

Tyco Telecom. (U.S.) Inc. v 32 Ave. of the Ams., LLC
2009 NY Slip Op 32476(U)
October 19, 2009
Supreme Court, New York County
Docket Number: 114627/04
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 114627/2004
TYCO TELECOMMUNICATIONS (US)
 VS.
32 AVENUE OF THE AMERICAS LLC
 SEQUENCE NUMBER : 004
 SUMMARY JUDGMENT

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...
 Answering Affidavits -- Exhibits _____
 Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is consolidated with motion
 Seq 005 & 006 and decided in accordance with the
 attached memorandum decision

FILED
 OCT 26 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

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

Dated: 10/19/09


WALTER B. TOLUB s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

-----X

TYCO TELECOMMUNICATIONS (U.S.) INC.,

Plaintiff,

Index No. 114627/04

-against-

32 AVENUE OF THE AMERICAS, LLC, RUDIN
MANAGEMENT CO., T-MOBILE USA INC., WATTS
REGULATOR CO., PJ MECHANICAL SERVICE &
MAINTENANCE CORP., PM CONTRACTING COMPANY
LLC., and UNITED AIR CONDITIONING CORP.,

Defendant.

-----X

Tolub, J.:

In motion sequence number 004, defendant Watts Regulator Co. (Watts) moves, pursuant to CPLR 3212, for summary judgment in its favor, dismissing the complaint. In motion sequence 005, defendant T-Mobile USA Inc. (T-Mobile) seeks leave to amend its answer to assert cross claims for common-law indemnity, contribution, and negligent hiring against defendant United Air Conditioning Corp. (United) and for contribution and common-law indemnity against defendant PM Contracting Company LLC. (PM Contracting). In motion sequence 006, defendants 32 Sixth Avenue Company, LLC (32 Sixth Avenue), sued herein as 32 Avenue of the Americas, LLC, and Rudin Management Co., Inc. seek leave to amend their answer to assert cross claims for common-law indemnity and contribution against defendants PM Contracting, United, and PJ

Mechanical Service & Maintenance Corp. (PJ Mechanical), as well as claims for breach of contract against PM Contracting and United.

Motions with sequence numbers 004, 005, and 006 are hereby consolidated for disposition.

Background

This action for property damage arises out a flood that occurred on March 5, 2003 at 32 Avenue of the Americas (the Premises). Plaintiff Tyco Telecommunications (U.S.) Inc. (Tyco), a tenant on the 9th floor of the Premises, allegedly incurred several million dollars worth of damage to its optical network equipment when approximately five gallons of water leaked through the 9th floor ceiling from defendant T-Mobile's office space on the 12th floor.

The leak originated from two anti-siphon valves, manufactured by Watts, that were part of the air conditioning units on the 12th floor. The Watts 800M4 Valve is a pressure vacuum breaker backflow preventer. The pressure vacuum breaker prevents backflow with two independent components, an air inlet valve and a check valve. Amended Notice of Motion, Exhibit A, ¶ 7.

On March 4, 2003, the water supply at the Premises was shut off, and the air inlet valve opened as the water pressure was reduced. Watts asserts, as support by its expert's affidavit,

that the air inlet valve was supposed to open when the water pressure dropped below a certain level, in accordance with national standards. *Id.*, ¶ 8. On March 5, 2003, the water supply was restored; however, the air inlet valve did not close, allegedly causing the flood. In the opinion of Watts' expert, while the water system was refilling, the water pressure remained below the minimum pressure required for the air inlet valve to close, and this allowed water to discharge from the valves, as they were designed to do. *Id.*, ¶ 10. While the valves remained open, water seeped through the 9th floor ceiling, destroying Tyco's telecommunication equipment.

Tyco brings this action against Watts for (1) negligence, alleging that Watts sold and distributed a defective product and failed to warn users that use of the valves could result in substantial flooding; (2) breach of warranty; and (3) strict liability based on defective design and manufacturing.

Analysis

Watts' Motion for Summary Judgment

"The drastic remedy of summary judgment should be granted only if there are no triable issues of fact." *Pearson v Dix McBride, LLC*, 63 AD3d 895 (2nd Dept 2009). The function of the court on a motion for summary judgment is to determine whether issues of fact exist, and not to resolve issues of fact or determine matters of credibility. *Id.* Here, after viewing the

evidence presented by the parties, it is clear that issues of fact exist, and summary judgment cannot be granted.

Watts submits an affidavit from its engineering expert, Rand Ackroyd, who concluded that the Watts 800M4 Valves were not defectively designed or manufactured, but rather, worked exactly as they were supposed to. Mr. Ackroyd opined that when the water supply was shut off at the Premises, the air inlet valve was depressurized and opened as required. Amended Notice of Motion, Exhibit A, ¶ 8. Mr. Ackroyd further opined that, when the water was turned back on, and the water system was refilling, the water pressure available to the valves was below the minimum pressure required to close the air inlet valve, and during this time of insufficient pressure, the valves remained open and allowed water to discharge, as they were designed to do. *Id.*, ¶ 10.

While this evidence makes a prima facie showing that the Watts 800M4 Valves were not defectively designed or manufactured, defendant United submits the affidavit of its engineering expert, Charles Vogel, refuting some of Mr. Ackroyd's findings and creating issues of fact.

For example, Mr. Vogel opined that it is inconceivable that the water pressure available to the valves remained below the minimum pressure required to close the air inlet valve for an extended period of time, unless the valves malfunctioned and failed to close as a result. United's Affirmation in Opposition,

Exhibit A, ¶ 6. Mr. Vogel asserts that once the water was turned back on, the minimum pressure available to the valves should have been achieved in seconds. *Id.* Therefore, the valves should have closed shortly after, unless there was something wrong with the valves themselves.

This court cannot make determinations of fact on a motion for summary judgment. On the two conflicting theories set forth in these experts' affidavits, it cannot be determined whether the problem was with the valves themselves, improper installation, how quickly the water pressure was restored, or a combination of all of the above. If Mr. Vogel is correct in his assessment that it would be mere seconds for the water pressure to return to a level where the valves would close, that indicates that perhaps there was some defect, which caused a malfunction. These conflicting affidavits create issues of fact.

Mr. Ackroyd also indicates that the second component of the Watts 800M4 Valve, the check valve, had some contamination on its sealing surface, which lessened the amount of pressure required for the check valve to operate properly. Amended Notice of Motion, Exhibit A, ¶ 9. However, Mr. Vogel disputes this conclusion, and asserts that any contamination on the sealing surface would normally require more pressure, and not less, as Mr. Ackroyd suggests. United's Affirmation in Opposition, Exhibit A, ¶ 7. Again, this raises another issue of fact in

[* 7]

regard to whether there was contamination, and if so, how it affected the valves.

Watts also seeks summary judgment, dismissing Tyco's claim for breach of warranty. In order to establish a cause of action for breach of warranty, a plaintiff must show that the product was not reasonably fit for the purpose for which it was intended. *Finkelstein v Chevron Chemical Co.*, 60 AD2d 640 (2nd Dept 1977). Thus, since there is a question as to whether there was defect with such product, it would be inappropriate to grant summary judgment on this claim.

Watts' summary judgment motion also encompasses Tyco's negligence claim based on a failure to warn, as Watts seeks dismissal of the entire complaint. The failure to warn claim is based on the adequacy of the engineering specifications and installation instructions that accompanied the Watts 800M4 Valves. However, Watts has not made a prima facie showing that it is entitled to judgment on that claim as a matter of law. Watts' moving papers do not address the negligence claim based on a failure to warn. Mr. Ackroyd does make mention of the installation instructions in his affidavit, but there is no discussion by Mr. Ackroyd as to the failure to warn claim. See Amended Notice of Motion, Exhibit A, ¶ 12.

Watts argues in its reply that a plaintiff must show that the failure to warn was a proximate cause of its damages.

However, on a motion for summary judgment, the burden to raise a triable issue of fact only shifts to the non-movant once the movant has made a prima facie showing, which Watts did not do in this instance. See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

Nevertheless, even if Watts had made a prima facie showing, issues of fact exist as whether there was a failure to warn. For example, the installation instructions stated that the Watts 800M4 Valve should not be installed "where discharge or spillage is objectionable." Affirmation of PM Contracting in Opposition, Exhibit B, at 3. PM Contracting's engineering expert, Phillip A. Sharff, asserts, in his affidavit accompanying PM Contracting's opposition, that this statement does not provide an adequate warning to the installer and users of the Watts 800M4 Valves, because it implies a small amount of leakage, and not the substantial flooding that occurred on March 5, 2003. Affirmation of PM Contracting in Opposition, Exhibit A, ¶ 16.

"A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known." *Liriano v Hobart Corp.*, 92 NY2d 232, 237 (1998). Foreseeing the potential that this valve could leak, Watts warned of installing the valve where discharge or spillage is objectionable. However, as Mr. Sharff points out, these warnings may have been inadequate, because the language can be

interpreted to imply a small amount of leakage. Thus, whether this warning was adequate is a determination for a jury.

Based on the foregoing, Watts' motion seeking summary judgment, dismissing the causes of action for negligence, strict liability, and breach of warranty, is denied.

Motions for Leave to Amend

Defendant T-Mobile seeks leave to amend its answer to assert cross claims for common-law indemnity, contribution, and negligent hiring against defendant United and for contribution and common-law indemnity against defendant PM Contracting. Also, 32 Sixth Avenue seeks leave to amend its answer to assert cross claims for common-law indemnity and contribution against PM Contracting, United, and PJ Mechanical, as well as claims for breach of contract against PM Contracting and United.

"Leave to amend pleadings is to be freely given, absent a showing of prejudice or surprise." *Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 60 AD3d 585 (1st Dept 2009). Here, there was no showing of prejudice or surprise by United or PJ Mechanical, as they did not submit any opposition to these motions for leave to amend. PM Contracting did submit opposition, but it simply stated that it opposed the motions, and did not give any further explanation. The court sees no reason not to grant T-Mobile and 32 Sixth Avenue's motions. Tyco had originally brought a separate action against PM Contracting,

United, and PJ Mechanical, which was consolidated with this action in November 2006. Following consolidation, all parties were able to participate in discovery as this action moved forward, and there is no evidence of prejudice or surprise.

Accordingly, it is

ORDERED that defendant Watts Regulator Co.'s motion for summary judgment is denied; and it is further

ORDERED that defendant T-Mobile USA, Inc.'s motion for leave to amend its answer to assert cross claims for common-law indemnity, contribution, and negligent hiring against defendant United Air Conditioning Corp. and for contribution and common-law indemnity against defendant PM Contracting Company LLC is granted; and it is further

ORDERED that defendant 32 Sixth Avenue Company, LLC's, sued herein as 32 Avenue of the Americas, LLC, and Rudin Management Co., Inc., motion for leave to amend its answer to assert cross claims for common-law indemnity and contribution against PM Contracting Company LLC, United Air Conditioning Corp., and PJ Mechanical Service & Maintenance Corp., as well as claims for breach of contract against PM Contracting Company LLC and United Air Conditioning Corp. is granted; and it is further

ORDERED that defendants T-Mobile USA, Inc. and 32 Sixth Avenue Company, LLC are to serve a copy of their amended answers within 20 days upon service of a copy of this order with notice

of entry; and it is further

ORDERED that all responsive pleadings be served within 10 days upon service of the amended answers.

Date: October 9, 2009

ENTER:



Walter B. Tolub, J.S.C.

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