Time Warner Cable N.Y. City, LLC v Fidelity Invs. Inst.Servs. Co., Inc.
2018 NY Slip Op 32860(U)
October 31, 2018
Supreme Court, New York County
Docket Number: 155968/2016
Judge: Robert D. Kalish
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH *Justice* **PART 29**

TIME WARNER CABLE NEW YORK CITY, LLC,

Plaintiff,

- v -

FIDELITY INVESTMENTS INSTITUTIONAL SERVICES COMPANY, INC.,

Defendant.

(and a third-party action)

INDEX NO. 155968/2016

MOTION DATE 9/26/18

MOTION SEQ. NO. 002

NYSCEF Doc Nos. 34–44, 47, and 52–58 were read on this motion for summary judgment.

Motion by Plaintiff Time Warner Cable New York City, LLC ("TWC") pursuant to CPLR 3212 for an order granting summary judgment in favor of Plaintiff and against Defendant/Third-Party Plaintiff Fidelity Investments Institutional Services Company, Inc. ("Fidelity") on the complaint is denied.

BACKGROUND

Plaintiff commenced the instant action on July 18, 2016, by e-filing a summons and complaint. The complaint alleges, in sum and substance, that TWC sustained extensive damage to its ground floor premises and property at 1360 Third Avenue, New York, New York (the "Premises"), when a second-floor boiler system owned, operated, and maintained by Fidelity flooded the Premises due to the negligence of Fidelity. On September 16, 2016, Fidelity interposed an answer, and on July 10, 2017, commenced a third-party action against Third-Party Defendants Honeywell International, Inc. ("Honeywell"), and BP Air Conditioning, Corp. ("BP Air"), entities which allegedly performed certain mechanical services on the subject boiler, by e-filing a third-party summons and complaint. On July 10, 2017, Honeywell interposed its answer to the third-party summons and complaint, and on April 6, 2018, BP Air interposed its answer.

On May 7, 2018, Honeywell filed a request for judicial intervention with motion seq. 001 pursuant to CPLR 3124 and 3126 to dismiss or, in the alternative, compel due to TWC and Fidelity's alleged failures to comply with certain discovery demands. That motion had been sub judice with the instant motion, was fully submitted on October 17, 2018, and was decided today in a separate decision and order of this Court.

On June 28, 2018, TWC filed the instant motion pursuant to CPLR 3212 for an order granting summary judgment in favor of TWC and against Fidelity on the complaint. Plaintiff

argues that it had leased the Premises and had been building out the space in anticipation of opening a retail store on the ground floor. Plaintiff further argues that, pursuant to its lease, it would occupy both the first floor and the basement of the Premises. TWC further argues that it retained nonparty N-Store Services ("N-Store") to build out the space. Plaintiff then argues, in sum and substance, that a boiler system owned and maintained by Fidelity malfunctioned, ruptured, burst, and leaked on November 17, 2014. TWC argues that it sustained damage to its premises and property amounting to $351,722.00 and is entitled to recover from Fidelity that amount plus interest at the rate of 9.00% per annum from November 17, 2014.

TWC annexes three affidavits in support of its motion. Mr. Perry Krieger avers in his signed, notarized affidavit, dated June 27, 2018, that he was employed as the resident manager/superintendent at 188 East 78th Street, a condominium, on the date of the accident, and has been so employed for over 10 years. (Margolis affirmation, exhibit G [Aff of Krieger].) Mr. Krieger states that the condominium is mechanical support for the space located at 1360 Third Avenue, New York, New York, including TWC's space and Fidelity's space on the date of the accident. Mr. Krieger indicates that Fidelity was responsible for maintaining its own mechanical units.

Mr. Krieger states that he responded to a fire alarm on the date of the accident, went to TWC's ground floor premises, which were undergoing renovations at this time, and observed "water on the floor and active water pouring from the ceiling." (Aff of Krieger ¶ 3.) Mr. Krieger then states that he went to Fidelity's space on the second floor, went to Fidelity's mechanical room, and "heard water 'roaring,' and saw that there was water, ankle high, in the mechanical room. The water was 'shooting out' of the condenser water line serving the McQuay heat pump. The valve was in the 'up' position." (*Id.*) Mr. Krieger then states that he "turned the valve perpendicular to the 'off' position, stopping the flow of water[,] [and] [w]hen the water later subsided, [] observed the cap on the floor and realized that the water pressure had blown the cap off." (*Id.*)

Mr. Todd Wagnon avers in his signed, notarized affidavit, dated October 27, 2017, that he was employed as a supervisor by N-Store, the general contractor for TWC's build-out of the Premises, and has been so employed for over seven years. (Margolis affirmation, exhibit H [Aff of Wagnon].) Mr. Wagnon states that he was the onsite supervisor for the build-out project, which encompassed a full demolition, remodel, and rebuild of the Premises from a Charles Schwab store to a Time Warner retail space, which would include a ground floor customer space and a basement-level space.

Mr. Wagnon indicates that he learned of the accident from Mr. Krieger at approximately 10:30 p.m. to 11:00 p.m. on November 16, 2014. Mr. Wagnon then states that he traveled to the Premises and arrived there at approximately 3:00 a.m. on the morning of November 17, 2014. Mr. Wagnon further states that he observed "water 'raining down' from the ceiling coming from the 2nd floor tenant directly above. The tenant was Fidelity." (Aff of Wagnon ¶ 3.) Mr. Wagnon then states that "[t]he water from Fidelity's boiler leaked through Fidelity's flooring and Time Warner['s] ceiling on the ground floor[] before traveling through the ground floor and ultimately gathering on the floor of the basement. There was an accumulation of 'ankle deep' water on the

floor of the basement." (*Id.* ¶ 4.) Mr. Wagnon has annexed as exhibit 1 to his affidavit photographs which he states that he took "illustrating the accumulation and water from Fidelity's malfunctioning boiler" and which the Court has reviewed. (*Id.*)

Jamie Dickerson's affidavit, signed and notarized on June 24, 2018, indicates that, as a result of the water damage sustained at the Premises, N-Store retained Maxons Restoration to perform certain water remediation. (Margolis affirmation, exhibit I [Aff of Dickerson].) Dickerson further indicates that N-Store then demolished and rebuilt the space, which had nearly been completely renovated and set to be placed into use by TWC at the time of the accident, resulting in a loss and repair costing $351,722.00. Dickerson was allegedly employed as a project manager by N-Store on the date of the accident and has been so employed for four years.

Fidelity argues in opposition that the instant motion is premature as the case is in its infancy, no depositions have been taken, and little or no substantial discovery has been exchanged. Fidelity further argues that Fidelity further argues that there is an issue of fact as to what caused the subject water leak and whether TWC's own construction workers or subcontractors, or Third-Party Defendants, were the cause. Fidelity then argues that TWC has failed to show that Fidelity created the subject condition or that its agents were not involved with the claimed negligence.

Fidelity annexes to its opposition papers an affidavit signed by Scott Goldsmith and sworn to on September 7, 2018, in Massachusetts before a Massachusetts notary public. (NYSCEF Doc No. 56 [Aff of Goldsmith].) Mr. Goldsmith states that he is a facility management lead with Jones Lang LaSalle Americas, Inc., the facility manager and provider for Fidelity on the date of the accident. Mr. Goldsmith further states that, at the time of the accident, he was senior facility manager for Fidelity. Mr. Goldsmith indicates that both Honeywell and BP Air had serviced the subject boiler during its time in service and that BP Air was the contracted service provider on the date of the accident. Mr. Goldsmith further indicates that BP Air performed service calls regarding the subject boiler on or about November 3-6, 2014, and November 12, 2014. Mr. Goldsmith then states that "Time Warner Cable was performing renovation work on their subject space/unit at the time of the subject accident."

DISCUSSION

"To obtain summary judgment it is necessary that the movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted].) "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 issues of fact from the case." (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Id.*) "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81

[2003].) "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) In the presence of a genuine issue of material fact, a motion for summary judgment must be denied. (*See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002].)

It is undisputed that water from the subject boiler leaked to the Premises, resulting in certain damages. In a case similar to the instant matter, the Appellate Division, First Department found that there were issues of fact as to whether the defendants caused or created a dangerous condition or had actual or constructive notice of a dangerous condition. (*Silverman v Perlbinder*, 307 AD2d 230 [1st Dept 2003].) In that case, the court noted that "[t]he water emanated from an area which was in the exclusive control of defendants and there are no allegations that plaintiff contributed in any way to the flood." Here, while TWC has demonstrated prima facie that Fidelity owned and maintained the subject boiler, TWC has tendered no proof in admissible form tending to show that Fidelity caused or created the dangerous condition or had actual or constructive notice of the condition. The relevant proof in admissible form as submitted by movant—the three annexed affidavits—contains a record of observations made of the water leak and damage after it had already begun and a single assertion, without substance, by Mr. Krieger that "the water pressure had blown the cap off" of the subject boiler. While, as in *Silverman*, the Court finds that "[t]his is the type of occurrence which likely would not have happened in the absence of some negligence," the proof submitted by movant in the instant motion, made without the support of formal discovery in this matter and prior even to a preliminary conference, is insufficient to establish TWC's entitlement to judgment as a matter of law against Fidelity.

While the Court need not consider the sufficiency of the opposition papers, even if the Court had found that Plaintiff met its prima facie burden, which it has not, the Court would have found persuasive Fidelity's argument that the instant motion is premature. CPLR 3212 (f), titled "Facts unavailable to opposing party," provides that,

> "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

It is apparent to the Court that discovery in this matter has barely begun, and that any or all of the parties in the instant actions may bear some responsibility for the accident. Both party depositions of TWC and nonparty depositions of N-Store and others with personal knowledge of the work being done may result in the disclosure of facts essential to justify Fidelity's opposition.

Moreover, even if Fidelity had not argued that the instant motion is premature, Fidelity raises a genuine issue of material fact in its opposition papers by means of Mr. Goldsmith's affidavit indicating that TWC was working in the subject mechanical room and on the subject boiler on the date of the accident.

TWC's reply affirmation in further support of its motion indicates that "the work being performed on behalf of Time Warner was *only* on the ground and basement floors" and "Fidelity does not claim that Time Warner had access to the Fidelity boiler or mechanical room." (Reply affirmation of Margolis ¶ 10 [emphasis added].) As to the latter statement, it is directly contradicted by Mr. Goldsmith's affidavit. Moreover, as to the former statement, the bare affirmation of Ms. Margolis, who has demonstrated no personal knowledge of the way the subject work was done "is without evidentiary value and thus unavailing." (*Zuckerman*, 49 NY2d at 563.)

CONCLUSION

Accordingly, it is

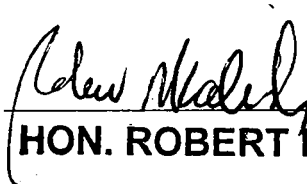
ORDERED that the motion by Plaintiff Time Warner Cable New York City, LLC pursuant to CPLR 3212 for an order granting summary judgment in favor of Plaintiff and against Defendant/Third-Party Plaintiff Fidelity Investments Institutional Services Company, Inc. on the complaint is denied; and it is further

ORDERED that, within 10 days of the date of the decision and order on this motion, Defendant shall serve a copy of this order with notice of entry on all parties; and it is further

ORDERED that the parties are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Wednesday, November 7, 20, 2018, at 9:30 a.m., for a preliminary conference.

The foregoing constitutes the decision and order of the Court.

Dated: October 31, 2018
New York, New York



HON. ROBERT D. KALISH J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE