

Travelers Prop. Cas. Co. of Am. v Crane Constr. Co., L.L.C.
2013 NY Slip Op 33251(U)
December 20, 2013
Supreme Court, New York County
Docket Number: 150161/10
Judge: Ellen M. Coin
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

NYSCEF DOC. NO. 732

RECEIVED NYSCEF: 12/23/2013

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

PRESENT: HON. ELLEN M. COIN
Justice

PART 63

Index Number : 150161/2010
TRAVELERS PROPERTY CASUALTY
vs.
CRANE CONSTRUCTION COMPANY,
SEQUENCE NUMBER : 016
SUMMARY JUDGMENT

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ANNEXED DECISION
AND ORDER.**

*This constitutes the decision and order
of the Court.*

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

Dated: 12/20/13

Enc, J.S.C.
HON. ELLEN M. COIN

1. CHECK ONE: _____ ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: _____ MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: _____ ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

-----X
TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA a/s/o Ann Taylor Retail Inc. d/b/a Ann
Taylor and other interested insureds under the
applicable policy of insurance,

Plaintiff,

-against-

CRANE CONSTRUCTION COMPANY, L.L.C.,
DONNELLY MECHANICAL CORP., DYNAMIC
AIR CONDITIONING COMPANY, INC., MARLIN
MECHANICAL INC., MARLIN MECHANICAL
SERVICES, INC., MICRON GENERAL
CONTRACTORS, INC., CONBRACO INDUSTRIES,
INC., HENNICK-LANE, INC., ARTMARK
PRODUCTS, CORP., LIBERTY CONTRACTING INC.,
TISHMAN SPEYER HOLDINGS, INC.,
RCPI LANDMARK PROPERTIES, L.L.C.,
JFKM ENGINEERS, JFK&M CONSULTING GROUP,
LLC, TSC DESIGN ASSOCIATES, JMV
CONSULTING ENGINEERING, P.C. ROBERT
DERECTOR ASSOCIATES, WALTER T. GORMAN,
P.E., P.C., ZAG GROUP, DON PENN CONSULTING
ENGINEER, AXIS DESIGN GROUP
INTERNATIONAL and BONSIGNORE
ARCHITECTS,

Index No. 150161/10

Motion Sequence No. 016

Defendants.

-----X
MARLIN MECHANICAL INC.
and MARLIN MECHANICAL SERVICES, INC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No.
590465/11

SANCO MECHANICAL, INC.,

Third-Party Defendant.

-----X
TISHMAN SPEYER HOLDINGS, INC. and RCPI

LANDMARK PROPERTIES, L.L.C.,

Second Third-Party Plaintiffs,

-against-

Second Third-Party Index No.
590286/10

ESPRIT US RETAIL LIMITED,

Second Third-Party Defendant.

-----X
ELLEN M. COIN, A.J.S.C.:

This is a subrogation action arising out of property damage allegedly sustained at the Ann Taylor store located in Rockefeller Center (600 Fifth Avenue, New York, New York) on May 31, 2010. Defendant Crane Construction Company, LLC (Crane) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety as against it and all cross claims as against it.

Background

Plaintiff Travelers Property Casualty Company of America alleges that on May 31, 2010, a valve from one of the chiller lines located in the ceiling of the mezzanine level of the Ann Taylor store failed, allowing pressurized water to discharge and flood the store. The discharge and flood allegedly resulted in the loss of merchandise, the need for subsequent repairs and a period of business interruption while the store was closed for repairs. Plaintiff allegedly paid its insured in excess of \$840,000 in connection with the damage. It is undisputed that Crane was the general contractor for the build-out of the Ann Taylor store three years prior to the incident, in 2007.

Plaintiff commenced this action on August 6, 2010 against Crane and the other

defendants,¹ alleging the following four causes of action: (1) negligence; (2) breach of contract; (3) strict products liability; and (4) breach of warranty.

Defendants Donnelly Mechanical Corp., Dynamic Air Conditioning Company Inc., Micron General Contractors, Inc., Conbraco Industries, Inc. (Conbraco), Hennick-Lane, Inc., Artmark Products, Corp., TSC Design Inc., JMV Consulting Engineering, P.C. and Robert Derector P.E.; defendants/third-party plaintiffs Marlin Mechanical, Inc., and Marlin Mechanical Services, Inc.; defendant/second third-party plaintiffs Tishman Speyer Holdings, Inc. and RCPI Landmark Properties, L.L.C.; and second third-party defendant Esprit Us Retail Limited assert cross claims for common-law indemnification and contribution against Crane (Lugara affirmation in support, exhibit C).

Crane moves for summary judgment, arguing that the complaint and all cross claims must be dismissed because it had no involvement in the valve that failed or the ceiling chiller line that discharged as a result. In support of its argument, Crane submits an affidavit from James Marshman, Crane's project manager/superintendent on the job, who states that Crane did not perform any physical work at the store; rather, Crane entered into contracts and issued purchase orders, work orders, and change orders with subcontractors who performed the work (Marshman aff, ¶ 5). According to Marshman, the scope of work did not include work on the ceiling chiller lines on the first floor mezzanine level or any valves on those lines (*id.*, ¶¶ 8, 9).

Crane also submits an affidavit from Joseph P. Crosson, a licensed professional engineer,

¹The other defendants include the property owner, the managing agent, certain contractors and design professionals involved in the build-out of the store, certain contractors and design professionals involved in the build-out of an adjoining store, certain contractors and design professionals involved in pre-build out construction work performed at the premises, and certain entities involved in the manufacturing, importation, and/or distribution of the failed valve.

who states that on November 8, 2010, he was present for an inspection and non-destructive testing of the failed valve and thereafter for destructive forensic testing of the valve, both conducted at the Failure Analysis & Prevention Millennium Metallurgy Laboratory in North Kingston, Rhode Island (Crosson aff, ¶ 5). Crosson states that the following tests were performed on the valve: (1) a detailed visual examination, including digital photographic documentation of the region of interest; (2) stereo-microscopic examination of the ball fracture surface; (3) scanning electron microscopy/energy dispersive spectroscopy analysis at regions of interest; (4) metallographic evaluation of the failed valve and a sister valve in the unetched and etched conditions; (5) chemical compositional analysis of the subject ball valve; and (6) hardness/microhardness testing evaluation of the subject ball valve (*id.*, ¶ 5). Based upon the inspections and tests performed on the valve, Crosson determined that the valve that failed was a ¾-inch Apollo® 94A series, full-port, brass ball valve (*id.*, ¶ 6). Crosson opines that the valve “fractured in a progressive, brittle manner (not as the result of an applied external force) via a stress-corrosion cracking mechanism,” and concludes that the subject valve “was not damaged . . . by the application of an external force such as the impact from construction tools, equipment, or machinery” (*id.*, ¶¶ 8, 9).

By stipulation dated December 3, 2013, Crane withdrew the branch of its motion seeking dismissal of the complaint as against it. In a separate stipulation dated December 3, 2013, plaintiff discontinued all claims against Crane with prejudice. Thus, the only remaining claims against Crane are the cross claims for indemnification and contribution by the other parties.

None of the parties opposed dismissal of the common-law indemnification and contribution claims against Crane. However, Conbraco submits a “surreply,” submitted not to

oppose the relief sought by Crane, but to “clarify” certain statements in Crane’s reply. Conbraco asserts that Crosson’s opinion that the subject valve was “not damaged [. . .] by the application of external force, such as the impact from construction tools, equipment or machinery,” if accepted as true by the court, would be prejudicial to the remaining defendants, as Crosson’s opinions and conclusions would not be subject to cross-examination at trial.

Discussion

“The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law” (*O’Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). “Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court’s function on a motion for summary judgment is “‘issue-finding, rather than issue-determination’” (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957], *rearg denied* 3 NY2d 941 [1957] [citation omitted]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

As a preliminary matter, the court notes that in its “surreply,” Conbraco does not assert that it received express permission in advance to address the merits of Crane’s motion. Therefore, Conbraco’s “surreply” has not been considered by the court (*see* CPLR 2214).

“Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear

responsibility for that loss because it was the actual wrongdoer” (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1st Dept 1985]). “Common-law indemnification requires proof not only that the proposed indemnitor’s negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence” (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010], citing *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

Pursuant to CPLR article 14, “two or more persons who are subject to liability . . . for the same personal injury, injury to property, or wrongful death, may claim contribution among them . . .” (CPLR 1401). “The critical requirement for apportionment by contribution under CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought” (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal quotation marks and citation omitted]).

Here, Crane submits uncontroverted evidence that during the build-out of the Ann Taylor store, neither Crane nor any of its subcontractors performed any work on the chiller line, and that its scope of work did not include any work on the subject chiller line (Marshman aff, ¶¶ 8-9). Further, Crane’s professional engineer states, based upon inspections and tests performed on the failed valve, that the subject valve “fractured in a progressive, brittle manner . . . via a stress-corrosion cracking mechanism,” and concludes that the subject valve “was not damaged . . . by the application of external force such as the impact from construction tools, equipment or machinery” (Crosson aff, ¶¶ 8, 9). Thus, Crane has shown that it was not negligent, and that it did not cause or contribute to the failure of the valve or discharge of pressurized water from the ceiling chiller line. None of the parties has raised an issue of fact (*see Ostrov*, 91 AD3d at 152).

Therefore, the cross claims for indemnification and contribution against Crane are dismissed.

Conclusion

Accordingly, it is hereby

ORDERED that the motion (sequence number 016) of defendant Crane Construction Company, LLC is granted to the extent of dismissing the cross claims for common-law indemnification and contribution as against it with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants.

Dated: December 20, 2013

ENTER:



A.J.S.C.

HON. ELLEN M. COIN