

St. Paul Fire & Mar. Ins. Co. v PJ Mech. Serv. & Maintenance Corp.

2009 NY Slip Op 31977(U)

August 24, 2009

Supreme Court, New York County

Docket Number: 115701/05

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **MARCY S. FRIEDMAN**

PART 57

Index Number : 115701/2005
ST. PAUL FIRE & MARINE
 VS.
PJ MECHANICAL SERVICE &
 SEQUENCE NUMBER : 008
 DISMISS

INDEX NO. 115701/05

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

Kaback
his motion to/for sum judgment

PAPERS NUMBERED

1

2

3

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied per accompanying decision/order dated 8-24-09.*

FILED

SEP - 1 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8-24-09

M S Friedman
MARCY S. FRIEDMAN

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

X

ST. PAUL FIRE AND MARINE INSURANCE
 COMPANY a/s/o POSNER ADVERTISING INC.

Index No.: 115701/05

Plaintiff,

DECISION/ORDER

- against -

PJ MECHANICAL SERVICE & MAINTENANCE
 CORP., t al.,

Defendants.

X

In this subrogation action, plaintiff insurer, St. Paul Fire and Marine Insurance Company (“St. Paul”), seeks to recover amounts paid to its subrogor, Posner Advertising Inc. (“Posner”), for property damages to a commercial premises that was leased to Posner by 30 Broad Street Associates L.L.C. and managed by Murray Hill Properties L.L.C. (collectively “Broad Street”). Defendant/third-party plaintiff Kaback Enterprises (“Kaback”) moves for summary judgment dismissing the complaint against it. By separate motion, third-party defendant Cool Wind Ventilation Corp. (“Cool Wind”) moves for summary judgment dismissing the third-party complaint and cross-claims against it. The Broad Street defendants also move for summary judgment dismissing the cross-claims against them.¹

The following facts are undisputed: On January 11, 2004, Posner’s premises was damaged by a flood that occurred when a sprinkler elbow, above a suspended ceiling in Posner’s

¹Plaintiff has discontinued the main action against the Broad Street defendants.

premises, froze and broke. The sprinkler system was installed by 30 Broad and was located next to an HVAC system that defendant Kaback installed pursuant to an agreement with non-party

~~Lehr Construction, a contractor hired by the tenant who occupied the space prior to Posner.~~ At the time of the flood, Posner had a preventive maintenance contract for the HVAC system with defendant PJ Mechanical Service & Maintenance Corp. The parties sharply dispute the cause of the freezing of the sprinkler pipe.

The complaint asserts two causes of action against defendants. The first, for negligence, alleges that defendants failed to install, maintain, and service the HVAC system in the premises in such a fashion as to prevent cold air infiltration from the exterior; that they failed to maintain and/or recommend proper levels of insulation and sealing in the area of loss; and that they failed to supply or recommend adequate heating levels in the premises. (Complaint, ¶ 15.) The second cause of action, for breach of contract, alleges that “defendant” and plaintiff’s subrogor entered into a contract whereby defendant was obligated to maintain, inspect, repair, and protect plaintiff’s insured’s property from freezing conditions. (Id., ¶ 18.)

Kaback moves for summary judgment dismissing both causes of action on the ground that they are barred by the statute of limitations. Kaback argues that the action is governed by CPLR 214(4), the three year limitations period for property damage, that the cause of action accrued when the HVAC system was installed in 2000, and that the action is time-barred because it was not commenced until 2005. Plaintiff argues that the action is governed by CPLR 213(2), the six year statute of limitations for breach of contract.

As Kaback correctly argues, a claim arising out of defective construction accrues on the date of completion of the construction. (City School Dist. of City of Newburgh v Hugh Stubbins

& Assocs., 85 NY2d 535 [1995].) However, as noted above, it is undisputed that plaintiff's subrogor, Posner, was not a party to the contract between the prior tenant and Kaback for

installation of the HVAC system. There is no evidence that Posner was in privity with the prior tenant or that Posner was an intended third-party beneficiary of that contract. Posner's claim in this action therefore is not maintainable to the extent that it is based on Kaback's alleged breach of the contract for installation of the system. (See IMS Engrs.-Architects, P.C. v State of New York, 51 AD3d 1355 [3d Dept 2008], lv denied 11 NY3d 706.)

Where liability does not arise out of a contractual relationship, the plaintiff, "as a stranger" to the contract, is "able to bring suit in negligence alone." (City School Dist. of City of Newburgh, 85 NY2d at 538.) The statute of limitations for injury to property based on negligence is three years. (See CPLR 214[4].) "The cause of action accrues when the damage [is] apparent." (Russell v Dunbar, 40 AD3d 952, 953 [2d Dept 2007] [internal quotation marks and citations omitted].) Here, the flooding incident occurred in 2004 and the action was commenced in 2005, within the three year statute of limitations. Plaintiff's negligence cause of action is accordingly timely.

Plaintiff also raises a triable issue of fact as to whether Posner entered into its own contract with Kaback for maintenance, as opposed to installation, of the system. Posner's facilities manager, Jose Infante, testified that Posner had a contract for maintenance with PJ Mechanical but switched back to Kaback for maintenance "because they were the original installers so they knew the system better than anybody. . . ." (Infante Dep. at 8.) Infante also gave details as to his contacts with Kaback. (Id. at 32-34.) Kaback's project superintendent, Steven Weisberg, acknowledged that Kaback made service visits to Posner's space in December

2002, within the six year period before commencement of this action. (See Weisberg Dep. at 28.) While Weisberg also testified that Kaback did not appear to have entered into a service agreement with either Posner or the prior tenant (See id. at 29), this dispute raises an issue of fact for trial as to whether an oral maintenance contract was made. Contrary to Kaback's contention, the statute of frauds would not bar enforcement of the alleged maintenance contract, as the contract could have been performed within one year.

Third-party defendant Cool Wind moves for summary judgment dismissing the third-party complaint and cross-claims against it. It is undisputed that Cool Wind was the subcontractor hired by Kaback to install and seal the duct work and louver associated with the HVAC system that was installed in the space by Posner's predecessor tenant. Plaintiff alleges that the sprinkler pipe froze in part because the duct work on the HVAC lacked sufficient insulation, permitting cold area to cause the nearby sprinkler system to freeze. (See P.'s 3101 [d] Exchange for Engineer [Kaback Aff. In Opp.to Cool Wind Motion, Ex. B].) In moving for summary judgment, Cool Wind asserts that its work was approved and paid for. Clearly, however, that fact is insufficient to demonstrate that Cool Wind is not subject to liability. Nor does Cool Wind produce an expert affidavit or other evidence to make a prima facie showing that its work was not a contributing cause of the accident. The branch of Cool Wind's motion to dismiss the complaint must accordingly be denied. The branch of its motion for dismissal of the cross-claims is also denied, as Cool Wind fails to specify the bases for such dismissal.

Finally, the Broad Street defendants move for summary judgment dismissing the cross-claims against them. Third-party defendants assert cross-claims that allege, among other things, that they are entitled to contribution or common-law indemnification if Broad Street's negligence

was a cause or the sole cause of the freezing of the sprinkler pipe. (See Answer of PJ Mechanical, Ex. C to Broad Street's Motion.) In moving for summary judgment, the Broad

~~Street defendants argue that they were not obligated under the lease with Posner to provide heat~~

to Posner's space on the weekend when the incident occurred, and that they therefore cannot be held liable for the freezing of the sprinkler pipe. Defendants fail, however, to demonstrate that there is no basis for liability to third-party defendants as a matter of law. It is undisputed that the sprinkler pipe was part of a building-wide system under defendants' ownership or control, and that defendants had a duty, imposed not merely by the lease but by operation of law, to maintain the sprinkler system in reasonably safe condition and to protect it from freezing. (See Duane Reade v SL Green Operating Partnership, 30 AD3d 189 [1st Dept 2006].) As the Broad Street defendants do not demonstrate as a matter of law that lack of heat in the building was not a contributing cause of the incident, dismissal of the contribution and common-law indemnification claims must be denied. Their motion, to the extent it seeks dismissal of other cross-claims, is also denied, as defendants do not specify grounds for dismissal of the other cross-claims.

It is accordingly hereby ORDERED that the motion of defendant/third-party plaintiff Kaback Enterprises for summary judgment dismissing the complaint against it is denied; and is further

ORDERED that the motion of third-party defendant Cool Wind Ventilation Corp. for summary judgment dismissing the third-party complaint and cross-claims against it is denied; and it is further

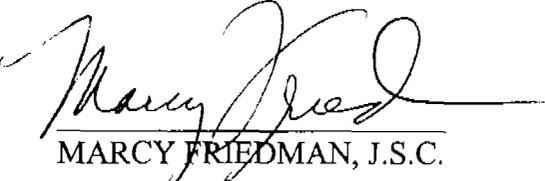
ORDERED that the motion of defendants 30 Broad Street Associates L.L.C. and Murray

[* 7]
Hill Properties L.L.C. for summary judgment dismissing the cross-claims against them is denied.

This constitutes the decision and order of the court.

Dated: New York, New York

August 24, 2009


MARCY FRIEDMAN, J.S.C.

FILED

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COUNTY CLERK'S OFFICE
NEW YORK