

<b>Philadelphia Indem. Ins. Co. v Addison PHS Corp.</b>
2022 NY Slip Op 33916(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 157533/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. DAVID B. COHEN **PART** **58**

*Justice*

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PHILADELPHIA INDEMNITY INSURANCE COMPANY AS  
SUBROGEE OF 220 FIFTH AVENUE LLC,

Plaintiff,

**INDEX NO.** 157533/2021

**MOTION DATE** 08/02/2022

**MOTION SEQ. NO.** 001

- v -

ADDISON PHS CORP., INDIVIDUALLY AND DOING  
BUSINESS AS ADDISON PLUMBING, ADDISON  
PLUMBING LLC, NEWGRANGE CONSTRUCTION  
COMPANY, INC.

Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

By notice of motion, defendants Addison PHS Corp. and Addison Plumbing LLC (collectively. Addison) move, pre-answer, for orders: (1) pursuant to CPLR 3211(a), dismissing the complaint based on documentary evidence; or (2) pursuant to CPLR 1001, dismissing the complaint for failure to join necessary parties; or (3) pursuant to CPLR 3126, imposing sanctions for spoliation. Plaintiff opposes.

I. PLEADINGS

Plaintiff insurance company brings this action as subrogee of its insured, 220 Fifth Avenue LLC (LLC), which owned a commercial office building at 220 Fifth Avenue in Manhattan (premises). Before September 20, 2020, LLC hired defendant New Grange Construction Company, Inc. (Newgrange) to perform construction work at the premises,

including the installation of a hot water heater. Newgrange then subcontracted with Addison to install the heater, which it did approximately one and a half years before September 2020.

(NYSCEF 1).

According to plaintiff, the heater was installed improperly, as it was: (1) installed in a horizontal, rather than vertical, position; (2) the pressure and temperature (P&T) valve was not piped to a sink as required; (3) installed without water sensors, which would have shut off intake water and minimized damage caused by a leak; and (4) installed without a leak detection sensor. Addison also failed to check the water pressure before installing the heater to see if the pressure was appropriate. (*Id.*).

On or about September 20, 2020, hot water leaked into space on the fifth floor of the premises, causing damage. Thereafter, LLC submitted an insurance claim to plaintiff, which plaintiff paid, thereby becoming subrogated to LLC's rights. LLC also had to pay a deductible. Plaintiff asserts claims against defendants for negligence and breach of contract. (*Id.*).

On September 2, 2021, Newgrange filed an answer with cross claims. (NYSCEF 6). In October 2021, Addison filed the instant motion in lieu of answering. (NYSCEF 9).

## II. CONTENTIONS

### A. Addison (NYSCEF 10-23)

Addison submits documents showing that:

- (1) On or about June 29, 2018, Addison entered into an indemnification agreement with Newgrange, related to plumbing work to be done at the premises;
- (2) Along with the agreement are a purchase order, emails concerning the parties' negotiations, and specification drawings, which reflect the parties' agreement that Addison

would provide the leak detection/water sensor but its installation would be performed by a third party. None of these documents mentions LLC;

(3) Addison also signed a warranty, agreeing to repair or replace its work if it became defective within one year of the date of final acceptance; and

(4) On November 1, 2018 and June 20, 2019, Addison's work passed inspection by the Department of Buildings (DOB), and DOB signed off on it on June 20, 2019.

Addison also submits an affidavit from its engineering expert, who attended testing performed on the heater by plaintiff on June 16, 2021. He opines that plaintiff's removal of the expansion tank before the test created an uncertainty as to whether the water pressure recorded during the testing was the same pressure that existed on the accident date. Moreover, according to the expert, the heater leaked because the P&T valve, which was manufactured by Cash Acme, leaked.

Addison argues that plaintiff's breach of contract claim fails as there was no contract between Addison and LLC, and LLC was not a third-party beneficiary thereof. Nor did Addison have a duty to install a leak detection/water sensor, and, in any event, the water heater was not installed defectively. The heater passed inspection by the DOB in 2018 and 2019, and it functioned properly for more than one and half years, past the expiration of the warranty period.

Addison also contends that it neither owed, nor breached, a duty to plaintiff or its subrogor, and therefore the negligence claim fails as a matter of law.

Further, Addison alleges that plaintiff also failed to name the party responsible for installing the sensor, Team Electric, along with Cash Acme, and that as they are necessary parties, the action must be dismissed.

Moreover, Addison maintains that plaintiff destroyed evidence critical to the defense by removing the expansion tank and filming a video allegedly showing the water heater leaking, thereby destroying evidence in the process. By removing the tank, it is no longer possible to test the water pressure that existed at the time of the leak. And the video reflects that the P&T valve was in an open position, letting water flow through it, which altered its condition and prevents an analysis of the valve at the time of the leak. Such spoliation by plaintiff, Addison argues, has significantly, if not fatally, compromised its defense.

B. Plaintiff (NYSCEF 27-43)

Plaintiff contends that the court must construe its complaint in the light most favorable to it, and determine only whether it has a cause of action, rather than whether it has stated one, and affidavits may not be considered unless the court gives notice to the parties that it intends to treat the motion to dismiss as one for summary judgment.

It contends that Addison's expert affidavit may not be considered, and that the other documents submitted do not qualify as documentary evidence as they are incomplete and unauthenticated. Nor did Addison lay a foundation for their admission.

That there is no contract between plaintiff and Addison is not dispositive, plaintiff argues, as it was a third-party beneficiary of the contract between Addison and Newgrange, observing that it is "inconceivable" that Addison would have believed that its installation of the water heater was for the benefit of Newgrange, the general contractor, rather than plaintiff's subrogor, the building's owner.

Plaintiff also contends that it has a negligence claim against Addison, as Addison owed it a duty to refrain from damaging its subrogor's building, and that evidence that the DOB

inspected and signed off on Addison's work does not demonstrate, as a matter of law, that it was not negligent in its installation of the heater.

Plaintiff denies that the heater installer or valve manufacturer are necessary parties here, but maintains that even if they are, they may be joined in this action instead of the action being dismissed. It asserts that it only learned of Team Electric's existence when Addison filed this motion, and that it should thus be granted leave to amend its complaint to add Team Electric as an additional defendant. However, as to Cash Acme, plaintiff argues that Addison's expert does not state that the valve was defective, and therefore, Cash Acme is not a necessary party to this action.

Plaintiff also denies that any spoliation occurred, arguing that all parties, including Addison, were present when the water heater was removed and it is now stored safely, and thus was not destroyed. And, as Addison was present during two examinations by plaintiff's expert, it could have tested the water pressure before the heater was moved. Plaintiff further contends that the video reflecting that the P&T valve is open is not authenticated and it is unclear who opened the valve or filmed the video. Moreover, to the extent that Addison's expert was able to inspect the valve and conclude that it was defective, Addison undermines its claim that it is unable to mount a defense.

#### C. Reply (NYSCEF 44-49)

Addison supports plaintiff's "cross motion" for leave to amend the pleadings to add Team Electric as a defendant. It contends that the video is not unauthenticated, but instead it received it from plaintiff's counsel, and the contract it submitted is a true and accurate copy thereof. Addison again argues that plaintiff spoliated evidence by moving the tank during the

inspection, thereby making it impossible to prove the level of the pressure in the tank after the leak, and it denies that it was able to inspect the heater before the video was filmed.

### III. ANALYSIS

#### A. Breach of contract

Addison fails to demonstrate that plaintiff has no claim against it for breach of contract based on its status as a third-party beneficiary of the contract between Addison and Newgrange, and therefore, that there is no contract between plaintiff and Addison or that Addison's documents do not mention plaintiff's subrogor by name is not dispositive. (*See e.g., Twin City Fire Ins. Co. v Sanitary Plumbing & Heating Corp.*, 273 AD2d 16 [1st Dept 2000] [granting motion to amend to add allegation that premises-owner subrogor was third-party beneficiary of contract between defendant company and lessee]).

Nor does Addison establish, as a matter of law, that it did not breach its contract with Newgrange based on the fact that the DOB signed off on the installation and/or that the heater worked as intended for more than one and a half years after its installation. In any event, plaintiff's expert opines that the installation was defective.

#### B. Negligence

Based on *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002), Addison fails to demonstrate that plaintiff has no claim against it for negligence as it alleges that Addison launched a force or instrument of harm by failing to install the heater properly, causing it to leak and damage the premises. (*See McEleney v Riverview Assets, LLC*, 201 AD3d 1159 [3d Dept 2022] [plaintiffs sufficiently alleged negligence claim by argument that contractor created dangerous condition in allowing machine to leak onto floor]; *Taliana v Hines REIT Three Huntington Quadrangle, LLC*, 197 AD3d 1349 [2d Dept 2021] [contractor which installed

HVAC system failed to demonstrate that it did not launch instrument of harm by negligently installing or maintaining system, which subsequently leaked]).

### C. Spoliation

As Addison's expert was able to offer an opinion as to the cause of the leak, Addison fails to establish that, to the extent that plaintiff spoliated evidence, it is unable to defend itself as result of the spoliation. In any event, there are conflicting expert opinions as to whether any evidence was spoliated. (*See Pennachio v Costco Wholesale Corp.*, 119 AD3d 662 [2d Dept 2014] [as expert was able to offer opinion as to whether mold existed in jar at issue, defendant's failure to preserve jar did not fatally compromise plaintiff's ability to prove case; moreover, as experts disputed whether spoliation occurred, issue should be resolved by jury]; *Krin v Lenox Hill Hosp.*, 88 AD3d 597 [1st Dept 2011] [issue of whether spoliation actually occurred should be presented to jury for resolution]).

### D. Necessary parties

As plaintiff did not file a cross motion, its request in opposition to Addison's motion for leave to amend its complaint to add Team Electric as a defendant may not be granted. (*See Scott v Westmore Fuel Co., Inc.*, 96 AD3d 520 [1st Dept 2012] [application to amend bill of particulars denied absent service of notice of cross motion]).

Moreover, even if Team Electric and Cash Acme may be proper defendants here, there is no merit to Addison's argument that they are necessary parties such that their current absence from this action requires its dismissal, especially as Addison does not show that joinder is unavailable at this stage of the litigation. (CPLR 1001[a] [necessary party is one whose absence will prevent complete relief for parties to action]; *Hecht v City of New York*, 60 NY2d 57 [1983]

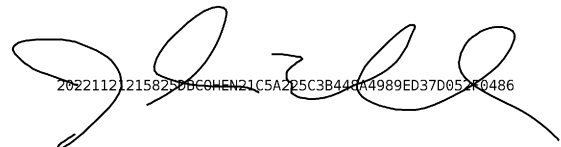
[as plaintiff may proceed against all or any defendants, joint and several tortfeasors not necessary parties pursuant to CPLR 1001]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants Addison PHS Corp. and Addison Plumbing LLC’s motion is denied in its entirety; and it is further

ORDERED, that movants file their answer within 20 days of the date of this decision and order.



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DAVID B. COHEN, J.S.C.

11/21/2022  
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE