SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MBNY, LLC,

Plaintiff,

- against -

LARKIN COLD STORAGE CO., INC.,

Defendant.

- x

Index No.: 703056/2014

Motion Date: 6/27/19

Motion No.: 42

Motion Seq.: 4

The following electronically filed documents read on this motion by plaintiff for an order granting plaintiff summary judgment pursuant to CPLR 3212 and awarding plaintiff $202,997.68 with applicable interest and attorneys' fees:

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	EF 62 - 72
Affirmation in Opposition-Exhibits	EF 75 - 78
Reply Affirmation	EF 79

This action arises from the damage to property belonging to plaintiff while warehoused by defendant. It is undisputed that pursuant to an agreement dated October 18, 2011 and titled Larkin and Max Brenner Term Sheet (hereinafter the Agreement), plaintiff agreed to pay $9,000 per month for storage of its merchandise, mainly consisting of chocolate.

In support of the motion, plaintiff submits an affidavit from Vincent Stewart, Director of Operations at plaintiff, dated May 15, 2019. Mr. Stewart affirms that in October of 2011, plaintiff entered into a contract for the storage of perishables with defendant. Throughout the duration of the contract, plaintiff paid defendant $9,000 per month with the understanding that defendant would preserve and protect merchandise stored at defendant's warehouse. In July 2012, plaintiff was storing assorted fine chocolates and confections, which were going to be sold in retail. There was approximately $900,000 of merchandise stored. Approximately $500,000 of that amount required refrigeration. The remaining $400,000 needed to remain frozen at or below zero degrees Fahrenheit. When the merchandise stored

with defendant in July 2012 was transferred into the custody of defendant, it was in good retail condition. On July 9, 2012, plaintiff learned from defendant that there was an incident in which the freezer shut down and a sprinkler burst. Plaintiff was informed that the incident happened on or before July 6, 2012. As a result of the freezer shut down, there was three to four inches of standing, unfrozen water in the freezer section of defendant's facility. The temperature in the freezer section was approximately forty degrees Fahrenheit. There was obvious water damage to the packaging. Upon further examination, much of the merchandise was destroyed by a combination of the water damage and melting. Mr. Stewart opines that this damage would not have occurred but for defendant's failure to maintain adequate temperatures in the warehouse and permitting a pipe to burst. Deducting the portion of merchandise plaintiff was able to salvage, the cost of merchandise destroyed was $202,997.68. Annexed to his affidavit is an accounting of the merchandise which was damaged and photographs. Defendant has not paid anything for the damage to plaintiff's merchandise while in its custody.

Plaintiff also submits an affidavit from David Royal, a Claims Manager with Liberty Mutual Insurance (Liberty Mutual) a parent company of Wassau Underwriters Insurance Company insurer of plaintiff at the time of the subject incident dated May 13, 2019. Mr. Royal affirms that based upon his personal knowledge and the file maintained by Liberty Mutual regarding this claim, after Liberty Mutual was notified of the loss, Liberty Mutual commenced an investigation into the claim. Consulting with experts and consultants, Liberty Mutual determined the value of the damage to plaintiff's property to be $202,997.68 excluding expected profits. Liberty Mutual determined that $141,014.19 of damage was attributable to the breakdown in freezers and $61,983.49 was attributable to water damage.

Based on the submitted evidence, plaintiff's counsel contends that summary judgment is warranted because the goods were damaged in the exclusive possession of the bailee, defendant. Additionally, counsel contends that because this action sounds in contract and relates to property, pre-judgment interest is appropriate at nine percent per annum.

In opposition, Adam Moskowitz, the President of defendant, submits an affidavit dated June 17, 2019. Mr. Moskowitz affirms that on Friday July 6, 2012, after business hours had ended at defendant's facility, there was a power outage in the area of the facility. As a result of the power outage, multiple compressors shut down in the freezer where plaintiff's merchandise was being

stored, causing the temperature to rise. Additionally, the power outage also caused issues with the sprinkler system within the storage unit where plaintiff's merchandise was being stored, causing a pipe to burst and flood the storage unit. The drop in temperature and flooding from the sprinkler system was not discovered until Monday, July 9, 2012, which was the first day defendant's facility was open following the power outage. Plaintiff was promptly notified of the power outage and resulting damage. The sprinkler system was inspected monthly pursuant to New York State standards. The drop in temperature and flooding due to sprinkler system issues, which were caused by a power outage after business hours, were not foreseeable or due to any affirmative action of anyone at defendant. Mr. Moskowitz opines that if there was no power outage, the temperature in the unit where plaintiff's merchandise was being held would have remained at an acceptable level to preserve the merchandise and there would not have been any flooding in the storage unit. He further opines that the power outage could not have been prevented by anyone at defendant, and the damage to plaintiff's merchandise was not due to any negligence on the part of defendant.

Defendant's counsel contends that summary judgment is not warranted as defendant has provided a sufficient non-negligent explanation for the damage to plaintiff's merchandise. Counsel further contends that the loss was not due to the negligence of defendant.

Defendant also submits a Sworn Statement in Proof of Loss and two Subrogation Receipts, all signed by Samuel N. Borgese on behalf of plaintiff and dated November 27, 2012, indicating that plaintiff received the sums of $136,014.19 and $61,983.49 from Wausau Underwriters Ins Co. based on such counsel argues that based on the Subrogation Receipts, there is an issue of fact as to whether plaintiff has already been reimbursed for the damage to its goods. However, such argument fails as a subrogee may bring suit in the name of a subrogor only (see Blanche, Verte & Blanche, Ltd. v Joseph Mauro & Sons, 79 AD3d 1082 [2d Dept. 2010]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form, eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his or her position (see Zuckerman v City of New York, 49 NY2d 557 [1980]).

"As a bailee, an owner of a warehouse is required to exercise reasonable care so as to prevent loss or damage to stored goods" (Northbrook Prop. & Cas. Ins. Co. v D.J.L. Warehouse Corp., 160 AD2d 917, 917 [2d Dept. 1990]; see UCC 7-204[1]). The failure to return the stored goods is prima facie evidence of gross negligence requiring the bailee to come forward with an explanation (see Roth v Black Star Publ. Co., 239 AD2d 484 [2d Dept. 1997]). To rebut this showing, defendant must demonstrate that it was not negligent, or if negligent, that the loss was not attributable to said negligence (see State Farm Ins. v Central Parking Sys., Inc., 18 AD3d 859 [2d Dept. 2005]). If the bailee provides an explanation for the loss of or damage to the goods, the burden then shifts to the bailor in proving that the bailee's negligence was the cause of the damage to the bailed goods (see I.C.C. Metals v Municipal Warehouse Co., 50 NY2d 657 [1980]).

Here, it is undisputed that the bailed goods were damaged, and thus, it is presumed that the damage was the result of defendant's negligence. Although defendant argues that the goods were destroyed by a power outage, which also caused issues with its sprinkler system, defendant did not rebut the presumption of negligence. Here, Mr. Moskowitz affirmed that a power outage was the cause of the damage. However, merely identifying the cause of the damage does not absolve defendant of responsibility for the bailed goods. Mr. Moskowitz failed to establish that any procedures were in place, such as a backup generator, to protect the goods from a power outage. Therefore, defendant failed to demonstrate that it exercised all reasonable efforts to protect the bailed goods, and plaintiff is entitled to judgment with interest (see State Farm Ins. Co. v Central Parking Sys., Inc., 18 AD3d 859 [2d Dept. 2005]; Murray v J.F. Hayes, Inc., 151 NYS 1 [App. Term, 1st Dept. 1915]). That branch of the motion for attorneys' fees is denied as the Agreement does not provide for such.

Accordingly, and for the reasons stated above, it is hereby,

ORDERED, that plaintiff's motion for summary judgment is granted; and it is further

ORDERED, that plaintiff shall have judgment and recover from defendant LARKIN COLD STORAGE CO., INC. the amount of $202,997.68 with interest at the rate of 9% per annum from July 6, 2012 together with statutory costs and disbursements.

Dated: July 1, 2019
Long Island City, N.Y.

ROBERT J. McDONALD