Brooklyn Union Gas Co. v Hallen Constr. Co., Inc.
2023 NY Slip Op 30387(U)
January 27, 2023
Supreme Court, Kings County
Docket Number: Index No. 511806/2015
Judge: Carl J. Landicino
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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 27th day of January, 2023

PRESENT:
CARL J. LANDICINO, J.S.C.

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THE BROOKLYN UNION GAS COMPANY, d/b/a NATIONAL GRID NY and NATIONAL GRID USA SERVICE COMPANY, INC.,

Plaintiffs,

- against -

HALLEN CONSTRUCTION CO., INC.,

Defendant.

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Index No.: 511806/2015

DECISION AND ORDER

Motions Sequence #13, 14

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered (NYSCEF)
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	270-331, 333-334, 335-369,
Opposing Affidavits (Affirmations)	374-435, 436-505, 541-550,
Reply Affidavits (Affirmations)	510, 511-538, 540,
Memorandum of Law	332, 370, 509, 539

Upon the foregoing papers, and after oral argument, the Court finds as follows:

Plaintiffs, The Brooklyn Union Gas Company, d/b/a National Grid NY (hereinafter the "Plaintiff Brooklyn Union Gas") and National Grid USA Service Company, Inc. (hereinafter the "Plaintiff National Grid") (collectively the "Plaintiffs") have commenced this proceeding and raise causes of action, *inter alia*, for negligence, breach of contract, and contractual indemnification against Defendant Hallen Construction Co., Inc. (hereinafter "Defendant") in relation to its agreement with Hallen, whereby Hallen was to furnish labor, materials, and equipment for replacement of a gas main beneath the Paerdegat Basin[1] (the "Agreement") and allege damages as a consequence of the release of natural gas.

[1] Paerdegat Basin is a channel that is connected to Jamaica Bay in the proximity of the southeast Brooklyn neighborhoods of Canarsie and Bergen Beach.

The Defendant now moves (Motion Sequence #13) for an order pursuant to CPLR 3212, granting Defendant summary judgment on Plaintiffs' claims and dismissing the action in its entirety. The Defendant argues that 1) Plaintiffs' negligence precludes a right to indemnification and the Navigation Law claims; 2) the presence of liquids in the pipeline was not foreseeable to the Defendant and precludes Plaintiffs' negligence claims; 3) the New York City Fire Department's ("FDNY") flushing of the street exacerbated the consequence of the release and was a superseding cause vitiating any negligence on the part of the Defendant; 4) Defendant did not breach a duty; 5) Plaintiffs cannot establish notice thereby precluding its claim for negligence; 6) Plaintiffs failed to allege specific provisions of the contract that were violated; 7) Defendant did not breach the contract; 8) warranty is inapplicable as the contract was one for services; and 9) Plaintiffs' claim for contribution is inapplicable because liability cannot be proven.

The Plaintiffs oppose the motion and cross-move (Motion Sequence #14) for an order pursuant to CPLR 3212 granting Plaintiffs partial summary judgment against Defendant on its second (breach of contract) and fourth (contractual indemnification) causes of action. The Plaintiffs contend that Defendant's motion should be denied as the Defendant agreed to perform the work and therefore agreed to be "solely responsible" for all of the means and methods of the work. Moreover, the Plaintiffs contend that Defendant has failed to meet its *prima facie* burden.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986],

Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 610 N.Y.S.2d 50 [2d Dept 1994].

The Plaintiffs' complaint alleges ten causes of action. Negligence, contract, warranty, contractual indemnity, common law indemnity, contribution, New York Navigation Law 181 (5) damages, and three causes of action relating to Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 USC 9601 (20)(A).

"The elements of common law negligence are a duty owed by the defendant to the Plaintiff, a breach of that duty and a showing that the breach of that duty constituted a proximate cause of the injury." *Ruiz v. Griffin*, 71 AD3d 1112, 1113, 898 N.Y.S.2d 590 [2d Dept 2012].

"The essential elements of a breach of contract cause of action are 'the existence of a contract, the [party's] performance pursuant to the contract, the [other party's] breach of his or her contractual obligations, and damages resulting from the breach.'" *Canzona v. Atanasio*, 118 AD3d 837, 838, 989 N.Y.S.2d 44, 47 [2d Dept 2014]. Generally, "[a] party's right to contractual indemnification depends upon

the specific language of the relevant contract." *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989].

A cause of action for breach of warranty accrues "when tender of delivery is made" and relates to sale of goods or products. *See Coakley v. Regal Cinemas, Inc.*, 188 AD3d 796, 799, 134 N.Y.S.3d 74, 79 [2d Dept 2020], *quoting Schwatka v. Super Millwork, Inc.*, 106 AD3d 897, 899, 965 N.Y.S.2d 547, 550 [2d Dept 2013].

Under the New York Navigation Law § 181, key provisions state that:

1. Any person who has discharged petroleum shall be strictly liable, without regard to fault, for all cleanup and removal costs and all direct and indirect damages, no matter by whom sustained…

5. Any claim by any injured person for the costs of cleanup and removal and direct and indirect damages based on the strict liability imposed by this section may be brought directly against the person who has discharged the petroleum, provided, however, that damages recoverable by any injured person in such a direct claim based on the strict liability imposed by this section shall be limited to the damages authorized by this section.

Defendant argues that Plaintiffs were responsible for the discharge, therefore the above provisions are not applicable.

Plaintiffs claim that the Defendant is an operator pursuant to CERCLA and that the relationship between the parties is such that the Defendant is responsible for damages sustained by the Plaintiff for Defendant's actions.

In support of its motion, Defendant relies primarily on the affidavit of Michael McCutcheon an energy pipeline expert, Tomlinson Fort, an environmental remediation and emergency spill response expert, the deposition testimony of Scott Fichera (National Grid's lead engineer), Dindo Dalena (National

Grid's field engineer), John Lusardi (National Grid's employee), and Redorno Perri (Defendant's foreman), in addition to other testimony.

In his affidavit, Michael McCutcheon states that he has been an energy pipeline expert for 42 years. He further states that, "[t]his matter concerns a release of natural gas condensate containing PCBs from a pair of 24-inch natural gas pipelines owned and operated by Brooklyn Union Gas Company doing business as National Grid New York and National Grid USA Service Company, Inc. (National Grid) at their crossing beneath Paerdegat Basin as the pipelines were being abandoned by filling with concrete grout. The pumped grout displaced condensate in the pipelines which spilled to the ground surface on the Seaview Ave side of Paerdegat Basin. The volume of condensate released has been estimated at approximately 1,400 gallons. The concentration of PCBs in the condensate was on the order of 10,000 mg/kg total Aroclors. The condensate flowed on top of the roadway toward a storm sewer inlet, and the New York City Fire Department (FDNY) subsequently flushed the remaining release volume into the storm sewer inlet which discharged to Paerdegat Basin." (See Defendant's Motion, Michael McCutcheon Expert Affidavit, NYSCEF Document 334, Paragraph 6). Mr. McCutcheon determined that the "root cause of the release was National Grid's failure to check for and remove condensate liquids from the low points of the twin 24-inch pipelines running beneath Paerdegat Basin prior to filling the twin pipelines with concrete. The advancing concrete displaced condensate liquids and caused fluids to exit the standpipe on the Seaview Avenue side of Paerdegat Basin on to the ground." (Id. Paragraph 7). Mr. McCutcheon provides numerous factors contributing to the cause of the gas condensate release "including (1) National Grid's failure to comply with applicable regulations and industry standards, (2) National Grid's failure to adhere to internal company policies and procedures, (3) Dindo Dalena's (National Grid Engineer) direction that Hallen continue pumping concrete after being warned of rising liquid and release, and (4) FDNY's

decision to respond to the release not by placing proper spill control equipment but instead by flushing the released gas condensate off the road, causing it to drain into storm sewers." (Id. Paragraph 8).

In his affidavit, Tomlinson states that he is a geological engineer, hydrogeologist, and registered professional geologist in Tennessee, Pennsylvania and Georgia. Mr. Fort's opinion is similar to that of Mr. McCutcheon. Mr. Fort, however, adds that "[t]he oily condensate spread on the surface of Paerdegat Basin and was distributed by wind and wave action. Subsequently, National Grid coordinated the response to the release which included both assessment and remediation tasks involving various exposed media." (See Defendant's Motion, Tomlinson Fort Expert Affidavit, NYSCEF Document 333, Paragraph 7). Mr. Fort states that "it is my professional opinion that the root cause of the condensate release was National Grid's failure to check the pipelines for liquids, remove liquids from the pipelines, and plan for possible liquid displacement prior to line grouting." (Id. Paragraph 8).

During Scott Fichera's deposition testimony, when asked to describe the steps involved in retiring or abandoning a pipeline, Mr. Fichera [Plaintiff's engineer] states that "[w]e create an SOP which determines how the system will be operated, you know, very broadly, and how that piece of main can be taken off the system, and as from an engineering standpoint, that's where the engineering part comes in, and then codes, standards or technical instructions for the retirement or abandonment of the piece that's going to be taken out takes over." (See Defendant's Motion, Fichera Testimony, NYSCEF Document 283, Page 43). When asked what the purpose of purging the pipeline is, Mr. Fichera explained that "[w]e purge to get the pressure down and gas out of the main." (Id. Page 45). When asked to confirm if the engineering process for retiring or abandoning a pipeline generally includes a step or a section that relates to the potential presence for liquid in a pipeline, he responded "[g]enerally, yes." (Id. Page 53). When asked to confirm if part of the retiring and abandoning process includes checking the pipeline to determine whether or not there is liquid inside the pipeline he confirmed, "[y]es." (Id. Page 60). When asked to further

confirm whether purging is always part of the process when retiring and abandoning a pipeline, Mr. Fichera confirmed, "[i]n my mind, yes." (Id. Page 85).

During Dindo Dalena's [Plaintiff's field engineer] deposition, he confirmed that the pipeline was checked for the presence of liquid. (See Defendant's Motion, Dalena Testimony, NYSCEF Document 284, Page 43). Mr. Dalena stated that "generally we would look for liquids in areas where there was a potential for collection at drips." (Id.). He further stated that "[a] drip is something that is installed within the pipeline where it could collect the contaminants that are in a pipeline." (Id.). He confirmed that the check for drips "would be before" the pipeline was purged. (Id. Page 44). When asked whether if an issue arose during the course of filling the old pipeline with the concrete grout he had the ability to direct the work to stop, Mr. Dalena confirmed "[y]es." (Id. Page 87). When asked if he knew if the pipeline had any gas remaining in it, he stated "[n]ot at the time. I don't recall that, no." (Id. Page 89). Mr. Dalena confirmed that Mr. Napolitano [National Grid Inspector] called Mr. Dalena to advise of "[c]omplaints about odor in the air" and "[t]hat they were smelling odor of gas in the air." (Id. Pages 103-104). When asked to recall what he told Mr. Napolitano in response to the information about the gas odor, Mr. Dalena stated "[t]he most I can recall is that I was mentioning something about possibly that it was just a residue from the pipeline." (Id. Page 104). He further confirmed that the fact that there were gas odor complaints did not "[a]t the time" cause any concern about what may or may not have been in the pipeline. (Id.).

During John Lusardi's deposition testimony, he confirmed that a change control form is to add work to a contract. (See Defendant's Motion, Lusardi Testimony, NYSCEF Document 293, Page 122). He further confirmed that the work being added to the Agreement was to fill the retired main with a flowable fill and to backfill all openings. (Id.). When Mr. Lusardi was asked whether he ever performed an inspection to see whether there was liquid at the low point of the retired pipeline, he responded "[n]o." (Id. Page 154-155).

During Pascale Ambrosio's [Hallen Employee] deposition testimony, he confirmed that he was informed of this project by John Lusardi after the new 30-inch pipeline was already installed. (See Defendant's Motion, Ambrosio Testimony, NYSCEF Document 297, Page 91). He confirmed that "I remember asking him how sure he was it was going to work, due to the abnormal configuration of the pipe." (Id. Page 92). Mr. Ambrosio further confirmed that he "had concerns that we wouldn't be able to fully fill the pipe because of the distance, and the nature of what we were trying to accomplish, and the abnormal configuration of the pipe." (Id.). When asked to explain what he meant by "abnormal configuration of the pipe" he stated, "I'm trying to remember, but I believe that there was a T, and it was two pipe manifold together, so that they got the volume of gas they needed. That's what I believe -- my memory -- if my memory serves me correct, that's what I believe was the case. And knowing what I know about pipe, I was very very hesitant to commit to doing something that I wasn't sure would be successful, but John [Lusardi] reassured me that 'don't worry about it, fill the pipe. It will be fine.'" (Id. Page 92-93). When asked to explain what his concerns were, Mr. Ambrosio stated that, "[m]y first concern was how do I calculate how much concrete I need, and that was addressed in my e-mail. My second concern was how do we know the pipe is filled. And -- because just from knowing the hydraulics of the situation, the concrete could arrive at the other standpipe without totally filling the pipeline." (Id. Page 93). When asked if this concern was because of the manifold, Mr. Ambrosio stated that "it could be a number of things. We're not inside the pipe. We don't know what's reacting within it, we don't know if we can achieve enough flow to get the pipe fully -- if you think about it, a pipeline, and how much concrete it is to push, with the primitive setup that we were asked to provide, there were worries that I had about performing the work as to what Nat Grid required." (Id. Page 93-94).

During Thomas Fedrigoni's deposition testimony, he confirmed that he was currently employed with Hallen Construction Company as a project manager. (See Defendant's Motion, Fedrigoni Testimony,

NYSCEF Document 298, Page 30). Mr. Fedrigoni stated that "[n]obody introduced the idea that the pipeline might be anything other than clean and empty when they asked us to do the work. They told us the entire pipeline that they wanted to introduce grout into. They never told us that there was a potential or a possibility of there being anything other than what they described to us." (Id. Page 130). When asked if Mr. Fedrigoni was concerned with pumping concrete grout into a retired pipeline, he responded "I had no concern because the request was coming from the gas company. They were the ones that were asking us to do the work. They would have the know how and the knowledge if there was a concern or not. Like I said, we never -- this is the first time that anybody that I know in our company has ever put grout into a pipeline before, so if there was a concern, it would have came from the gas company, not from us." (Id. Page 132). When asked why Mr. Fedrigoni was telling Mr. Perri to ask the customer for direction, Mr. Fedrigoni stated that "[b]ecause it was a customer -- first of all, there is two components here. Number 1, it's the customer who is controlling the operation -- this particular operation, and Number 2, when a condition changes on a scope of work, we automatically defer to the customer, especially when it comes to environmental or other aspects of the pipeline. Once emergency services are called into [*sic*] a site, it becomes the customer's decision on how to proceed, not the contractors." (Id. Pages 171-172).

During Redorno Perri's [Defendant's foreman] deposition, he confirmed that when he started working on National Grid jobs the locations were "[m]ostly Brooklyn and Queens". (See Defendant's Motion, Perri Testimony, NYSCEF Document 301, Page 21). When asked what Mr. Fedrigoni told Mr. Perri when he called Mr. Perri to come over to the Paerdegat site, Mr. Fedrigoni stated "[b]asically what they were doing. They were pumping grout into the old pipe, and I was supposed to go over there and just watch the one side when the line filled up with the concrete to cap it off, and there would be another employee on the other side filling the concrete trucks." (Id. Pages 43-44). When asked if Mr. Fedrigoni and Mr. Perri spoke about how Mr. Perri knew that the job was finished, Mr. Perri stated that "I guess

when I got to the other side, once the concrete started coming to the other side where the standpipe was, I was to put a cap on it. Once the concrete got to the other side of the pipe, I was to cap it off." (Id. Page 50). When asked if Mr. Perri and Mr. Fedrigoni discussed the odor that he smelled when they got to the Seaview Avenue side, Mr. Perri stated, "I don't recall. We may have discussed it. I don't recall exactly what we said about it. I don't remember." (Id. Pages 73-74). When asked if he was concerned about an odor coming out of the pipeline, Mr. Perri stated "[a] little bit but it was part of the whole process of pouring the concrete in. There would be some kind of odor coming out." (Id. Page 74). Mr. Perri further stated that "Tom said, at the time some kind of odor could come out if they were purging the line -- not purging. Pumping the concrete into it so you would be able to smell the line itself." (Id.). When asked if the odor was familiar to Mr. Perri, he stated "[y]es. It smelled like sometimes when you first[,] when you do a main cutout, you could smell that gas. It was a gas odor smell. Very similar to a regular gas". (Id.). When asked to confirm if Mr. Perri had a conversation with the firemen, Mr. Perri responded "[y]es." (Id. Page 83). He stated that "I basically told him what we were doing. I explained to him what we were doing there and we were pumping the concrete from the line to retire the old line, and the smell they were smelling was the odor coming out of the line." (Id.). When asked how long the fire department was at the site the first time they appeared, Mr. Perri stated "[m]aybe a few minutes. Not long." (Id. Page 84). Mr. Perri further stated that "the fire department came by again later on not too long after that. I don't remember if it was the same department, but there was another visit by the fire department, another after that." (Id. Page 86). When asked if he was concerned that the liquid in the pipeline was eventually going to rise up out of the standpipe, Mr. Perri stated "[y]es. I knew eventually it would come up. That's why I kept in contact to let you know, but I was told [] once -- the same thing pretty much with the concrete. Once it got to above the standpipe, I was to put the cap on just to cap it off." (Id. Page 103). Mr. Perri confirmed that his training confirmed that when he saw a liquid in the pipeline he should have assumed

that it was a hazardous substance. (Id.). When asked what Mr. Dalena told Mr. Perri at the time the liquid was coming out of the pipe, Mr. Perri stated "[j]ust to continue pumping because they were worried about the pipe not being able to be completely filled with the concrete and just to continue pumping." (Id. Page 124). Mr. Perri confirmed that he had a conversation with National Grid personnel and he stated that the conversation was "[a]bout stopping the pumping of the trucks. They just said, 'Stop pumping the trucks.' And I said I am on the phone with the engineer and I was told to continue. I don't remember if I handed the phone to one of the new Nat Grid -- the newer inspectors on that side who had just arrived. The one who was told about the pumping. I gave him the phone and he spoke to Dindo over the phone and told them to stop the trucks." (Id. Pages 126-127). Mr. Perri confirmed that he gave the order to stop the pumping. (Id. Page 127). When asked if liquid was still coming out of the pipe after the pumping stopped, Mr. Perri stated, "[y]es. For a little bit longer there was still liquid coming out. I don't remember exactly how much longer, but there was still some liquid coming out. Yes." (Id.). When asked if he instructed the firemen who came to the site to open the hydrants and spray down the liquid on the roadway, Mr. Perri stated "[n]o." (Id. Page 141). When asked why Mr. Perri did not think he had the authority to stop the job, he stated "[b]ecause it was not my project and it was not my -- I was under the direct supervision of Nat Grid like I always am on the mains, and that was the project going on. I just didn't think I had the authority to stop the pumping." (Id. Page 201).

Defendant argues that Plaintiffs' oversight, direction and own negligence bars its claims in relation to contractual indemnification and Navigation Law. Specifically, Defendant argues that Plaintiffs breached their duty by failing to inspect for and remove liquid from the old pipeline. Defendant alleges that Plaintiffs did not check for liquid at the low point of the old pipeline or remove any liquid from the old pipeline, prior to directing the Defendant to fill the line. Defendant further contends that it followed the Plaintiff's direction in accordance with the prior interaction at work sites, and insofar as the Plaintiff

was the "gas company" their role was to direct operations. Plaintiffs "[a]dmit that it did not remove any liquids from the pipelines being grouted by Hallen on September 27, 2012 in the year, prior to September 27, 2012." (Response to Notice to Admit, Exhibit P, Paragraph 11). The Defendant further contends that since it was the Plaintiffs' obligation to remove any gas in the pipe prior to the Defendant's work, the spill was not foreseeable. Therefore the Defendants contend that any staffing for remediation only related to precautions taken when the pipe had been purged. There was no reason to provide otherwise. The Defendant further argues that Plaintiffs directed what occurred after the discharge and the FDNY exacerbated the condition and was not subject to the Defendant's direction.

Plaintiffs oppose the motion and cross-move (motion sequence #14) for partial summary judgment granting its breach of contract and contractual indemnification claims. Plaintiffs argue that Defendant breached their agreement by failing to 1) properly staff the grouting project; 2) properly prepare for the spill; and 3) adequately prevent and respond to the spill. In opposition to Defendant's motion, Plaintiffs rely primarily on the affidavits of Daniel Glenning and Christopher Ryan, and the deposition testimony of Pascale Ambrosio, Scott Fichera, Thomas Fedrigoni, Redorno Perri, Matthew Lachner, Jonathan Mack, Robert Napolitano, Dindo Dalena, Stuart Buhrendorf, John May, Reginald Durham, and William Ryan.

In his affidavit, opposing Defendant's motion, Daniel Glenning states that "I am currently Director of the Gas Transformation Project Management Office at National Grid USA Service Company, Inc." "This affidavit is based upon my personal knowledge and my review of National Grid's business records relating to Hallen." National Grid and Hallen entered into the contract on March 23, 2012 for purchase order number 703755 (the 'Agreement') for a fixed term price of $4,731,540.75." (See Glenning Affidavit, NYSCEF Document 468, Paragraphs 2-4). He further stated that "National Grid and Hallen executed a change order to the existing Agreement, dated September 26, 2012 ('Change Order'), to retire the twin 24-inch pipelines by filling them with concrete grout ('Grouting Project')." (Id. Paragraph 5). Mr.

Glenning further stated that "[t]he Change Order for the Grouting Project provided for payment to Hallen in the amount of $92,651. National Grid paid Hallen all amounts owing under the Agreement, including amounts owing under the Change Order. "Hallen's work for the Grouting Project was performed under the Change Order, which is part of the original Agreement executed by Hallen and National Grid. Therefore, all of Hallen's work related to the Grouting Project was governed by Hallen's contractual obligations identified in Agreement. Contrary to Hallen's counsel's suggestions, Hallen's work for the Grouting Project was not limited to the specific words in the Change Order but encompassed its continuing obligations found in the Agreement. The Change Order identifies the work but it is contractor's responsibility under the Agreement to determine the means and methods required to complete the work in a manner that is safe and does not pollute the environment. Hallen was responsible for the planning, means and methods, preparation and implementation of the Grouting Project, which included taking any environmental and safety precautions required by the Agreement, permits, regulations, and/or laws." (Id. Paragraphs 8-9).

In his affidavit, Christopher Ryan states that "I am a pipeline grouting and environmental contracting expert and have been retained on behalf of Plaintiffs The Brooklyn Union Gas Company d/b/a National Grid NY and National Grid USA Service Company, Inc. (collectively 'National Grid') to offer my opinions on the subject case." (See Ryan Affidavit, NYSCEF Document 478, Paragraph 1). Mr. Ryan further states that "[i]n my opinion, given the clear language of the Contract and my experience as a grouting and environmental contactor, Hallen Construction Co., Inc. ('Hallen' or 'Contractor') was responsible for the planning and execution of the work to fill a retired natural gas pipeline that runs under the Paerdegat Basin in Brooklyn, New York (the 'Pipeline') with cementitious grout (the 'Project'). Hallen failed to do sufficient planning for the work and failed to consider contingency plans for events that might transpire during this kind of work. Hallen failed to comply with the terms of the Contract. Even without

regard to contractual requirements, Hallen failed to follow simple and customary construction safety protocols that would have prevented or significantly mitigated the consequences of the spill of natural gas condensate on September 27, 2012 (the 'Spill'). For example, Hallen failed to protect the nearby manhole and stormwater catch basin ('Storm Drain') before it started to pump the cementitious grout ('Grout'). The 'flowable' Grout is a mixture of sand, water and cement which is designed to be less viscous than conventional concrete or mortar. This allows it to be pumped for longer distances in something like a pipeline. When it was apparent that an unexpected liquid was rising in the Pipeline, Hallen continued pumping and took no actions to contain a possible spill. In addition, Hallen either requested that the FDNY open a nearby hydrant to flush the liquid that came out of the Pipeline or did nothing to prevent the FDNY from doing so. Either way Hallen did not act in accordance with the standard of care required for a contactor performing this type of work. Hallen's failure to exercise reasonable care to prevent spills and its failure to follow its own environmental protocols caused and made the consequences of the Spill much worse. Hallen's failure to exercise reasonable care was a substantial factor in causing the contamination of the Paerdegat Basin, Con Edison's manhole, and surrounding area that resulted in millions of dollars of damages to National Grid. If Hallen had acted in accordance with the standard of care expected of a contractor grouting a pipeline, the contamination would not have reached the Paerdegat Basin or Con Edison's manhole." (Id. Paragraphs 10-12).

During Pascale Ambrosio's deposition testimony, he confirmed that "Hallen was responsible for the means and methods, along with Michels, who handled the means and methods of the directional drill." (See Poole Deposition, NYSCEF Document 342, Page 55). When asked if Hallen was required to take all necessary safety and other precautions to protect property and the public from harm while on the construction site for the Paerdegat project he stated, "[y]es, Hallen was responsible." (Id.). When asked if the terms and conditions of the contract apply to the work being done when a change order is issued, Mr.

Ambrosio stated, "[y]es, they do." (Id.). When asked what clarification was added for the change order for the Paerdegat Basin grouting project, Mr. Ambrosio stated that "[t]he clarification was my concern that there was no accurate way of predicting how much concrete grout would be used, so there was a dialogue and an e-mail, so I wanted it clarified how much we included, and what the cost would be for anything above and beyond that. My job is to protect Hallen's risk." (Id. Pages 58-59).

The Court finds that there are contradicting versions and conflicting expert analysis on the actions of the respective parties and the responsibility for the occurrence and the aftermath. What is clear, is that it is unclear as a matter of law whether the Defendant was at all responsible and whether National Grid or Defendant Hallen, or both, were solely responsible for the occurrence and the aftermath. "Where the parties offer conflicting expert opinions, issues of credibility arise requiring jury resolution" *Martin v. Siegenfeld*, 70 AD3d 786, 788, 894 N.Y.S.2d 115 [2d Dept 2010]; see *Pinto v. Putnam Hosp. Ctr., Inc.*, 107 AD3d 869, 966 N.Y.S.2d 866 [2d Dept 2013]; *Bartels v. Eack*, 164 AD3d 1202, 83 N.Y.S.3d 657 [2d Dept 2018]. However, Plaintiff's third cause of action for warranty is dismissed. *See Perlmutter v. Beth David Hosp.*, 308 N.Y. 100, 123 N.E.2d 792 [1954]. It is clear that the contract at issue is one for services, not goods. Accordingly, no warranty attaches. As such, Defendant's motion (motion sequence #13) for summary judgment is otherwise denied.

Turning to Plaintiffs' motion (motion sequence #14), the Plaintiffs alleged that Defendant breached the Agreement and Defendant is required to indemnify Plaintiff National Grid. Plaintiffs direct the Court to relevant sections of the Terms and Conditions of the Agreement:

> 3.4 The Contractor shall be solely responsible for all construction means, methods, techniques, sequences, procedures, safety and compliance programs in connection with the performance of the Work.
>
> 4.2 The Contractor and all Subcontractors shall employ only competent and experienced personnel. The Contractor's personnel on the Site shall include, but not be limited to, a quality assurance representative, a safety representative and an individual knowledgeable in environmental rules and regulations…

4.3 Whenever required by law, regulations, or code, or any applicable governmental approval, the Contractor shall employ only licensed and properly trained personnel in the performance of the Work.

21.1 The Contractor warrants: (a) that it is aware of the purpose for which its Work is being used and that its work shall be suitable for said purpose ... (c) that all Services shall be performed by qualified and competent personnel, and in accordance with the highest standards of care, skill, and diligence, and consistent with recognized and sound engineering and construction practices and procedures; ... (e) that all Work shall be free from faults and defects of any kind, including faults and defects in design, engineering, workmanship, construction, erection, and/or materials …

32.2 The Contractor shall, and shall require its Subcontractors and their employees to comply with the Owner's Safety Requirements and all established Project safety rules as they may be amended from time to time and to take all necessary safety and other precautions to protect property and persons from damage or injury arising out of performance on the Project, whether the same are in force at the execution of this Agreement or may in the future be passed, enacted or directed.

32.3 The Contractor shall provide adequate safeguards, safety devices and protective equipment and enforce their use and take any other needed actions to protect the life, health and safety of the public and to protect property in connection with its performance on the Project.

34.2 The Contractor shall conduct all operations in such a manner to minimize the impact upon the natural environment and shall comply with all solid waste, hazardous waste, health and safety, notice, training, and environmental protection laws…

34.6 In the event of a release or discovery of hazardous waste or substance, the Contractor shall respond in accordance with the Agreement.

43.4 Work shall be performed in a manner which minimizes to the greatest extent possible any disruption to the surrounding communities and general public.

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The Plaintiffs also direct the Court to relevant sections of the indemnification provisions of the Terms and Conditions:

22.1 If any act or omission to act on the part of the Contractor … causes in whole or in part ... any damage to, environmental contamination of, or destruction of any property ... the Contractor shall be liable for any claims, losses, damages and costs (including legal expenses) arising therefrom.

22.2 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless, and at the Owner's option, defend the Owner, its affiliates and their officers, directors, employees, agents, successors, assigns, and servants, from and against any and all claims and/or liability for damage to property, injury or death of any person, including, but not limited to, the Contractor's

employees, Subcontractors, and the Subcontractor's employees, or any other liability incurred by the Owner or its affiliates, including expenses, legal or otherwise, caused wholly or in part, by any act or omission, negligent or otherwise of the Contractor, its Subcontractors and their officers, directors, employees, agents, servants, or assigns, arising out of or connected with the Agreement, regardless of whether caused in part by a party indemnified hereunder.

22.3 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless, and at the Owner's option, defend the Owner and its affiliates and their officers, directors, employees, agents, servants, and assigns from and against any liability, loss, or expense arising by reason of claims by any third party, including, but not limited to, the Contractor's employees, Subcontractors, and Subcontractors' employees as the result of the actual or asserted failure, omission, or neglect of the Contractor to comply with the Agreement.

34.5 The Contractor shall, at its expense, take all actions necessary to protect the Owner, its affiliates and all third parties, including without limitation employees and representatives of the Owner, from any exposure to, or hazards of, hazardous and/or toxic wastes or substances, and the Contractor shall defend, indemnify, and hold harmless the Owner and its affiliates from any acts, claims, or damages claimed by the Contractor's employees, Subcontractors, and Subcontractors' employees, or any other liability incurred by the Owner, its affiliates or third parties arising from a discharge of, exposure to, handling, disposition or transportation of hazardous or toxic materials or waste.

NYSCEF Document 361.

Plaintiffs contend that this evidence (the contract, affidavits and deposition testimony) is sufficient to meet its *prima facie* burden for an order granting summary judgment on its claim for breach of contract and indemnification. Plaintiffs argue that this evidence shows that Defendant failed to properly staff the grouting project, properly prepare for the spill, properly respond to the spill, and failed to obtain the required insurance. Plaintiffs further contend that Plaintiffs performed under the Agreement by paying Defendant for the work on the grouting project and were damaged by Defendant's breach in incurring millions of dollars in expenses responding to and remediating the spill. Plaintiffs rely on 22.1 of the Terms and Conditions in that Defendant is to defend Plaintiffs against claims and liabilities arising, even in part, from Defendant's acts or omissions. However, the Plaintiffs do not address its role, presence and direction on the day of the occurrence.

Defendant opposes the motion (motion sequence #14). Defendant contends that Plaintiffs have failed to establish that Defendant breached any portion of the relevant contract with Plaintiffs. Defendant further contends that even if it did breach the contract, Plaintiffs have failed to establish that such breach caused Plaintiffs to sustain damages. Defendant argues that the contract was for services and that the language was not clearly defined. In fact, the Change Order (number 1) solely states "[f]ill the retired main with a flowable fill and backfill/pave all openings." Further, the Defendant argues that Plaintiffs should be estopped from arguing breach of contract, that Plaintiffs waived the right to assert a breach of contract, and have not established their *prima facie* burden for breach of contract. Defendant also argues that Plaintiffs have failed to establish a *prima face* showing to establish the Plaintiff's indemnification claim.

"Waiver 'requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable'" *Marcum, LLP v. Silva*, 117 AD3d 917, 919, 986 N.Y.S.2d 508 [2d Dept 2014] quoting *Nassau Trust Co. v. Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184, 436 NE2d 1265, 451 NYS2d 663 [1982]. However, a "waiver is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence" *Peck v. Peck*, 232 AD2d 540, 649 N.Y.S.2d 22 [2d Dept 1996]. Here, Defendant argues that Plaintiffs waived their rights when they did not exercise their right to object pursuant to section 4.2 of the Terms of Conditions prior to the spill. Specifically, Defendant argues that insofar as Plaintiffs sent only one representative to oversee the Project that Defendant was conducting, they accepted Defendant's methods of fulfilling the Terms and Conditions of the Agreement.

Plaintiffs argue that Defendant had the contractual obligation to staff the Project in adherence to the safety provisions provided in the Terms and Conditions. As there are questions of fact as to whether Defendant violated provisions of the contract and/or the Defendant was negligent, summary judgment for

breach of contract and contractual indemnification is not warranted. As such, Plaintiffs' motion (motion sequence #14) is denied. See *Naranjo v. Star Corrugated Box Co.*, 11 AD3d 436, 783 N.Y.S.2d 607 [2d Dept 2004]; see *Connolly v. Brooklyn Union Gas Co.*, 168 AD2d 477, 562 N.Y.S.2d 718 [2d Dept 1990].

There are a number of outstanding issues that have not been resolved. Whether the Plaintiffs should have indicated the possibility of the existence of the substance in the pipe to the Defendant. Whether Defendant should have inquired as to the possibility of the presence of gas in the line. When gas was detected by the presence of the odor, which party was to take action and what action should have been taken. The contract is not clear on these specific issues, and the course of conduct of the parties on the day in question as reflected in the motion papers does not resolve the outstanding issues in the action.

Based on the foregoing, it is hereby ORDERED as follows:

The Defendant's motion for summary judgment (motion sequence #13) is granted solely to the extent that the Plaintiff's third cause of action for warranty is dismissed.

The Plaintiffs' motion for summary judgment (motion sequence #14) is denied.

This Constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
FILED
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