

Granite State Ins. v Tower Enters. of N.Y. & N.J. LLC
2020 NY Slip Op 34694(U)
February 21, 2020
Supreme Court, Westchester County
Docket Number: Index No. 71172/2015
Judge: James W. Hubert
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (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
COUNTY OF WESTCHESTER

-----X
GRANITE STATE INSURANCE a/s/o
WESTCHESTER COUNTRY CLUB, INC.,

Motion Seq. 1

Plaintiff,

Index No.: 71172/2015

-against-

**DECISION & ORDER ON
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

TOWER ENTERPRISES of NY & NJ, LLC,

Defendant.

-----X
Hubert, J.S.C.

On this motion, Defendant Tower Enterprises of NY & NJ, LLC ("Tower") moves for an Order granting summary judgment in its favor and dismissing Plaintiff's complaint. For the reasons explained below, Tower's motion is granted.

Tower Enterprises provides commercial and industrial heating, cooling, ventilation, and air conditioning equipment and services. By letter dated May 23, 2013, Tower entered into a Preventative Maintenance Service Agreement ("the Agreement") with Westchester Country Club ("the Country Club") for yearly maintenance of one or more of its cooling towers on its property at 99 Biltmore Avenue in Rye, New York. The Agreement lists 26 categories of maintenance that Tower agreed to perform, in addition to costs and services that were excluded from the Agreement, including repairs, draining or refilling the towers, and heat trace and pipe insulation.

Plaintiff Granite State Insurance Company issued an insurance policy to the Country Club covering the premises, including the Evapco Model ESW-102-43 exterior cooling tower at issue in this action.

The complaint alleges that Tower was responsible for maintaining and "winterizing" the

exterior cooling towers in order to prevent the internal coil from freezing, and that “following the winterization of the cooling tower by defendant following the 2013 cooling season, and sometime prior to May 6, 2014, the internal coil of the Evapco Model ESW-102-43 froze and sustained catastrophic damage.” In essence, Plaintiff states that because the cooling tower was not properly drained, residual water in the coil was caused to freeze over the winter. At some point, the coil ruptured, which became apparent in May when the weather became warmer and the frozen water inside the coil thawed.

Plaintiff states that Defendant was negligent in maintaining the cooling tower. In addition to its cause of action for negligence, Plaintiff alleges that Defendant breached the Agreement by failing to maintain, inspect and service the cooling towers equipment.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986); *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476, 982 N.Y.S.2d 813 (2013); CPLR § 3212 (b). Since summary judgment generally precludes a party from presenting his or her case to a jury, the moving party has a heavy burden of showing the absence of any material issues of fact. *Deleon v. New York City Sanitation Dept.*, 25 N.Y.3d 1102, 14 N.Y.S.3d 280 (2015). Additionally, the courts must carefully scrutinize the motion papers in a light most favorable to the non-moving party, and draw every available inference in favor of the opposing party. *Negri v. Stop & Shop*, 65 N.Y.2d 625, 491 N.Y.S.2d 151 (1985); *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 A.D.3d 757, 114 N.Y.S.3d 100 (2d Dep’t 2019).

If the movant has made a prima facie showing, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a triable issue of fact that must be resolved at trial. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). The opposing party cannot rely on mere allegations or denials in the pleadings. Likewise, conclusory statements, unsubstantiated allegations and inadmissible evidence are insufficient to defeat summary judgment. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, as is a “shadowy semblance of an issue.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 45 N.Y.S.3d 864 (2016)(internal citations omitted).

On this motion, Defendant argues that summary judgment is warranted because (1) Tower had no contractual duty to drain the cooling tower; and (2) even if Tower had a duty to drain the cooling tower, the County Club itself performed the work that allegedly caused the property damage. In support of its motion, Defendant has submitted the relevant pleadings, deposition testimony, the Agreement itself, and various emails between the parties. Of particular significance is a May 13, 2014 email to Tower from Michael Calgi, director of engineering for the Country Club, in which he states:

Obviously we know we have a leak but because of the orientation of the coil and the dimensions it is hard for us to determine or see the results that have occurred that are the cause of the leaks. We took some pictures and sent them to Matt but without really taking a close look as to the results we don't know whether we need to replace the coil or could consider a repair. As you know we have followed your instruction manual for cold weather operation and [the Assistant Director of Engineering for Westchester County Club] took precautions to properly drain the Unit and use heat-trace tape where he was instructed by one of your techs at the time of instruction.

In order to prevail on a negligence claim, “a plaintiff must demonstrate (1) a duty owed

by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.” *Pasternack v. Laboratory Corp. of Am. Holdings*, 27 N.Y.3d 817, 37 N.Y.S.3d 750 (2016), quoting *Solomon v. City of New York*, 66 N.Y.2d 1026, 1027, 499 N.Y.S.2d 392 (1985). Likewise, to satisfy the damages element of a cause of action for breach of contract, a plaintiff must prove that the breach directly and proximately caused the plaintiff’s injury. *34-35th Corp. v. 1-10 Indus. Assoc., LLC*, 103 A.D.3d 709, 959 N.Y.S.2d 519 (2d Dep’t 2013).

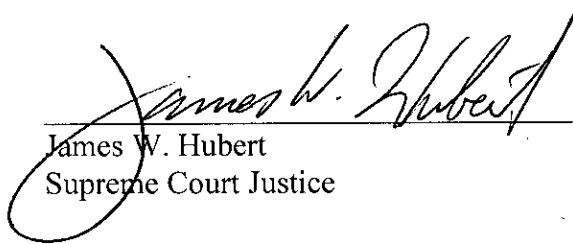
Based on the evidence submitted, the Court finds that Defendant has established, *prima facie*, that it did not owe a duty to the Country Club to drain the cooling tower in question under the terms of the Agreement, or otherwise. The evidence submitted in support of this motion further establishes that the Country Club’s own actions in not properly draining the cooling tower was the proximate cause of the damages in question. See *34-35th Corp. v. 1-10 Indus. Assoc., LLC*, 103 A.D.3d 709.

Plaintiff’s opposition papers consist only of an untimely affirmation submitted by Plaintiff’s attorney, who has no personal knowledge of the facts. “An attorney’s affirmation that is not based upon personal knowledge is of no probative or evidentiary significance.” *Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456, 826 N.Y.S.2d 152 (2d Dep’t 2006). In any event, the affirmation raises no triable issue of fact that must be resolved at a trial.

Accordingly, Defendant’s motion for summary judgment is granted, and the complaint is dismissed.

The foregoing constitutes the Decision & Order of the Court.

Dated: White Plains, New York
February 21, 2020



James W. Hubert
Supreme Court Justice