

Great Northern Ins. Co. v Steamaster Co., Inc.
2008 NY Slip Op 33116(U)
November 17, 2008
Supreme Court, New York County
Docket Number: 112924/04
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MICHAEL D. STALLMAN
Justice, J.S.C.

PART 7

GREAT NORTHERN INS.

INDEX NO. 112924/04

MOTION DATE 8/8/08

MOTION SEQ. NO. 001 ~~002~~

MOTION CAL. NO. 56

- v -

STEAMMASTER

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits A-E
Notice of Cross Motion
 Answering Affidavits -- Exhibits 1-3, Exhibits A-G
 Replying Affidavits - Exhibits A-E
+ Reg 02, 03, 04, 05
 Cross-Motion: Yes No

PAPERS NUMBERED
<u>1-2</u>
<u>3-4, 5-6</u>
<u>7</u>

Upon the foregoing papers, it is ordered that this motion *and cross motion are*
decided in accordance with the court's
placida opinion (decision and order).

FILED

NOV 20 2008

COUNTY CLERK'S OFFICE
NEW YORK

MICHAEL D. STALLMAN
J.S.C.

Dated: 11/17/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

THIS DOCUMENT IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 7**

-----X
GREAT NORTHERN INSURANCE COMPANY a/s/o
CHRISTOPHER and SILVANA PASCUCCI,

Plaintiffs,

-against-

Index No.: 112924/04

STEAMASTER CO., INC., STEAMIST
CORPORATION, SIEBE APPLIANCE CONTROLS,
ROBERTSHAW CONTROLS COMPANY and EATON
CORPORATION,

DECISION AND ORDER

Defendants.

-----X
STEAMASTER CO., INC. and STEAMIST
CORPORATION,

**Third-Party Index
No.: 590072/06**

Third-Party Plaintiffs,

-against-

MAYFAIR CONSTRUCTION GROUP, L.L.C., ROTH
PLUMBING & HEATING, INC., LOCUST VALLE
ELECTRIC, INC. and TRUE MECHANICAL CORP.

FILED
NOV 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.:

Motion sequence numbers 001, 002, 003, 004, and 005 are consolidated for disposition.

In motion sequence number 001, third-party defendant True Mechanical Corp. (True Mechanical) moves for summary judgment, pursuant to CPLR 3212, dismissing all claims and cross-claims against it, and third-party defendant Locust Valley Electric, Inc. (Locust Valley) similarly cross-moves for the same relief.

In motion sequence number 002, third-party defendant Roth Plumbing & Heating, Inc. (Roth) moves for summary judgment, pursuant to CPLR 3212, dismissing all claims and cross-claims

against it.

In motion sequence number 003, defendant/third-party plaintiff Steamaster Co., Inc. and Steamist Corp. (collectively, Steamaster) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint against it based on a claim of spoliation, and summary judgment as to all cross-claims against it.

Similarly, in motion sequence 005, defendants Siebe, Robertshaw and Eaton (now collectively, Invensys), move for summary judgment of all claims and cross-claims against it, alleging that spoliation of the evidence prevents it from defending itself adequately.

In motion sequence number 004, third-party defendant Mayfair Construction Group, L.L.C. (Mayfair) moves for summary judgment, pursuant to CPLR 3212, dismissing all cross-claims and third-party claims against it, or, in the alternative, seeks a conditional judgment for contractual indemnification from Roth and Locust Valley, and common law indemnification from True Mechanical.

BACKGROUND

This action arises out of alleged damage to the premises owned by plaintiff's subrogor. Plaintiff claims that Invensys manufactured, sold and distributed a defectively designed and manufactured solenoid valve, Model Number S-53, Serial Number K68686, which was utilized in a steam bath generator designed and manufactured by Steamaster, which was then sold to plaintiff's subrogor. The steam bath was installed in the attic of the subject premises. It is alleged that the valve malfunctioned and fractured, causing water to overflow into the premises that resulted in damage to the premises in the amount of \$727,935.69.

Plaintiff's complaint sets forth two causes of action against Steamaster and Invensys: the first

cause of action is for negligence in the design, manufacture and sale of the solenoid valve; and the second cause of action is for breach of the implied warranty of merchantability of the valve.

In the third-party complaint, Steamaster sets forth four causes of action against Mayfair Construction Group, LLC, the general contractor for the construction of the subject premises, and three subcontractors: Roth, which installed the piping; Locust Valley, which supplied the electrical work; and True Mechanical, which was responsible for the heating.

The first cause of action in the third-party complaint is for negligence in the installation of the subject steam generator unit; the second cause of action seeks indemnification from all third party defendants; the third cause of action alleges that Steamaster is a third-party beneficiary of the various construction agreements, which entitles it to indemnification; and the fourth cause of action alleges that the third-party defendants breached their agreements with Steamaster in not procuring insurance naming Steamaster as an additional insured.

The steam valve that allegedly malfunctioned was a component, manufactured by Invensys, of a personal steam shower unit manufactured by Steamaster, and installed by Roth in the attic of the subject premises three to four years prior to the incident in question. Steamaster allegedly assembled the steam shower unit and tested it without any notice of any defect, and then shipped it to a plumbing supply company that is not a party to this action, four years prior to the incident in question. The unit was purchased for plaintiff's subrogor by subrogor's interior designer.

Steamaster and Invensys allege that the accident was not the result of any design or manufacturing defect in the product, but was occasioned by the heating and ventilation systems in the premise's attic. The plumbing supply pipes were installed by Roth, and the heating of the attic was installed by True Mechanical. Additionally, True Mechanical was responsible for maintaining

and servicing the heating equipment, up to and including the time of this action. The incident in question occurred during a snowstorm in February of 2003.

Third-party defendant Mayfair was the general contractor for the construction of the new premises, and Mayfair subcontracted to True Mechanical, Roth and Locust Valley. Pursuant to the terms of the subcontracts with Roth and Locust Valley, the subcontractors agreed to indemnify and hold harmless

“Mayfair Construction Group, LLC and Leone Building Corp., their successors and assigns, and their officers, directors, members, agents and their successors and assigns, and any of them, from and against any claims, damages, losses and expenses including, but not limited to, attorneys’ fees, arising out of or resulting from the performance of any work or construction work relating to the property located at 533 Centre Island Rd., Center Island, N.Y. 11771, including, without limitation, any and all claims, damages, losses of expenses attributed to personal injury, bodily injury, sickness, disease or death, or to injury or destruction of tangible property and for all acts or omissions of the undersigned or anyone directly or indirectly employed by them or any for whose acts may be liable. Such obligation shall include that the undersigned shall name Mayfair Construction Group, LLC and Leone Building Corp. as an additional insured on their insurance policies”

There is no contractual indemnification provision between Mayfair and True Mechanical.

Originally, there was no plan to install a shower in the attic, but, after construction commenced, the original contracts were amended to include the attic personal steam shower, based on an updated architect’s plan.

Locust Valley performed the electrical hookup for the steam generator, and the wiring for the generator took place after the unit was installed. Locust Valley installed the shut off switch to allow the unit to be serviced, and the flex metallic tubing containing wires which ran from the disconnect to the unit and controls in the shower.

During discovery, four experts submitted opinions regarding the possible cause of the

accident.

Donald E. Wise, a professional engineer retained by Steamaster, opined that there was no defect in the steam generator equipment or the valve component, but that the leak was caused by subjecting the piping to freezing conditions because the piping allegedly passed through unconditioned space in the attic. Exhibit F, Notice of Motion to motion sequence number 003.

James Feeney, a professional engineer retained by Roth, opined that the steam generating unit was properly installed and properly placed in a conditioned and insulated space. Exhibit D, Affirmation in Partial Opposition to motion sequence number 003.

William J. Meyer, a professional engineer retained by plaintiff, stated, in his inspection report made one week after the incident in question, that the ambient heat in the attic was higher than that in the rest of the house, and that the leak was caused by a failure of the steam generator occasioned by a fracture in the solenoid valve. This expert said that he believed that the most likely cause of the leak was abnormal internal stresses on the valve. He further stated that a complete inspection of the valve would necessitate a destructive examination, but, for the present time, the valve would be kept intact for future evidence. Exhibit D, Affirmation in Opposition to motion sequence number 003.

Lastly, Dr. Frank E. Watkinson, a professional engineer retained by defendant Invensys, stated that, in his professional opinion, the cracking in the valve was not caused by a defect in the design or manufacture of the valve, but was attributable to ice formation in a pipe that supplied water to the steam unit. Attachment to Notice of Motion for motion sequence number 005.

After the institution of this lawsuit, plaintiff had the piping removed from the premises, and that piping was subsequently cut up into small pieces by Roth, making inspection of the piping virtually impossible. However, all the parties have had the opportunity to inspect the valve whose

fracture allegedly caused the leak.

DISCUSSION

Summary judgment is appropriate when the movant establishes a prima facie entitlement to judgment as a matter of law by the submission of competent evidence. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Summary judgment is warranted where there are no genuine issues of material fact and, therefore, the moving party is entitled to judgment as a matter of law. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Summary judgment must be denied if, upon the papers submitted, there remains a triable factual question.

Third-party defendant Locust Valley's cross motion for summary judgment is granted. Not only is this cross-motion unopposed, but none of the documents submitted with the various motions even hint that the damage was caused by the electrical installation, which was the only task performed by Locust Valley.

Motions sequence numbers 001, 002, 003 and 004, seeking summary judgment not based on spoliation of evidence are denied.

The papers submitted with the motions include statements of four experts who present conflicting opinions as to the cause of the crack in the valve. The parties' conflicting expert affidavits raise issues of fact (*Frobose v Weiner*, 19 AD3d 258 [1st Dept 2005]), and "[w]hen experts offer conflicting opinions, a credibility question is presented requiring a jury's resolution." *Shields v Baktidy*, 11 AD3d 671, 672 (2d Dept 2004). "[T]he weight to be afforded the conflicting testimony of experts is a matter particularly within the province of the jury [internal quotation marks and citation omitted]." *Gleeson-Casey v Otis Elevator Company*, 268 AD2d 406, 407 (2d Dept 2000).

Defendants Steamaster's and Invensys' motions to dismiss the action based on spoliation of

the evidence are denied.

The evidence that was destroyed was the piping leading to the unit. Defendants claim that, without the pipe to test, they have been unduly prejudiced in their ability to mount an adequate defense. In *Kirkland v New York City Housing Authority* (236 AD2d 170 [1st Dept 1997]), the court distinguished between claims based on negligence and claims based on design defects. In that case, the court stated that, whereas the product in question itself would be the best and most conclusive evidence of any design defect, the existence of any such defect is a factual issue that can be proven by circumstantial evidence.

In the instant case, defendants are being sued for a design defect in the solenoid valve installed as part of a steam generator unit. The valve in question has not been destroyed, and has been examined by the parties. If defendants can prove, as they assert, that there was no design or manufacturing defect in the valve or the unit, they would prevail in the main action. Defendants are not required to prove an alternate theory of possible cause for the accident. The question as to whether or not the pipe was insulated, the thrust of this defense argument, may be assertable via evidence other than the actual pipe, such as eyewitness accounts and installation bills and receipts.¹

Under New York law, spoliation sanctions may be appropriate where a litigant, intentionally or, under some circumstances, negligently, disposes of crucial items of evidence involved in an accident before an adversary has had an opportunity to inspect them. *See Kirkland v New York City Housing Auth.*, 236 AD2d 170, *supra*. One such sanction is the dismissal of the action (*Mudge, Rose, Guthrie, Alexander & Ferndon v Penguin Air Conditioning Corp.*, 221 AD2d 243 [1st Dept

¹ The cut pieces of pipe, if still extant, may be examined to determine if the pipe had been insulated.

1995]), which Steamaster and Invensys are seeking. However, the nature and extent of any penalties to be imposed lies in the Court's discretion. CPLR 3126.

In the instant matter, it would be inappropriate to dismiss the main action, which is based on a design defect of a valve, because the valve has not been spoliated and has been inspected by the litigants.

The motion made by Mayfair for an order of conditional summary judgment for contractual indemnification against Roth and common law indemnification against True Mechanical is granted, based on the indemnification clause in the subcontract and on principles of common law indemnification. *Goodman v CF Galleria at White Plains, LP*, 39 AD3d 588 (2d Dept 2007). However, at this juncture, the Court cannot state that Mayfair, as the general contractor, may be found in any way liable, because of the factual questions remaining in this case.

Lastly, since summary judgment has been denied because material questions of fact exist, the Court does not need to address Steamaster's cause of action seeking indemnification. Although this issue was discussed in the opposition papers to this motion, unlike Mayfair's motion, such relief was not requested in the motion itself.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Locust Valley Electric, Inc.'s cross-motion for summary judgment, under motion sequence number 001, is granted and the complaint is hereby severed and dismissed as against third-party defendant Locust Valley Electric, Inc., and the Clerk is directed to enter judgment in favor of said defendant, with costs and disbursements to Locust Valley Electric, Inc. as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that Mayfair Construction Group, LLC's motion, under motion sequence number 004, is granted to the extent of granting summary judgment for contractual indemnification from Roth Plumbing & Heating, Inc. and common law indemnification from True Mechanical Corp., on the condition that plaintiffs prevail on their claims against Mayfair Construction Group LLC; and it is further

ORDERED that True Mechanical Corp.'s motion for summary judgment, under motion sequence number 001, is denied; and it is further

ORDERED that Roth Plumbing & Heating, Inc.'s motion for summary judgment, under motion sequence 002, is denied; and it is further

ORDERED that Steamaster Co., Inc. and Steamist Corp.'s motion for summary judgment, under motion sequence number 003, is denied; and it is further

ORDERED that the motion for summary judgment by Siebe Appliance Controls, Robertshaw Controls Company and Eaton Corp. (now collectively, Invensys), under motion sequence 005, is denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: November 17, 2008
New York, New York

ENTER:



MICHAEL D. STALLMAN, J.S.C.