SHORT FORM ORDER

INDEX No. 04-28461
CAL. No. 07-0216-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 2-13-07
ADJ. DATE 4-16-08
MNEMONIC: # 002 - MG; CASEDISP

MAIDSTONE CLUB,

Plaintiff,

- against -

AAA SPRINKLER CORP.,

Defendant.

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Upon the following papers numbered 1 to 29 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 16 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 17 - 25 ; Replying Affidavits and supporting papers 26 - 29 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (002) by the defendant, AAA Sprinkler Corp., pursuant to 3212 for summary judgment dismissing the complaint, is granted and the complaint of this action is dismissed with prejudice.

The plaintiff has commenced this action arising from an incident on December 3, 2002 where an elbow connecting pipes in a sprinkler system broke, allegedly causing flooding in the premises known as the Maidstone Club, East Hampton, L.I., New York. The complaint set forth causes of action for negligence, breach of contract, breach of express warranties, and breach of implied warranties.

The defendant, AAA Sprinkler Corp. (hereinafter AAA), seeks summary judgment dismissing all the causes of action in the complaint, and supports the motion (002) with, inter alia, an attorney's affirmation; copies of the pleadings, bill of particulars, notice to admit, the plaintiff's response to the notice to admit; copies of the transcripts of the examinations before trial of Michael Gyure (hereinafter Gyure) on behalf of the Maidstone Club (hereinafter Club) and Carmine Geonine (hereinafter Geonine) of AAA; and a copy of the Fire Sprinkler Quotation, dated January 20, 1999, and the Agreement, dated April 6, 1999.

The plaintiff opposes this motion by submitting, inter alia, an attorney's affirmation; a copy of the amended and supplemental bill of particulars; a copy of the

expert disclosures from the plaintiff's expert, Anthony K. Musumeci, P.E. of Emtech Consultants Professional Engineers LLC, dated March 26, 2007 and May 16, 2007; copies of the transcripts of the examinations before trial of Gyure for the Club and Geonine for AAA; and a copy of the Fire Sprinkler Quotation, dated January 20, 1999.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

The Fire Sprinkler Quotation, dated January 20, 1999, lists the terms of the sprinkler work to be performed at the Club by the defendant for a quote in the amount of $22,500.00. It is signed by Richard Dand on behalf of AAA, with general conditions annexed thereto. The Sprinkler Inspection Agreements, dated April 6, 1999, April 6, 2000, April 17, 2001, have been provided together with an agreement stamped "Received May 0, 2002"

The plaintiff's response to the Notice to Admit, dated February 27, 2002, provides, inter alia, that Robert Gallagher was the general manager of the Club and was authorized to enter into contracts and approve payments on January 22, 1999, and signed the AAA January 20, 1999 proposed sprinkler work agreement which provided for the altering of the existing dry pipe sprinkler system. Plaintiff further admitted that, on January 22, 1999, the "Fire Quotation" (Fire Sprinkler Quotation), dated January 20, 1999, became a contract between AAA and Club, with the "General Conditions" made part of the proposal, and that, on April 1, 2000, AAA and the Club entered into an agreement which provided AAA would perform the fire sprinkler inspection services, excluding the compact or compactor room and garbage chutes, repairs and maintenance work on the sprinkler system, and fire pumps, backflow preventers, pressure or gravity tank, tests or certification.

At his deposition, Gyure testified that he had been the general manager of the Club since February, 2003 and that the Club was owned by the membership and run by a board of governors to whom he reported. The Club was open only to members from late April through December 31st, its beach and tennis courts open only for the summer season, and its golf course open for a six month season. Gyure testified that an employee lived at the Club year round, but later stated that there hadn't been a person living consistently in the building through the months when the Club was closed. He stated that someone was there every day, and that person was to make sure that there was nothing wrong. He further testified that his responsibilities were to oversee the operations of the Club, to make sure that the policies established by the Club's Board of Governors were implemented, and also to oversee the other employees who reported to the department heads: comptroller, dining services manager, assistant manager, golf, tennis and swim professionals, junior activity manager, buildings manager or maintenance supervisor, beach manager, security and grounds superintendent.

He testified that the building manager was the person who would come to him with any problem, including the sprinkler system. He stated the Club contracted with a company to make sure that the Club was in compliance with all local and state laws, and that it worked closely with the Village of East Hampton Fire Marshal (hereinafter Fire Marshall) who once a year physically inspected the sprinkler system. He stated the Club did not require its employees to be familiar with the National Fire Protection Association (hereinafter NFPA) or take any training with the NFPA provisions. He also testified he was aware that AAA installed, maintained and inspected the sprinkler system at the Club and had provided such service for the last twenty years, but was not currently doing work for the Club.

He testified that, on December 3, 2003, about 11 pm, an elbow in a portion of the sprinkler system burst on a pipe located in the northern part of the clubhouse in attic ceiling space above the ballroom on the second floor. He stated water flowed from the system and drenched a portion of the clubhouse. A number of employees were in the building at the time because they lived there in staff quarters located on the second and third floors of the east wing of the main clubhouse. He received a phone call informing him that the alarms were going off, and also a phone call from ADT, an alarm company, advising him there was a sprinkler release and the fire brigade had been dispatched. He was not in the building when he received the phone calls and, upon arriving at the Club and entering the front doors of the clubhouse, he observed water from the ballroom ceiling cascading down into the lobby. He thought the water main was turned off in about five minutes, but the water in the sprinkler pipes continued flowing for a good half hour as once the pipe burst it opened the sprinkler heads. He did not call AAA that night, and he did not know if Stewart Bennet, the maintenance supervisor or building manager, called AAA. He stated the representative from Granite State Insurance of New York, the plaintiff's insurance carrier, came to inspect the scene along with a representative of York Claims, the adjustor. The final repairs were done about a year later.

Gyure testified there had been previous renovations wherein the ballroom was redone prior to February, 2003. Regarding a proposal from AAA, dated July 16, 2003, for a proposed new bathroom and mechanic room, he thought the project was completed in the spring or fall of 2004 but by another company. He stated that nothing was done in the attic where the problem occurred, and that it remained the same.

Gyure further testified that he was told that the elbow, the metal pipe, on the sprinkler system, had burst and water came out at that point. He stated it was surmised that there must have been water in the system. He stated it was a dry system and was not intended to be in areas where the temperature was below freezing, but he believed the water in the system froze and expanded, bursting the metal pipe.

At his deposition, Geonine testified that he retired from AAA after forty nine years, and that the business closed in February, 2006. He described AAA as providing fire sprinkler installation service and inspection. He stated that he had licenses from New York City and about ten Long Island towns which allowed him to perform sprinkler work and fire protection work in those jurisdictions. In January, 1999, he was the president of AAA and it had about thirty employees including office staff, draftsmen and draftswomen, estimators, field operatives, and mechanics and helpers who could work their way up in an apprentice-like system.

Geonine testified that AAA had a service or maintenance relationship with the Club since the late 1970's. Although AAA installed the initial sprinkler system in the Club, he did not know when it was done, but stated the last modification was done in 1999. He further said this modification was pursuant to the standard form of a quotation which was also utilized as a contract and was carried forward as a contract. He also said that the quotation and the General Conditions (AAA Form G-1, paragraphs 1-24) formed the total contract for AAA and the acceptance by the owner. He thought the sprinkler system was a wet and dry system wherein part of the system was water year round and a part of the system was dry and did not have water in the pipes. He stated that if the building was heated year round, it would be a wet system, and if the building was unheated part of the year, it would be a dry system. If there was an area on the wet side that protected a small outside area, that may have been part of the dry system and the exterior areas that did not have heat would be part of the dry system. The wet system did not have a compressor, but the dry system did and it maintained air in the pipe work to hold back the seat of the dry pipe valve so that water did not enter the system. In 1999, there was some retrofit work done on the dining room (ballroom) area and surrounding areas.

He first learned of the leak in the sprinkler system in 2004 when he was served a copy of the summons and complaint, dated December 2, 2004.[1] He stated they had a twenty four hour emergency number in effect in December 2003 with a call forwarding system on AAA's telephone system that would call a number of people in sequence, and no one knew about this leak. At the time this incident occurred, the Club was not one of its accounts as AAA did not receive the return of its invoice for inspection. There was a new manager at the Club and the account was turned over to another (sprinkler) company.

Geonine testified that it would be very difficult to say that AAA improperly installed something, as it (the system) was approved by the authorities having jurisdiction

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[1]The affidavit of service indicates service of the summons and complaint was made February 23, 2005.

under inspection by the local Fire Marshal. The January 20, 1999 sprinkler modification was done in the attic, consisting of heads and pipes, and that the HVC units in the attic required sprinkler heads underneath due to size as the oversized units blocked the sprinkler head space in the attic. He further testified that in March, 1999, there was a repair of a broken head and a reset of the dry pipe valve, and draining of all the low points done on this modification project because construction workers at the Club broke the sprinkler head. He stated the valve was left in an open position and the system was operating.

Pursuant to the inspection agreement between the parties, Geonine testified the system was checked on a monthly basis and every quarter there was a water flow test for the insurance company, depending upon its requirements and a main drain test was done annually. In the five year insurance company test, water was not introduced into the dry pipes, but pressure valves and the operation of the system was checked so as not to allow water to go into the system. During routine inspections conducted under the terms of the contract, water was not introduced to the dry system as everything was done on a bypass of the dry valves. He stated it was the responsibility of the owner to drain all the low points, and that was indicated in the NFPA standards. He stated it was also the responsibility of the owner to blow down the system and make sure the compressor was operating properly, maintain the compressor, and make sure the valves opened and closed properly, and also make sure there were no birds nests in the water motor or other things such as soda cans. Geonine indicated that the last invoice for work at the Club was February 25, 2003. A proposal was prepared and sent to the Club for inspecting and maintaining the system between May 2003 and April 2004. He stated that until November 2003 AAA was doing inspections for the Club, and he notified the Fire Marshal in 2004 that AAA was no longer doing the inspections. He stated that the last inspection was November 2003. He believed AAA's employees were having problems getting into the building, and AAA's policy was that if it couldn't inspect the system after two times, it notified the customer of that, and if AAA couldn't get in a third time, it dropped the inspection because AAA did not want to be liable for anything that occurred. He stated in January 2003 AAA made an emergency service call where AAA removed two frozen dry pendant heads and put plugs in, reset the system and put the system back in operation. In May 2003 AAA relocated two sprinkler heads in the attic and kitchen and an inspection was done on October 30, 2003.

In reviewing the submissions, it is determined that the agreement provided essentially that AAA was to provide services to the Club for the installation of a sprinkler system, not the sale of goods (*See generally,* ***Milau Associates, Inc. v North Avenue Development Corp,*** 42 NY2d 482, 398 NYS2d 882 [1977]). "From its inception, the 'English rule' served as a basis for applying the commercial law of sales whenever a transaction resulted in a transfer of chattels. Applying this formulation in ***Lee v Griffin*** (1 B & S 272, 121 Eng Rep 716 [KB, 1861]), Justice Blackburn held that a contract to manufacture and fit a set of false teeth was subject to sales remedies. Courts in the United States, however, generally followed the 'labor rule', under which the law of sales would not be applied if the contract required a workman 'to put materials together and construct an article for the employer' (***Mixer v Howarth,*** 38 Mass [21 Pick] 205, 207 [1838])" (***Milau Associates, Inc. v North Avenue Development Corp.,*** supra).

FIRST CAUSE OF ACTION

AAA seeks dismissal of the first cause of action as the statute of limitation had expired when the action was commenced. The plaintiff has pleaded that the defendant owed a duty to the plaintiffs to perform and/or supervise activities of those subcontractors in selection of parts/equipment for its work; to hire competent employees, agents, servants, inter alia; and that the defendant breached that duty by failing to supervise or use due care or to perform those duties causing the plaintiff to suffer severe financial damages. In reviewing the cause of action as pleaded, it is determined that the plaintiff has pleaded a cause of action for negligence.

"As suggested in ***Pearlmutter v Beth David Hosp.,*** (308 NY 100, 104), citation added, those who hire experts for the predominant purpose of rendering services, relying on their special skills, cannot expect infallibility. Reasonable expectations, not perfect results in the face of any and all contingencies, will be ensured under a traditional negligence standard of conduct. In other words, unless the parties have contractually bound themselves to a higher standard of conduct, reasonable care and competence owed generally by practitioners in the particular trade or profession defines the limits of an injured party's justifiable demands (e.g. ***Aegis Prods. v Arriflex Corp. of Amer.***, 25 AD2d 639 [recognizing that in cases where 'the service is performed negligently, the cause of action accruing is for that negligence,' and 'if it constitutes a breach of contract, the action is for that breach])" (***Milau Associates, Inc. v North Avenue Development Corp,*** supra).

In the instant action, the first cause of action as stated is merely a restatement of the breach of contractual obligations asserted in the second cause of action for breach of contract and does not set forth that a legal duty independent of the contract itself has been violated. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract" (***Clark-Fitzpatrick, Inc. v Long Island Rail Road Company,*** supra]). "Merely charging a breach of a "duty of care," employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim (***Clark-Fitzpatrick, Inc., v Long Island Rail Road Company,*** 70 NY2d 382, 521 NYS2d 653 [1987]). Based upon the foregoing, although the plaintiff has labeled the first cause of action as one for negligence, the Court finds that the first cause of action is duplicative of the second cause of action for breach of contract.

Accordingly, the first cause of action is dismissed.

SECOND CAUSE OF ACTION FOR BREACH OF CONTRACT

The second cause of action alleges the contract was entered into between the parties with the defendant performing certain activities related to the fire protection system, and, inter alia, the defendant agreed to perform and/or supervise the activities related to the work in a careful, safe, proper, professional and non-negligent manner, using appropriate supervision, personnel, contractors, subcontractors, employees, servants, techniques and

material which did not cause damage to the premises or the plaintiff, and that the defendant breached the contract though its acts and/or omissions.

AAA seeks dismissal of the second cause of action for breach of contract. It contends that the plaintiff breached the contractual provisions of the contract by not timely notifying the defendant of the claimed damages and by not giving the defendant the opportunity to timely inspect the damages, thus waiving all rights of recovery against the defendant. AAA also claims that the plaintiff has failed to plead with specificity that part of the contract which the defendant is alleged to have breached.

The Fire Sprinkler Quotation, dated January 20, 1999, provided for work to alter the existing dry pipe sprinkler system for Club's proposed renovations. The proposal further required that it would be the owner's responsibility to supply sufficient heat where wet sprinkler piping was installed to prevent the pipe from freezing during cold weather. The owner was to hold AAA harmless against any damages due to freeze ups.

Pursuant to the contract agreement, at paragraph 17, AAA guaranteed the installation against defective workmanship and material for a period of one (1) year from the date of completion. AAA's liability in respect to its guarantee herein was limited to the expense which it would be obliged to incur in correcting the defective workmanship or material. Paragraph 18 of the contract provided that "in the event of damages... claimed by the owner, his agent or his tenants, notification shall be given to AAA within 24 hours of any loss." It was further agreed that any goods or property reported damaged shall be available for inspection by AAA or its authorized representative. It was also agreed to that "[i]f notification is not given to AAA at its place of business as indicated on its agreement, it is agreed that the Owner...waives all rights of recovery."

Gyure, in his deposition testimony, stated that he did not believe that he notified AAA that night (December 3, 2003) of the water leak problem and he did not recall if the maintenance supervisor, Stewart Bennet, called AAA to advise it of the problem. Geonine, in his deposition, testified AAA was not notified of the incident until served with the summons and complaint, which affidavit of service indicates that service was made on February 23, 2005. The agreement provides that "[i]f notification is not given to AAA at its place of business as indicated on its agreement, it is agreed that the Owner...waives all rights of recovery." Thus AAA has established prima facie entitlement to summary judgment on the waiver provisions which would preclude recovery by the Club.

The plaintiff has opposed the defendant's motion to dismiss. However, in his deposition, Gyure testified that he did not notify AAA of the incident and did not know if Stewart Bennet notified AAA of the incident. Therefore, the plaintiff has not raised a factual issue to preclude summary judgment concerning the waiver provisions of the agreement between the parties. The plaintiff has not produced an affidavit from Stewart Bennet or anyone else, which demonstrates that AAA was timely notified of the incident complained of herein at any time prior to the service of the summons and complaint or that timely opportunity was provided to AAA to inspect the premises where the incident occurred.

Accordingly, the second cause of action for breach of contract is dismissed.

THIRD AND FOURTH CAUSES OF ACTION

AAA seeks dismissal of the third and fourth causes of action for breach of express and implied warranties, arguing that these causes of action are not applicable to service contracts.

It is determined that express and implied warranties apply to the sale of goods and not to service contracts; the express warranty section of the Uniform Commercial Code is no more applicable to a service contract than the code's implied warranty provision (***Milau Associates, Inc. v North Avenue Development Corp,*** supra). As this Court has determined that the within contract is a contract for services, the express and implied warranty provisions do not apply.

Accordingly, that part of the defendant's motion which seeks dismissal of the remaining third and fourth causes of action for breach of express and implied warranties is granted, as a matter of law, and the complaint of this action is dismissed with prejudice.

Dated: 6/12/08

J.S.C.

__X__ FINAL DISPOSITION **____ NON-FINAL DISPOSITION**