SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54M

----------x

HANOVER INSURANCE COMPANY a/s/o HUMAN, LLC,

DECISION AND ORDER

Index No. 151277/15

Plaintiffs,

-against-

EFFICIENT AIR SOLUTIONS, INC., ITS BASHERT, LLC d/b/a SENSES NEW YORK, INC. and SEAVIEW AIR CONDITIONING COMPANY, INC.,

Defendants,

----------x

JENNIFER G. SCHECTER, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition. Efficient Air Solutions, Inc. (EAS) moves for summary judgment pursuant to CPLR 3212 (sequence 002). Seaview Air Conditioning Company, Inc. (Seaview) cross moves to strike EAS' answer and cross-claims and to suppress or strike the deposition testimony of George Herrara (Herrara). Seaview also moves for summary judgment dismissing all claims and cross-claims against it (sequence 003).

## Background

This action involves a fire that occurred on February 11, 2013, at a commercial building located at 138 Fifth Avenue in Manhattan (Building). The Building was owned by 138 NY Realty Corp. (Owner). Owner rented the second floor of the Building

to Its Bashert, LLC d/b/a Senses NY (Senses), a salon.[1] The third floor of the Building was leased to Human, LLC (Human), a recording studio.

Heat, Ventilation and Air Conditioning Unit (HVAC)

Senses' heating, ventilation and air conditioning was provided by way of a ducted heating/cooling system. The heating/cooling system had a single blower motor. The same blower motor would circulate cooled air in the summer and heated air in the winter. The heating component of the system consisted of a gas-fueled duct furnace. The furnace was equipped by the manufacturer with two safety switches. The safety switches were designed to automatically shut down the furnace in response to an adverse temperature condition.

Pursuant to its lease, Senses was responsible for servicing and maintaining the subject HVAC system (Affirmation Support Motion Sequence 003 [Sup 03], Ex O at ¶¶ 31-32; Affirmation in Support of Cross Motion [Sup CM], Ex D at 81). Senses retained both Seaview and EAS to service the HVAC unit.

---

[1] The separate and related action between Owner, Senses, Seaview and EAS (153665/2014) was settled and discontinued (Affirmation in Support Motion Sequence 002 [Sup 02], Ex F). This motion was originally timely but mistakenly filed in that related action. It was subsequently filed under the correct index number and no one now disputes that there is good cause for entertaining the motion.

Work on the HVAC Unit

On January 20, 2009, Seaview responded to Senses' call complaining that there was no heat on the second floor of the Building. Seaview performed work between the second and third floors on the furnace's main gas valve and thermostat and it "furnished and installed parts for the system" (Sup 03, Ex P).

On May 7, 2009, Senses and EAS entered into a service and maintenance agreement (Agreement) (Sup 03, Ex Q). The Agreement provided that EAS would exclusively inspect, repair and replace certain air conditioning parts (*id*). Despite the Agreement, in 2011, EAS inspected and performed mechanical and electrical maintenance on Senses' heating unit, wiring and the blower (Sup 03, Ex R).

The Fire

On February 11, 2013, there was a fire at the Building. Before the fire, Hanover Insurance Company (Hanover), issued an insurance policy to Human. Pursuant to that policy, Hanover paid Human $459,715.42 for damage caused by the fire (Affirmation in Opposition to Motion Sequence 002 [Hanover Opp 02] at ¶ 9).

Post-fire inspections revealed that the furnace components were functioning, the gas valve had been electrically disconnected, the safety switches were

disconnected and a transformer lead for the blower motor was dislodged on the unit because it was improperly connected (Hanover Opp 02 at ¶¶ 12-18, Ex 1).

Experts

James E. Crabtree, a professional engineer, inspected the location of the fire on plaintiff's behalf and attended a destructive examination of the evidence removed from the incident (Hanover Opp 02, Ex 1 [Crabtree Aff] at ¶ 4). Crabtree inspected the manner in which the HVAC system was installed and configured (*id.* at ¶ 5).

Crabtree explained that the heating component of the system consisted of a gas-fueled duct furnace, which was equipped by the manufacturer with two thermal limit safety switches. The safety switches were designed to automatically shut down the furnace if the temperature rose to the level that the limit switch was set to.

Crabtree opined that the fire occurred "because the fan motor ceased to operate during a call for heat (from the thermostat) in the space as the result of . . .[a] transformer lead becoming detached from the electrical lug on the fan motor contactor" (Crabtree Aff at ¶ 20). "With the fan motor stopped, the duct heater continued to operate with no air flow through it . . . the heater housing sufficiently increased in

temperature . . . [and] ignite[d] the wooden structural members above it" (*id.* at ¶¶ 26, 31). To a reasonable degree of engineering certainty, Crabtree concluded that the fire occurred because the thermal limit safety switches that were installed in the furnace at the time of manufacture were disconnected at some point before the fire (*id.* at ¶ 32).

In support of this motion for summary judgment, EAS submitted the affidavit of Evan K. Haynes, a professional engineer and certified fire explosion investigator. Haynes was present at two evidence examinations and noted that there was fire damage to the floor joints above the furnace (Sup 02, Haynes Affidavit [Haynes] at ¶¶ 2-3, 7). He observed that the thermal limits within the furnace were bypassed (*id.* at ¶¶ 9, 12). He further noted that the thermal protection from the factory included a thermostat and thermal fuse located inside of the furnace and that these elements are not readily visible from the exterior of the unit (*id.* at ¶ 13). Haynes opined "to a reasonable degree of engineering certainty, the furnace was the heat source for the fire . . . which ignited the wood floor joists located directly above the furnace" and that "furnace wiring would have had to have been traced within the unit . . . to determine that the internal thermal protection was bypassed" (*id.* at ¶¶ 11, 14).

William P. Nolan, a certified fire explosion and vehicle investigator , submitted an affidavit on behalf of EAS as well (Sup 02, Aff Nolan [Nolan]). He too attended the joint evidence examination. He concluded that the damage to the furnace was consistent with overheating (Nolan at ¶ 9).

Deposition Testimony

George Herrara (EAS)

Herrara was an EAS employee from about 2005 through 2015 (Sup 03, Ex K [Herrara] at 22). He was deposed on April 15, 2016. He testified that he never saw the contract between EAS and Senses and that EAS would service air conditioners (*id.* at 23, 38-39). He explained that to perform certain work on the air conditioner, a cover would have to be removed from the fan coil unit on the side of the blower. He stated that EAS performed work on the blower motor as well as checked for vibration to make sure wires were not loose or broken (*id.* at 46-48, 52-54).

Bruce Conroy (Senses)

Bruce Conroy is the owner of Senses (Sup CM, Ex D at 15). He testified that he only knew Seaview and EAS by name (*id.* at 55-60). He recalled that EAS would "maintain [the] HVAC system" (*id.* at 60-61). When asked whether EAS maintained the heating system as well as the air conditioning system, he

responded that he "didn't think there was a difference" (*id.* at 61-61, 99-100). Senses would call Seaview and later EAS when there was a problem with the HVAC unit (*id.* at 83-84).

Lennox King (Seaview)

Lennox King (King) was deposed on behalf of Seaview (Sup 03, Ex L [King]). He performed work for Senses at least ten times over a number of years (Sup 03, Ex M [King Further] at 16-17, 45). He explained that the first thing he does when on a "no-heat call" is attempt to diagnose the problem (King at 46). He would check the thermostat, then with a meter he would check whether the furnace was getting power and then he would "check out things like the safety switches" (King at 47-48, 53, 75-77, 118-19, 135-37). Safety switches were always accessible, even if a panel just had to be removed (*id.* at 105-06). If the problem remained he would continue to check the system further by checking things like the gas valve, the motor, and the fan (*id.* at 55, 83-85). Very rarely, he would have to jump or temporarily bypass some of the safety switches in order to test some of the other components of the system (*id.* at 56-58, 106; King Further at 36-37). Presented with a work order by Seaview for Senses, King stated that "[t]he thermostat and gas valve [were] bad on this particular

invoice" but he had no specific recollection of the job (*id.* at 62-65, 70-71, 88, 112).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden, which is "a heavy one," is on the movant to make a prima facie showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts (*see William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

As recognized by all of the parties, a party who enters into a contract to render services may assume a duty of care to third parties if it launches a force or instrument of harm (*Espinal v Melville Snow Contractors*, 98 NY2d 136, 140-41 [2002]). Launching a force or instrument of harm has been interpreted as creating or exacerbating a dangerous condition (*see generally Brown v Garda CL Atlantic, Inc.*, 150 AD3d 542, 543 [1st Dept 2017]).

Here, if any of the parties disconnected the safety switches on the HVAC unit, it can be said to have launched a force or instrument of harm by causing a condition that allowed for the dangerous overheating of the unit. The parties' submissions, including their expert affidavits, establish that because the blower was not working and the safety switches were not connected, the furnace overheated causing the fire. Both EAS and Seaview performed work on the heating components of the HVAC unit, including wiring work. The evidence establishes that material issues of fact exist concerning whether Seaview or EAS disconnected the safety wires, launching a force or instrument of harm that caused the fire and damaged Human's recording studio (*see Greater New York Mut. Ins. Co. v ERE LLP*, 125 AD3d 417 [1st Dept 2015]). Because neither Seaview nor EAS established, as a matter of

law, that it did not launch an instrument of harm, their motions for summary judgment are denied.

Similarly, because questions of fact exist concerning the cause of the fire, Seaview's motion for summary judgment on its cross claims for contribution and indemnification is denied as is its motion to dismiss EAS' cross claim for indemnification.

Cross-Motion by Seaview to Strike EAS' Answer

On April 15, 2016, EAS produced Herrara for a deposition at 10:00 in the morning (Sup CM, Ex F). EAS' counsel referred to Herrara as "his client" though he was EAS' former employee (*see e.g. id.* at 10:19; *see id.* at 20:2-4; 22:23). Shortly before 1:40 p.m., and about 15 minutes into Seaview's questioning of Herrara, EAS' attorney placed the following on the record:

> "The witness has an appointment at 2 p.m. and has to leave now to make his appointment. Also, Seaview's witness is here and waiting for his deposition to commence. We've decided to end this deposition at this point and to reconvene at a later agreed-upon time . . . to continue with the deposition of this witness. And we will produce Mr. Herrara at a mutually convenient date and time as agreed upon by all the parties" (*id.* at 142:10-23).

Counsel for Seaview responded: "We only got through elementary questions . . .. And we reserve our right to his further deposition" (*id.* at 143: 3-7).

EAS' attorney subsequently expressed skepticism that Seaview's own witness would be completed that day and suggested that both witnesses could return at a later date to finish up (*id.* at 146). In response to Seaview's attorney's statement that she had a right to ask Herrara questions necessary for her client's defense, EAS' counsel emphasized:

> "nobody's preventing you from doing that. But we would have to reschedule the completion of his deposition by you. And we're willing to do that. And we're not saying that this witness will not be produced" (*id.* at 148:2-8).

He later reaffirmed:

> "And we are going to produce him for the completion of his deposition at a mutually convenient date and time, as has been stated by counsel" (*id.* at 151: 9-13).

Despite numerous demands, however, EAS failed to produce Herrara for a continued deposition and, despite numerous court orders, EAS has failed to produce any other witness for examination before trial.[2]

---

[2] At court conferences, EAS insisted that Herrara was a former employee and it was unclear that EAS had already earlier voluntarily produced Herrara and committed to bringing him back. Thus, the court ordered Seaview to

Pursuant to CPLR 3126, Seaview cross moves to strike EAS' answer and cross claims, to suppress and strike Herrara's deposition testimony and to preclude EAS from calling a witness at trial based on EAS' failure to produce Herrara for a continuing deposition despite its representations that it would do so (Sup CM at 8).

CPLR 3126 broadly authorizes the court to make such orders that "are just" to ensure compliance with discovery orders. Herrara was under EAS' control when it voluntarily produced him for deposition and committed to producing him again so that his deposition could be completed. The court therefore orders EAS to either produce Herrara for his continued deposition within 30 days of the e-filing of this decision and order or within that period to serve on him a copy of this order along with a cover letter informing him that it is ORDERED that he must appear for the completion of his deposition otherwise he may be held in contempt of court. Unless it produces Herrara for continuation of his deposition,

---

subpoena Herrara and ordered EAS to provide the identity of another witness. There is no need, however, to subpoena Herrara for a continued deposition as he already consented to jurisdiction by appearing for his examination before trial in April 2016. He left his deposition so that he could make an appointment but promised to return and finish. He must honor that obligation or risk being held in contempt.

EAS must e-file proof of compliance with the notification requirement (including proof of service and a copy of the cover letter) within 35 days of the e-filing of this decision and order.

If Herrara fails to appear for the completion of his deposition, Seaview may move for any appropriate relief including holding Herrara in contempt, preclusion and/or seeking an adverse inference based on his nonappearance. The court is not convinced on this record that the drastic remedy of striking EAS' pleadings is appropriate.

Accordingly, it is

ORDERED that EAS' motion for summary judgment (sequence 002) is denied; and it is further

ORDERED that Seaview's cross motion is granted to the extent that Herrara must appear for the completion of his deposition; and it is further

ORDERED that EAS must either produce Herrara for a continued deposition or serve him with a copy of this order along with an accompanying cover letter consistent with this decision within 30 days of the e-filing of this decision and order; and it is further

ORDERED that if Herrara fails to appear to complete his deposition, Seaview may move for additional relief including

holding Herrara in contempt, preclusion and/or seeking an adverse inference at trial; and it is further

ORDERED that the discovery set forth in this decision and order may proceed notwithstanding the filing of the note of issue; and it is further

ORDERED that Seaview's motion for summary judgment (sequence 003) is denied.

This is the decision and order of the court.

Dated: July 5, 2018

HON. JENNIFER G. SCHECTER