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SHORT FORM ORDER

INDEX No. 05-3746
CAL. No. 09-00719-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-31-09 (#006)
MOTION DATE 8-3-09 (#007)
ADJ. DATE 10-19-09
Mot. Seq. # 006 - MD
007 - MD

STATE FARM FIRE & CASUALTY COMPANY a/s/o ANDREW SMITH and LISA SMITH, Plaintiffs, - against - DIX HILLS AIR CONDITIONING, INC., Defendant.	STUART D. MARKOWITZ, P.C. Attorney for Plaintiffs 575 Jericho Turnpike, Suite 210 Jericho, New York 11753 LOCCISANO & LARKIN Attorneys for Defendant/Third-Party Plaintiff 150 Motor Parkway, Suite 405 Hauppauge, New York 11788-5108
DIX HILLS AIR CONDITIONING, INC., Third-Party Plaintiff, - against - FRIEDLANDER ACQUISITION CORP. and JOHN McLAUGHLIN PLUMBING & HEATING, INC., Third-Party Defendants.	NICOLETTI GONSON SPINNER & OWEN, LLP Attorneys for Third-Party Defendant Friedlander Acquisition Corp. 555 Fifth Avenue, 8th Floor New York, New York 10017 BEE READY FISHBEIN HATTER & DONOVAN Attorneys for Third-Party Defendant John McLaughlin Plumbing & Heating, Inc. 170 Old Country Road, Suite 200 Mineola, New York 11501

Upon the following papers numbered 1 to 46 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21; 22 - 39; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 40; 41 - 43; 44; Replying Affidavits and supporting papers 45; 46; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motion made by third-party defendant Friedlander Acquisition Corp. for summary judgement (Mot. Seq. #006) and the motion made by third-party defendant John McLaughlin Plumbing & Heating Inc. for summary judgment (Mot. Seq. #007) are consolidated; and it is further

ORDERED that this motion by third-party defendant Friedlander Acquisition Corp. for summary judgment dismissing the third-party complaint and all cross claims against it, is denied; and it is further

ORDERED that this motion by third-party defendant John McLaughlin Plumbing & Heating Inc. for summary judgment dismissing the third-party complaint and all cross claims against it, is denied.

In February 2004, homeowners, Andrew Smith and his wife Lisa Liberatore (hereinafter Mrs. Smith), left their home located on 17 Arosa Court, in Greenlawn, New York, to go on a five day vacation to Florida. When Mrs. Smith and their children returned to the home, on or about February 18, 2004, she opened their front door to find water cascading down from the second floor balcony to the first floor and a partial collapse of the second-floor ceiling. It appears that a pipe in the attic froze, burst, and caused the house to become flooded with water. State Farm Fire & Casualty Company, who insured the Smiths, paid the insurance claims submitted for damages caused by the flooding. Thereafter, State Farm Fire & Casualty Company a/s/o Andrew and Lisa Smith (hereinafter "State Farm"), commenced an action against defendant Dix Hills Air Conditioning, Inc. (hereinafter "Dix Hills") alleging that it negligently designed, installed, maintained, and repaired the Smith's HVAC (heating, ventilation and air conditioning) system. Dix Hills then commenced a third-party action against Friedlander Acquisition Corp. (hereinafter "Friedlander") the original builder of the home, and John McLaughlin Plumbing & Heating Inc. (hereinafter "McLaughlin") the original plumbing contractor who was hired by Friedlander, for contribution and indemnity, claiming that Friedlander and McLaughlin improperly installed and insulated the pipes and that they failed to use antifreeze agents.

Friedlander now moves for summary judgment dismissing the third-party complaint and all cross claims against it, arguing that it owed no duty to Dix Hills and McLaughlin. In support of its motion, Friedlander submits, *inter alia*, the testimony of Eric Friedlander, from two depositions, wherein he explained that Friedlander purchased the lot at 17 Arosa Court and built a home on speculation, selling it in January, 1999, to Christopher Binsack. Mr. Friedlander testified that Friedlander provided Mr. Binsack with a two year limited warranty, which ran from the date of the closing. He also stated that he hired architect Thomas D. Reilly to design the building plans for this house, but that the actual design of the HVAC system was done by the HVAC contractor, Dix Hills, in conjunction with the heating design which was done by the plumbing contractor, McLaughlin. He stated that the type of HVAC system used at this house was called a hydronic system, and that he believed Dix Hills installed this hydronic system. Mr. Friedlander alleged that out of all the houses that he has built, about two-thirds, or approximately seven hundred homes, had the hydronic system installed. He also testified that out of the seven hundred homes using the hydronic system, none of them had ethylene glycol or propylene glycol (hereinafter "glycol" which apparently is known to be a type of antifreeze), or a freeze-stat device (which is apparently a type of sensor that is installed to the plumbing to trigger the circulator and prevent pipes from freezing). In addition, Mr. Friedlander stated that glycol is not required by the New York State Building Code or local municipal codes, and out of these seven hundred homes using the hydronic system, he has never heard of an incident such as occurred at 17 Arosa Court.

At his deposition, Mr. Friedlander also alleged that an individual named Ed Stanback[1] was his construction coordinator, and that Mr. Stanback's duties included job site management, subcontractor management, and performing a walk-through inspection of the house at 17 Arosa Court at the time it was completed. He testified to the effect that additionally, Mr. Stanback would review the work performed by a contractor after it was done. He further testified to the effect that there would be coordination between McLaughlin, the plumbing contractor, and Dix Hills, the installer of the HVAC system, because the pipes that the plumber installed would go to the air conditioning and heating system. However, Mr. Friedlander alleged that he did not know whether it was the plumber or the HVAC contractor who connected the two units together. Finally, Mr. Friedlander alleged the Town of Huntington inspected the house, including the plumbing, prior to issuing a Certificate of Occupancy, and that to receive a Certificate of Occupancy the house would have to comply with the New York State Building Code and the Town of Huntington Building Code.

Friedlander also submits the testimony of Brian Proct from two depositions, who has been employed by Dix Hills as its project manager for approximately fifteen years, and who oversees the jobs. Mr. Proct testified that Dix Hills installed the air conditioning and heating system at 17 Arosa Court when it was originally built. He explained that Dix Hills installed the heat coil for the heating system which goes into its duct work which was in the attic. He also testified to the effect that at the time of the initial installation of the heat coil, Dix Hills installed a humidifier in the attic. Mr. Proct further explained in pertinent part that it is understood that there is going to be water running through the heat coil, as well as the humidifier. He alleged that he put the coil in the attic, but it was not connected to anything when it was put there. He stated that Dix Hills "put the coil in the duct work and the plumber pipes it." Mr. Proct testified that he did not know who was responsible to ensure that proper insulation was placed on the heating coil, whether it was the plumber or the builder. Mr. Proct also testified that between 1998 and 2004, Dix Hills did perform maintenance on the air conditioning unit on several occasions.

In further support of its summary judgment motion, Friedlander submits the deposition testimony of John McLaughin, who testified that he actually did the original plumbing work at this premises. He stated that, as far as the attic space, McLaughlin's work included venting for all the bathroom fixtures and hooking up the hydronic coil. He also stated that hooking up the hydronic coil involved the running of copper piping from the basement to the coil location. Mr. McLaughlin testified that McLaughlin did not install the coil, that the coil had already been installed when the pipe work was put in the attic, and that McLaughlin hooked the piping to the coil. He alleged that the pipes in the house, including the pipes in the attic going right to the coil, were insulated with "Armaflex" pipe insulation, which is a type of black foam that gets wrapped around the pipes and then is taped. He stated that the plumbing inspector for the Town of Huntington inspected the insulation that his company placed on the piping.

In addition, at his deposition, Mr. McLaughlin alleged in pertinent part that he has used glycol, but not frequently, and that the use of glycol would be specified in the agreement between McLaughlin and the

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[1] In one deposition this individual's last name appears "Stanback" and in another deposition his last name appears as "Stainback." For consistency, this Court will refer to this individual as "Stanback."

general contractor. He also testified to the effect that normally a freeze-stat would be installed by the HVAC contractor, but if McLaughlin was supposed to install the freeze-stat, it would be specified in McLaughlin's agreement with the general contractor. Mr. McLaughlin stated in pertinent part that in order to prepare the bid for a house, Friedlander would give McLaughlin a spec sheet so that he knew exactly what Friedlander was requiring for the job. He stated that in this case, there was never any discussion regarding adding glycol to the system or using a freeze-stat for the system, and the written proposal did not require the use of either. He further alleged that he has used glycol in less than one percent of the homes that he has worked on, one involved a house on a windy bluff, and the other involved a house which was vacant for the winter. Mr. McLaughlin alleged that in a normal type of setting glycol is not used, and that there was no code provision that required the installation of glycol or freeze-stat at the time this house was built. Finally, Mr. McLaughlin testified that Friedlander's project manager would coordinate and check the progress of the work.

Friedlander also provides the deposition testimony of Mr. Smith, the homeowner, who testified that he had utilized the services of Dix Hills to winterize and perform routine maintenance on the air-conditioning and heating systems. Mr. Smith stated that he recalled one occasion where he had Dix Hills check the system in the attic because the air felt dry, and Dix Hills came to check it and said that it was functioning correctly. Additionally, Friedlander provides Mrs. Smith's deposition testimony, wherein she testified to the effect that prior to her trip to Florida, from April of 2001, she did touch the thermostat, for the purpose of turning on the heat or turning it off. She alleged, however, that prior to leaving for the trip to Florida, she did not recall what, if anything, she did with respect to the heat.

Friedlander argues that based upon this evidence, it is beyond question that it did not owe Dix Hills a duty relating to the subject premises. Friedlander alleges that Dix Hills was hired to install the HVAC system in the subject premises and any possible negligence in the installation cannot be imputed upon it. It contends that it did not direct the means or the methods of the work performed by Dix Hills. Further, it claims that the Town of Huntington conducted multiple inspections and issued a Certificate of Occupancy indicating that all the work was performed properly. It maintains that any culpable conduct regarding the negligent installation of the HVAC system or plumbing system was that of Dix Hills or McLaughlin and thus, the third-party complaint against it should be dismissed. Friedlander argues that for similar reasons, McLaughlin's cross claims against it should also be dismissed.

McLaughlin also moves for summary judgment dismissing the third-party complaint and cross claims against it. In support of its motion, McLaughlin submits some of the same deposition testimony as Friedlander, that is, the deposition testimony of Eric Friedlander, Brian Proct, John McLaughlin, and Mrs. Smith. In addition, McLaughlin provides the court with the deposition testimony of Megan Nicolosi, who is employed by State Farm, and who explained that she was the "on-call" representative for State Farm and spoke with the insured at 7:45 on February 18, 2004. Ms. Nicolosi testified to the effect that she memorialized the telephone conversation she had with Mrs. Smith by entering the information into a log. Ms. Nicolosi was then asked to read from the log, wherein she read, "Spoke with the named insured, Lisa Smith, and insured said she was on vacation and turned the heat off. She returned today and found water pouring throughout the house." McLaughlin also submits a copy of the State Farm log.

Additionally, McLaughlin submits an affidavit of Mrs. Smith wherein she stated that it was her custom and practice when they were away for more than a few days, to lower the temperature in the winter and push the "hold" button on the thermostat to prevent the heat from switching on and off. She stated that she would normally set and hold the temperature to around 60 degrees in the winter. In her affidavit, Mrs. Smith also alleged that she has no specific or general recollection of having hit the "hold" button prior to the February 2004 trip. She claimed that she has never turned the entire system off, winter or summer. She explained that she may have told someone upon returning from their 2004 vacation that she had "shut the heat off" but that is how she refers to turning the heat down. Mrs. Smith alleged that her words were not meant to be taken literally.

McLaughlin argues that since the proof herein establishes that it performed its obligations in a workmanlike manner in accordance with the plans and specifications agreed to by Friedlander, it is not liable for damages that may result. Further, McLaughlin contends that from the State Farm log, which contains an admission by Mrs. Smith that she turned the heat off, as well as Mrs. Smith's deposition testimony wherein she did not deny either turning the heat off or reducing the heat, it may be reasonably inferred that Mrs. Smith deviated from an acceptable standard of care. It claims that the plumbing and insulation both satisfied a Town inspection and a Certificate of Occupancy was issued. McLaughlin emphasizes that the work was performed in accordance with the spec sheet provided by the builder. It asserts that there is no evidence in the record to establish the existence of a defective condition in the plumbing system prior to the date of loss. Therefore, argues McLaughlin, the third-party complaint and all cross claims against it should be dismissed.

Defendant /third-party plaintiff Dix Hills opposes both Friedlander and McLaughlin's motions. Dix Hills claims that Friedlander acted as the general contractor and its building supervisor, Mr. Stanback, was present on a daily basis to oversee the work. Dix Hills maintains that no document has been produced indicating that it was to install a freeze-stat device on the HVAC system. It contends that if this device was warranted it would have been the general contractor's responsibility to make sure the device was installed and hooked up. It asserts that if glycol or freeze-stat was not directed to be installed or paid for by the general contractor, an issue as to its negligence is a key factor in this case, and thus, Friedlander's motion for summary judgment should be denied. In addition, Dix Hills alleges that Brian Proct's deposition testimony establishes that it was the responsibility of McLaughlin, the plumbing subcontractor, to prevent freezing of any water lines. Dix Hills contends that McLaughlin's motion for summary judgment should be denied because there exists a material issue of fact as to who was responsible for the installation of antifreeze protection for the system.

State Farm opposes the motion by McLaughlin for summary judgment. It contends that Mrs. Smith adequately protected her HVAC system from freezing and simply reduced the thermostat to sixty degrees. It claims that Mrs. Smith left the thermostat in her home at an acceptable temperature when she left for vacation. State Farm argues that McLaughlin's failure to protect the Smith's HVAC system from freezing was the direct cause of the damages. In support of its opposition, State Farm submits the affidavit of Paul Angelides, a consulting engineer, who inspected the premises on March 10, 2004. Mr. Angelides states that: the Smith's attic is unheated space; as a result, below-freezing ambient air temperatures can and will occur within the attic; and this condition can cause freeze damage to the recirculating loop piping and coil unless

precautions have been taken to prevent freeze damage. Mr. Angelides maintains that the New York State Uniform Fire Prevention and Building Code, specifically §850.7, which was in effect at the time this heating system was installed, requires that, "equipment and systems subject to damage from freezing shall be adequately protected against freezing." Mr. Angelides additionally points to the American Society of Heating Refrigeration and Air Condition Engineers' 1992 Systems and Equipment Handbook which specifies the use of either glycol and freeze-stat as precautions to prevent freezing. He alleges that based upon his inspection, he determined that the water in the pipes froze because ethylene glycol or other antifreeze was not installed in the circulating piping. He also alleges that since antifreeze was not used, the system should have been protected against freezing through the use of a freeze-stat. State Farm argues that based upon the evidence herein there is, at the very least, questions of fact as to whether Mrs. Smith adequately protected her home's HVAC system from freezing and whether McLaughlin failed to adequately protect the system from freezing.

The proponent of a motion for summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, providing sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposition papers (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d at 324; ***Winegrad v New York Univ. Med. Center***, 64 NY2d at 852). Once this initial showing has been made, however, the burden shifts to the party opposing the summary judgment motion to tender evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Alvarez v Prospect Hosp.***, at 324; ***Zuckerman v City of New York***, 49 NY2d at 562).

In the case at hand, both Friedlander and McLaughlin have made a prima facie showing that they were not negligent by demonstrating that the HVAC and plumbing systems were properly installed, that the pipes were properly insulated with "Armaflex" insulation, and that the use of glycol or freeze-stat was not required. However, in opposition, State Farm, through the affidavit of its engineer, has raised issues of fact as to whether the pipes were properly installed, and whether to be "adequately protected" glycol or freeze-stat should have been used to protect the pipes from freezing. In addition, Dix Hills in opposition, as well as Friedlander and McLauglin in opposition to each other's motion, have raised an issue as to who was responsible for the protection of the pipes. Where, as here, there are material issues of fact in dispute, the motions for summary judgment must be denied (*see* ***Supan v Michelfeld***, 97 AD2d 755, 468 NYS2d 384 [2d Dept 1983]; *see also* ***RD Rice Construction, Inc. v Sage Mechanical, Inc.***, 16 Misc3d 1127(A), 847 NYS2d 905 [Sup Ct, NY County 2007]).

As to McLaughlin's and Dix Hill's argument that they installed the plumbing and the HVAC systems in accordance with their contract with Friedlander, the court notes that, generally, a contractor is justified in relying upon the specifications which it has contracted to follow, unless those plans are so clearly defective that a contractor of ordinary prudence would not have performed the work (***Hartofil v McCourt & Trudden Funeral Home, Inc.***, 57 AD3d 943, 871 NYS2d 299 [2d Dept 2008]). In this case, it is unclear as to whether the spec sheet provided by Friedlander was so patently defective, because it did not include the installation of either glycol or freeze-stat, that McLaughlin or Dix Hills should not have

performed their work in such a manner.

As to Friedlander's argument that it owed no duty to either McLaughlin or Dix Hills, liability in negligence has been found in favor of a subcontractor against a project manager who was required to manage, supervise and inspect construction, who continuously reviewed a design during its development, and who identified omissions or defects in design (*see* ***Northrup Contracting, Inc. v Village of Bergan and MRB Group, P.C.***, 139 Misc2d 435, 527 NYS2d 670 [Sup Ct, Monroe County, 1986], *affd in part and mod. in part on other grounds* 129 AD2d 1002, 514 NYS2d 306 [4th Dept 1987]). "These duties can reasonably be said to inure to the benefit of subcontractors... for [they]... are members of a limited class whose reliance upon the project manager's ability is clearly foreseeable" (***McKinney & Son v Lake Placid Olympic Games, Inc.***, 92 AD2d 991, 993; 461 NYS2d 483, 486 [3d Dept 1983], *mod. on other grounds* 61 NY2d 836, 473 NYS2d 960 [1984], [internal quotation marks and citation omitted]). In the present case, although Friedlander contends that it did not direct the means or methods of the work performed by the subcontractors, based upon Eric Friedlander's own deposition testimony, there is an issue of fact as to whether Mr. Stanback's involvement as construction coordinator was such that, Friedlander assumed a duty.

Finally, there is an issue of fact as to whether Mrs. Smith turned off the heat causing the pipes to freeze. Mrs. Smith's statement to the State Farm representative that she shut the heat off, her statement at her deposition that she did not recall what she did with the heat, and her statement in her affidavit the she has never turned the entire system off, raise an issue of credibility. It is well settled that a court should not weigh the credibility of a witness on a summary judgment motion (*see* ***Conciatori v Port Authority of New York and New Jersey***, 46 AD3d 501, 846 NYS2d 659 [2d Dept 2007]; ***Yaziciyan v Blancato***, 267 AD2d 152, 700 NYS2d 22 [1st Dept 1999]).

Accordingly, the motions by Friedlander and McLaughlin for summary judgment dismissing the third-party complaint and all cross claims against them are denied.

Dated: 12/23/09

THOMAS F. WHELAN, J.S.C.