

Hanover Ins. Co. v SHC NY, Inc.

2010 NY Slip Op 30102(U)

January 14, 2010

Supreme Court, New York County

Docket Number: 115229/2007

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C.
Justice

PART 2
115229-07
Index No.

Manover Insurance Company
SHE NY, Inc and R
Child Party Action

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 2
MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DELETED

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DELETED

Dated: 1/14/10

Reg
LOUIS B. YORK
J.S.C. J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

HANOVER INSURANCE COMPANY as
subrogee of NICOLE CLOTHING, INC.,

Plaintiff,

Index No. 115229/2007

-against-

SHC NY, INC.,

and

PIERRE LA TOUCHE, L.L.C.,

Defendants.

SHC NY, INC.,

Third-Party Plaintiff,

TP Index No. 590685/2008

-against-

PETER PLUMBING ASSOC., INC. and
MADISON WAREHOUSE CORP.,

Third-Party Defendants.

x

FILED
JAN 20 2010
NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

Currently defendant/third-party-plaintiff SHC NY, Incorporated's ("SHC") moves for summary judgment dismissing the underlying complaint along with any cross-claims and counterclaims asserted against it; and third-party-defendant Madison Warehouse Corporation's ("Madison Warehouse") cross-moves for summary judgment as against SHC. According to to the Court's computer information system, the note of issue was filed on April 30, 2009. The motion is dated June 2, 2009 and the cross motion is dated June 8, 2009. For the reasons below, the Court denies the motion and grants the cross-motion in part and denies it in part.

This is a subrogation action. Plaintiff Hanover Insurance Company (“Hanover”) is subrogee of Nicole Clothing, Inc. (“Nicole Clothing”). According to the president of Nicole Clothing, David Yehezkel, Nicole is a clothing wholesaler located at 53 West 36th Street in New York. Nicole used the first level of the building and also used the basement for storage. The building also contained a jewelry store and a salon, defendant Pierre La Touche. In March 2007, there was renovation work ongoing pursuant to a contract between Pierre La Touche and SHC, an architectural firm which also served as designer and contractor for the project. With respect to the plumbing, the contract provided that SHC would be responsible for installing three pedicure stations, seven sinks, two hair sinks, two water closets, a kitchen sink, kitchen faucet, counter top, a pump with water fountain, one refrigerator, one washer, one dryer, one microwave, one auto claver, two mirrors, a bathroom wall and a hot water heater, along with any other bathroom equipment and accessories. SHC entered into a contract with Peter Plumbing Associates, Incorporated (“Peter Plumbing”) regarding some of this work but the scope of the ultimate agreement is unclear. SHC states that Peter Plumbing was responsible for all of the plumbing work, but Peter Plumbing asserts that it only performed the inspection and obtained the necessary work permit.

During the course of renovation work, a water pipe burst and flooded the basement. According to Mr. Yehezkel, the pipes had been turned off during some part of the construction work that day and the damage occurred when the pipes were turned back on. Hanover paid Nicole Clothing \$360,000 for its losses and brought this action against both Pierre La Touche and SHC. Hanover alleges that movant SHC was negligent because, *inter alia*, 1) it failed to adequately supervise the work and workers involved in the project in question; 2) it failed to follow proper plumbing practices; 3) it failed to turn off the water once the pipe had burst and to

replace the damaged pipe promptly; and 4) in other respects it failed to perform the work properly, failing to comply with relevant laws and guidelines and failing to exercise due care.

SHC answered the complaint, alleging that it is not responsible for the damages in question. The answer alleges in particular that third parties are responsible for any existing damages. Moreover, SHC cross-claimed against Pierre La Touche based on common law and contractual indemnification and on negligence. In addition to answering the complaint, SHC initiated a third-party action against Peter Plumbing and Madison Warehouse. In the third party action SHC alleges that if it is found liable for any of the damages it is due to the primary negligence of these two parties.

Now SHC moves for summary judgment dismissing all claims, cross claims and counterclaims against it. In support of its motion for summary judgment, SHC relies on the testimony of Steven H. Chang, its vice president. According to Mr. Chang, SHC had no direct involvement with the contracting work once it handed over its plans. Moreover, it had no supervisory involvement with the plumbing work and no one at his company had personal knowledge relating to the burst pipe and/or any attempts to repair it. Moreover, SHC points to the testimony of Yeong H. Heo, president of Peter Plumbing, which reveals that Peter Plumbing obtained the permit for the plumbing work and performed the necessary inspection as well.

SHC also argues that Madison Warehouse vice president Chun Yee Yung's deposition testimony supports SHC's right to summary judgment. Madison owned the building on the date of the flooding, though it sold the property shortly thereafter. According to the deposition Madison was not directly involved with the work initiated by Pierre La Touche although employees of Pierre La Touche showed him the work in the basement on a few occasions. When the superintendent informed him that the pipe had burst, Mr. Yung stated, he contacted the

owner of Nicole Clothing, the insured, the party who allegedly had exclusive access to the basement. However, according to Mr. Yung the owner of Nicole Clothing did not come to the building and as a result of this the super did not have ready access to the basement. Therefore, it took approximately a half hour for the superintendent to gain access to the basement and turn off the water valve.

According to SHC, the above testimony conclusively establishes that SHC had no supervisory involvement in the project and no relationship to the events which caused the problems leading to the burst pipe, and that because of the lack of proximate cause it cannot be found guilty of negligence. SHC argues that the allegedly problematic feeder pipe ran from the basement of Pierre La Touche into the basement of Nicole Clothing. According to SHC it had no access to that basement so was not responsible for any problems there. In addition, SHC alleges the pipe violated the New York City Plumbing Code because it did not have a sufficient number of supporting brackets and that this violation was the cause of the pipe's failure.

Hanover, as subrogee of Nicole Clothing, opposes the motion. It notes that SHC was the contractor in charge of the renovation and states that on the date that the pipe burst a representative of SHC was at the site and announced that it was turning off the water for several hours. Thus, it states that SHC was more involved than it suggests. According to the deposition testimony of David Yehezkel, Nicole Clothing's owner, it also was SHC which turned off the water and Nicole Clothing itself was uninvolved.¹

¹ Hanover also justifies Mr. Yehezkel's failure to drive to the building that night, but this is irrelevant to the motion and cross motion before the court; that may have affected the extent of the damages but does not alter SHC's alleged liability. Similarly, the alleged representations of the superintendent to Mr. Yehezkel that the construction company caused the problem and that the building only hired companies with insurance are irrelevant to the various liability issues addressed in this motion.

Hanover also points to Mr. Chang's testimony on behalf of SHC. Not only was SHC the architect but the general contractor and designer. As general contractor, SHC hired Peter Plumbing and Mr. Chang visited the site once a week. Hanover argues that this shows SHC retained sufficient supervisory powers and sufficient control over the project to make it liable. Mr. Chang also testified that Peter Plumbing performed the plumbing work and received \$20,000 for its services. However, according to Hanover Mr. Chang's testimony is inaccurate. It cites the testimony of Mr. Heo, president of the plumbing company, which it excerpts, that a "Mr. Oh" (presumably identified in the earlier, omitted pages of the deposition) asked him only to obtain the plumbing permit. Mr. Heo states that he thought he also would be performing plumbing work but that Mr. Oh subsequently told him it had been done. Hanover suggests that either SHC performed the work or that it retained responsibility for the work.

Finally, Hanover annexes the affidavit of its expert, who states that for various reasons SHC was responsible for the damage. The expert also states that Mr. Chang was negligent for failing to visit the site more frequently. According to the opposition papers, SHC was therefore liable under the New York City Administrative Code § 27-1009(a), which imposes a duty upon the contractor to institute and maintain safety measure and to safeguard property which the work may impact. Even if SHC subcontracted out the plumbing work to Peter Plumbing – a fact which Hanover disputes – it should have instructed the subcontractor of any hazards related to the project so that the plumber could have avoided them. Thus, Hanover clarifies, it does not attempt to hold SHC liable based on its vicarious liability but on its negligent failure to supervise when it had a duty to do so.

In reply, SHC contests the allegations and their evidentiary basis. It states that Hanover has not submitted any evidence but the deposition testimony and attempts to controvert it with

the deposition testimony of its own client. It states that the failure to provide supporting brackets for the pipes and other failures also not attributable to SHC were solely responsible for the pipe problem and resulting damage. It also states that the determinations of Hanover's expert are conclusory and faulty and in contradiction to his earlier statements. SHC states that there is no evidence it even had access to the area where the pipes were located. According to SHC, Nicole Clothing's president's testimony that he did not mention problems with the piping to SHC provides conclusive evidence that SHC had no duty regarding or knowledge of the state of the pipes. It submits the affidavit of its own expert, who states that the piping which caused the problem was the sole responsibility of Nicole Clothing.

Summary judgment is only proper if no genuine issues of material fact exist based on the evidence submitted in support of the motion. See German v. Bronx United in Leveraging Dollars, Inc., 258 A.D.2d 251, 684 N.Y.S.2d 541 (1st Dept. 1999). Based on the above, it is clear that issues of fact abound. There are varying statements as to the whether Peter Plumbing was involved in the renovation, and the scope SHC's role and involvement in the work is also disputed hotly. Also, as earlier noted, according to Hanover SHC may have turned off the water; as the turn off switch allegedly was in Nicole Clothing's basement this raises a question as to whether – contrary to its own statement – SHC had access to this area. The parties also dispute whether SHC's project was complete when the water was turned off. Moreover, both parties submit a copy of the contract between Pierre La Touche and SHC but neither submits copies of more pertinent contracts – that is, those between the contractor and any subcontractor. Thus, the issue of whether SHC retained or subcontracted responsibility to oversee the project or any parts of the project remain unresolved.

In addition, as indicated above, SHC and Hanover rely on the statements of their experts. The expert affidavits are in conflict with each other, also raising issues of fact as to causation and responsibility for the incident. See Cregan v. Sachs, 65 A.D.3d 101, 109, 879 N.Y.S.2d 440, 445 (1st Dept. 2009)(conflicting expert affidavits raised issues of fact and credibility that could not be resolved on summary judgment motion). SHC cannot merely dismiss Hanover's expert and insist on the veracity of its own. Moreover, because of the technical nature of some of the issues and the ambiguity of the facts as presented, the Court is especially reluctant to rely on deposition testimony and expert affidavits to explain why the pipe burst and who is responsible for the incident. See Miracle Two Fish Plaza Corp. v. 1865 Rest Corp., Index No. 01-216 (App. T. 1st Dept. Oct. 26, 2001)(avail at 2001 WL 1682623).

In summary, there is conflicting testimony on issues including 1) who performed the plumbing work, 2) whether there were multiple subcontractors, 3) whether SHC was allowed access to Nicole's basement to turn off the water, 4) whether the pipes were properly secured and 5) to what extent SHC was responsible for problems with Nicole's pipes. There also are questions as to the extent to which SHC was involved and/or should have been involved in the supervision and control of the project. Numerous critical questions regarding responsibility and causation remain unanswered, at least to the satisfaction of this Court. Therefore, this matter is best left to the trier of fact. See Salamone v. Midland Ave. Owners Corp., 66 A.D.3d 422, -, 886 N.Y.S.2d 391, 391 (1st Dept. 2009). The Court notes that the parties cite numerous cases supporting their legal positions, but these principals of liability do not come into play until the underlying factual issues are resolved. Therefore, the Court considered but need not address those arguments here.

Next the Court turns to Madison's cross-motion for summary judgment. Initially, the Court considers the cross-motion despite SHC's argument as to its timeliness. It appears that the cross-motion, dated June 8 and initially returnable on June 26, 2009, was made within 60 days of the note of issue filing date of April 30, 2009. Thus it appears the cross-motion was timely.

The Court bases its assessment as to timeliness on the Court's case information system, but both parties here operate on the assumption that the cross-motion was made 12 days after the 60 days had expired. Even if the Court's information as to the filing date of any of these papers is inaccurate, however, the Court grants Madison's current request that the Court excuse its brief delay. Madison apparently requested extra time by affidavit which it submitted to the Court in May. The Court is not aware of the application and Madison does not annex a copy. However, the Court also notes that any request for additional time should have been made either by motion, within the cross-motion or by telephone conference with the Court and all parties. Therefore, if the Court received the application by affidavit it would not have considered it.

Now, however, Madison's application is properly before the Court. There are several reasons the Court grants the request: (1) Madison attempted to seek extra time within the 60 day period; (2) its papers were only 12 days beyond the 60 days and well within the discretionary 120 days afforded by the statute; (3) the Court retains discretion to grant a party additional time to make a motion; (4) SHC had ample opportunity to oppose the motion so was not prejudiced; and (5) it is in the interest of judicial efficiency to consider the discrete application and determine whether Madison should remain in the case.

Accordingly, the Court turns to the cross-motion. As owner of the building Madison had "a duty to maintain [its] property in a reasonably safe condition under the existing circumstances

.” Walters v. Northern Trust Co. of New York, 29 A.D.3d 325, 326, 816 N.Y.S.2d 18, 20 (1st Dept.2006). However, “to recover damages for a breach of this duty, [SHC] must establish that [Madison] created, or had actual or constructive notice of the dangerous condition that precipitated the injury.” Id. Here, Madison states that it did not create the condition and that it lacked the requisite notice as well. Madison submits the affidavit of Chun Yee Yung, its sole officer, who states (1) his company was never told about any problems with the pipes at the property and (2) it had no notice that there was a water leak until the superintendent notified him of the problem on March 30, 2007, the date of the incident.

In response, SHC refers to its earlier papers to argue that there were ongoing problems with the pipes and a pre-existing failure to secure the pipes with brackets. According to SHC, this raises a questions as to whether the owner might have known about the problem. At this late stage of the litigation, when all discovery is complete, this argument is unpersuasive. SHC’s statement as to notice purely speculative – that is, SHC has set forth no evidentiary basis in support of its statement.

SHC also states that Madison’s superintendent turned off the water due to the leak but that he turned on the water again before the problem was resolved because of tenant complaints. The Court notes that SHC relies on the statement of David Yehezkel, Nicole’s president, that the superintendent told Yehezkel that he had turned on the water again. This testimony is hearsay and lacks evidentiary value. However, although it would not be an adequate basis for judgment it is sufficient to create an issue of fact precluding summary judgment. The testimony raises questions as to 1) whether the superintendent was instructed that he could turn on the water by another party, 2) who bears responsibility for the superintendent’s action, if it occurred and 3) whether and to what extent this resulted in some of the property damage. In

[* 11],
light of the dispositive nature of the relief requested and in the interest of allowing all parties their day in court, the Court denies the motion for summary judgment as to this argument.

Based on the above, therefore, it is

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

ORDERED that the cross-motion is granted and the claims against Madison are severed and dismissed except to the extent to the extent that they assert negligence based on Madison's alleged conduct in turning on the water prematurely.

Dated: Jan. 14, 2010

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LOUIS B. YORK, J.S.C.

**LOUIS B. YORK
J.S.C.**

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