
ABRAMS, GORELICK, FRIEDMAN & JACOBSON, P.C.

CASES AND POINTS

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O PENING STATEMENT

This past quarter has been a very busy one for AGF&J.

This edition of Cases & Points includes several cases of note which were handled by the firm.

In addition, we have been very busy growing, as well. In the past three months five new attorneys have come aboard.

Jay S. Gunsher and Marc A. Zanoni have joined us as associates. Jay is a 1995 graduate of St. John's Law School and is an experienced insurance defense and coverage attorney with a background in general liability, labor law and automobile liability insurance. Marc graduated from Fordham Law School in 1997 and is an experienced insurance defense litigator with an extensive background in automobile liability insurance.

We are also pleased to advise that Joshua Glaser, Joseph Fitapelli and Manna Morejon, who were paralegals at AGF&J while attending law school, have passed the bar exam and are joining the Firm as associates. Josh, Joe and Manna attended New York Law School.

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ENFORCEABILITY OF LEASE PROVISIONS WAIVING TENANTS' CLAIMS AGAINST LANDLORDS

By: Daniel J. Friedman

In a recent case handled by AGF&J, the United States District Court for the Southern District of New York granted summary judgment dismissing a subrogation action commenced by Charter Oak as the subrogee of ARS Mechanical Inc., a tenant, against its landlord, Trio Realty Company. Charter Oak Fire Ins. Co. v. Trio Realty Co. (2002 WL123506*2, 1/31/02)

The tenant, ARS, operated an auto repair facility at Trio's Bronx building. On August 16, 1998, while changing an automobile fuel pump, Trio's employee accidentally spilled gasoline on the floor. The gasoline fumes came in contact with the pilot light of a nearby natural gas waterheater and a three alarm fire ensued. ARS' insurer, Charter Oak, paid \$457,000 for damage to ARS' property and sought to subrogate against Trio, alleging that Trio was liable because it allowed a water heater which was not installed in compliance with National Fuel Gas Codes to be in the repair station.

The Lease

The lease, typical of many commercial leases in New York City, provides in part: "Tenant hereby waives any claim against the landlord by reason of the landlord's negligence or other acts or omissions or other occurrences insofar as such claim is based on a risk insured under any policy carried by the tenant or

with respect to such act or occurrence that does not arise as a result of the willful negligence or malfeasance of the landlord . . . tenant agrees to accept said premises 'as is' . . . landlord shall not be obligated or required to do any work or to make any alterations or install any fixtures, equipment or improvements, or make any repairs . . . tenant shall also maintain, at its own expense, its own hot water heating equipment. . . landlord shall have no obligation to provide tenant with heat or hot water."

Negligence v. Gross Negligence

The Court dismissed Charter Oak's cause of action for negligence based upon that part of the lease which states that ARS "waive[d] any claim against the landlord by reason of landlord's negligence". U.S. District Judge Preska rejected Charter Oak's argument that New York General Obligation Law § 5-321, which provides that agreements that exempt a landlord from liability for its negligence are void and unenforceable because they are against public policy overrides the lease. Relying on New York case law, Judge Preska held that a lease that "reallocates" risk to an insurer does not violate § 5-321 and because New York Courts, as a general matter, look favorably upon agreements which require parties to carry insurance thereby, affording

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protection to the public, the lease at issue is not void. Judge Preska thereby restated New York law that if a tenant carries its own insurance, the provision of a lease exempting a landlord from its own negligence is enforceable.

While a waiver clause in a commercial lease will be enforceable to limit recovery for ordinary negligence, it will not preclude recovery for gross negligence. The Courts have defined gross negligence as: “. . . [t]he degree of negligence arising where there is a reckless indifference with the safety of human life (intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured have interests.

While the issue of gross negligence is ordinarily a question of fact which must be resolved by a jury, there are cases such as this, where the Court can decide the issue and grant the moving party summary judgment.

In this case, Judge Preska decided that as a matter of law, there was no gross negligence on the part of Trio because the immediately prior tenant also operated an automobile repair garage without incident; the lease of ARS commenced immediately after the repair garage's tenancy; that the lease specifically provided that the premises were taken by the tenant "as is"; Trio had no obligation to make alterations; Trio had "no obligation" to provide tenant with "heat or hot water" ; the tenant was obligated to "install and maintain at its own costs and expense, its own hot water heating equipment"; ARS acknowledged that it had "thoroughly examined" the premises and was fully familiar with the condition thereof; and, Trio admitted to have relit the pilot light of the water heater on more than one occasion.

Conclusion

While Judge Preska's decision in Charter Oak Fire Ins. Co. v. Trio Realty Co. does not create new law, it

is significant in several respects. First, the lease at issue is the common form of commercial lease. The "as is condition" and the obligation for a tenant to provide its own heat, hot water, etc. are common in commercial leases. Second, most subrogating attorneys will also allege gross negligence in order to circumvent the waiver for ordinary negligence. This decision may encourage other Judges to look beyond the mere allegation of gross negligence, analyze what the landlord's duties are under the lease as well as the acts or omissions alleged to constitute gross negligence and resolve these issues on a summary judgment motion.

Any questions regarding this case, property damage or property related claims can be addressed to Dan Friedman at dfriedman@agfjlaw.com.

Summary of Recent Decisions

Lead Paint Cases – "Notice" of the Defect.

The Court of Appeals was recently called upon to determine what evidence is required for a plaintiff/tenant to establish sufficient notice to a landlord of the hazard of lead paint poisoning to children, so as to defeat a landlord's motion for summary judgment.

In Chapman v. Silber and Stover v. Robilotto, the Court of Appeals was faced with a choice between two extremes: the loss of affordable housing caused by the economic impact upon landlords for judgments and settlements in lead poisoning cases and the ability of infants to recover for injuries sustained as the result of ingesting lead paint in their homes. In the unanimous opinion written by Judge Carmen Ciparick, the Court took a middle ground approach.

It refused to impose upon landlords a "new duty" to test for the existence of lead in older buildings based solely upon a "general knowledge" of the inherent dangers

to children of lead based paint. However, the Court held that "under traditional common law principles, a triable issue of fact is created as to whether a landlord knew or should have known of the lead paint conditions if the landlord 1) retained a right of entry to the premises and assumed a duty to make repairs, 2) knew the premises were constructed before the 1960 lead paint ban; 3) knew of peeling paint on the premises, 4) knew of the hazards of lead based paint to children, and 5) knew that a young child lived on the premises.

Applying this standard, the Court reversed an Order granting summary judgment to the landlord in Chapman, and affirmed the Order granting summary judgment in Stover.

In Chapman the Court concluded that the landlord was sufficiently aware of all of the relevant factors so as to raise a question of facts as to whether he did, in fact, have notice of the condition. However, in Stover, the Court found that the evidence in the record did not establish that the landlord had either actual or constructive knowledge of a problem of chipped or peeling paint in the apartment and thus, no issue of fact as to notice was presented for a jury to consider.(94 N.Y.2d 9 [Nov. 15, 2001])

Absence of Notice – Slip and Fall

In Schindler v. Filene's Basement, Inc., a case handled by AGF&J, the Court was called upon to determine whether a question of fact existed regarding whether the defendant, Filene's, created a defective condition which caused the plaintiff to fall upon entering the store or, in the alternative, whether Filene's had actual constructive notice of the condition which may have been the cause of plaintiff's fall.

In the Schindler case, plaintiff contended that on her way to the entrance to the store, she either slipped and fell as the result of debris

scattered on the floor near a planter in the atrium or tripped on the planter which was built into the floor of the atrium. She alleged that the planter was devoid of foliage and not roped off in any way and that as a result, the border in the planter could not be easily distinguished from the floor.

Filene's established by deposition testimony and affidavits that the area in question was cleaned on a regular basis, several times throughout the course of the day.

Thus, the Court found that under the evidence in the record, it could not be said that Filene's had actual or constructive notice of the debris allegedly on the floor of the atrium. Furthermore, the Court found that the planter was open and obvious to the general public and that consequently, no duty existed to warn of conditions which were readily observable to the public.

Accordingly, the Supreme Court, Nassau County (J. Gerald Carter) granted summary judgment to Filene's in a decision dated January 11, 2002. For additional information, contact Gail J. Monaco.

• Negligence: the Emergency Doctrine

The mother of a newborn infant sued when her baby was injured while a nurse was transporting her to the nursery in a bassinette. While the nurse was pushing the cart, the right front wheel detached causing the cart to tilt. The nurse attempted to stabilize the cart while she called out for help. When no one responded, she decided to "lower the bassinet and the cart to the floor" by turning the unit on its side. As she did so, the infant fell to the floor and sustained a skull fracture and an epidural hematoma.

Defendant/nurse moved for summary judgment, relying on the emergency doctrine. That doctrine provides that when a person is confronted by a sudden, unexpected event not of his or her making which

leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context.

However, in reversing the trial Court's dismissal of the action against the defendant nurse, the Appellate Division, Second Department, found that there existed genuine issues of material facts as to whether the nurse was, in fact, faced with an emergency and, if so, whether she acted reasonably under the circumstances. Thus, the Court reversed summary judgment and allowed the case to proceed against the defendant/nurse, as well as the hospital. Stathis v. Mercy Medical Center and Virginia Garrison, (2d Dep't Oct. 22, 2001, 732 N.Y.S.2d 31)

• Errors and Omissions Policies: Intentional Acts

In Watkins Glen Central School Dist. v. National Union Fire Ins. Co., the Appellate Division, Second Department, was faced with the question of whether the defendant's Errors & Omissions insurer was obligated to defend and indemnify the plaintiff school district in a Federal action against it arising from the District's alleged negligent hiring and supervision of a teacher with a history of sexual misconduct with students.

In the Watkins case, the Appellate Division affirmed the trial Court's denial of the insurer's motion for summary judgment.

The insurer alleged that coverage for damages arising from the teacher's alleged sexual misconduct was expressly foreclosed pursuant to the assault and battery and bodily injury/emotional distress exclusions contained in the School District's Errors and Omissions policy.

In affirming the lower Court's denial of the insurer's motion for summary judgment, the insured argued that since the specific exclusion for sexual misconduct had been deleted from the policy, the School District's damages arising from the teacher's sexual misdeeds were covered. The Court found that since the policy provisions relied upon by the insurer were ambiguous under the circumstances, the lower Court had properly considered the parole evidence tendered by the insured School District.

Thus, the Appellate Court affirmed the finding below that since the Errors & Omissions policy was intended to cover the School District's negligence in its rendering of professional services, it did, in fact, include coverage for negligence in the District's hiring and supervision of its employees.

The Court distinguished this case from the one in which New York's highest Court denied coverage to the insureds under a CGL policy, for claims arising out of its employee's assault or other intentional acts when it found that in those cases, the operative act giving rise to the potential liability was an excluded intentional sexual assault in the policy. The Court found that no New York case had done so in the context of an attempt to compel an insured to provide professional malpractice insurance under an Errors & Omissions policy.

It will be interesting to see whether the Court of Appeals grants leave to appeal based upon the lower court's distinction between the meaning of a term in a CGL policy and the same term in an Errors & Omissions policy. (2d Dep't, Oct. 29, 2001) 732 N.Y.S.2d 70

• Property Insurance: Collateral Estoppel Against the Insured

In Sterling Ins. Co. v. Chase, the defendant/insured had been

convicted of two counts of insurance fraud and one count of arson stemming from two fires that occurred at his home in February, 1990 and February, 1993. Although defendant appealed the conviction, the appeal has not yet been perfected.

In December, 1995, the plaintiff insurer commenced a common law fraud action against the defendant insured to recover the proceeds it had paid in connection with the 1993 fire. Defendant/insured moved to compel production of certain documents and photographs in the insurance company's possession relating to its investigation of the fire. The plaintiff insurance company cross-moved for summary judgment. In affirming the lower Court's grant of summary judgment to the plaintiff insurer, the Appellate Division found that the two primary elements of collateral estoppel (that there is an identity of issue which has necessarily been decided in the prior litigation and which is decisive of the present action and the parties sought to be estopped had a full and fair opportunity to contest the decision it now claimed to be controlling) had been met by the insurance company. Thus, the Court found that the defendant/insured was collaterally estopped to deny it had been guilty of a fraudulent insurance act, and affirmed the insurance company's judgment, granting it recovery of the amounts paid to the insured. (4th Dep't, Oct. 25, 2001), 731 N.Y.S.2d 778

• **CGL Insurance Policy: Duty to Defend**

The Appellate Division, Second Department, was called upon to decide whether a Complaint alleging that the insured had used the plaintiff's trademark in connection with the insured's sale or advertising of a counterfeit product was potentially covered under the insured's CGL policy as an "advertising injury" thus obligating

the insurer to provide a defense to its insured.

The plaintiff/insurer issued a policy of commercial general liability insurance to its insured, Quality Distributors, which included coverage for "advertising injury". The insured was sued by Proctor & Gamble in the U.S. District Court for the Eastern District of New York in an action alleging that the defendant distributed counterfeit "Head and Shoulders" shampoo. Defendant requested its insurer to defend and indemnify it and the insurer refused, alleging that the claims against the insured in the underlying action alleged intentional acts, excluded by its policy.

The lower Court granted the insurer's motion for summary judgment and the defendant/insured appealed. On appeal, the Appellate Division found that although the issue of the insured's ultimate obligation to indemnify Proctor & Gamble could not be decided, the allegations of the underlying complaint did, in fact, allege an "advertising injury" and thus, the allegations were potentially within the coverage provision of the policy. Thus, the Court modified the decision below finding that the insurer had a duty to defend the underlying action. (2nd Dep't. Oct. 15, 2001) 731 N.Y.S.2d 234.

• **Negligence: Snow and Ice Removal**

The question of whether, and under what circumstances, an out of possession landlord can be held responsible for the tenant's negligent removal of snow and ice from the sidewalk in front of the premises is often presented to Courts. That standard of care was determined in a recent case handled by AGF&J in Supreme Court, New York County.

In Rosario v. City of New York, et al., suit was commenced by a pedestrian who slipped and fell at the premises owned by defendant, Halivis Realty Corp. Suit was commenced

against Halivis, its tenant (Bueno Restaurant Corp.) and the City of New York. Pursuant to the lease between Halivis and Bueno Restaurant, it was the tenant's obligation to keep the sidewalk free of ice and snow. Apparently, the tenant attempted to clear the sidewalk but did so improperly.

The landlord moved for summary judgment on the grounds that it had no contractual duty to keep the snow and ice off the sidewalk and further, that it did not have any notice of the tenant's improper attempt to clear the sidewalk.

The landlord argued that if it was to be held responsible for the tenant's negligent failure to clear snow and ice from the sidewalk, the plaintiff must establish that the landlord had actual or constructive notice of the condition of the sidewalk. Without such proof, the landlord is entitled to judgment dismissing the complaint. The Court agreed and granted summary judgment to the landlord. (Sup. Ct., New York Co., January 14 2002, J. Stallman)

If you have any further questions about the Rosario decision, please contact Alexander Perczekly.

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