221 E. 50th St. Owners, Inc. v Efficient Combustion & Cooling Corp.
2018 NY Slip Op 33160(U)
December 10, 2018
Supreme Court, New York County
Docket Number: 155137/2017
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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221 EAST 50TH STREET OWNERS, INC.,

Plaintiff,

- against -

Index No. 155137/2017

EFFICIENT COMBUSTION and COOLING CORP. and PETROLEUM TANK CLEANERS LTD.,

Decision and Order

Defendants.

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HON. PAUL A. GOETZ, J.:

This action arises from an oil leak in a tank located in plaintiff's basement. Plaintiff alleges that defendant Efficient Combustion and Cooling Corp. (ECC), and its subcontractor, defendant Petroleum Tanks Cleaners Ltd. (PTC), improperly drained the plaintiff's oil tank and failed to inspect it and test it before it was refilled, thereby causing an oil spill. In the complaint, plaintiff asserts causes of action under Navigation Law §§ 176 and 181, as well as claims for breach of contract and negligence. Plaintiff also seeks a declaratory judgment declaring that defendants are wholly responsible for the costs associated with cleaning the oil spill. Plaintiff now moves for an order pursuant to CPLR 3212 for partial summary judgment as to liability against defendants and for a default judgment against defendant PTC. ECC opposes plaintiff's motion and cross-moves to strike plaintiff's complaint pursuant to CPLR 3126 and the common law doctrine of spoliation. PTC also opposes plaintiff's motion and cross-moves for an order pursuant to CPLR 3126 and the common law doctrine of spoliation to dismiss plaintiff's complaint and all cross claims against it and pursuant to CPLR 2004 and 3012 (d) compelling plaintiff to accept late service of its answer.

BACKGROUND

Plaintiff owns the building and property located at 221 East 50th Street, New York, New York (the property). The property's heating system operated on #4 fuel oil, which was stored in a 4,000-gallon tank located in the basement level (*see* plaintiff's notice of motion, Clayton aff, ¶ 4). On December 1, 2015, plaintiff entered into a written agreement with ECC (the Agreement) to convert the property's existing heating system to a system capable of operating on both natural gas and #2 fuel oil (*see* plaintiff's notice of motion, Santamarina affirmation, exhibit E [Agreement]). The purpose of the conversion was to make the property's heating system more environmentally friendly and energy efficient (*see* Clayton aff, ¶ 5).

ECC hired PTC as a subcontractor to drain the #4 oil from the property's oil tank, then clean, test, and inspect the tank (*see* Clayton aff, ¶ 7). On or about May 26, 2016, PTC drained the oil tank of #4 oil (*see id.*, ¶ 10). Then, an oil supplier pumped 2,000 gallons of #2 oil into the tank (*id.*, ¶ 11). On or about May 31, 2016, ECC observed that there had been an oil spill as all the #2 oil had leaked from the oil tank into the soil and other parts of the property (*see id.*, ¶ 12; Santamarina affirmation, exhibit G). The oil spill spread to the adjacent property located at 825 3rd Avenue, New York, New York (*see* Clayton aff, ¶ 12). Plaintiff alleges that it conducted investigation, cleanup and removal of the oil spill, and has incurred substantial costs and expenses (*see* Clayton aff, ¶ 17; Santamarina affirmation, exhibit I).

On June 5, 2017, plaintiff commenced this action against defendants. On January 17, 2018, PTC filed a third-party complaint against Original Energy (Original), which is the entity that filled the oil tank with 2,000 gallons of #2 oil before the oil spill (*see* PTC's notice of cross motion, Larkin affirmation, exhibit D). PTC's third-party complaint alleges that Original improperly filled the tank, which caused it to leak (*see id.*).

DISCUSSION

Plaintiff's Summary Judgment Motion

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Plaintiff moves for partial summary judgment as to liability on its first cause of action pursuant to section 181 (1) of the Navigation Law which provides that "[a]ny 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" (Nav. Law § 181). "Discharge" is defined, in relevant part, as "any intentional or unintentional action or omission resulting in the releasing, spilling [or] leaking . . . of petroleum . . ." (Nav. Law § 172[8]). A party will be strictly liable as a discharger under section 181(5) if they "set in motion the events which resulted in the discharge" (*see Domermuth Petroleum Equip. & Maintenance Corp. v. Herzog & Hopkins, Inc.*, 111 AD2d 957, 957, 959 [3d Dept 1985]). Property owners are considered dischargers for purposes of the Navigation Law because they are presumed to have

control over "potential sources of contamination" (*see State v Green*, 96 NY2d 403, 407 [2001]). The Court of Appeals recognizes that "[a]lthough even faultless owners of contaminated lands have been deemed 'dischargers' for purposes of their own section 181 (1) liability, where they have not caused or contributed to (and thus are not 'responsible for') the discharge, they should not be precluded from suing those who have actually caused or contributed to such damage" (*White v Long*, 85 NY2d 564, 569 [1995]).

Defendants oppose plaintiff's motion arguing that plaintiff's motion is premature as no discovery has been conducted. "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" (*Amico v Melville Volunteer Fire Co.*, 39 AD3d 784, 785 [2d Dept 2007] [internal citations omitted]). "A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated" (*Matter of Fasciglione*, 73 AD3d 769, 770 [2d Dept 2010] [internal citations omitted]; *see also Liggins v Daly II Associates*, 278 AD2d 107 [1st Dept 200]). "This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Nicholson v Bader*, 83 AD3d 802, 802 [2d Dept 2011] [internal quotation marks and citations omitted]). Furthermore, it would be premature to grant summary judgment on the issue of liability when no depositions have been held (*see Hirsch v Greenridge Assocs., LLC*, 26 AD3d 411, 412 [2d Dept 2006]).

Here, it is undisputed that no discovery had been conducted prior to plaintiff filing its motion for partial summary judgment. Plaintiff filed its complaint on June 5, 2017 (*see* Santamarina affirmation, exhibit A). ECC filed its answer on July 10, 2017 (*see* Santamarina affirmation, exhibit B). On the same date, ECC served on plaintiff discovery demands, including

but not limited to a demand for a verified bill of particulars, a notice for discovery and inspection, a notice of deposition, and combined demands (*see* ECC's notice of cross motion, Bieder affirmation, exhibit A). Plaintiff did not respond to ECC's discovery demands and instead filed a motion for partial summary judgment.

Moreover, there are questions of fact as to which party "set in motion the events which resulted in the discharge" and /or "actually caused or contributed to [the] damage" (*Domermuth*, 111 AD2d at 957; *White v Long*, 85 NY2d at 569). Defendant ECC has raised triable issues of fact with respect to its role in discharging the oil and in whether plaintiff caused or contributed to the oil spill. For example, ECC alleges that it was not responsible for the delivery of #2 oil nor was it at the property between the date of oil delivery on May 26, 2016 and the date the oil spill was discovered on May 31, 2016 (*See* Bieder affirmation, exhibit C). ECC further alleges that the superintendent of the property called ECC on May 31, 2016 to determine why the boiler was not running (*see id.*). No discovery has been provided as to what occurred at the property during the period between the oil delivery and the discovery of the spill, what maintenance was performed, what responsibilities did the superintendent or anyone else have to inspect and maintain the area where the oil tank was located, who delivered the oil, what precautions were taken to deliver the oil, and what did any representative of plaintiff do to confirm that the oil was secured upon delivery.

Defendant PTC has also raised triable issues of fact with respect to its role and plaintiff's role in discharging the oil. PTC alleges that when it left the tank on May 26, 2016, the tank had just passed pressure sensor testing, water sensor testing, and acoustic testing under criteria set by the U.S. Environmental Protection Agency (*see* PTC's notice of cross motion, Larkin affirmation, exhibit E). Plaintiff submitted an unsworn report by Alan Fidellow, an engineer of

Levine Fidellow Consulting Inc., in which Fidellow opined that PTC should be held accountable for the oil spill because it "should have properly tested and inspected the tank prior to the introduction of #2 oil" (*see* Santamarina affirmation, exhibit J at 2). Since Fidellow's report is not in admissible form it may not be considered (*Accardo v. Metro-North R.R.*, 103 A.D.3d 589 [1st Dep't 2010]). Even if Fidellow's report had been in admissible form, he did not identify how he reached the conclusion that PTC should be held accountable for the spill as he did not identify any procedures for cleaning and testing oil tanks or describe how PTC departed from any procedures nor did he cite to any codes or statutes or explain how PTC may have violated them.

PTC further alleges that between the time it performed the cleaning and testing and the oil spill, ECC, Original, and plaintiff had access to the oil tank. However, without any discovery or depositions, PTC does not have any information about what may have occurred after it tested the oil tank. In addition, PTC filed a third-party complaint against Original, the company that filled the oil tank with #2 oil and which may have information pertinent to the cause of the oil spill. Since there are triable questions of fact, plaintiff's branch of the motion for partial summary judgment on its first cause of action pursuant to section 181 of Navigation Law must be denied.

Plaintiff further argues that even if it was partially responsible for the oil spill, it would still be entitled to partial summary judgment on its second cause of action pursuant to section 176 (8) of the Navigation Law. Section 176 (8) provides that "every person providing cleanup, removal of discharge of petroleum or relocation of persons pursuant to this section shall be entitled to contribution from any other responsible party" (Nav. Law § 176[8]). However, because no discovery was completed before plaintiff filed its motion, whether plaintiff is entitled

to contribution cannot be determined at this time. Therefore, this branch of plaintiff's motion must also be denied.

Plaintiff also moves for partial summary judgement as to liability on its third cause of action for breach of contract. Plaintiff alleges that ECC breached their contract by failing to properly install, service, maintain, inspect or handle plaintiff's heating system. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009], *affd* 14 NY3d 901 [2010]). However, plaintiff fails to establish a breach as the Agreement does not state that ECC is responsible for the oil tank. Section 18 of the Agreement states, "It is understood and agreed that this agreement . . . does not include any repairs or alterations to the Owners existing apparatus which specifically includes but not limited thereto . . . fuel tanks" (Agreement, § 18). Section 24 of the Agreement provides as follows:

> "IT IS UNDERSTOOD AND AGREED BY AND BETWEEN THE OWNER AND [ECC] THAT THIS CONTRACT DOES NOT INCLUDE THE REMOVAL, REPLACEMENT, UPGRADE OR REPAIRING OF THE EXISTING OIL TANK. IT IS FURTHER UNDERSTOOD AND AGREED THAT THE OWNER SHALL (BE) SOLELY RESPONSIBLE FOR THE TANK IN IT[S] CONDITION"

(Agreement, § 24). The plain language of the Agreement states that the owner, here plaintiff, is responsible for the condition of the oil tank, and that ECC is not responsible for the oil tank. Therefore, that portion of plaintiff's motion for partial summary judgment as against ECC for breach of contract must be denied.

Plaintiff also moves for summary judgment as against defendants on its fourth and fifth causes of action for common law negligence and declaratory judgement respectively. On a cause of action for negligence that is premised on acts performed by a defendant pursuant to a contract, the plaintiff must establish that the defendant violated a legal duty separate and independent of the contract (*see Clark-Fitzpatrick, Inc. v Long Island Rail Road Co.*, 70 NY2d 382 [1987]). "Declaratory judgment is a remedy that may be granted as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR 3001). Plaintiff argues that there are no disputed issues of fact to be tried as to the negligence and declaratory judgment claims. However, as previously stated, there are issues of fact and the motion is premature as no discovery had been completed before plaintiff filed its motion. Therefore, that portion of plaintiff's motion for partial summary judgement on its negligence and declaratory judgment causes of action as against defendants must be denied.

Cross-Motions For Sanctions

Pursuant to CPLR 3126 and the common law doctrine of spoliation, ECC cross moves for an order striking plaintiff's complaint and PTC cross moves for an order dismissing the action and all cross claims as against it. "Spoliation is the destruction of evidence" (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]). "Under the common-law doctrine of spoliation, when a party negligently loses or intentionally destroys key evidence, the responsible party may be sanctioned under CPLR 3126" (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713-714 [2d Dept 2013] [internal citations and quotation marks omitted]). "Spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before his or her adversary had an opportunity to inspect them" (*Abar v Freightliner Corp.*, 208 AD2d 999, 1001, [3d Dept1994] [internal citations

omitted]; *see also Hennessey v Restaurant Assoc., Inc.*, 25 AD3d 340 [1st Dept 2006]). "The Supreme Court has broad discretion in determining what, if any, sanction should be imposed for spoliation of evidence" (*Lentz v Nic's Gym, Inc.*, 90 AD3d 618, 618 [2d Dept 2011]).

In support of their respective cross motions, defendants argue that the property's oil tank constitutes a key piece of evidence that plaintiff destroyed before defendants had an opportunity to inspect it, which completely deprived them of the ability to defend themselves in this action. "The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to prove its claim or defense" (*Morales v City of New York*, 130 AD3d 792, 793 [2d Dept 2015] [internal citations and quotation marks omitted]). "However, striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct and, thus, the courts must consider the prejudice that resulted from the spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (*id.* at 794 [internal citations and quotation marks omitted]). Here, it would be premature for the court to impose the sanctions requested without giving plaintiff and defendants an opportunity for discovery to see whether plaintiff's destruction of the tank actually deprives defendants of their ability to defend themselves in this action. Therefore, the branches of the cross motions of ECC and PTC based on CPLR 3126 and the common law doctrine of spoliation are denied without prejudice.

Plaintiff's Motion for a Default Judgment and PTC's Cross-Motion to Compel Acceptance of its Answer

Plaintiff moves for a default judgment as against PTC for its failure to serve an answer. PTC opposes plaintiff's motion for a default judgment as against it and cross-moves pursuant to CPLR 2004 and CPLR 3012 (d) to compel plaintiff to accept late service of its answer. CPLR 2004 states "[e]xcept where otherwise expressly prescribed by law, the court may extend the

time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." CPLR 3012 (d) provides "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." PTC has provided a reasonable excuse for its delay. PTC alleges that it never received a copy of the complaint because although plaintiff mailed a copy to 236 Butler Street Brooklyn, NY 11217, PTC did not occupy this premises after plaintiff commenced this action on June 5, 2017 (*see* Larkin affirmation, exhibit K, ¶ 19). PTC further alleges that it learned of the action through ECC's counsel, submitted its answer, and plaintiff never rejected the answer. Also, plaintiff has not opposed this branch of PTC's cross motion. Therefore, that portion of plaintiff's motion for a default judgment as against PTC must be denied and that portion of PTC's cross motion pursuant to CPLR 2004 and CPLR 3012 (d) to compel plaintiff to accept late service of its answer must be granted.

Any remaining arguments not addressed above have been considered and found to be unpersuasive.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's summary judgment motion is denied in its entirety; and it is further

ORDERED that the cross motions of defendant Efficient Combustion and Cooling Corp. pursuant to CPLR 3126 and the common law doctrine of spoliation to strike the complaint are denied without prejudice; and it is further

ORDERED that defendant Petroleum Tanks Cleaners Ltd.'s cross motion pursuant to CPLR 2004 and CPLR 3012 (d) to compel plaintiff to accept late service of its answer is granted, and the motion is otherwise denied; and it is further

ORDERED that the parties shall appear for a compliance conference on January 17, 2019 at 9:30 AM. 80 Centre St. Room 320

Dated: 12/10/18

ENTER:

J.S.C.