ARBITRATION SERVICES, INC.

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D&W CENTRAL STATION ALARM CO., INC.
Claimant,

Case No. 201070

-against-

DECISION ON MOTION

DAL ELECTRIC CORP.,
Respondent

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The undersigned is the Arbitrator assigned to hear and determine the above-captioned Arbitration Proceeding, having heretofore filed in the offices of Arbitration Services, Inc. the requisite Arbitrator's Oath. By Notice of Motion dated September 3, 2010, Claimant D&W Central Station Alarm Co., Inc ("D&W"). moves pursuant to C.P.L.R. §3212 for an order granting summary judgment to D&W dismissing the "claims" against D&W asserted by Respondent DAL Electric Corp., ("DAL") including an award of attorneys fees.

In support of the instant motion, D&W has submitted an affidavit of Warren Davis sworn to on September 2, 2010, a Memorandum of Law in support of the motion, an affirmation of counsel for D&W dated September 27, 2010, an affidavit in Reply of Warren Davis sworn to on September 24, 2010 and a Memorandum of Law in Reply. The motion for summary judgment was opposed by DAL by the submission of an affidavit of Sal D'Alessio sworn to on September 17, 2010, an affidavit of Mario Monticciolo sworn to on September 17, 2010, affirmation of counsel for DAL dated September 17, 2010 and a Memorandum of Law in opposition to the motion of D&W.

DAL is an electrical contractor who appears to be a subcontractor in construction performed for the benefit of Friends Seminary School, the owner or lessee of the premises located at 222 East 16th Street, New York, N.Y. (the "Premises"). On April 24, 2006 D&W entered into a Standard Sales Alarm Contract with DAL for the purchase and installation of equipment for extension of the then approved fire alarm system situated in the Premises ("2006 D&W Contract") . On April 27, 2006 DAL and D&W entered into an AIA Standard Form Agreement for the same work at the same premises as was covered in the 2006 D&W Contract ("2006 AIA Contract"). It is not disputed that the 2006 AIA Contract was executed later in time than the 2006 D&W Contract and covered sale and installation of an expansion to the existing alarm system at the Premises.

By document dated July 20, 2007, D&W entered into a Standard Alarm Sales Contract with DAL for purchase and installation of certain equipment at the Premises in an amount of $14,880.00. The aforesaid contract, annexed to the Davis affidavit as Exhibit "F", details a payment schedule for "Fire Alarm Equipment Delivered", a tie in and programming to the panel and further refers to and incorporates a letter dated April 19, 2007, not attached to Exhibit "F", but further referred to in Paragraph 7 of the Davis affidavit. The April 19, 2007 letter is attached to the D'Allesio affidavit (Exhibit "A") and clearly refers to the equipment as a smoke purge system. The April 19, 2007 letter also requires a tie in to the fire alarm panel, programming and one initial testing of the smoke purge

system ("2007 D&W Contract").

In another document dated July 13 2007, DAL and D&W executed an AIA Standard Form of Agreement ("2007 AIA Contract") providing for the same work at the same premises as specified in the 2007 D&W Contract. Both the 2007 D&W Contract and the 2007 AIA Contract contain an integration clause and a clause indicating that the agreement supercedes all prior understandings and agreements, respectively, to the effect that it is clear that the last executed agreement is the effective agreement governing the terms and provisions applicable to the work to be provided in 2007 as specified in the April 19, 2007 letter.

The 2007 D&W Contract provides, *inter alia*, exculpatory clauses disclaiming any liability for loss or damage caused by D&W's negligence, limitations of liability to a sum certain in the event of any liability, an abbreviated limitation period of thirteen (13) months to commence an action or proceeding and a provision requiring DAL to purchase a policy of liability and property damage insurance covering D&W's negligent performance, naming D&W as an insured and indemnifying D&W against any such loss. In sharp contrast, the 2007 AIA Contract does not contain such disclaimers and requires D&W to indemnify DAL and the owner of the premises against claims resulting from D&W's performance of its work resulting in damage, including property damage.

On August 7, 2007 D&W's employee Wayne Evans conducted a test of the newly installed fire alarm system installed at the premises. D&W did not have access to the elevator shaft to visually inspect and test the hatch system, which apparently opens and closes in response to certain signals from the D&W sold equipment. According to the Davis affidavit, Mr. Davis admits that the elevator hatch relay module had an extra code due to a mistake in his programming causing the hatch to open during the test, which remained open after completion of the test. On the evening of August 7, 2007, a rainstorm occurred in which substantial amounts of water entered the open hatch causing property damage.

An examination of the available pleadings attached to the motion indicate a Demand for Arbitration filed by DAL for negligence and breach of contract with a claim for $100,000, together with interest and attorney's fees and "Respondent's Answer" containing a Counterclaim[1] for $97,000.00. The Counterclaim alleges that DAL was a subcontractor and the contractor withheld the sum of $97.000.00 to repair and/or reimburse the owner of the premises for the damage in question. The Counterclaim asserts causes of action alleging negligence, breach of contract and gross negligence. D&W interposed a Reply to Counterclaim asserting, *inter alia*, affirmative defenses based upon the alleged governing 2007 D&W Contract, and including the exculpatory clauses referenced herein.

In its opposition to the summary judgment motion, DAL alleges that it was the custom and

[1] There is no D&W claim annexed, or referred to, in the papers submitted in support or opposition to the motion.

usage of DAL to require the execution of an AIA contract after a proposal was accepted as was performed in this matter, except that in connection with D&W, a separate contract with D&W was used as well as the AIA contract, which, in 2006 preceded the execution of the 2006 AIA Contract. In the D'Allesio affidavit, Mr. D'Allesio avers that he specifically remembers that the 2007 AIA Contract was executed subsequent to the 2007 D&W Contract and that the 2007 AIA Contract is "simply misdated". Additionally, DAL urges that the summary judgment motion be denied as the test conducted on August 7, 2007 was a test of the Fire Alarm System and not the Purge System as the elevator contractor did not show up and that the test was therefore a test performed pursuant to the 2006 Fire Alarm System contracts. Counsel for DAL has submitted an affidavit attaching certain service work orders involving programming the system which were performed by D&W prior to the 2007 Contracts. The Monticcolo affidavit states that the elevator hatch could not have opened due to a test in the purge system as such was not conducted on August 7, 2007 due to the elevator company not appearing, although so scheduled, and the August 7, 2007 test was only a test of the Fire Alarm system (See ¶5, Monticcolo affidavit).

In Brown Bark I, LP v. Metroflor Transportation Services, Inc., 847 N.Y.S. 2nd 825, 18 Misc. 3rd 513 (Sup. Ct., 2007) the court held that:

> "On a motion for summary judgment, the plaintiff must establish a prima facie showing, entitling it to judgment as a matter of law. (Zuckerman v City of New York, 49 NY2d 557, 562 [198 0].) Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986].) Only when there is no doubt as to the existence of a genuine issue of fact may summary judgment be granted. Byrnes v Scott, 175 AD2d 786, 787 [1st Dept 1991]; Gibson v American Export Isbrandtsen Lines, 125 AD2d 65, 74 [1st Dept 1987].) After the moving party has sustained its prima facie burden, the burden shifts to the defendant, who must then show the existence of a genuine issue of material fact. (Zuckerman, 49 NY2d at 562.) The opposing party must raise triable issues of fact that are based upon more than mere conclusory or unsupported assertions. Sun Yau Ko v Lincoln Sav. Bank, 99 AD2d 943 [1984], affd 62 NY2d 938 [1984], citing Zuckerman v City of New York, 49 NY2d 557 [1980].)"

DAL attempts to create a question of fact by claiming in the D'Allesio affidavit that Mr. D'Allesio remembers that the 2007 AIA Contract was signed after the 2007 D&W Contract, notwithstanding the later date of the 2007 D&W Contract and notwithstanding that DAL admits the genuineness of such latter contract by failing to respond to a Notice to Admit pursuant to C.P.L.R. §3123, annexed to the Davis Affidavit as Exhibit "F". Such unsupported conclusion contradicted by a writing the genuineness of which is admitted, can not be used to create a genuine question of fact to defeat a motion for summary judgment.

DAL further argues that D&W rendered programming services in January, 2007, pursuant to written work orders annexed to the Affirmation of DAL's counsel. While the Davis Affidavit admits that a programming error caused the elevator hatch to remain open during and after the August 7, 2007 test, his affidavit is silent as to when the programming error occurred. It is clear

that no damage was sustained due solely to the programming error without such error being coupled with the test conducted on August 7, 2007 which resulted in the elevator hatch remaining open. DAL argues that the August 7, 2007 test could not have been pursuant to the 2007 D&W Contract which provided for the addition of the Purge System, but alleges since access to the elevator shaft was unavailable due to the unexplained absence of the elevator company, the testing must have been pursuant to the 2006 D&W Contract. It strains credulity to accept that the work performed pursuant to the April, 2006 installation was first tested in August, 2007. The 2007 D&W Contract expressly provided that the work was intended to tie together with the fire alarm system. I find that no genuine question of fact exists disputing that the test conducted on August 7, 2007 was a test performed after installation of the Purge System addition to the Fire Alarm System and that the fact that the elevator hatch could not be checked due to the absence of the elevator operator does not negate the clear fact that the test was conducted pursuant to the 2007 D&W Contract and was conducted with the intent to test the newly installed system.[2]

In Sommer v. Federal Signal Corp., 583 N.Y.S.2d 957, 79 N.Y.2d 540 (Ct. Appeals, 1992) the Court held that a provision in a contract for alarm services disclaiming any liability for non-performance or negligence of the alarm company, or in the alternative, limiting damages to an amount defined therein is enforceable in the absence of gross negligence. Gross negligence is defined as intentional wrongdoing, or reckless indifference to the rights of others. Indeed, even a cause of action for contribution is limited by contractual provisions disclaiming liability predicated upon ordinary negligence between the parties, where contribution is not sought by an injured third party.

In the instant case, I find as a matter of law that a programming error or the failure to conduct a test without the presence of the elevator operator is not gross negligence.

In Melodee Lane Lingerie Co. v. American District Telegraph Co. 271 N.Y.S.2d 937, 18 N.Y.2d 15 (Ct. Appeals, 1966) the Court held, in a case addressing sprinkler systems, that the predecessor to G.O.L. §5-323 held that clauses exculpating an alarm company from liability for negligence in the construction, maintenance and repair of real property are void against public policy, unless the contract offers the customer the ability to purchase full liability. In the instant matter, Paragraph 11 of the 2007 D&W Contract offers the purchaser the right to enter into a supplemental contract to obtain a higher limit by paying an increased amount. In Florence v.

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[2]Both parties make reference to the absence of the elevator company during the time of the test, without elaboration as to whether or not its presence was scheduled, by whom or why the elevator company was not present, the answer to which does not create a material question of fact. At best, DAL can argue that the elevator company's presence was necessary to determine whether the elevator hatch operated properly during the test and that conducting the test of the system without the presence of the elevator company is an act of ordinary negligence on the part of D&W knowing that access the elevator shaft was not accessible during the test. Such argument has not been raised by either party.

Merchant's Central Alarm Co., 433 N.Y.S. 2d 91 (Ct. Appeals, 1980) cited by D&W, the Court held that other than a sprinkler contract, an alarm contract dealing with the obligation to transmit a signal only is not one that affects real property or the construction, maintenance and repair of real property as contemplated by G.O.L. §5-323 and there is no need to offer greater liability for an increased charge. However, Florence, is a case easily distinguishable from the case at bar as the alarm company merely hooked up its transmitter to equipment installed by another party, and pertained to the failure to relay a signal.

In Tate v. Clancy-Cullen Storage Co., Inc. 577 N.Y.S. 2d 377, 178 A.D. 2d 292 (1st Dept., 1992), a matter in which the alarm company was installing a replacement alarm system and personal injuries were sustained, the First Department distinguishing Florence, *supra*, held that such installation constituted services rendered in connection with the construction, maintenance and repair of real property within the ambit of G.O.L. §5-323, but further held that in cases involving property damage, the ruling in Melodee Lane Langerie Co., *supra*, is controlling.

Additionally, the clear and unambiguous language of Paragraph "9" of the 2007 D&W Contract clearly states that "...the alarm equipment, once installed, becomes the personal property of the buyer; that the equipment is not permanently attached to the realty and shall not be deemed fixtures." Moreover, Paragraph "10" of the D&W 2007 Contract requires DAL to maintain a policy of liability insurance, including property damage, and that D&W and DAL agreed to name both D&W and DAL as insured parties in such policy[3]. There is no question of fact presented that DAL did not maintain the policy required by the 2007 D&W Contract.

In view of the holding in Melodie Lane Langerie Co., *supra*, and the provisions of Paragraph "9" and "10" of the 2007 D&W Contract, I find that the disclaimer of liability for negligence is not void due to the dictates of G.O.L. §5-323.

Moreover, DAL, in its opposition to the Motion for Summary Judgment, did not dispute the argument that summary judgment should be granted as the 2007 D&W Contract contained a provision in paragraph "12" thereof that the action was not brought within the abbreviated thirteen (13) month statute of limitations, nor did DAL dispute the legal validity of such provision.

While D&W additionally moves for attorney's fees and Paragraph "12" of the 2007 D&W Contract provide for an award of attorney's fees, there is no evidence presented as to a retainer agreement, an amount claimed or other basis from which to calculate attorney's fees.

Accordingly, for the reasons set forth herein, that portion of the Summary Judgment

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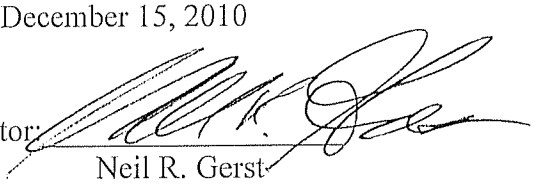
[3] Additionally, DAL did not oppose D&W's argument for summary judgment that DAL breached the contract by not obtaining the required insurance, nor did DAL refute the legal validity of such clause. If adequate insurance had been obtained, as so required, DAL would likely have not sustained the damages which are the subject of this Arbitration Proceeding.

Motion made by D&W to dismiss the claims of DAL is granted, and the portion of such motion requesting summary judgment for an award of attorney's fees is denied and remitted to a hearing. The foregoing constitutes the decision and order of this tribunal.

Dated: December 15, 2010

Arbitrator: 

Neil R. Gerst