

**Travelers Indem. Co. of Conn. v HI-RE-LI
Conditioning Corp.**

2014 NY Slip Op 31060(U)

April 23, 2014

Sup Ct, New York County

Docket Number: 107752/09

Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT
a/s/o ERE LLP,

Plaintiff,

- v -

INDEX NO. 117752/09
MOTION DATE 03-12-2014
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

HI-RE-LI CONDITIONING CORP.,

Defendant.

HI-RE-LI CONDITIONING CORP.,
Third-Party Plaintiff,

THIRD-PARTY INDEX NO. 590041/2011

- v -

440 REALTY ASSOCIATES LLC and
SMITH AFFILIATES MANAGEMENT CORP.,

Third-Party Defendants.

440 REALTY ASSOCIATES LLC and
SMITH AFFILIATES MANAGEMENT CORP., d/b/a
SAMCO PROPERTIES,

Fourth-Party Plaintiffs,

- v -

ERE LLP,

Fourth-Party Defendant.

FOURTH-PARTY INDEX NO. 590343/2011

FILED

APR 28 2014

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 11 were read on this motion for summary judgment by Defendant and Third-Party Plaintiff, Hi-Re-Li Conditioning Corp.:

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

PAPERS NUMBERED	
1 - 4	_____
5 - 7, 8 - 9	_____
10 - 11	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant, and Third-Party Plaintiff Hi-Re-Li Conditioning Corp.'s (hereinafter referred to as "Hi-Re-Li") motion for summary judgment dismissing the complaint in its entirety with prejudice and all cross-claims and counter-claims in their entirety, as against it, is granted only to the extent that any causes of action, cross-claims or counterclaims for contractual indemnification are severed and dismissed. The remainder of the motion is denied.

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

Travelers Indemnity Company of Connecticut (hereinafter referred to as "Travelers"), brought this subrogation action on behalf of, and arising out of damage to property owned by its insured ERE, LLP, resulting from a January 18, 2009, sprinkler pipe bursting in the computer server room of 440 Park Avenue South, New York, New York, causing 15,000 gallons of water to drain from water tanks into the fifth floor. The complaint alleges that Hi-Re-Li, an HVAC contractor, was negligent in the installation and maintenance of an air conditioning and split unit installed in a window, in ERE, LLP's server room resulting in a freeze-up of the sprinkler causing it to burst and the resulting property damage.

Hi-Re-Li commenced a third-party action for common law indemnification and contribution against 440 Realty Associates LLC (hereinafter referred to as "440 Realty") and Smith Affiliates Management Corp. (hereinafter referred to as "Smith"), the building owner and manager respectively, alleging any liability is based on their affirmative acts of negligence. 440 Realty and Smith asserted counter-claims for contribution and common-law indemnification against Hi-Re-Li. 440 Realty and Smith also commenced a fourth-party action against ERE, LLP, the fifth floor tenant, asserting claims for negligence, breach of contract, violations of law, strict liability, contractual indemnification and common law indemnification and contribution. Hi-Re-Li asserted cross-claims against ERE, LLP for indemnification and contribution in the fourth-party action based on ERE LLP's negligent acts or omissions. ERE, LLP then asserted counterclaims against Hi-Re-Li for negligence, indemnification and contribution in the fourth party action.

Hi-Re-Li seeks an order granting it summary judgment dismissing the complaint, in its entirety with prejudice, and all cross-claims and counter-claims in their entirety as against it. Hi-Re-Li's motion for Summary Judgment is opposed by Travelers, and ERE, LLP, separately, as a defendant in the fourth-party action.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. In determining the motion, the Court must construe the evidence in the light most favorable to the non-moving parties (SSBS Realty Corp. v. Public Service Mut. Ins. Co., 253 A.D. 2d 583, 677 N.Y.S. 2d 136 [N.Y.A.D. 1st Dept., 1998]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, requiring a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Hi-Re-Li contends that it is not negligent because there was no notice of any defective condition concerning the sprinkler pipe or installation of a window unit and its actions did not cause the pipe to burst.

ERE, LLP argues that summary judgment should be denied because it directly entered into a contract for the installation and maintenance of the air conditioning unit with Hi-Re-Li and there remain issues of fact concerning the extent that Hi-Re-Li breached its duty of care related to the installation of the air conditioning units and freezing of the sprinkler pipe causing it to burst. Travelers contends that notice is not an element of the claims, because Hi-Re-Li caused the condition.

A cause of action for common-law negligence requires plaintiff establish that a duty is owed by the defendant, a breach of the duty owed and that the breach of the duty is the proximate cause of injury (*Turcotte v. Fell*, 68 N.Y. 2d 432, 502 N.E. 2d 964, 510 N.Y.S. 2d 49 [1986]). A duty of reasonable care owed to an injured party is a basic requirement of any recovery in negligence (*Palka v. Servicemaster Mgmt. Services Corp.*, 83 N.Y.2d 579, 634 N.E.2d 189, 611 N.Y.S. 2d 817 [1994]). Whether and to what extent a particular duty was breached is an issue of fact for the jury to determine (*Tagle v. Jakob*, 97 N.Y.2d 165, 763 N.E.2d 107, 737 N.Y.S. 2d 331 [2001]).

Hi-Re-Li contractually agreed to perform installation and maintenance of the air conditioning units potentially creating a duty of care. There remain issues of fact concerning whether Hi-Re-Li's manner of installation and maintenance of the air conditioning units was a breach of the duty of care that would result in a finding of negligence.

Travelers alternatively refers to the March 11, 2011 deposition testimony of Mordechai Aharoni, owner and president of Hi-Re-Li, wherein he states at pages 57 and 108 (Mot. Exh. T), that under the terms of the contract, Hi-Re-Li was required to inspect and maintain the equipment including monthly maintenance check-ups, but that the last time he went to ERE, LLP was almost two and a half months before the loss. Travelers contends there remain issues of fact concerning whether Hi-Re-Li is liable based on it's insured's reliance on the unperformed maintenance work. ERE, LLP contends that a determination of negligence should be based on whether Hi-Re-Li launched an instrument of harm with the installation of the units.

A "breach of a contractual obligation will not be sufficient in and of itself to impose tort liability for noncontracting third parties upon the promisor." (*Church ex rel. Smith v. Callanan Indus., Inc.*, 99 N.Y.2d 104, 782 N.E.2d 50 [2002] and *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 773 N.E.2d 485, 746 N.Y.S. 2d 120 [2002]). However, there are three exceptions to this general rule: "where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm;...where the plaintiff detrimentally relies on the continued performance of the contracting party's duties;...and where the contracting party has entirely displaced the other party's duty" (*Stiver v. Good & Fair Carting & Moving, Inc.*, 9 N.Y.3d 253, 878 N.E.2d 1001, 848 N.Y.S. 2d 585 [2007]).

An admitted failure to perform monthly inspections and report conditions creates an issue of fact as to whether there was detrimental reliance on performance of contractual duties. A determination of whether the negligence resulted in an unreasonable or increased risk of harm is required on a claim of launching of an instrument of harm (*All American Moving and Storage, Inc. v. Andrews*, 96 A.D. 3d 674, 949 N.Y.S. 2d 17 [N.Y.A.D. 1st Dept. 2012]).

The deposition testimony of Mr. Aharoni regarding his visits for maintenance and check-up of the unit, creates an issue of fact as to whether the failure to do so for two and a half months was negligent, based on ERE,LLP's detrimental reliance of performance of Hi-Re-Li's contractual duties. There also remain issues of fact concerning whether manner in which the air conditioning units were installed was negligent or launched an instrument of harm.

Hi-Re-Li contends that its experts and specifically, Michael Walsh, P.E., and his tests and calculations concerning the temperature in the room, inflow of air in the gaps and heat conditions establish that Hi-Re-Li's actions did not cause the sprinkler pipe to burst. Mr. Walsh finds that there was another cause of the damage, specifically, a blunt force to the pipe that caused it to burst. Travelers and ERE, LLP each argue that deposition testimony and the expert opinion provided by their experts, raise triable issues of fact as to causation and the conflicting expert testimony is a basis to deny summary judgment.

Conflicting expert affidavits and deposition testimony as to whether conditions and causation are a basis to deny summary judgment (*Hernandez v. 21 Realty Co.*, 113 A.D.3d 503, 978, N.Y.S. 2d 841 [N.Y.A.D. 1st Dept., 2014] and *Mike v. 91 Payson Owners Corp.*, 114 A.D.3d 420, 979 N.Y.S. 2d 332 [N.Y.A.D. 1st Dept., 2014]). A review of the multiple expert affidavits and deposition testimony submitted for each of the parties including those of Mr. Pietropaolo and Mr. Walsh, results in a finding that they are conflicting and create issues of fact concerning the cause of the bursting pipe.

Hi-Re-Li contends that the cross-claims and counterclaims for common law indemnification cannot be sustained because they are derived solely from claims of negligence or wrongdoing asserted against Smith, 440 Realty and ERE, LLP. Hi-Re-Li also argues that its lack of negligence is a basis to grant summary judgment on the indemnification cross-claims and counterclaims.

A party sued solely for its own wrongdoing rather than under a theory of vicarious liability cannot assert a claim for common law indemnification (*Great American Insurance Companies v. Bearcat Financial Services, Inc.*, 90 A.D.3d 533, 934 N.Y.S. 2d 413 [N.Y.A.D. 1st Dept., 2011]). A party seeking common law indemnification cannot recover unless it is only negligent because of strict statutory liability (*Gulotta v. Bechtel Corporation*, 245 A.D.2d 75, 664 N.Y.S. 2d 801 [N.Y.A.D. 1st Dept., 1997]) and *Walker v. Trustees of the University of Pennsylvania*, 275 A.D.2d 266, 712 N.Y.S. 2d 117 [N.Y.A.D. 1st Dept., 2000]). Implied indemnification is applied like common law indemnification and applies to a party found vicariously liable by shifting liability to the wrong doing or negligent party (*17 Vista Fee Associates v. Teachers Ins. And Annuity Ass'n of America*, 259 A.D.2d 75, 693 N.Y.S. 2d 554 [N.Y.A.D. 1st Dept., 1999]).

A review of the claims asserted by Hi-Re-Li against Smith, 440 Realty and ERE, LLP, shows that the language used does not only apply to their own wrongdoing or negligence. There has been no finding that Hi-Re-Li is entitled to summary judgment on the claims of negligence against it and there remain issues of fact concerning liability on the counterclaims and cross-claims for common law indemnification.

Hi-Re-Li argues that the cross-claims and counter-claims for contribution should be dismissed because there has been no showing of an act or omission that caused damages, or breach of duty other than contractual, causing the alleged injury.

Common-law contribution applies to damages for personal injury, injury to property and wrongful death. Individuals or entities that are subject to liability for damages, may seek contribution regardless of whether they are parties to an action or there is a judgment (*Board of Education of the Hudson City School Dist. v. Sargent*,

Webster, Crenshaw & Foley, 71 N.Y. 2d 21, 517 N.E. 2d 1360, 523 N.Y.S. 2d 475 [1987]). Contribution applies to those circumstances where a party has paid more than its equitable share of damages to plaintiff (Edgewater Apartments, Inc. v. Flynn, 268 A.D. 2d 227, 701 N.Y.S. 2d 357 [N.Y.A.D. 1st Dept., 2000]). Injury to property does not apply where plaintiff's underlying claims seek only the benefit of the bargain regardless of the tort language. Contribution also does not apply where the underlying claim is for purely economic damages as a result of breach of contract and fails to assert an independent legal duty resulting in injury to property (Children's Corner Learning Center v. A. Miranda Contracting Corp., 64 A.D. 3d 318, 879 N.Y.S. 2d 418 [N.Y.A.D. 1st Dept., 2009]).

The claims for contribution survive because there remain issues of fact concerning Hi-Re-Li's liability for negligence in this action outside of contractual liability. ERE, LLP's has raised an issue of fact concerning its claims of negligence derived from the launching of an instrument of harm giving rise to an independent legal duty.

Hi-Re-Li argues that any cross-claims and counter-claims for contractual indemnification should also be dismissed because of the nonexistence of contractual provisions imposing indemnification or warranties between the parties.

Contractual indemnification involves the parties agreeing in a contract to shift liability from the owner or contractor to the subcontractor that proximately caused plaintiff's injuries through its negligence (*Picaso v. 345 East 73 Owners Corp.*, 101 A.D. 3d 511, 956 N.Y.S. 2d 27 [N.Y.A.D. 1st Dept., 2012]). The contract between ERE, LLP and Hi-Re-Li has no indemnification or warranty provisions and there is no basis to sustain any claims, cross-claims or counter-claims for contractual indemnification against Hi-Re-Li.

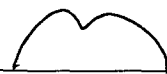
Accordingly, it is ORDERED that Hi-Re-Li Conditioning Corp.'s Motion pursuant to CPLR §3212, for Summary Judgment dismissing the complaint in its entirety with prejudice and all cross-claims and counter-claims in their entirety, as against it, is granted only to the extent that any causes of action, cross-claims or counterclaims for contractual indemnification are severed and dismissed, and it is further,

ORDERED that the remainder of the motion is denied, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

FILED ENTER :

APR 28 2014



MANUEL J. MENDEZ
J.S.C.

Dated: April 23, 2014 COUNTY CLERK'S OFFICE
NEW YORK

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE