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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.: 7521-05

PRESENT:
HON. DANIEL MARTIN

Motion Date: 3/30/10
Submitted: 11/3/10
Motion Sequence No.: 05 - **MotD**

RAYMOND R. BUURMA, Individually Executor of the ESTATE OF JEAN LENTZ, Deceased and on behalf of Distributee of the Estate of JEAN LENTZ, Deceased

Plaintiff,

-against-

KEYSPAN CORPORATION, *Et al.*,

Defendant.

PLAINTIFF'S ATTY:
Stanley E. Orzechowski, P.C.
542 North Country Road, Suite B
St. James, New York 11780

DEFENDANTS ATTYS:
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177 Montague Street
Brooklyn, New York 11201

Mourey, Klott & Cashin
175 E. Old Country Road
Hicksville, New York 11801

The following named papers have been read on this motion:

Order to Show Cause/Notice of Motion	**X**
Cross-Motion	
Answering Affidavits	**X**
Replying Affidavits	**X**

The complaint of this action sets forth causes of action for negligence and breach of contract resulting in the conscious pain and suffering and wrongful death of the plaintiff's decedent, Jean Lentz, on March 29, 2003 at her home located at 2 Inez Lane, Commack, New York, as a result of a gas explosion and fire relating to the gas fueled heating system located in the plaintiff's decedent's home. A third cause of action seeks production of the heating system component parts which were removed from the decedent's residence following the fire and explosion.

By order dated July 29, 2005 (Molia, J.), the complaint was dismissed as asserted against

the individual defendants, Dennis Klott, John Cashin, Sr. and Lynn A. Mourey, Esq.

The defendants KeySpan Corporation, KeySpan Services Inc., and KeySpan Energy Solutions now seek summary judgment dismissing the complaint on the basis that there was no contract between either of them and the decedent, Jean Lentz, and no relationship of any kind between them and the decedent. Defendant KeySpan Home Energy Services seeks summary judgment dismissing the complaint on the bases there was no breach of contract between the decedent and KeySpan Home Energy Services and no negligence by KeySpan Home Energy Services. The defendants KeySpan Energy Solutions d/b/a KeySpan Energy Home Services and KeySpan Home Energy Services, Inc. seek summary judgment dismissing the complaint on the bases that the service contract relied upon by the plaintiff requires that KeySpan Home Energy Services perform one annual preventive maintenance inspection and repairs upon request of the customer and that, because the decedent never requested KeySpan Home Energy Services to inspect or repair the heating system, there was no breach of contractual duties; that KeySpan Home Energy Services common law duties are limited to those defined by the contract; that there is no proof that a defect existed in the house heating unit prior to the evening of the explosion that the defendants could have or should have discovered and corrected; and that the incident was caused by a cracked gas pipe in the ceiling of the first floor of the decedent's home and the service contract did not require inspection or repair of gas pipes.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment, it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, supra). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499 [2nd Dept 1989]), and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065 [1979]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, the verified answer, and the plaintiff's verified bill of particulars; signed copies of the transcript of the examination before trial of Raymond R. Buurma dated September 17, 2007, David E. Cox dated September 21, 2009; the unsigned transcript of the

examination before trial of William Zimmerman dated September 17, 2007; affidavits of Alfred C. Berech , Assistant Secretary of National Grid Services, Inc. (formerly known as KeySpan Services, Inc.), and Lisa Zafone, assistant secretary of KeySpan Corporation, William Zimmerman as Operations Manager for Nassau and Suffolk Counties KeySpan Home Energy Services, LLC.; an unauthenticated copy of The Premier Heating Service Plan and application for The Premier Heating Service Plan; an unauthenticated copy of the General History dated October 15, 2002; 2 photographs; an unauthenticated copy of Compensation Agreement from First Adjustment Group, Inc.; unauthenticated copy of a State of New York Claim Form dated July 28, 2003; an unsworn report of Thomas J. Karn dated October 27, 2006; a copy of the Curriculum Vitae of David E. Cox; and a letter dated June 6, 2003 from David Cox.

The unsigned transcript of the examination before trial of William Zimmerman dated September 17, 2007 is not in admissible form pursuant to CPLR 3212 and is not accompanied by an affidavit pursuant to CPLR 3116. Therefore, such transcript is not considered in this motion (see, ***Martinez v 123-16 Liberty Ave. Realty Corp***, 47 AD3d 901 [2nd Dept 2008]; ***McDonald v Maus,*** 38 AD3d 727 [2nd Dept 2007]; ***Pina v Flik Intl. Corp.***, 25 AD3d 772 [2nd Dept 2006]). The unauthenticated documents, as well as the unsworn report of Thomas J. Karn, as set forth above, are not in admissible form to be considered on a motion for summary judgment.

Based upon a review of the admissible evidence, it is determined that the moving defendants have failed to establish prima facie entitlement to summary judgment dismissing the complaint as the moving papers raise factual issue which preclude the same.

Raymond R. Buurma testified at his examination before trial to the effect that he is the son of the decedent, Jean Lentz. At the time of the fire, his mother resided at 2 Inez Lane, Commack, New York for approximately 35 years. The house, described as a high ranch, was about forty years old at the time of the fire on March 29, 2003. The decedent had a tenant living in the house with her, as well as Raymond Burrma's son who happened to be hospitalized for one week prior to the fire. For a period of five years prior to the fire, no electrical work, plumbing or any type of repair or maintenance work had been conducted at the house. About six months before the incident, an appliance repairman determined the gas stove in the apartment was not operational so he shut off the gas supply to the stove. There was also a gas stove in the portion of the house the decedent occupied, but there were no problems experienced with it. The house was heated with a hot air gas heating system which was the original heating system in the house. There was one thermostat for the entire house. During the year prior to the fire, there were no problems with the heating system. The summer prior to the fire, Burma had changed the filter on the heating unit, but testified he would not know how to inspect the heating system. His mother, his son, and the tenant in the house never complained about the heating system. The living area, bedrooms and kitchen were located on the main level of the house. The second level down was where the tenant's apartment was located, and also where the heating unit was located. At no time did he ever detect any gas leaks within the building prior to the fire, nor did his son or the tenant.

Buurma testified he was involved in his mother's decision to enter into a contract with KeySpan Home Energy Services and saw the brochure for the contract, but never saw the contract. His mother advised him in November or December prior to the fire that she called KeySpan Home Energy Services for the purpose of having them inspect the heating system and perform maintenance. He had gone to the house and saw the filter he had put in August leaning against the

wall and there was a new filter in the heating system. He asked his mother if KeySpan came and she said yes, but when he asked her if they did a safety inspection, she advised him she was not sure, but thought so. He looked downstairs and did not see any paper work, reports or inspection for the efficiency of the unit and his mother advised that KeySpan did not give her anything. Thereafter, he did not call KeySpan or visit them as his son was involved in a terrible automobile accident and attempts were being made to save his leg. On the evening of the fire, he had been at his mother's house to take her out to dinner and returned her to her home at about 6:00 p.m. When he walked in the front door, he did not smell any gas at the time, and his mother had not indicated to him that there was any problem with the heating system. He then left and learned about the fire and his mother's death from a neighbor. Subsequent to the fire, he spoke with Officer Fjeldal from the Suffolk County Police Department Arson Squad, and asked him about the heating system for the house as it disappeared. Officer Fjeldal advised him that anything the Arson Squad had taken from the house was in Yaphank at the Police Department. Buurma testified he never gave permission for anyone to remove any part of the heating system from the house. He later learned that State Farm Insurance had removed parts of the heating system from the house, but he never gave them permission to do so. His mother smoked.

David Cox testified at his deposition that he is a consulting engineer with a narrow specialty in the investigation of explosions and fires related to flammable gas, fuel gasses, natural gas, propane, butane, and acetylene, among others. He has a bachelor in civil engineering, a bachelor of business administration, and is a registered professional engineer in the Commonwealth of Massachusetts and is certified as a fire investigator by the International Association of Arson Investigators. He has investigated several hundred fires and explosions and is familiar with gas-fired furnaces, having examined many. In April 2003 he was retained by State Farm Insurance to investigate the fire at the decedent's home and prepared a written report with regard to his inspection conducted on April 18, 2003. He described the heating system as a hot air furnace with a burner compartment with a heat exchanger and blower, fed by air return ducts from the various rooms. The distribution systems went out to the various rooms, configured from the bottom up. The furnace operates on natural gas. The gas fuel is burned or ignited. He testified that the gas burners had been removed prior to his inspection. He examined some gas piping but could not be sure that he saw it all, and testified that some pipe was missing, except for threads still in the T where the pipe had been broken off in addition to a T (with a length of pipe still remaining inside the T that is two to three threads long). The furnace in the burner chamber burns gas and air from the house, and the combination becomes carbon dioxide and water vapor which is then conducted up through a flu out the chimney.

Based upon his examination of the furnace and the examination of the building, Mr. Cox testified he formed an opinion that there had been a fracture of the gas piping at a time prior to the incident, and the gas circulated in such a way that it finally found a source of ignition. There was evidence of corrosion on the T and pipe in the nature of rust, or an oxide of iron, which is significant in that the rust pattern only encompasses roughly 180 degrees of the total fracture surface from which he opined that one fracture of one half of the pipe occurred before the other, that is, on the rust surface. He found evidence of rusting on part of the pipe and a fresh break on the remainder. He stated that he interpreted it to mean that this pipe had cracked before and had remained open for a certain period of time(unknown) but at the time of the explosion came completely apart. He examined the report of the fire marshal and determined that all the evidence he saw points to gas escaping from someplace into the house and being ignited at some point without the burner being

involved except as a possible source of ignition. He added the caveat that he did not examine the burner. It was his opinion that if the source of the gas which caused this explosion had come from the burner, he would have expected to see explosive damage in the vent system or the duct work that takes the heat around the house, or the vent system that ventilates the products of combustion from the furnace. He did not see any explosion damage to the vent system that ventilates the products of combustion from the furnace. If the cause of the explosion was some defect in the burner, that would have produced, in his opinion, some damage to the ventilation system for the burner itself which includes vent pipes that run from the burner to the chimney, but he did not see any damage to those. When he examined the duct work that carried the heat from the hot air from the furnace through the house, he saw damage to practically all of the duct work that carried the hot air from the furnace through the house.

Mr. Cox testified that it was his opinion that there was fugitive gas in the house that was drawn into the furnace duct system through the hot air system in some way, through air returns, and at the time of ignition, everything burned with explosive results. The closer the suspected break is to the greatest area of damage, the more likely they are to be related. He did not see any evidence of any cracks or breaks in the heat exchanger and did not remove any sheet metal. His opinion, based upon a reasonable degree of engineering certainty, was that there was no evidence that this incident was caused by any defect in the burner. He believe, based upon his examination, that there was a natural gas explosion that occurred from natural gas coming from the broken fitting depicted in photograph C7 where gas could have leaked from that location and would have had an odor. He did not see any problem with the heating system itself. He further testified that he did not test for leaks to the gas meter and had been advised that the utility company had been there and tested for leaks to the furnace. He also testified that the piping from the meter to the furnace appeared to be in place when he did his inspection; however, he stated, most of the piping was hidden in that it was under the concrete floor of the garage/basement.

The testimony by Mr. Cox raises factual issues which preclude summary judgment. He stated that the gas burners had been removed prior to his inspection. He did not test the pilot or pilot safety at the house. He did not dissemble the furnace and plug the inlet and outlet to apply pressure to see if there were any leaks in the heat exchanger itself, which would have been more accurate than the visual inspection he did. He did not examine or test the remainder of the piping and did not witness testing by the utility, and could not completely rule out a leak in the rest of the piping involved in the heating system. He did not examine the chimney. Only the exposed vent system was visually inspected. He did not make a determination as to the manufacturer of the furnace or any of its parts. He did not see the burner on this unit and suspected it may have had standing pilots which stay lit forever once they are lit. He did not feel there was a delayed ignition.

William Zimmerman sets forth in his affidavit that he is employed by KeySpan Home Energy Services, LLC as the operations manager for Nassau and Suffolk Counties and is familiar with the records maintained by KeySpan Home Energy Services, Inc. regarding service contracts with customers, requests for service by customers and service calls by KeySpan Home Energy Service, Inc. He states that KeySpan Home Energy Services Inc. is not a public utility, does not sell or distribute natural gas or electricity to any customer, and is in the business of contracting with commercial and residential property owners to perform maintenance or installation of gas appliances and air conditioning equipment. He states that the decedent contracted with KeySpan Home Energy Services Inc. on October 28, 2002 for a service plan for her house heating unit for which he has

provided a copy of the application and the terms of the service plan. He states that according to the service plan between Mrs. Lentz and KeySpan Home Energy Services, KeySpan Home Energy Services would inspect Mr. Lentz's house heating unit once a year upon her request and perform the types of repairs listed in the plan upon her request. There was no record of Mrs. Lentz or anyone else requesting that KeySpan Home Energy Services either inspect or make any repairs to her home heating unit at any time prior to the accident of March 23, 2003. He also states that there is no record of Mrs. Lentz or anyone else making a request for inspection or repair to equipment of the home heating equipment or a report of a gas leak. Therefore, he opines, his company was under no obligation to take any action regarding her home.

Factual issues preclude summary judgment. Raymond Buurma testified that he saw a new filter in the heating system and that the filter he had previously replaced was standing on the floor by the heating system. He was then advised by the decedent that KeySpan had been there to service the burner. KeySpan claims that there is no record to show that the decedent called to schedule an appointment or inspection.

Also, in reviewing the Offer and Terms and Conditions of the purported service contract, it is noted that the Offer and the document Terms and Conditions are not dated, and that Mr. Zimmerman does not claim that this is an actual copy of the plan offered to the decedent. No copy of contract # 1754075 has been provided by the moving defendants, raising factual issues concerning whether this is the plan that was in effect at the time of issue. Further, the Terms and Conditions at paragraph 2 provides that KeySpan reserved the right to make an on-site inspection of the Equipment before accepting the Equipment for coverage under the Plan. There has been no testimony proffered concerning whether or not such equipment was inspected prior to KeySpan accepting the equipment for coverage, and, if so, the condition of the equipment at the time. These factual issues further preclude summary judgment.

Alfred C. Bereche set forth in his affidavit that he is Assistant Secretary of National Grid Services, Inc., formerly known as KeySpan Services, Inc., and that National Grid is not and never was a public utility corporation. National Grid does not and never did distribute or sell natural gas to homeowners. He states that National Grid is a holding company with no independent equity interest in the subsidiaries it owned, and in 2002 and 2003; KeySpan Home Energy Services, LLC was one of a number of subsidiary companies of KeySpan Services, Inc.; and that KeySpan Energy Solutions, LLC is a subsidiary of KeySpan Home Energy Services, LLC and as such, is only an indirect subsidiary of KeySpan Services, Inc. He further states that National Grid Services, Inc. was not involved in the day to day operations or management of its direct or indirect subsidiaries and that KeySpan Services, Inc. did not have any contract or relationship with the decedent.

It is determined that the affidavit of Mr. Bereche is conclusory and unsupported by admissible evidence. He does not set forth a basis for his statements and does not set forth the actual relationship and functions of KeySpan Home Energy Services, LLC, KeySpan Energy Solutions, LLC and KeySpan Services, Inc. and National Grid (see, ***Brody v Catel***, 16 Misc3d 1105A [Supreme Court, Kings County 2007]). No certificates of incorporation have been submitted and he does not indicate that he is authorized or in a position to aver as to the defendants in this action since he is secretary of National Grid Services, Inc. and not secretary to the moving defendants. Nor does he set forth the degree of control, if any, that any of the aforementioned companies exercises over the other, and whether there are different boards of directors and corporate officers, thus raising

factual issue precluding summary judgment.

Lisa Zafonte set forth in her affidavit that she is an assistant secretary of KeySpan Corporation and that in 2002 and 2003 KeySpan Corporation was a holding company with no independent operations, no non-officer employees, and no assets other than the stock of the subsidiaries it owned. She further states that KeySpan Corporation did not enter into service contracts with homeowners such as the decedent and did not sell or distribute natural gas to the decedent and has no relationship with the decedent or her house.

It is determined that the affidavit of Lisa Zafonte is conclusory and unsupported by admissible evidence and she does not set forth the basis of her knowledge or the degree of management and control exercised by KeySpan Corporation over the co-defendants, thus raising factual issue which precludes summary judgment.

Here, it is not known if the holding companies conduct their business through the subsidiaries. It is determined that the moving defendants have failed to proffer sufficient evidentiary proof for this court to determine as a matter of law that the moving defendants are not responsible for the conduct of their subsidiaries. It cannot be determined whether the officers and or employees of a parent corporation exercise control over the daily operations of the subsidiary corporation and act as the true prime movers behind the subsidiaries actions, if the parent company is conducting business through the subsidiary, and if the subsidiary exists solely to serve the parent (see, ***Van Valkenburgh, Nooger & Nelville v Hayden Pub. Co.***, 39 NY2d 34 [1992], ***Port Chester Elec. Constr. Corp. v Atlas***, 40 NY2d 652 [1976], ***Fiur Co. v Ataka & Co.***, 71 AD2d 370 [1st Dept 1979]; see also, ***Superior Transcribing Service, LLC v Paul***, 72 AD3d 675 [2nd Dept 2010], ***Portnoy v American Tobacco Co.***, 1997 Misc. Lexis 661 [Supreme Court, Suffolk County 1997]), or that the moving defendants were not beneficiaries of the contract with the decedent (see, ***Forum Ins. Co. v Texarkoma Transportation Co.*** 229 AD2d 341 [1st Dept 1996]).

All the defendants seek dismissal of the complaint on the basis of spoliation asserting the plaintiff failed to preserve the house heating unit. The moving defendants have not established prima facie that the plaintiff removed any of the heating equipment from the house and is responsible for spoliation of evidence. The admissible proof establishes that parts were removed from the scene by the Arson Squad of the County of Suffolk Police Department and that State Farm Insurance conducted an inspection removing parts of the heating system.

Accordingly, defendants' motion is denied in its entirety.

So Ordered.

Dated: February 8, 2011
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.