

**Concord Vil. Owners, Inc. v Trinity
Communications Corp.**

2008 NY Slip Op 31359(U)

April 15, 2008

Supreme Court, New York County

Docket Number: 0106917/2004

Judge: Doris Ling-Cohan

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

PRESENT: HON. DORIS LING-COHAN
Justice

PART 36

Concord Village Owners, Inc

INDEX NO.

106917/04

- v -

Trinity Communications et al

MOTION DATE

MOTION SEQ. NO.

008

MOTION CAL. NO.

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

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

PAPERS NUMBERED

1, 2

Answering Affidavits -- Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant Keyspan Corp
is consolidated for disposition with motion sequence
numbers 009-012, and granted in accordance with
the attached memorandum decision.

FILED
MAY 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/15/08

[Signature]
HON. DORIS LING-COHAN, S.C.

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: IAS PART 36

-----X
CONCORD VILLAGE OWNERS, INC.,

Plaintiff,

-against-

Index No.: 106917/04

TRINITY COMMUNICATIONS CORP, TIME WARNER
CABLE OF NEW YORK CITY, a division of
TIME WARNER ENTERTAINMENT COMPANY, L.P.,
TIME WARNER, INC., and KEYSpan CORPORATION,

Motion Seq No: 008, 009
10, 11 & 12

Respondents.

-----X
LING-COHAN, J.:

Motion sequence numbers 008, 009, 010, 011 and 012 are consolidated for disposition.

In this action, plaintiff, a residential cooperative corporation, seeks compensation for an injury to its gas piping system, located inside of the building it owns at 225 Adams Street in Brooklyn (the Building or 225 Adams Street), that it alleges was caused by the defendants' negligent rupture of an outside underground gas line and subsequent negligent testing of the gas piping system.

Here, plaintiff moves for summary judgment in its favor, as against defendants Trinity Communications Corp. (Trinity) and Time Warner Cable of New York City (Time Warner),¹ on liability (CPLR 3212). All of the defendants, and third-party defendant Central Locating Service Ltd (CLS) (together, defendants), move for an order granting summary judgment dismissing the complaint (CPLR 3212). In the alternative, Trinity moves for bifurcation of the liability and damages portions of the trial. Trinity also cross-moves for an order dismissing the third cause of

¹Sued herein as Time Warner Cable of New York City, Time Warner Entertainment Co. Inc., and Time Warner Inc.

action of the complaint against it for failure to state a cause of action (CPLR 3211).

Plaintiff contends that the pipes of its previously operational gas distribution system failed tightness tests administered by defendant Keyspan Energy Delivery (Keyspan),² due to leaks, after the fracture, or rupture, approximately 70 feet away from the Building, of Keyspan's gas line (the Gas Main), by Trinity, an excavator engaged by Time Warner to perform trenching work on Time Warner's cable. Plaintiff claims that Trinity ruptured the Gas Main after negligently failing to properly locate it and by using a mechanical trenching machine (Vermeer) in the area of the Gas Main. Plaintiff claims that the same injury to its gas distribution system was caused by Keyspan's later negligent conduct in testing the system for leaks.

The following background information is undisputed. To aid in preventing damage to underground utilities due to excavation, utilities operators, such as Keyspan, plaintiff's natural gas provider, and Time Warner have, pursuant to statute, established a central registry to notify utility owners and operators that ground excavation is imminent (One-Call Center).³ A few days prior to the rupture, a Time Warner employee notified the One-Call Center of proposed excavation on property adjacent to the Building, for the repair of Time Warner's underground cable. Third-party defendant Central Locating Service, Ltd. (CLS), which had been hired by the involved utilities operators, performed the mark out of the various utilities at the work site.

On November 19, 2002, Trinity, during excavation, ruptured the Gas Main with a Vermeer, causing natural gas to escape from the cracked main into the outside air, but did not

²Keyspan was sued herein as Keyspan Corporation.

³"The One-Call Center was established "to protect underground facilities . . . from damage due to excavation . . . work" (*Watral & Sons, Inc., v OC Riverhead* 58, LLC, 34 AD3d 560, 565 [2d Dept 2006]). Its purpose is, among other things, to receive from excavators, and transmit to underground facilities operators, notices of intent to perform excavation (Public Service Law § 119-b [1] [h]).

make direct contact with any part of the Building, or any piping system therein. To stop the escaping gas, Keyspan crimped the outdoor pipe that supplied gas to the Building, shut off the Building's gas service, and immediately repaired the Gas Main.

Approximately two days after the rupture, Keyspan returned to 225 Adams Street to test the integrity of the gas pipes located inside of the Building. The Building has two internal gas distribution systems. One of two systems, which supplies gas to the Building's boilers, and had been replaced in 1990, passed the tests. The other system, consisting of older, black-iron pipe with threaded connections, that supplied gas to the Building's laundry room and the apartment kitchen stoves (the Building's Gas Distribution System or the Gas System), failed the tests due to leaks.⁴ Consequently, Keyspan did not restore gas service to the Building's Gas Distribution System. Thereafter, plaintiff replaced the Gas System, and here seeks compensation from defendants, of \$1,006,426.20, in damages, representing its replacement costs, plus interest.⁵

Plaintiff commenced suit against Trinity and Time Warner in May 2004. Thereafter, Trinity filed a third-party action, for judgment over, against Keyspan and CLS. In early 2005, plaintiff sued Keyspan. That suit was later consolidated with plaintiff's suit against Trinity and Time Warner.

The first and second causes of action of the complaint against Trinity and Time Warner are for their alleged negligence in failing to verify the location of the Gas Main during excavation. The third cause of action of that complaint is based on Trinity and Time Warner's alleged violation of article 36 of New York's General Business Law (GBL), Public Service Law (PSL) § 119-b, and 16 NYCRR part 753. Plaintiff alleges, in the fourth cause of action, that

⁴According to plaintiff, unlike the Gas System, the boiler's gas system has welded joints.

⁵Plaintiff seeks damages solely for the harm to its Gas System.

[7 5.]
Trinity and Time Warner engaged in an abnormally dangerous activity. In a separate complaint against Keyspan, plaintiff alleges that Keyspan engages in an abnormally dangerous activity in providing natural gas to New Yorkers, and caused injury to the Gas System by improperly conducting testing thereon. Plaintiff filed the note of issue on or about March 15, 2007.

Plaintiff's Motion for Summary Judgment as against Time Warner and Trinity

It is well established that in order for a movant for summary judgment to establish a prima facie case, it must provide sufficient admissible evidence eliminating material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Finkelstein v Cornell Univ. Med. Coll.*, 269 AD2d 114, 117 [1st Dept 2000]). “Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Roman v Hudson Telegraph Assocs.*, 15 AD3d 227, 228 [1st Dept 2005]). When deciding a motion for summary judgment, the court must view the evidence in a light most favorable to the non-moving party (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2d Dept 1990]), and accord “plaintiffs the benefit of every reasonable inference” (*Negri v Stip & Shop, Inc.*, 65 NY2d 625, 626 [1985]; *Gurfein Bros. v Hanover Ins. Co.*, 248 AD2d 227, 229 [1st Dept 1998]).

Plaintiff argues that Trinity was on notice of the existence of a Gas Main and, despite having the opportunity to avoid hitting it by verifying its exact location and hand digging, failed to do so, thereby breaching common-law duties of care owed to plaintiff and violating GBL §

764 (2) and 16 NYCRR 753-3.6.⁶ Plaintiff also argues that Trinity violated: (1) 16 NYCRR 753-3.7, when it did not notify Keyspan that it had been informed of the existence of a gas line, the location of which was unknown; (2) 16 NYCRR 753-3.8 by using the Vermeer to excavate closer than four inches from the marked and known perimeter of the Gas Main; and (3) 16 NYCRR 753.10 by not taking reasonable precautions to prevent damage to the Gas Main.⁷

Plaintiff contends that Time Warner was an excavator because it initiated the excavation work to be performed in order to have its cable repaired, notified the One-Call Center of the intended excavation, and requested the mark out. Thus, plaintiff argues, Time Warner assumed control over, and responsibility for, the excavation work, making Time Warner liable to it in the same manner as Trinity. Plaintiff further argues that Time Warner violated 16 NYCRR-4.10, because the record is devoid of evidence that Time Warner took any action to avoid the rupture or ensure that Trinity hand dug after it was notified that the Gas Main was not properly marked. Plaintiff's position is that Trinity and Time Warner's negligence in rupturing the Gas Main caused injury to the Gas System (Pl. Mov. Aff., at 10, ¶ 40), and plaintiff's damages.

⁶Excavation work is governed by statutes and rules, designed to protect underground facilities, which set forth procedures to be followed (*see e.g.* GBL § 764; 16 NYCRR 753). GBL § 760 (5) defines an "Excavator" as one engaged in "a trade or business which includes the carrying out of excavation" "The [excavator] ha[s] a duty to avoid damage to the underground [facilities] and [its] violation of the statute's implementing rules and regulations . . . constitutes some evidence of negligence . . . properly considered by the factfinder" (*Verizon N.Y., Inc. v Village of Athens*, 43 AD3d 526, 527 [3d Dept 2007]), quoting *Watral & Sons*, 34 AD3d at 567; *see City of Albany v Central Locating Serv.*, 228 AD2d 920, 922 [3d Dept 1996]).

GBL § 764 (2) requires excavators to verify the precise location of underground facilities prior to excavation "in a manner set forth in the rules . . . adopted . . . pursuant to" PSL § 119-b. These rules include 16 NYCRR 753-3.6 (b) which provides that an excavator must verify the location of underground gas facilities "by exposing the underground facility . . . by means of hand dug test holes at one or more points where the work area and tolerance zone overlap, or more points as designated by" the facility operator.

⁷16 NYCRR 753-3.7 provides that the excavator must notify the operator as soon as possible if it cannot verify the precise location of an underground facility. 16 NYCRR 753-3.8 prohibits an excavator from employing mechanical excavating equipment closer than four inches from the marked, designated, or known perimeter of an underground facility unless agreed to by the operator. 16 NYCRR 753- 3.10 (a) provides that "[e]xcavators shall take all reasonable precautions to prevent contact or damage to underground facilities . . . including . . . compliance with . . . directions . . . given by affected . . . operators."

Plaintiff maintains that there is no dispute that the Building's Gas Distribution System worked well prior to the rupture, without interruption or complaint, and without any gas odor, but that it did not work after the rupture. Plaintiff argues that it is thus entitled to summary judgment, because there were no intervening causes between the time Trinity ruptured the Gas Main and the Gas System failed testing, making Trinity's rupture of the Gas Main the only plausible explanation for, and proximate cause of, the Gas System's failure.

To establish a prima facie case for negligence, a plaintiff must prove that (1) defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) "that such breach was a substantial cause of the resulting injury" (*Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 59 [1st Dept 2006], quoting *Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept], *affd* 89 NY2d 824 [1996]); *Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). To meet its burden on the issue of proximate cause, plaintiff submits, with its moving papers, its expert disclosure response (Pl. Mov. Aff., Exh. T), signed only by its counsel. This document is not evidence or admissible, and may not be used to support a movant's burden on summary judgment (*Alvarez*, 68 NY2d at 324; *Roman*, 15 AD3d at 228). As plaintiff did not make a *prima facie* showing of entitlement to summary judgment in its *moving* papers, plaintiff's motion is denied.

Plaintiff's assertion in its *reply* papers of an argument in support of summary judgment based upon the doctrine of *res ipsa loquitur*, is improperly presented to the Court; a claim based upon the doctrine of *res ipsa loquitur* is not asserted in the pleadings. In any event, to prevail on *res ipsa loquitur*, plaintiff must demonstrate that the following criteria are met:

“(1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff”

(*Morejon v Rais Const. Co.*, 7 NY3d 203, 209 [2006], quoting *Corcoran v Banner Super Mkt.*, 19 NY2d 425, 430 [1967], quoting Prosser, Torts § 39, at 218 [3d ed]).

The Court of Appeals has recently stated that summary judgment on *res ipsa loquitur* “would happen only when the plaintiff’s circumstantial proof is so convincing and the defendant’s response so weak that the inference of defendant’s negligence is inescapable” (*Morejon*, 7 NY3d at 209); this is not the case herein. It should be noted that plaintiff’s alleged injury was to its Gas System, not the struck Gas Main which belongs to Keyspan. It is undisputed that the Gas Main is outside of plaintiff’s building and that at the time of the rupture, the pipes of the Gas System, inside of the Building, were decades old, uninspected, and untested (*see* Pl. Op. Aff., Exh B, ¶ 11; Trinity Reply Aff., Exh. B [Building Certificate of Occupancy (COO), dated 1951]). Thus, while plaintiff asks that the court determine that, in the absence of negligence, such a Gas System would not test positive for or have any leaks, this contention does not speak for itself. Moreover, regardless of defendants’ control over the Gas Main, it did not have exclusive control over the Gas System.

Defendants’ Motions for Summary Judgment

All of the defendants move for summary judgment on the ground that they were not the proximate cause of plaintiff’s damages. Essentially, their position is that their conduct merely revealed the pre-existing unsafe and deteriorated condition of the Gas System, or furnished the occasion for discovery of its condition, but was not the cause of the leaks. Defendants also move for summary judgment dismissing plaintiff’s fourth cause of action that they engaged in an abnormally dangerous activity. In the alternative, Trinity moves, as mentioned above, to bifurcate the trial.

In addition, Time Warner argues that it cannot be held liable for any negligence of Trinity because it did not direct Trinity's work. Keyspan moves for dismissal of the complaint against it on the grounds that its testing was not negligent, and did not cause plaintiff's damages. Trinity cross-moves to dismiss the third cause of action under the General Business Law, pursuant to CPLR 3211, for failure to state a cause of action.⁸

On the causation issue, defendants submit the affidavits of two engineers, Frank Schwalje and John R. Urinyi,⁹ the deposition testimony of several Keyspan employees, and a Keyspan report. Plaintiff contends that defendants should be precluded from offering expert opinion because they did not respond to plaintiff's CPLR 3101 demand for expert disclosure, served on Trinity in 2004 and Keyspan in 2005, or comply with the court's preliminary conference order.

Plaintiff argues that defendants were aware that this case involves matters of a complex and technical nature, not within the understanding of the layperson, and thus that it was crucial, or reasonably necessary, that all of the parties obtain experts to explain and substantiate their technical arguments. Plaintiff claims prejudice because it was unable to earlier view the defendants' expert witness reports, and thus not afforded the same strategic opportunity as defendants to rebut with an "on-point" expert and to acquire an expert to address the contentions of a disclosed expert (Pl. Op. Aff., at 30, ¶ 108).

Trinity's counsel maintains that its delay was caused by the large volume of discovery in this matter, which its expert needed to review, and states that post-deposition discovery demands were not served until February 2007. Trinity and Keyspan state that when they served their

⁸Trinity, in its separate cross motion, appears to also argue for summary judgment despite the fact that the notice of motion neither requests summary judgment nor contains a general prayer for relief.

⁹Each of the defendants adopt and rely on the affidavits of Schwalje and Urinyi.

reports, no trial date had been set for this case. Trinity disputes plaintiff's claim that it retained Schwalje in 2003, stating that he was then retained only by an insurance company to investigate. Neither Trinity nor Keyspan, however, state when they hired their respective experts.

“CPLR 3101 (d) (i) does not require a party to respond to a demand for expert witness information at any specific time nor does it mandate that a party be precluded from proffering expert testimony merely because of noncompliance with the statute,” without evidence of “intentional or willful failure to disclose and a showing of prejudice . . .” (*Rowan v Cross County Ski & Skate, Inc.*, 42 AD3d 563, 564 [2d Dept 2007], quoting *Hernandez-Vega v Zwanger-Pesiri Radiology Group*, 39 AD3d 710, 710-711 [2d Dept 2007] [affirming lower court decision to deny plaintiff's motion to preclude defendants' expert from testifying at trial where plaintiff had two weeks within which to review defendants' expert's material prior to scheduled commencement of trial and record did not support conclusion that delay was intentional or willful]; *Hernandez-Vega*, 39 AD3d at 711 [stating “[c]ourt providently exercised its discretion in considering the affidavits of the [defendants'] experts as there was no evidence that the . . . failure to disclose was intentional or willful and there was no showing of prejudice . . .”).

In certain instances, a party's late disclosure of its expert witness may raise an inference of intentional withholding (*see Cela v Goodyear Tire & Rubber Co.*, 286 AD2d 640 [1st Dept 2001] [reversing trial court's order denying defendant's motion to preclude plaintiffs from offering expert testimony, and granting motion unless plaintiffs' counsel paid \$1,000 to defendant's counsel within 30 days, in which event the order would be affirmed]; *Herrera v Persaud*, 276 AD2d 304, 305 [1st Dept 2000] [finding that plaintiffs' late disclosure of their expert in opposition to defendants' summary judgment motion raised the inference of an intentional withholding and therefore granting conditional preclusion]).

Here, while defendants' excuses for their late disclosure are not persuasive, plaintiff's statement that it knew that Trinity had retained an expert and, its argument about the necessity that defendants produce an expert in this case, do not support its claim of surprise or misapprehension concerning whether defendants would present an expert. In addition, Trinity and Keyspan served their motions, with expert affidavits, on, respectively, June 8, 2007 and June 11, 2007. Plaintiff served its opposition on July 13, 2007, and made no application for an extension of time in order to address defendants' experts' affidavits (*cf. Rowan*, 42 AD3d at 564 ["plaintiff had two weeks within which to review the material prior to the date when the trial was scheduled to begin. . . . [P]otential prejudice to the plaintiffs could have been eliminated" by adjourning the trial]; *Shopsin v Siben & Siben, Esqs.*, 289 AD2d 220, 221 [2d Dept 2001]).

Plaintiff cites to *Bauernfeind v Albany Medical Ctr. Hosp.* (195 AD2d 819 [3d Dept 1993]), to support its assertion of prejudice. In *Bauernfeind*, however, the Court determined that the *seven-year delay* in producing expert disclosure, until four days before trial, critically undermined defendants' preparation of a defense in that they were reasonably led to believe that plaintiff would not present an expert on the issue of informed consent at trial (*id.* at 819). Further, in *Bauernfeind*, in reliance on plaintiff's failure to respond to their demand, defendants did not retain their own trial expert. While plaintiff claims strategic disadvantage, its expert, Harvey Brickman, a registered professional engineer "with 40+ years of experience with the installation and testing of gas distribution systems in high rise buildings in New York City" (Pl. Mov. Aff., Exh. T, ¶ 4), has submitted a report specifically addressing the contentions raised by the defendants' experts.¹⁰ Plaintiff does not specify any point about which its rebuttal was

¹⁰To the extent that plaintiff relies on the preliminary conference order it submits, that order has an April 2006 end date for disclosure. Plaintiff served its expert response in March 2007.

hampered due to late disclosure; thus, its preclusion request is denied.

In support of their summary judgment motions, defendants submit the affidavit of Frank Schwalje,¹¹ an engineer and manager with a gas utility company, with engineering consulting experience involving evaluation of gas piping systems. Schwalje inspected the Building's Gas Distribution System on January 15, 2003.

Schwalje states that, within the Building, gas is normally distributed at 1/4 pounds per square inch (p.s.i.), and that pursuant to the New York City Administrative Code (NYC Code) §§ 27-921 and 27-922, the entire gas system must pass a tightness test of at least 1-1/2 times the working pressure or not less than 3 p.s.i. for 30 minutes. Schwalje further states that after replacing/installing all new shut-off valves in each of the apartments, the trunk line was tested first, and the eight individual risers were each tested, and failed to hold pressure at 1/4 p.s.i., thus failing at normal line pressure. Schwalje asserts that once a gas distribution system is not "gas tight," attempts are made to locate the area of leakage. Thus, after the Gas System failed testing, Keyspan's then-employee, Domingo Torres, applied special soap at numerous locations, upon which application bubbles, indicating the presence of leaks in the pipe joints, were seen. Schwalje avers that plaintiff had no procedures in effect for maintenance or inspection of the Gas System, and that while the gas leakage rate was noted to be minute, the NYC Code requires that there be no leakage at all.

Schwalje opines, that the interruption of the gas service to the Building on November 19, 2002, due to the rupture, did not proximately cause or contribute to the pre-existing condition of the Gas System. He states that there is no scientific evidence or basis to conclude that damage to

¹¹All of the experts are licensed engineers who swear that they base their affidavits on their knowledge, experience, and the evidence herein.

the Gas Main, located outside of the Building, produced a pressure spike within the Building's piping system that caused leakage because:

(1) Natural gas is compressible, and the small momentary change in the configuration of the Gas Main would have had no impact on the pressure within the pipe.

(2) Gas is transmitted from a Keyspan supply source, travels towards the Building, and was observed escaping in the area of damage to the Gas Main after its rupture, and that the Gas Main provides gas to customers, which is continuously being consumed, causing pressure to drop unless the supply is maintained. Thus, Schwalje opines, the incident could not have caused any increase in pressure, and the pressure in the gas pipes inside of the Building was not increased, because pressure cannot increase when it is continuously being released elsewhere.

(3) There is a pressure regulator in the Building that maintains a constant supply pressure, at a reduced pressure from that of the supply main, and in order to produce a pressure increase in the Building, the regulator would have to have simultaneously failed at the time of the rupture. Schwalje avers that pressure regulating systems are designed with pressure protection features that prevent a significant increase in pressure should the regulator fail, and that should pressure increase, gas from the regulator is released through a vent pipe that leads outside the Building. Schwalje opines that the regulator for the Gas System was in proper working condition on the day of the incident, with no reports of abnormally high gas pressure within the Building during that time frame.¹²

¹²Schwalje states that Keyspan records reveal that the regulator in place for the Gas System was not replaced after this incident or prior to the pressure testing, and that photos of the regulator, marked at the deposition of Torres as Exhibit 12, reveal that this type of regulator is typical of those customarily installed in the 1990's. Schwalje goes through several of the meter numbers and states that none was changed immediately after the incident, except that this inspection on January 15, 2003 revealed that a new regulator was added to supply pilot gas for the boilers (not part of the Gas System), during the period of the gas shut down, to keep them operating. While, as discussed below, plaintiff claims that Keyspan changed the regulator or regulators, the only significance plaintiff attributes to this change concerns Keyspan's testing, not the other defendants' conduct.

Schwalje opines that the Gas System was in an unsafe and deteriorated condition prior to the date of the incident, and that the threaded black pipe used to construct the Gas System was incapable of remaining gas tight or, maintaining a pressure of 3 p.s.i. to comply with current codes, or the normal pressure of 1/4 p.s.i., due to the deterioration over time, caused by corrosion and/or degradation of the mechanical threaded joint seals. Schwalje states that since the riser piping and branch connection to each apartment were concealed within the building walls, pinpointing these leaks was not feasible, and that the gas odor detected after the incident was the result of the large surge of gas escaping from the area of the damage to the Gas Main.

Schwalje states that an additive to natural gas makes its presence detectible, and regulations require that the odorant be detectible when the gas concentration reaches 20% of the lower flammability limit. He opines that since the Gas System was not required to undergo periodic testing, and the leaks minute, dispersed throughout the piping system and, for the most part, enclosed behind walls of the Building, gas leaks were able to go undetected from smell and could go undetected by smell for years, but that regulations require that there be no leaks. Concluding that disrupting gas flow does not create leaks, but that testing the Gas System revealed leaks present prior to the gas service interruption, Schwalje also avers that it is not uncommon for old buildings to fail pressure tests simply due to the preexisting deteriorated condition of the pipes and their connections, and that he has personal knowledge of similar events in the New York.

Defendants also submit the sworn testimony of Torres, who testified that he had experience investigating gas leaks, and conducted the tests of the Gas System (Keyspan Mov. Aff., Exh. E, at 123). Torres testified that he conducted the testing at 1/4 p.s.i., and that the Gas System failed the test (*id.*, at 215-216, 322; Pl. Op. Aff., Exh. H, at 321).

In opposition to the motion for summary judgment, plaintiff submits the affidavit of its expert, Harvey Brickman, a mechanical engineer, who avers that he bases his testimony on his experience in construction, information he has obtained directly from witnesses, and his visit to 225 Adams Street in March of 2004. Brickman opines that Trinity was negligent in digging mechanically, without first locating the Gas Main, particularly as there is evidence that a map was missing and that Trinity could not locate the Gas Main on available maps. Brickman states that, based on the known dangers of digging mechanically before all utilities are located, this conduct violated state regulatory requirements and construction industry and New York City custom and practice.

Regarding causation, Brickman states that Schwalje's and defendants' assertions that the Gas System leaked prior to the rupture are not factually supported, that the Gas System was "operable" pre-rupture, and the evidence is clear that it did not leak until after the rupture (Pl. Op. Aff., Exh B, ¶¶ 3, 7). To support this assertion, Brickman avers that he has not seen any documents, dated prior to the incident, of visits by Keyspan to investigate any complaint with the Gas System or a gas odor, or seen or learned of credible evidence that would suggest that there was a defect in the Gas System's operation prior to the rupture (*id.*, ¶ 7). Brickman further avers that gas pipes in the Building's basement were always exposed, and that had plaintiff's plumbing contractors—who were working at the premises and would have been acutely aware of a gas odor and its significance—smelled gas prior to the rupture, they would have stopped work and called Keyspan. Brickman states that a gas odor was present in the Building after the rupture, and testing seems to have shown that most of the joints were leaking.

According to Brickman, at the time of the rupture, the Gas System consisted of black iron pipe, which will last up to 50 years with some rust, and that systems such as those at 225 Adams

Street will last for many decades, and may last for nearly 100 years. In Brickman's professional opinion, rust on the pipes did not cause the failure of the Gas System, and is not significant or evidence that the Gas System was leaking prior to the abrupt loss of service (Pl. Op. Aff., Exh. B, ¶¶ 8-9). Brickman maintains that the Gas System had to, and did, pass a test before obtaining the COO in 1959, and that due to their typical long life, there is no requirement, by custom or code, to inspect the type of gas system in the Building.

Brickman maintains that at the moment the Gas Main was ruptured, the Building lost gas service and there were reports of a gas odor in the apartments. The mostly likely explanation for the odor was, in his professional opinion, that the pilot lights of the stoves went out, because of the drop in gas pressure from the rupture, allowing some gas to escape into the Building. Brickman further avers that the loss of pressure in the gas lines, and the introduction of air and humidity into a previously closed system, occurred. It is his professional opinion that the loss of pressure was a direct result of the rupture of the Gas Main.

Brickman maintains that the subject pipes have threaded connections, and the same kind of pipes and threading were used to install the new replacement system. Brickman further asserts that during installation, a plumber uses a kind of joint compound as a lubricant, but not an adhesive, on the threaded connection so that it is tight. Brickman states that the lubricant is not an adhesive, and is irrelevant to "the chain of events starting with the loss of pressure in the [System] which was a direct result of the negligence of" Trinity and Time Warner in rupturing the Gas Main "that caused the threaded fittings in the pipe to leak so that, as a result, the [System] would no longer hold the gas" (Pl. Op. Aff., Exh. B, ¶ 18). Brickman further states that:

"[t]his development, namely the threaded fittings in the pipe leaking so that, as a result, the [System] would no longer hold the gas. In my professional opinion, that

happened to the otherwise well functioning gas system at 225 Adams Street upon the rupturing of the [Gas Main] serving the building by [Trinity], which was due to the negligence of [Trinity] and Time Warner”

(*id.*, ¶ 19).

Brickman challenges Keyspan’s claim that its testing was not negligent and did not cause damages to the Gas System, by stating that Keyspan did not produce an eyewitness to all of its actions at 225 Adams Street, or certain disclosure that he believes Keyspan either has or should have concerning: regulator(s) or reducing valves it changed, testing of the Gas System, and testing procedures. Brickman states that no one from Keyspan appeared to know if the regulators had been changed, but when he visited 225 Adams Street, over a year after the incident, in March 2004, a regulator appeared to be “relatively new.” Brickman states that this is consistent with the testimony of plaintiff’s plumbing contractor, who did not witness the inspection of the regulators, but testified that he saw Keyspan changing regulators which were removed from the site.

Brickman describes the deposition testimony of Torres, who conducted the testing, as unclear and troubling in that it suggests that the service valve was activated when the status of the reducing valve was not known. Brickman points out that Torres’s testimony suggests that he tested the Gas System with gas which, Brickman avers, is “prohibited” (Pl. Op. Aff., Exh. B, ¶ 30). Consequently, Brickman opines that he cannot rule out negligence on the part of Keyspan, and believes that there are “factual issues respecting . . . Keyspan’s liability which must await trial”(*id.*)

On a motion for summary judgment, the court’s function is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Once a movant meets its summary judgment burden, however, the non-moving party “must assemble and lay bare its affirmative proof to demonstrate the existence of genuine, triable issues”

(*Corcoran Group, Inc. v Morris*, 107 AD2d 622, 624 [1st Dept], *affd* 64 NY2d 1034 [1985]; *Kornfeld v NRX Tech.*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]).

For purposes of this motion, the court is presuming as true plaintiff's assertions that the Gas Main is a high-pressure gas line, and the Gas System a low-pressure system that operated prior to rupture, and passed tests necessary to obtain a COO in 1951 or 1959.¹³ Also presumed true, is that the other buildings in plaintiff's cooperative complex still have their original gas systems in operation, without incident, that only 225 Adams Street was served by the Gas Main (*see* Pl. Op. Aff., Exh. B, at 3, ¶ 7 n 1), and that gas systems in the other buildings were not affected by the incident.

Defendants maintain that they have demonstrated that the Gas System's leaks, and plaintiff's damages, were not caused by the rupture, the crimping of the Gas Main, the suspension of gas service to Building, or Keyspan's testing. As previously stated, to establish a *prima facie* case for negligence, a plaintiff must prove injury proximately resulting from the breach of a duty owed to it (*Chunhye Kang-Kim*, 29 AD3d at 59; *Solomon*, 66 NY2d at 1027). In addition,

“[e]vidence of negligence is not enough by itself to establish liability. It must also be proved that the negligence was the cause of the event which produced the harm sustained by one who brings the complaint. Further, liability may not be imposed upon a party whose alleged negligence merely furnishes the condition or occasion for the occurrence of the event and is not the proximate cause of the accident”

(*Howell v Bacc Bldrs., Inc.*, 13 AD3d 341, 341-342 [2d Dept 2004] [citations and internal quotation marks omitted]; *Sheehan v City of New York*, 40 NY2d 496, 501 [1976]). “[P]laintiff is not required to exclude every other possible cause, but need only offer evidence from which

¹³Plaintiff's expert states that the COO was issued in 1959. Trinity provides a copy of the Building's original COO, dated 1951.

proximate cause may reasonably be inferred” (*Burgos v Aqueduct Realty Corp.*, 92 NY2d 544, 550 [1998]; see *Schneider v Kings Highway Hosp. Ctr.*, 67 NY2d 743, 744-745 [1986]).

Plaintiff’s claim is that the harm to its Gas System was caused by two events. The first was Trinity’s puncturing of the outside Gas Main, which necessitated the crimping of the gas line and the shutting off of gas to the Building. The second was Keyspan’s allegedly improper testing of the Gas System, conducted days after the rupture. Addressing the latter contention first, plaintiff argues that Keyspan’s conduct in testing and repairing the Gas System was a hazardous activity, for which Keyspan should be held liable (Pl. Op Aff., at 26, ¶ 95), and that due to the absence of certain discovery concerning testing, valve changing procedures and the regulator(s), Keyspan’s role in the incident is not clear.

The parties do not dispute, and plaintiff states, that Keyspan was required by law to test the Gas System. Moreover, Keyspan has produced admissible evidence, Torres’s testimony, that its testing was within the NYC Code requirements.¹⁴ There is no other evidence in this record that testing was done at another pressure rate. Accordingly, based on Torres’s testimony and Schwalje’s affidavit, Keyspan has met its burden on summary judgment.

Plaintiff argues that there is testimony in the record that the regulator was replaced and that “replacement of valves around the time of the testing has a significant effect on the condition of the piping subject to the testing” (Pl. Op Aff., at 24, ¶ 88). Assuming Keyspan did change regulators or reducing valves, however, plaintiff provides no admissible evidence to demonstrate that the change would have or could have adversely affected the Gas System’s condition.

Brickman does not opine, to a reasonable degree of certainty, that anything Keyspan did in

¹⁴The NYC Code concerning testing gas systems “embodies a legislative determination that a gas system that leaks under the more extreme condition should not be put back into service, and must be repaired or replaced” (*Simkowitz v Firemen’s Fund Ins. Co.*, 5 AD3d 283, 284 [1st Dept 2004] quoting *St. Paul Fire & Mar. Ins. Co. v 111 Tenants Corp.*, 2003 WL 21242998, *4 [SD NY 2003] [internal quotation marks omitted]).

testing caused, or could have caused, the Gas System's leaks, or even changed its condition. Indeed, Brickman does not state what the purportedly missing evidence might demonstrate as to Keyspan's alleged role in causing plaintiff's injury. Opinions that are contingent or grounded in noncommittal language are not probative (*see Cillo v Resjefal Corp.*, 16 AD3d 339, 340 [1st Dept 2005] [finding to be conjecture expert testimony that plaintiff's ability to access certain higher paid jobs was "likely" to be negatively impacted by development of her disease further]; *Melino v Lauster*, 195 AD2d 653, 656 [3rd Dept], *affd* 82 NY2d 828 [1993] [testimony that "if plaintiff still has similar symptoms . . . she may" have a permanent injury lacked probative value]).

While plaintiff's counsel alludes to the "troubling" testimony from Torres suggesting that the service valve was activated at a time when the status of a regulator was not known, and states that this would have caused a "very high pressured gas to flow through the Gas System and constituted a hazardous activity (Pl. Op. Aff., at 26, ¶ 94), an attorney's affidavit lacks probative value on summary judgment (*Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585 [1st Dept 1982], *affd* 59 NY2d 688 [1983]). Furthermore, plaintiff filed the note of issue and certificate of readiness and may not defeat summary judgment by speculating about the possible existence of evidence, where it offers only an attorney's affidavit to support its contention that the allegedly missing evidence would raise a triable issue of fact (*Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712, 714 [1st Dept 2005] ["unsubstantiated allegations" are insufficient to defeat summary judgment]; *cf. Melcher v City of New York*, 38 AD3d 376, 377 [1st Dept 2007] [denying plaintiff's invocation of CPLR 3212 (f) in opposition to summary judgment where plaintiff "waived her right to further disclosure when she filed her note of issue"]). Thus, Keyspan's motion for summary judgment is granted.

Time Warner and Trinity have also met their initial summary judgment burden with

Schwalje's expert affidavit. In response, however, plaintiff has sufficiently refuted such proof, by the submission of its experts affidavit; there are material issues of fact as to Time Warner and Trinity's negligence in the damage to plaintiff's gas system to warrant a denial of Time Warner and Trinity's motion for summary judgment. Specifically, in his affidavit, Brickman disputes the contention that the Gas System was leaking prior to November 19, 2002 and asserts that the Gas System was not leaking until after the rupture. Brickman further indicates that the presence of rust on the pipes was "not significant" and that "[b]lack iron rusts and will last up to 50 years with rust on it". (Pl. Op. Aff., Exh B ¶ 8). Brickman maintains that "[i]n my professional opinion, the rust did not cause the failure of the low pressure gas distribution system and is not evidence that the low pressure gas distribution system...was leaking prior to the abrupt loss of service caused by [d]efendants Trinity...and Time Warner". (*Id.*). According to Brickman, "[a]t the moment that [d]efendant Trinity...ruptured the 6" high pressure gas line serving 225 Adams Street, the building lost gas service. There are reports of a gas smell in the apartments. In my professional opinion, that is most likely an explanation for the pilot lights in the stove going out is the drop in gas pressure resulting from the rupture. Some gas escaped in the building as the pilot lights went out. The loss of pressure in the gas lines and the introduction of air and humidity into a previously closed system then occurred". (*Id.* at ¶ 13).

Moreover, Brickman specifically refutes that the loss of the threaded connection was due to the age of the pipe and the aging material originally used by the installer to lubricate the threads. Brickman asserts that "[t]his lubricating material, which today is Teflon and previously was a type of joint compound is irrelevant to the chain of events starting with the loss of pressure in the low pressure gas distribution system which was a direct result of the negligence of [d]efendants Trinity...and Time Warner in rupturing the 6" high pressure gas line...that caused the

threaded fittings in the pipe to leak so that, as a result, the low pressure gas distribution system would no longer hold the gas...[i]n my professional opinion, that happened to the otherwise well functioning gas system...upon the rupturing of the 6" high pressure gas line serving the building by ...Trinity, which was due to the negligence of ...Trinity...and Time Warner". (*Id.* at ¶¶ 18, 19). Thus, Time Warner and Trinity's motions for summary judgment are denied.

Third-party defendant CLS's motion for summary judgment is also denied. In seeking summary judgment, CLS merely argues that plaintiff's claims fail, however, plaintiff has not asserted any direct claims against third-party defendant CLS. Thus, CLS's motion for summary judgment is denied.

That portion of Defendants' motions which seeks to dismiss plaintiff's claim that they engaged in an abnormally dangerous activity is granted. *See Searle v. Suburban Propane Division of Quantum Chemical Corporation*, 263 AD2d 335 (3rd Dept 2000)(holding that the installation or maintenance of a propane gas storage tank, transmission system and fixtures does not represent an ultra hazardous activity). There is no proof in the record to support a basis for the imposition of strict liability based upon abnormally dangerous activity.

That portion of Trinity's motion which seeks bifurcation of the liability and damages portion of the trial of this case is granted. As the issues as to liability are complex, bifurcation will assist in simplifying the issues to be considered by the jury. The Court notes that plaintiff does not object to bifurcation. (Pl. Op. Aff., ¶ 110)

Trinity's cross-motion to dismiss plaintiff's third cause of action which is based upon defendants' alleged statutory duties pursuant to General Business Law Article 36 (GBL § 760 et seq.), Public Service Law § 119-b, Industrial Code 53 (Part 753 of the GBL) and 16 NYCRR 753-1.1, et seq., for failure to state a cause of action, is granted; such statutes do not provide for

private *causes of action* on behalf of an adjacent landowner, for an alleged breach. *See N.A. Orlando Contracting Corp. v. Consolidated Edison Co.*, 129 Misc 2d 1077, *affirmed* 131 AD2d 827 (2nd Dept 1987). A violation of the asserted statutes/regulations may constitute some evidence of negligence, however, they do not provide a basis to assert a separate cause of action; nor has plaintiff cited case law in support of its position that the statutes/regulations provide for a private cause of action.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (motion seq. no. 012) is denied; and it is further;

ORDERED that the motion for summary judgment of Time Warner Cable of New York City sued herein as Time Warner Cable of New York City, Time Warner Entertainment Co. Inc. and Time Warner Inc. (motion seq. no. 010) is denied; and it is further

ORDERED that the motion for summary judgment of Keyspan Energy Delivery sued herein as Keyspan Corporation (motion seq. no. 008) is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion for, *inter alia*, summary judgment of Trinity Communications Corp. (motion seq. no. 011) is granted to the extent that (1) plaintiff's fourth cause of action is dismissed from this case; and (2) Trinity's request that the liability and damages portions of the trial of this case be bifurcated, is granted with scheduling and whether to utilize the same jury for each portion of the trial, to be determined by the presiding judge in the TAP Part or the trial judge; and it is further

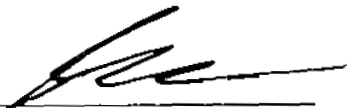
ORDERED that Trinity Communications Corp.'s cross motion to dismiss the third cause

of action in the complaint is granted for failure to state a cause of action; and it is further

ORDERED that the motion for summary judgment of third-party defendant Central Locating Service, Ltd.'s. (motion seq. no. 009) is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: April 15, 2008



Hon. Doris Ling-Cohan, J.S.C.

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