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| Ancient Mariner Cottages Inc. v National Grid USA |
| 2018 NY Slip Op 31928(U) |
| August 7, 2018 |
| Supreme Court, Suffolk County |
| Docket Number: 13-3104 |
| Judge: Denise F. Molia |
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INDEX No. 13-3104
CAL. No. 17-009860T

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice Supreme Court

MOTION DATE 10-27-17
ADJ. DATE 01-05-18
Mot. Seq. # 002 - MD

-----X
ANCIENT MARINER COTTAGES INC., dba
BURCLIFFE BY THE SEA,

Plaintiff,

- against -

NATIONAL GRID USA and LONG ISLAND
POWER AUTHORITY,

Defendants.
-----X

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Upon the following papers numbered 1 to 21 read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 to 16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17 to 20; Replying Affidavits and supporting papers 21; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants National Grid USA and Long Island Power Authority for summary judgment dismissing the complaint is denied.

The plaintiff commenced this action seeking recovery for damage to its property that allegedly occurred on October 30, 2011. The plaintiff alleges that defendants National Grid USA ("National Grid") and Long Island Power Authority ("LIPA") failed to use reasonable care in, among other things, maintaining, installing and inspecting their equipment and power lines, which caused the plaintiff's cottages, located at 397 Old Montauk Highway, Montauk, New York (the "premises" or "property"), to loose power during a weather event. The plaintiff further alleges that defendants negligently failed to shut off the electricity flowing to the plaintiff's property before making repairs, and, as a result of defendants' negligence, there was a fire on the plaintiff's property, causing property damage totaling \$67,099.34, damage to contents inside the property totaling \$11,959.54, and loss of income totaling \$3,219.73.

RST

Defendants now move to dismiss the complaint pursuant to CPLR 3126 on the ground of spoliation. They argue that the circuit breaker panel that caught fire on the premises was not preserved for litigation, and, inasmuch as it was the “sole crucial and material piece of evidence” in the case, they are prejudiced in defending the claims against them. Defendants also seek summary judgment on the ground that their expert opined that the fire was due to a failure of the plaintiff’s electrical equipment. Defendants submit, among other things, the pleadings, the affidavit of their expert, and the deposition transcripts of the parties and witnesses. The plaintiff opposes the motion, arguing that the expert affidavit should not be considered, and that defendants failed to meet their burden on the motion.

Robert Burke testified that he was part owner of the plaintiff, and that he lived on the premises in October 2011 when the incident occurred. The night before the incident, Burke woke at approximately 1:00 a.m. and heard thunder. He observed that there was no power in the clock that was next to his bed, but when he walked into the bathroom and turned on the lights, the lights turned on. He realized that he may have lost “one leg of power” because of the storm. When he woke on the morning of October 31, the electricity in his kitchen seemed to operate normally; however, some areas of the home did not have electricity, causing him to call LIPA at approximately 8:00 a.m. While doing some house work at approximately 10:00 a.m., he observed that a wire that was connected to the premises was dangling from a pole. A crew of LIPA workers arrived at approximately 12:00 p.m., and Burke directed them to the dangling wire. While the worker was reattaching the wire, he commented that “this thing sure is drawing a lot of current.” Simultaneously, Burke observed smoke coming from the garage, and the worker was immediately told to “kill all the power to the house.” When he entered the garage, Burke observed flames in the electrical panel. According to Burke, the fire marshal conducting an investigation as to the cause of the fire told him that there “was probably a lightning strike” that caused damage to the breakers in the panel, and that the fire might have started while Burke was asleep. The fire marshal stated that the fire did not progress because the connection between the pole and the property was broken. Burke further testified that “men in suits” arrived at the premises to speak to the workers after the fire, and that those men inspected the panel and the meter, and instructed the workers to remove the meter. Burke did not speak to the men in suits, and no one asked Burke to “preserve anything.” As a result of the fire damage, Burke hired a general contractor to make repairs, as well as an electrical company to re-wire the premises and to replace the electrical panel that was in the garage. The work was completed, and in April 2012, power was restored to the property. Burke was not aware of the location of the damaged electrical panel, and the electrician he hired did not tell him what caused the fire. Burke further testified that his insurance company also inspected the premises after the incident.

Lynne O’Rourke testified that she was an adjuster for the plaintiff’s insurance company, and she inspected the property a few days after the incident. She testified that she was not an electrician or an engineer; however, she had worked in the industry for a number of years. According to O’Rourke the cause and origin of the fire was the “arc[ing] at the pole when the LIPA workmen came to make the repairs due to the power outage” and the arching “transferred through the line into the circuit breaker box into the garage.” Although O’Rourke would sometimes retain the services of a consultant to determine the cause and origin of the fire, the insurance company felt that “the cause and origin was cut and dry” inasmuch as Burke had witnessed the “arc[ing]” and the subsequent smoke in the garage. O’Rourke observed the electrical panel during her inspection; however, she believed that the panel had been discarded since that time. O’Rourke recalled that sometime after Burke was paid by the insurance company, defendants were notified of a subrogation claim, and she could not recall whether defendants contacted her about conducting an inspection

of the panel with regard to that claim. O'Rourke could not recall whether she requested that Burke retain the electrical panel.

Michael McLaughlin testified that he worked for National Grid as a dispatcher at the time of the incident and that he sent the journeymen linemen to the premises. He testified that a field supervisor met with the linemen after the fire occurred to make a determination as to liability. However, because the fire marshal deemed the issue an "inside problem" and National Grid "only own[ed] up to the connection on the house," Burke concluded that National Grid was not responsible and the linemen moved on to other jobs. The incident was not one worthy of a "full blown investigation"; therefore, no incident report was created. Although a lineman would generally verify that an electrical panel was installed before energizing a newly constructed home, it was not general practice for the lineman to check the electrical panels of existing homes before restoring electrical service. The condition of the electrical panel was the home owner's responsibility.

James Bogen testified that he was one of the journeyman lineman who responded to the premises. When he arrived, Bogen observed that a wire from the house to the pole was dangling because of a storm that occurred the day before. Bogen did not enter the cottage, and did not speak to the owner before commencing his work. In his experience, he had not inspected a homeowner's electrical system before beginning to work on the outside electric system, and he was not required to perform such an inspection. He recalled that there was a spark when the dangling wire was reconnected, which was not unusual. When Bogen observed the smoke from the garage, he instructed the lineman who was reconnecting the wire to cut the electricity flowing to the house. He recalled that he observed the damaged electrical panel from afar after the fire, and that he did not inspect it.

Thomas Baker testified that he was the fire marshal who responded to the fire at the premises. He photographed the damaged electric panel, and concluded that there was a "violent occurrence within the electrical panel" that was caused by an "unspecified arc." He described an arc as a break in a wire that caused electricity to try to "jump across that break." The arcing appeared to have occurred near or at the electrical panel, and Baker could not determine the exact location within the panel because of the damage. He testified that it was usual practice for the insurance company to investigate further and conduct a forensic analysis on the panel to determine the exact location of any failure. In his report concerning the fire, Baker indicated that the cause was an unspecified short circuit.

Additionally, George Ello, who was a manager at PSEG Long Island as well as an electrical engineer and certified fire investigator, averred in an affidavit that he reviewed the photographs of the breaker panel, among other things, but he did not inspect the electrical panel because it was not preserved. He stated that the breaker panel was owned by the plaintiff, and the fire occurred when the wire was reconnected because of "issues at the plaintiff's circuit breaker." He further averred that because the electrical panel was not available, it was impossible to determine the exact nature of the failure. He stated that it was "not possible for the re-connection of a hot leg to cause a failure at the customer's circuit breaker panel, absent any defective condition with the customer-owned equipment."

It is well established that 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 issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*,

64 NY2d 851 [1985]). The burden then shifts to the party opposing the motion, which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (see *Roth v Barreto*, *supra*; *O'Neill v Town of Fishkill*, *supra*).

As an initial matter, the Court notes that "it is New York's common-law doctrine of spoliation, rather than CPLR 3126, that [it] must consider, since CPLR 3126 covers refusal to comply with a discovery order or a willful failure to disclose, neither of which is applicable here" (*Strong v City of New York*, 112 AD3d 15, 21, 973 NYS2d 152 [1st Dept 2013]). It is well established that Supreme Court has broad discretion in determining the appropriate sanction for spoliation of evidence (see *Pegasus Aviation I, Inc. v Varig Logistica S.A.*, 26 NY3d 543, 551 [2015]; *Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714, 964 NYS2d 255 [2d Dept 2013]; *De Los Santos v Polanco*, 21 AD3d 397, 397, 799 NYS2d 776 [2d Dept 2005]). "A party that seeks sanctions for spoliation of evidence must show that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, that the evidence was destroyed with a culpable state of mind, and that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*SM v Plainedge Union Free School Dist.*, __AD3d__, 2018 NY Slip Op 04370 [2d Dept 2018]; see *Neve v City of New York*, 117 AD3d 1006, 1008, 986 NYS2d 606 [2d Dept 2014]; *Mendez v La Guacatala, Inc.*, 95 AD3d 1084, 944 NYS2d 313 [2d Dept 2012]; *Utica Mut. Ins. Co. v Berkoski Oil Co.*, 58 AD3d 717, 718, 872 NYS2d 166 [2d Dept 2009]). This sanction has been applied even if the destruction occurred through negligence rather than wilfulness (see *DiDomenico v C & S Aeromatik Supplies, Inc.*, 252 AD2d 41, 53, 682 NYS2d 452 [2d Dept 1998]) and "where evidence was negligently destroyed, the party seeking sanctions must establish that the destroyed evidence was relevant to the party's claim or defense" (*SM v Plainedge Union Free School Dist.*, *supra*). Notwithstanding, "where the plaintiffs and the defendants are equally affected by the loss of the items and neither have reaped an unfair advantage in the litigation, it is improper to dismiss a pleading on the basis of spoliation" (see *De Los Santos v Polanco*, *supra*; *Lawson v Aspen Ford*, 15 AD3d 628, 629-630, 791 NYS2d 119 [2d Dept 2005]; *Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 334, 772 NYS2d 78 [2d Dept 2004]).

Here, defendants failed to meet their burden to warrant a sanction for spoliation. "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and 'fatally compromised its ability to' prove its claim or defense" (*Neve v City of New York*, 117 AD3d 1006, 1008 [2d Dept 2014] [citation omitted]). There is no indication in the record that when Burke hired the electrical contractor to replace the damaged electrical panel, Burke possessed an obligation to preserve the same, and defendants failed to show that the disposal of the electrical panel fatally compromised their ability to defend against the plaintiff's claims. Burke testified that the fire marshal told him that it was a lightning strike that caused the damage to the electrical panel, and that the fire may have started overnight. Defendants also submitted the affidavit of their expert, who averred that, based upon his experience, it was impossible that the reconnecting of the broken electrical wire caused the fire. Furthermore, McLaughlin acknowledged that a full investigation concerning the fire was not warranted,

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inasmuch ass the fire marshal made a determination that the cause of the fire was an unspecified arc at or near the electrical panel.

Defendants also failed to conclusively establish that there was no issue of fact to resolve at trial. Generally, the issue of proximate cause is for the fact finder to resolve (*see Gray v Amerada Hess Corp.*, 48 AD3d 747, 853 NYS2d 157 [2d Dept 2008]; *Adams v Lemberg Enters., Inc.*, 44 AD3d 694, 843 NYS2d 432 [2d Dept 2007]; *see also Derdiarian v Felix Contractor Corp.*, 51 NY2d 308, 434 NYS2d 166 [1980]), and a court's responsibility in considering a motion for summary judgment is issue finding, not issue determination (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rennie v Barbarosa Transport, Ltd.*, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]). Here, although the fire marshal testified that the cause of the fire was an unspecified arc, which occurred as a result of damage caused at or near the electrical panel, the insurance adjuster, who observed the electrical panel a few days after the fire, testified that the insurance company determined the fire was caused by arcing at the electrical pole on the outside of the home. Defendants discount the adjuster's testimony, arguing that she was not an electrician or an engineer; however, the court is not in a position to resolve issues of fact or to determine matters of credibility. The conflicting testimony presents an issue of fact to be determined by the trier of fact, and not on this motion. For this reason, defendants' motion for summary judgment is denied.

Dated: 8-7-18

Hon. Dennis R. Mullen
A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION