

**New York Cent. Mut. Ins. Co. v Amerigas Propane,
L.P.**

2011 NY Slip Op 32217(U)

August 12, 2011

Supreme Court, Wyoming County

Docket Number: 41048

Judge: Mark H. Dadd

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At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 12th day of August, 2011.

PRESENT: HONORABLE MARK H. DADD
Acting Supreme Court Justice

STATE OF NEW YORK
COUNTY COURT: COUNTY OF WYOMING

NEW YORK CENTRAL MUTUAL INSURANCE
CO., as subrogee of RICHARD BRYDALSKI and
DEBRA BIFARO

Plaintiff

DECISION and ORDER

v.

Index No. 41048

AMERIGAS PROPANE, L.P., and
AMERIGAS PROPANE, INC.

Defendants

The above-named defendants, having moved for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint, and said motion having duly come on to be heard.

NOW, on reading the pleadings of the parties, and on reading and filing the notice of motion dated April 25, 2011, supported by the affirmation of John A. Hsu, Esq., dated April 25, 2011, together with the annexed exhibits, and the opposing affidavit of Timothy P. Barna, Esq., sworn to on July 14, 2011, together with the annexed exhibits, and after hearing Todd Kulkin, Esq., attorney for the defendants, in support of the motion, and Timothy P. Barna, Esq., attorney for the plaintiff, in opposition thereto, and due deliberation having been had, the following decision is rendered.

The subrogors of the plaintiff own a residence located at 2618 Sodum Road in

North Java, New York. The complaint alleges that on July 18, 2007, the subrogors entered into a contract with the defendants by which the defendants [hereinafter “Amerigas”] promised to supply propane for heating and cooking to the Sodum Road residence. A copy of the purported contract, bearing the signatures only of the subrogors, is attached to the complaint. The complaint further alleges that on or about December 8, 2007, the property suffered extensive damage from the bursting of water pipes. According to the plaintiff, the agreement required Amerigas to make automatic deliveries of propane – called by Amerigas a “forecast” delivery schedule – intended to eliminate the possibility that the propane supply at the residence might run out. The plaintiff claims that when the propane nevertheless did run out, the propane fired furnace at the residence ceased operation, and this led to the pipes bursting when the temperature inside fell below freezing. In the answer, Amerigas denies entering into such an agreement with the subrogors. Counsel for Amerigas contends in his affirmation that Amerigas is entitled to summary judgment “because there is no evidence to support that Amerigas had a valid, enforceable contract with plaintiff subrogors to supply propane on a ‘forecast’ delivery schedule.”

The submissions filed in support of the motion include the depositions of Russell J. Deer, the area service technician for Amerigas, and Addy Klink, a former customer relations representative of Amerigas. Ms. Klink, who left employment with Amerigas for health reasons in August 2007, did not recall having any dealings with the subrogors. With regard to the policies of Amerigas in force during her employment, she testified that it was required that a signed Amerigas Propane contract be on file with Amerigas before any propane would be delivered to a customer – whether pursuant to a “forecast” delivery schedule, or in response to a specific request by a customer, which she referred to as a “will call” delivery. Ms. Klink stated that the Amerigas contract could be picked up in person by the customer at the Amerigas offices, or mailed to the customer upon request. Alternatively, the contract would be delivered to the customer by Russell Deer, the service technician, when he was sent to the customer’s property

to set up propane service.

Russell Deer testified that customers often would sign the contract and return it to him while he was present testing the equipment and setting up service; in which case, he would sign the contract for Amerigas and take it back to the office, leaving the customer with a copy. If the customer did not immediately sign and return the contract to him, the customer would have to mail or deliver it to the Amerigas office prior to receiving propane deliveries. According to Deer, once an executed contract was received, the customer would be immediately placed on a "forecast" delivery schedule – no other papers were required. Deer testified that to receive propane on a "will call" basis, however, the customer must complete and return a separate request form in addition to the contract.

In his deposition testimony, Deer said that he had gone to the Sodum Road address on July 18, 2007, to test equipment and set up propane service. He recalled providing the subrogors with the Amerigas contract, but he testified that they did not sign and return it to him that day. Deer stated that the prior owner of the property had received propane from Amerigas on a "forecast" delivery basis, and as a result, there were two Amerigas tanks already on the property on July 18. Deer explained that after the prior owner had died, the two tanks had been locked by Amerigas, and the prior owner's account had been credited with the value of the remaining propane. On July 18, after he had determined that the equipment and appliances at the residence were in working order, Deer unlocked the tanks, permitting the subrogors to begin using the propane. The subrogors were charged for the 159 gallons of propane that remained in the tanks, as shown by Deer's July 18, 2007, work order.

Amerigas has also submitted a copy of its response to the plaintiff's request for discovery. This contains copies of notes purportedly written to the subrogors by Linda Berg, Amerigas Sales Service Manager, on August 3, 2007, and September 4, 2007. The notes indicate that no signed contract had been received from the subrogors prior to those dates. There is also a copy of an Amerigas computer record, apparently created on December 12, 2007, which

contains the notation “no contract in file.” Also, the Court notes that upon a prior motion for summary judgment, Amerigas submitted an affidavit of Linda Berg, sworn to on May 6, 2010, stating that “[t]o date, this office has never received a signed Residential Propane Supply Agreement & Equipment Lease Service Application which would allow Ms. Bifaro to be placed on a ‘forecast delivery’ instead of ‘seasonal will call.’”

The Court finds that Amerigas has made a prima facie showing that it owed no duty, contractual or otherwise, to the plaintiff to maintain the propane level at the Sodum Road residence in 2007. On this basis, Amerigas has met its initial burden upon the motion (Alvarez v. Prospect Hospital, 68 N.Y.2d 324 [1985]).

The plaintiff’s submissions in response, however, are sufficient to show that issues of fact still remain to be determined, and as a consequence, summary judgment is precluded. In her deposition, submitted by the plaintiff, Debra Bifaro insists that she did return an executed contract to Amerigas, either by mail, or by giving it to Russell Deer before he left the property on July 18, 2007. She testified that she was, in fact, “ninety percent sure” that she gave it to Deer that day. In addition, although Amerigas contends that the subrogors were “will-call” customers, not “forecast” delivery customers, on the day that the pipes burst, Russell Deer’s testimony concerning the policies of Amerigas indicates that an executed contract was required to be on file in either case. Moreover, based upon his testimony that the company required a contract before a customer could receive more than the minimal amount of propane required to test the equipment, it appears to the Court unlikely that Russell Deer would have unlocked the Amerigas tanks at the Sodum Road property, and sold to the subrogors the 159 gallons of propane contained in them, without obtaining a signed contract on July 18, 2007. Finally, contrary to the contention of counsel for Amerigas, the alleged admission of Addy Klink found in Ms. Bifaro’s May 27, 2010, affidavit, is not, in the Court’s estimation, directly contradicted by Ms. Bifaro’s December 9, 2010, deposition testimony. As such, the alleged admission also raises a question of fact with regard to whether Amerigas breached a duty when it failed to

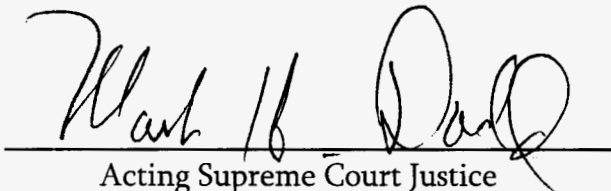
supply propane.

As an alternative basis for summary judgment, Amerigas argues that it was under no obligation to maintain the propane level at the Sodum Road property because, as a seasonal residence, that property was ineligible for "forecast" deliveries under the terms of the Amerigas contract. Ms. Bifaro's deposition testimony that the subrogors received "forecast" deliveries at Sodum Road after December 2007 is sufficient to show that this also is a question of fact which must be left to the fact finder for determination. Accordingly, summary judgement will not be granted.

NOW, THEREFORE, it is hereby

ORDERED that the motion of the defendants is denied.

DATED: August 12, 2011


Acting Supreme Court Justice

