[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 117815/2005
BEVILACQUA, OTTAVIANO
vs.
BLOOMBERG
SEQUENCE NUMBER : 008
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 008

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED

FEB 08 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

Case ready for trial
after Mediation Completed

Dated: FEB 06 2012
FEB 06 2012

HON. JUDITH J. GISCHE J.S.C.
HON. JUDITH J. GISCHE

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

----------X

OTTAVIANO BELIVACQUA and KATHRYN BELIVACQUA,

Plaintiffs,

-against-

BLOOMBERG, L.P., SCALES INDUSTRIES TECHNOLOGIES, INC. and QUINCY COMPRESSOR, INC.,

Defendants.

----------X

BLOOMBERG, L.P.,

Third-Party Plaintiff,

-against-

ABM ENGINEERING SERVICES,

Third-Party Defendant.

----------X

SCALES INDUSTRIAL TECHNOLOGIES, INC.,

Second Third-Party Plaintiff,

-against-

QUINCY COMPRESSOR,

Second Third-party Defendant.

----------X

SCALES INDUSTRIAL TECHNOLOGIES, INC.,

Third Third-Party Plaintiff,

-against-

COLTEC INDUSTRIES, INC.,

Third Third-Party Defendant.

----------X

Decision/Order
Index № 117815/05
Seq No.: 008

Hon. Judith J. Gische
J.S.C.

Third-Party
Index № 591004/06

Second Third-Party
Index № 590227/08

Third Third-Party
Index № 590683/08

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Quincy n/m (3212) w/GNH affirm, ML and GM affids, exhs	1
Plaintiff opp w/EB affirm, exhs	2
Quincy reply w/GNH affirm	3

Upon the foregoing papers, the decision and order of the court is as follows:

JUDITH J. GISCHE, J.:

In this personal injury action, defendant/second third-party defendant/third third-party defendant Quincy Compressor (Quincy), an unincorporated division of Coltec Industries, Inc., moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint of plaintiffs Ottaviano Bevilacqua (Bevilacqua) and Kathryn Bevilacqua[1]. Familiarity with the procedural history of this lawsuit is presumed, and prior motion practice pertaining to the first-, second- and third-party actions has resulted in a dismissal of all claims against Bloomberg, L.P. (Bloomberg) and Scales Industries Technologies, Inc. (Scales). The third-party action, under New York County index No. 591004/06, against Bevilacqua's employer ABM Engineering Services (ABM) was discontinued with prejudice, by stipulation dated October 4, 2007, and filed on October 11, 2007. At this juncture, the parties have completed discovery, the note of issue has been filed, and the sole remaining defendant, Quincy, seeks an order granting a summary judgment dismissal of the complaint. This motion for summary judgment is timely

[1]Kathryn Bevilacqua asserts a derivative claim based upon her allegations of loss of services.

(CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 (2d Dept. 2004). The court's decision and order is as follows:

On April 4, 2005, Bevilacqua was working as an operating engineer for ABM, the property management company which, at all relevant times, had an engineering contract to maintain the heating and cooling systems in the building owned by Bloomberg and located at 560 Washington Street in lower Manhattan (the Building). On that date, Bevilacqua and his work partner, Chris Reid, were assigned to work the overnight shift in the Building. His checklist of duties included routine inspection of the oil levels and various gauges for equipment, known as "chillers,"[2] which are located in the Building's "chiller room." It is his contention that, at approximately 2:45 A.M., while walking toward the air compressors (part of the chiller equipment) to check the oil levels, he was caused to slip, fall and injure his knee and lower back due to the presence of oil on the floor. Quincy concedes that oil was present on the floor, but disagrees with Bevilacqua's contention that the oil had leaked from the air compressors.

It is undisputed that the air compressors, also referred to by the parties as "pumps," were owned by Bloomberg, manufactured by Quincy, and were under a manufacturer's one-year warranty at the time of plaintiff's accident. The specific model was the Quincy 350 Duplex (Model 350). Model 350 is comprised of two compressors, or "pumps,"[3] which feed compressed air into one receiver tank, and an oil is used to lubricate the internal components of the pumps.

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[2]Chillers are the machines which maintain the chill water temperature for the building's air conditioning and blower system.

[3] The deponents alternately referred to the air compressors as pumps.

The parties also do not dispute that Scales, a local distributor of Quincy compressors, installed and serviced the air compressors, that prior to the accident, Scales' employees had transmitted complaints about leaking oil to Quincy, that both prior to, and after, the accident, the air compressors had been returned to Quincy and replaced under the terms of the warranty.

According to ABM's then-chief engineer, James Spahn (Spahn), who was responsible for overseeing engineering maintenance at the Building, ABM had been reporting problems with oil leakage at least as far back as August 2004. At his deposition, Spahn testified that when he was called to the scene (by Reid) after plaintiff fell, he saw "a slick of oil on the floor" which Spahn knew had come from air compressors numbered three and four because:

> [Bevilacqua's] function that night was to service that particular piece of equipment. Between the air compressor and the wall, there is a floor drain . . . the air compressor condensates into a receiving tank and there is an automatic valve that opens up to relieve the water from the receiving tank at this opening, and when that valve opens up, it's under 90-plus pounds of pressure. . . . [t]here was a mist around the floor drain, which was only three or four feet away from the piece of equipment.
>
> * * *
>
> . . . a mist of oil. In other words, it wasn't a puddle, it was like a light coating and if you walked straight, you wouldn't be able to see it. You actually had to lean to the side to see it. And going to the floor, I felt it, seeing how it was coming from the compressors, so we secured the air compressors . . .
>
> * * *
>
> so we shut off the air compressors and we degreased the area, and then we called Scales Air Compressors to come in and take a look at them

(Spahn Dep., at 12 - 13).

Spahn explained that, while ABM was responsible for in-house maintenance of the equipment, ABM was required to call upon Scales to handle matters other than routine maintenance because the unit was still under the manufacturer's one-year warranty. Accordingly, ABM began calling Scales in or about August 2004, to inspect the compressors when traces of

oil started to appear where oil should not have been, indicating that the units were leaking internally (*Id.* at 15 - 16). Scales made several service visits and tried to address the problem by changing to a heavier grade of oil (*id.* at 15). Adjusting the oil, however, did not correct the leakage problem, and by September 2004, Scales deemed the equipment in need of replacement, which was then handled under the terms of the warranty (*Id.* at 19).

In January 2005, and again in February 2005, Scales was called back to the Building because the replacement compressors were also showing signs of internal leakage. Scales inspected them and reported back to Quincy that they, again, needed to be replaced. In or about mid-February 2005, Quincy approved the return and exchange of the compressors, based upon reports from Scales that the compressors were passing oil. After Bevilacqua's accident on April 4, 2005, a claim was made, once again, under the warranty for a return and exchange of the compressors.

A series of documents, entitled Warranty Claims, Returned Material Authorizations (RMA's), Shop Orders and Warranty Invoices, record the history of the complaints made and the actions taken with respect to compressors numbered three and four. The Warranty Claims, which were generated by Scales, and the RMAs, Shop Orders and Warranty Invoices, which were generated by Quincy, confirm that complaints about oil leakage were received by Quincy both before and after plaintiff's accident. These documents provide, in relevant part:

Warranty Claim No. 223878 [received from] Scales
Details of Complaint: 7/3/03 & 8/4/03; Units leaking oil from discharge lines
Warranty Claim No. 229051 [received from] Scales
Details of Complaint: 9/28/04 Units passing oil through vales, spoke with Quincy & ok'd
Action Taken to Correct: 9/28/04: installed (2) Quincy 350 Basic Compressors in exchange.

RMA: dated 7/21/04; Defective pumps to be returned to Quincy REMAN Dep.

RMA: dated 1/27/05: The two 350 Compressors are passing oil. The customer is adding more than a quart of oil a week to each compressor. They are being returned to be evaluated for the reason why they are doing this . . .
RMA: dated 4/05/05: When these [compressors] are returned . . . they . . . need to be evaluate[d].

Shop Order No. 976957; 7/21/04 . . . placing order for (2) 350QRB1 compressors . . . pumps passing oil . . . returning pump[s] to REMAN.
Shop Order No. 161501; 1 - 13 - 05. . . Ricko/Scales is saying that these compressors are leaking & using oil. . . . These were replacement compressor[] for others with the same problems . . . 1 - 27 - 05 . . . both compressors have a 40% duty cycle, & each compressor is passing in the area of a quart of oil a week. Rick has been working with Mark Long & Mark ask[d] me to replace . . .
4 - 6 - 05 . . . Mark Long has been working with Rich @ Scales on this compressor & two others. The compressor[s] were replacement[s] for others that [passed] oil. Now these are passing oil Mark ask[ed] to send new compressor[s] that will have extended test on them & Mark Long & Chuck Fisher will inspect them before they are taken off the test stand. Having defective ones returned to be evaluate[d] by Quincy.

Warranty Invoice: order date 7/21/04 - invoice dated 7/30/04; defective pumps to be returned to Quincy REMAN Dep.

Warranty Invoice: order date 1/27/05 - invoice date 2/19/05; please have an exten[ded] compressor to make sure they are not passing oil. These two compressor[s] are replacing compressors. . . . Returning the defective compressor[s] to Quincy on RMA.
Warranty Invoice: order date 4/06/05 - invoice date 5/20/05; all these compressors need to have a[n] extended test done to them to make sure they do not pass oil. . . . Returning the defective compressor[s] back to Quincy on RMA.

Plaintiffs commenced this action based, in large part, on the fact that Quincy was made aware of recurring problems with oil leakage by the compressors at the Building. Bevilacqua claims that the actions which Quincy took to remedy the problem were inadequate, that the April 4, 2005 seepage of oil outside the unit was a foreseeable result, and that he is entitled to damages accordingly.

New York has long recognized that:

> [a] manufacturer who places a defective product in the market that causes injury may be liable for the ensuing injuries. A product may be defective when it contains a manufacturing flaw, is defectively designed or is not accompanied by adequate warnings

> for the use of the product. A manufacturer has a duty to warn against latent dangers resulting from foreseeable uses of its product of which it knew or should have known

(*Liriano v Hobart Corp.*, 92 NY2d 232, 237 [1998] [internal citations omitted]; *see also Voss v Black & Decker Mfg. Co.*, 59 NY2d 102, 107 [1983]).

Bevilacqua's complaint sounds in, among other things, strict products liability, negligence and breach of warranty, and is based upon allegations that Quincy defectively designed, manufactured, repaired and replaced the compressors used at the Building, that the compressors were not free from defects, were not in proper operating condition, were not fit for the purpose intended and/or that Quincy caused or allowed the compressors to leak oil without providing adequate warning of this hazard.

Following the completion of discovery, Quincy served the instant motion for summary judgment on the grounds that there is no evidence that: the compressors operated improperly on April 4, 2005; the compressors were negligently or defectively designed or manufactured; Quincy breached an express or implied warranty; or Quincy breached a duty to warn of a possible danger based on the operation of the compressors or based on the provisions made for oil mist collection when fluids were drained from the two-compressor unit through one automatic valve.

Quincy does not deny that prior to April 4, 2005, it had received complaints from Scales concerning problems that compressors three and four were having with internal oil leakage, or that the compressors had previously been returned and exchanged under warranty for precisely that reason. What Quincy denies and disputes are Bevilacqua's claims that the finding of oil outside the compressors on April 4, 2005, was related to the earlier instances of internal oil leakage, and/or that notice of prior incidents of internal leakage is tantamount to notice of

possible external leakage or seepage. Quincy also denies that the automatic valve's release of a mist containing oil was caused by a malfunction of the compressors, and asserts that if Bevilacqua was injured by any act other than his own negligence, it was due to the manner in which fluids were drained from the compressors, and that Quincy was not responsible for the pipe used to drain the fluids from the automatic valve.

It is well settled that to obtain summary judgment, Quincy, as movant, "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. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

In support of its motion, Quincy submits the transcripts of depositions held in this matter, together with two sworn affidavits, one from Gerard Muller (Muller), a licensed, professional engineer, and the other from Mark Long (Long), the Manager of Service and Warranty for Quincy Compressors whose name appears on several documents relating to the compressors, and whose deposition transcript is annexed to the motion. In their respective affidavits, both Muller and Long explain how this type of compressor works, confirm that the Model 350 was not defective in design, manufacture or operation, opine that the compressors at issue were reasonably safe for the purpose intended, and offer a theory about plaintiff's accident.

In his affidavit, Muller states that the Model 350 was first produced in or about 1940, is of a common design for air compressors of its type, and with various modifications, has been in use worldwide since that time due to its utility and efficiency (Muller Aff., ¶ 8). Muller explains that the Model 350 consists of an electric motor

> that turns a shaft . . . which in turn drives an oil-lubricated reciprocating piston that compresses the air within a cylinder into a smaller space within the cylinder in order to increase the air pressure. A valve in the cylinder then opens to allow the compressed (pressurized) air to be discharged to an air receiver tank that maintains the pressurized air in a storage tank.

With respect to oil, Muller explains that the minuscule amount of oil used

> to lubricate the piston's reciprocating sliding motion is normally picked up by the compressed air discharged with each piston stroke and is carried over to the air receiver tank. The actual amount of oil carry-over varies greatly depending on a range of . . . variables . . . [and the] oil carryover . . . is . . . an unavoidable consequence of the need to lubricate the cylinder walls and does not indicate a defect in the design or manufacture of this type of compressor

(*Id.*, ¶¶ 10, 11).

Muller adds that the high velocity at which the condensed fluids are released at the floor drain "produces a mist composed of water and oil" (*Id.*, ¶ 16). Muller's theory is that Bevilacqua's accident "was the result of the presence of oil on the flooring due to inadequate oil mist collection provisions where the air receiver drain pipe enters the floor drain, thereby allowing oil mist to permeate the surrounding area" (*Id.*, ¶ 20).

Long's affidavit also details the mechanical workings of the Model 350, explaining that the compressors, or pumps, work by transferring, or "discharging" compressed air from its cylinders into the receiver tank. He states that "[t]he entire process . . . is entirely self-contained and nothing exits outside of the compressor unit" (Long Aff., ¶ 8).

With respect to oil, Long states that the compressors use a rotary pump to distribute the oil used to lubricate both the internal rotating components and the pistons/rod assemblies, and that the passing of oil, along with the compressed air and a certain amount of water vapor, to the receiver tank, is a part of the normal operation of the Model 350. He further explains that, over

time, the water vapor condenses into liquid water which, along with the carried-over lubricating oil, accumulates in the bottom of the air receiver. The receiver tank on the Model 350 has a drainage valve for the removal of condensed fluids, and

> because oil is not soluble in water, the carry-over oil in the air receiver separates from the condensed water vapor. Each time the drain valve is actuated over a fixed time period, a certain amount of water will drain which may or may not be all the water present in the air receiver. If all the water is drained during one of these fixed duration automatic draining events, then the oil floating on the condensed water vapor would also be drained and exit the drain pipe . . . as an oil mist. This appears to be what occurred in this case

(*Id.*, ¶¶ 14 -15).

Finally, Long points out that Quincy does not provide equipment to capture and/or coalesce the fluid/mist unless it is specifically requested by the purchaser, and he suggests that the pipe used to carry the fluids from the valve to the floor drain was neither manufactured by, nor provided by, Quincy. He also suggests that, if a mechanical defect was the cause of plaintiff's fall, the defect pertained either to the pipe, or to the manner in which the pipe connected to the valve and/or floor drain, neither of which was Quincy's responsibility.

Quincy also relies on information provided Ediberto Vera (Vera), the Scales service technician who inspected the compressors in September 2004 and January 2005. Vera testified that he was sent to the Building to investigate customer complaints of oil leakage. When questioned about his observations during his service calls, he specifically denied seeing oil leak out of the compressors during either inspection, and he denied seeing oil present on the floor in the vicinity of the compressors during either inspection.

Contrary to Quincy's assertions, neither Vera's testimony nor the expert affidavits establish, as a matter of law, that the oil was discharged onto the floor as part of the normal

course of operation of the compressors, and not as a result of a design defect or of a manufacturing defect or repair. While both affiants stress the fact that the prior complaints pertained only to internal oil leakage, that the carry-over, or "passing" of oil into the receiver tank is an unavoidable consequence of the need to lubricate the internal moving components of the compressors, and that it is normal for a small amount of oil to be discharged when the drainage valve is activated, neither has established, for the purpose of summary judgment, that that normal discharge is what caused the oil to appear on the floor on this particular occasion, as opposed to a defect in the compressors themselves. Although Long was deposed in this matter, he testimony is unhelpful on this issue as he was unable to recall any information pertaining to any of the compressors sent to, or returned, from the Building. He was also unable to recall any information pertaining to post-accident testing. This was so despite language on the Shop Orders indicating that "Mark Long" would be involved in that process.

Furthermore, despite the fact that the compressors were returned to Quincy after the accident on April 4, 2005, neither affiant indicates that his evaluation and expert opinion was based upon his or any other person's inspection of the specific compressors at issue. The conclusions drawn by each affiant - - that the compressors were free from defects and were reasonably safe for the purpose for which they were intended - - do not resolve questions as to the manner in which the subject compressors functioned on April 4, 2005. Each surmises that Bevilacqua slipped on oil which was discharged as part of the normal drainage process. Both conclude that "this appears to be what occurred in this case" (Long Aff., ¶ 14; Muller Aff., ¶ 13). Their opinions are insufficient to establish entitlement to judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). They do not rule out all other

possibilities for the existence of oil outside of the compressor

Long also fails to reconcile his explanation regarding circumstances under which oil, in the form of an oil and water mist, passes externally during the drainage process, with his statement to the effect that "[t]he entire process . . . is entirely self-contained and nothing exits outside of the compressor unit" (Long Aff., ¶ 8). Finally, he, like Muller, fails to explain why Quincy ordered the return of the compressors after plaintiff fell, if, as they assert, the external discharge of the oil was a natural consequence of the proper functioning of the Model 350. Accordingly, based upon the affidavits of Long and Muller, it is not possible to rule out the possibility that the oil found outside the compressors was the product of a design or manufacturing defect, whether negligent or otherwise.

Summary judgment should not be granted where there is any doubt as to the existence of material and triable issues of fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]) and the motion court is obligated to draw all reasonable inferences in favor of the nonmoving party (*Assaf v Ropog Cab Corp*, 153 AD2d 520, 521 [1st Dept 1989]). Inasmuch as the affidavits are insufficient to establish how and when the oil came to be on the floor at the time of plaintiff's fall, Quincy has not tendered sufficient evidence to demonstrate that there are no material issues of fact for the trier of fact (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384 - 385 [2005]).

Finally, even if Quincy had made a prima facie showing, summary judgment would, nevertheless, be denied as the sworn testimony of ABM's chief engineer (Spahn) directly contradicts the explanations offered by Long and Muller with respect to the external discharge of oil. According to Spahn, there are no circumstances under which oil should combine with the

water/vapor being expressed through the automatic valve, whether by design or as a result of internal leakage. He explained:

> [w]hen the air compressor runs, it compresses air and moisture that is in the air. There is a storage tank that the two units sit on top of. It's called a receiver. The air that's pumped up is stored there, which travels along with it is the moisture which condenses back to water. There's an automatic valve in the tank that's programmed by time to open to relieve the water that collects in the bottom of the tank to a floor drain, so every so many minutes or hours, whatever is programed, this valve opens up and the tank dumps into a floor drain, the pipe, and what happened is, the pipe, the floor drain is only three, four feet away from the compressor itself. And when the valve opens to relieve the water, the oil that leaked internally is now in with the water sprayed out on the floor drain

(Spahn Dep., at 24). When asked whether that should happen, Spahn replied "no, it shouldn't happen . . . [b]ecause the oil should not be where the water is" (*id.* at 25).

Spahn explained that he ran a test to see what caused the oil to end up on the floor on April 4, 2005.

> It was after I spoke to Scales. What we did was we took a five-gallon plastic drum of water, the plastic drinking bottles, we cut it in half, and we put it over the floor drain and we ran the compressors and we let the valve open like they're supposed to and spray up and cover the plastic containers with water. . . . the oil shouldn't be there

(*id.* at 71 - 72).

Based upon his knowledge of the compressors and the result of his test, Spahn concluded that the oil leakage problem, which, up until the time of plaintiff's accident, had only plagued the compressors internally, was now causing oil to be expressed externally when the valves were in an open position.

A review of Vera's transcript reveals that, while he did not personally observe the oil leaking outside the compressors prior to April 4, 2005, he had, prior to that date, serviced at least

one other compressor which leaked oil outside the unit. When asked about possible causes of an external oil leak, Vera responded that problems with oil filters, side cover plates, o-rings, and/or oil pumps could cause that result (Scales/Vera Dep., at 29 - 35). Neither Quincy nor the affiants addressed this possibility.

Questions of fact are presented by the conflicting opinions as to whether the oil on which Bevilacqua slipped was discharged as part of the normal operation of the compressors, or occurred as a result of a defect involving compressors numbered three and four. The motion court cannot resolve those issues as it is the province of a jury to determine the weight to be afforded the conflicting testimony of experts (*see Gleeson-Casey v Otis El. Co.*, 268 AD2d 406, 407 [2nd Dept 2000]).

Conclusion

Accordingly, it is hereby

ORDERED that Quincy's motion for summary judgment is denied for the reasons stated; and it is further

ORDERED that this case is ready to be tried once mediation is completed; and it is further

ORDERED that plaintiff shall serve a copy of this decision order on the mediator and the office of trial support; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
February 6, 2012

So Ordered:

Hon. Judith J. Gische, J.S.C.