Travelers Prop. Cas. Co. of Am. v Crane Constr. Co., L.L.C.
2015 NY Slip Op 31246(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 150161/10
Judge: Ellen M. Coin
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[* 1]

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

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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

Action No. 1

Motion Sequence No. 022

Defendants.

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MARLIN MECHANICAL INC.
and MARLIN MECHANICAL SERVICES, INC.,

Third-Party Plaintiffs,

-against-

Third-Party Index No. 590465/11

SANCO MECHANICAL, INC.,

Third-Party Defendant.

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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.

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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,

Index No. 159207/12

-against-

Action No. 2

SANCO MECHANICAL, INC.,

Defendant.

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ELLEN M. COIN, J.S.C.:

In these related subrogation actions, plaintiff Travelers Property Casualty Company of America seeks to recover, as subrogee of its insured, Ann Taylor Retail, Inc. (Ann Taylor) and other interested insureds, for property damage allegedly sustained at the Ann Taylor store located in Rockefeller Center (600 Fifth Avenue, New York, New York) on May 31, 2010.

In Action No. 1, defendant Micron General Contractors, Inc. (Micron) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims against it.

In Action No. 2, Sanco Mechanical, Inc. (Sanco) cross-moves, pursuant to CPLR 2221 (e), for leave to renew the court's decision and order dated August 28, 2013, which denied its motion to dismiss pursuant to CPLR 3211 (a) (1) and 3211 (a) (7).

BACKGROUND

Plaintiff 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. As a result, the Ann Taylor store allegedly sustained significant water damage to the elevator, merchandise, fixtures, walls, and floors throughout the premises in an amount exceeding $1,426,337.49. Plaintiff reimbursed its insured, Ann Taylor, in an amount exceeding $1,426,337.49 for the property damage.

On January 23, 2007, Tishman Speyer Properties, L.P (Tishman), as agent for RCPI Landmark Properties, LLC (RCPI), hired Micron as a general contractor for a pre-build-out project at what would later become Ann Taylor's space (Spitz affirmation in support, exhibit H). Micron was required to "[f]urnish and install all work in accordance with drawings by TPG Architecture dated 7/17/06 and by Robert Derector Associates [hereinafter, RDA] dated 7/28/06," including drawing M-1 (*id.*). Pursuant to the contract, Micron was obligated to "supervise and direct the Work to ensure that it is accomplished in all respects in accordance with the Contract Documents and in a first-class and workmanlike manner" (*id.*).

Subsequently, by purchase order, Micron hired Marlin Mechanical Corp. (Marlin) as a subcontractor to furnish HVAC work as per drawings (*id.*, exhibit J). In a subcontract change order dated May 30, 2007, the scope of the subcontract was changed to "[f]urnish and install complete HVAC installation including but not limited to sketching, shop drawings, ductwork, equipment, piping, insulation, louvers, testing and balancing of water and air, controls & control wiring, drilling & chopping on OT, tie-ins on OT, as-builds and sign-offs" (*id.*).

By purchase order dated January 30, 2007, Marlin, in turn, hired Sanco as a subcontractor

to "[p]rovide piping work as per contract drawings, specs and sketch dated 12/21/06" (*id.*, exhibit K).

It is undisputed that the failed valve was a three-quarter inch ball valve (Crosson 6/24/13 aff, ¶ 6).

Michael Lonigro (Lonigro), RDA's design engineer, testified at his deposition that three-quarter-inch valves were needed on the job because of the way that the pipes were installed (Lonigro EBT at 99). Lonigro believed that the three-quarter inch valves were installed as part of the job (*id.*). In addition, Lonigro stated that if the valve were brass, "it wouldn't have met the spec" (*id.* at 74).

Plaintiff commenced Action No. 1 on August 6, 2010 against, among other defendants, Micron, alleging the following four causes of action: (1) negligence; (2) breach of contract; (3) strict products liability; and (4) breach of warranty.

As relevant here, defendants Artmark Products Corp. (Artmark), Tishman Speyer Holdings, Inc. (Tishman), RCPI Landmarks Properties, L.L.C. (RCPI), and Conbraco Industries, Inc. (Conbraco) assert cross-claims for common law indemnification and/or contribution against Micron. Tishman and RCPI also assert a cross-claim for contractual indemnification against Micron.

On December 26, 2012, plaintiff commenced Action No. 2 under Index No. 159207/12 against Sanco, also asserting the same four causes of action against it. On October 18, 2013, the court consolidated Action No. 1 with Action No. 2 for purposes of discovery and trial.

Previously, Sanco moved to dismiss the complaint on multiple grounds, including that plaintiff failed to state a cause of action because Sanco did not install the failed valve. On

August 18, 2013, the court denied Sanco's motion to dismiss, stating on the record, in relevant part, that:

> "Here, the complaint alleges that a valve affixed to a chiller drain line in the ceiling of the Ann Taylor store failed, allowing pressurized water to escape. It further alleges that the defendant installed the subject line and valve that failed. Plaintiff now alleges that recent facts indicate that there were alterations to the line that are not reflected on the original plans. While defendant's principal alleges that only a two-and-a-half-inch valve was installed, he does not allege that he was not on the scene at the time of the installation. The affidavit of plaintiff's expert Leach indicates that field modifications occurred in the piping system, that he observed two valves not depicted in the plan. The face of the complaint alleges facts which fit within plaintiff's theory of negligence and there has not been discovery as yet between the parties. Accordingly, the motion to dismiss for failure to state a cause of action is denied"

(Oral argument tr at 9). The court also denied the branch of the motion seeking dismissal of plaintiff's "res ipsa loquitur" and gross negligence causes of action.

On appeal, the First Department modified the court's August 28, 2013 decision only to the extent of dismissing the "res ipsa loquitur" and gross negligence claims (*Travelers Prop. Cas. Co. of Am. v Sanco Mech., Inc.*, 126 AD3d 527, 527 [1st Dept 2015]). To the extent relevant here, the Court stated that "[w]e have considered defendant's remaining arguments, including its contention that plaintiff failed to state a claim against it for common law negligence, and find them unavailing" (*id.* at 528).

On March 26, 2014, plaintiff discontinued its claims for strict products liability, breach of warranty, and breach of contract against Micron, with prejudice (Spitz affirmation in support, exhibit B). Therefore, the only remaining claim against Micron is for negligence.

DISCUSSION

A. Micron's Motion for Summary Judgment

1. Plaintiff's Negligence Claim

Micron argues, relying on *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.* (76 NY2d 220 [1990]), that it did not owe plaintiff a duty of care. Specifically, Micron asserts that it did not install the three-quarter-inch ball valve that led to plaintiff's loss, and that no such component was called for in its contracts. Micron also maintains that the leak was caused by a latent manufacturing defect in the valve. Micron, therefore, contends that it did not breach any duty, and that it did not cause plaintiff's loss.

As support, Micron submits an affidavit from its former president, Ron Franco (Franco), who states that Micron did not perform any work, maintenance, repairs or alterations to the chiller lines to which the failed valve was attached; rather, it hired subcontractors to perform any installation and alteration of HVAC systems (Franco aff, ¶ 8). In other words, Micron did not install the failed valve (*id.*). Franco states that "[f]ollowing completion of our contract, [he] was informed by virtue of [his] regular meetings and oversight of the company, that the 600 Fifth Avenue space was diligently inspected by Micron, as well as other entities, and found to be in good order" (*id.*, ¶ 9). Franco also states that its contract and subcontracts do not call for the use of a three-quarter-inch ball valve (*id.*, ¶ 10).

Micron also relies on an affidavit from Anthony Storace, P.E. (Storace), who, on December 12, 2012, attended a destructive inspection of the subject valve at FAB Laboratory located in North Kingston, Rhode Island (Storace aff, ¶ 5). Storace inspected and photographed the failed valve and its sister valve and participated in a metallurgical evaluation in which the two valves were cut apart to expose the internal metal structure under low and high optical resolution (*id.*). Storace noted under high magnification a manufacturing defect in the failed

valve in the form of a narrow, V-shaped, sharp-edged crack, beginning at the surface of the valve body and progressing inwardly toward the center of the valve; the sister valve contained no such defect (*id.*, ¶ 6). According to Storace, the failed valve was not capable of sustaining the stress of the chilled water pressure because it contained a latent manufacturing defect in the form of a crack that weakened the valve body (*id.*, ¶ 7).

In opposition to Micron's motion, plaintiff argues that Micron's motion should be denied as premature, or, instead, that the court should order a continuance to allow for Franco to be deposed. Alternatively, plaintiff contends that there are issues of fact as to whether Micron adequately inspected and supervised the installation of the HVAC system. To support its argument, plaintiff submits an affidavit from Joseph P. Crosson, P.E. (Crosson), who examined the valve and reviewed the results of the tests performed on the valve, and opines within a reasonable degree of engineering certainty that the failed valve body material was brass, and that "high zinc content brass alloys, such as that used for the incident valve, are more susceptible to stress corrosion cracking, the cause of failure at issue, than bronze alloys" (Crosson 6/24/14 aff, ¶ 6).[1]

It is well settled that "[t]he 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" (*Ryan v Trustees of Columbia Univ. in the City of N. Y., Inc.*, 96 AD3d 551, 553 [1st Dept 2012] [internal quotation marks and citation omitted]). "Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to

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[1]Artmark, Tishman/RCPI, and Conbraco also oppose Micron's motion for essentially the same reasons.

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 Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). On a motion for summary judgment, facts must be viewed "in the light most favorable to the [non-moving party]" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 340 [2011]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

In *Eaves Brooks*, *supra*, on which Micron relies, the Court of Appeals declined to extend tort liability to alarm and sprinkler maintenance companies resulting from the failure of those companies to perform maintenance or inspection duties pursuant to their contracts with the building's owners (*Eaves Brooks Costume Co.*, 76 NY2d at 227). The Court noted that "[i]n the ordinary case, a contractual obligation, standing alone, will impose a duty only in favor of the promisee and intended third-party beneficiaries and mere inaction, without more, establishes only a cause of action for breach of contract" (*id.* at 226 [citation omitted]). The Court explained that "inaction may give rise to tort liability where no duty would otherwise exist if, for example, performance of contractual obligations has induced detrimental reliance on continued performance and inaction would result not 'merely in withholding a benefit, but positively or actively in working an injury'" (*id.*, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 167 [1928]).

Eaves Brooks cited to an earlier Court of Appeals decision, *Moch Co.*, *supra*, which held that a contractor owes a duty to noncontracting parties where "the putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm" (247 NY at 168).

In subsequent cases, the courts have defined three exceptions to the general rule as follows: (1) "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]); (2) "where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*id.*); and (3) "where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (*id.* at 112 [internal quotation marks and citation omitted]).

Under the first exception, a defendant owes a duty where it creates or exacerbates an unreasonable risk of harm to others (*id.* at 111). Other iterations of this exception emphasize whether the contractor made the subject area "less safe than before the construction project began" (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 67 [1st Dept], *lv dismissed* 4 NY3d 739 [2004], *rearg denied* 4 NY3d 795 [2005]; *see also Moran v City of Schenectady*, 47 AD3d 1001, 1002-1003 [3d Dept 2008]; *Oefelein v CFI Constr., Inc.*, 45 AD3d 1002, 1004 [3d Dept 2007]).

Although Micron's former president states that Micron did not install the valve and its contract did not call for three-quarter inch valves (Franco aff, ¶¶ 8-10), RDA's witness testified that the plans did not record unforeseen events that arose during the build-out (Lonigro EBT at 98-100). He also stated that three-quarter inch valves were needed on the job because of the way that the pipes were installed (*id.* at 99). Micron's former president also states, in conclusory fashion, that Micron "diligently inspected" the work (Franco aff, ¶ 9). However, RDA's witness stated that "[i]f it was brass, it wouldn't have met the spec" (*id.* at 74). Micron's own expert, who attended the destructive testing of the failed valve, states that the failed valve was brass (Storace aff, ¶ 2). Plaintiff's expert opines that the valve failed due to stress corrosion cracking,

and states that brass alloys are more susceptible to stress corrosion cracking than bronze alloys (Crosson 6/24/14 aff, ¶ 6). Viewing the evidence in the light most favorable to plaintiff, there are triable issues of fact as to whether Micron performed its contract according to specifications and supervised the installation of the incorrect valve, thereby launching a force or instrument of harm (*see Powell v HIS Contrs., Inc.*, 75 AD3d 463, 464-465 [1st Dept 2010] [issue of fact as to whether contractor failed to direct that new sidewalk completely replace excavated area, which created an unreasonable risk of harm]; *cf. Davies v Ferentini*, 79 AD3d 528, 529-530 [1st Dept 2010] [general contractor did not launch a force or instrument of harm where its work was performed pursuant to the DOT's sketches, and end assemblies were properly installed pursuant to DOT's specifications]; *Luby v Rotterdam Sq., L.P.*, 47 AD3d 1053, 1055 [3d Dept 2008] [defendant did not launch a force or instrument of harm where defendant's construction of ramp conformed to architectural drawings implemented under direction of mall's construction manager, and construction manager and town inspected and approved the defendant's work]).

In a negligence case, the plaintiff "'must generally show that the defendant's negligence was *a substantial cause* of the events which produced the injury'" (*Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 200 [1st Dept 2010][emphasis in text], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315, *rearg denied* 52 NY2d 784 [1980]). "There may be one, or more than one, substantial factor" (*Ohdan v City of New York*, 268 AD2d 86, 89 [1st Dept], *lv denied* 95 NY2d 769 [2000], citing 1A PJI 2:71). "As a general rule, the question of proximate cause is to be decided by the finder of fact . . ." (*Derdiarian*, 51 NY2d at 312). In light of the above evidence, there are questions of fact as to whether Micron's inspections and oversight over the installation of the chiller line which contained the failed valve caused plaintiff's loss.

Therefore, the branch of Micron's motion for summary judgment seeking dismissal of plaintiff's negligence claim is denied.

2. Cross-Claims for Common Law Indemnification and Contribution Against Micron

Micron argues that since it is free from negligence and did not contribute to the failure of the valve, all cross-claims for indemnification and contribution should be dismissed.

"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]). "Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citation omitted]; *see also* CPLR 1401). Since Micron has failed to show that it was not negligent, it is not entitled to dismissal of the cross-claims for indemnification and contribution against it.

3. Tishman and RCPI's Cross-Claims for Contractual Indemnification Against Micron

As discussed above, Micron contends that it has shown that it was not negligent and did not contribute to the failure of the valve. In response, Tishman and RCPI contend that Micron owes it contractual indemnification pursuant to section 5.2 of its contract, which states:

> "To the fullest extent permitted by law, *Contractor shall indemnify, defend, protect and hold harmless Owner, Owner's Agent . . . from and against all claims, damages, losses and expenses, including attorney's fees, directly or indirectly arising out of or alleged to arise out of or resulting from the performance of the Work, or the failure to perform the Work*, including but not limited to all claims, damages, losses or

> expenses which may be: (a) attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property other than the Work itself, including the loss of use resulting therefrom, and (b) caused in whole or in part by any fault or negligent act or omission of Contractor, any subcontractor, anyone employed by them, or anyone for whose acts they may be liable, or by anyone acting for or on behalf of them, regardless of whether or not it is caused in part by one of the Parties"

(Varrecchia affirmation in opposition, exhibit A [emphasis added]).

Thus, Micron may be required to indemnify Tishman and RCPI for any claims arising out of the performance of its work or *alleged* to arise out of the performance of its work (*see DiPerna v American Broadcasting Cos.*, 200 AD2d 267, 269-270 [1st Dept 1994] [contractor was required to indemnify site owner, despite finding of no liability in contractor's favor in main action, under indemnification calling for indemnification of liabilities "claimed" to arise out of or be connected with any accidents "alleged" to have happened in or about the place where the contractor was performing work]). Therefore, Micron is not entitled to dismissal of Tishman and RCPI's cross claim for contractual indemnification against it.[2]

B. Sanco's Cross-Motion for Leave to Renew the Court's August 28, 2013 Decision

Sanco moves for leave to renew the court's decision and order dated August 28, 2013, which denied its motion to dismiss. Sanco relies on Storace's affidavit sworn to September 19, 2013, which, as discussed above, indicates that the failure of the chiller valve occurred because of a manufacturing defect, and not due to its installation (Storace aff, ¶ 7). Sanco argues that at the time that it moved to dismiss in February 2013, it was unaware of Storace's opinion, and it

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[2]In addition, as noted by Tishman and RCPI, Micron was required to purchase and maintain commercial general liability naming Tishman and RCPI as additional insureds. It is well established that an agreement to procure insurance is distinct from an agreement to indemnify (*see Kinney v Lisk Co.*, 76 NY2d 215, 218 [1990]).

had no reason to retain a metallurgist to inspect the valve when destructive testing was performed on December 12, 2012, because Sanco was not yet a defendant. However, Sanco states that it voluntarily participated in the destructive testing.

In opposition, plaintiff argues that: (1) Sanco made an improper cross-motion; (2) Sanco does not present any "new evidence"; (3) Sanco fails to provide a reasonable justification for its failure to present this evidence on the prior motion; and (4) the motion should be denied as discovery has not yet been completed. Conbraco also asserts that Sanco's cross-motion was improperly made, and that there are issues of fact as to its negligence.

A motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" or must show that "there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]; *see also Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013]; *Matter of Katz*, 63 AD3d 836, 837-838 [2d Dept 2009]). Furthermore, the papers must "contain [a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]).

A motion for leave to renew is intended to bring to the court's attention new or additional facts which, although in existence at the time the original motion was made, were unknown to the movant and therefore not brought to the court's attention (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 568 [1st Dept 1979]). "This requirement, however, is a flexible one and the court, in its discretion may also grant renewal in the interests of justice, upon facts which were known to the movant at the time the original motion was made" (*Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376 [1st

Dept 2001]). Even if the vigorous requirements for renewal are not met, such relief may be properly granted "so as not to defeat substantive fairness" (*Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460, 461 [1st Dept 2007]).

The court rejects plaintiff and Conbraco's argument that the cross motion should not be considered as procedurally improper. "Although a cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party, a technical defect of this nature may be disregarded, where...there is no prejudice, and the opposing parties had ample opportunity to be heard on the merits of the relief sought" (*Daramboukas v Samlidis*, 84 AD3d 719, 721 [2d Dept 2011] [internal quotation marks and citations omitted]). Plaintiff and Conbraco do not claim that they have suffered any prejudice, or that they have not had a sufficient opportunity to be heard on the merits.

Although Sanco submits Storace's affidavit in support of its motion for leave to renew, Sanco has not submitted any "new facts" (*see e.g. Lower E. Side II Assoc., L.P. v 349 E. 10th St., LLC*, 118 AD3d 607, 607 [1st Dept 2014] [expert affidavit did not contain "new" facts not known to movant at the time that it made the original motion]; *Conley v Central Sq. School Dist.*, 255 AD2d 981, 981 [4th Dept 1998] [information contained in expert's affidavit submitted in support of Town's motion to renew was based upon facts that were in Town's possession and knowledge at time of its original motion]). In addition, in the exercise of its discretion, the court finds that Sanco has not offered "[a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]). Sanco asserts that it was not aware of Storace's opinion. However, Sanco's counsel admits that it attended the destructive testing of the valve on December 12, 2012, upon which Storace's opinion is based.

In any event, the court finds that Storace's affidavit "would [not] change the prior determination" (CPLR 2221 [e] [2]).

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, "bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference" (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]). The relevant inquiry is whether "a material fact as claimed by the pleader to be one is not a fact at all" and "no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Here, the complaint alleges that Sanco installed the chiller line and valve that failed (complaint, ¶ 15). While Sanco relies on Storace's opinion that the valve failed due to a latent manufacturing defect and not its installation (Storace aff, ¶ 7), the complaint alleges facts that fit within plaintiff's theory of negligence (*see Leon*, 84 NY2d at 87-88). Moreover, Storace's affidavit does not demonstrate that a material fact pleaded by plaintiff is "not a fact at all" (*Guggenheimer*, 43 NY2d at 275), or conclusively show that plaintiff has no cause of action. Plaintiff submits an expert affidavit indicating that the valve failed because of stress corrosion

cracking, and that brass alloys are more susceptible to stress corrosion cracking (Crosson 6/24/14 aff, ¶ 6). RDA's witness testified that brass valves did not comply with the contract's specifications (Lonigro EBT at 74). Thus, Sanco may have installed or selected the incorrect valve for use on the chiller line at the premises (*see generally Annunziato v City of New York*, 33 AD3d 950, 951 [2d Dept 2006] [City's proof on motion to dismiss did not conclusively show that no cause of action existed; affidavit of plaintiffs' expert epidemiologist did not conclusively establish that plaintiffs' illnesses were not caused by toxic emissions from City landfill]). Accordingly, Sanco's motion for leave to renew the court's August 28, 2013 decision is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 022) of defendant Micron General Contractors, Inc. for summary judgment is denied; and it is further

ORDERED that the cross-motion of defendant Sanco Mechanical, Inc. for leave to renew the court's August 28, 2013 decision and order is denied.

Dated: July 17, 2015

ENTER:

Ellen M. Coin, A.J.S.C.