

Scholastic, Ins. v Pace Plumbing Corp.

2013 NY Slip Op 31895(U)

August 5, 2013

Supreme Court, New York County

Docket Number: 115155/08

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

SCHOLASTIC, INC.,
Plaintiff,

Index No.: 115155/08

- v -

Motion Date: 01/18/13

PACE PLUMBING CORP., PJP MECHANICAL
CORP., P.J. MECHANICAL CORP., LUNA
MECHANICAL, INC., LUNA MECHANICAL
ENTERPRISES, INC, and LUNA MECHANICAL
& SONS, INC.,

Motion Seq. No.: 04

Defendant.

FILED

AUG 14 2013

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s).	1, 2
Answering Affidavits - Exhibits	No (s).	3
Replying Affidavits - Exhibits	No (s).	4
Sur Replying Affidavits		5

Cross-Motion: Yes No

This subrogation action arises from flooding, which damaged plaintiff Scholastic(Scholastic) Inc.'s building (Building), located at 557 Broadway in Manhattan, on June 1, 2006. The flooding resulted when a Victaulic coupling (coupling), securing a section of four-inch diameter piping to a 90-degree elbow in the ceiling of the first floor of the Building, became loosened and the piping separated. Defendant Pace Plumbing Corp. (Pace) had installed the coupling.

Pace now moves, pursuant to CPLR 3212 (a), for summary judgment dismissing the complaint. Pace argues that: (1) the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED
 GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

action is time-barred; (2) there is no evidence of negligence on its part; and (3) the complaint must be dismissed, because plaintiff is responsible for spoliation of evidence, inasmuch as Scholastic failed to preserve the coupling.

The statute of limitations is an affirmative defense that is waived if it is raised neither in the defendant's answer, nor in its pre-answer motion to dismiss. CPLR 3211 (e); Horst v Brown, 72 AD3d 434 (1st Dept 2010). Pace contends that Scholastic's complaint is governed by the six-year statute of limitations governing breach of contract claims (CPLR 213 [2]), and that therefore the action is untimely, because it was commenced more than six years after the Building was completed. Pace asserts that it did raise this defense in its answer. Scholastic argues that the three-year limitations period set forth for claims sounding in negligence (CPLR 214 [4]) controls; that the action is timely, because it was commenced less than three years after the Building was damaged by the flooding; and that Pace failed to give proper notice of its statute of limitations defense.

CPLR 3013 provides that statements in a pleading "shall be sufficiently particular to give the court and parties notice of ... the material elements of each cause of action or defense." CPLR 3014 provides that "[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs. ...

Separate causes of action or defenses shall be separately stated and numbered." CPLR 3018 (b) provides that, when pleading affirmative defenses, "[a] party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise ... [including] statute of limitation".

After setting forth 14 affirmative defenses in properly separate and numbered paragraphs, Pace set forth the following 15th affirmative defense:

"That the answering defendant not being fully advised as to all the facts and circumstances surrounding the incident complained of hereby asserts and reserves onto [sic] itself the defenses of accord and satisfaction, arbitration and award, discharge of bankruptcy, duress, estoppels, failure of consideration, fraud, illegality, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or an affirmative defense which further investigation of this matter may prove applicable herein."

Such alphabetical list of wholly conclusory defenses fails to comply with CPLR 3013, or CPLR 3014, and therefore fails to give Scholastic adequate notice that a statute of limitations defense is being alleged, let alone any notice of which statute of limitations Pace relies upon. See *Colleran v Rockman*, 232 AD2d 322 (1st Dept 1996); *Freemont Inv. & Loan v Sessions*, 21 Misc 3d 1121[A], *5, 2008 NY Slip Op 52132[U] (Sup Ct, Kings County 2008) citing *Foley v D'Agostino*, 21 AD2d 60 (1st Dept 1964). Moreover, the defenses listed are not even asserted, but are expressly set

forth only potentially, to be raised if subsequently found to be applicable. In these circumstances, the court does not hesitate to hold that Pace has waived the defense of untimeliness.

Pace argues that Scholastic has not been prejudiced, because, no matter how clearly the affirmative defense might have been pled, Scholastic could not retroactively commence this action at an earlier time. That argument is wholly unpersuasive. It is always the case that, once litigation has commenced, the facts preceding the litigation cannot be changed. The rules governing pleadings bear on the conduct of the litigation. Here, had Scholastic been given adequate notice that Pace would rely on the six-year limitations period, it would have had notice to seek discovery with respect to the factual basis for such affirmative defense.

It is undisputed that the loosening of the coupling, and the consequent separation of the piping that the coupling had secured, was the cause of the flooding in the Building. Victaulic couplings are affixed to each of the pipes that they secure, by means of two nuts and bolts on each side of the pipes. Photographs of the coupling, that Scholastic took before it was removed, show a number of threads on one of the bolts indicating that it was not fully locked down. Scholastic demonstrates that the coupling was lost in the course of the emergency clean-up and repair work, after nonparty Gary Long placed it in ankle-deep

water below the ladder that he was using, lest it fall and cause injury. Mr. Long was employed by nonparty PAR, The Plumbing Mechanical Fire Protection Company (PAR), which Scholastic hired to repair the plumbing, but whose work, Scholastic asserts without dispute, it did not control.

Pace's expert witness, Philip Sharff, P.E., states in his affidavit that the approximately six-year interval between Pace's installation of the piping and the failure of the coupling is consistent with proper installation, because an improperly installed coupling would be more likely to fail immediately; a coupling can fail because of a hidden defect in the coupling material; and, because the coupling was lost, it is impossible to determine whether, indeed, the coupling failed due to an improper installation and/or a defect in the manufacture of the coupling.

In its opposition to Pace's motion, Scholastic submits an unsworn report from its expert, Julius A. Ballanco. After Pace submitted its reply papers, arguing that Scholastic had submitted no admissible evidence of negligence on Pace's part, Scholastic submitted Mr. Ballanco's affidavit, which is identical in content to his unsworn report, whereupon the undersigned adjourned the matter and allowed Pace to submit a reply affidavit from Mr. Sharff.

Mr. Ballanco states that "[e]mployees of Pace apparently did not tighten the bolt correctly on the failed

coupling." (emphasis added). Speculative expert testimony, such as that of Mr. Ballanco, is insufficient to raise an issue of fact. Morrissey v New York City Tr. Auth., 100 AD3d 464 (1st Dept 2012); Lau v Wan, 93 AD3d 763 (2d Dept 2012). Moreover, Mr. Ballanco's conclusion is based, in part, upon his incorrect premise that the invoice that PAR issued to Scholastic stated "retorqued Victaulic couplings as necessary," establishes that the three other Victaulic couplings that Pace had installed were loose. He states that such looseness indicates that the bolts on the couplings were not properly tightened when they were initially installed. However, Mr. Long, who actually performed the work listed in the invoice, testified that he examined the three other Victaulic couplings, and that none of them needed to be tightened.

Finally, with respect to the other basis for Mr. Ballanco's conclusion that he excluded all the possible causes of the failure of the coupling, other than an improper initial installation, his conclusion fails to address Mr. Sharff's point about the six-year interval between the installation of the coupling and its failure. While Mr. Ballanco states that there is no evidence of a defect in the coupling (as indeed there cannot be, inasmuch as plaintiff failed to retain the coupling), he does not dispute that the coupling may have been manufactured defectively and that the six year interval tends to show there

was no negligence in the installation. Accordingly, his affidavit fails to offer any evidence that refutes Scholastic's prima facie defense that a manufacturing defect cannot be excluded as the sole cause of the flooding. See Moore v Almanzar, 103 AD3d 415 (1st Dept 2013) (plaintiff's expert's affidavit failing to discuss points made by defendant's expert insufficient to raise issue of fact); Mirdita v Ash Leasing Inc., 101 AD3d 480 (1st Dept 2012) (same). In short, because the coupling was lost on the day of the flooding, Scholastic's expert can do no more than speculate that Pace was negligent.

In view of Scholastic's inability to raise an issue of fact, there is no need for this court to address the issue of a sanction for spoliation of evidence.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendant Pace Plumbing Corp. is granted and the complaint is dismissed as against such defendant with costs as calculated by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: August 5, 2013

ENTER:

FILED

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

AUG 14 2013