COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS.

HOUSING COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 95 CV 399

DORIS STREETER, Plaintiff)
)
v.)
)
NEW ENGLAND MORTGAGE ASSOCIATES,)
L.P., et al., Defendants)

DEFENDANT, SIGNET ELECTRONIC SYSTEMS, INC.'S,
MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, SIGNET Electronic Systems, Inc. ("SIGNET"), and moves the Court for summary judgment on the plaintiff's claims and the co-defendant, New England Mortgage Associates, L.P.'s, cross-claims against it. As grounds, there is no reasonable likelihood that the plaintiff and the cross-claimant will be able to sustain her respective burdens of proving negligence and/or causation at trial of this action. SIGNET files herewith a memorandum of law and appendix of exhibits in support of this motion.

WHEREFORE, SIGNET respectfully requests the court to allow its motion for summary judgment.

SIGNET ELECTRONIC SYSTEMS, INC.,
Defendant

By ______________________________

JOHN B. STEWART (BBO #551180)
MORIARTY, DONOGHUE & LEJA, P.C.
1331 Main Street
Springfield, MA 01103
(413) 737-4319

COMMONWEALTH OF MASSACHUSETTS
HAMPDEN, SS.

HOUSING COURT DEPARTMENT
OF THE TRIAL COURT
CIVIL ACTION NO. 95 CV 399

DORIS STREETER, Plaintiff)
)
v.)
)
NEW ENGLAND MORTGAGE ASSOCIATES,)
L.P., et al., Defendants)

DEFENDANT, SIGNET ELECTRONIC SYSTEMS, INC.'S, MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

I. Statement of the Case

It is undisputed the 180-unit Colony Apartments building was owned and managed by 303 Maple Street Realty Trust ("Realty Trust") until that entity filed a Chapter 11 bankruptcy petition in 1992. By a stipulation entered into between Realty Trust and its mortgagee, New England Mortgage Associates, L.P. ("NEMA"), Realty Trust agreed to "provide to NEMA written evidence the fire alarm system on the Property has been tested and found to be in good working order by an independent testing laboratory or service, not later than January 27, 1993." (See Ex. A <bankruptcy stipulation>, at 4).

Accordingly, on January 27, 1993 Realty Trust engaged the defendant, SIGNET Electronic Systems, Inc. ("SIGNET"), to repair and test the alarm system. SIGNET employees worked on the system on February 1-2, 1993, and at the completion of their work the "system tested fine" and was 100% operational. On or before February 3, 1993, Realty Trust stopped payment on its check for $770 to SIGNET for services rendered.

Thereafter, on or about May 25, 1993, NEMA took possession of the Colony Apartments building pursuant to a judicial order of entry. NEMA then hired Samuel Plotkin & Associates ("Plotkin") to perform certain management services for the building.

A fire occurred at the Colony Apartments on May 28, 1993. At the time of the fire no alarms sounded. The plaintiff has commenced this claim alleging the

negligence and breaches of warranty of SIGNET in failing to properly and adequately repair and service the alarm system causing plaintiff's damages. In addition, the plaintiff alleges SIGNET was duty-bound to warn the tenants, occupants and the owner or manager of the Colony Apartments of dangers of the alarm system but failed to do so, causing plaintiff's damages. See Counts X, XI and XII of plaintiff's complaint. The co-defendant, NEMA, likewise asserted cross claims against SIGNET seeking indemnification or contribution.

The plaintiff was a second-floor tenant in unit #26 of the Colony Apartments for a short period of time[1/] when, on May 28, 1993 at about 5:00 a.m., she noticed smoke when she was in her apartment bathroom to get a drink of water. (Ex. B <plaintiff's deposition>, at 15, 42, 32, 13). In response, she told her boyfriend to get up and then she ran down the hallway to wake up her adult daughter. (Id., at 45, 42). The plaintiff's daughter lived down the hallway in unit #25. (Id., at 33).

When the plaintiff opened her apartment door to go down the hallway to her daughter's unit there was no smoke in the hallway. (Id., at 47). When the plaintiff's daughter came to the door, she said "get those kids out of here" (Id., at 47-48), and walked back to her apartment "for just a few minutes" to get her pocketbook. (Id., at 48-49, 90-91, 51). On her way back to her apartment she could smell smoke, but did not see any in the hallway. (Id., at 50).

As she left her apartment and began down the stairs she encountered some smoke. (Id., at 51, 92). She was pushed by an unknown person and fell down

---

1. The plaintiff's testimony concerning how long she lived at the Colony Apartments before the fire was somewhat vague and confusing. At first, she said she did not remember when she moved into that apartment. (Id., at 11). When pressed for the time she moved in, she said "like, in the wintertime . . it started, like, getting warm. The summer was getting ready to break through." (Id., at 12). "I wasn't living there long before the fire broke out." (Id., at 13).

while descending the stairs. Her boyfriend helped her up and out of the building. (Id., at 52-53). There was no smoke in the first flight of stairs; the smoke was contained to the second flight of stairs and the second floor hallway. (Id., at 53). Once outside, she felt "terrible" because she "got all the smoke in my lungs." (Id., at 54).

By the time she made it outside, the fire department and ambulances had arrived. (Id., 64-65). The plaintiff concedes it would have been safer for her to leave the building immediately after waking her daughter instead of returning to her apartment to find and retrieve her pocketbook. (Id., at 100). "A lot of time went by" from her first noticing smoke in her bathroom until the time she made her way out of the building. (Id., at 115).

According to the plaintiff, her apartment was a one room efficiency and had no in-unit smoke detector. (Id., at 15, 39, 32, 86). She was unaware if there was any in-unit fire alarm. (Id., at 39). In the short period she lived there, she never heard any smoke detectors or fire alarms go off in the building. (Id., at 40).

The plaintiff never made any complaints to anyone about the condition of the building. (Id., at 15). The second floor hallway was unlighted and dark. (Id., at 15-16, 91). The front door to the apartment building was unlocked and open to anyone at any time. (Id., at 34, 56-57). A back door was also left open. (Id., at 83). There was drug dealing carried on in the hallways of the building; "crowds <of drug buyers> would come up the hallways." (Id., at 84).

In the few days before the fire, the plaintiff observed somebody in the hallway using a stepladder to work on the second floor fire or smoke alarm system. (Id., at 80). According to the plaintiff, "they was there not that much. A lot of weeks before <the fire>." (Id., at 80-81). She cannot identify who the workmen were or the name of their employer. (Id., at 81). The entire

time she lived there she never heard the alarm system go off. (Id., at 81-82).

The plaintiff felt there were a lot of problems with the apartment building, particularly persons running up and down the hallways and knocking on apartment doors. She felt one of these unauthorized persons probably disabled the alarm system. (Id., at 82-83; 89-90).

Plotkin understood there were many problems with the building and determined "the most prudent thing to do would be to have a security service twenty-four hours almost as a fire watch . . . for the security and safety of the residents there until we could identify the various problems in the building . . . and advise NEMA what kind of monies they would need to improve the property." (Ex. C <Plotkin deposition>, at 51). Plotkin had no information about the functionability of the fire alarm system in between the time it took over the building on May 25, 1993 until the time of fire on May 28, 1993. (Id., at 89-90, 95-96). Plotkin was unaware of any testing of the fire alarm system between May 25-28, 1993. (Id., at 94).

The plaintiff has not identified any goods supplied by SIGNET which were unmerchantable and caused her damages. (Exhibit D <Plaintiff's answers to interrogatories>, no. 5). The basis of the plaintiff's claim of negligence is that the alarm did not sound at the time of the fire on May 28, 1993. (Id., no. 6). The plaintiffs have not designated any expert witnesses who would be expected to testify about improper workmanship or defective materials used in connection with services rendered by SIGNET. (Id., no. 7).

The apparent sole basis for NEMA's cross-claim against SIGNET is also that the alarm system did not sound on May 28, 1993 after it had been repaired and "tested fine" on February 2, 1993. (Exhibit D <NEMA's answers to interrogatories>, No. 8). NEMA has no information to cast doubt on SIGNET's assertion the alarm system was operable on February 2, 1993. (Id., no. 11).

Finally, NEMA has no information about any changes to the operability of the alarm system between February 2, 1993 and May 28, 1993, or the reason the alarm system failed to sound at the time of the fire on May 28, 1993. (Id., no. 12-14).

Affidavits of the SIGNET employee repaired and tested the fire detection and alarm system at the Colony Apartments on February 1-2, 1993 and an officer of SIGNET both indicate there was no agreement to monitor or maintain the operability of alarm system. The building owner requested SIGNET to fix the system, which it did. At the completion of its work on February 2, 1993, the system "tested fine" and was "100% operational." (Ex. F and G).

On April 30, 1993, the Springfield Fire Department inspected the building and found the fire alarm system was inoperative, noting "most detectors just hanging from ceiling." The investigator added: "<building> has problem with drug related vandalism." (Exhibit H).

II. Issues Presented

A. Whether the plaintiff and cross-claimant have a reasonable expectation of sustaining their burden of proving SIGNET was negligent in its rendering of services at the Colony Apartments on February 1-2, 1993.

B. Whether the plaintiff and cross-claimant have a reasonable expectation of sustaining their burden of proving services negligently provided by SIGNET or breaches of warranty by SIGNET were a proximate and legal cause of the plaintiff's damages and injuries.

C. Whether the plaintiff and cross-claimant have a reasonable expectation of sustaining her burden of proving there was a sale of goods by SIGNET, which goods were unmerchantable or unfit for their intended purposes and that defective condition was a proximate and legal cause of the plaintiff's damages and injuries.

III. Argument and Authority

A. THERE IS NO DIRECT OR INFERENTIAL EVIDENCE OF IMPROPER WORKMANSHIP OR MATERIALS USED IN THE RENDERING OF SERVICES BY SIGNET ON FEBRUARY 1-2, 1993

The plaintiff has not identified any direct evidence of improper workmanship rendered or defective materials supplied by SIGNET on February 1-2, 1993. (See plaintiff's answers to interrogatories, nos. 5-6). Therefore, the focus must turn to whether the admissible circumstantial evidence available to the plaintiff permits a rational inference the serviceman's conduct on February 1-2, 1993 breached a duty of care owed to the plaintiff.

The mere happening of an accident is not proof of negligence. Abrahams v. Rice, 306 Mass. 24 (1940). The sole fact that the plaintiff was injured is insufficient to prove the defendant was negligent. Borysewicz v. Dineen, 302 Mass. 461 (1939). More precisely, the mere failure of an alarm to operate does not give rise to an inference of responsibility on the part of an alarm company.[2/] See Sandler v. Boston Automatic Fire Alarm Co., 303 Mass. 586, 593 & 597 (1939) ("it would be a matter of conjecture, if an inference of defect was permissible from the failure of the <alarm> system to operate, whether that defect existed in the defendant's equipment or in that part over which it had control"). It is notable in the Sandler case there was an on-going maintenance duty on the part of the alarm company.

The duty owed by repairers is dependent on what exactly the repairer was contracted to do. Bulpett v. Dodge Associates, Inc., 5 Mass. App. Ct. 593, 598 (1977) and cases cited therein. SIGNET's affidavits establish it was hired only

---

2. The plaintiff should be estopped from arguing the fact the alarm did not go off is something that ordinarily would not have occurred in the absence of negligence on the part of SIGNET, the one-time alarm repairer. To her, "something had to be cut for <the alarms> not to go off" at the time of the fire. (Ex. B <plaintiff's deposition>, at 90). She felt unauthorized people running about the halls "probably cut <the alarms> off." (Id. at 82, 83).

to bring the alarm system up to operability. There was no agreement requiring SIGNET to monitor or maintain the alarm system in working order. Contrast, Power Service Supply, Inc. v. E.W. Wiggins Airways, Inc., 9 Mass. App. Ct. 122, 128 (1980) (mechanic agreed to inspect helicopter daily and to repair it was liable for failure to discover a missing or improperly flared cotter pin which caused crash); Banaghan v. Dewey, 340 Mass. 73, 40 (1959) (service company contracted with building owner to inspect and maintain elevator in "A-1 safe condition" was liable for injuries caused by lack of repair). SIGNET did not undertake any overarching obligation to ensure the operability of the alarm system after February 2, 1993. Obviously, every time an electronic system once fixed by a serviceman fails to function months later it does not create an trialworthy claim against the serviceman.

In this case, the plaintiffs have not identified what exactly SIGNET's serviceman did or failed to do which caused the alarm to be inoperable at the time of the fire. In addition, the plaintiff has not disclosed which of the various components of the heat detection and alarm system caused the system to be inoperable on May 28, 1993.

The doctrine of res ipsa loquitur or inferred negligence is inapplicable to the factual situation presented in this case. A jury applying its common experience would have to speculate to conclude that the probable cause of the alarm's failure to sound on May 28, 1993 was some negligent act of SIGNET's serviceman on February 1-2, 1993. Res ipsa loquitur "applies where the direct cause of the accident and so much of the circumstances as were essential to its occurrence were within the sole control of the defendant, . . . and permits the fact finding tribunal to infer from the occurrence itself that in light of ordinary experience the accident would not have happened unless the defendant had been negligent." Couris v. Casco Amusement Corp., 333 Mass. 740, 741

(1956).

A plaintiff need not show the exact cause of the accident or exclude all other possible causes, but must show there is a greater probability than not that the accident resulted from the defendant's negligence. Enrich v. Windmere Corp., 416 Mass. 83, 87 (1993) (citing cases). A "mere possibility of an explanation <for an accident> predicated in negligence is not enough to take the issue to the jury." Artz v. Hurley, 334 Mass. 606, 609 (1956). Where, as here, there are several defendants, res ipsa loquitur is applicable only if it is possible to make the inference the accident would not have occurred without the negligence of each defendant. Rafferty v. Hull Brewing Co., 350 Mass. 359, 362 (1966).

It is undisputed that SIGNET parted with any control over the alarm system roughly four months before the accident. After that, the control box, the wiring of the system and the alarm components were subject to vandalism and other intervening conduct of third persons. If there is any other reasonable or probable cause of an accident besides the defendant's negligence, then res ipsa loquitur may not be applied. Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 425 (1932). See Dame v. Bay State Stevedoring Co., 2 Mass. App. Ct. 915 (1975) (where bale striking plaintiff could have come from a pile stacked by defendant's employee or from a forklift operated by a third person, judgment required for defendant). For instance, in Mendum v. Mass. Bay Transp. Authority, 1 Mass. App. Ct. 873 (1974), the court upheld a directed verdict for an escalator repair and maintenance company and the escalator owner, holding the circumstances shown did not permit a finding the device's erratic behavior would not have happened except for the defendants' negligence. "The erratic behavior of escalator suggests causes not shown to be within the exclusive control of the defendants as, for example, manipulation of its movement by unauthorized

persons."

The plaintiff's own allegations in her complaint point to other alleged causes of her injuries, undercutting any notion those injuries and the inoperable fire alarm which ordinary experience suggests were due to the negligence of SIGNET. Before the fire, the physical condition of the alarm system suggested to the city fire department that vandalism was the cause of the inoperability of the alarms.

This case is analogous to McCabe v. Boston Consolidated Gas Co., 314 Mass. 493, 496 (1943), in which a gas stove exploded four weeks after the defendant installed it. On these facts, the court found no inference of negligence on the part of the defendant and judgment was entered in its favor as a matter of law. In a similar vein is Musolino LoConte Co. v. Boston Consolidated Gas Co., 330 Mass. 161, 162-165 (1953), in which it was held the mere fact of a break in a gas line resulting from a leak of gas was insufficient to permit an inference of negligence against the gas company. Accord, Stewart v. Worcester Gas Light Co., 341 Mass. 425, 434 (1960). By comparison, "the common experience of mankind in no way suggests that an unexplained fire in an automobile six years after its purchase was caused by a defect in the vehicle that had existed from the time of the vehicle's manufacture and sale." Kourouvacilis v. General Motors Corp., 410 Mass. 706, 717 (1991).

In short, in a 180-unit apartment building--with front and back doors open 24 hours a day, management unsure what individuals were tenants and which were not, with unlighted hallways, drug dealing in the hallways and unauthorized persons moving about the hallways, and vandalized smoke detectors hanging from the ceiling--a non-functioning fire alarm four months after its last service is not something that ordinarily does not occur unless the alarm company had been negligent. It is at least equally probable that the alarm system ceased working

system ceased working due to vandalism or other intervening conduct. See Restatement (Second) of Torts, §328D(1)(b). The plaintiff is not entitled to an inference of that the alarm failure was attributable to SIGNET's negligence based on the facts and circumstances operative in this case.

A defendant who does not bear the burden of proof at trial may demonstrate the absence of a triable issue by either submitting affirmative evidence that negates an essential element of the plaintiff's case or by demonstrating that proof of the plaintiff's case is "unlikely to be forthcoming at trial." Flesner v. Technical Communications Corp., 410 Mass. 805, 808 (1991); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 710 (1991). The sources of proof and witnesses identified by the plaintiff are insufficient to create a triable issue of fact regarding SIGNET's negligence, and accordingly summary judgment should be entered in SIGNET's favor on the plaintiff's negligence claims.

B. THERE IS INSUFFICIENT EVIDENCE OF A CAUSAL NEXUS BETWEEN SIGNET'S ALLEGED CONDUCT AND THE PLAINTIFF'S INJURY

Assuming arguendo the plaintiff and cross-claimant, by reference to materials described in Rule 56(c), are able to raise a genuine issue of material fact regarding SIGNET's alleged negligence, then SIGNET maintains there is no causal relationship between its conduct--whether characterized as negligence or a breach of warranty--on February 1-2, 1993 and the non-functionability of the fire alarm at the time of the fire.

In her discovery responses, the plaintiff has not explained how whatever allegedly actionable conduct carried out by SIGNET on February 1-2, 1993 caused the alarm system to become inoperable. Further, the plaintiff and cross-claimant's discovery responses did not provide any factual support that a properly functioning fire alarm would have prevented the plaintiff's alleged personal injury.

The pre-trial record is devoid of any direct evidence of the cause of the alarm system's failure to function at the time of the fire. Nor has the plaintiff or cross-claimant designated any expert witness who might testify of the cause of the alarm failure on the date of the fire, and to link that cause to some defect of materials or workmanship in SIGNET's repairs four months before the fire. Nor is this case one in which a rational factfinder could infer causation under the operative facts and circumstances based on general knowledge.

Yet, even if the plaintiff were able to connect some specific conduct of SIGNET to the non-operability of the alarm after it left SIGNET's control, the plaintiff would still bear the burden of proving her injuries were caused by the alarm failure. The requirement of proving "but for" causation is an essential element of the plaintiff's case. Unless a defendant's conduct makes a difference in the result, that is, the plaintiff's injury would probably have been averted if a defendant had not been negligent, then the defendant is entitled to judgment as a matter of law. This key element cannot be left to the jury's conjecture. LeClair v. Silberline, 379 Mass. 21, 30-31 (1979) (no evidence a properly functioning sprinkler system would have prevented plaintiff's injury; judgment for defendant as a matter of law). As above, the plaintiff cannot rely on an inference of causation from the circumstances where common experience suggests more than one cause. Here, other possible causes (i.e. the unlighted hallway and the plaintiff's own lengthy pause to locate her pocketbook before escaping) are apparent. Cf. Addis v. Steele, 38 Mass. App. Ct. 438 (1995) (hotelkeepter's failure to provide adequate lighting causal in guest's arson fire injuries).

For example, in Wainwright v. Jackson, 291 Mass. 100 (1935), the defendant's breach of duty in failing to provide appliances to extinguish fires

was not the "but for" cause of plaintiff's injuries because the fire in that case spread so rapidly the presence of extinguishing devices would not have avoided the plaintiff's injury. Id., at 101-102. Accord, Williams v. Fontes, 9 Mass. App. Ct. 809 (1980) (possible effect of fire extinguishers, if present, in averting plaintiff's injury "in the realm of speculation," requiring judgment as a matter of law for defendant). See O'Connor v. Raymark Industries, Inc., 401 Mass. 486, 592 (1988) ("<'but for' cause> . . . means something that makes a difference in the result").

In this case, the plaintiff's sources of proof identified in her discovery responses show no reasonable likelihood she will be able to satisfy her burden of proving a causal relationship between the defendant's conduct and the failure of the alarms to operate, and also a causal relationship between failure of the alarm to operate and her injuries.

C. THE PLAINTIFF'S BREACH OF WARRANTY CLAIMS ARE NOT TRIALWORTHY SINCE THERE WAS NO "SALE OF GOODS"

The essential elements of a breach of implied warranty products liability claim are a sale of goods by the defendant, Mason v. General Motors Corp., 397 Mass. 183, 187-188 (1986); that at the time the goods were sold they were defective in a way that made them unfit for the ordinary purposes from which they were made; and that as a proximate result of this defect the plaintiff was injured.

There is no direct or circumstantial evidence of a sale of goods by the defendant, SIGNET. The plaintiff is unable to identify goods supplied by the defendant at any time proximate to the fire which is the subject of this lawsuit. SIGNET's conduct in installing a one new heat sensor in some portion of the Colony Apartments building, was inexorably intertwined with its provision of services, and does not constitute a transaction in goods. In order to

maintain a breach of warranty claim, "there must have been a transaction involving the sale of goods. If the heart of the contract or transaction is the rendition of services, then the UCC does not apply." Ramcharran v. Carraro Graphic Equipment, Inc., 823 F.Supp. 63, 67 (D.Mass. 1993). Cf. New England Watch Co. v. Honeywell, Inc., 11 Mass. App. Ct. 948 (1981) (questioning, but not deciding, whether contract for burglar alarm protection falls within article 2 of UCC). The gravamen of SIGNET's contract was the rendition of services to repair and test the alarm system. It is notable that SIGNET's bill for $770 was for labor; it did not charge sales tax as would be required on the sale of goods.

The fact that SIGNET provided limited services at the Colony Apartments four months before the fire, which included repair of some alarm system wiring and replacement of a heat sensor, does not satisfy the legal requirement of a transaction involving the sale of goods necessary to maintain a breach of implied warranty products liability action.

IV. Conclusion

The plaintiff and cross-claimant have no reasonable expectation of carrying their burden of proof as to negligence, breach of warranty and causation against SIGNET at trial of this action. Based on all the foregoing, the SIGNET is entitled to summary judgment on counts X, XI and XII of plaintiff's complaint and NEMA's cross-claim.

SIGNET ELECTRONIC SYSTEMS, INC.,
Defendant

By ______________________________

JOHN B. STEWART (BBO #551180)
MORIARTY, DONOGHUE & LEJA, P.C.
1331 Main Street
Springfield, MA 01103
(413) 737-4319