caused the fire to spread, which was the injury alleged. *Id.* at 70. However, the default judgment did not give GEX a "blank check" to recover damages "it had suffered from whatever source." *Id.* Consequently, GEX had the burden of proving that [**23] all of the damages alleged were proximately caused by the spread of the fire, which by reason of the default was admitted to have been the proximate result of Elul's negligent acts or omissions. In order to meet this burden, GEX should have been required to prove that none of the damages was proximately caused by the negligence of its own employees in starting the fire or in its negligent storage of flammable materials.

Because the district court failed to require GEX to submit such proof, and in fact denied Elul the opportunity to submit proof that the damages were not the sole result of the injury for which it was liable, I would vacate the award and remand for a determination of the extent to which Elul's negligence proximately caused the damages suffered by GEX.

FOCUS - 3 of 13 DOCUMENTS

Caution
As of: Jan 15, 2014

St. Paul Fire & Marine Insurance Company, As Subrogee of E. Gluck Corporation, Plaintiff-Appellee, v. City of New York and City University of New York, Defendants-Appellants, and Contel Business Systems, Inc. f/k/a Executone, Inc., Defendant. Contel Business Systems, Inc. f/k/a Executone, Inc., Third-Party Plaintiff, v. Bedrock Realty Co. and Lazard Realty, Inc., Third-Party Defendants

No. 89-7904

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

907 F.2d 299; 1990 U.S. App. LEXIS 10908

January 31, 1990, Argued
June 27, 1990, Decided
June 27, 1990, Filed

PRIOR HISTORY: [**1] Appeal from a judgment of the United States District Court for the Eastern District of New York, I. Leo Glasser, Judge, based on a jury verdict that appellants were negligent and thus are liable for water damage that ruined a half-million dollar inventory of watches.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, city and university, sought review of a judgment by the United States District Court for the Eastern District of New York based upon a jury verdict that they negligently caused a water leak and failed to stop it in a timely manner and were therefore liable to appellee subrogee for water damage that ruined an inventory of watches.

OVERVIEW: A jury returned a verdict against appellants, city and university, finding them negligent in causing a water leak and failing to stop it in a timely manner and holding them liable to appellee subrogee for water damage to an inventory of watches. Appellants sought review. The court held that the claim for negligently causing the water leak should not have been submitted to the jury on a res ipsa loquitur theory because there was insufficient evidence to show that appellants had exclusive control over the room where the leak started. The room was kept unlocked so repairmen could have access to it, and a third party was seen near the room several times. The court also found that there was insufficient evidence to support the negligence claim for delay in responding to the report of a leak. The first report referred to leak on the third floor, not the seventh floor where the watches were located, therefore appellants' engineer acted reasonably in not calling for an immediate inspection of the seventh floor. Other evidence

showed that the watches were already damaged before the engineer would have been able to reach the building to fix the leak. The court reversed the judgment.

OUTCOME: The court reversed the judgment finding appellants, city and university, liable to appellee subrogee for water damage to an inventory of watches because there was insufficient evidence to submit either the res ipsa loquitur claim for negligently causing the leak or the standard negligence claim for failing to stop the leak to the jury.

COUNSEL: Barry P. Schwartz, New York, New York (Fay Leoussis, Peter L. Zimroth, Corporation Counsel of the City of New York, of Counsel), for Defendants-Appellants.

David J. Groth, Philadelphia, Pennsylvania (Cozen and O'Connor, Philadelphia, Pennsylvania; Kenneth; A. Bloom, O'Donnell, Fox & Gartner, P.C., New York, New York of Counsel), for Plaintiff-Appellee.

JUDGES: Oakes, Chief Judge, Kearse and Fletcher * Circuit Judges.

* The Honorable Betty B. Fletcher, of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION BY: OAKES

OPINION

[*300] OAKES, Chief Judge.

In this appeal of a judgment entered in the United States District Court for the Eastern District of New York (I. Leo Glasser, Judge) on August 10, 1989, the City of New York and City University of New York challenge a jury verdict that they are liable for water damage that ruined a half-million [**2] dollar inventory of watches. We agree with appellants' claims that the action should not have been submitted to the jury on a theory of *res ipsa loquitur* and that appellee failed to make out a prima facie case of negligence. Accordingly, we reverse the judgment of the district court.

BACKGROUND

The dispute centers on the events of June 16, 1986, at 29-10 Thomson Avenue, [*301] Long Island City, Queens, when a water leak, described by one eyewitness as "like Niagara Falls," rained down upon an inventory of watches in the sixth-floor premises of E. Gluck Corporation ("Gluck"). The source of the leak was a fully opened one-inch drain valve on a large air-conditioning unit in a machine room on the building's seventh floor ("Room 747"), which was subleased by the City of New York for use as additional classroom space for LaGuardia Community College, part of the City University of New York (referred to jointly as the "City" appellants). The sublessor of the seventh floor was Contel Business Systems, Inc. ("Contel"), the building's former owner, which was contractually responsible for providing air conditioning to the floor as well as maintaining and repairing the air-conditioning [**3] unit.

St. Paul Fire & Marine Insurance Company ("St. Paul"), as subrogee of Gluck, brought this diversity action in March 1987, alleging that the City's and Contel's negligence caused the massive water leak. Contel, in turn, brought a third-party action against Bedrock Realty Company and Lazard Realty, Inc., the building's owner and managing agent, which was dismissed when the district court granted the third-party defendants' motion for a directed verdict during the trial.

The following facts were established at trial. No classes were scheduled at LaGuardia Community College on June 16, 1986, so activity on the seventh floor was quieter than usual. The security guard stationed on the floor during the day did not see anyone go near Room 747. A guard working the evening shift, Tom Farley, reported that a Bedrock employee named Kurt was on the seventh floor twice that afternoon, and at 5:15 P.M. was seen walking towards Room 747.

At 8:15 P.M., after making a final round of the floor, Farley locked the seventh floor and left the building. Two-and-a-half hours later, at 10:45 P.M., a maintenance worker cleaning space used by LaGuardia on the building's third floor noticed a "serious" [**4] water leak coming from the ceiling. The worker notified a building security guard, who called LaGuardia's chief engineer, Henry Paulsen, at his home around 11 P.M. to tell him about the problem. Paulsen instructed him to put a garbage pail under the leak and said he would investigate it when he reported for work at 6 A.M. the next morning.

Around the same time, an alarm in Gluck's vault area

on the sixth floor was activated by the water leak. Two police officers responded to the alarm at 11:20 P.M., but they left when they were unable to gain access to Gluck's locked premises. Sometime between 11:30 P.M. and midnight, Jack Litwack, a Gluck vice president, also arrived at the building. When Litwack unlocked and entered the sixth floor, he saw water seeping out from under Gluck's vault doors. Upon opening the vault doors, he saw water pouring down from the ceiling, causing a flood four to five inches deep on the floor. Believing that the watches, which were drenched and apparently not waterproof, were already ruined and that there was nothing he could do to stop the leak, Litwack went home.

Alerted by a security guard, LaGuardia's maintenance worker, who was on the third floor, unlocked [**5] and inspected LaGuardia's space on the seventh floor sometime around 12:30 A.M. He discovered that the leak was coming from an air-conditioning unit in Room 747, which was always left unlocked so that Contel could have access to it. Paulsen, LaGuardia's engineer, was again called at home, and he arrived at the building sometime between 1 and 2 A.M. When he went up to the seventh floor, Paulsen had to wade through water an inch-and-a-half deep to close the drain valve.

A subsequent investigation by LaGuardia as to the cause of the flood was inconclusive.

Following the presentation of evidence at trial, the City and Contel made motions to dismiss the complaint, which were denied. The case against the City then went to the jury on two claims: (1) a *res ipsa loquitur* negligence claim based on the drain valve being open and (2) a standard negligence claim for failing to stop the leak in a timely [*302] manner. The court instructed the jury that the claim against Contel was based on its alleged negligent maintenance or repair of the drain valve.

On March 30, 1989, the jury returned a special verdict that absolved Contel and apparently found the City liable under both negligence [**6] theories. We say apparently because, as all parties now acknowledge, the question on the special verdict form that was supposed to address the *res ipsa loquitur* issue was less than clear in its approach. The sole question asked of the jury to establish the City's negligence on the *res ipsa loquitur* claim was whether the City "failed to exercise reasonable care in controlling access to room 747." [1] The jury answered that question in the affirmative, as well as a separate question addressed to the delay claim, namely whether Paulsen "failed to appropriately respond to notice he received that there was a water leak on the third floor." The jury assessed Gluck's damages at $ 529,262, which, with interest, amounted to $ 662,375.02 in the court's amended judgment of August 10, 1989.

1 The record and briefs are muddled as to the different claims of negligence St. Paul made against the City. At oral argument, St. Paul's counsel clarified that evidence concerning the City's alleged failure to secure Room 747 adequately was only related to the exclusive control requirement of *res ipsa loquitur* and was not intended to be asserted as a separate negligence claim. In any event, we do not believe the City acted negligently in leaving Room 747 unlocked, for Contel needed access to the air-conditioning unit and the City had no reason to foresee that the room would attract vandals or outsiders.

[**7] The City challenges the judgment on two grounds: (1) St. Paul's claim that the City negligently caused the leak should not have been submitted to the jury on a *res ipsa loquitur* theory, and (2) St. Paul failed to make out a prima facie case of negligence in its claim that the City failed to stop the leak in a timely manner.

DISCUSSION

Res Ipsa Loquitur Claim for Causing the Leak

Res ipsa loquitur is an often confused and often misused doctrine that enables a jury presented only with circumstantial evidence to infer negligence simply from the fact that an event happened. Since the time it was crafted by Baron Pollock in *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), in which a now-legendary barrel of flour rolled out of a window, its use has expanded to cover a myriad of accidents and incidents. But before a case can be submitted to a jury in New York on a *res ipsa loquitur* theory, there are three requirements that must be met. The plaintiff must establish that: (1) the event was of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it was caused by an agency or instrumentality within the exclusive [**8] control of the defendant; and (3) it was not due to any voluntary action or contribution on the part of the plaintiff. *See Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d

219, 226, 492 N.E.2d 1200, 1204, 501 N.Y.S.2d 784, 788 (1986) (citation omitted); *see generally* Restatement (Second) of Torts § 328D (1965). In the case before us, the City's main challenge is that the second element of the test, namely whether the air-conditioning unit was within its exclusive control, was not met.

The purpose of the exclusive control requirement is to eliminate within reason the possibility that the event was caused by someone other than the defendant. *See Dermatossian*, 67 N.Y.2d at 227, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789. Accordingly, in order to establish exclusive control, "the evidence 'must afford a rational basis for concluding that the cause of the accident was probably "such that the defendant would be responsible for any negligence connected with it."'" *Id.* (quoting 2 F. Harper & F. James, *The Law of Torts* § 19.7 at 1086 (1956) (quoting Prosser, *Res Ipsa Loquitur in California*, 37 Cal.L.Rev. 183, 201 (1949))). [**9] Although the possibility of all other causes need not be eliminated altogether, "'their likelihood must be so reduced that the greater probability lies at defendant's door.'" *Id.* at 227, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789 [*303] (quoting 2 F. Harper & F. James, *The Law of Torts* § 19.7 at 1086). In other words, to invoke the doctrine of *res ipsa loquitur*, the plaintiff must establish control by the defendant "of sufficient exclusivity to fairly rule out the chance that [the injury] was caused by some agency other than defendant's negligence." *Id.* at 228, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789.

As numerous cases have shown, it is not enough to prove that the defendant had control if there is sufficient evidence that a third party also had access to the instrumentality that caused the injury. For example, in *De Witt Properties v. City of New York*, 44 N.Y.2d 417, 377 N.E.2d 461, 406 N.Y.S.2d 16 (1978), the court found that although the City controlled the water mains under the street, the plaintiffs were not entitled to a *res ipsa loquitur* instruction because there was proof that Consolidated Edison also [**10] had access to the area of a broken water main and the proof did not eliminate the utility's activities as a possible cause of the broken main. The court explained that "proof that third parties have had access to the instrumentality generally destroys the premise, and the owner's negligence cannot be inferred." *Id.* at 426, 377 N.E.2d at 465, 406 N.Y.S.2d at 27.

Two recent cases involving public transportation in New York City similarly establish limits on the availability of *res ipsa loquitur*. In *Ebanks v. New York City Transit Auth.*, 70 N.Y.2d 621, 512 N.E.2d 297, 518 N.Y.S.2d 776 (1987) (mem.), the plaintiff filed suit after being injured when he became caught in a two-inch gap that had opened upon an escalator stair in the subway system. The case was submitted to the jury on a *res ipsa loquitur* theory, and the New York Court of Appeals reversed. The Court of Appeals reasoned that although the Transit Authority owned and maintained the escalator, the proof at trial did not adequately refute the possibility that the escalator had been damaged by a member of the public either inadvertently, such as by permitting a hand truck to get stuck [**11] in the escalator, or through an act of vandalism. *See id.* at 623, 512 N.E.2d at 298, 518 N.Y.S.2d at 777. In *Dermatossian, supra*, the Court of Appeals ruled that an action involving an injury allegedly caused by a defective grab handle on a bus should not have been submitted to the jury on a *res ipsa loquitur* charge because the proof did not adequately exclude the possibility that the grab handle was broken by something other than the Transit Authority's negligence, such as a fellow bus passenger. *See Dermatossian*, 67 N.Y.2d at 228, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789.

In the case before us, like *Ebanks* and *Dermatossian*, there was ample evidence that the leak may have been caused by something other than the defendants' negligence. In the first place, the City always left Room 747 unlocked so that it would be accessible to Contel employees to service and repair the air-conditioning units. Accordingly, anyone with access to the seventh floor could have walked right into the room. Although no classes were scheduled on June 16, 1986 and the floor was quieter than usual, the record establishes that many people other [**12] than City or Contel employees passed through the floor. Most significantly, there was specific evidence that a particular individual not affiliated with the City or Contel was spotted in the vicinity of Room 747 on two separate occasions that afternoon. The only person LaGuardia's security guards could recall seeing near the air-conditioning room that entire day was an individual named Kurt, who worked for Bedrock Realty Company. According to LaGuardia's incident report, which was admitted into evidence, Kurt approached the security desk on the seventh floor at 5:15 P.M. and told the guard that he was going into the air-conditioning room. The guard saw Kurt walk in the direction of Room 747 and never saw him leave the floor.

Because an individual could exit the seventh floor by way of a stairway after the floor was locked for the night, it is possible that Kurt or some other person may have remained on the floor after it was locked at 8:15 P.M. The fact that the only specific evidence of access to the drain valve involved someone other than an employee of the defendants weighs [*304] strongly against the application of *res ipsa loquitur*.

Moreover, the nature of the leak [**13] also casts doubt about the involvement of City or Contel employees. Because the air-conditioning unit could only be operated with the drain valve closed and Contel, not the City, maintained and repaired the air conditioners, it is far from likely that a City employee went into Room 747 and negligently opened the drain valve. And because no maintenance work was done on the unit on the day in question, it is also not likely that a Contel employee went in and negligently opened it. This supposition is confirmed by the jury verdict absolving Contel of liability.

In light of all of the evidence presented in this case, we cannot say that the evidence "'affords a rational basis for concluding that the cause of the accident was probably "such that the defendant would be responsible for any negligence connected with it."'" *Dermatossian*, 67 N.Y.2d at 227, 492 N.E.2d at 1205, 501 N.Y.S.2d at 789. St. Paul's proof did not adequately exclude the possibility that the drain valve was opened by someone other than a City or Contel employee, such as Bedrock employee Kurt or some vandal who had access to the floor during the day. Accordingly, St. Paul failed to establish defendants' [**14] exclusive control over Room 747, and submission of this case to the jury on a theory of *res ipsa loquitur* was improper. Because St. Paul offered no direct evidence implicating the City, it also failed to establish a prima facie case on a standard negligence claim against the City for causing the leak.

Standard Negligence Claim for Delay in Responding

As to the jury's finding that the City negligently delayed responding to the report of a leak, the City argues that it had no way of knowing that there was a leak on the seventh floor because the 11 P.M. phone call to Paulsen, LaGuardia's chief engineer, reported a water leak through the ceiling of LaGuardia's space on the third floor. Even assuming that that report constituted notice of a leak on the seventh floor, the City argues that it should not be liable for damage to Gluck's watches because they had already been destroyed by that time.

At 11 P.M., Paulsen was called at home and told about a "serious" leak on the third floor. Although St. Paul sought to establish that the phone call was sufficient to provide the City with notice of a leak coming from the seventh floor, we find that that proposition requires too great [**15] a leap of imagination. Between LaGuardia's space on the third floor and LaGuardia's space on the seventh floor were the fourth, fifth and sixth floors of the building, none of which was occupied by the City. Only a seer, a soothsayer or a clairvoyant would have suspected the problem originated on the seventh floor; alas, Paulsen was just an engineer. We thus find that Paulsen acted reasonably in not calling for an immediate inspection of the seventh floor. Accordingly, the City was not negligent in failing to discover the source of the leak after the initial report.

Even if we found that the 11 P.M. call put the City on notice about a possible leak coming from the seventh floor, the evidence suggests that no additional damage was caused by its failure to turn off the water earlier. By the time Gluck vice president Jack Litwack arrived at the building between 11:30 P.M. and midnight, he saw water "like Niagara Falls" pouring down the shelves lining the vault. Even if Paulsen had headed for the building immediately upon receiving the 11 P.M. call, he could not have gotten there much before Litwack, for he lived some twenty miles away. By that time, it appeared to Litwack at least that [**16] the watches were already destroyed. After all, after seeing the condition of the vault he left the building and went home instead of trying to salvage any of the watches.

Thus, as with St. Paul's *res ipsa loquitur* claim, we believe that the district court should not have submitted the negligent delay claim to the jury. St. Paul failed to establish a prima facie case that the City acted negligently by not responding sooner to the report of a leak on the third floor.

[*305] Finding no evidence in the record sufficient to enable either of St. Paul's negligence claims against the City to go to a jury, we reverse the district court's judgment.

Arthur Kill Power, LLC and ACE American Insurance Company, Plaintiffs, against American Casualty Safety Insurance Company, Defendant.

102943/08

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

26 Misc. 3d 1228(A); 907 N.Y.S.2d 435; 2010 N.Y. Misc. LEXIS 358; 2010 NY Slip Op 50297(U)

February 9, 2010, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

SUBSEQUENT HISTORY: Affirmed in part and modified in part by Arthur Kill Power, LLC v. American Cas. Safety Ins. Co., 80 A.D.3d 502, 915 N.Y.S.2d 535, 2011 N.Y. App. Div. LEXIS 301 (N.Y. App. Div. 1st Dep't, Jan. 20, 2011)

HEADNOTES

[**435] [*1228A]
Contracts--Construction--Choice-of-Law Clause.
Contracts--Construction--Additional Insured.

COUNSEL: [***1] For Plaintiffs: Robert A Fitch, Esq., James R. Callan, Esq., Rawle & Henderson LLP, New York, NY.

For Defendants: Kenneth A. Bloom, Esq., Susan Mahon, Esq., Gartner & Bloom, PC, New York, NY.

JUDGES: Michael D. Stallman, J.

OPINION BY: Michael D. Stallman

OPINION

Michael D. Stallman, J.

This action involves a dispute between two insurance companies as to whether one of the policies provides insurance coverage to plaintiffs in an underlying personal injury action, and whether that policy is primary or excess to the other policy. Plaintiff Arthur Kill Power LLC (Arthur Kill) and ACE American Insurance Company (ACE) move for summary judgment in their favor against defendant American Safety Casualty Insurance Company (ASCIC), sued herein as American Casualty Safety Insurance Company (Motion Seq. No. 003). ASCIC separately moves for summary judgment in its favor against Arthur Kill (Motion Seq. No. 004). This decision addresses both motions.

BACKGROUND

Pursuant to a Purchase Order dated January 27, 2006, Arthur Kill allegedly engaged Wing Environmental, Inc. (Wing) to perform asbestos abatement at Arthur Kill's power plant in Staten Island. On February 25, 2006, Jose Barros, a Wing employee, allegedly sustained personal [***2] injuries in a slip and fall accident. On July 6, 2007, Barros commenced an action in the Supreme Court, New York County against Arthur Kill, among other defendants, *Barros v Arthur*

Kill Power, LLC, Index no. 109338/2007. Barros allegedly slipped and fell while unloading a Wing truck parked at the dock of the Arthur Kill power plant, "as a result of grease which had fallen from and/or was caused to cover the floor of the subject premises as a result of defendants['] negligence." Callan Affirm., Ex H [Verified Complaint] P 38. Arthur Kill then impleaded Wing, seeking contractual indemnification, common-law indemnification and contribution, and damages for Wing's alleged failure to procure insurance.

It is undisputed that ACE insured Arthur Kill for expenses of the action, pursuant to a liability insurance policy, no. HDOG21723873. The ACE policy has limits of $ 1 million for each occurrence, and $ 2 million in the general aggregate. It is undisputed that ASCIC issued a commercial general liability policy, No. ENV009296-05-01 to EWT Fireproofing, Inc., which contained an endorsement that designated Wing as a named additional insured. Like Arthur Kill's ACE policy, the ASCIC policy has [***3] limits of $ 1 million for each occurrence, and $ 2 million in the general aggregate.

Arthur Kill contends that it is an additional insured under the ASCIC policy. By letter dated July 11, 2007, a third-party administrator for an entity related to Arthur Kill, Broadspire, tendered Barros's claim to Wing, requesting it to notify Wing's insurer, ASCIC. By letter dated July 26, 2007, Broadspire sent ASCIC a copy of its tender letter to Wing, a copy of a certificate of insurance, and a copy of the purchase order. By letter dated October 10, 2007, ASCIC disclaimed coverage. Citing an Employer's Liability exclusion in the policy, ASCIC concluded that there was no coverage as to Arthur Kill. Even if coverage applied, ASCIC concluded that its coverage was excess to any policy issued to Arthur Kill. The letter also stated, "We reserve the right to assert and/or modify any policy defense that may be deemed applicable at any time through the course of our investigation." Callan Affirm., Ex J.

I.

As a threshold issue, the parties disagree as to the law applicable to ASCIC's policy. As Arthur Kill indicates, section 16 of the ASCIC policy states, "This policy and all additions to, endorsements to, [***4] or modifications of the policy shall be interpreted under the laws of the State of Georgia." Callan Affirm., Ex E [ASCIC Policy] at AS020. ASCIC contends that New York law applies because the action seeks a declaration as to ASCIC's duties to defend and indemnify plaintiffs for an incident allegedly occurring in the State of New York.

> "Generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction.
>
> * * *
>
> If ... the foreign law does not entail any such violation ... full effect should be given to the law of our sister State.' Crucially, however, we have reserved the public policy exception for those foreign laws that are truly obnoxious.'"

Welsbach Elec. Corp. v MasTec N. Am., Inc., 7 NY3d 624, 629, 859 N.E.2d 498, 825 N.Y.S.2d 692 (2006). Here, Georgia law bears a reasonable relationship to the transaction (i.e, the ASCIC policy), because ASCIC is located in Atlanta, Georgia. *See e.g.* ASCIC policy, at AS007, AS067 (indicating corporate address in Georgia). ASCIC's choice of law analysis is flawed, because it disregards the choice of law provision in its own policy. Therefore, Georgia law applies to the interpretation of the ASCIC policy, which [***5] includes additions, endorsements, and modifications to the policy.

Under Georgia law, "[t]he hallmark of contract construction is to ascertain the intention of the parties. However, when the terms of a written contract are clear and unambiguous, the court is to look to the contract alone to find the parties' intent." *Park 'N Go v. United States Fid. & Guar. Co.*, 266 Ga 787, 791, 471 S.E.2d 500 (1996).

II.

Arthur Kill argues that it is an additional insured under the ASCIC policy pursuant to an Additional Insured Coverage Endorsement [form ENV 98 011 11 04], which adds as an additional insured,

> "d. Any person shown as an Additional Insured on a certificate of insurance issued by us or our authorized representative, or by endorsement to the policy, *provided such person is required to be named as an*

> *Additional Insured in a contract with you*, shall be entitled to coverage hereunder solely for claims' or suits' for bodily injury' . . .arising solely out of your negligence.
>
> * * *
>
> No obligation for defense or indemnity under the policy is provided to any Additional Insured for claims' or suits' directly or indirectly arising from' the status, actions, or inaction, including (without limitation) for vicarious, [***6] derivative or strict liability of said Additional Insured, its agents, consultants, servants, contractors or subcontractors (other than the Name Insured), except for the actions or inactions of the Named Insured.
>
> e. We will have no duty to defend any insured, other than the Named Insured, except when the sole allegation against that insured is vicarious liability for the sole negligence of the Named Insured.

ASCIC Policy, at AS027. A certificate of insurance issued by EBCO International, Inc. [1] states, "NRG Arthur Kill Power, LLC is added as additional insureds [*sic*] under General Liability coverage with respects [*sic*] the following project: Removal of 5,000 sf of boiler jacket and insulation - Unit 20 Superheat Elev 53-102." *Id.*, Ex G.

> 1 EBCO International, Inc. was the producer of the ASCIC policy. A letter dated August 2, 2005 from ASCIC to EBCO International, Inc. granted EBCO International, Inc. the authority to issue certificates of insurance on behalf of the Named Insured. Callan Affirm., Ex F.

ASCIC contends that there was no contract between Wing and Arthur Kill requiring Wing to name Arthur Kill as an Additional Insured. According to ASCIC, the "contract" consists only of the [***7] terms of Arthur Kill's proposal, which does not, on its face, contain the provisions requiring Wing to obtain insurance coverage on Arthur Kill's behalf. Rather, those provisions are contained in paragraph 11 of the General Terms and Conditions, which were incorporated by reference in the proposal. In support of this argument, ASCIC cites New York cases holding that a subcontract does not incorporate by reference the indemnification provisions of a prime contract.

The issue is not whether the insurance procurement provisions were incorporated into the proposal. Rather, the issue is whether the term "contract" in the ASCIC endorsement would include not only the proposal, but also the General Terms and Conditions, which were incorporated by reference. Interpretation of the word "contract" is governed by Georgia law. In the absence of a specific definition of "contract" in the ASCIC endorsement, the term "contract" must be interpreted as it is understood under Georgia law. Georgia law provides that,

> "When an agreement consists of multiple documents that are executed at the same time and during the course of a single transaction, those documents should be read together. Thus, the documents [***8] here that were executed contemporaneously must be construed together."

Lovell v Thomas, 279 Ga App 696, 700, 632 S.E.2d 456 (Ga App 2006). Thus, a Georgia court would have considered that the proposal, the purchase order, and the General Terms and Conditions formed a single contract, to be construed together.

The cases upon which ASCIC relies are inapposite. New York law does not apply to interpretation of the term "contract" in the ASCIC policy. Moreover, the New York cases speak to the issue of whether a subcontract incorporates the indemnification provisions of a prime contract, which is not the case here. The proposal is not incorporating by reference the terms of a prime contract. Even if New York law applied, "[i]t is a well-established principle of contract law that all contemporaneous instruments between the same parties relating to the same subject matter are to be read together and interpreted as forming part of one and the same transaction." *Davimos v Halle* , 60 AD3d 576, 577, 877 N.Y.S.2d 20 (1st Dept 2009). Thus, New York law would have regarded the proposal, purchase order, and terms and general condition as forming one contract.

As mentioned above, paragraph 11 of the General

Terms and Conditions of Wing's [***9] agreement with Arthur Kill required Wing to purchase insurance on Arthur Kill's behalf. It states,

> "INSURANCE. Supplier [Wing] shall purchase and maintain such insurance as will protect Supplier and Buyer [Arthur Kill] from the losses or claims set forth below which may arise out of or result from Supplier's performance or obligations to perform under this Purchase Order, whether such performance be by Supplier or by anyone directly or indirectly employed by Supplier, or by anyone for whose acts Supplier may be liable:
>
> * * *(b) NRG Energy, Inc. and Buyer shall be added as Additional Insured's [*sic*] on the GL, AL, and Umbrella policies for injury or damage resulting from Supplier's performance of this Purchase Order. The Additional Insured status noted in this Section shall be specifically endorsed to Supplier's Policies, and with respect to the General Liability Policy shall be broad as that provided by the ISO CG 20 10 11 85 endorsement form. . ."

Callan Affirm., Ex C.

In sum, Arthur Kill has met the two requirements to be named as an additional insured under the ASCIC policy pursuant to the Section A of the Additional Insured Coverage Endorsement. First, a certificate of insurance by [***10] an authorized representative indicates that Arthur Kill is an additional insured. Second, a contract between Wing and Arthur Kill requires Arthur Kill to be named as an additional insured to the ASCIC policy.

III

ASCIC argues that an Employer's Liability exclusion applies here. Sub-paragraph 2 of Section I -- Coverages of the ASCIC Policy provides, in relevant part:

> "This insurance does not apply to:
>
> * * *
>
> e. Employer's Liability
>
> Bodily Injury' to:
>
> (1) An employee' of any insured arising from' and in the course of:
>
> (a) Employment by any insured; or
>
> (b) Performing duties related to the conduct of the insured's business
>
> * * *
>
> This exclusion applies:
>
> (1) Whether an insured may be liable as an employer or in any other capacity; and
>
> (2) To any obligation to share damages with or repay someone else who must pay damages because of the injury."
>
> This exclusion does not apply to liability assumed by the insured under an Insured contract.'"

ASCIC Policy, at AS009. [2]

> 2 ASCIC indicates that such exclusions are applicable to additional insureds under New York law. As discussed above (*see* Section I, *supra*), the law of Georgia applies to the interpretation of the ASCIC policy. However, plaintiffs do not argue that, [***11] under Georgia law, the exclusion does not apply to Arthur Kill.

ASCIC reasons that the exclusion applies because Barros was an employee of Wing, an additional named insured, and he allegedly suffered bodily injury in the course of his employment by Wing. Arthur Kill does not challenge that analysis. The parties dispute whether the exception to the exclusion, for "liability assumed by the insured under an Insured contract,'" applies.

The ASCIC Policy defines "Insured contract," in relevant part, as:

> "That part of any written contract or written agreement under which you assume the tort liability of another party to pay damages not otherwise excluded under the policy because of bodily injury'

> or property damage' to a third person or organization and caused by your negligence."

ASCIC Policy, at AS022. Arthur Kill contends that the indemnification provisions in Wing's agreement with Arthur Kill constitutes an "Insured contract," as defined in the ASCIC policy.

The Court notes that ASCIC acknowledges that Wing, the additional named insured, arguably assumed the tort liability of Arthur Kill. Bloom Affirm. P 24. Therefore, ASCIC concedes that Wing's agreement with Arthur Kill is an Insured Contract [***12] due to the indemnification provisions contain in the General Terms and Conditions. And yet, ASCIC argues that such Wing's assumption of the tort liability of Arthur Kill is insufficient. Rather, ASCIC argues that Arthur Kill must have assumed the tort liability of another third-party for the exclusion to apply. This analysis is faulty.

The Employer's Liability exclusion reads, "This exclusion does not apply to liability assumed by the insured under an Insured contract.'" As discussed above, Wing is an additional named insured under the ASCIC policy, and Arthur Kill is an additional insured under the policy, both by virtue of endorsements. The Employer's Liability therefore could be read as:

> (1) "This exclusion does not apply to liability assumed by [Wing] under an Insured contract.'"
>
> (2) "This exclusion does not apply to liability assumed by [Arthur Kill] under an Insured contract."

Thus, the exclusion does not apply either where Wing assumed the tort liability of another, or where Arthur Kill assumed the tort liability of another. However, because the issue is whether the exclusion applies to Arthur Kill's liability, it is irrelevant to look at whether the exclusion is inapplicable to [***13] any tort liability that Arthur Kill assumed for a third-party.

It bears repeating that ASCIC acknowledged that Wing arguably assumed Arthur Kill's tort liability. Bloom Affirm. P 24. Thus, it is unambiguous that the Employer's Liability exclusion does not apply to Arthur Kill's tort liability, which was "liability assumed by [Wing] under an Insured contract.'"

IV

On these motions, ASCIC raises the defense of late notice, even though ASCIC did not disclaim on the ground of late notice in its letter dated October 11, 2007. Arthur Kill argues that, under Georgia law, the late notice defense should be disregarded because ASCIC does not show that it suffered any prejudice. Callan Opp. Affirm. P 21.

Section IV, paragraph 2 of the ASCIC policy states, in relevant part:

> "a. You must see to it that we are notified in writing as soon as practicable and within thirty (30) days of when you become aware of an occurrence,' an offense which may result in a claim'.
>
> * * *
>
> b. If a claim' is made or suit' is brought against any insured, you must:
>
> (1) Immediately record the specifics of the claim' or suit' and the date received; and
>
> (2) Notify us in writing within ten (10) days of your first receipt of the claim' [***14] or suit'."

ASCIC Policy, at AS018. Barros commenced his personal injury action on July 6, 2007. By letter dated July 26, 2007, Broadspire sent ASCIC a copy of its tender letter to Wing, a copy of a certificate of insurance, and a copy of the purchase order, requesting a decision. Bloom Affirm., Ex I. Insofar as ASCIC's defense of late notice is based on the July 26, 2007 letter from Broadspire, such notice appears to have been given within 20 days of the commencement of Barros's lawsuit.

However, the record does not indicate when Arthur Kill was served with the papers; Arthur Kill apparently answered the complaint in Barros's action on January 24, 2008. *See* Bloom Affirm., Ex G. Thus, on the record before this Court, it cannot be determined, as a matter of law, whether Arthur Kill notified ASCIC within ten days after receipt of the Barros suit, i.e., after being served with the pleadings.

ASCIC submits no authority under Georgia law that the letter dated July 26, 2007 constitutes late notice. ASCIC cited New York cases only, and cited only one case where notice was given four weeks after commencement of the underlying action, which is not the case here. Because it cannot be determined [***15] from the record when Arthur Kill was served with the pleadings in the Barros action, the Court cannot rule out the possibility that Arthur Kill might have sent notice to ASCIC within ten days of being served with the pleadings, thus complying with the notice requirements of the policy. Therefore, ASCIC has not met its prima facie burden of establishing late notice as a matter of law. Accordingly, the Court does not reach the issue of whether, under Georgia law, ASCIC waived this defense by failing to raise it when it disclaimed coverage.

V.

ASCIC also disclaimed coverage on the ground that coverage under its policy was excess to any other coverage issued to Arthur Kill, pursuant to Section IV (4) of its policy. *See* Callan Affirm., Ex J. Arthur Kill contends that the ASCIC policy provides coverage on a primary basis, by virtue of a Primary Non Contributory Insurance endorsement to the policy, form ENV 98 036 11 04.

The endorsement states, in relevant part:

> "Solely with respect to the specified project listed below and subject to all terms, conditions, and exclusions to the policy, this insurance shall be considered *primary* to the Additional Insuredlisted below if other valid and collectible [***16] insurance is available to the Additional Insured for a loss we cover for the Additional Insured under Coverage A. It is also agreed that any other insurance maintained by the additional insured *shall be non contributory.*
>
> Additional Insured (s)Specified Project
>
> As required by those entities with whom the Named Insured executes a written contract prior to the start of the projectVarious

ASCIC Policy, at AS031. ASCIC argues that the endorsement does not apply because Wing did not execute a written contract with Arthur Kill before Barros's accident.

The endorsement clearly and unambiguously defines additional insureds as those entities with whom the Named Insured, i.e., Wing, executes a written contract *prior* to the start of the project. It is undisputed that Wing executed the purchase order on February 27, 2006, two days after Barros's alleged accident. Callan Affirm., Ex C; Bloom Affirm., Ex D. Arthur Kill points out that it executed the purchase order before Barros' accident, but this is irrelevant to the definition of additional insured under the endorsement. The issue is not, as Arthur Kill contends, whether Wing and Arthur Kill intended to be bound by the terms of their agreement before [***17] Wing executed the purchase order. *See* Callan Reply Affirm. P 10. The issue is whether Arthur Kill falls under the definition of additional insured in this endorsement, which it clearly does not. To find otherwise would contravene the unambiguous terms of this endorsement. Therefore, the Court concludes that this endorsement does not apply.

Section IV, paragraph 4 of the ASCIC policy states, in relevant part:

> **"4. Other Insurance**
>
> If other valid and collectible insurance is available to the insured, our [ASCIC's] obligations are limited as follows:
>
> > a. This insurance is primary, except when b. below applies.
> >
> > b. This insurance is excess over any other insurance that is valid and collectible insurance available to the insured or any Additional Insured whether such insurance is primary, excess, contingent, or on any other basis and regardless of the nature, kind, date of issuance or limits of such insurance available to the insured or any Additional Insured. We shall have no obligation to provide defense or indemnity for any claim' or suit' for which other insurance exists until such time as the limits of such other insurance are exhausted by the payment of claims' or suits.'"

ASCIC Policy, at [***18] AS019. It is undisputed that the ACE policy constitutes "other valid collectible insurance" available to Arthur Kill. According to Section IV (4) (b), the ASCIC policy would be considered excess to the ACE policy, regardless of whether that policy is primary or excess.

Arthur Kill contends that the ACE policy provides that its insurance is excess to the ASCIC policy, which would create a conflict in the coordination of the two policies that would need to be resolved. The Court disagrees.

Section IV of the ACE policy issued to Arthur Kill provides, in pertinent part:

"4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is primary. Then, we will share with all that other insurance by the method described in **c.** below.

b. Excess Insurance

This insurance is excess over:

* * *

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, [***19] or products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

* * *

c. Method of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss of the remains, whichever comes first."

Callan Affirm., Ex K [CG 00 01 12 04] at Pages 10-11 of 15. Arthur Kill's ACE policy is presumptively primary, unless an exception applies.

Contrary to Arthur Kill's argument, the exception of Section IV (b) (2) does not apply. Section IV (b) (2) appears to make the ACE policy excess to any other policy which provides the same scope of liability coverage for arising out of "premises-operations" or "products and completed operations," [3] where Arthur Kill is named as an additional insured. Although Arthur Kill was added as an Additional Insured to the ASCIC policy by endorsement, the endorsement did not provide the same scope of liability coverage. The "premises-operations" coverage and the "products-completed operations" exposure categories refer to the operations of the [***20] insured, which refers here to Arthur Kill. Although Arthur Kill was named as an additional insured under the ASCIC policy, the additional insured endorsement clearly insured Arthur Kill against " claims' or suits' for bodily injury' . . .arising solely out of [Wing's] negligence," not arising out of the premises or operations of Arthur Kill. *See* Section II, *supra*. Thus, the Court concludes that Section IV (b) (2) of Arthur Kill's ACE policy does not apply.

> 3 "The premises-operations' exposure category . . . corresponds to the insured's liabilities as an organization arising out of its ownership of land, building, and other premises; its ongoing operations, whether they be manufacturing, contracting, transportation, of a service nature, or otherwise; . . .
>
> [T]he products-completed operations' exposure category . . . corresponds to the insured's liabilities arising out of products that the insured manufactures, distributes, or sells, as well as liabilities arising out of operations such as contracting and building operations that have already been completed."
>
> 20-129 Appleman on Insurance § 129.1.

Because that provision does not apply, the ACE policy provides coverage on a primary basis, which [***21] presents no conflict in coordinating insurance coverage with the ASCIC policy. By virtue of Section IV (4) of the ASCIC policy, coverage under the ASCIC policy is excess to the ACE policy.

VI.

It cannot be determined on this motion whether the ACE policy, with a limit of $ 1 million for each occurrence, will be exhausted due to the costs to Arthur Kill from Barros's lawsuit. However, the Court notes that, by the terms of the additional insured endorsement, ASCIC has no duty to defend Arthur Kill. It provides, in pertinent part, "e. We will have no duty to defend any insured, other than the Named Insured, except when the sole allegation against that insured is vicarious liability for the sole negligence of the Named Insured." ASCIC Policy, at AS027.

The complaint in Barros's action alleges that Barros "was caused to slip and fall . . . as a result of grease which had fallen from and/or was caused to cover the floor of the subject premises as a result of defendants['] negligence." Callan Affirm., Ex H [Verified Complaint] P 38. The existence of a slipping hazard on Arthur Kill's premises is not an allegation based on "vicarious liability for the sole negligence of the Named Insured [Wing]," [***22] as contemplated in the additional insured endorsement. As the premises owner, Arthur Kill has a common-law duty to maintain the premises in a reasonably safe condition. Although it is possible that Wing could have caused the alleged accumulation of grease, the "sole allegation" against Arthur Kill, based on paragraph 38 of the complaint, is not based on the vicarious liability of Arthur Kill.

Although Arthur Kill is a additional insured under the ASCIC policy, ASCIC therefore has no duty to defend Arthur Kill under the ASCIC policy.

CONCLUSION

The Court has determined that the Employer's Liability exclusion of the ASCIC policy does not apply to Barros's lawsuit against Arthur Kill. ASCIC has also not demonstrated that Arthur Kill's notice to ASCIC of Barros's lawsuit was late as a matter of law. Finally, the Court has determined that Arthur Kill's ACE policy provides coverage on a primary basis, and that coverage under the ASCIC policy is excess to the ACE policy.

Because it cannot be determined on this motion whether the ACE policy will be exhausted, it is premature to declare whether ASCIC has any duty under the ASCIC policy to Arthur Kill. However, by the terms of the additional insured [***23] endorsement, ASCIC has no duty to defend Arthur Kill. At most, ASCIC might have a duty to indemnify Arthur Kill.

Accordingly, it is hereby

ORDERED that plaintiffs' motion for summary judgment is granted in part; and denied in part; and it is further

ORDERED that defendant's motion for summary judgment is granted in part; and denied in part; and it is further

ADJUDGED and DECLARED that, under commercial general liability policy, No. ENV009296-05-01, defendant has no duty to defend plaintiff Arthur Kill Power, LLC in *Barros v Arthur Kill Power, LLC*, Index no. 109338/2007; and it is further

ADJUDGED and DECLARED that coverage under commercial general liability policy, No. ENV009296-05-01, issued by defendant, for plaintiff Arthur Kill Power, LLC is excess to coverage provided under ACE policy no. HDOG21723873; and it is further

ORDERED that the issues of whether notice to defendant was untimely and whether defendant has duty to indemnify are severed, and the action shall continue as to these severed issues.

Dated: February, 2010

New York, New York