

GlobeSpan Telecom. v 65 Broadway, LLC
2008 NY Slip Op 33740(U)
July 25, 2008
Supreme Court, New York County
Docket Number: 601045/06
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
GLOBESPAN TELECOMMUNICATIONS,

DECISION & ORDER

Plaintiff,

-against-

Index No.: 601045/06

65 BROADWAY, LLC, MARSAR WEST, LLC, AM
PROPERTY HOLDING CORP. & DONNELLY
MECHANICAL CORP.,

Defendants.

-----X
TRAVELERS INDEMNITY CO. OF ILLINOIS, a/s/o,
NEW GLOBE COMMUNICATIONS, LLC, & GLOBE
COM TELECOMMUNICATIONS, INC.,

Plaintiffs,

-against-

Index No.: 113141/05

DONNELLY MECHANICAL CORP., A.M.
PROPERTY HOLDING CORP. & 65 BROADWAY
CO., LLC,

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

FILED
JUL 29 2008
NEW YORK
COUNTY CLERK'S OFFICE

These are negligence actions, which have been joined. The actions arose from water damage to telecommunications equipment and other property, caused by an HVAC pipe which froze and burst. The first action was brought by GlobeSpan Telecommunications (GlobeSpan), the tenant who assumed the lease obligations of the original tenant-corporation, GlobeCom which was a related company. In its complaint, Globespan sought recovery against Donnelly Mechanical Corporation (Donnelly), the company that provided service to the subject HVAC system, and against 65 Broadway Co., LLC (65 Broadway), the landlord, Marsar West, LLC

(Marsar) and A.M. Property Holding Corp. (AM), the management company, (collectively “landlord”). The second action was brought by Travelers Indemnity Company of Illinois (Travelers), the tenant’s insurer, as subrogor, to recover for the portion of property damages it paid to its insured. It named 65 Broadway, AM and Donnelly as defendants.

Travelers now moves for summary judgement against Donnelly and landlord. Landlord cross-moves to dismiss Travelers’ action against 65 Broadway, Marsar and AM and the cross-claims of Donnelly. Donnelly cross-moves to dismiss Travelers’ action and all cross-claims against it.¹ Globespan submits papers opposing landlord’s motion to dismiss the actions against 65 Broadway, AM and Marsar and in opposition to Donnelly’s cross-motion.

I. Submissions of Travelers on Motion

Travelers argues that its motion should be granted against all of the defendants in its action, based upon the doctrine of *res ipsa loquitur*, and further argues that landlord was negligent in maintaining the building systems which caused the property damage.

A. Travelers’ Complaint

In its complaint, Travelers alleged negligence as to all of the defendants. It asked for \$250,000 which it paid to its insured, as well as interest and attorney fees. In answer, Donnelly cross-claimed against AM and 65 Broadway, and AM and 65 Broadway cross-claimed against Donnelly.

B. Deposition Testimony

Travelers submits a few, non-contiguous pages of the following depositions: Michael Hoffman, who it describes as the former president of New Globe Communications, LLC; Paul Wasserman, who it describes as the vice president of AM; Mark Faith, who it describes as the

¹Donnelly mistakenly denominates Travelers’ action as a third-party action.

chief engineer of 65 Broadway; and Nick Pepe, who it describes as a senior field supervisor of Donnelly.

C. Lease

Travelers submits the first page and the two page rider of the five year lease. The lease, dated July 8, 1999, was between AM and 65 Broadway as owner and Globe Com., Inc. (GlobeCom) as tenant. The use of the premises was described as "general executive office and switch room and uses incidental thereto." The rider provided that the lease was to commence on August 1, 1999, that the tenant was not permitted to make any structural changes to the premises and that non-structural changes could be made with permission of the owner. Paragraph 4 of the lease provided:

Tenant shall, throughout the term of this lease, take good care of the demised premises and the fixtures and appurtenances therein. Tenant shall be responsible for all damage or injury to the demised premises or any other part of the building and the systems and equipment thereof, whether requiring structural or nonstructural repairs caused by or resulting from carelessness, omission, neglect or improper conduct of Tenant, Tenant's subtenants, agents, employees, invitees or licensees, or which arise out of any work, labor, service or equipment done for or supplied to Tenant or any subtenant or arising out of the installation, use or operation of the property or equipment of Tenant or any subtenant....Owner shall maintain in good working order and repair the exterior and the structural portions of the building, including the structural portions of its demised premises, ... and the building plumbing, electrical heating and ventilating systems (to the extent such system presently exist) serving the demised premises. Tenant agrees to give prompt notice of any defective condition in the premises for which Owner may be responsible hereunder after Tenant is aware of same or should reasonably been aware....

D. Hicks' Affidavit

Alec Hicks, Jr., president of a property management consulting firm, submitted an affidavit. He cites to paragraph 4 of the lease which obligated the owner of the building "to maintain in good working order and repair the structural portions of the building, including the structural portions of its demised premises, and the public portions of the building interior and

the building plumbing, electrical, heating and ventilating systems (to the extent such systems presently exist) serving the demised premises.” Mr. Hicks opines that 65 Broadway was obligated under the lease to maintain the building in a “superior,” “reasonably prudent fashion.” He further opines that building engineers should have been present during the weekend of the incident, “when abnormally, cold temperatures were forecast, to check each floor, and monitor building systems and perimeter temperatures.” He averred that:

A freeze up in a commercial building, of any water-filled pipes, does not typically occur without the negligence of someone who failed to act prudently in exposing such pipes to sources of cold air infiltration. Proper heating, insulation and isolation of pipes that are no longer in service are reasonable steps that can almost always eliminate the risks of a freeze up condition.

Mr. Hicks listed the following protocols which should have been taken by building management: a permanent shutdown of water flow in the piping loop of the baseboard radiation unit in the GlobeCom space; inspections; increased temperature checks during unusually cold weather; familiarizing the building engineers with all shutoff valves; implementing extraordinary measures in preparation for extraordinarily cold weather. He opined that: the failure of 65 Broadway and Am to take such measures resulted in the incident; if the water which flowed to the abandoned piping loop leading to the GlobeCom tenancy had been permanently shut down, the freeze -up would not have occurred; and that the baseboard unit should have been checked by the building annually in preparation for the heating season and in times of predicted freezing temperatures.

Mr. Hicks’ unsworn report is annexed to his affidavit. It discusses the facts and gives opinions and conclusions. However, the documents from which the facts were taken and the opinions gleaned were not listed, annexed or cited. The report will not be considered.

E. Steven Pietropaolo Affidavit

Steven Pietropaolo, a licensed engineer and the president of LGI Forensic Group, a forensic consulting and engineering firm, submitted an affidavit. He avers that he is experienced in investigating ruptures in water-filled pipes, including HVAC pipes. He inspected the premises on May 24, 2004 and January 18, 2008, read deposition testimony, saw photographs and building work logs and opines that the freeze up of the subject pipe occurred:

because of the lack of water flow in the building's supply and return hot water flow in the building's supply and return hot water lines of an abandoned radiation unit because the lines were not properly isolated, and because they were close to the exposure from cold exterior air caused by the lack of duct work and proper insulation of the supplemental HVAC system above New Globe's tenancy.

He further opines that the landlord and HVAC maintenance company should have identified the missing duct work, the building owner should have removed the supply pipes to the abandoned baseboard radiation unit in the GlobeSpan space instead of shutting its water valves, Donnelly should have made sure the air intake louver was properly insulated and Donnelly should have replaced the missing duct work of the supplemental HVAC unit. Again, an unsworn report is attached to the affidavit and will not be considered.

II. Submissions of Donnelly in Opposition to Motion & on Cross-Motion

Donnelly cross-moves for summary judgment in its favor, arguing that it did not have actual or constructive notice of the condition which caused the pipe freeze-up and that it did not control the agency or instrumentality that caused the freeze-up. It submitted the following documents.

A. Wasserman Deposition

Paul Wasserman, vice president of AM, a company which manages commercial real estate in the tri-state area, testified that his brother was the president of AM and his father was its

secretary. AM is the managing agent of 65 Broadway and has an office on the seventh floor of the building. AM was responsible for overseeing the physical operations of the building. Mr. Wasserman, his brother and his father, as well as numerous other entities including Marsar, are members of 65 Broadway. Marsar has no management responsibilities for 65 Broadway.

65 Broadway is a twenty-one storey building made up of 350,000 square feet. GlobeCom leased the fourth floor. Globespan never legally replaced GlobeCom as the tenant. Mr. Wasserman did receive rent checks from Globespan and never objected. Indeed, Marsar asked him to work with Globespan.

AM's file for the GlobeCom/Globespan lease, with all the documentation, has been lost.

At the start of the lease term, negotiations were had with the tenant regarding a supplemental air conditioning unit. AM built "a whole new installation" for GlobeCom, hanging a new lowered ceiling, lights, carpets, walls, etc. Mr. Wasserman recalled it was the Tenant's responsibility to install the supplemental air conditioning unit, and he testified that the building, on behalf of GlobeCom, hired an outside vendor, American Aluminum, at GlobeCom's expense. American Aluminum installed the unit, which was to be maintained by GlobeCom. GlobeCom, however, was not pleased with the supplemental unit and AM, at its expense, hired Donnelly to repair the unit and replace components to make it work. Subsequently, GlobeCom used Donnelly and paid Donnelly to maintain the unit. The supplemental unit became GlobeCom's responsibility. Similarly, the build-out was GlobeCom's responsibility. AM was responsible only for the building systems, such as electrical conduits and hot water pipes. The building engineers who worked for 65 Broadway maintained these systems.

AM has security guards at the premises on weekends. Moreover, he testified that water pipes and sprinkler pipes are passively maintained systems and are not checked on a regular basis.

B. Faith Deposition

Mark Faith testified that he has worked at 65 Broadway since 1995 and for AM as its chief engineer since 1999. He has never worked for Marsar West, LLC. In January of 2004, he worked from 9 a.m. to 5 p.m., Mondays through Fridays. Although the building is open on weekends, no building staff is on duty. Heat is provided to the extent that it goes on if the temperature drops below 50 degrees. A security guard, however, is posted in the lobby.

On January 10, 2004, Mr. Faith was called at home by a security guard who told him water was coming through the ceiling of the first floor. He arrived at 65 Broadway and went up to the fourth floor, where he saw flooding in the Globespan space. John Bayer, a building engineer, and a couple of porters were there vacuuming the water in the main office.

Mr. Faith then went into the area of the premises which contained the Globespan machinery (the switch room). By then, the valve on the main water riser had been turned off, but there was water on the floor and the machinery appeared to be damaged. The water came from a 3/4 inch, copper hot water heating pipe which led to the base board radiator. It was used for heating the building and belonged to the building. That pipe-line ran through the Globespan space and went around the edge of the switch room. It was insulated with fiberglass. Prior to January 10, there had never been a problem or complaints regarding the line.

On January 10, Mr. Faith observed that a two-foot portion of the duct work that connected the supplemental air conditioning unit to the outside through an open louver, was removed and missing, allowing cold air into the ceiling space. The louver was placed in a panel,

above the window, and the duct work was part of the supplemental unit. The supplemental air conditioning unit was in the space above the dropped ceiling of the Globespan switch room. A portion of the heating pipe in the ceiling space, froze and burst on January 10. Mr. Faith testified that, other than the heating line, no building equipment was in the area and that no one from the building would have any reason to remove the missing piece of duct. He further testified that the building was unaware of the missing piece of duct until the flood.

The supplemental air conditioning unit was not installed or maintained by the landlord. The unit was installed at the time of the build-out and it was changed shortly thereafter, by a contractor. Mr. Faith did not supervise the installation or reinstallation of the supplemental unit. After the reinstallation, GlobeCom made no complaints about the unit, and it was serviced by an outside contractor hired by GlobeCom. When serviced, the unit was accessed by removing some ceiling tiles.

Mr. Faith recalled that GlobeCom had requested that the heat in its switch room be turned off, at the time it moved into the space. The heating pipe was left in place and the valves supplying hot water to it were shut off by the building. The valves are in the ceiling right above the switch room. However, the pipe running to the valves still contained water, and it was this portion of the pipe that froze and burst.

Mr. Faith testified that there is freeze protection in the building. Temperature sensors sense when the temperature in the building drops below 60 degrees and turn on fans and increase the heat. They were located on the 6th and 12th floors.

At about the same time that the pipe burst in the Globespan space, a cold water pipe leading to a sink also burst in the outside wall of the Variety Café, a deli on the first floor. On January 12, 2008, a sprinkler pipe burst in the building loading dock.

C. Pepe Deposition

Nick Pepe, a senior field supervisor with Donnelly Mechanical, testified that he had worked for Donnelly for 12 years. Donnelly, an HVAC company, is owned by a number of principals and employs approximately 55 people. Mr. Pepe testified that although he had done work at 65 Broadway, he did not believe that he had ever worked in the Globespan space. He, however, testified that Donnelly had installed an air conditioning system at 65 Broadway for GlobeSpan. AM did not have an agreement with Donnelly for work done at 65 Broadway.

Mr. Pepe identified six Donnelly work tickets for work done at Globespan. He interpreted those tickets. On November 16 and 19, 2001, two workers changed the filters and the belts of the air conditioning unit. It was not necessary for a building representative to supervise this work; the Donnelly workers would remove the ceiling tile and access the air conditioner. When doing preventative maintenance, Donnelly did not clean the air conditioner ducts. Possibly they would clean the louvers.

On January 15, 2002, Donnelly cleaned the air conditioner's filters and provided an estimate for a freon leak check and air conditioning repair. On January 22, 2002, the leak check and repair were completed. No duct-work was removed. Indeed, if ducts were removed, the mechanic would note it on the ticket, and the removal would have to be done after obtaining approval from the office. On October 23, 2002, a survey of the air conditioning equipment was done. On January 22, 2003, Donnelly reset a low pressure control, defrosted the coil and adjusted the belts. Finally, on April 11, 2003, the filters were changed and a condenser cover was removed.

D. Hoffman deposition

Michael Hoffman testified that he is currently self-employed and is president of Wave Communications. He had been the general manager of Globespan, LLC from 1999 to March of 2004. He had formed the company with Charles Young, the company's vice president of marketing, and William Marra, who dealt with sales. The company had approximately ten employees. Globespan rented space at 65 Broadway, on the fourth floor, from AM properties. Two other companies also had space on the fourth floor.

On January 10, 2004, he was called at about 3:00 p.m. by one of his technicians who watched the system with the help of a remote monitoring application. He told Mr. Hoffman that there was a red alert on a major system. This meant that the main component of GlobeSpan's system was no longer operational. The technician worked at home and was on his way to the office. No one was physically at the premises. The technician called from the office at approximately 3:30 p.m. and told Mr. Hoffman that he was up to his knees in water and that the equipment was flooded. Two building engineers were in the office, operating a water vacuum. The engineers had been there when the technician arrived.

Mr. Hoffman testified that all maintenance in the space was done by AM. AM replaced the air conditioning unit in 2000 or 2001 by hiring Donnelly and called for maintenance on numerous occasions. However, Globespan paid for the maintenance which was done by Donnelly. Mr. Hoffman identified Donnelly's work tickets as those he had previously seen and paid. Globespan's chief engineer had authority to deal with Donnelly directly, which included calling for maintenance and signing a maintenance contract.

Mr. Hoffman, Mr. Young and Mr. Marra, eventually, arrived at the offices on January 10. Mr. Hoffman was told by Mr. Faith that a pipe had frozen and burst. Mr. Hoffman saw the pipe, which was old and had a big hole in it. January 10 was an extremely cold day.

For four days, work was done on the premises – the location was drained of water and the electricity was repaired. On the fifth day, Globespan was partially operational, but the majority of applications were still down. Globespan never became fully operational. As a result of the flood, the switch machinery, the core of Globespan's equipment, was badly damaged. The switch mechanism was located in Globespan's switch room.

The air conditioning unit had been installed for the switch room to keep the machinery cool. The temperature in the switch room was not to go above 85 degrees. The original unit did not keep the room cool enough. After the new unit was installed, Globespan complained about the heat in the switch room. Globespan personnel did not touch the heating or air conditioning systems or touch anything above the ceiling tile, although one of Globespan's engineers "would try to help service and make sure the work [was] being done." The only companies that worked above the dropped ceiling were AM and Donnelly.

E. Donnelly HVAC Maintenance Contract

The Donnelly HVAC maintenance contract submitted to Globespan, was not signed by Globespan.

F. Pietropaolo Affidavit

Steven Pietropaolo, a licensed engineer and president of LGI Forensic Group, Inc., a forensic consulting and engineering firm, reviewed deposition transcripts, building work logs and photographs and concluded that the damage to Globespan equipment occurred due to a freeze-up in the fourth floor of the building. He opined that "the lack of water flow in the building's supply and return hot water lines of an abandoned radiation unit" caused the freeze-up, since "the lines were not properly isolated, and because they were close to the exposure from

cold exterior air caused by the lack of duct work and proper insulation of the supplemental HVAC system above New Globe's tenancy."

Mr. Pietropaol further opined the landlord and Donnelly should have identified the missing duct work, the landlord should not have abandoned the hot water lines but should have removed the supply pipes rather than shutting down the valves. Manual shut off of the valves was not enough. Donnelly should have ensured that the air intake louver was properly insulated and made sure that dangerous cold air did not enter the premises. Donnelly should have properly insulated and repaired the missing duct work.

G. Donnelly Work Tickets

The work tickets indicated that Donnelly performed the following on the following dates:

November 19, 2001: air conditioning system thoroughly checked and air filters found clogged; 12 air filters and 4 belts replaced.

January 15, 2002: air conditioning system thoroughly checked; air filters replaced; refrigerant checked; estimate for leak check and repair.

January 22, 2002: leak checked and repaired.

October 23, 2002: "a complete survey of all mechanical air conditioning, heating &/or ventilating systems performed;" the general condition of the equipment was noted; air filters and belts were replaced.

January 22, 2003: the low pressure control was reset and checked; "Ductwork adjusted/aligned as required for proper operation; "coils found frozen and defrosted prior to restart of unit;" belts were adjusted and aligned.

April 11, 2003: the air conditioning was not working in the switch room; cover for the condenser air was removed; air filter was checked and replaced.

III. Submission of Landlord on Cross-Motion

A. Faith Affidavit

Mark Faith, the chief building engineer for the landlord, averred that Globespan's space was approximately 3,000 square feet and that there was a small computer/mechanical room within that space. Globespan needed a supplemental air conditioning system to diffuse the heat generated in the computer room. It is standard building practice for a tenant to hire an outside contractor for this work and for Mr. Faith to inspect the work to make sure no damage is done to the building. Globespan hired American to build that unit in the dropped ceiling. The unit had an intake duct and an exhaust duct, both opened to outside air through a window louver. The unit was not an HVAC unit -- a heating, ventilation and air conditioning unit. It was an air conditioning unit only.

The unit was not working properly and Globespan was referred to Donnelly by AM. Donnelly had worked for other tenants in the building. The unit belonged to Globespan, not the building. The only people who had access to the ceiling space were Globespan and Donnelly, and Donnelly worked on the condenser cover, part of the intake duct, in April 2003. The sub-freezing air that froze the pipe on January 10, 2004 came from a louver vent. The pipe that burst was a 3/4 inch standard, copper pipe.

Mr. Faith further averred that there were four sensors in the building in four zones. They acted as thermostats to assure that the occupants of the building were comfortable. They were attached to office walls and triggered the building's systems to turn the temperature up if the temperature fell below a certain level.

The radiator pipe in the Globespan space, created a loop. It ran from above the dropped ceiling to the radiator in the office space and then back up to the ceiling space, creating a

squared-off "U". There was a valve where the pipe turned to go into the office space and another valve where the pipe came back up to the ceiling space and turned horizontally. The water was turned off by turning off the valve. The pipe could not be capped off, since that would have left the radiator in the office space unworkable. It also was needed for sprinkler heads. In addition, Mr. Faith averred that there was a pneumatic control valve which created standing water between the valves. Moreover, he stated that there are thousands of feet of pipe in the building, as well as 2600 shut off valves. It would be impossible to check each valve and all the pipes in extreme weather. Finally, Mr. Faith averred that the loading dock sprinkler pipe-break took place in an unheated mechanical space, and the Variety Café burst pipe occurred in a tenant build-out.

B. American Aluminum Inc. Invoice

The invoice from American Aluminum, Inc. is dated June 22, 1999 and is made out to Glob Com. It refers to 3 ton a/c equipment which was supplied and installed in the ceiling with vibration isolators and ductwork. It also states that window louvers and ducts were fabricated and installed, as well as thermostats.

IV. Travelers' Opposition to Landlord's Cross-Motion

A. Pietropaol Affidavit

Mr. Pietropaolo submitted a further affidavit in which he averred that the facts that the unit was an air-conditioning unit and not an HVAC and that the pipe was 3/4 of an inch thick is immaterial to his opinions. He also opined that the fact that an automatic cut off valve was present was irrelevant since the water was shut off by manual valve. According to Mr. Pietropaolo, the building should have removed the 3/4 inch supply and return line and insulated the one inch building lines or rerouted those lines away from the air condenser supply and ducts.

He agreed that tenants are typically responsible for supplemental air conditioning units and that the removal of the duct was a significant contributing factor in causing the flood.

V. Globespan Opposition to Landlord's Cross-Motion

A. Hicks' Report

The Hicks report, which was not in evidentiary form, was submitted.

B. Young Affidavit

Charles Young, an officer and shareholder of Globespan averred that no employees of Globespan removed ceiling tiles or the duct or entered the ceiling space. The only people who Mr. Young observed enter the ceiling space were individuals who either worked for the landlord or who worked for Donnelly. The landlord has a key to the switch room.

VI. Globespan's Opposition to Donnelly's Cross-Motion

A. Donnelly Work Orders

The Donnelly work tickets and the supporting paperwork was submitted. The work tickets were the same as those previously submitted. However, the January 22, 2003 supporting paperwork additionally stated: "found condenser intake air duct [illegible], close and seal duct, also found coil partially frozen. Defrost coil. Adjust condenser and evaporator belts. Restart unit and test operation. Left working O.K. Intake on Cap. To be removed for Summer operation." The documentation for April 11, 2003 stated; "Checked out a/c uncover condenser intake charge filter unit [ineligible] O/K."

IV. Conclusions of Law

A. Travelers' Summary Judgment Motion

1. Res Ipsa Loquitur

The doctrine of *res ipsa loquitur* permits a trier of fact to consider circumstantial evidence to infer a defendant's negligence. *Morejon v. Rais Construc. Co.*, 7 N.Y.3d 203, 205-6 (2006); *Tarson v. Niagara Mohawk Power Corp.*, 278 A.D.2d 865, 867 (2000). The inference may be invoked against several defendants when they share a common duty and there is no indication any one of them actually caused the injury. *De Witt Properties, Inc. v. New York*, 44 N.Y.2d 417, 427 (1978) citing *Schroeder v. City & County Sav. Bk.*, 293, N.Y. 370, 374 (1944).

Res ipsa loquitur is appropriately invoked when: an event is of a kind which ordinarily does not occur absent someone's negligence; the event was caused by an agency or instrumentality within the exclusive control of the defendant; and the event was not due to any voluntary action on the part of the plaintiff. *Morejon, supra* at 209; *De Witt, supra* at 426; *Butti v. Rollins*, 133 A.D.2d 205 (2d Dept. 1987). "Only in the rarest of *res ipsa loquitur* cases may a plaintiff win summary judgment." *Morejon, supra*. Those are cases "in which no facts are left for determination." *Morejon, id.* at 212. *Accord Simmons v. Neuman*, 50 A.D.3d 666, 667 (2d Dept. 2008)(*res ipsa loquitur* "does not ordinarily or automatically entitle the plaintiff to summary judgment,...even if the plaintiff's circumstantial proof is unrefuted. "); *Tora v. GVP AG*, 31 A.D.3d 341, 342 (1st Dept. 2006)("the only instance when summary judgment must be granted to a plaintiff on a *res ipsa* theory is '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.'). Thus, as noted in the seminal case of *Corcoran v. Banner Super Market, Inc.*, 19 N.Y.2d 425, 431 (1967):

It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, *it is still necessary to bring it home to the defendant.*

Here, Travelers has failed to carry the heavy burden of demonstrating its right to summary judgment based on *res ipsa loquitur*. The broken water pipe was an event which normally would not have occurred absent someone's negligence. *See De Witt, supra* at 426("water mains do not ordinarily break if they are properly maintained"). Nonetheless, on the proof submitted, issues of fact exist as to whether the pipe, the ductwork and the louver were in the exclusive control of defendants, landlord and Donnelly, and whether any voluntary action on the part of Globespan contributed to the break. The evidence submitted indicates that plaintiff as well as Donnelly and the landlord had access to and control of the ceiling area containing the hot water line, ductwork to the air conditioner and the louver. Further, Mr. Hoffman, the general manager of Globespan, testified that Globespan's engineers "would try to help [Donnelly] and make sure the work [on the supplemental air conditioner was] being done." Service to the air conditioner was required to make sure the air conditioner cooled the switch room, and the service tickets indicated that during the January 22, 2003 and April 4, 2003 service, the ductwork was worked on. Whether Globespan's engineers helped in this work or oversaw and knew of this work is a question for the jury.

2. *Negligence of Landlord*

Nor can Travelers succeed on its motion against 65 Broadway and AM. Although they, as the landlord, owed Globespan the duty to maintain the premises, including the water lines, in a reasonably safe condition, issues of fact exist as to whether they acted unreasonably and whether their conduct was a proximate cause of the injury,

To explain, Travelers' contends that the landlord was negligent because: it was the landlord's obligation to maintain the hot water line in good working order; the landlord failed to inspect all of the water pipes in the building when extreme cold was forecast; and the landlord

shut the valves to Globespan's baseboard heat in the switch room, leaving standing water in the line, but should have removed the entire line instead. Further, it contends that the landlord's negligence was a proximate cause of the damage to its property. However, landlord submitted evidence that it would not have been reasonable for it to have inspected thousands of feet of pipe and 2600 water valves every time New York City experienced extremely cold weather, that temperature in the building was kept above 50 degrees Fahrenheit and that it could not remove the subject water line since it was needed for Globespan's sprinkler system. Also, a jury question exists as to whether Donnelly, not landlord, was the sole proximate cause of the damage.

B. Donnelly Cross-Motion

The parties all agree that, at the very least, the removal of the ductwork and the open louver were contributing factors causing the burst pipe and flood. The Donnelly work tickets and supporting paperwork make clear that Donnelly did work on the supplemental air conditioning system and, specifically, both adjusted and aligned it and removed a portion of it. This occurred months before the flood, but does raise a question for the jury as to Donnelly's liability.

C. Landlord's Cross-Motion

As noted above, questions of fact exist as to whether landlord's actions in shutting off the water flow to the radiation system was negligent. AM and 65 Broadway, therefore, remain parties to the action. However, in searching the record, Marsar is dismissed from the action. The record demonstrates that Marsar is but one of many entities who are members of 65 Broadway. Marsar did nothing, on this record, to make it personally liable in this action.

Accordingly, it is

ORDERED that Travelers' motion for summary judgment is denied; and it is further

ORDERED that the cross-motion of Donnelly Mechanical Corp. seeking summary judgment is denied; and it is further

ORDERED that the cross-motion of A.M. Property Holding Corp. And 65 Broadway Co., LLC seeking summary judgment is denied; and it is further

ORDERED that Marsar West, LLC is dismissed from this action, the remainder of the action is severed and shall continue and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the remaining parties are directed to appear for a pre-trial conference in Part 54, Room 1227, 111 Centre Street, New York, NY, on August 14, 2008 at 9:30 a.m.

July 25, 2008

ENTER

J.S.C.

FILED

JUL 29 2008

NEW YORK
COUNTY CLERK'S OFFICE