

**BARBARA R. KAPNICK**

PRESENT.

Index Number : 111128/2005

S & H PALACE

vs

NEW YORK MERCHANTS

Sequence Number : 002

DISMISS ACTION

PART 12

111128/05

INDEX NO.

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/17/06

**BARBARA R. KAPNICK  
J.S.C.**

**BARBARA R. KAPNICK**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

-----X  
S&H PALACE d/b/a CHAMBERS JEWELRY  
STORES, INC.

Plaintiff,

- against -

NEW YORK MERCHANTS PROTECTIVE CO., INC.,

Defendant.

-----X  
BARBARA R. KAPNICK, J.:

**DECISION/ORDER**

Index No. 111128/05  
Motion Seq. No. 002

In this action, plaintiff S & H Palace d/b/a Chambers Jewelry Stores, Inc. seeks to recover damages from defendant New York Merchants Protective Co., Inc. ("NYMP") for breach of contract and negligence. Defendant has asserted a counterclaim for legal fees pursuant to the terms of the parties' contract.

Defendant now moves for summary judgment dismissing plaintiff's Complaint and granting summary judgment in favor of defendant and against plaintiff on its counterclaim.

There is no dispute that the parties entered into a contract dated October 2, 2000, by which defendant was to lease, service and monitor a central station burglar alarm at plaintiff's retail jewelry store located at 79-81 Chambers Street in Manhattan.

Plaintiff's Complaint alleges that defendant received a signal from the alarm at plaintiff's store at 11:06 p.m. on Saturday, July 2, 2005.

Defendant's "Alarm Occurrence Report" indicates that it called the store but received no answer.

Plaintiff concedes that defendant also called its owner, Edward Hamra, at home at approximately 11:07 p.m., but claims that he was assured that defendant would send a guard to the premises "if there was a problem." Plaintiff claims that "Hamra did not receive another call from Defendant, and accordingly believed that the Premises were secure."

Defendant also allegedly contacted Vanguard Security ("Vanguard"), a guard response service to which defendant had subcontracted guard response duties, at approximately 11:07 p.m. and notified them of the alarm signal, and then allegedly contacted the New York City Police Department. The alarm was declared "full clear" at 11:10 p.m.

Defendant's Report indicates that there was also an interruption of the alarm service at the premises at 11:24 p.m. and that Vanguard dispatched a guard to the store at 11:41 p.m. The guard allegedly arrived at 11:59 p.m. and performed an exterior examination of the premises, but saw no sign of a break-in. The guard, who did not possess keys to the premises, determined that there was no need for a further investigation and left the premises at approximately 12:06 a.m.

At about 10:30 p.m. on Sunday, July 3rd, Hamra received a phone call at his home from Police Officer William Clinton, informing him that the store had been burglarized. Hamra claims that he discovered upon arriving at the store that the alarm wires had been snapped and that the alarm system had been dismantled.

Plaintiff further claims that most of its inventory was stolen and seeks in this action to recover damages against the defendant for its failure to take further actions in response to the initial alarm and subsequent interruption of service.

Defendant argues that this action must be dismissed based, inter alia, on the following provisions of its contract with plaintiff:

22. NO WARRANTIES OR REPRESENTATIONS: LESSEE'S EXCLUSIVE REMEDY: NYMP does not represent nor warrant that the alarm system will prevent any loss, damage or injury to person or property, by reason of burglary, theft, hold-up, fire or other cause, or that the alarm system will in all cases provide the protection for which it is installed or intended. Lessee acknowledges that NYMP is not an insurer, and that Lessee assumes all risk for loss or damage to Lessee's premises or its contents. NYMP has made no representations or warranties, and hereby disclaims any warranty of merchantability or fitness for any particular use. Lessee's exclusive remedy for NYMP's default hereunder is to require NYMP to repair or replace, at NYMP's option, any equipment or part of the alarm system which is non-operational.

23. EXCULPATORY CLAUSE: The parties agree that NYMP is not an insurer and no insurance coverage is offered herein. Lessee's payments to NYMP are for the installation, rental and service of an alarm system designed to reduce certain risks of loss, though NYMP

does not guarantee that no loss will occur. NYMP is not assuming liability and therefore shall not be liable to Lessee for any loss or damages sustained by Lessee as a result of burglary, theft, hold-up, fire, smoke, equipment failure, or any other cause whatsoever, regardless of whether or not such loss or damage was caused by or contributed to by NYMP's negligent performance to any degree or failure to perform any obligation (emphasis supplied). Lessee releases NYMP from any claims for contribution or indemnity.

24. LIMITATION OF LIABILITY: The parties agree that the alarm system is not designed or guaranteed to prevent: any loss by burglary, theft and other illegal acts of third parties, or loss by fire, smoke, water or any other cause.

If, notwithstanding the terms of this agreement, there should arise any liability on the part of NYMP as a result of burglary, theft, hold-up, fire, smoke, equipment failure, or any other cause whatsoever, regardless of whether or not such loss, damage, or personal injury was caused by or contributed to by NYMP's negligence to any degree or failure to perform any obligation, such liability will be limited to an amount equal to six (6) times the monthly payment paid by the Lessee to NYMP at the time such liability is fixed, or to the sum of \$250.00, whichever is greater. If Lessee wishes to increase NYMP's maximum amount of such limitation of liability, Lessee may, as a matter of right, at any time, by entering into a supplemental agreement, obtain from NYMP a higher limit by paying an additional amount consonant with the increase of liability. This shall not be construed as insurance coverage.

It is well settled that "[a]bsent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced (citations omitted)." Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 553 (1992). See also, Hartford Insur. Co. v. Holmes Protection Group, 250 A.D.2d 526, 527 (1st Dep't 1998). Likewise, exculpatory and limitation of liability clauses have repeatedly been enforced. See, David Gutter Furs v.

Jewelers Protection Services, Ltd., 79 N.Y.2d 1027 (1992); Florence v. Merchants Cent. Alarm Co., 51 N.Y.2d 793 (1980).

However, even "when a party has entered into a contract absolving it from its own negligence, public policy requires that it may still be held liable for damages caused by its gross negligence". Stuart Rudnick, Inc. v. Jewelers Protection Services, Ltd., 194 A.D.2d 317 (1st Dep't 1993). See also, Hanover Insur. co. v. D & W Central Station Alarm Co., 164 A.D.2d 112 (1st Dep't 1990).

"Used in this context, 'gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." Colnaghi USA v. Jewelers Protection Services, Ltd., 81 N.Y.2d 821, 823-24 (1993). See also, Hartford Insur. Co. v. Holmes Protection Group, supra at 527; Sommer v. Federal Signal Corp., supra at 554; Obremski v. Image Bank, Inc., 30 A.D.3d 1141 (1st Dep't 2006).

Plaintiff contends that defendant's failure to notify plaintiff, Vanguard or the police of the interruption of alarm service at 11:24 p.m. constitutes gross negligence. According to plaintiff, had any of the aforementioned parties been notified of this service interruption, steps beyond an external examination of

the premises might have been taken, and the robbery interrupted or prevented.

However, the Appellate Division, First Department, has held that neither a "[d]elayed or inadequate response to an alarm signal" (Hartford Insur. Co. v. Holmes Protection Group, supra at 528) nor a failure to send "an employee to investigate signals indicating a possible alarm system malfunction" (Master Craft Jewelry Co. v. Holmes Protection of New York, Inc., 277 A.D.2d 56 [1st Dep't 2000], lv. to app. denied, 96 N.Y.2d 711 [2001]) rises to the level of gross negligence. Even a failure "on two occasions to respond to a signal indicating a possible burglary despite hourly noise reminders, while clearly ordinary negligence," has been held not to constitute gross negligence. See, Consumers Distributing Co. v. Baker Protective Services, 202 A.D.2d 327 (1st Dep't 1994), lv. to app. denied, 84 N.Y.2d 811 [1994].<sup>1</sup>

Based on the papers submitted and the oral argument held on the record on April 5, 2006, this Court finds that defendant's conduct in this case, while setting forth a claim for ordinary

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<sup>1</sup> In Hanover Insur. Co. v. D & W Central Station Alarm Co., supra, the Appellate Division, First Department found that there was an issue of fact as to whether or not the defendant burglar alarm company was grossly negligent. However, in that case, the defendant not only failed to notify the police upon receipt of three alarm signals in the span of four hours, but affirmatively directed the guard who responded "to forget the assignment" because he encountered difficulty in entering the buildings. 164 A.D.2d at 115.

negligence, is "not indicative of intentional wrongdoing" (Master Craft Jewelry Co. v. Holmes Protection of New York, Inc., supra at 56) and thus does not, as a matter of law, rise to the level of gross negligence.

Plaintiff alternatively argues that defendant should be subject to tort liability in this case irrespective of its contractual duties and thus held liable for its failure to exercise reasonable care under the circumstances (that is, for its ordinary negligence) since "[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship." Sommer v. Federal Signal Corp., supra at 551.

That action involved a small, containable fire that had spread out of control because the fire detection system allegedly failed to timely detect the fire and the fire alarm company failed to transmit the alarm to the fire department. The Court noted that fire alarm companies "perform a service affected with a significant public interest; failure to perform the service carefully and competently can have catastrophic consequences", and concluded that "[t]he nature of [the company's] services and its relationship with its customer therefore gives rise to a duty of reasonable care that is independent of [its] contractual obligations." Sommer v. Federal Signal Corp., supra at 553.



In this case, plaintiff has not established the existence of such an independent duty. Moreover, although the Court of Appeals in Sommer v. Federal Signal Corp. found that plaintiff possessed claims in tort as well as contract, the Court found that the exculpatory clause of the parties' contract was enforceable against claims of ordinary negligence (supra at 553). Thus, even were this Court to find that defendant breached a duty to plaintiff independent of its contractual obligations, plaintiff would still be required to make a showing of gross negligence.

Accordingly, defendant's motion for summary judgment dismissing plaintiff's Complaint must be granted. The Clerk may, therefore, enter judgment dismissing plaintiff's Complaint with prejudice.


Paragraph 18 of the parties' contract specifically provides that "[s]hould NYMP prevail in any litigation between the parties", Chambers Jewelry Stores, Inc. "shall pay NYMP's legal fees." Therefore, this Court is constrained to also grant that portion of defendant's motion seeking summary judgment on its counterclaim for legal fees.

The issue of the amount of attorney's fees owed by plaintiff under the contract is referred to a Special Referee to hear and determine.

Plaintiff's counsel is directed to serve a copy of this order with notice of entry upon the Special Referee Clerk, who shall place this matter on the Part 50R calendar for the referral to a Special Referee.

This constitutes the decision and order of this Court.

Dated: October 17, 2006

  
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Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.