Gap, Inc. v Fisher Development, Inc.
2003 NY Slip Op 30071(U)
May 7, 2003
Supreme Court, New York County
Docket Number: 0011331/1998
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich, Justice PART 54

The Gap Inc.

INDEX NO. 113313/98

MOTION DATE 1/23/03

-v-

MOTION SEQ. NO. 007

Fisher Development Inc

MOTION CAL. NO.

The following papers, numbered 1 to 8 were read on this motion to/for CPLR 4404, 4545 and 2201

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2,3,4
Answering Affidavits — Exhibits	5,6,7
Replying Affidavits	8

SCANNED
MAY 16 2003

Cross-Motion: ☒ Yes ☐ No (3 cross-motions)

Upon the foregoing papers, it is ordered that this motion of Alpha Mechanical to set aside the verdict both as a matter of law and as against the weight of the evidence, its motion to reduce the verdict and its motion for a stay, are denied in accordance with the annexed decision.

The cross-motions of plaintiffs, then Fisher Development, Kabco and Annuity Fund are decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/7/03

SHIRLEY WERNER KORNREICH
J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
--X
THE GAP, INC.,
:
Plaintiff,
.
-against- DECISION & ORDER
: INDEX NO.: 113313/98
FISHER DEVELOPMENT, INC., KABACK ENTER.
& ALPHA MECH. CORP., :

Defendants.
.... X

HON. SHIRLEY WERNER KORNREICH:

Procedural History

This is an action brought to recover for property damage caused to plaintiff's premises as a result of a burst pipe in its heating system, a system installed by defendants. Plaintiff brought actions sounding in tort and contract. Fisher Development, Inc. ("Fisher") was the general contractor hired by plaintiff to build-out the premises; Kaback Enterprises ("Kaback") was the subcontractor hired by Fisher to complete the plumbing work; and Alpha Mechanical Corporation ("Alpha"), the sub-subcontractor, was hired by Kaback to do the piping work for the heating and ventilation system.

The contract between plaintiff and Fisher required Fisher to indemnify plaintiff. Similarly, the contract between Fisher and Kaback provided Kaback would indemnify Fisher. Fisher cross-claimed against its co-defendants for contribution and against Kaback for common law and contractual indemnification. Kaback, in turn, asked for contribution and common law indemnification against its co-defendants. Finally, Alpha claimed the case against it was barred by the Statute of Limitations and the damages were caused in whole or in part by its co-defendants.

The written contract between plaintiff and Fisher also required Fisher to name plaintiff as an additional insured on the general liability portion of its insurance policy. Fisher was insured by Fireman's Fund Insurance Company ("Fireman's"), and plaintiff was named as an additional insured. Prior to trial of this matter, the Court granted plaintiff's motion against Fireman's, in a separate action, adjudging and declaring that plaintiff is entitled to recover under Fisher's insurance policy and referring the matter for an assessment of damages.[1] That decision is now on appeal, although Fireman's has cross-moved here asking to intervene to the extent that it may have a future right of subrogation as against Kaback or Alpha.

The instant case was tried before me. The jury found for the defendants on the tort claims. It then found: Alpha had not completed its work before July 22, 1995 (three years prior to bringing this action); and Fisher had breached its contract with plaintiff, Kaback had breached its contract with Fisher and Alpha had breached its contract with Kaback. The Court granted Fisher's cross-claim against Kaback based on contractual indemnification and Kaback's claim as against Alpha based on common law indemnification. Alpha now moves for: 1) an order directing judgment in its favor as a matter of law; 2) an order directing a new trial on the ground that the verdict was against the weight of the evidence; 3) an order, pursuant to CPLR §4545, reducing the verdict to zero due to plaintiff's recovery of its loss from Fireman's, a collateral source; and 4) a stay of judgment pending appeal pursuant to CPLR 92201. Plaintiff, Fisher and Kaback oppose

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[1] The Gap promptly reported its losses and explained to Fireman's that its engineering investigator had identified the source of the flooding damage as Alpha's negligent installation of a 3/4 inch hydronic heat cap. Fireman's responded that its investigation also showed that the property damage was caused by the improper installation of a hot water cap by the installing contractor but denied the claim as excluded under the third party benefits. See Court's decision in The Gap v. Fireman's Fund, Inc., Index No. 604964/98.

Alpha's motion and cross-move to set aside the jury's verdict on Alpha's negligence, both as a matter of law and as against the weight of the evidence.

Trial

Steve Weinberg, a job supervisor for Kaback (the sub-contractor), testified to the following. Kaback was a heating and air-conditioning contractor, hired pursuant to written contract by Fisher (the general contractor) to install the air-conditioning and heating ("HVAC") units at The Gap offices at 620 Fifth Avenue, New York City, during' **1995.** The contract provided for this work to be completed on the fourth and fifth floors at a cost of over $700,000. Pursuant to the contract, the work was to be done "in strict accordance with the plans and specifications" of The Gap and was to comply with the New York City Building Code.

Mr. Weinberg oversaw and scheduled Kaback's work at the project and, "in a general fashion" oversaw the sub-contractors' work. Alpha was one of the contractors hired by Kaback. By purchase order, Kaback had contracted with Alpha to build the piping for the HVAC unit "as per plans and specifications" for the sum of **$500,000.** Kaback relied on Alpha to comply with the plans, specifications and Building Code.

Electrical, mechanical, plumbing and sprinkler drawings were supplied to Kaback by Fisher. The plans and specifications were compiled by engineers for The Gap. Kaback prepared no drawings, specifications or plans. The specifications and plans, marked as emanating from

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The Gap, were given to Alpha, and Alpha prepared shop drawings for the hydronic pipe, which drawings then were submitted to Kaback who forwarded them to The Gap's engineers. Once approved, they were returned to Alpha.

By June, 1995, Alpha had completed the piping but the system was not up and running and, therefore, not considered completed since the hot water necessary to run the hydronic system was not available until November or December, 1995. The Alpha employees worked on The Gap job for the entire year of 1995.

On March 1, 1996, Mr. Weinberg was notified that there had been a flood at the fourth floor offices of The Gap and went to the premises. The flood originated in a valve of the hydronic piping. The cap on one valve had been eaten away and had a hole in it. The cap was not "blown off' the valve, and its threads were intact.

Brass valves were the appropriate material for this heating system, whose temperature could reach 180 degrees. Although the valve was made of brass, the cap was not. It was zinc/aluminum alloy. Kaback's service report from that day states, "blown three-quarter inch GH cap...cause of problem with head of vacuum and in time blowout." Although the valve should not normally be left open, if it were, the cap would prevent leakage.

Alpha purchased and installed the valves and caps in the hydronic system for The Gap. Mr. Weinberg testified that although he did not order the valves and caps for The Gap job, in his work for Kaback, he at times orders valves and caps for the type of system installed by Alpha. When he does so, he sends the specifications to the supplier and informs the supplier that he is ordering valves for a hot water system. When the valve and cap arrive, the packing slip in the package advises if it is useable for a hot water system.

Michael Holland, the supervisor of field operations for Alpha, testified to the following. Alpha was contacted by Kaback regarding the work for The Gap, reviewed the plans and specifications drawn up by The Gap's engineers and submitted a bid for the hydronic piping – a hot water, low pressure heating system -- which bid was accepted. Alpha knew the work it was doing was for The Gap.

Alpha got copies of the plans and specifications and submitted shop drawings and standards, inclusive of the materials it would use. The piping was to be copper, the valves bronze and there were to be caps of brass.

Mr. Holland was responsible for overseeing the job and went to the site two or three times a week. He also ordered the materials for the job. He had ordered bronze valves and brass caps, but had not kept the orders or receipts' for these items. Mr. Holland ordered the brass caps in a bulk amount, did not tell the supplier what the caps were for and testified that if the supplier did not have enough brass caps, it might have substituted caps of a different material. The foreman at the job site was supposed to check the caps to assure that they were brass. Packing slips would indicate the caps' makeup. Mr. Holland did not know if the foreman checked the caps.

Mr. Holland had been trained as a steamfitter and had worked for Alpha for twenty-three years. **As** a result, he was familiar with the New York City Building Code. The Code required that the caps be bronze or brass. Indeed, the specifications required the caps to be brass. Mr. Holland admitted that the valves and caps should be of the same material and that bronze and brass were the appropriate materials for this heating system. Caps made from a zinc/aluminum alloy would not meet the specifications. Additionally, it would not be good and accepted practice for Alpha to fail to follow the specifications issued by The Gap's engineers or the New York City

Building Code. In fact, pursuant to its agreement with Kaback, Alpha had agreed to perform the work according to the plans, the specifications and the Code.

Alpha installed approximately sixty valves and caps. Once the caps were installed, one could not tell by visual inspection whether the caps were made of brass. One could not see the material which comprised the cap unless it was physically in hand and one, then, could see the color difference.

In the end, Alpha was paid $522,000 by Kaback.

Connie Manfreda, an operations manager for The Gap who worked at The Gap offices during the period when the offices were flooded, took photographs of the damaged Gap premises on March 1,1996, testified to the water shooting from a hole in the valve cap and identified the photograph she took of the corroded cap. She testified to the damages caused by the flood.

Robert Vecchio, a licensed professional engineer, testified that he works as a consultant and has investigated the Times Square scaffold collapse, both World Trade Center bombings and the Con Edison disaster at Gramercy Park. He also has evaluated City buses and trains and AmTrack locomotives. He was asked to analyze the corroded cap from The Gap flood.

Mr. Vecchio testified that the cap fractured due to corrosion resulting from contact with hot water. The threads on the cap were intact, and the cap had not burst off of the valve. The cap was made of a zinc/aluminum alloy which corrodes when exposed to hot water. Mr. Vecchio found that 90% of the cap had corroded. He further testified that zinc/aluminum alloy should not be used in a hot water system, that the New York City Building Code requires plumbing systems to use copper, bronze or brass materials, and that if the cap had been made out of one of these materials, the cap would not have corroded and the flood would not have occurred since the cap

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acts as a failsafe device when the valve is left open. Mr. Vecchio testified that one could not determine the material from which the cap was made by merely looking at the cap.

Patrick Monahan, a Vice President of Fisher testified that he Visited the flooded site after the incident. He observed a valve-cap which had a hole in it and saw that the water which flooded the premises had issued from that hole. He also testified to the work to and cost of repair.

After a charge conference, the jury was asked to decide: whether each of the defendants was negligent and whether that negligence was a proximate cause of the flood; whether Alpha had completed its work before July 22, 1995; whether Fisher had violated its contract with plaintiff, Kaback had violated its contract with Fisher and Alpha had violated its contract with Kaback; whether each such breach was a proximate cause of the flood; and the magnitude of the damages. The Court ruled that The *GAP* was a third party beneficiary of Kaback's contract. See Internationale Nederlanden (U.S.) Capital Corp. v. Bankers Trust Co., 261 A.D.2d 117, 123 (1" Dept. 1999)(third party may recover on breach of contract where binding contract exists, contract intended for its benefit and benefit to third-party was direct, not incidental); Goodman-Marks Assocs.. Inc. v. Westbury Post Assocs., 70 A.D.2d 145, 148 (2d Dept. 1979)("Where performance is to be rendered ***directly*** to a third party under the terms of an agreement, the third party is deemed an ***intended*** beneficiary of the covenant and is entitled to sue for its breach."). See also MK West St. Co. v. Meridien Hotels, Inc., 184 A.D.2d 312,313 (1" Dept. 1992). Additionally, the Court ruled that Alpha could be held liable in tort for any negligence arising from its contract with Kaback. See Palka v. Servicemaster Management Servs. Corp., 83 N.Y.2d 579 (1994); Theoharis v. Pengate Handling Sys. of N.Y., Inc., 300 A.D.2d 884 (3d Dept. 2002);

Hanmer v. Bell Atl.. Inc., 2003 N.Y. App. Div. Lexis 936 (4th Dept.).[2]

The jury found: 1) no tort violations; 2) Alpha had not completed its work on the project before July 22, 1995, bringing the action within the three year statute of limitations; 3) each defendant had breached its contract; 4) each breach was a proximate cause of the flood; and 5) $88,837 in damages.

Conclusions of Law

Alpha's motion to set aside the verdict

CPLR §4404(a) provides that a court may set aside a jury verdict upon motion as a matter of law or "where the verdict is contrary to the weight of the evidence." A jury verdict may be set aside as a matter of law where " 'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial.' " Coakley v. The City of New York, 286 A.D.2d

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[2] The New York Court of Appeals in Espinal v. Melville Snow Contractors. Inc., 98 N.Y.2d 136, 140 (2002), set forth the situations which would impose a duty of care to third parties based upon contract. Those are:

> (1)where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"[against the third party] ... (2) where the plaintiff [third party] detrimentally relies on the continued performance of the contracting parties' duties... and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely...[citations omitted].

~~Accord Church~~ v. Callanan Indus.. Inc., 99 N.Y.2d 104, 111-112 (2002).

Here, the Court finds such a duty was imposed upon Alpha running to The Gap. Alpha's failure to comply with the Building Code, some evidence of negligence, the specifications and plans and its own shop drawings, "launched an instrument of harm." Specifically, a valve cap unsuitable for installation in a hot water system was put into that system, thereby causing a flood and extensive property damage. The Gap had relied o Alpha to perform its work in a workmanlike manner, according to The Gap's specifications and plans, in compliance with the Building Code and in conformity with Alpha's own, submitted shop drawings. Further, Alpha displaced Kaback in building the hydronic pipe.

576,577 (1st Dept. 2001) citing Cohen v. Hallmark Cards, Inc., 45 N.Y.2d 493,499 (1978). On the other hand, when confronted with a motion to set aside a verdict based on the weight of the evidence, the court must determine whether " 'the evidence so preponderate[d] in favor of the [plaintiff] that [the verdict] could not have been reached on any fair interpretation of the evidence.' " Lolik v. Big V Supermarkets, 86 N.Y.2d 744,746 (1995). Accord Grassi v. Ulrich, 87 N.Y.2d 954,956 (1996)(on motion to set aside verdict, after finding sufficient evidence to support verdict, court must consider conflicting evidence on issue and apply test cited in Lolik).

Based upon the facts elicited at trial, the jury's finding that Alpha breached its contract with Kaback should not be set aside as a matter of law. The purchase order, introduced into evidence, and the testimony of all the witnesses established that Alpha was to do its work in accordance with both The Gap's specifications and plans and the Building Code. Mr. Holland, Alpha's own operation's manager admitted that Alpha was fully aware that it was working on The Gap's premises, according to The Gap's plans and specifications, and that the plans and specifications were not followed. Furthermore, testimony, which included that of the sole expert witness, and photographs established that Alpha installed a zinc/aluminum valve cap in the hot water system, that the specifications, plans and Building Code required the cap to be made of brass or bronze, that hot water corroded the cap and that the water which flooded the premises flowed through this corroded cap. A rational jury easily could have found that Alpha failed to use the appropriate cap on the valve in violation of the plans, specifications and Building Code – a contract breach, thereby, causing the cap to erode and the flood to occur. Indeed, there is no valid line of reasoning and permissible inferences which could lead a rational jury to find otherwise. Accordingly, Alpha's motion to set aside the verdict as a matter of law, is denied.

Similarly, the jury's verdict against Alpha is not against the weight of the evidence. Again, Mr. Weinberg, an experienced HVAC mechanic, and Mr. Vecchio, an engineer, testified that the plans and specifications, as well as the New York City Building Code required the use of brass or bronze caps and valves and that zinc/aluminum caps were inappropriate in a hot water system. The evidence established that the flood and damage to plaintiff's property were caused by a zinc/aluminum cap which had corroded. Mr. Vecchio testified that hot water corrodes zinc/aluminum and that 90% of the subject cap was corroded by the hot water.

Alpha's own operations manager, Mr. Holland, testified that the use of an aluminum/zinc alloy cap violated both Alpha's agreement to abide by the plans and specifications and the Building Code and that such cap should not be used in a hot water system. He further testified that he ordered the caps for the job, that they were ordered in bulk, that he failed to tell his supplier that the caps were to be used in a hot water system, that the supplier at times substitutes caps of different material from those ordered and that he did not check to ascertain that brass or bronze caps were supplied. He admitted that the Alpha foreman, present on the job at all times, was supposed to check that the cap was brass, but that Mr. Holland did not know if the foreman did so. Accordingly, the evidence on this issue sufficiently supported the jury verdict. It did not preponderate to such an extent in favor of Alpha as to make the jury's finding incongruous with a fair interpretation of the evidence.

<u>Plaintiffs, Fisher's and Kaback's motion to set aside the verdict as against the weight of the evidence</u>

In fact, the evidence militates in favor of Plaintiff's, Fisher's and Kaback' s motions seeking to set aside the verdict finding for Alpha on negligence. The Court finds that there is no

valid line of reasoning and permissible inferences which could possibly lead a rational jury to the conclusion that Alpha was not negligent and that its negligence was not a proximate cause of the flood. Mr. Holland, Alpha's own field operations manager and its sole trial witness, admitted: that Alpha had violated the Building Code, some evidence of negligence; that it was not good practice to use the cap Alpha had installed; that he had failed to tell Alpha's supplier that the system for which the cap was to be used was a hot water system; that he had not checked to make sure the caps supplied were brass even though he knew the supplier, at times, substituted items ordered with items made from a different material; and that the foreman on the job was supposed to make sure the caps supplied were brass. Moreover, all of the evidence pointed to the corroded zinc/aluminum cap as the cause of the flood and The Gap's damages. Plaintiff's, Fisher's and Kaback's motions to set aside the verdict finding in favor of Alpha on negligence, thus, is granted and Alpha is adjudged negligent and its negligence is adjudged to be a proximate cause of the property damage suffered by The Gap.

Indemnification

Alpha also argues that it should not have to indemnify Kaback for its breach of the Fisher contract since Alpha had no contractual obligation to do so. The Court disagrees.

Indemnity, an equitable principal dictated by "simple fairness," recognizes that

> "[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity"

McDermott **v.** City of New York, 50 N.Y. 2d 211,216-217 (1980). ***An*** indemnity claim will lie both where one party has been held vicariously liable for the tort of another and where a party is held accountable for another's breach of contract. Id. at 218.

Here, a clear reading of the evidence demonstrates that Kaback has been held vicariously liable for Alpha's conduct. It was Alpha who installed an improper zinc/aluminum cap, in violation of Kaback's contract with Fisher and Kaback's agreement with Alpha. Fisher and Kaback neither created any drawings for the pipes nor did any installation. Once installed, inspection by Kaback could not reveal that the cap was composed of aluminum and zinc, not brass. Nonetheless, Fisher was found to have breached its contract with The Gap, and Kaback was found to have breached its contract with Fisher. Kaback's common law indemnification claim against Alpha, therefore, was appropriate once Kaback was found liable to Fisher and Fisher to The Gap. See Menorah Nursing Home, Inc. v. Zukov, 153 A.D.2d 13, 24 (2d Dept. 1989)("A general rule of contract law states that a general contractor is permitted to recover from a subcontractor whatever damages it might have incurred as a result of a breach of the subcontract"). This ruling is not in violation of CPLR § 1401, as Alpha argues, since CPLR § 1401 is not intended to apply to pure breach of contract claims. See Bd. of Educ. v. Sargent, Webster, Crenshaw & Folley, 71 N.Y.2d 21, 28 (1987).

Damages

Nor does the Court find Alpha's argument that its damages must be limited to the replacement cost of the cap compelling. The property damage incurred by The Gap due to Alpha's breach of contract was a foreseeable, consequential injury for which Alpha could be held liable. See Koch v. Con Edison Co. of N.Y., Inc., 62 N.Y.2d 548, rehearing denied 63 N.Y.2d 771 (1984), cert. denied 469 U.S. 1210 (1985); Menorah Nursing Home, inc. v. Zukov, supra ('Where a contractor sublets a part of the work to be done in the erection of a building or other structure, he may recover for the failure of the subcontractor to perform his contract all the

damages resulting therefrom and which may reasonably be supposed to have been within the contemplation of the parties.") .

Reduction of the verdict

Additionally, Alpha moves to have the verdict reduced to zero because the Court has ruled in favor of The Gap as against Fireman's Fund, its insurer. Fireman's has asked to intervene on this motion since it might have a future right of subrogation, and the Court grants that motion. Alpha's motion is denied since Fireman's has not paid The Gap as yet and should it pay, it will then have a subrogation claim against Alpha..

Stay

Finally, Alpha has moved for a stay of judgment pending appeal. The Court declines to issue a stay in this case arising from a 1995 incident. The injured party has litigated its claim for approximately $90,000 over this eight year period. As a result, the parties to this action and to the declaratory judgment, insurance action have expended tens of thousands of dollars in litigation costs. The Court refuses to further delay plaintiffs entitlement to be made whole, particularly where the Court feels the issues raised on appeal are palpably without merit.

Consequently, it is

ORDERED that Fireman Fund's motion to intervene on the motion in the above-entitled action, is granted; and it is further

ORDERED that defendant-Alpha's motion is denied in its entirety; and it is further

ORDERED that plaintiffs, Fisher's and Kaback's motions to set aside the verdict in favor of Alpha on the issues of Alpha's negligence and its negligence being a proximate cause of plaintiff's property damage, is granted and judgment on that question should be entered in favor

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of plaintiff and against **Alpha** mechanical **Corp.**

This shall constitute the decision and order of the Court,

DATED: May **7,2003**