SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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ANDREY TARASENKO and PATRICIA TARASENKO,

Plaintiff,

DECISION AND ORDER
(Motions # 2 AND #3)

-against-

Index No.: 030894/2015

EVCO MECHANICAL CORP. and MONSEN ENGINEERING COMPANY,

Defendants.
----------X
Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 14, were considered in connection with (i) Defendant EVCO MECHANICAL CORP's (hereinafter "Evco") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in its favor, dismissing the action against it and all cross-claims (Motion #2); and (ii) Defendant MONSEN ENGINEERING COMPANY INC.'s (hereinafter "Monson") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, granting summary judgment in its favor, dismissing the Complaint and all cross-claims (Motion #3):

PAPERS	**NUMBERED**
Motion #2	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-Q"	1-2
MEMORANDUM OF LAW IN OPPOSITION/AFFIRMATION IN OPPOSITION/ AFFIDAVIT OF VINCENT PICI, P.E./AFFIDAVIT OF ANDREY TARASENKO/ EXHIBITS "1-22"	3-6
AFFIRMATION IN REPLY/EXHIBITS "A-B"	7
Motion #3	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS "A-F"	8-9
MEMORANDUM OF LAW IN OPPOSITION/AFFIRMATION IN OPPOSITION/ AFFIDAVIT OF ANDREY TARASENKO/AFFIDAVIT OF VINCENT PICI, P.E./ EXHIBITS "1-18"	10-13

AFFIRMATION IN REPLY 14

Upon the foregoing papers, the Court now rules as follows:

This action was commenced by Plaintiff seeking monetary damages for personal injuries in the nature of thermal and chemical burns, sustained on February 1, 2013 through February 3, 2014, during the course of his employment as a mechanical technician at Tolstoy Foundation Rehabilitation and Nursing Center ("Tolstoy"). It is alleged that Plaintiff sustained these injuries when he was exposed to hot water from the boiler system's expansion tank when the pressure relief valve blew, discharging hot water and chemicals into the sub-basement, which Plaintiff was charged with draining as well as getting the heat back on in the facility.

In 2000, Defendant Evco removed the existing boilers and installed two new boilers, each two million BTUs, as well as the associated piping, pumps, and electrical connections. After the installation of the boilers, Defendant Evco continued to perform preventative service and maintenance on the boilers, for many years. In June 2010, Evco entered into a three year service contract for Tolstoy's boilers which also required Evco to service the boiler's associated parts and components, including the expansion tank, and make sure all work complied with all applicable codes. Defendant Evco asserts that in 2011 that contract was cancelled, however, there is a factual dispute as to whether it nonetheless continued to perform inspections and service the boilers during the years 2011-2013, based upon invoices and testimony. Defendant Monson, who went out of business in 2015, had a preventative maintenance contract with Tolstoy in 2013, although its principal testified that it began doing work at the facility a couple of years before Plaintiff's accident. Plaintiff alleges that Defendants were negligent and careless in the installation/addition of new boilers to the subject premises and negligent in failing to maintain, inspect, repair, and service the boiler and heating system in a safe manner.

Defendant Evco moves for summary judgment and dismissal of the Complaint and all cross-claims. Evco argues that it performed its installation work according to the plans/drawings provided to them by Tolstoy, as prepared by a licensed engineer. It provides a copy of the architectural drawings but no expert affidavit attesting to the fact that the installation was in accordance with the plans. Defendant Evco argues that it cannot be held liable for the alleged negligent defective installation where it merely followed the plans prepared by the engineer. Additionally, they argue that the complaint must be dismissed because its installation work occurred 13 years prior to the accident and is therefore too remote in time to ascribe liability. Lastly, Defendant Evco argues that the Complaint must be dismissed because Evco was not negligent, did not have a duty to plaintiff and did not perform its work in a negligent manner. With respect to the issue of duty, Defendant Evco argues that its maintenance contract was terminated more than a year prior to Plaintiff's accident; it did not launch a force or instrument of harm on the subject premises with respect to their installation of the boilers and it did not displace the owner's duty to maintain the boilers since Tostoy had their own employees who serviced and maintained the boiler system and expansion tank on a daily basis.

In opposition to Defendant Evco's motion for summary judgment, Plaintiff submits the expert affidavit of Vincent Pici, a mechanical engineer who has overseen the construction, operation and maintenance of hospital boiler systems. Mr. Pici opines that Defendant Evco deviated from the plains by failing to install the additional expansion tank indicated on the drawing and further deviated from accepted standards of engineering and plumbing by failing to take measure to upgrade the existing expansion tank or add an additional expansion tank. It is his opinion that by failing to provide additional expansion capacity, and by failing to install an appropriately sized pressure relief valve, Evco created a recurring dangerous condition, and launched an instrument of harm in that it created an

over pressurized heating boiler system. Additionally, Mr. Pici opines that by failing to correct the improper means of discharging the heated water from the pressure relief valve, of which they were aware, Evco deviated from accepted plumbing and engineering practice, as well as Code and manufacturer's installation guidelines. Plaintiff also contends that all of the plumbing work on the boilers was completely delegated to Evco and Monson because while Tolstoy employees performed inspections, if they found something wrong, the repair work was to be done by those entities.

Defendant Monson also moves for summary judgment and argues that as an independent contractor, it is not liable to Plaintiff. It argues that it did not launch a force or instrument of harm because Plaintiff claims that the boiler system existed in a dangerous and defective conditions since the installation of new boilers, and Monsen did not design or install the new boiler system. Monsen claims that Plaintiff did not detrimentally rely on Monsen since the Monsen technician told him that replacement of the tank and valve was Evco's responsibility as the entity that installed the new boilers. Lastly, Monsen claims that it did not "entirely displace" Tolstoy's duty to maintain the premises since Monsen did not have exclusive control over the boiler system or a full-service maintenance and repair contract.

In opposition to Monsen's summary judgment motion, Plaintiff notes that Monsen did not produce its preventative maintenance contract with Tolstoy or any other documents related to their relationship with Tolstoy, as its principal testified that all of their documents were "thrown away," in the summer of 2016 and maintenance reports would be in the "garbage, shredded or recycled." Plaintiff asserts that because the action was commenced on March 2, 2015, and Defendant was served on March 11, 2015, Monsen destroyed all of their records despite actual knowledge that the case was pending and as such, there should be an adverse inference charge.

In reply, with respect to the spoliation issue, Monsen argues that it vacated its

offices in May 2016, and relinquished all of its documents and computer equipment to the bankruptcy trustee and had no knowledge as to the records whereabouts after that. It claims that although Plaintiff originally commenced this action in June 2015, the claims were dismissed because Monsen had filed bankruptcy before the suit was commenced. It was only after Plaintiff sought leave from the bankruptcy court to proceed, was the Complaint later amended and served upon defense counsel.

Plaintiff also opposes the summary judgment motion on the ground that Tolstoy detrimentally relied on Monsen to maintain the boilers and its associated systems in a safe manner and to correct installation defects, thus raising triable issues of fact as to whether Monsen displaced Tolstoy's duties to maintain the boilers and do plumbing work. Plaintiff points out that Tolstoy employees did not self perform plumbing work in connection with the boilers, as they did not have a license to do so. Additionally, as part of the maintenance of the boilers which was undertaken by Monsen, it is alleged that Monsen was responsible to correct the over pressurization condition, to install a correctly sized pressure relief valve, and to remove the garden hose and hard pipe the discharge to right above the floor drain, all of which Plaintiff claims Tolstoy relied upon Monsen to do.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party

opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const. Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

In order to establish a prima facie case of negligence, the plaintiff must show that the defendant owed a duty to the plaintiff and that duty was breached. Solomon v. New York, 66 N.Y.2d 1026, 499 N.Y.S.2d 392 (1985). With respect to a third-party contractor, the general rule is that such contract does not give rise to a duty, on the part of the contractor, to use reasonable care to prevent foreseeable harm to residents or visitors to the property. Roach v. AVR Realty Company, 41 A.D.3d 821, 639 N.Y.S.2d 173 (2d Dept. 2007). However, there are three exceptions to that general rule: (1) where the contractor failed to use reasonable care in the performance of its duties, thereby launching a force or instrument of harm; (2) where the plaintiff detrimentally relies upon the continued performance of the contractor's duties; or (3) where the contractor displaced the property owner's duty to maintain the premises in a reasonably safe condition. Id. With regard to the first exception, a contractor may be liable for an affirmative act of negligence which results in the creation of a dangerous condition. Losito v. City of New York, 38 A.D.3d 854, 855, 833 N.Y.S.2d 564 (2d Dept. 2007).

With regard to Defendant Evco's summary judgment motion, it is the Court's determination that same must be denied as there are triable issues of fact as to whether

Evco launched an instrument of harm as a result of its installation of the boiler system and whether there was detrimental reliance with respect to the maintenance of the boilers. With respect to the installation, through the affidavit of Mr. Pici, Plaintiff has demonstrated a triable issue of fact as to whether Evco deviated from the plains by failing to install the additional expansion tank indicated on the drawing and further deviated from accepted standards of engineering and plumbing by failing to take measure to upgrade the existing expansion tank or add an additional expansion tank.

Additionally, there are triable issues of fact as to whether the failure to provide additional expansion capacity, and the failure to install an appropriately sized pressure relief valve, created a recurring dangerous condition, and launched an instrument of harm in that it created an over pressurized heating boiler system. This Court does not find the installation of the boilers in 2000 to be too remote in time with respect to the accident, particularly where as here, there appears to have been continued maintenance performed by Evco up to the time of the occurrence.

Defendant Monsen's summary judgment must also be denied as there are triable issues of fact as to whether Plaintiff detrimentally relied upon the continued performance of the contractor's duties. As part of the maintenance of the boilers which was undertaken by Monsen, there are triable issues of fact as to whether Monsen was responsible to correct the over pressurization condition, to install a correctly sized pressure relief valve, and to remove the garden hose and hard pipe the discharge to right above the floor drain, and whether Tolstoy detrimentally relied upon them to do so, particularly where, as here, none of its employees had a plumber's license to perform such tasks.

As to whether Plaintiff is entitled to an adverse inference charge with respect the destruction of the contract and maintenance documents, said determination is left to the trial Judge. The Court notes, however, that "once a party reasonably anticipates litigation, it

must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." VOOM HD Holdings, LLC v. Echo Star Satellite LLC, 93 A.d.3d 33, 41, 939 N.Y.S.2d 321 (1st Dept. 2012). There seems to be little question, notwithstanding its bankruptcy filing, that once Defendant was served with process in March, 2015, that it was on notice of the Plaintiff's claims and the need to retain relevant documentation. It was not until May 2016, more than a year later, that Monsen's computers were allegedly removed by the bankruptcy trustee. Defendant Monsen has offered no explanation why, during that time period, it undertook no actions to preserve the relevant documents.

Accordingly, it is hereby

ORDERED the Notice of Motion filed by Defendant Evco Mechanical Corp. for summary judgment and dismissal of the Complaint and all cross-claims against it (Motion #2) is DENIED; and it is further

ORDERED that the Notice of Motion filed by Defendant Monsen Engineering Company for summary judgment and dismissal of the Complaint and any cross-claims (Motion #3) is DENIED; and it is further

ORDERED that the parties are directed to appear in the Trial Readiness Part on **WEDNESDAY, JANUARY 30, 2019, at 9:30 a.m.**

The foregoing constitutes the Decision and Order of this Court on Motions #2 and #3.

Dated: New City, New York
December 31, 2018

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties via -NYSCEF-