

Praetorian Ins. Co. v Long Is. Power Auth.
2019 NY Slip Op 31563(U)
April 2, 2019
Supreme Court, Queens County
Docket Number: 704580/2014
Judge: Bernice D. Siegal
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY
Present: HONORABLE BERNICE D. SIEGAL IAS TERM, PART 25
Justice

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PRAETORIAN INSURANCE COMPANY and
WESCO INSURANCE COMPANY a/s/o Yaron
Kayam

Index No.: 704580/2014
Motion Date: 10/15/2018

Plaintiff,

Motion Seq. No.: 2

-against-

LONG ISLAND POWER AUTHORITY,
and NATIONAL GRID PLC, NATIONAL GRID
PLC A/K/A NATIONAL GRID US8, INC.,
NATIONAL GRID USA, INC., KEYSpan ENERGY
TRADING SERVICES, LLC d/b/a NATIONAL GRID,
NATIONAL GRID USA, and NATIONAL GRID ENERGY
TRADING SERVICES, LLC

FILED
APR 10 2019
COUNTY CLERK
QUEENS COUNTY

Defendants.
-----X

The following papers numbered 1 to 14 read on this motion by defendant Long Island Power Authority, defendant Long Island Lighting Company and defendant National Grid Electric Services, LLC for summary judgment dismissing all of the claims against them

Papers
Numbered

Notice of Motion - Affidavits - Exhibits	1 - 4
Affirmation in Opposition - Exhibits	5 - 9
Reply Affirmation	6 - 10
Memoranda of Law.....	11 - 14

Upon the foregoing papers it is ordered that Defendants' motion for summary judgment on the ground of a lack of duty to de-energize and pursuant to the *Ryan* rule is denied.

I. The Allegations of the Complaint

The plaintiffs were owners of real and personal property located on the Rockaway Peninsula, County of Queens, New York on or before October 29, 2012. They were also customers of the Long Island Power Authority (LIPA) and National Grid PLC a/k/a National Grid US8, Inc., National Grid USA, Inc., Keyspan Electric Services, LLC, and Keyspan Energy Trading Services, d/b/a National Grid.

LIPA, formed under Public Authorities Law §1020 as a non-profit municipal electric provider, owned and operated an electric transmission and distribution system that serviced areas on Long Island, including the Rockaway Peninsula. Between 1997 and 2002, LIPA entered into management service agreements with Keyspan Electric Services, LLC and Keyspan Energy Trading Services, LLC (collectively Keyspan Electric). After mergers, Keyspan Electric changed its name to National Grid. In 2012, National Grid had three main functions pursuant to its agreements with LIPA: (1) the operation and maintenance of the transmission and delivery system, (2) the repair of the transmission and delivery system, and (3) customer service. National Grid had responsibilities concerning emergency preparedness

and planning regarding such events as hurricanes and flood surges subject to the supervision of LIPA.

Before October 2012, both LIPA and National Grid knew that flooding in areas such as the Rockaway Peninsula created the danger of fires caused by the corrosive effects of salt water on live electrical wiring. The defendants also knew that de-energization in flood prone areas was “an accepted custom and accepted usage by utilities throughout the country.”

In late October, 2012, Superstorm Sandy, also called “Hurricane Sandy,” nearly 2,000 miles across, moved up the Atlantic coastline, causing the National Weather Service to issue high wind and flood watches for areas in New York and New Jersey. On October 28, 2012, the City of New York issued a mandatory evacuation order for the Rockaway Peninsula. On October 29, 2012, the superstorm hit the New York City Metropolitan area at high tide, and the resulting surge flooded many areas in the city and on Long Island, including the Rockaway peninsula, with devastating effect.

The defendants had left electrical transmission lines energized, and electrical arcing from flood waters coming into contact with the live wires started fires which destroyed the premises owned and/or occupied by the plaintiffs.

II. The Instant Action

The plaintiffs began the instant action by the filing of a summons and a complaint on July 2, 2013.

The first cause of action, which is for negligence, alleges that the defendants had a duty to establish an emergency response plan concerning areas that were known to be prone to flooding and that the plan should have dealt with electrical wiring that could cause fires by coming into contact with salt water. The failure of the defendants to de-energize the Rockaway Peninsula allegedly “constituted a departure from good and accepted engineering principles as set forth in the National Electrical Safety Code” and “a departure from the custom and practices of electrical utilities throughout the country.”

The second cause of action, which is for gross negligence, alleges that “the defendants were grossly negligent in failing to de-energize the Peninsula and [in failing] to implement appropriate emergency protocols.”

The third cause of action is also for negligence, not for fraud, despite some allegations concerning reliance on representations made by the defendants about an emergency response plan. Plaintiffs allege that Defendants were negligent in “fail[ing] to advise the plaintiffs, as required by emergency protocols, to turn off electricity in their homes prior to evacuating the Peninsula and thereafter in order to prevent fire,” and thus this failure to advise caused the destruction of homes and property. Plaintiffs further allege that the Defendants were negligent in failing to de-energize the Peninsula.

Prior orders of this court concerning motions by the defendants to dismiss on the grounds of governmental function immunity made in this action (*see*, *Baumann v. Long*

Island Power Authority, 45 Misc.3d 257[Sup. Ct. July 09, 2014]) and in related actions *Heeran v Long Island Power Authority (Lipa)*, 2014 N.Y. Slip Op. 32205(U)[Sup. Ct. July 09, 2014]; *Connolly v Long Island Power Authority*, 2014 WL 12519907[(Sup. Ct. July 15, 2014), were appealed by the defendants. In affirming, the Appellate Division held that the provision of electricity was properly categorized as a proprietary function. (See, *Heeran v. Long Island Power Auth.*, 141 A.D.3d 561 [2nd Dept. 2016]; *Connolly v. Long Island Power Auth.*, 141 AD3d 555 [2nd Dept. 2016]; *Baumann v. Long Island Power Auth.*, 141 AD3d 554 [2nd Dept 2016].) The Court of Appeals affirmed all three cases sub nom *Connolly v. Long Island Power Auth.*, 30 NY3d 719 (2018), holding that the plaintiffs had adequately alleged that the defendants were acting in a proprietary capacity, rather than in a governmental capacity, when they allegedly were negligent in failing to preemptively de-energize the electrical grid.

III. The Instant Motion

A. Introduction

Defendants now move upon the grounds that Defendants did not have a duty to preemptively de-energize the electrical grid, or alternatively, pursuant to *Ryan v. New York Cent. R. Co.*, 35 NY 210 (1866), that a failure to preemptively de-energize the electrical grid was not a proximate cause of injury to most of the plaintiffs.

B. The Duty of the Defendants

1. Introduction and General Principles

The defendants argue as follows: “[a]n electric utility does not have a duty to intentionally impose a blackout on the general public and its customers, including persons and facilities to whom electricity can be lifesaving, to avoid the potential damage that might befall a particular group, in the face of an adverse weather event. Thus, without a duty to de-energize, there is no basis upon which the plaintiffs can maintain a negligence action against the defendants.” (Memorandum of Law, p.2.)

“To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.” (*Solomon by Solomon v. City of New York*, 66 NY2d 1026, 1027, [1985]; *Pasternack v. Lab. Corp. of Am. Holdings*, 27 NY3d 817 [2016].) “[A] duty of reasonable care owed by a tortfeasor to an injured party is elemental to any recovery in negligence.” (*Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 NY2d 579, 584 [1994].)

“In the absence of a duty, as a matter of law, there can be no liability.” (*Pasternack v. Lab. Corp. of Am. Holdings, supra*, 825.) “Without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm.” (*Lauer v. City of New York*, 95 NY2d 95, 100 [2000].)

Although the Legislature establishes some duties through the enactment of statutes, the courts more often determine duties as matter of policy. (See, *Lauer v. City of New York*,

supra.) “The definition and scope of an alleged tortfeasor's duty owed to a plaintiff is a question of law.” (*Pasternack v. Lab. Corp. of Am. Holdings, supra*, 817; *see also* 532 *Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 NY2d 280[2001]; *Palka v. Servicemaster Mgmt. Servs. Corp.*, *supra.*) “Although dependent upon the facts and circumstances, ‘[t]he existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court.’” (*Montanez v. New York State Elec. & Gas*, 144 AD3d 1241, 1243 [3rd Dept. 2016] quoting *Di Ponzio v. Riordan*, 89 NY2d 578, 583 [1997].) “The nature of the inquiry depends, of course, on the particular facts and circumstances in which the duty question arises. The analysis is also driven by considerations of public policy.” (*Di Ponzio v. Riordan, supra*, 583.)

“The affirmative duty of power companies to exercise reasonable care in the operation and maintenance of their power lines is clear.” (*Miner v. Long Island Lighting Co.*, 40 NY2d 372, 378, [1976]; *see, Wheeler v. Citizens Telecommunications Co. of New York*, 71 AD3d 1218, 1220 [“NYSEG had a duty to use reasonable care to warn linemen who might work on the pole of its defective condition”]; *Trapani by Trapani v. Rochester Gas & Elec. Corp.*, 229 AD2d 923, 923 [issue of fact as to “whether RG & E failed to exercise reasonable care in operating and maintaining its power line”]; *Capital Mut. Ins. Co. v. Niagara Mohawk Power Corp.*, 137 AD2d 877, 877 [3rd Dept. 1988] [“It is well established that utility companies have an affirmative duty to exercise reasonable care in the operation and maintenance of power lines”]; *Holden v. Boyle*, 80 AD2d 281, 284 [“Utilities have an affirmative duty to exercise reasonable care in the operation and maintenance of their power

lines “]; N.Y. Pattern Jury Instr.--Civil 2:195 [an electric power company is required to use reasonable care in its business of generating and distributing electricity].)

“Courts traditionally fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability.” (*Hamilton v. Beretta U.S.A. Corp.*, 96 NY2d 222, 232 [2001] [internal quotation marks and citation omitted]; see also *532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc.*, 96 NY2d 280 [(2001).)

2. Cases Related to De-Energization Cited by the Defendants

In *Nicholas v. New York State Elec. & Gas Corp* (283 App.Div. 291 [4th Dept. 1954], amended, 283 App Div . 915, aff'd, 308 NY 930 [1955]), a painter brought suit against a power company for injuries sustained while painting the company's sub-station. The Appellate Division dismissed the complaint, holding that the power company did not incur liability for not de-energizing the substation while the plaintiff worked. While the holding has several rationales, the Appellate Division wrote:“Concededly, the defendant was required to exercise reasonable care to see to it that plaintiff was not injured while upon its premises. In considering its duty to exercise such care, we should not overlook that it was a public service corporation which was under a continuing duty to supply current to its customers. It was impossible to shut down its entire sub-station and at the same time serve its customers

unless some substitute transmission line was available as a means for distribution of current.”

(*Nicholas v. New York State Elec. & Gas Corp.*, *supra*, 298.) In *Nicholas*, the Appellate Division majority noted that “[m]ore convincing evidence would be difficult to find to establish the cause of plaintiff’s misfortune. It all points to carelessness on the part of the plaintiff in unnecessarily going upon the beam and coming in such close contact with the ‘hot’ transfer bus as to cause electric current to arc and pass through his body producing the injuries complained of.” In contrast, in the within action, there has been no evidence to suggest the plaintiffs are, in any way, at fault for their loss.

In *Alesi v. City of New York* (9 AD2d 236 [1st Dept. 1959], *aff’d*, 12 NY2d 703[1962]) a worker was electrocuted when a pneumatic jackhammer drill he was operating came into contact with high-tension electric cables. The complaint alleged, *inter alia*, that the defendants were negligent in failing to de-energize or remove the cables when they learned that excavation was taking place nearby. The Appellate Division reversed the judgment in favor of plaintiff and against defendant Consolidated Edison Company and dismissed the complaint. The Appellate Division wrote: “It has been urged by plaintiff that as soon as Edison learned that workmen were nearby it should have de-energized or rerouted its cables to render the area completely safe. A duty to take precautions which are completely disproportionate to the dangers presented cannot reasonably be imposed. To de-energize all the cables on East 38th Street simultaneously would have deprived large areas of the city of electrical power. There would have been no light, no transportation, no refrigeration, no elevator service, and all would be affected —public and private services alike. If this had

to be done for each excavation in the city streets adjacent to an Edison electrical installation, the city would virtually become paralyzed,” (*Alesi v. City of New York*, supra, , 241–42.) This case has some relevance to the case at bar because a community’s need of an electric supply is a factor recognized by the court to be weighed in determining the reasonableness of a utility’s decision not to de-energize.

In *Capital Mut. Ins. Co. v. Niagara Mohawk Power Corp.* (supra, 137 AD2d 877), a fire originated from a short circuit inside a distribution box owned and controlled by plaintiff’s insured, and the plaintiff brought suit alleging that the defendant utility breached its duty of reasonable care by failing to place a fuse on the customer’s incoming service line. The appellate court held that “Supreme Court correctly determined as a matter of law that defendants were not required to install a safety fuse on the customer’s service line in order to fulfill their duty of reasonable care.” (*Capital Mut. Ins. Co. v. Niagara Mohawk Power Corp.*, supra.) *Capital Mutual* is inapposite to the instant matters because “the fires originated from a short circuit in a disconnect box under the customer’s control and not from a breach of duty on defendants’ part.” (*Capital Mut. Ins. Co. v. Niagara Mohawk Power Corp.*, supra.).

Finally, in *Montanez v. New York State Elec. & Gas* (supra, 144 AD3d 1241), property owners brought an action against an electric utility, alleging, inter alia, that the company had been negligent in maintaining, inspecting and repairing a power line on a permanent utility easement over their property and in failing to take proper precautions to prevent electrical malfunctions that caused a structural fire in their home. The power line, downed by

Hurricane Irene, remained live for several hours. The Appellate Division affirmed the motion court's grant of summary judgment to the defendant. The appellate court wrote: "In determining the scope of duty, courts examine, among other factors, whether the 'injury-producing occurrence is one that could have been anticipated.'" (*Montanez v. New York State Elec. & Gas, supra*, 1243, quoting *Di Ponzio v. Riordan, supra* 583.) The appellate court determined that summary judgment in the defendant's favor was warranted because the plaintiff failed to raise a genuine issue of fact as to foreseeability. The Court found that plaintiff's evidence did not demonstrate that "defendant should have reasonably perceived the risk that the downed power line could cause a fire in the residence hundreds of feet away." (*Montanez v. New York State Elec. & Gas, supra*, 1244.).

3. Cases Related to De-Energization Cited by the Plaintiffs

In *Russell v. New York State Elec. & Gas Corp.* (276 App.Div. 44, 49 [3rd Dept. 1949] aff'd, 301 NY 593 [1950]), where a state trooper sustained an electrical shock from a live electric wire that had fallen and had made contact with a car that he touched, the Appellate Division held: "Whether [the power company] acted with reasonable dispatch in attempting to repair the line without shutting off the power, or whether it failed to exercise reasonable care in not breaking the current, either from lack of facilities or otherwise, was, under all the circumstances, a question of fact for the jury."

In *Tallarico v. Long Island Lighting Co* (45 AD2d 845 [2nd Dept. 1974.], aff'd, on the opinion below 38 NY2d 733 [1975]), a worker laying a sewer pipe stood in a trench above

which a crane was in operation. As the crane operator lowered a bucket into the trench, the worker was supposed to take hold of it and guide it, but when the worker touched the bucket, he was electrocuted. The crane's 30-foot boom had come into contact with LILCO's overhead bare primary wire and had transmitted the wire's power to the bucket. After a jury trial and the entry of a judgment against the defendants, which included LILCO, they appealed. While reducing the award of damages, the Appellate Division decided that it would not grant a new trial upon the questions of fact. The Appellate Division held, inter alia, “[i]t was for the jury to say whether LILCO, having been able to de-energize or relocate the section of the line under which the decedent stood, acted with that degree of care which was commensurate with the risk to which it had exposed him.” (*Tallarico v. Long Island Lighting Co.*, *supra*, 846.) A power company must exercise reasonable care in the operation and maintenance of its electrical lines (*see, Miner v. Long Island Lighting Co.*, *supra*) once a duty of care toward a party is found or assumed. It is also relevant as an example where an appellate court found that a utility may be held liable for a failure to de-energize and that this is an issue for the jury.

Austro v. Niagara Mohawk Power Corp (103 AD2d 903, 904, [3rd Dept. 1984]), though reversed on other grounds (66 NY2d 674 [1985]) cites *Tallarico*, and finds : “Where electrocution is a foreseeable risk, it was for the jury to decide whether NiMo, having been able to de-energize the section of line at the construction site, acted with that degree of care which was commensurate with the risk to which plaintiff had been exposed.” (*Austro v. Niagara Mohawk Power Corp.*, *supra*, 904.)

4. General Principles Concerning The Duty Owed To A Party

The issue of whether a party owes a duty of care to reasonably avoid injury to another party is a question of law for the courts, and the courts resolve legal duty questions by resort to considerations of morality, logic and the social consequences of finding a duty. (*Tenuto v. Lederle Labs., Div. of Am. Cyanamid Co.*, 90 NY2d 606 [1997].) The imposition of a duty of care requires weighing its usefulness in furthering a social benefit against its costs and burdens. (*Peralta v. Henriquez*, 100 NY2d 139.) Factors relevant to this issue taken into consideration include, inter alia, “the social utility of the activity out of which the alleged injury arises; Preventative considerations, which involve the ability of the defendant to adopt practical means of preventing injury, the possibility that reasonable men can agree as to the proper course to be followed to prevent injury, the degree of certainty that the alleged injuries were proximately caused by the defendant and the foreseeability of harm to the plaintiff; Economic considerations, which include the ability of the defendant to respond in damages; [and], the probability of feigned claims and the difficulties inherent in proving the plaintiff’s case.” (*Donohue v. Copiague Union Free Sch. Dist.*, 64 AD2d 29, 33 [2nd Dept. 1978], *aff’d*, 47 NY2d 440[1979]; see also *Kazanoff v. United States*, 945 F2d 32, [2d Cir. 1991] [applying NY law].)

5. Discussion

Defendants move for summary judgment on two grounds (1) the absence of a duty to preemptively de-energize prior to Superstorm Sandy and (2) a lack of proximate cause as Defendants' alleged liability is limited solely to those properties to which the fires first spread.

A. Whether the defendants owed a duty of the care in the supply of electricity

It is well settled that power companies must “exercise reasonable care in the operation and maintenance of their power lines...” (*Miner v. Long Island Lighting Co.*, supra at 378; see, *Wheeler v. Citizens Telecommunications Co. of New York*, supra at 1220; *Trapani by Trapani*, supra at 923; *Capital Mut. Ins. Co.*, supra at 877; N.Y. Pattern Jury Instr.--Civil 2:195.)

Whether under all of the circumstances of this case the defendants breached a duty of care found to be owed to any plaintiff is an issue of fact. (see, e.g., *Tallarico v. Long Island Lighting Co.*, supra.)

Defendants assert that reasonable care does not include a duty to preemptively de-energize. Defendants reliance on *Capital Mutual* for this proposition is misplaced because herein the fires did not start from an item “under the customer's control.” (*Capital Mut. Ins. Co. v. Niagara Mohawk Power Corp.*, supra.) Herein, the Defendants were in exclusive control over the power lines. In addition, Defendants reliance on *Nicholas* is likewise without merit as the ruling was based, in part, on the Plaintiff having acted carelessly. Herein, there is no assertion that plaintiffs acted carelessly or, in any way, were responsible for the fires.

Defendants also argue that as a matter of policy no liability should be imposed upon them for not deliberately interrupting electrical service since the disadvantages of deliberately interrupting electrical service to the community are so great. The defendants point out that without power many necessary things cannot operate: traffic lights, life-support equipment such as ventilators, gas stations, hospitals, nursing homes, home appliances, refrigerators and heating units.

The defendants next invoke LIPA's tariff for electrical service which provides in relevant part: "The Authority shall try, at all times, to provide regular and uninterrupted service." But the disadvantages of deliberately interrupting electrical service, admittedly substantial, are just one factor to be taken into consideration in ascertaining the scope of duty in this case. The court finds that this one factor alone does not outweigh all the other factors combined which together indicate that the defendants are not entitled to total immunity as a matter of policy. Chief among these other factors is the extensive damage to the property of numerous parties caused by fires and the danger to human life from these fires. Because the making of a decision to de-energize as an adverse weather event approaches can involve many competing considerations and depends on the particular situation, the court does not find, as the defendants urge, that as a matter of policy, an electric utility always does not have a duty to interrupt service to the general public to avoid the potential damage that might be sustained by a particular group from an adverse weather event.

The tariff states, in relevant part, that the "[t]he Authority shall try, at all times, to provide regular and uninterrupted service; however, The Authority will not be liable:.... (c)

For service the Authority interrupts to prevent or relieve an emergency which threatens the system or the healthy or safety of a person or a surrounding area...”

The Fourth Circuit Court of Appeals rejected a similar argument made by an electrical company stating that “[t]he requirement that the defendant furnish uniform service to its customers does not, of course, mean that it may not cut off its current in an emergency to prevent impending calamity.” (*Virginia Elec. & Power Co. v. Carolina Peanut Co.*, 186 F.2d 816, 820 [4th Cir 1951].) The Fourth Circuit Court of Appeals also noted that they were “not impressed by the argument that because defendant supplied current under a tariff approved by the public service commission of the state, it could not cut off the current from its lines to avoid a dangerous situation which threatened great loss to one of its customers.” (*Id.* at 820.)

Defendants also contend that denial of the within motion would, in essence, make them an “Insurer” and lead to “Limitless Liability.” In addition, the defendants argued that their actions, or inactions, were as a result of their obligation to protect hospitals, nursing homes and other facilities that are reliant upon their provision of electricity. However, defendants reasoning is flawed because whether or not the within motion is granted the defendants are not subject to liability in the absence of negligence. Furthermore, the cases cited to by Defendants involved third persons or involved the failure to mitigate a hazard on someone else’s property. (*Hamilton v. Beretta U.S.A. Corp*, 96 NY2d 222, 232 [2001]; *Darby v. Compagnie National Air France*, 96 N.Y.2d 343 [2001].) The within action involves the defendants’ own power lines that were operated by the defendants.

In *Food Pageant, Inc. v. Consol. Edison Co.* (54 NY2d 167 [1981]), cited by the plaintiffs, Con Edison's entire electrical power system failed, apparently because of lightning strikes. The July 13, 1977 black out left approximately three million customers of Consolidated Edison located in New York City and Westchester County without electrical power. A grocery store chain brought an action against the utility to recover for food spoilage and loss of business during the electrical power failure. The jury found the defendant to be liable for gross negligence and that the plaintiff should recover \$40,500. The Appellate Division affirmed, and the case went to the Court of Appeals. The Court of Appeals found "that there was sufficient evidence of the defendant's gross negligence to present this issue for jury determination." (*Food Pageant, Inc. v. Consol. Edison Co.*, *supra* at 172.) If the Court of Appeals did not limit Con Ed's liability in a case involving a citywide blackout affecting approximately three million customers, this court will not venture down the path pointed to by the defendants.

Plaintiffs made a strong showing that preventative considerations, the ability of the defendants to adopt practical means of preventing injury, are in their favor. The defendants, who provided electricity to areas known to be vulnerable to storm surges, could have, and should have, promulgated written protocols for storm de-energization. The defendants could have studied and planned in advance when and where de-energization is required and how it must be accomplished. Decisions concerning how and when to respond to an approaching hurricane should not be made on the spur of the moment. The plaintiffs also made a showing

that there was no clear line of authority charged with the duty of making a decision on de-energization.

The foreseeability of harm to the plaintiffs was clear. There were ample weather reports of the approach of Superstorm Sandy and about the great surges that would occur. The dangers of flood waters coming into contact with live electrical power were well known in the utility industry.

Defendants failed to show that economic considerations are in their favor. The defendants are not small contractors whose existence would be threatened by an undue expansion of liability (*see, Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136 [2002]), but rather large entities with adequate ways to compensate for losses. The defendants submitted no affidavit from an expert analyzing the possible extent of their losses and demonstrating an inability to recoup those losses through other means. The defendants did not show that they are being exposed to “limitless liability” in this case (*see, In re New York City Asbestos Litig.*, 5 NY3d 486 [2005]) or that a limitation of liability is necessary to keep their provision of services at a reasonable rate. (*See, Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., supra.*)

For the reasons set forth above, the court finds that, in the case at bar, the defendants were under a duty to exercise reasonable care in the supply of electric service (*see, Miner v. Long Island Lighting Co., supra; Wheeler v. Citizens Telecommunications Co. of New York, supra*) and that whether the defendants breached this duty in the case at bar is an issue for the trier of fact. Defendants were under a duty to exercise such care as would be commensurate with the inherent danger hidden in its high voltage equipment. (*Nicholas v.*

New York State Elec. & Gas Corp, supra.; 53A N.Y. Jur. 2d Energy §304 (“An electric company must exercise reasonable care, commensurate with the danger involved in constructing and maintaining the requisite equipment, to safeguard the public from injury and damage.”); see also *Bennett v. New York & Queens Electric Light & Power Co.*, 294 N.Y. 334, 337-338 [1945].)

In this case, it is for the jury to decide whether defendants, having been able to de-energize, “acted with that degree of care which was commensurate with the risk to which it had exposed” the Plaintiffs. (*Tallarico v Long Is. Light Co.*, 45 A.D.2d 845, 846 [2nd Dept 1974]; see also *Bennett v. New York & Queens Electric Light & Power Co.*, supra.)

B. The Ryan Rule

The defendants also seek summary judgment dismissing all but seven of the claims against them for lack of proximate cause. In doing so, they rely on the *Ryan* rule which was announced by the Court of Appeals in *Ryan v. New York Cent. R. Co* (35 NY 210) long ago in 1886.

The courts have employed the tests of proximate cause and foreseeability to place reasonable limits on liability as a matter of public policy. (*Martinez v. Lazaroff*, 66 AD2d 874 [2nd Dept.1978], aff'd, 48 NY2d 819 [1979].) In *Ryan*, The New York Central Railroad Company because of its negligence set fire to wood in one of their sheds. The fire burned the woodshed, and sparks spread to the house of the plaintiff about one hundred and thirty feet from the shed. The fire also spread to other houses. The Court of Appeals held that “this

action cannot be sustained, for the reason that the damages incurred are not the immediate but the remote result of the negligence of the defendants. The immediate result was the destruction of their own wood and sheds; beyond that, it was remote.” (*Ryan v. New York Cent. R. Co.*, *supra*, 213.)

Though criticized, the *Ryan* rule endured, and it was more clearly stated by the Court of Appeals in *Homac Corp. v. Sun Oil Co.* (258 NY 462 [1932]). Thus, PJI still states: “It is the settled law of New York that the limit of liability for damages caused by fire is the damage to the lands to which the fire first spreads and that the owner of the premises on which the fire originated is not liable for damage to lands beyond that.” (NY PJI--Civil 2:72.). In other words, “if the fire spreads from a defendant's land to a plaintiff's building across intervening land, there can be no recovery.” (*Homac Corp. v. Sun Oil Co.*, *supra*, 466.) “The rule regarding liability for damage caused when a fire spreads to other premises is based on proximate cause principles applied in 1932, and research has disclosed no more recent appellate court cases that conflict with the decision establishing this rule.” (Warren’s Negligence in the New York Courts, §193.04)

In the case at bar, the plaintiffs’ memorandum of law eviscerates the defense based on the *Ryan* rule. Plaintiffs convincingly demonstrate that *Ryan v. New York Cent. R. Co* (*supra*) is a relic left over from 1886 and should not be followed here.

From its inception, the *Ryan* rule, promulgated by a court overzealous in its promotion of the nascent railroad industry, had “no support” outside of New York. (See, Joseph H. Beale, *The Proximate Consequences of an Act*, 33 *Harv L. Rev* 633, 642 [1920].) American

Jurisprudence 2d states the law prevalent in other jurisdictions as follows: “A party may not be required to show that a fire was directly communicated to damaged property in order to recover for damages caused by a fire negligently started elsewhere—for example, where a fire burns across intervening lands before reaching the damaged property—where there is no independent, intervening, causative agency. This rule may not, however, be applied universally [citing only NY cases].” (35A Am Jur 2d, Fires, §38,) “In determining whether a particular act was the proximate cause of damage caused by a fire at some other time or place, the fire's nearness in point of time or distance is less important than the closeness of causal connection, the natural sequence of the act, and whether the resulting loss should or might have been anticipated. In the ordinary sense, a fire—however far it may go—may be one continuous fire, and thus the proximate cause of all the injuries it produces regardless of the distance traveled.” (35A Am Jur 2d, Fires, §37; *see, Osborne v. City of Whittier*, 103 Cal. App. 2d 609, 617, 618, 230 P.2d 132, 137 [Dist. Ct. Appeal 1951] [“there may be a recovery where the fire burned across intervening lands before reaching the property damaged for which recovery is sought” “Generally, a fire, however far it may go, is one continuous fire—the same fire—and is the proximate cause of all the injuries and damage it may produce in its destructive march, whether it goes to abutting property or several miles.”].) It should be noted that in *Homac (supra)*, even the Court of Appeals itself raised some doubt concerning the viability of *Ryan (supra)* by leaving open the question “whether or not the Webb case [*Webb v. R. W. & O. R. R. Co.*, 49 NY 420 1872], overruled the Ryan case.” (*Homac Corp. v. Sun Oil Co.*, *supra* 466.)

The Court of Appeals has not dealt with the *Ryan* rule since its decision in *Homac* (*supra*). The plaintiffs observe: “Defendants do not cite, and the plaintiffs could not find, a single case after 1932 in which any Department of the Appellate Division, or the Court of Appeals purported to apply the *Ryan* rule in order to defeat or limit recovery.” (Memorandum, p61.)

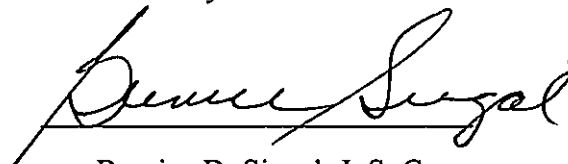
The cases cited by the defendants provide little support for their assertion that the *Ryan* rule has continued vitality. In *Alper v. Ramsden*, 113 NYS.2d 745 [(Sup. Ct. 1952)], the motion court reluctantly applied the rule though the judge stated that he was “unsympathetic” with it. The motion court quoted American Jurisprudence (Vol. 22, Sec. 48), and part of the quote states: “These decisions [such as *Ryan*,] however, have been very generally condemned as contrary to sound principle by the courts of other states, and the doctrine which they state has not been uniformly accepted even in the states where the decisions were made.” In *European Motor Cars, Inc. v. Gottlieb* (24 AD2d 511 [2nd Dept.1965]), the court distinguished *Homac* (*supra*) and affirmed an order denying the defendants summary judgment. In *New York Prop. Ins. Underwriting Ass'n v. Hampton* (30 Misc3d 32 [App. Term 2nd, 11th, and 13th 2010]), *Homac* was cited in the dissent, In *Pagan v. Goldberger* (51 AD2d 508 [2nd Dept.1976]), an action brought against a landlord by a mother and her three-year-old son who was injured when he fell on the sharp edge of radiator part, the court mentioned *Ryan* (*supra*) and *Homac* (*supra*) as instances of where the tests of proximate cause and foreseeability were used to limit liability as a matter of public policy.

This court is mindful of the rule of *stare decisis* (see, *People v. Garvin*, 30 NY3d 174, 2017) and of its obligation as a lower court to follow the precedents set by the appellate courts. “It is axiomatic that the Appellate Division and the trial courts are ‘court[s] of precedent and [are] bound to follow the holding of the Court of Appeals’.” (*Margerum v. City of Buffalo*, 148 AD3d 1755, 1758 [4th Dept. 2017], quoting *Jiannaras v. Alfant*, 124 AD3d 582, 586[2nd Dept. 2015,] affd. 27 NY3d 349 [2016].) Nevertheless, a lower court need not follow case law which is plainly outdated. In *Adams v. New York City Transit Auth.* (211 AD2d 285 [1st Dept. 1995]aff’d, 88 NY2d 116 [1996]), the Appellate Division reevaluated “the common carrier doctrine expounded in *Stewart v. Brooklyn & Crosstown R.R. Co.*, 90 NY 588 (1882)” and found “the doctrine no longer applicable and contrary to the tenor of modern tort law.” The Court of Appeals agreed with the Appellate Division and abrogated *Stewart*. *Ryan* is no less a relic than *Stewart*. Although the plaintiffs have attempted to distinguish *Ryan* from the case at bar for the reason that here the defendants were not strangers to them, but were parties to whom the defendants owed a duty of care in the supply of electricity, the distinction is problematic. This court decides that the better course is to confront the viability of the *Ryan* rule head on. The *Ryan* rule is inconsistent with the trend of modern tort law in which liability has been expanded and accordingly the defendants are not entitled to summary judgment on the basis of an anachronistic view of proximate cause.

Conclusion

For the reasons set forth above, Defendants' motion for summary judgment on the ground of a lack of duty to de-energize and pursuant to the *Ryan* rule is denied.

Dated: 4/2/2019


Bernice D. Siegal, J. S. C.

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COUNTY CLERK
QUEENS COUNTY