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SHORT FORM ORDER

INDEX No. 05-29498
CAL. No. 11-01360OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 48 - SUFFOLK COUNTY

PRESENT:

Hon. HECTOR D. LaSALLE
Justice of the Supreme Court

MOTION DATE 6-24-11 (#006)
MOTION DATE 11-15-11 (#007)
ADJ. DATE 1-18-12
Mot. Seq. # 006 - MD
 # 007 - MD

TYWAN A. JOHNSON, SR.,

Plaintiff,

- against -

KEYSPAN CORPORATION, KEYSPAN ENERGY DELIVERY, LONG ISLAND POWER AUTHORITY and D&H REALTY CO. LLC,

Defendants.

Action No. 1
Index No. 05-17877

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MARY ELLEN SCHNEIDER,

Plaintiff,

- against -

KEYSPAN CORPORATION, KEYSPAN ENERGY CORPORATION, KEYSPAN GAS EAST CORPORATION d/b/a KEYSPAN ENERGY DELIVERY and D&H REALTY CO. LLC.,

Defendants.

Action No. 2
Index No. 05-29498

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Upon the following papers numbered 1 to 90 read on these motions to compel and for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10; 30 - 70 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 11 - 25; 71 - 75 ; Replying Affidavits and supporting papers 26 - 27; 76 - 90 ; Other 28 - 29 (sur-reply) ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendants Keyspan Corporation, Keyspan Energy Corp., Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery in Action No. 2 to compel a mental examination of plaintiff and the motion by plaintiff in Action No. 2 for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (006) by defendants Keyspan Corporation, Keyspan Energy Corp., Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery in Action No. 2 for an order pursuant to CPLR 3121 and CPLR 3124 compelling plaintiff Schneider to submit to a mental examination by the physician previously designated or, in the alternative, pursuant to CPLR 3126 prohibiting plaintiff from introducing evidence of her mental condition at trial is denied; and it is further

ORDERED that the motion (007) by plaintiff in Action No. 2, Mary Ellen Schneider, for summary judgment in her favor on the complaint on the issue of liability as against defendants Keyspan Corporation, Keyspan Energy Corp., Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery in Action No. 2 and directing that the matter be set down for an immediate inquest or trial with regard to damages is denied.

These actions, which have been joined for trial, arise from an explosion and fire that occurred on October 12, 2004 at 3:47 p.m. damaging the used car portion of premises known as Habberstadt Nissan Motors located at 838 East Jericho Turnpike, in Huntington Station, New York and owned by defendant in Action Nos. 1 and 2, C & C Realty Co., LLC. That portion of the premises abuts the main Habberstadt Nissan premises located at 850 East Jericho Turnpike owned by defendant in Action Nos. 1 and 2, D & H Realty Co., LLC. The plaintiffs in Action Nos. 1 and 2 were employees of Habberstadt Nissan working in the building at 850 East Jericho Turnpike at the time of the incident. The Court's computerized records indicate that the note of issue in Action No. 2 was filed on June 30, 2011.

Plaintiff in Action No. 2, Mary Ellen Schneider (plaintiff Schneider), alleges in her amended complaint dated May 6, 2008 a first cause of action against defendants Keyspan Corporation, Keyspan Energy Corp., Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery in Action No. 2 (the Keyspan defendants). Plaintiff Schneider alleges that prior to and including October 12, 2004, the Keyspan defendants laid the gas transmission lines and pipelines in the public ways and highways directly in front of the subject premises, owned said lines and their components, and maintained, serviced and inspected the same. In addition, plaintiff Schneider alleges that on October 12, 2004, while she was working at the subject premises, she was injured physically and psychologically by the cave in and collapse of the subject premises following a gas explosion caused by the negligence of the Keyspan defendants in their installation, ownership, maintenance, repair and utilization of said gas pipelines, components and parts with no contributory negligence or assumption of the risk on plaintiff's part. Plaintiff Schneider includes in her allegations of negligence failure to use reasonable care in the installation of the pipelines, fittings and component parts of the gas transmission system to prevent leaks or other defects; failure to perform or properly perform inspections; and failure to warn or install devices that would warn plaintiff. Plaintiff Schneider also alleges that the Keyspan defendants had actual and constructive notice of the dangerous and defective conditions of the gas pipelines and their components.

By her bill of particulars dated November 1, 2006, plaintiff Schneider claims that a gas leak from

a Keyspan Energy Delivery distribution main was caused by the failure of a fused butt joint on a four-inch diameter polyethylene pipe thus allowing gas to migrate into the basement of the building from spaces in the foundation where concrete block had been removed and not replaced or repaired. In addition, plaintiff Schneider claims that at the time of the incident she was employed as a Customer Service and Business Development Representative and that as a result of said gas explosion she sustained physical injuries as well as post-traumatic stress disorder, severe depression, difficulty sleeping, anxiety and nervousness. She indicates that she has been receiving treatment from Mildred Antonelli, Ph.D. (Dr. Antonelli) from November 15, 2004 to the present.

Plaintiff Schneider seeks summary judgment in her favor on the complaint in Action No. 2 on the issue of liability as against the Keyspan defendants on the grounds that defendants admitted in an incident report filed with the federal government and in deposition testimony that they installed on May 23, 1988, owned, and operated the gas main with a defective butt fuse, and the natural gas that initiated and fueled the explosion came from said gas main with a defective butt fuse. Plaintiff's submissions include the pleadings, her bill of particulars, plaintiff's signed deposition transcript from February 11, 2008, the certified deposition transcripts of William J. Kienle who testified on behalf of Keyspan Corporation on June 22, 2007 and April 3, 2008, the certified deposition transcript of Edward VanGulden who testified on behalf of the Keyspan defendants on October 10, 2007, a Suffolk County Police Department Supplementary Report, a Keyspan incident report, a Butt Fusion Failure Analysis Report for Keyspan Energy, and a judgment in a related action.

In partial opposition to the motion, the Keyspan defendants argue that plaintiff has failed to differentiate among the three as to who owns the pipes, maintained them, and was allegedly responsible for the gas leak. The Keyspan defendants concede that on October 12, 2004, Keyspan Energy Delivery Long Island owned and operated a gas main that was the source of leaking natural gas that eventually was ignited in the building where plaintiff worked and was present in; that at the time that they were deposed William Kienle and Edward VanGulden were employees of Keyspan Energy Delivery Long Island; and that the report filed with the US Department of Transportation (incident report) was filed on behalf of Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery Long Island. In addition, the Keyspan defendants admit that in two other actions arising from the subject gas incident, they conceded the issue of liability at or before trial and agreed to proceed on the issue of damages. The Keyspan defendants assert that plaintiff declined their offer to concede liability made almost two years ago and that they are still willing to concede the issue of liability in this action and are willing to proceed to trial on the issue of damages but only after they have had an opportunity to complete outstanding discovery memorialized in a stipulation attached to the certification order dated May 16, 2011. In the attached stipulation dated May 16, 2011, the parties "agreed to certify this case subject to the defendants' Keyspan request for a psychiatric examination of plaintiff which will be the subject of a motion to compel to be made by defendants within 20 days."

In reply, counsel for plaintiff Schneider explains that plaintiff did not accept the concession of liability offered by the Keyspan defendants because it would prejudice her inasmuch as interest would not begin to run until the date of trial or judgment. In addition, plaintiff Schneider asserts that the Keyspan defendants are collaterally estopped from arguing plaintiff's failure to distinguish between the three entities inasmuch as the Keyspan defendants failed to satisfy the proof required to do so in their motion for summary judgment in an unrelated case in Suffolk County Supreme Court entitled, Raymond R. Buurma, Individually

and as Executor of the Estate of Jean Lentz, Deceased and on behalf of Distributee of the Estate of Jean Lentz, Deceased, plaintiff, against Keyspan Corporation, Keyspan Services, Inc., Keyspan Energy Solutions, LLC d/b/a Keyspan Home Energy Services, Keyspan Home Energy Services, LLC, Lynn A. Mourey, Esq., Senior Counsel Keyspan Services, Inc., Dennis Klott (Keyspan supervisor/Investigator), John Cashin, Jr., (Keyspan Investigator), defendants under Index number 7521-2005. According to plaintiff, the order dated February 8, 2011 (Martin, J.) in that action has collateral estoppel effect concerning issues regarding the inter-relationship of defendant Keyspan Corporation with its subsidiaries especially concerning "issues of directions to provision control and management and has been decided adversely to Keyspan Corporation and to its subsidiaries including Keyspan Energy Corp, Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery (Keyspan Energy Long Island) as named Defendants in this matter." Plaintiff Schneider also contends that defendants Keyspan waived their right to a psychiatric examination by failing to timely request such an examination and asserts that plaintiff already submitted to an orthopedic and neurological independent examination.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, 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 which require a trial of the action" (***Alvarez v Prospect Hosp.***, *supra* at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, *supra* at 562, 427 NYS2d 595).

"In view of the dangerous and explosive character of gas and its tendency to escape, a gas company has the duty to use that degree of caution which is reasonably necessary to prevent the escape or explosion of gas from its pipes and equipment" (PJI 2:185; *see generally* ***Schmeer v Gaslight Co. of Syracuse***, 147 NY 529, 538, 42 NE 202 [1895]; ***Jackson v Gas Co.***, 2 AD3d 1104, 1105, 769 NYS2d 638 [3d Dept 2003]; ***Lockwood v Berardi***, 135 AD2d 881, 882, 522 NYS2d 279 [3d Dept 1987]; *see also* ***New York Central Mut. Fire Ins. Co. v Glider Oil Co., Inc.***, 90 AD3d 1638, 1641, 936 NYS2d 815 [4th Dept 2011]). Thus, the duty to act with reasonable care "stems from the nature of its services" (*see* ***Sommer v Federal Signal Corp.***, 79 NY2d 540, 552, 583 NYS2d 957 [1992]; *see also* ***New York Central Mut. Fire Ins. Co. v Glider Oil Co., Inc.***, *supra*).

It is sufficient if plaintiff proves facts and circumstances from which the jury might reasonably and fairly infer that the gas mains of defendant and the appurtenances in connection therewith were defective or negligently maintained, inspected and operated by defendant, or that defendant did not use the care which a reasonable prudent person would have exercised under the facts and circumstances presented by plaintiff (***Laughlin v New York Power & Light Corp.***, 23 NYS2d 292 (S Ct, Rensselaer County, Nov 13, 1940], *affd* 261 AD 1107, 27 NYS2d 87 [3d Dept 1941], *affd* 287 NY 681, 39 NE2d 296 [1942]). Evidence submitted as to the character, nature and content of the gas, the constituent chemical elements of it, the location of defendant's gas mains, the construction of the vault, the absence of any odor or gas, the position and location of sewers with reference to the vault, the methods of inspection pursued by defendant are all issues for the

determination by the jury as to whether or not defendant did or did not exercise the care which a reasonably prudent person would have done under the circumstances (*id*).

The doctrine of collateral estoppel, a narrower species of res judicata, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in the prior action or proceeding, and decided against that party or those in privity, whether or not the tribunals or causes of action are the same (***Ryan v New York Tel. Co.***, 62 NY2d 494, 501-502, 478 NYS2d 823 [1984]; ***Breslin Realty Dev. Corp. v Shaw***, 72 AD3d 258, 263, 893 NYS2d 95 [2d Dept 2010]). Once the party seeking the benefit of collateral estoppel establishes that the identical issue was "material" (emphasis supplied) to a prior judicial or quasi-judicial determination, the party to be estopped bears the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action or proceeding (*see*, *id.*).

Plaintiff Schneider, as the party moving for summary judgment, must demonstrate that the explosion was caused by the gas leak due to the alleged negligence of one or more of the Keyspan defendants (*see generally* ***Carrazana v Stratford Five Realty, LLC***, 69 AD3d 479, 892 NYS2d 396 [1st Dept 2010]). Plaintiff's submissions demonstrate that an improperly conducted butt fusion on a pipe caused the gas leak, as concluded in the Butt Fusion Failure Analysis Report for Keyspan Energy, and that the gas leak caused the subject explosion, as determined in the Suffolk County Police Department Supplementary Report. However, there is no evidence of exclusive control by the Keyspan defendants from the time that the pipe was installed nor evidence as to which, if any, of the three Keyspan defendants performed the faulty butt fusion or that their negligence in inspecting or maintaining said pipe resulted in the gas leak. Specifically, there is no evidence as to how such a gas leak should have been detected prior to such an explosion; how long such a gas leak must occur to cause such an explosion; whose responsibility it would be to detect such a gas leak into the basement of the building, the property owner's or the gas company's; and what is the general and accepted standard of inspection or maintenance of gas pipelines. Mr. Kienle, a Senior Supervisor for Keyspan National Grid, testified at his deposition on April 3, 2008 that he did not know whether from 1998 until the date of the incident the Keyspan defendants did any work on the subject pipe or whether it had been performed previously by LILCO. He also testified that routine maintenance consisted of replacing leaking pipelines and moving pipelines when there is a road widening.

Contrary to plaintiff's assertions, the February 8, 2011 order in the Buurma action cited by plaintiff has no collateral estoppel effect on plaintiff's motion for summary judgment. That action involved a gas fueled heating system located in the decedent's home; Keyspan Energy Corp. and Keyspan Gas East Corporation d/b/a Keyspan Energy Delivery Keyspan Energy Corp. were not defendants in that action; the Keyspan defendants in that action were the movants for summary judgment; and the order made no final determination concerning the inter-relationship of various Keyspan subsidiaries or any adverse determination on "control and management." In addition, any stipulation admitting liability by the Keyspan defendants in related cases has no binding effect in this action inasmuch as it was not a final, binding decision on the issue of liability by the Court (*see* ***Breslin Realty Dev. Corp. v Shaw***, *supra*). Plaintiff Schneider's burden on her motion for summary judgment herein is different than that of the defendants and plaintiff must meet her burden prior to defendants. Thus, plaintiff's argument that the Keyspan defendants failed to submit any affidavits from corporate officers in opposition to the motion is unavailing. Plaintiff Schneider's submissions raise issues of fact for determination by a jury (*see* ***Laughlin v New York Power & Light Corp.***, *supra*). Therefore, in light of plaintiff's failure to make a prima facie showing on the issue of liability of the

Keyspan defendants, her motion for summary judgment is denied in its entirety, regardless of the sufficiency of the Keyspan defendants' opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*).

The Keyspan defendants request an order pursuant to CPLR 3121 and CPLR 3124 compelling plaintiff Schneider to submit to a mental examination by the physician previously designated or, in the alternative, pursuant to CPLR 3126 prohibiting plaintiff from introducing evidence of her mental condition at trial. They assert that the records they obtained from plaintiff's treating psychologist, Dr. Antonelli, were illegible and that they needed her narrative report to conduct the psychiatric examination, which report they did not receive until October 2010.

Plaintiff Schneider opposes the request as untimely and prejudicial and her submissions in opposition include the preliminary conference order of October 5, 2006 (Tanenbaum, J.).

The submissions indicate that the Keyspan defendants obtained Dr. Antonelli's narrative report dated October 6, 2010, then sought to depose her, which was denied by order of the Court dated April 8, 2011 (Tanenbaum, J.). Thereafter, counsel for the Keyspan defendants sent a letter dated May 12, 2011 to plaintiff' counsel indicating that they designated a psychiatrist pursuant to 22 NYCRR § 202.17 to examine plaintiff at a time and place to be arranged by the parties. Four days later the parties attended the certification conference and executed the attached stipulation.

Here, the Keyspan defendants did waive their right to conduct a psychiatric examination of the plaintiff Schneider by their failure to arrange for such an examination within the 45-day time period following her deposition set forth in the preliminary conference order (*see* ***Schenk v Maloney***, 266 AD2d 199, 697 NYS2d 332 [2d Dept 1999]). The Keyspan defendants failed to serve a notice of psychiatric examination pursuant to CPLR 3121 and 22 NYCRR § 202.17 (a) prior to requesting the medical records of plaintiff's treating psychologist by letter dated June 27, 2007 pursuant to 22 NYCRR § 202.17 (b) or within 45 days after plaintiff's February 11, 2008 deposition. Thus, there was no indication until four days prior to the certification conference on May 16, 2011 that the Keyspan defendants intended to conduct a psychiatric examination of plaintiff Schneider. The Court in its April 8, 2011 order determined that the affidavit dated October 6, 2010 of plaintiff's treating psychologist provided sufficient information as would be contained in a narrative report and substantially provided the information sought by the defendants concerning expert discovery (*see id.*). However, said determination did not excuse defendants' delay in serving a notice of psychiatric examination. Therefore, the request of the Keyspan defendants to compel plaintiff Schneider to submit to a mental examination is denied in its entirety.

Dated: April 16, 2012
Central Islip, NY

HON. HECTOR D. LASALLE, J.S.C.

____ FINAL DISPOSITION **__X__ NON-FINAL DISPOSITION**