

Trizechahn, Inc. v Timbil Chiller Maintenance Corp.
2010 NY Slip Op 31293(U)
May 24, 2010
Sup Ct, NY County
Docket Number: 111425/04
Judge: Saliann Scarpulla
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5.26.10

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

PRESENT: ~~XXXXXXXXXX~~ Scarpulla
Justice

PART 19

TRIZE CHANN, INC.

INDEX NO. 111425/04

MOTION DATE _____

-v-
TIABIL CHILLER MAINTENANCE
CORP., ET AL.

MOTION SEQ. NO. 10

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 is determined in
accordance with the accompanying
decision/order.

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/24/10

Samuel Scarpulla
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
TRIZECHAHN, INC.,

Plaintiff,

- against-

Index No.: 111425/04

Submission Date: 3/24/2010

TIMBIL CHILLER MAINTENANCE CORP.,
TUTHILL CORP. F/K/A CORPUS MURRAY,
GENERAL ELECTRIC INTERNATIONAL, INC.,
YARWAY CORP., CARRIER CORP., AND
WOODWARD GOVERNOR COMPANY, INC.,

DECISION AND ORDER

Defendants.

----- X

For Plaintiff:
Clausen Miller, P.C.
One Chase Manhattan Plaza
New York, NY 10005

For Defendant Timbil Chiller Maintenance Corp.:
Maroney O'Connor LLP
11 Broadway, Suite 1060
New York, NY 10004

Papers considered in review of this motion for summary judgment:

- Notice of Motion 1
- Aff in Opp 2
- Reply 3

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this action to recover damages for, *inter alia*, breach of contract and negligence, defendant Timbil Chiller Maintenance Corp. ("Timbil") moves for summary judgment dismissing the complaint insofar as asserted against it, or, in the alternative, for an order enforcing the terms of a Service Agreement limiting the availability of indirect and consequential damages and the amount of damages recoverable to the annual contract amount of \$22,200.00.

Plaintiff Trizechahn, Inc. ("Trizechahn") is the owner of the building located at One New York Plaza. Timbil is a service maintenance company that entered into a written Service Agreement with Trizechahn with respect to a Chiller Unit located at One New York Plaza, effective July 1, 1999. The Chiller Unit was a 6,000 ton steam powered turbine refrigeration machine responsible for providing refrigeration and air conditioning to One New York Plaza. On August 11, 2001, the compressor, turbine and related equipment located in the sub-cellar of One New York Plaza allegedly experienced an overspeed event which led to a breakdown of the Chiller Unit and an explosion.

Trizechahn commenced this action alleging causes of action for negligence, breach of contract, breach of express warranties and breach of implied warranties.¹

Timbil now moves for summary judgment dismissing the complaint insofar as asserted against it, or, in the alternative, for an order enforcing the terms of the Service Agreement limiting the availability of indirect and consequential damages and the amount of damages recoverable to the annual contract amount of \$22,200.00.²

¹ Defendant Timbil Chiller Maintenance Corp. is the only remaining defendant in this action. The claims asserted against defendants Tuthill Corp. f/k/a Corpus Murray, Yarway Corp., Carrier Corp. and Woodward Governor Company, Inc. were discontinued by stipulation of discontinuance on or about April 7, 2006. The action against defendant General Electric International, Inc. was settled for \$20,000 pursuant to a settlement agreement and stipulation of discontinuance on or about January 17, 2007.

² In an Interim Order dated March 24, 2010, this court denied the branch of Timbil's motion which was for summary judgment dismissing the complaint insofar as asserted against it, finding that issues of fact were raised by the parties' conflicting expert affidavits.

In support of the motion, Timbil submits the Service Agreement, including a General Provision page which provides, in relevant part,

10. T.C.M. SHALL NOT, under any circumstances, be liable for any accident, injury, breakage, loss, or damage to equipment or property connected her[e] within, or the resultant consequences, unless such loss or damage is caused by negligence acts or omission or commission by T.C.M.'s agents, employees, or subcontractors.

11. NEITHER PARTY to this AGREEMENT shall hold the other responsible for any indirect or consequential damages of a commercial nature such as but not limited to, loss of revenue or loss of use of any equipment or facilities.

12. T.C.M.'s MAXIMUM LIABILITY based upon any claim or cause of action shall not exceed the yearly contract price of this AGREEMENT.

Timbil argues that the yearly contract price was \$22,200.00 and therefore, according to the limitation of liability clause, the maximum damages recoverable can not exceed \$22,200.00.

In opposition, Trizechahn argues that issues of fact exist as to whether the General Provision page referred to by Timbil is part of the Service Agreement. Trizechahn further argues that in any event, even the court finds that the General Provision page is part of the Service Agreement, the limitation of liability clause is unenforceable under New York General Obligations Law Section 5-323 and is invalid as a matter of law for lack of specificity.

Discussion

The Court first notes that Trizechahn's argument that issues of fact exist as to whether the General Provisions page submitted by Timbil in support of its motion is part of the

Service Agreement is without merit. Trizechahn argues that the General Provisions page was not previously produced in discovery, was not mentioned or authenticated by Timbil's witness at an examination before trial, did not contain bates stamps which the other pages of the Agreement did have, and was in a different font than the other four pages of the Service Agreement.

However, Timbil's witness James Carbonaro ("Carbonaro") clearly testified at an examination before trial that the Service Agreement that he was shown at his examination before trial was not complete as it did not include the cover sheet or "General Provisions" page that were a part of the Service Agreement. He clearly testified that the Service Agreement included a General Provisions page that listed "legal responsibilities. Who is responsible for what, and also payment schedules and cancellation of the contract."

Further, Carbonaro submits an affidavit in which he avers that the General Provision page was part of the Service Agreement when the Agreement was signed by him and Peter Fiore on behalf of Trizechahn. Trizechahn submits no evidence or affidavits from individuals with personal knowledge (like Carbonaro) providing that the General Provision page was not part of the Service Agreement when executed. Trizechahn merely submits the affirmation of its attorney. Its attorney's mischaracterizations of Carbonaro's testimony and unsupported allegations as to the contents of the Service Agreement at the time it was executed are not probative and do not raise any material issues of fact.

Trizechahn also argues that the limitation of liability clause is unenforceable under New York General Obligations Law §5-323 and is invalid as a matter of law for lack of specificity.

New York General Obligations Law §5-323 provides,

Every covenant, agreement or understanding in or in connection with or collateral to any contract or agreement affecting real property made or entered into, whereby or whereunder a contractor exempts himself from liability for injuries to person or property caused by or resulting from the negligence of such contractor, his agent, servants or employees, as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances, shall be deemed to be void as against public policy and wholly unenforceable.

Section 5-323 prevents a contractor from exempting itself from liability for its own negligence for work performed in maintaining, servicing and/or repairing real property or appurtenances to real property. *See Rogers v. Dorchester Associates*, 32 N.Y.2d 553 (1973).

Trizechahn refers to *Melodee Lane Lingerie Co. v. American District Telegraph Co.*, 18 N.Y.2d 57 (1966) to support its argument that the contractual limitation of liability in the Service Agreement is unenforceable. In *Melodee Lane Lingerie Co.*, plaintiff tenant store sought to recover for damage to its merchandise caused by water that escaped from a sprinkler head on the premises. The premises was covered by an alarm system which was designed to give warning of escaping water from the sprinklers. In addition to suing the owner and manager of the premises, plaintiff also sued the alarm company, alleging negligent maintenance and/or repair to the alarm system. The alarm company's contract contained a

limitations clause which provided for a maximum liability of \$50 or a sum equal to ten percent of the then current annual service charge (\$561.00), whichever was greater.

In determining the extent of the alarm company's potential indemnification liability, the Court of Appeals held that the predecessor to General Obligations Law §5-323 (Real Property Law Section 235) was applicable to the sprinkler alarm contract and that limitations of liability clauses are valid notwithstanding the statute if the customer is given "a voluntary choice of obtaining full or limited liability by paying under a graduated scale of rates proportioned to the responsibility in transportation or other service rendered." *Melodee Lane Lingerie Co. v. American District Telegraph Co.*, 18 N.Y.2d 57, 69 (1966). The Court of Appeals concluded that because there was no opportunity given to the subscriber to pay an annual service charge, if it so chose, consonant with full liability, the limitation of liability clause was invalid. *See also 80-82 Greene Street Corp. v. AFA Protective Systems, Inc.*, 100 Misc. 2d 334 (N.Y. App. Term 1979).

Here, the Service Agreement is plainly covered by General Obligations Law §5-323, as it is an agreement in which Timbil seeks to limit its liability for negligently performing "maintenance and repair of real property or its appurtenances." Further, Timbil presents no evidence that Trizechahn had the opportunity to pay an annual service charge, if it so chose, consonant with full liability. Therefore, pursuant to General Obligations Law §5-323 and in accordance with the Court of Appeals' holding in *Melodee*, this court declines to enforce

the term of the Service Agreement limiting the maximum amount of damages recoverable to the annual contract amount of \$22,200.00.

However, because Trizechahn does not submit any argument in opposition to the branch of Timbil's motion seeking an order enforcing the term of the Service Agreement prohibiting "indirect or consequential damages of a commercial nature," the Court grants that branch of Timbil's motion.

In accordance with the foregoing, it is

ORDERED that defendant Timbil Chiller Maintenance Corp.'s motion for summary judgment dismissing the complaint insofar as asserted against it is denied as set forth in this court's Interim Order dated March 24, 2010; and it is further

ORDERED that defendant Timbil Chiller Maintenance Corp.'s motion for an order enforcing the terms of the Service Agreement limiting the availability of indirect and consequential damages and the amount of damages recoverable to the annual contract amount of \$22,200.00 is granted only to the extent that the Court dismisses all claims for indirect or consequential commercial damages.

This constitutes the decision and order of the court.

Dated: New York, New York
May 24, 2010

ENTER:

Saliann Scarpulla
J.S.C.

7 **SALIANN SCARPULLA**
J.S.C.

FILED
MAY 26 2010
NEW YORK
COUNTY CLERK'S OFFICE