

FILED

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JOAN M. GILMER
CIRCUIT CLERK, ST LOUIS COUNTY

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

NATIONAL SURETY CORPORATION,)
et al.,)

Plaintiffs,)

v.)

THE LAWRENCE GROUP LIVING,)
L.L.C.,)

Defendant,)

and)

NATIONAL FIRE SUPPRESSION,)

Defendant/Third-Party Plaintiff)

v.)

SIMPLEXGRINNEL LP)

Third-Party Defendant)

Cause No. 13SL-CC04140

Division No: 16

**AMENDED ORDER/JUDGMENT PERTAINING TO THIRD PARTY DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

This matter has come before this court on a single Motion for Summary Judgment of Third Party Defendant SimplexGrinnell, LP ("Simplex") alleging that Third Party Plaintiff, National Fire Suppression ("National Fire"), has provided no evidence that Simplex had installed the sprinkler head that ultimately caused damage to the residence of Plaintiff's insured.

The Motion is fully briefed. Oral argument was heard on June 11, 2015. Proposed orders were submitted to this court on February 5 and April 10, 2015. This court hereby finds and concludes as follows:

I. SUMMARY JUDGMENT CASE LAW

A. Summary judgment is designed to permit the trial court to enter judgment without delay, when the moving party has demonstrated, on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. ITT Commercial Finance Corp vs. Mid-America Marine Supply Corp., 854 S.W.2d 371, 382 (Mo. banc (1993)).

B. When a “defending party” moves for summary judgment, that party need not controvert all elements of the non-movant’s claim in order to establish a right to summary judgment. Id. at 381. Rather, a “defending party” may establish a right to judgment by showing (1) facts that negate any one of the claimant’s element facts; or (2) that the non-movant, after an adequate period of discovery, has not been able to produce, and will not be able to produce, evidence sufficient to allow a trier of fact to find the existence of *any one* of claimant’s elements; or (3) that there is no genuine dispute as to the existence of each of the fact’s necessary to support the movant’s properly pleaded affirmative defenses. Id.

C. When the movant has made a prima facie showing, the burden shifts to the non-movant. The non-movant must set forth specific facts showing that there is a genuine issue of fact for trial. Mo. Sup. Ct. R. 74.04(e). If the non-movant cannot contradict the showing made by the movant, summary judgment is proper. Pursuant to Rule 74.04, a genuine issue exists, however, when the record contains competent materials that evidence two plausible, but contradictory, accounts of essential facts. Id. at 382.

II. Findings of Fact

1. National Fire was subcontracted to retrofit the sprinkler system in Melvin and Dorothy Lefkowitzes’ unit located in The Residence. The retrofitting included modifying the sprinkler system in their sauna.

2. During this retrofit, Plaintiffs claim that National Fire failed to install properly rated sprinkler heads for use in their sauna. One sprinkler head failed because it was not rated to accommodate the sauna's heat. Significant damage resulted in the insured's residence.

3. National Fire claims that Simplex must have installed the incorrect sprinkler head sometime after National Fire had finished its work in June of 2008.

4. Tara Cillo, The Residence's property manager, testified that she did not allow Simplex to perform any inspections or work in the Lefkowitzes' unit nor did she provide Simplex with access to their unit.

5. Ms. Cillo testified that "every time that Simplex comes and does any work [at The Residence] there would be a work order that was produced." She did state, however, that it was "possible" that Simplex could do work without generating a work order and it is "possible" that she would not have retained it.

6. Ms. Cillo confirmed in her deposition the statement in her affidavit that Simplex does not go into individual homeowner units for inspections.

7. Ms. Cillo later confirmed that there was one report of a single inspection dated April 27, 2012, wherein Simplex entered into an individual unit (not belonging to the Lefkowitzes) in The Residence.

8. Dorothy Lefkowitz stated that she has no knowledge of Simplex's performing any work in her unit or of any entity replacing the sprinkler head between the date of National Fire's work and the date of the incident.

9. National Fire's corporate representative testified that he has no direct evidence to support the claim that Simplex even stepped foot into the Lefkowitzes' unit.

10. Third Party Plaintiff could point to no evidence to establish that Simplex had entered into the Lefkowitzes' residence.

11. Third Party Plaintiff's entire claim rests upon its establishing that on one occasion, Simplex entered into a condominium belonging to another resident despite manager Cillo's saying otherwise. Third Party Plaintiff suggests that if Cillo were incorrect on this one occasion, she may be incorrect about other occasions. Accordingly, National Fire argues, she may be incorrect about the claim that Simplex did not enter the Plaintiffs' condominium.

III. CONCLUSIONS OF LAW

Missouri courts require that plaintiffs establish a causal relationship between the defendant and the injury-producing agent as a precondition to maintenance of their causes of action. Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984). The same is true for third-party plaintiffs suing for indemnity. *See, e.g.,* Pernoud v. Martin, 891 S.W.2d 528, 537 (Mo. App. E.D. 1995); Denny's Inc. v. Avesta Enterprises, Ltd., 884 S.W.2d 281, 286 (Mo. App. W.D. 1994). Without this evidence, summary judgment is appropriate for the defendant. Id.

This Court finds that Third-Party Plaintiff National Fire has failed to present any evidence to support its claim that Simplex had installed the faulty sprinkler. There is no evidence showing that Simplex ever entered the Lefkowitzes' unit, much less installed the sprinkler head at issue. The strongest argument set forth by Third-Party Plaintiff is that because Tara Cillo had stated that Simplex had never entered any units in The Residence for inspections – which was proven to not be true on one occasion -- there may have been other incidents of entry which were undocumented. One of those incidents could have involved Plaintiffs' unit. That possible entry could have been for purposes of changing a sprinkler head. Third-party plaintiff's entire case is based on the remote *possibility* that Simplex completed work in the Lefkowitzes' unit without

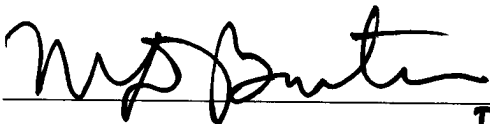
any documentation or witnesses or admissions. Without any evidence to support this claim, it must fail as a matter of law. “A judgment must be based on evidence and not speculation.”

Glover v St. Louis County Circuit Court, 157 S. W. 3d 329, 331 (Mo. App. E.D. 2005). “Without supporting evidence, adjudgment cannot stand.” Wesley v Crestwood Police Det., 148 S. W. 3d 838, 840 (Mo. App. E.D. 2004).

III. ORDERS

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Third-Party Defendant’s Motion for Summary Judgment – claiming that Third-Party Plaintiff has not presented evidence to support its claim – is **GRANTED. Third-Party Plaintiff’s claim against Third-Party Defendant is DISMISSED WITH PREJUDICE.**

SO ORDERED:


_____ *Div 16*

Honorable Michael D. Burton
Circuit Judge
Division 16

Date: 7/8/15

CC: Attorneys of Record