Philadelphia Indem. Ins. Co. v Par Plumbing, Co., Inc .
2019 NY Slip Op 31387(U)
May 14, 2019
Supreme Court, New York County
Docket Number: 157983/2016
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. KATHRYN E. FREED** **PART** **IAS MOTION 2EFM**

Justice

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INDEX NO. 157983/2016

PHILADELPHIA INDEMNITY INSURANCE COMPANY,

Plaintiff,

MOTION SEQ. NO. 001

- v -

PAR PLUMBING, CO., INC.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Philadelphia Indemnity Insurance Company (Philadelphia Indemnity), as subrogee of nonparty 7 MetroTech, LLC (7 MetroTech), brings this action to recover $282,738.59 for property damage sustained by 7 MetroTech's premises (the Insured Premises), located at 365 Bridge Street, Brooklyn, NY, due to defendant Par Plumbing, Co., Inc.'s (Par) alleged negligence. Par now moves for summary judgment dismissing the complaint and Philadelphia Indemnity opposes the motion. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion is denied.

Factual and Procedural Background:

In 2005, the Insured Premises was converted into luxury residential condominium units (Residential Conversion). In connection with the Residential Conversion, Par performed plumbing work on the Premises between 2007 and 2010.

On February 18, 2015, a copper pipe, which was part of the HVAC system located in the exterior wall of Unit 9P, froze and split, discharging water from Unit 9P all the way down to the Insured Premises' lobby. Philadelphia Indemnity retained Michael P. Walsh (Walsh), a professional engineer and a member of Levine Fidellow Engineering Consultants d/b/a Levine Fidellow Consulting, Inc., to investigate the cause of the water damage. Walsh determined that "the cause and origin of the damage was a result of inadequate protection of water bearing piping installed within the exterior wall of the Insured Premises." Walsh aff, ¶ 7. Walsh also interviewed the building superintendent, who informed him that the subject piping and system were installed in 2007, during the Residential Conversion. Walsh conducted a search of the New York City Department of Buildings (DOB) records and located a permit, number 302066626-02-PL, issued to Par for: "PLUMBING- ALTERATION TYPE 1 Install new HVAC, Plumbing fixtures and boiler(s) with associated piping in conjunction with Residential Conversion as shown with plans filed herewith." *Id.*, ¶ 10, exhibit 1. The work was approved in 2006 and the permit was renewed on April 8, 2009. According to Walsh, the permit expired in November 2010. Walsh examined all permits from 2008 to 2016 and, while several plumbing permits were issued for individual units (specifically, units 10F, 15I and 7A), he did not find any additional DOB plumbing or HVAC permits in conjunction with Unit 9P. Based on his findings, he concluded that "all plumbing and HVAC work and associated piping in connection with the Residential Conversion was performed under the Par Plumbing permit." *Id.*, ¶ 13.

In an affidavit in support, Brendan McMonagle (McMonagle), a Par project manager since 2000, states that Par performed plumbing work at the Insured Premises between 2007 and 2010 pursuant to a trade contract with nonparty MetroTech LLC (Trade Contract) dated April 25, 2006. According to McMonagle, "[a]ll work performed by PAR was performed in

accordance with the [piping plans], which were not prepared by PAR" and that its work "was certified on October 25, 2010." McMonagle 3/19/18 aff, ¶¶ 5, 6. Annexed to his affidavit are the Trade Contract (*id.*, exhibit A), a NYC Department of Buildings (DOB) document that shows the status of various jobs in connection with the Residential Conversion (DOB Job Status Document) (*id.*, exhibit B) and a set of drawings, numbered "P2.03" and titled "Second Thru [sic] Ninth Level Plumbing Floor Plan" (Plumbing Floor Plan). *Id.*, exhibit C.

Exhibit A to the Trade Contract sets forth the "Scope of Work," which includes, in pertinent part, "all Plumbing work for areas as indicated in the contract drawings and specifications as noted in Exhibits B1 and B2." *Id.*, exhibit A, "Scope of Work," ¶ 51. Exhibits B1 and B2 to the Trade Contract provide drawing titles and specification lists for the Conversion Project. The Plumbing Floor Plan is listed among the "Plumbing Drawings" of exhibit B1. *See id.*, exhibit A. The DOB Job Status Document shows that plumbing work, for a job consisting of "[i]nstall[ing] new HVAC, Plumbing fixtures and boiler(s) with associated piping in conjunction with Residential conversion as shown on plans filed herewith," was signed off on October 25, 2010. *Id.*, exhibit B.

Based on his review of these documents and the photographs of the subject pipe supplied by Philadelphia Indemnity, McMonagle maintains that "[t]here is no connection whatsoever between the pipe identified in the photograph and any work performed by PAR." *Id.*, ¶ 13. He states that the pipe in the photograph runs along an exterior wall, is adjacent to an HVAC unit and is not a domestic water pipe (*i.e.* a pipe carrying potable water), whereas "PAR's copper piping work was limited to domestic water piping" (*id.*, ¶ 9) and "PAR did not run its piping on exterior walls" (*id.*, ¶ 11) or "install pipes adjacent to an HVAC unit in Apartment 9P." *Id.*, ¶ 12. In a supplemental affidavit, McMonagle reiterates that Par did not perform any HVAC work at

the Insured Premises and that, "[u]pon information and belief, the HVAC subcontractor at the Project was Matrix Mechanical Corp." McMonagle 7/30/18 aff, ¶ 4. In addition, McMonagle states that "[t]here was no HVAC work performed pursuant to PAR PLUMBING's permit" (*id.*, ¶ 5) and speculates that "[i]t may be that the HVAC work was performed under [the general contractor's Alteration Type 1] permit." *Id.*, ¶ 6.

Legal Conclusions:

Par contends that it is entitled to summary judgment dismissing the complaint because the evidence demonstrates that it had no role in the installation of the HVAC system and the associated pipes. Philadelphia Indemnity opposes, asserting that Par has failed to demonstrate, prima facie, that it did not install the subject pipe and that, in any event, Walsh's findings are sufficient to raise an issue of fact. In addition, Philadelphia Indemnity argues that the motion is premature since discovery has not been completed.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Madeline D'Anthony Enters., Inc. v. Sokolowsky*, 101 AD3d 606, 607 (1st Dept 2012), quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Once the movant satisfies its burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.'" *Madeline D'Anthony Enters., Inc.*, 101 AD3d at 607, quoting *Alvarez*, 68 NY2d at 324. Summary judgment is a drastic remedy and "should not be granted where there is any doubt as to the existence of [material and triable issues of fact], or

where the issue is arguable." *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968) (internal quotation marks and citation omitted).

As a preliminary matter, this Court notes that Philadelphia Indemnity's opposition to the instant motion was served a day late. This motion was originally returnable on June 5, 2018. By stipulation, the parties adjourned the motion to July 31, 2018. Philadelphia Indemnity had until July 11, 2018 to serve its opposition. *See* Tergesen reply affirmation, exhibit A. It served its opposition on July 12, 2018. However, because Par has not shown that it suffered any prejudice, this Court accepts the untimely papers. *See Morgan v Candia*, 69 AD3d 500, 500 (1st Dept 2010) ("[t]he court properly accepted plaintiff's untimely papers in opposition to defendants' motion [for summary judgment], as defendants did not suffer any prejudice"); *see also Dinnocenzo v Jordache Enters.*, 213 AD2d 219, 219 (1st Dept 1995) (finding no abuse of discretion in accepting an opposition to summary judgment that was a day late, where the movant "ha[d] not shown that it suffered any prejudice").

Par fails to establish prima facie that it did not perform any work on the subject HVAC pipe. Par's entire motion is premised on McMonagle's affidavit, in which he states that Par's work on the Residential Conversion was limited to domestic pipes and had nothing to do with the HVAC system or pipes running along exterior walls. In support, he supplies copies of the Trade Contract, the Plumbing Floor Plan and the DOB Job Status Document.

However, nothing in these documents supports Par's position. First, McMonagle fails to direct this Court's attention to any provision in the Trade Contract's 109 pages that supports his assertions and this Court's review of the document fails to reveal any such provision. According to the Trade Contract, the scope of work includes the "install[ation] [of] all Plumbing work for areas as indicated in the contract drawings and specifications as noted in Exhibits B1 and B2."

McMonagle 3/19/18 aff, exhibit A, "Scope of Work," ¶ 51. However, nothing in exhibits B1 and B2 or the Plumbing Floor Plan establishes that Par's work was limited to the installation of domestic pipes or excluded HVAC piping. In addition, although it appears that there was a separate HVAC contractor working on the Residential Conversion (*see id.*, ¶ 96 [referring to "HVAC" and "Plumbing" as separate contractors]), this does not establish that Par's work did not overlap with that of the HVAC contractor.

Additionally, although McMonagle states that Par performed all work in accordance with the Plumbing Floor Plan (*see id.*, ¶ 6), he does not state that the Plumbing Floor Plan contains the final and entire scope of Par's work. Indeed, exhibit B1 to the Trade Contract lists 19 separate plumbing drawings, the majority of which postdate the Plumbing Floor Plan. Further, the DOB's Job Status Document directly contradicts McMonagle's assertion that Par's work was entirely unrelated to HVAC, as the pertinent job description provides as follows: "Install new HVAC, Plumbing fixtures and boiler(s) with associated piping in conjunction with Residential Conversion as shown on plans filed herewith." *Id.*, exhibit B. For the foregoing reasons, Par fails to establish prima facie that its work did not include the subject HVAC pipe. *Contra Amarosa v City of New York*, 51 AD3d 596, 596-597 (1st Dept 2008) (finding that two construction companies were entitled to summary judgment where they established prima facie that they did not perform any work at the site of the accident: one, through the "the affidavit of its risk manager[,] stating that his search of the company's records turned up no records of work" at the location, and its employees' time sheets, confirming that the company had worked at a different location; the other, based on the "unrebutted affidavit of the project superintendent," stating that its project was located "at least 400 feet from the site of the accident," and "[t]he permits attendant to that project" that supported that assertion); *Flores v City of New York*, 29

AD3d 356, 358 (1st Dept 2006) (finding that deposition testimony of two project managers and a diagram of the area where the work was actually performed "show[ed] that neither [the defendant] nor its agents had performed work where plaintiff allegedly fell"); *Shechter v City of New York*, 17 AD3d 124, 125 (1st Dept 2005) ("summary judgment was properly granted in favor of [the defendant] upon documentary evidence conclusively establishing that the underground conduits it had installed were nowhere near the site of plaintiff's accident"); *Shun Jian Ke v Hsu & Assoc.*, 300 AD2d 140, 140 (1st Dept 2002) (granting summary judgment to professional engineering firm, where its "applications for the permits and the permits themselves clearly limited the work to the first floor and cellar" and where it did not perform any work on the second floor's exterior, the site of the accident).

Even assuming, arguendo, that Par had established its prima facie entitlement to summary judgment, Philadelphia Indemnity sufficiently raises an issue of fact requiring denial of the motion. Walsh's search of DOB records revealed a permit issued to Par in 2006 for: "PLUMBING ALTERATION TYPE 1 Install new HVAC, Plumbing Fixtures and boiler(s) associated with piping in conjunction with Residential Conversion as shown on places filed herewith." Walsh aff, exhibit 1. In addition, Walsh states that a further DOB archive review identified Par as the sole plumbing/HVAC permit holder for the entire Residential Conversion in 2006. *See id.*, ¶ 13. While McMonagle speculates that "[i]t may be that the HVAC work was performed under [the general contractor's Alteration Type 1] permit" (McMonagle 7/30/18 aff, ¶ 6), he does not explain why Par was issued a permit to "[i]nstall new HVAC" (Walsh aff, exhibit 1) or his own submission, which indicates that Par's work included "[i]nstall[ing] new HVAC, Plumbing fixtures and boiler(s) with associated piping in conjunction with Residential Conversion." McMonagle 3/19/18 aff, exhibit B. Therefore, whether Par installed the subject

HVAC pipe constitutes an issue of fact, requiring denial of summary judgment. *Compare Bermudez v City of New York*, 21 AD3d 258, 258-259 (1st Dept 2005) (finding that "the street opening permit . . . at the intersection where plaintiff [was injured], and the City's contract with Acme for such work, [were] insufficient to raise a question of fact as to whether such work was actually performed," where the "[t]he undisputed testimony of Acme's project and office managers" established that the "the City had cancelled the contract and, as a result, Acme performed no work at the site" and where "the undisputed record of Acme's job site locations . . . did not include the site of plaintiff's accident"), *with Bral v City of New York*, 221 AD2d 283, 284 (1st Dept 1995) (finding that there was a triable issue of fact as to whether the defendant construction company had performed work at the site of the accident, where the defendant's denial "was made solely by its principal and was otherwise unsupported" and where the "[p]laintiffs . . . submitted documentary evidence in the form of a building permit issued to, and insurance certificates obtained by, [the] defendant . . . for the worksite").

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendant Par Plumbing, Co., Inc.'s motion for summary judgment is denied; and it is further

ORDERED that counsel are directed to appear for a previously scheduled status conference on July 9, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

5/14/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE