

**St. Paul Fire & Mar. Ins. Co. v Inter-County Mech.
Corp.**

2010 NY Slip Op 33194(U)

October 15, 2010

Sup Ct, NY County

Docket Number: 100455/2007

Judge: Joan A. Madden

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: Hon. Joel A. Miller
Justice

PART 11

Index Number : 100455/2007
ST. PAUL FIRE INSURANCE &
VS.
INTER-COUNTY MECHANICAL CORP
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

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

on this motion to/for _____

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

Exhibits ...

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision and order.

FILED
NOV 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: October 15, 2010

[Signature]
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: PART 11

-----X
ST. PAUL FIRE AND MARINE INSURANCE
COMPANY a/s/o MAURICE VILLENCY INC.,

Plaintiff, Index No. 100455/2007

-against-

INTER-COUNTY MECHANICAL CORP., 200
MADISON ASSOCIATES, LP, GEORGE
COMFORT & SONS INC., LOEB PARTNERS
REALTY AND DEVELOPMENT CORP., and
R & S SERVICES, INC.,
Defendants.

-----X

Joan A. Madden, J.:

This is a case in which plaintiff subrogee, St. Paul Fire and Marine Insurance Company (St. Paul), has asserted negligence and breach of contract claims against, among others,¹ Inter-County, arising out of about \$1,000,000 in damages incurred by St. Paul's subrogor, Maurice Villency Inc. (Villency), when a sprinkler pipe allegedly froze and burst in Villency's furniture showroom, supposedly as a result of cold air emanating from adjacent air ducts. Inter-County now moves for an order granting it summary judgment. In the event that its summary judgment

¹Inter-County Mechanical Corp. (Inter-County) has advised that St. Paul discontinued the action as to codefendants 200 Madison Associates LP, George Comfort & Sons Inc., and Loeb Partners Realty and Development Corp., respectively the landowner, the building's landlord, and the management company of the property where Villency was a tenant. Further, St. Paul's counsel advised in his supplemental affirmation in opposition to the instant motion that plaintiff has discontinued this action against codefendant R & S United Services Inc. ® & S). Thus, Inter-County is now the sole remaining defendant.

FILED

NOV 04 2010
NEW YORK
COUNTY CLERK'S OFFICE

motion is denied, Inter-County seeks, pursuant to CPLR 3001, the issuance of a declaratory judgment, under its contract's clause, limiting damages to direct damages only, and excluding liability for consequential damages, including loss of profits or other economic loss.

Background

Villency, at the time in issue, operated furniture showrooms in New Jersey, Connecticut and New York, including one on Madison Avenue in Manhattan, for more than 30 years. Villency installed, at that latter location, on some unspecified date or dates, a cooling system, including air ducts, which drew in outside air into the cooling units for its operation, and separate air ducts into which hot air from its cooling units was discharged. On August 13, 2002, Villency entered into Inter-County's "official standard" (Troesch ebt, at 23) air-conditioning maintenance contract (the contract). A purpose of the preventive maintenance program was directed toward achieving "peak system performance." Contract, at 2. Robert Indovino (Indovino), Villency's Director of Operations, signed the contract on behalf of it. Indovino worked out of Villency's Plainview, Long Island offices. Under the contract, the yearly cost to Villency was about \$7,000.

As is relevant, the contract provided that Inter-County would provide four custom maintenance inspections a year, including basic inspection, oiling and adjusting procedures

[* 4]

recommended by the manufacturer. Labor for emergency service and repairs was covered under the contract. The contract excluded, under the inspection and labor program, most parts and materials, services or repairs listed in Appendix "A", and any equipment not listed in an equipment inventory which was to be provided on Villency's acceptance of Inter-County's contract. The contract obligated Villency to provide Inter-County with safe and well lighted access to Villency's equipment. Appendix "A" (§§ 1, 2, 9) indicated that Inter-County would not be responsible for, among other things, the "[m]aintenance, repair or replacement to ... ductwork, [or] insulation," changes in ductwork, "or services beyond the covered equipment."

Joseph Troesch (Troesch), who was then Inter-County's "sales engineer," signed the contract on behalf of Inter-County, but did not price it out (Troesch ebt, at 23; but see id. at 13). He testified that the aforementioned equipment inventory, the purpose of which was to let the customer know which equipment was covered, was never provided to Villency, and that he did not know why it was not provided. Troesch ebt, at 83-85. He asserted that such an inventory would list only the "units," meaning the actual air-conditioning units. Id. at 80, 84. Troesch further testified that Inter-County never obtained the equipment manufacturers' brochures; did not know whether they were available from the manufacturers; did not know whether he had taken steps to get them from the manufacturers; did not request

the brochures from Villency; and failed to advise Villency that Inter-County lacked the brochures. Id. at 81-83.

In August 2003, Villency contacted Inter-County because water was leaking from a part of its suspended ceiling above its first-floor showroom. Inter-County sent one of its service technicians, Julio Cruz (Cruz), to look into the problem. Cruz inspected the space above the wet ceiling tiles, and saw two to three feet of rotting ductwork, which was allowing hot air, which was being discharged from the cooling unit into the discharge duct, to escape into the dropped ceiling space and condense, resulting in the moisture condition. Cruz called Troesch, who obtained the services of a ductwork subcontractor to go to Villency to inspect. Troesch did not know whether Inter-County charged Villency for its inspection of the ductwork and did not believe that it charged for its subcontractor's inspection. Troesch ebt, at 105. Troesch then sent Villency a repair proposal to remove and replace two 64" x 24" discharge air ducts, for a price in excess of \$19,000.

Thereafter, Villency obtained an estimate from former codefendant, R & S, which proposed to remove and replace one piece of sheet metal from a discharge duct, the rotted section, for \$3,000. Villency opted to use R & S's more limited and less expensive services, which it then performed in early September 2003.

On December 2, 2003, Cruz and another Inter-County

technician, apparently named Charlie, went to Villency's premises to close down the cooling system for the winter. The system's water towers and pumps were drained, filters were changed, and belts and motors were checked. Cruz testified that, in terms of whether any other work had been done, he could only speak for himself, but that his work did not require him to look into the suspended ceiling where the ducts were located. When asked whether ductwork was inspected to ensure that the system was maintained to achieve peak performance, Cruz replied, "we don't do duct work." Cruz ebt, at 26. Cruz also testified that ductwork freezes, but that he had never heard of pipes near ductwork freezing. Cruz further testified that he had seen a fixed louver on the outside of Villency's premises, which led to the ductwork that was for the system's water tower, and that his inspections for Villency did not require him to inspect the louver. He was then asked whether the individual performing the winterization process was required to inspect the louver. Cruz replied that he did not know if Charlie had done so. When asked if that were something Charlie might do, Cruz responded, "Maybe ... Maybe not." Cruz ebt, at 75.

Troesch, who initially testified that the ductwork was not part of the cooling system, but eventually conceded that it was (Troesch ebt, at 38, 103), asserted that winterization did not include inspecting the ductwork or checking sources of cold air, because the ducts would just sit there for 10-30 years and not

need anything (id. at 36-37). Troesch further indicated that it was not his practice to tell customers to obtain separate contractors to inspect their ductwork, because that was not an item that needed to be inspected or worried about. However, Troesch later testified that he believed that the ductwork in issue was about 30 years old. Id. at 114.

He also testified that the ductwork and louvers that opened into the ducts were not covered under the contract, that, as part of ordinary scheduled maintenance, Inter-County would not inspect that ductwork to make sure that there were no voids, and that he never heard of pipes freezing when the ductwork was closed. Troesch asserted that ductwork was inspected only upon a customer's request. When asked what inspections, if any, were called for by Inter-County's technicians to lessen the risk of freezing to pipes near ductwork or air intake louvers, Troesch responded, "I don't know. If we see something that looks bad to us, we'll mention something, if it looks normal we don't even pay attention to it." Troesch ebt, at 50. He also testified that there was no reason to have the louvers closed. He further testified, when asked if he would ever recommend to customers that their louvers be insulated for the winter, that it depended, and that there were "a billion different cases." Id. at 56.

On about January 11, 2004, the sprinkler pipe cracked, causing extensive damage to Villency's showroom and inventory, thereby allegedly resulting in business interruption losses. By

letter dated January 22, 2004, St. Paul's counsel advised Inter-County of a likely subrogation action against it, as a result of a frozen sprinkler pipe caused by Inter-County's alleged failure to maintain Villency's HVAC and cold air infiltration system. St. Paul's counsel advised that Villency needed to commence repairs to mitigate its damages, and that if Inter-County, its attorney, or its insurance carrier desired to inspect the damages and components, it should contact St. Paul's counsel within 72 hours, and that if no one contacted counsel, repairs would commence, and damaged materials would be discarded. There is no indication that within 72 hours Inter-County contacted St. Paul's counsel, but Troesch, evidently a day after the pipe broke, went to the premises with another Inter-County sales representative to inspect and take photographs. On January 24, 2004, non-party Rheem Contracting Corp. (Rheem) repaired the pipe. Its invoice recites that the pipe leaked due to freezing. Villency and R & S thereafter entered into a service contract dated April 14, 2004 for the maintenance of specifically listed air cooling equipment. That contract recited that R & S would not be responsible for labor, parts or repair of ductwork.

Thereafter, St. Paul commenced this action against Inter-County and the aforementioned former codefendants. The complaint asserts negligence (first cause of action) and breach of contract (third cause of action) claims against Inter-County. The

complaint and bill of particulars allege, in addition to the failure to maintain the ductwork and louvers, the negligent and grossly negligent failures to protect the building from cold air infiltration; recommend proper sealing and insulation to prevent cold air infiltration; warn of the risks associated with not closing the louvers; properly inspect and warn Villency of the dangers which posed a risk of freezing to adjacent pipes; and to do those things needed to protect Villency's property.

Complaint, ¶ 16; Bill of Particulars, ¶ 4.

Inter-County moves for summary judgment dismissing the entire action as to it on the grounds that it did not cause the freeze-up of the sprinkler pipe, which caused the alleged damages, and did not have any duty with respect to the ductwork, because it was specifically excluded from the contract. Alternatively, Inter-County seeks a declaratory judgment limiting St. Paul's recovery in accordance with the contract's "liquidated damages" clause. St. Paul opposes the motion. After it submitted its reply affirmation, Inter-County sought to amend its motion to add a new basis for dismissal of the action, namely, that Villency spoliated evidence by discarding the broken sprinkler pipe.

Discussion

Spoliation

Inter-County seeks to amend its counsel's moving affirmation in support of its summary judgment motion so as to adopt R & S's

request, made in its subsequent summary judgment motion, to strike St. Paul's complaint on the ground that Villency disposed of the broken sprinkler pipe at a time when it was aware that it might be needed for litigation. Inter-County's application is denied.

A party seeking the imposition of substantial and severe sanctions for spoliation of evidence must demonstrate that the entity or individual sought to be "sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when [that individual or entity] was on notice that such evidence might be needed for future litigation." *Haviv v Bellovin*, 39 AD3d 708, 709 (2d Dept 2007); see also *Tapia v Royal Tours Service, Inc.*, 67 AD3d 894, 896 (2d Dept 2009) (plaintiffs must show that "they are 'prejudicially bereft of the means of prosecuting'" the action [internal citation omitted]); *Dessources v Good Samaritan Hospital*, 65 AD3d 1008, 1010 (2d Dept 2009) (plaintiff's expert's speculative affidavit was inadequate to establish that the loss of fetal monitoring tapes was crucial evidence); *Utica Mutual Insurance Co. v Berkoski Oil Co.*, 58 AD3d 717 (2d Dept 2009). Sanctions can be ordered whether the spoliation was negligent or intentional. *Baglio v St. John's Queens Hospital*, 303 AD2d 341 (2d Dept 2003); *Squitieri v City of New York*, 248 AD2d 201 (1st Dept 1998).

The court is given a broad degree of discretion in deciding which sanction is appropriate, and since striking a party's pleading constitutes drastic relief, the court is required to consider the prejudice to the other side. *Utica Mutual*, 58 AD3d at 718; see also *Minaya v Duane Reade International, Inc.*, 66 AD3d 402 (1st Dept 2009). "[A] less severe sanction or no sanction is appropriate where the missing evidence does not deprive the moving party of the ability to establish his or her case or defense." *Denoyelles v Gallagher*, 40 AD3d 1027, 1027 (2d Dept 2007). When a lesser sanction is imposed, it "is a matter best left to the discretion of the trial court and should be made on the basis of the record before it at the time." *Quinn v City University of New York*, 43 AD3d 679, 680 (1st Dept 2007); *Kugel v City of New York*, 60 AD3d 403 (1st Dept 2009).

In the instant case, while Inter-County seeks to make much of the fact that Villency did not wait 72 hours after giving Inter-County notice before Villency repaired the pipe, Inter-County has not indicated that within that 72-hour period it sought to inspect the pipe. Significantly, Troesch and an Inter-County salesman visited the site the morning after the event, and thus had the opportunity to inspect the pipe if they so chose. Also, at his deposition, Troesch did not appear to dispute that the pipe had frozen. Troesch ebt, at 64, 68, 72, 75-76, 100). Further, Inter-County has failed to demonstrate that inspection

of the pipe is crucial to its defense. *Hartford Fire Ins. Co. v Regenerative Bldg. Constr. Inc.*, 271 AD2d 862, 864 (3d Dept 2000).

Specifically, although Rheem's pipe repair invoice indicated that the leaking pipe was due to a freeze-up of the sprinkler lines, there is no indication that Inter-County ever attempted to depose Rheem, a disinterested witness, to ascertain the basis for that conclusion. Additionally, Inter-County's expert effectively opined that the pipe could not have frozen if the showroom was kept heated above 32°. Thus, while Inter-County has shown, via St. Paul's counsel's January 22, 2004 letter, that Villency was on notice that the pipe might be needed for future litigation, Inter-County has not demonstrated that it is bereft of the defense that the pipe did not burst due to a freeze-up of the sprinkler line. Moreover, Inter-County does not claim that evidence of the ducts' condition was spoliated. It therefore has evidence as to whether the ducts' condition caused a freeze-up of the pipe.

Next, Inter-County's motion, which seeks dismissal of the complaint, violates my preliminary conference order, which provided that all dispositive motions had to have been made within 60 days of the filing of the note of issue, which, according to the court's case management system, occurred on November 6, 2009. Inter-County's request to amend its affirmation in support of its summary judgment motion was served

on March 12, 2010, evidently in response to R & S's motion for summary judgment and to strike St. Paul's complaint. While the County Clerk's file reveals that R & S sought, and was granted, an extension of time to serve its summary judgment motion, because it and St. Paul were in the midst of discussions as to whether St. Paul would voluntarily discontinue its action as to R & S, no such extension was ever granted to Inter-County. Here, it is clear from Inter-County's counsel's moving affirmation that it was aware that the pipe was missing; yet, it did not seek dispositive relief on spoliation grounds until after its time to do so expired.

Thus, good cause has not been demonstrated to relieve it of its obligation to timely move for dispositive relief on the ground of spoliation. *Glasser v Abramovitz*, 37 AD3d 194 (1st Dept 2007). In light of the foregoing, its request for summary judgment based on spoliation of the pipe is denied. Nonetheless, this denial is without prejudice to a motion for a missing evidence charge at trial. *Barnes v Paulin*, 52 AD3d 754, 755 (2d Dept 2008); *Quinn v City of New York*, 43 AD3d at 680; *Rodriguez v 551 Realty LLC*, 35 AD3d 221 (1st Dept 2006); *see e.g.* PJI 1:77.

Summary Judgment

The law is well settled that the movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief, by

eliminating all material allegations raised by the pleadings. *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to meet one's burden mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. However, where the movant demonstrates its prima facie entitlement to summary judgment, the burden shifts to the other side to raise a material triable issue of fact warranting the motion's denial. *Alvarez v Prospect Hospital*, 68 NY2d at 324. Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of [its] day in court [internal citations omitted]." *Gibson v American Export Isbrandtsen Lines, Inc.*, 125 AD2d 65, 74 (1st Dept 1987).

Before addressing the parties' substantive claims, there are two preliminary issues. First, Inter-County requests in its reply affirmation that the court preclude St. Paul from offering on this motion and at trial a statement allegedly made by an unidentified Inter-County "mechanical representative" to St. Paul's investigating engineer/expert, who was evidently on Villency's premises on January 20, 2004. The basis for this request is that St. Paul failed to provide that statement during

discovery, as required (CPLR 3101 [e]; *Kaye v M & J Associates*, 46 AD2d 894 [2d Dept 1974]), thereby allegedly hampering and prejudicing Inter-County's defense of this case (*Sherman v Tamarack Lodge*, 146 AD2d 767 [2d Dept 1989]). The alleged statement, as referred to in that investigator's affidavit, was to the effect that the employee performed the yearly winterization and startup of Villency's air conditioning equipment, and that such winterization included draining the system, and that the startup included preparing the system for use.

To the extent that Inter-County is seeking preclusion of the statement at trial, as opposed to on this motion, that is an evidentiary issue for the trial. As to Inter-County's request that the court preclude the statement on this motion, it is readily apparent that such statement has not prejudiced or hampered Inter-County in its defense of the action, Inter-County's bald and conclusory assertion to the contrary notwithstanding, since the statement is essentially a reiteration of the deposition testimony of Inter-County's employees, Cruz and Troesch, as was noted by that investigator in his affidavit (¶ 9).

Nonetheless, while the court declines to preclude that statement based on a failure to disclose it during discovery, it is clearly inadmissible on this motion, since that individual's

identity has not been revealed (Griggs v Children's Hosp. of Buffalo, Inc., 193 AD2d 1060 [4th Dept 1993]; Dehn v Kaplan, 131 AD2d 535 [2d Dept 1987]), there is no indication that he was sent by Inter-County to the premises for the purpose of being interviewed, and his speaking authority has not been demonstrated. Loschiavo v Port Auth. of N.Y. & N.J., 86 AD2d 624 (2d Dept 1982), affd 58 NY2d 1040 (1983); Sherman v Tamarack Lodge, 146 AD2d at 768. Thus, the alleged statement constitutes hearsay, and will not be considered on this motion.

Second, to the extent that Inter-County seeks in its reply papers to preclude St. Paul from using its expert's affidavit to oppose this summary judgment motion on the ground that St. Paul failed to serve a CPLR 3101 (d) statement, such request is, in the exercise of my discretion, denied since no prejudice has been demonstrated. Howard v Kennedy, 60 AD3d 905 (2d Dept 2009); Hernandez-Vega v Zwanger-Pesiri Radiology Group, 39 AD3d 710 (2d Dept 2007); Freeman v Kirkland, 184 AD2d 331 (1st Dept 1992); but see Construction by Singletree, Inc. v Lowe, 55 AD3d 861 (2d Dept 2008) (court did not abuse its discretion when it barred a defendant from using its experts' affidavits to oppose a codefendant's summary judgment motion to dismiss part of the defendant's cross claim, since the note of issue and certificate of readiness had been filed without the defendant having provided CPLR 3101 [d] statements). Specifically, St. Paul's expert's

claims are essentially a rehashing of its pleadings, and certainly could not have surprised Inter-County. Also, Inter-County did not formally move for an order granting it preclusion when the plaintiff's CPLR 3101 (d) statement was not forthcoming at the time it filed its note of issue or once Inter-County received St. Paul's opposing papers which contained the expert's affidavit. See *Kozlowski v Alcan Aluminum Corp.*, 209 AD2d 930 (4th Dept 1994); see also *Freeman v Kirland*, 184 AD2d at 332. Instead, Inter-County raised the preclusion issue in its reply affirmation, so that St. Paul was not afforded an opportunity to respond. Thus, the request to preclude the expert's affidavit is denied.

Turning now to the substance of Inter-County's summary judgment application, Inter-County, which did not submit an expert's affidavit with its initial moving papers, argues that it is entitled to summary judgment since it did not cause the freeze-up condition. The basis for this claim is the assertion of Inter-County's counsel that there is no evidence in the record regarding causation, i.e. what caused the pipe to burst, and, that since the pipe was discarded, plaintiff will merely be speculating as to the cause of the accident. While not entirely clear, Inter-County also seems to be asserting that, as Villency chose R & S, rather than it, to repair the ductwork, Inter-County cannot be responsible for problems with the sprinkler pipe.

Thus, Inter-County maintains that it is entitled to summary judgment. This assertion is without merit.

A party does not meet its burden of establishing its entitlement to summary judgment simply by pointing to gaps in a plaintiff's case. *Bryan v 250 Church Associates, LLC*, 60 AD3d 578 (1st Dept 2009). Initially, it must be noted that Inter-County has not established a particular problem with R & S's repair of the discharge duct which caused the pipe to burst. In this regard, the court also notes that Troesch's testimony (ebs, at 66) suggests that the broken pipe was in the vicinity of an inlet duct. Therefore, it may have been an inlet duct, rather than a discharge duct, which caused the pipe to burst. In view of the foregoing, Inter-County has not prima facie established that the accident was unrelated to the ductwork or the louvers, or that Inter-County should be exonerated because R & S repaired a discharge duct. Thus, irrespective of the adequacy of the opposing papers, Inter-County is not entitled to summary judgment on these bases.

This leaves the issue of whether Inter-County has prima facie established that it had no contractual duty with respect to the ductwork and louvers. Inter-County maintains that, since the contract excluded maintenance of the ductwork and insulation, it is entitled to summary judgment. Inter-County's counsel, who does not profess any expertise, claims that the contractual

exclusion of ductwork is common in the HVAC industry, as allegedly demonstrated by Villency's contracts with it and R & S.

St. Paul asserts that the contract provision relied upon by Inter-County in an attempt to exonerate itself simply meant that, if work were required on the ductwork or louvers, there would be an additional charge, not that Inter-County lacked a duty during its winterization process to inspect or warn of deficiencies. In this regard, St. Paul relies on Indovino's deposition transcript submitted by Inter-County. Indovino effectively testified that he was of the belief that, looking at the contract as a whole, which mentioned inspections and the system, that inspections of the ductwork were part of the contract, and that the Appendix "A" exclusion meant that work on the ducts would be excluded from the contract price. Indovino ebt, at 26-29, 45, 47-49. Indovino testified that he expected that if there were a problem with the system, Inter-County would bring it to his attention.

St. Paul also relies on the affidavit of its expert engineer, Steven Pietropaolo (Pietropaolo), who inspected the premises on January 20, 2004 and February 6, 2004. Pietropaolo asserts that, while the contract does not provide for replacement of ductwork, it is standard industry practice during winterization of air conditioning systems to investigate all areas of potential cold air ingress to prevent freezing damage

caused by air infiltration through the air conditioning system. Pietropaolo then goes on to list various deficiencies in the ductwork and louvers which permitted air to escape, such as a missing access panel on a duct, the lack of insulation, particularly around the louvers, gaps between the louvers and ductwork, and non-functioning dampers, which he discovered during his inspection. Pietropaolo opines that Inter-County, at minimum, had the duty to inspect for and warn of these deficiencies, which allegedly caused the pipe to freeze.

In reply, Inter-County submits the affidavit of its expert engineer, Klas Haglid, who does not purport to have examined the premises in issue. Haglid observes that the contract contains the standard exclusion of maintenance of the ductwork and insulation, and concludes that this meant that not only was maintenance excluded, but also inspection. Haglid further concludes that the winterization services provided by Inter-County were in accordance with industry standards.

In construing a contract, it is the parties' intent which is controlling. *American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 (1st Dept 1990). Where that intent can be found from the agreement itself, summary judgment is appropriate, but if reference to extrinsic facts is required to discern the parties' intention, summary judgment is inappropriate. *Ibid.* A contract which "is complete, clear and unambiguous on its face must be

enforced according to the plain meaning of its terms." *Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 (2002); *Bailey v Fish & Neave*, 8 NY3d 523, 528 (2007). Contracts "should be read as a whole to ensure that undue emphasis is not placed upon particular words and phrases," and the courts cannot in construing a contract add or subtract terms or distort their meanings. *Bailey*, 8 NY3d at 528. "[A]s between interpretations of an ambiguous term, that interpretation will be chosen which best accords with the sense of the remainder of the contract." *A & Z Appliances, Inc. v Electric Burglar Alarm Co., Inc.*, 90 AD2d 802, 802 (2d Dept 1982). A construction which renders a provision meaningless is to be avoided. *Spaulding v Benenati*, 57 NY2d 418, 425 (1982). A form contract is to be construed "most strongly against the party who prepared it." *A & Z Appliances, Inc. v Electric Burglar Alarm Co., Inc.*, 90 AD2d at 802; see also *Jacobson v Sassower*, 66 NY2d 991, 993 (1985).

However, in interpreting a contract, "whether it is facially clear is not the be all of things. The broader aim is a practical interpretation of the expressions of the parties [so] that there be a realization of [their] reasonable expectations [internal citations and quotation marks omitted]." *Loblaw v Employers' Liability Assur. Corp., Ltd.*, 57 NY2d 872, 878 (1982); *Duane Reade Inc. v Cardtronics, LP*, 54 AD3d 137, 140 (1st Dept 2008). "[A] court must look for the meaning of the writing to 'parties of the

kind' who contracted it, bearing in mind the 'interests' it was intended to further [internal citations omitted]." *Loblaw v Employers' Liability Assur. Corp., Ltd.*, 57 NY2d at 878.

In the instant case, the contract is not clear and complete upon its face because, aside from the fact that the inventory list was never provided by Inter-County to Villency, the contract does not specify the exact nature of the inspections recommended by the manufacturers, which inspections Inter-County was, according to the contract, required to make. Inter-County, which has the burden on this motion, has not shown that such recommended inspections excluded the ductwork attached to the air-conditioning units, which units were dependent on the ductwork for the system's operation.

Further, it is unclear from the contract whether, in excluding ductwork "maintenance," the contract also excluded ductwork inspection and warnings to Villency, here where the contract's stated goal was directed to achieving "peak system performance," and where Inter-County was to instruct Villency in the "system[s]" operation to provide "the best operating efficiency or conditions." *Lindy moving aff.*, ex. J. As noted earlier, Troesch conceded that the ductwork was part of the system.

Whether, in light of the foregoing, inspections of the ductwork and the obligation to alert Villency about any ductwork

problems were included in the contract, and whether Indovino could reasonably have concluded that they were so included, present issues of fact. Accordingly, Inter-County's application which seeks dismissal of the entire complaint as to it is denied.

Limitation of Liability/Exculpatory Clause

As the court has found an issue of fact as to Inter-County's liability, the next issue to be considered is Inter-County's request for a declaratory judgment limiting its liability in accordance with the contract's limitation of liability/exculpatory clause, which Inter-County and St. Paul refer to as a liquidated damages clause. That clause (¶ 7 of the contract's general provisions) limits Inter-County's liability arising out of its performance of the contract, including the malfunction of Villency's equipment and the failure or negligence of Inter-County's employees or agents, to direct monetary damages, and further provides that Inter-County shall not be liable for incidental, special or consequential damages, including loss of profits, or other economic loss. Inter-County notes that, during discovery, St. Paul provided it with a list of damages, including an amount of \$435,000 attributable to business interruption. Inter-County maintains that the foregoing contract clause excludes damages for business interruption, and that, accordingly, it is entitled to a declaratory judgment to that effect. St. Paul asserts that the clause should not be honored since it limits

damages to an amount which does not bear a reasonable relationship to Villency's actual loss.

Initially, it should be noted that the existence of a clause limiting a party's liability or exculpating that party is an affirmative defense. *Sommer v Federal Signal Corp.*, 79 NY2d 540 (1992); *Art Masters Associates, Ltd. v United Parcel Service*, 77 NY2d 200 (1990); *Hacohen v Bolliger Ltd.*, 108 AD2d 357 (1st Dept 1985). Ordinarily, a party cannot obtain summary judgment on an unpleaded affirmative defense. *Eschen Steel & Iron Works Co., Inc. v John T. Brady & Co.*, 94 AD2d 605 (1st Dept 1983); *Furlo v Cheek*, 20 AD2d 939 (3d Dept 1964). However, this rule is inapplicable where the unpleaded defense does not surprise or prejudice the plaintiff. *Igbara Realty Corp. v New York Property Insurance Underwriting Association*, 104 AD2d 258, 262 (1st Dept 1984); *Herbert F. Darling, Inc. v City of Niagara Falls*, 69 AD2d 989, 990 (4th Dept 1979), *affd* 49 NY2d 855 (1980); *Carlson v Travelers Ins. Co.*, 35 AD2d 351, 353 (2d Dept 1970).

In the instant case, the complaint is based in part on Inter-County's alleged breach of the contract which contains the damages clause at issue. Moreover, in opposing this branch of Inter-County's motion, St. Paul does not claim to have been prejudiced or surprised by Inter-County's reliance on this clause. Thus, the court will entertain this branch of Inter-County's motion.

Neither St. Paul's complaint, nor Inter-County's answer

contains a cause of action for a declaratory judgment.

Nonetheless, that which Inter-County effectively seeks is an order granting it partial summary judgment dismissing St. Paul's claims for loss of profits, business interruption and other special, incidental, or consequential damages.² See e.g. *Noble Thread Corp. v Vormittag Associates, Inc.*, 305 AD2d 386 (2d Dept 2003); see also *Daily News, L.P. v Rockwell International Corp.*, 256 AD2d 13 (1st Dept 1998).

A contract clause limiting a party's liability or exculpating it from its negligence is enforceable, absent unconscionability, or a statute or public policy to the contrary. *Metropolitan Life Ins. Co. v Noble Lowndes International, Inc.*, 84 NY2d 430 (1994); *Sommer v Federal Signal Corp.*, 79 NY2d at 553-554; *Mom's Bagels of New York v Sig Greenebaum, Inc.*, 164 AD2d 820 (1st Dept 1990).

Here, there is no claim that the contract provision was statutorily barred. Nor has St. Paul demonstrated unconscionability. A contract is not unconscionable merely because the parties have agreed to shift the risk of loss.

Metropolitan Life Ins. Co. v Noble Lowndes International, Inc., 84 NY2d at 436; *Laidlaw Transportation, Inc. v Helena Chemical Co.*,

²There are no longer any codefendants, since the action has been discontinued against them. Accordingly, there are no extant claims against Inter-County for contribution. I therefore need not address the interplay between a claim for contribution and the exculpatory/limitation of liability clause. See *Sommer v Federal Signal Corp.*, 79 NY2d at 555-560.

255 AD2d 869, 870 (4th Dept 1998). The contract at issue was not one of adhesion where Villency lacked any meaningful choice as to whether to enter into it, nor is this a case where Inter-County was more powerful or sophisticated than Villency.

The court also finds that public policy does not render the provision unenforceable. Although public policy may prevent the enforcement of a penalty against a defendant, it does not bar the enforcement of a contractual limitation in that party's favor. *Metropolitan Life Ins. Co. v Noble Lowndes International, Inc.*, 84 NY2d at 436, citing 5 Corbin, *Contracts*, § 1068, at 386. However, as a matter of public policy in this state, exculpatory/limitation of liability clauses are unenforceable if they serve to insulate a party from willful or grossly negligent behavior. *Sommer v Federal Signal Corp.*, 79 NY2d at 554; *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-385 (1983); *Banc of America Securities L.L.C. v Solow Building Co. II, LLC*, 47 AD3d 239, 244 (1st Dept 2007). "Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack [] of intentional wrongdoing [internal quotation marks and citation omitted]." *Sommer v Federal Signal Corp.*, 79 NY2d at 554.

Here, irrespective of the pleadings' bald allegations of grossly negligent and reckless conduct in connection with Inter-County's alleged failures to, among other things, recommend proper

sealing and insulation to prevent cold air infiltration, to warn of the risks associated with not closing the louvers, and inspect and warn of alleged deficiencies, such claims amount to ordinary negligence. *Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823-824 (1993); *David Gutter Furs v Jewelers Protection Services*, 79 NY2d 1027, 1029 (1992); *Ninacci Diamond & Jewelry Co. v Miller Freeman, Inc.*, 281 AD2d 342 (1st Dept 2001); *Hartford Ins. Co. v Holmes Protection Group*, 250 AD2d 526 (1st Dept 1998). Accordingly, St. Paul's claims for consequential damages, including any loss of profits or any business interruption claims, are dismissed.

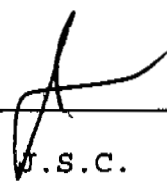
Conclusion

In conclusion, it is

ORDERED that Inter-County Mechanical Corp.'s summary judgment motion is granted solely to the extent of dismissing St. Paul Fire and Marine Insurance Company's claims for consequential damages, including any business interruption and loss of profits claims, but is otherwise denied; and it is further

ORDERED that the parties shall appear for a status conference on October 28, 2010 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY,

Dated: October 15, 2010



J.S.C.

FILED

NOV 04 2010
NEW YORK
COUNTY CLERK'S OFFICE