

**Greater N.Y. Mut. Ins. Co. v Duane
Reade**

2007 NY Slip Op 30255(U)

March 13, 2007

Supreme Court, New York County

Docket Number: 0108937

Judge: Jane S. Solomon

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SCANNED ON 3/19/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JANE S. SOLOMON**

PART 55

Index Number : 408937/2003
GREATER NY MUTUAL INSURANCE

INDEX NO. _____

vs
DUANE READE

MOTION DATE _____

Sequence Number : 004

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

The following papers, numbered 1 to 9 were read on this motion to/for _____

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-7

Replying Affidavits _____

8-9

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided

pursuant to accompanying depositions & order.

Pre Trial Conference 3/19/07 on this and 40297/07 at 2PM.

FILED

MAR 19 2007

Dated: 3/13/07

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
GREATER NEW YORK MUTUAL INSURANCE COMPANY
a/s/o COURT STREET INVESTORS, LLC, ESTATE
OF JOSEPH S. WOHL and all other named
insureds under policy number 1131M82370,

Plaintiffs,

-against-

DUANE READE, a General Partnership and
NANOIA BAILING MACHINERY CORP.,

Defendants.
-----X

ST. PAUL FIRE AND MARINE INSURANCE
COMPANY a/s/o DUANE READE INC.,
and other interested insureds under
policy number 0144sp0725

Plaintiffs,

-against-

NANOIA RECYCLING EQUIPMENT INC. and
NANOIA BAILING MACHINE CORP.

Defendant.
-----X

JANE S. SOLOMON, J.

DECISION AND ORDER

Index No. 108937/03
(Action No. 1)

FILED
MAR 20 2007

Index No. 402972/04
(Action No. 2)

These actions, which have been consolidated for discovery and trial, arise out of insurance claims filed as the result of a fire that occurred in a Duane Reade drug store (Premises) located at 16 Court Street in Brooklyn, on July 10, 2002. Plaintiff Greater New York Mutual Insurance Company (Greater NY), in action no. 1, sues as the subrogee of the owners of the building in which the fire occurred. Plaintiff St. Paul Fire and Marine Insurance Company (St. Paul), in action no. 2, sues as the subrogee of Duane Reade.

Defendant in actions nos. 1 and 2, Nanoia Bailing Machinery Corp., and defendant in action no. 2, Nanoia Recycling

Equipment, Inc. (together, Nanoia), jointly move, pursuant to CPLR 3211 (a) (7), or, in the alternative, CPLR 3212 (a), for an order dismissing claims in each of the actions, alleging that Nanoia, which had installed and serviced the conveyor and the baling machine at the Premises, had a duty to inform Duane Reade that the area adjacent to the conveyor belt motor must be cleaned to avoid a potentially combustible situation, and that Nanoia had a duty to ensure compliance with applicable building code regulations governing building materials and sprinklers; or, in the alternative, precluding the introduction at trial of evidence or testimony that Nanoia had such duties. In addition, Nanoia moves to preclude St. Paul from calling its proposed expert witness, Don McBride, to testify on "what responsibilities a mechanical contractor/service provider should follow when providing services to a customer." Finally, in action no. 2, Nanoia moves to dismiss the second cause of action, which alleges breach of contract.

At the outset, the court rejects the argument, made by both plaintiffs, that Nanoia's motion is untimely inasmuch as it was served more than 60 days after the note of issue was filed in each of the actions. Nanoia's motion is addressed to the claims described above and to expert witnesses whose testimony as to those claims plaintiffs wish to present at trial. Plaintiffs identified neither the witnesses, nor the claims, until more than 60 days after the notes of issue were filed. The complaint in action no. 1 gave not even a hint that Greater NY would raise the claims described above. The complaint in action no. 2 mentions "improper

placement of combustible sources near heat sources," and "failing to properly advise local fire authorities of the nature, and the insured of hazards associated with the improper status of the sprinkler system." The first of those statements does not give notice of a purported duty to warn; the second, the meaning of which is somewhat unclear, in any event does not give notice of a purported duty to ensure compliance with applicable regulations. Moreover, this court's preliminary conference order provided that any dispositive motion be made "per CPLR." CPLR 3212 (a) provides that a motion for summary judgment must be made within 120 days of the filing of the note of issue.

Nanoia installed the subject conveyer, running between the basement and the ground floor of the Premises, prior to Duane Reade's tenancy. Once Duane Reade took over the Premises, Nanoia serviced the conveyer solely on an as-called basis. It is undisputed that Nanoia had no written contract with Duane Reade, and that it had no duty either to inspect or to maintain the conveyer on an ongoing basis. On the morning of the day in which the fire occurred, Nanoia had installed a new motor on the conveyer. Nanoia had previously installed a new motor approximately two weeks earlier, to replace a motor that had burned out.

The New York City Fire Department determined that the fire was caused by heat from electrical equipment, and that it "originated in ... combustible material ... near [the] conveyer motor." Frederick P. von Bargen, the president and sole owner of

Nanoia, testified at his deposition that the presence of construction debris and other rubbish, including boxes that had fallen off the conveyer, was a constant problem, and that he had advised both Duane Reade's maintenance dispatcher and the manager of the Duane Reade store at the Premises that the rubbish created a dangerous condition. Don Guida, the Nanoia mechanic who installed the motor on the day of the fire, also testified that he had complained to the Duane Reade store manager about the garbage piled up underneath the conveyer. There is no basis in the record to surmise that Nanoia had contributed to the presence of combustible materials in the vicinity of the conveyer motor. However, St. Paul wishes to present an expert witness who would testify at trial that, in his opinion, Nanoia should not have left any combustible materials near the conveyer, whether the garbage was its own or Duane Reade's. Whether Nanoia had a duty to dispose of such garbage is a question of law. See Church v Callanan Indus., Inc., 99 NY2d 104 (2002). A claim of negligence may not be predicated upon on the failure of a defendant to perform work outside the scope of work that it agreed to perform. See Rahim v Sottile Sec. Co., 32 AD3d 77 (1st Dept 2006); American Motorists Ins. Co. v A-1 Security Systems, 243 AD2d 594 (2d Dept 1997). Greater NY intends to call, among other expert witnesses, Jon LeBow, who would testify, among other things, that, on the day of the fire, Nanoia notified neither Duane Reade nor the building owner that there was a fire hazard in the area around the conveyer motor. It should go without saying that Mr. LeBow cannot testify

as to a purported fact of which he has no direct knowledge. Moreover, it is undisputed that Nanoia had complained about the debris and garbage before the day of the fire.

With regard to the sprinkler issue, Mr. von Bargen testified that he was generally aware that a sprinkler line is required to be installed underneath conveyers, and that he knew that there had been none under the subject conveyer from the time that Nanoia had installed it. Greater NY argues that Nanoia's repeated repairs or replacements of the conveyer motors in the absence of a sprinkler line exacerbated an already dangerous condition. This is not a case in which a defendant turns on a boiler in a room that he knows to be full of gas. The absence of a sprinkler line was not a contributing cause of the fire that broke out. At bottom, Greater NY's argument is that Nanoia was responsible for seeing to it that either the building owner or Duane Reade installed a sprinkler line. That argument has no basis in law or fact.

The claim alleging breach of contract, in action no. 2, alleges that Nanoia had contracted with Duane Reade to "properly operate, maintain, inspect, [and] repair the [conveyer,] and to protect the [Duane Reade's] property from fire." However, St. Paul has not come forward with any evidence to contradict Mr. von Bargen's deposition testimony that Nanoia had no more than an oral contract to repair the conveyer on an as-called basis. Nanoia properly does not challenge St. Paul's right to go forward on its negligence claim. However, there is no basis for the breach of

contract claim. See Glens Falls Ins. Co. v Quality Furniture Serv. Corp., 301 AD2d 626 (2d Dept 2003).

Finally, Mr. McBride's proposed testimony as to the responsibilities of mechanical contractors is not presented as bearing on "an issue calling for professional or technical knowledge, possessed by [an] expert and beyond the ken of the typical juror." De Long v County of Erie, 60 NY2d 296, 307 (1983); see also Ortiz v Variety Poly Bags, Inc., 19 AD3d 239 (1st Dept 2005).

Accordingly, it is hereby

ORDERED that the motion for summary judgment is granted, and to the extent that plaintiffs claim that defendants had a duty to warn that the area adjacent to the conveyer belt motor must be cleaned to avoid a potentially combustible situation, a duty to clean said area, or a duty to ensure that one or the other plaintiff install a sprinkler line in the basement of the premises, those claims are dismissed; and it is further

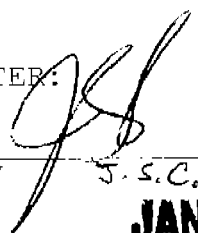
ORDERED that plaintiff St. Paul Fire and Marine Insurance Company is precluded from calling its proposed expert witness, Don McBride, to testify as to the proper responsibilities of a mechanical contractor/service provider; and it is further

ORDERED that, in the action bearing index number 402972/04, the second cause of action is dismissed.

Dated: March 13, 2007

FILED
MAR 19 2007
NEW YORK
COUNTY CLERKS OFFICE

ENTER:



S.S.C.

JANE S. SOLOMON