

**Philadelphia Indem. Ins. Co. v Lowe's Home Ctrs.,
Inc.**

2018 NY Slip Op 34402(U)

April 19, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 15-602085

Judge: Martha L. Luft

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SHORT FORM ORDER

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CAL. No. 17-00693-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. MARTHA L. LUFT
Acting Justice of the Supreme Court

MOTION DATE 6/13/17 (#002)
MOTION DATE 7/25/17 (#003)
MOTION DATE 9/19/17 (#004)
ADJ. DATE 9/19/17
Mot. Seq. #002 - MotD
Mot. Seq. #003 - MotD
Mot. Seq. #004 - MotD

-----X
PHILADELPHIA INDEMNITY INSURANCE
COMPANY a/s/o WHALERS COVE
CONDOMINIUM,

Plaintiff,

- against -

LOWE'S HOME CENTERS, INC., LOWE'S
COMPANIES, INC., and ROBERT BECK,
Individually; and ROBERT BECK d/b/a BIAGIO
PLUMBING & HEATING, and BIAGIO
PLUMBING & HEATERS,

Defendants.

CARMAN, CALLAHAN & INGHAM, LLP
Attorney for Plaintiff and Third-Party Defendant
266 Main Street
Farmingdale, New York 11735

CATALANO GALLARDO &
PETROPOULOS, LLP
Attorney for Defendants and Third-Party
Plaintiffs Lowe's Home Ctrs. and Lowe's Cos.
100 Jericho Quadrangle, Suite 326
Jericho, New York 11753

-----X
ROBERT BECK, Individually, ROBERT BECK
d/b/a BIAGIO PLUMBING & HEATING, and
BIAGIO PLUMBING & HEATING,

Third-Party Plaintiffs,

- against -

KENNETH GOLDBERG,

Third-Party Defendant.

BAXTER SMITH & SHAPIRO, P.C.
Attorney for Defendants and Third-Party
Plaintiffs Beck and Biagio Plumbing &
Heaters
99 North Broadway
Hicksville, New York 11801

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendants Lowe's Home Centers, Inc. and Lowe's Companies, Inc., dated April 28, 2017, and supporting papers; (2) Notice of Cross Motion by defendants/third-party plaintiffs Robert Beck, Robert Beck d/b/a Biagio Plumbing & Heating, and Biagio Plumbing & Heaters, dated June 21, 2017, and supporting papers; (3) Reply Affirmation by defendants Lowe's Home Centers, Inc. and Lowe's Companies, Inc., dated July 19, 2017, and supporting papers; (4) Notice of Motion by the plaintiff and third-party defendant, dated July 21, 2017, and supporting papers; (5) Affirmation in Opposition by the plaintiff and third-party defendant, dated July 21, 2017, and supporting papers (Mot. Seq. #003); (6) Affirmation in Opposition by defendants Lowe's Home Centers, Inc. and Lowe's Companies, Inc., dated September 5, 2017, and supporting papers (Mot. Seq. #004); (7) Reply Affirmations by the plaintiff and third-party defendant, dated September 19, 2017, and supporting papers; it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Lowe's Home Centers, Inc. and Lowe's Companies, Inc. for an order pursuant to CPLR 3212, granting summary judgment in their favor on their cross claims against Robert Beck, Robert Beck d/b/a Biagio Plumbing & Heating, and Biagio Plumbing & Heaters for contribution, common-law indemnification, contractual indemnification, and breach of contract to procure insurance, is granted to the extent of granting conditional summary judgment on their cross claim for common-law indemnification, and is otherwise denied; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendants/third-party plaintiffs Robert Beck, Robert Beck d/b/a Biagio Plumbing & Heating, and Biagio Plumbing & Heaters for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against them, and in their favor on their cross claims against Lowe's Home Centers, Inc. and Lowe's Companies, Inc. for contribution and common-law indemnification, is granted to the extent of granting summary judgment dismissing the cross claims against them for contribution and for breach of contract to procure insurance, and is otherwise denied; and it is further

ORDERED that the motion by the plaintiff and third-party defendant for an order pursuant to CPLR 3212, granting summary judgment in the plaintiff's favor and against the defendants for the relief demanded in the complaint, or, in the alternative, dismissing the third-party complaint, is granted to the extent of dismissing the third-party cause of action for common-law indemnification, and is otherwise denied.

This is a subrogation action to recover sums allegedly paid by the plaintiff to its insured, Whalers Cove Condominium, for damages sustained to the insured's condominium complex in Babylon, New York due to a fire on November 3, 2013 resulting from improper installation of a hot water heater some five years earlier. It appears that Kenneth Goldberg, the owner of unit 32, purchased a new hot water heater and installation package from Lowe's Home Centers, Inc. and Lowe's Companies, Inc. (collectively, "Lowe's") in November 2008 and, later that month, the heater was installed by Robert Beck, Robert Beck d/b/a Biagio Plumbing & Heating, and Biagio Plumbing & Heaters (collectively, "Biagio"). The plaintiff claims that the fire originated in unit 32, that the defendants' negligence in installing the hot water heater caused the fire, that it paid its insured \$76,591.04 for damages sustained in the fire, and that it thereby became subrogated to any and all claims that its insured had against the defendants.

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The plaintiff alleges as its sole theory of liability that negligent or improper installation of the hot water heater caused the fire. Noting that Biagio, as agent or installer for Lowe's, was solely responsible for performing the installation and all related electrical work, the plaintiff contends that the fire originated in the junction box built into the top of the hot water heater, and was the direct result of an "arcing event" caused by improper installation of the wire connections inside the box, *i.e.*, a wire nut connection of the copper conductor from the hot water heater to the aluminum wire supply in the house. Biagio, in response, notes the lapse of five years between the date of the installation and the date of the fire, during which time the junction box was solely under the care, custody, and control of the homeowner, and further notes the storage of combustible materials in the utility room where the hot water heater was located as a possible contributing cause of the fire; it does not dispute, however, that an arcing event occurred in the junction box and triggered the fire.

It appears that as of November 18, 2008, Lowe's and Biagio were parties to a contract pursuant to which Biagio agreed to install plumbing and heating units purchased by Lowe's customers ("the installation contract"). Paragraph 11 of the installation contract provides that

Installer agrees to protect, defend, hold harmless, and indemnify Lowe's, its agents, and employees from and against any and all claims, demands, actions, liabilities, losses, costs, and expenses (including, but not limited to, attorneys' fees), arising out of any actual or alleged * * * damage to or destruction of any property * * * arising out of or resulting or claimed to have resulted in whole or in part from any actual or alleged act or omission of the installer, whether lawful or unlawful and regardless of whether or not it was caused in part by Lowe's.

Also on or about November 18, 2008, Goldberg and Lowe's entered into a contract for the sale and installation of the hot water heater ("the customer contract") providing, in part, as follows:

Lowe's does warrant that the Installation Services will be performed by the Installer in a good and workmanlike manner. Lowe's warranty for Installation Services shall extend for a period of one year from the date the Certificate of Completion is signed by the Customer or for such greater period as may be required by applicable law governing consumer warranties for workmanship (the Warranty Period). Customer must give Lowe's written notice within the Warranty Period of any warranty claim relating to Installation Services. Customer agrees that its sole and exclusive remedy against Lowe's for a warranty claim is reinstallation in a good and workmanlike manner, including the repair and replacement of any Goods if and to the extent reasonably necessary to correct the defective Installation Services. Customer shall have no other remedy against Lowe's for a warranty claim, including without limitation remedy for loss or damage caused by normal wear and tear, loss or damage which has not been reasonably mitigated, loss or damage caused by acts of God, incidental or consequential damages for lost profits, sales, injuries to persons or property, or any other incidental or consequential damages. Lowe's warranty for Installation Services shall be in lieu of any other warranty expressed or implied, including without limitation any implied warranty or merchantability or fitness for a particular purpose. In connection with any warranty claim, Customer agrees, at no cost to Lowe's, to prepare the Premises, including the removal and replacement of

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fixtures incident to the repair area, so that Lowe's, or its designee, can correct the defective Installation Services without undue delay.

In its complaint, the plaintiff pleads a single cause of action against the defendants, sounding in negligence. Lowe's, in its answer, pleads three cross claims against Biagio: the first, seeking contribution and common-law indemnification, the second, for contractual indemnification, and the third, alleging breach of contract to procure insurance. Biagio, in its answer, also pleads three cross claims against Lowe's, in effect, seeking contribution and common-law indemnification. In its third-party complaint, Biagio pleads separate causes of action against Goldberg for contribution and common-law indemnification, alleging that the homeowner was negligent in failing to retain a licensed electrician to inspect or replace the existing aluminum wiring in the home, in failing to install pigtail connectors to the existing aluminum wiring, and in storing combustible materials in proximity to the hot water heater.

Now, discovery having been completed and a note of issue having been filed on April 28, 2017, the parties timely move for summary judgment.

To obtain summary judgment it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Addressing first the plaintiff's motion, the court finds that the plaintiff failed to establish its entitlement to summary judgment. The plaintiff alleges in its moving papers that Lowe's owed a duty to the homeowner (i) to verify that his home was safe for the installation and (ii) to provide an installer who would correctly inspect and install the hot water heater. But the plaintiff has not identified any duty which Lowe's may have owed to the plaintiff's insured. Nor has the plaintiff established that the duty to verify the safety of the premises is a duty cognizable at law; even assuming that the duty to hire a competent installer is a legally recognized duty, the plaintiff failed to demonstrate as a matter of law that such duty was breached. Assuming further, without deciding, that Biagio was negligent in causing the fire, it has not been demonstrated how or why vicarious liability should be imposed on Lowe's for any such negligence. As a general rule, a party who retains an independent contractor is not liable for injury to a third party caused by the independent contractor's negligent acts (*Kleeman v Rheingold*, 81 NY2d 270, 598 NYS2d 149 [1993]; *Rosenberg v Equitable Life Assur. Socy. of U.S.*, 79 NY2d 663, 584 NYS2d 765 [1992]). Here, the plaintiff has made no factual showing and has engaged in no legal analysis to demonstrate the applicability of an exception to the independent contractor rule (*see generally* 1B PJI3d 2:255, Introductory Statement). The plaintiff's showing as to Biagio's claimed liability is similarly deficient. Any duty Biagio had with respect to the installation of the hot water heater arose exclusively from its contract with Lowe's. Breach of a contractual obligation generally will not be sufficient to impose tort liability for injury to a noncontracting third party, with three exceptions: (1) where the defendant, by failing to exercise reasonable care in discharging its contractual obligations, creates an unreasonable risk of harm to others, or increases that risk, (2) where the plaintiff is injured as a result of reasonable reliance upon the defendant's continued performance under the contract, and (3) where the defendant completely displaced another party's duty to safely maintain its premises (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002]). As the plaintiff failed to even discuss,

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much less establish, the possible applicability of any of those exceptions, it cannot be said as a matter of law, on the record provided, that Biagio owed the plaintiff's insured a duty of care.

As to the Lowe's motion, summary judgment is granted to the extent Lowe's seeks summary judgment on its cross claim for common-law indemnification. In order to establish a claim for common-law indemnification, a party must demonstrate "that no negligent act or omission on its part contributed to the plaintiff's injuries, and that its liability is therefore purely vicarious" (*Coque v Wildflower Estates Devs.*, 31 AD3d 484, 489, 818 NYS2d 546, 551 [2006]). Based on the deposition testimony of Robert Beck, and further based on the deposition testimony and affidavit of Robert Ruggiero, a Lowe's field service manager, Lowe's contends that the hot water heater was installed solely by Biagio, its independent contractor, without assistance or supervision by anyone at Lowe's. The court finds such showing sufficient to establish its prima facie entitlement to summary judgment. Biagio, in opposition, failed to raise a triable issue of fact. Although a representative of Lowe's was briefly at the property while the hot water heater was being installed, it is evident that she was there to ensure that certain customer service requirements of Lowe's were being met, and that she provided no technical assistance and exercised no supervisory responsibility over the installation. Nor, despite Biagio's argument to the contrary, does the fact that the fire did not occur until some five years after the installation establish that it was free from active fault. Accordingly, Lowe's is entitled to summary judgment on its claim for common-law indemnity, on condition that the plaintiff recover judgment against Lowe's; the court notes that the common-law right to indemnification against the party actually at fault encompasses the right to recover attorney's fees, costs, and disbursements incurred in defending the main action (*Chapel v Mitchell*, 84 NY2d 345, 618 NYS2d 626 [1994]).

In all other respects, its motion is denied. As to its cross claim for contribution, summary judgment is denied because the rule of apportionment among tortfeasors, originally set forth in *Dole v Dow Chem Co.* (30 NY2d 143, 331 NYS2d 382 [1972]) and later codified in CPLR article 14, has no application to those who are only vicariously liable (*Rogers v Dorchester Assoc.*, 32 NY2d 553, 347 NYS2d 22 [1973]). Regarding its cross claim for contractual indemnification—that Biagio was obligated under the terms of the installation contract to hold harmless and indemnify Lowe's from and against "all claims, demands, actions, liabilities, losses, costs, and expenses," including attorneys' fees, arising out of any actual or alleged damage to or destruction of any property "resulting or claimed to have resulted in whole or in part from any actual or alleged act or omission" on their part—it appears that the installation contract (and its indemnification clause) may be governed by North Carolina law, an issue which was raised for the first time on this motion by way of reply and which was not fully briefed by the parties. Under the circumstances, the court finds it inappropriate to consider summary judgment as to that claim. And as to the cross claim for breach of contract to procure insurance, Lowe's concedes in its moving papers that it was named as an additional insured under Biagio's policy and, therefore, that Biagio's contractual obligation was met (*see Chunn v New York City Hous. Auth.*, 83 AD3d 416, 922 NYS2d 3 [2011]).

Consistent with the preceding analysis, Biagio's motion is granted only to the extent of granting summary judgment dismissing the cross claims against it for contribution and for breach of contract to procure insurance. Insofar as Biagio seeks summary judgment dismissing the complaint, it failed to affirmatively demonstrate that it was free from fault; the passage of five years, without more, does not so attenuate its alleged negligence from the claimed injury as to relieve it of liability. As to the cross claim

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against it for contractual indemnification, the court notes, for the reasons stated previously, that a determination as to the merits of that claim must await the trial of the action. Nor is Biagio entitled to summary judgment on its own cross claims against Lowe's—whether for contribution, because the relative culpability, if any, of the parties has yet to be determined (*e.g. Markey v C.F.M.M. Owners Corp.*, 51 AD3d 734, 858 NYS2d 293 [2008]), or for common-law indemnification, as it failed to establish prima facie that it was not actively negligent (*e.g. Colyer v K Mart Corp.*, 273 AD2d 809, 709 NYS2d 758 [2000]).

Finally, as to Goldberg, summary judgment is granted to the extent of dismissing the third-party claim for common-law indemnification, because any potential liability on the part of Biagio would be premised upon its own wrongdoing and would not be purely vicarious (*see Blank Rome, LLP v Parrish*, 92 AD3d 444, 938 NYS2d 284 [2012]; *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 492 NYS2d 371 [1985]; *County of Westchester v Welton Becket Assoc.*, 102 AD2d 34, 478 NYS2d 305, *appeal dismissed* 64 NY2d 734, 485 NYS2d 752 [1984], *aff'd* 66 NY2d 642, 495 NYS2d 364 [1985]). As to the third-party claim for contribution, however, the court finds Goldberg's conclusory assertion that "he did not owe a duty to any of the parties," without more, insufficient to warrant the granting of summary judgment in his favor.

The court directs that the claims as to which summary judgment was granted are hereby severed and that all remaining claims shall continue (*see* CPLR 3212 [e] [1]).

Dated: April 19, 2018

Martha L. Luft
 A.J.S.C.

HON. MARTHA L. LUFT

 FINAL DISPOSITION X NON-FINAL DISPOSITION