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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Saliann Scarpulla Justice

PART 19

Index Number : 403103/2006
METRO-NORTH COMMUTER RAILROAD
vs.
EMPIRE CITY SUBWAY
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED
APR 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 4/16/12

Saliann Scarpulla, J.S.C.
SALIANN SCARPULLA

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

ROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

OPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

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METRO-NORTH COMMUTER RAILROAD COMPANY and THE METROPOLITAN TRANSIT AUTHORITY,

Plaintiffs,

- against-

Index No.: 403103/2006
Submission Date: 01/11/2012

EMPIRE CITY SUBWAY COMPANY (LIMITED),

Defendant.

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For Plaintiffs:
Seth J. Cummins
General Counsel
Metro-North Commuter Railroad Co.
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New York, NY 10017

For Defendant:
Conway, Farrell, Curtin & Kelly, P.C.
48 Wall Street
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Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Mem of Law in Support. 2
Aff in Opposition 3
Reply Affirmation 4
Notice of ECS's Motion. 5
Aff in Support 6
Aff in Opposition 7
Reply Aff 8

HON. SALIANN SCARPULLA, J.:

In this declaratory judgment action, plaintiffs Metro-North Commuter Railroad Company ("Metro-North") and the Metropolitan Transportation Authority ("MTA") (collectively "plaintiffs") move for an order granting summary judgment and declaring that (1) defendant Empire City Subway Company (Limited) ("ECS") is responsible for

repairing and maintaining certain vaults above plaintiffs' railroad, and must promptly act to safeguard the vaults or reimburse plaintiffs for the cost to repair the vaults; and that (2) ECS must reimburse plaintiffs for the costs to date, totaling $59,090, of repairing one of the vaults (motion sequence no. 4). ECS moves separately for summary judgment dismissing the complaint (motion sequence no.3). Motion sequence nos. 3 and 4 are consolidated for disposition.

MTA leases the property encompassing the Grand Central Terminal ("GCT") and related property from non-parties Midtown Trackage Ventures LLC and the Owasco River Railway Inc. pursuant to a lease agreement dated April 8, 1994. Under its lease agreement, MTA is responsible for maintaining GCT and making structural repairs of pipes, mains and vaults ". . . which a utility company is not obligated to repair and maintain."

Metro-North, MTA's subsidiary, manages GCT for the operation of its commuter railroad. Originally, the railroad tracks were above-ground. In 1903, the City of New York granted Metro-North's predecessor railroad the right to build depressed tracks at GCT's current location. Under the Laws of 1903, the predecessor railroad could relocate and change, at the railroad's expense, all ducts or conduits around GCT "in such manner and to such an extent as may be necessary or reasonably required" to build the tracks.

ECS is a telecommunications utility and the franchise holder from the City of New York for underground telecommunications conduits in the Manhattan roadways. Under

its 1891 franchise agreement with the City of New York, ECS is required "to provide, build, equip, maintain and operate" its underground vaults. Telecommunications and cable companies then pay ECS rental fees for the use of conduit spaces in ECS's vaults.

In August 2003, a utility vault above a GCT train shed collapsed, causing concrete and debris to fall onto the train platform. Following the vault's collapse, plaintiffs retained engineering firm Parsons Brinckerhoff Quade & Douglas, Inc. ("PB") to identify and locate all utility vaults above the train shed. Of the thirty vaults found above the train shed, eighteen were similar in construction to the one that collapsed. Three of these eighteen vaults had covers with "ECS" imprinted on them (the "subject vaults").

On January 27, 2007, Harry Hall ("Hall"), a Senior Engineer with Metro-North, and an ECS representative conducted a field inspection of the subject vaults. Hall attests that during the inspection, the ECS representative opened the subject vaults from the street by removing the covers. Plaintiffs maintain that they do not have access to the interior of the subject vaults.

Thereafter, Metro-North installed emergency temporary timber and steel shoring on one of the subject vaults. According to Julio Valzevan ("Valzevan"), a Senior Supervising Structural Engineer with PB, two of the subject vaults require a permanent external support system to avoid collapse. Plaintiffs demanded that ECS reimburse them for the cost of the emergency repairs to the first subject vault, and that ECS pay for the repairs to the remaining subject vaults. ECS refused.

Plaintiffs commenced this action in January 2007 to recover their costs in repairing the subject vaults. Plaintiffs plead various theories of recovery, including restitution, unjust enrichment, implied contract, quantum meruit and negligence. Plaintiffs also seek a declaratory judgment that ECS is obligated to maintain and repair the subject vaults, or to reimburse plaintiffs for maintaining and repairing the subject vaults. In its answer, ECS denies any obligation for the maintenance of the subject vaults.

Kevin Keogh ("Keogh"), an ECS Area Operations Manager, testified at his deposition that the ECS imprint like the one found on the subject vaults indicates that ECS owns the vault. Moreover, In an email dated April 1, 2008, John Joseph Curley ("Curley")of ECS stated that ECS was responsible for maintaining the vaults.

In contrast, in support of ECS's dismissal motion, Calvin Gordon ("Gordon"), a Specialist with ECS, submits a two page affidavit in which he attests that GCT's owner built the subject vaults and "is responsible if the vaults require any structural repair or reconstruction alleged by Metro North." According to Gordon, he based his conclusions on records and emails the plaintiffs and ECS exchanged, but does not specify which emails or records.

Plaintiffs now move for summary judgment, arguing that ECS has admitted ownership and maintenance responsibility for the subject vaults. Plaintiffs further argue that ECS is obligated under its franchise agreement with the City to maintain the subject vaults.

In opposition and in support of its motion to dismiss, ECS maintains that plaintiffs are responsible for repairing the subject vaults under their GCT lease and The Laws of 1903. ECS further contends that plaintiffs have failed conclusively to establish that ECS owns the vaults, or that the vaults require external support systems. ECS admits that it maintains the interior of the subject vaults, but argues that it is not responsible for installing external support systems.

ECS argues that the Court should dismiss the unjust enrichment, restitution, and quantum meruit causes of action because plaintiffs did not perform the repairs at ECS's behest. ECS contends that the implied contract cause of action should be dismissed because the facts do not establish that there was a meeting of the minds between plaintiffs and ECS. ECS further argues that all of plaintiffs' alleged damages are prospective, thus plaintiffs cannot maintain a negligence cause of action. Lastly, ECS maintains that plaintiffs lack standing to recover from ECS because plaintiffs never contracted with ECS, nor were they third-party beneficiaries of a contract between ECS and another party.

Discussion

As an initial matter, ECS's argument that plaintiffs lack standing to bring this action is meritless, as ECS waived this affirmative defense by failing to raise it in its answer or pre-answer motion to dismiss. *See Country Pointe at Dix hills Home Owners Association, Inc. v. Beechwood Organization*, 80 A.D.3d 643, 651 (2d Dept. 2011). The

Court will therefore address on the merits the parties' respective summary judgment motions.

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, plaintiffs have made a *prima facie* showing of entitlement to a declaratory judgment that ECS is responsible for repairing and maintaining the subject vaults. ECS does not contest that its logo was imprinted on the covers of the subject vaults, which Keogh testified indicates that ECS owns the vaults.[1] Hall attests that the ECS representative was able to open the subject vaults during their inspection on January 27, 2007. Moreover, ECS admits in its opposition papers that it has an ownership interest in the subject vaults.

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[1]While ECS argues that Keogh's testimony does not bind ECS, the Court finds that Keogh testified as ECS's representative, thus his deposition may be used as evidence-in-chief. *See* CPLR § 3117(a)(2).

ECS also seeks to impeach its own witness's testimony, claiming that Keogh's testimony is unreliable because he did not have personal knowledge of the subject vaults or directly oversee Manhattan construction activities. However, Keogh's testimony relates to all of ECS's vaults, not specifically the subject vaults. Thus, his lack of personal knowledge as to the subject vaults is irrelevant.

Further, plaintiffs are not required under their lease to repair vaults that an outside utility company is obligated to repair and maintain, and ECS's franchise agreement with the City of New York states that ECS is responsible for maintaining its vaults.[2] ECS argues that its maintenance responsibilities do not extend to making external repairs to the vaults. However, ECS concedes that it maintains the subject vaults' interior, and Valzevan attests that the repairs are needed because of deterioration inside the subject vaults.

Though Gordon concludes that GCT's owner is responsible for repairs to the subject vaults, he does not provide the specific basis for his conclusion. Further, Gordon does not refute that repairs are needed because of the subject vaults' interior deterioration. Accordingly, Gordon's affidavit is insufficient to raise a triable issue of fact. *See P. D. J. Corp. v. Bansh Properties, Inc.*, 29 A.D.2d 927, 928 (1968).[3]

Moreover, plaintiffs are entitled to restitution for their costs to date in repairing the vaults. Where a plaintiff fulfills a defendant's duty "because there was an immediate necessity to protect public decency, health or safety, " that plaintiff is entitled to

[2]ECS contends that the Franchise Agreement applies only to facilities ECS built on public property. However, ECS does not cite to any section in the Agreement, nor any other authority, that includes this limitation.

[3]The Court rejects ECS's argument that it is not responsible for external structural repairs because it does not have access to the train shed. Hall attests, and ECS does not contest, that plaintiffs have previously granted ECS access to the train shed to perform construction.

restitution for the expenses in fulfilling the duty. *City of New York v. Lead Indus. Ass'n*, 222 A.D.2d 119, 125 (1st Dept. 1996).[4]

As stated above, it was ECS's duty to maintain the interior subject vaults interior, the deterioration of which necessitated the repairs. Further ECS does not present any credible evidence to rebut Valzevan's attestation that the temporary shoring was necessary to prevent another vault collapse, or that another collapse would endanger commuters using the GCT platform. The Court thus finds that ECS must reimburse plaintiffs for their costs to date of repairing the subject vaults.[5]

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by plaintiffs Metro-North Commuter Railroad Company and the Metropolitan Transportation Authority is granted; and it is further

[4]ECS argues plaintiffs have failed to show an unjust enrichment and thus are not entitled to restitution. *See Slater v. Gulf, M & O. R. Co.*, 307 N.Y. 419, 421 (1954). However, unjust enrichment is not a predicate to recovery through restitution. *See City of New York*, 222 A.D.2d at 127-28 (holding that plaintiffs stated a viable cause of action for restitution against defendants where plaintiffs incurred costs to abate lead hazards arising from the use of lead paint defendants manufactured).

[5]Because the Court finds that plaintiffs are entitled to restitution for their expenses, it does not address whether plaintiffs may recover under unjust enrichment, quantum meruit, implied contract or negligence theories.

ORDERED that the summary judgment motion by defendant Empire City Subway Company (Limited) is denied.

Settle judgment on notice.

Dated: New York, New York
April 16, 2012

ENTER:
Saliann Scarpulla, J.S.C.

FILED

APR 18 2012

NEW YORK
COUNTY CLERK'S OFFICE