

National Gen. Ins. Co. v Islandaire N.Y., LLC
2023 NY Slip Op 31541(U)
May 8, 2023
Supreme Court, New York County
Docket Number: Index No. 150916/2020
Judge: Lori S. Sattler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR-----X
NATIONAL GENERAL INSURANCE COMPANY,INDEX NO. 150916/2020

Plaintiff,

MOTION DATE 01/11/2023,
01/11/2023

- V -

ISLANDAIRE NEW YORK, LLC, NORWEST AIR
CONDITIONING & HEATING SERVICE CORP., E.S.G.C.
CORP., R. E. HANSEN INDUSTRIES INC.MOTION SEQ. NO. 003 004

Defendant.

**DECISION + ORDER ON
MOTION**-----X
HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 100, 102, 103, 104, 105, 110, 111, 112, 113, 114, 115, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 101, 106, 107, 108, 109, 116, 117, 125

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

In this subrogation action, defendant R.E. Hansen Industries, Inc. (“Hansen”) moves, in Motion Sequence 003, for summary judgment dismissing the Amended Complaint of plaintiff National General Insurance Company (“Plaintiff”) as against it, as well as all other claims and cross-claims against it. In Motion Sequence 004, defendant E.S.G.C. Corp. (“ESGC”) moves for summary judgment dismissing the entirety of Plaintiff’s Amended Complaint as against it. Plaintiff and Norwest Air Conditioning & Heating Service Corp. (“Norwest”) oppose the motions. The motions are consolidated for disposition.

This action arises out of water damage that occurred during a renovation of Apartment 7C located at 245 East 93rd Street, New York, New York (“the apartment”) owned by Plaintiff’s subrogor, Rajen Shah (“Shah”). ESGC was hired as the general contractor for the renovation

project which, in part, included the replacement of seven air conditioning units known as “packaged terminal air conditioning” or “PTAC” units. Shah contracted with Norwest for the removal of the apartment’s old PTAC units and the purchase and installation of seven new units, which were manufactured by Hansen and defendant Islandaire New York.¹ Norwest installed the new PTAC units on or before July 24, 2017. In July 2018, Shah noticed water leaks around “several” of the PTAC units (NYSCEF Doc. No. 68, Shah EBT, at 26). The water leaks caused significant damage to the apartment, requiring extensive remediation and repair work. Shah was paid \$251,760.46 pursuant to his insurance policy with Plaintiff.

Multiple individuals inspected the apartment to determine the cause of the leaks, with some concluding that the leaks were caused by improper pitching of the metal sleeves into which the PTAC units were installed. According to these witnesses, the sleeves were supposed to slope down towards the wall to allow drainage, but instead were either flat or sloped forward. Manuel Guirado of Norwest and Chris Noreika of Hansen expressed this theory in their respective depositions (NYSCEF Doc. No 70, Guirado EBT at 37; NYSCEF Doc. No. 82, Noreika EBT at 37). However, a July 30, 2018 invoice from Islandaire signed by “Chris N.” states that the water damage in the units was “not an installation issue” (NYSCEF Doc. No. 79).

Hansen removed all seven PTAC units on September 6, 2018. Three of the units were then resold by Hansen. According to Hansen’s principal, the four remaining units were preserved after Hansen received correspondence from Plaintiff’s counsel regarding possible litigation. Hansen subsequently retained an expert, Mark Cambria, who inspected the four units for manufacturing defects in October 2018. In his affidavit, Cambria states that no

¹ Islandaire has not appeared in this action, and a default judgment was entered against it on February 25, 2021 (NYSCEF Doc. No. 42). According to the EBT of Hansen’s witness, Chris Noreika, and the affidavit of its principal Robert E. Hansen, R.E. Hansen Industries Inc. does business as Islandaire and manufactured the PTAC units.

manufacturing defects in the four remaining PTAC units were apparent. Three of these units were also subjected to stress tests of their internal drainage systems. Based on the inspection and test results, Cambria concluded that none of the four preserved PTAC units were defective.

The party moving 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). A movant’s “failure to make a prima facie showing that they were entitled to judgment as a matter of law” requires denial of the motion “regardless of the sufficiency of the opposing papers” (*Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant makes this prima facie showing, “the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact” such that trial of the action is required (*id.*). The facts presented “must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

“[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to meet this burden (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988] [internal citations and quotation marks omitted]). “[B]ald, conclusory assertions or speculation and [a] shadowy semblance of an issue are insufficient to defeat summary judgment (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016], quoting *S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974] [internal quotation marks omitted]).

Hansen moves, in Motion Sequence 003, for summary judgment dismissing the entirety of Plaintiff’s Amended Complaint against it. With respect to the first cause of action, Hansen argues that there can be no finding of negligent product liability against it because it owed no

duty to Plaintiff as it had no contract with Shah and because the PTAC units did not have any manufacturing defects. Plaintiff and Norwest argue in opposition that there are issues of fact regarding the causation of the water leak that preclude summary judgment on the question of negligent products liability.

This branch of the motion is denied as Hansen fails to meet its prima facie burden of showing an absence of material issues of fact. Although Hansen asserts that there is no evidence to warrant a finding of manufacturing defect and points to the improper pitch as a source of the water leak, Hansen's own service report of July 30, 2018 concluded that water damage had been found in all units in the apartment and that the leak was "not an installation issue" (NYSCEF Doc. No. 105). Hansen also replaced all seven of the units. In addition, although Hansen produced an expert who attested that he investigated four of the PTAC units and found no manufacturing defects, the remaining three were not tested, and were not examined or tested by Hansen's expert witness (NYSCEF Doc. No. 119, Hansen aff ¶ 6; Cambria aff ¶¶ 2, 12, 21). On the record before the Court, Hansen has not established that there is no issue of material fact as to the absence of design or manufacturing defects in all the PTAC units. Similarly, Hansen's claim that the lack of a contractual relationship between it and Shah demonstrates that it had no duty is unavailing (*see Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 411 ["The tort remedy permits the injured plaintiff to seek redress from remote parties in the distributive chain regardless of privity"]).

That branch of Hansen's motion seeking dismissal of the cause of action alleging breach of express warranty is granted. A seller creates an express warranty through, inter alia, "[a]ny affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain . . . that the goods shall conform to the affirmation or

promise” (N.Y. U.C.C. Law § 2-313[1][a]). To maintain a breach of express warranty claim, a plaintiff must demonstrate that it relied upon the seller’s representations (*see Himmelstein, McConnell, Gribben, Donoghue & Joseph LLP v Matthew Bender & Co., Inc.*, 172 A.D.3d 405, 406 [1st Dept 2019]). Here, Hansen meets its prima facie burden by showing that Plaintiff fails to allege that it or its subrogor, Shah, relied on any express warranty produced by Hansen. It further satisfies its burden by submitting Shah’s testimony stating that he “did not receive any” warranty documents with which to register the PTAC units in support of this position (Shah EBT at 86). Although Plaintiff invokes the language included in a warranty document for Islandaire PTAC units, it fails to demonstrate that Shah relied on this language at the time of purchase or that the document containing this language was provided with the units at issue.

Hansen further argues that the breach of implied warranty claims must be dismissed because neither Plaintiff nor its subrogor was in privity with it and that to the extent this cause of action is based upon a theory of implied warranty of merchantability, there is no dispute of material fact as to whether the PTAC units were not defective. It is well-established that “there can be no warranty absent privity between” a seller and a plaintiff (*Gordon v Ford Motor Co.*, 239 AD2d 156 [1st Dept 1997]). Here, Hansen submits evidence showing that Shah purchased the PTAC units directly from Norwest, thereby demonstrating prima facie the lack of privity between itself and Plaintiff (NYSCEF Doc. No. 78, Norwest Invoice). Shah also testified that he understood that Norwest installed the PTAC units and that Islandaire manufactured them; he had no knowledge of Hansen (Shah EBT at 60-61). Plaintiff and Norwest fail to tender any proof in opposition that would create an issue of fact as to the existence of privity between Plaintiff and Hansen. Accordingly, that branch of the motion seeking summary judgment on the breach of implied warranty claim is granted.

Hansen argues that the cause of action for strict products liability should be dismissed because there is no dispute of material fact as to the lack of a defect in the PTAC units. The Court denies this branch of the motion as Hansen has failed to meet its prima facie burden of showing a lack of a dispute of material issues of fact as to whether the PTAC units had a manufacturing defect.

ESGC moves, in Motion Sequence 004, for summary judgment dismissing all causes of action against it. In support of its motion, ESGC states that it only served as general contractor for apartment renovations, pursuant to its contract with Shah. It maintains that it did not design or manufacture the subject PTAC units. ESGC further maintains that it did not contract with Norwest, Hansen, or Islandaire for the installation of the PTAC units or removal of the old units; rather, it contends that Shah separately contracted for all work concerning the PTAC units, including their installation and removal. Finally, ESGC argues that it had no actual or constructive notice of the conditions and circumstances regarding installation and removal of PTAC units and that it had nothing to do with the wall sleeves in the apartment.

Plaintiff opposes the motion. It argues there are questions of fact pertinent to ESGC's liability due to its status as general contractor, specifically whether it had contractual duties with respect to work on the air conditioning system. Plaintiff cites to the contract between ESGC and Shah, which includes a provision requiring ESGC to indemnify Shah for any property damage "arising out of or in any way relating to the work" (NYSCEF Doc. No. 108 at 10). Plaintiff also argues that Shah's testimony stating that ESGC was "managing the whole project" creates a question of fact as to ESGC's role in installing the PTAC units.

Norwest also opposes the motion and argues there are material issues of fact regarding ESGC's duties as project manager, specifically its oversight of Norwest's installation of the

PTAC units. Norwest further contends that ESGC is not entitled to dismissal of the negligence claims against it as a matter of law because of its possible role in causing a water overflow issue because ESGC workers ran the PTAC units during construction, which Norwest maintains could have caused dust to build up on the units' cooling coils, resulting in faster condensation and a water discharge.

Those branches of ESGC's motion seeking dismissal of the negligence and strict products liability causes of action are granted because it was not a manufacturer or seller of the allegedly defective PTAC units. A party may be held liable in products liability under either a theory of strict liability or ordinary negligence where it manufactures or sells a defective product in the normal course of business (*see Finerty v Abex Corp.*, 27 NY3d 236, 241 [2016]; *Gebo v Black Clawson Co.*, 92 NY2d 387, 392-393 [1998]).

Here, the record shows that the PTAC units were manufactured by Hansen/Islandaire and that Shah purchased them from Norwest (NYSCEF Doc. No 73). Although the contract between ESGC and Shah includes a line item for "Air Conditioner" with a price of \$28,000 (NYSCEF Doc. No. 72), this provision was clarified by ESGC's owner, Eddy Sigcha, who stated that removal and installation of the PTAC units was not part of the contract and that this provision merely referenced a referral to another air conditioner company (Sigcha EBT at 18-19). Sigcha testified that Shah rejected ESGC's referral in favor of using "Islandaire" for the PTAC units (*id.*). He further testified that Norwest was paid by Shah for the PTAC work and that ESGC would deduct an equal amount from its invoices to Shah (*id.* at 25). Consequently, ESGC was not a seller of the PTAC units and therefore cannot be held liable under either a strict products liability or negligence theory for any alleged defective manufacture of the PTAC units (*cf. Gebo*, 92 NY2d at 392-393). For the same reasons, the breach of express and implied warranty causes

of action must also be dismissed as against ESGC as it was not a seller (*see Gordon*, 239 AD2d at 156).

The Court denies that branch of ESGC's motion seeking dismissal of the sixth cause of action alleging negligent installation of the PTAC units as there is a dispute of material fact over the extent of ESGC's role in overseeing this part of the renovations. Sigcha testified that neither he nor his company had any role in the installation of the units and that it did not hire Norwest as a subcontractor (Sigcha EBT at 54-55). However, Shah testified that ESGC was managing the "whole project" (Shah EBT at 83) and Sigcha further testified that an ESGC employee was on site at the apartment "100 percent of the time" (Sigcha EBT at 63).

The Court further denies the branch of the motion seeking dismissal of the cause of action alleging that ESGC was negligent in running the PTAC units during ongoing construction because there is a material issue of fact about whether running the units during construction caused dust to build up within them such that a water leak was caused or became more likely. Hansen's expert found sheetrock dust in one of the four PTAC units inspected after the loss and Sigcha testified that the PTAC units were running during construction (Cambria aff ¶ 14; Sigcha EBT at 82). According to Hansen's expert, this buildup had the potential to cause faster condensation in the unit, although he concluded that this was not likely the case with the one unit with this condition (*id.* ¶¶ 14, 25).

Accordingly, it is hereby:

ORDERED that the motion of defendant R.E. Hansen Industries, Inc. (Motion Sequence 003) is denied with respect to the first and fourth causes of action; and it is further

ORDERED that the motion of defendant R.E. Hansen Industries, Inc. (Motion Sequence 003) is granted to the extent that the second and third causes of action against it are dismissed; and it is further

ORDERED that the motion of defendant E.S.G.C. Corp. (Motion Sequence 004) is granted to the extent that the first, second, third, and fourth causes of action against it are dismissed; and it is further

ORDERED that the motion of defendant E.S.G.C. Corp. (Motion Sequence 004) is denied as to the sixth and seventh causes of action.

This constitutes the Decision and Order of the Court.

<u>5/8/2023</u>			
DATE		LORI S. SATTLER, J.S.C.	
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