

Hanover Ins. Co. v T.J. Piping & Heating Inc.
2022 NY Slip Op 32988(U)
September 6, 2022
Supreme Court, New York County
Docket Number: Index No. 150952/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8Hanover Insurance Company a/s/o Ballet Hispanico of New York,
Inc. et al

INDEX NO. 150952/18

- v -

MOT. DATE

T.J. Piping & Heating Inc.

MOT. SEQ. NO. 009

The following papers were read on this motion to/for sj

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

ECFS Doc. No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

ECFS Doc. No(s). _____

Replying Affidavits

ECFS Doc. No(s). _____

Plaintiff Hanover Insurance Company (Hanover) commenced this action to recover for property damage incurred by its subrogor and plaintiff-intervenor Ballet Hispanico of New York, Inc. (Ballet). A sprinkler pipe on the first floor separated and the escaping water spread through Ballet's building, damaging sets, costumes, and the premises. Defendant T. J. Piping & Heating, Inc. (Piping), which installer the sprinkler system in the cellar, now moves, pursuant to CPLR § 3211 (a) (7), to dismiss the negligence cause of action as duplicative of the contract cause of action and, pursuant to CPLR § 3212, for summary judgment dismissing the action against it. Hanover opposes the motion. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment is available. The relevant facts are as follows.

The pipe at issue was a sprinkler feed main connected to an elbow by couplings. Piping installed the sprinkler system in 2012. The flooding occurred on August 29, 2016. Piping's installation of the sprinkler system in the cellar was part of a major renovation of Ballet's building. The project specifications, dated March 2011, include "Upgrade/install sprinkler system in cellar" in the list of work to be performed (NYSCEF 226, at 011100-1, ¶ 12). The project specifications and the drawings set forth the work of Piping and other trades, including construction, plumbing, electrical. Piping and Ballet entered into a contract in January 2012. The contract provides that Piping's "Scope of work" is to provide labor and material and to install sprinkler heads and related piping as per drawing (NYSCEF 209, Jackman aff, ex A, at 5 of 9). The drawing shows that a new sprinkler system is planned for the cellar and that there is an existing system on the first floor (id., ex B, excerpts from the drawing, at 30 of 31).

Jackman is the sole proprietor of Piping. His moving affidavit states that he has been installing sprinkler piping since at least 1973 and holds New York State sprinkler and welding licenses (NYSCEF 209). Jackman alleges that Piping's task was to install sprinkler piping from one point of

Dated: 9-6-22

 HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

connection to another in the cellar. "All relevant points of connection were solely within the Situs basement" (id., ¶ 18). He alleges that Piping had no obligation to perform any work on the first floor and during the two weeks that Piping worked in the cellar, neither Jackman nor any Piping employee performed any work on or entered the first floor.

According to the expert retained by Hanover, the flooding occurred when the couplings on either side of the elbow failed. The expert states that the vertical and the horizontal parts of the pipe were not properly joined as required by code. Plaintiff alleges that it was Piping's responsibility at the time that it installed the sprinkler in the cellar to ensure that the sprinkler system on the first floor was adequately secured. Piping argues that its work was confined to the cellar and that it had no responsibility for the sprinkler on the first floor.

The amended complaint alleges that Piping had access to the first-floor sprinkler piping while it was working in the cellar (NYSCEF 212). The negligence cause of action alleges that Piping failed to fulfill its duty to Ballet to service, repair, and/or inspect the sprinkler system and related piping in a non-negligent manner so as to avoid creating an unreasonable risk of property damage. The contract claim alleges that the express and/or implied terms of Piping's contract included the assurance that Piping would perform its services in a workmanlike manner and would utilize due care to prevent harm to the property, and that Piping breached this assurance. Hanover paid \$522,000 to its insured, Ballet, for damage caused by the flooding and seeks to recover this amount from Piping.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The report by Hanover's expert predates Piping's instant motion. Piping's evidence consists of a report by its expert refuting the conclusions of Hanover's expert. Gerard J. Naylis, P.E., Hanover's expert, states that the subject pipe was in the multi-purpose room on the first floor in the northwest corner of the building (NYSCEF 234, Naylis report, at 1). The subject pipe and elbow were available for inspection by Piping. "The pipe and elbow were behind a gypsum board wall that was part of the renovations. Prior to the renovations, a wall had been in place that was removed as part of the renovations exposing the sprinkler piping, including the feed main and elbow that separated" (id.). The court takes this to mean that, during renovations, the wall covering the pipe was demolished, the pipe was exposed, and then the gypsum board was installed, presumably after the renovations in that area were completed.

Naylis appends a NYC Department of Buildings permit, dated February 10, 2012, issued to Piping to install the sprinkler system (NYSCEF 234, permit, appendix D). The permit reads "Interior demo & related plumbing, sprinkler, mechanical renovation on cellar, 1st and 2nd floor as per plans" (id.). Naylis claims that the specifications demonstrate that Piping's duties extended to the first-floor sprinkler system. Section 011100 of the specifications, under the heading, "Cutting, Patching, and Removals," states "Provide temporary shoring and other supports necessary to prevent settlement or other damage to existing construction, which is to remain" (NYSCEF 226 at 011100-3, ¶ 1.06 [E] [1]). "Sprinkler Systems" provides that sprinkler work is governed by the National Fire Protection Associa-

tion (NFPA) 13, Standard for the Installation of Sprinkler Systems, and by other codes and standards (id. at 211313-1, ¶¶ 1.02, 1.05). The section headed "Piping" requires clevis hangers, band hangers and other supports for piping (id. at 211313-6, ¶ 2.03 [C] [2]). "Verification of Conditions" requires that prior to installing the new system, the existing system must be tested, "as prescribed for new systems in accordance with NFPA 13, to ascertain its operating condition" (id. at 211313-8, ¶ 3.01 [A]). A report must be prepared for the "Director's Representative" indicating the repairs required, if any, to make the existing system function properly (id.). Repairs to the existing system are not included in the work unless requested by "Order on Contract" (id.).

Naylis arrives at the following "Findings and conclusions." 1) The project specifications were prepared to be used by all parties involved in the renovation and Piping was aware of the specifications, as noted on its contract. 2) As part of the renovations, certain portions of the walls and ceilings at Ballet were opened and/or removed, providing clear and unobstructed access to those portions of the interior of the structure. "This included the south wall of the first-floor multi-purpose room where the sprinkler piping was in place." 3) The specifications contained clear directions for how sprinkler pipes and risers were to be secured and braced in accordance with existing codes. 4) Piping had an obligation to comply with the requirements contained within the project specification. 5) The specifications explicitly required the verification of existing conditions. 6) Piping either did not perform an examination of existing conditions or failed to observe that an existing sprinkler riser did not have the proper bracing. 7) Had Piping performed the required verification of existing conditions the lack of bracing on the sprinkler piping and riser would have been identified and the deficient condition corrected and the loss would not have occurred (NYSCEF 234).

The affidavit by Piping's expert, Shawn Rothstein, P.E. states as follows. There is no evidence or professional reason to believe that Piping's work was in violation of any applicable law, regulation, code, or ordinance (NYSCEF 210, affidavit, at 2). Piping's work was subject to "Special Inspection;" it passed the required testing, and was signed off on March 19, 2014 (NYSCEF 210, report, ex A, at 2-3). Rothstein states that the drawings show that all of Piping's work was below the first floor. Regarding the permit's reference to the first and second floors, the expert states, "it is simply a restatement of the description from the alteration application for [the job] and refers to the overall project" (id. at 2).

Piping's expert addresses the findings and conclusions of Hanover's expert. Re Naylis's statement that Piping should have explored the deficient piping on the first floor when said piping was exposed during the renovations, Rothstein states, "The demolition indicated in the design drawings was very limited, was restricted mainly to the [multi purpose room], and therefore would not be expected to have exposed the subject piping" (NYSCEF 210, ex A, at 9). Nor do the drawings indicate work for Piping on the same floor as the deficient piping.

Re Nyalis's reference to "temporary shoring" in the specification's section on "Cutting, Patching and Removals," Rothstein states that the purpose of said section is to caution that demolition in one part of the facility should be performed in a way that protects other parts. Temporary shoring is intended to support items where construction operations reduce the support that those other parts have. There is no indication that the construction operations changed the support of the subject piping, and Piping did no demolition that would affect that pipe (NYSCEF 210, ex A, at 5).

Regarding the requirement that sprinkler installation be in accordance with NFPA 13, Rothstein states that the rule refers to new piping that is being installed and not to existing piping. The specifications provide that "existing construction not indicated or specified to be removed, replaced or altered are not included in the work" (NYSCEF 210, ex A, at 5). Rothstein further states that there is no proof that Piping did not comply with any specification requirement and that, even if it did not comply with a requirement, there is no proof that any such noncompliance would have caused the leak. The tests in NFPA 13 would not identify a missing pipe support. In addition, the subject piping would have been tested when it was originally installed. That is additional evidence that the testing would not detect the missing support (NYSCEF 210).

At his deposition, Jackman was questioned about the part of Piping's permit referring to both the "1st and 2nd floor as per plans". Jackman testified, "That's not the scope of my work. I have nothing to do with no mechanical. I have nothing to do with no renovation of the cellar. All I have to do is the sprinkler. They just have a permit here describing all the work that's being done in the building. In the building. Because if you look at probably all the other contractors that it has, it is probably going to say the same thing, you know" (NYSCEF 217 at 37). "No plumbing, no demolition because we didn't have any demolition. No mechanical renovation. All that. That has nothing to do with me" (id., at 37-38). Asked about the references in the permit to plumbing and mechanical, Jackman said that he didn't do any plumbing there and he has no plumbing license. He didn't do mechanical work because it was not part of his work (id. at 38). "If you look at the drawing, they show a point of connection and a point of disconnection. My job is from the point of connection and piping out whatever needs to be piped out" (id. at 41).

Jackman was asked if he adhered to a provision in the project specifications about testing the existing system. Jackman answered, "It was not my job to do that . . . It is not my job because that's the entire building . . . My job is to install the piping from point to connection in the basement. That is not my responsibility. My responsibility -- I was not paid to do nothing like that. It is not part of my contract" (NYSCEF 217 at 51). "If I am not hired to test the entire building then I cannot test it. That's why they have a point of connection and a point of disconnection. So you disconnect. You cap off wherever you have to cap and you test your work. Maybe it was part of the plumber's job who was there or maybe the general contractor" (id. at 53).

Pages 30 and 31 of the drawings deal with the installation of the sprinkler system in the cellar (NYSCEF 209, ex B; NYSCEF 231). Page 30 is titled "Detail of New Sprinkler System Connection to Existing Fire Service." Jackman testified that page 30 "tells me where the point of connection is, where I have to connect into the existing system" (NYSCEF 217 at 66). Asked about the part of the drawing that shows (according to the attorney conducting the deposition) that the existing system goes up from the basement to the first floor, Jackman said, "That doesn't go to the first floor" (id.). "This line that runs across here, do you see where the line that runs straight across, that means it is below the floor . . . The drawing clearly shows you that" (id. at 67). The lines show that the work is below the first floor (id.). "Our work is not above the floor" (id.).

According to the legend on page 30 of the drawings, the unbroken bold line stands for new fire sprinkler and the broken line stands for existing fire sprinkler (NYSCEF 209, ex B; NYSCEF 231). The drawings show that the broken line travels through the basement ceiling to the first floor. The unbroken line stays in the basement. While the drawing indicates that the new sprinkler should connect to the existing sprinkler, it does not show that the connection point is at the first floor. Piping shows that its work was confined to the cellar, that it had no duties related to the first floor, including inspection, that the connection between the new sprinkler system in the cellar and the existing system did not require work on the first floor, that it was not obligated to provide support for the sprinkler system on the first floor, that it was not obligated to provide support or shoring outside of the cellar, and that it was not obligated to test the existing system. Piping shows that, even if the subject piping was exposed during the renovations, Piping had no duties related to it.

On this record, Piping has established *prima facie* case that its actions or omissions did not cause the damage and that it did not act negligently. In turn, plaintiff has failed to raise an issue of fact as to whether Piping was negligent. Although summary judgment is rarely granted in negligence actions, it should result when a party cannot raise a triable issue of fact (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943, 943 [1st Dept], affd 62 NY2d 938 [1984]). In light of this result, the parties' argument as to whether Hanover's claims are duplicative is denied as moot.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that the motion by defendant T. J. Piping & Heating, Inc., pursuant to CPLR 3211 (a) (7), to dismiss the negligence cause of action as duplicative of the contract cause of action and, pursuant to CPLR 3212, for summary judgment dismissing the action is granted and the action is hereby dismissed in its entirety; and it is further

ORDERED that judgment be entered herein by the clerk of this court in favor of the defendant T. J. Piping & Heating, Inc., and against the plaintiff Hanover Insurance Company for the costs and disbursements of this action to be taxed by said clerk.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

9-6-22
New York, New York

So Ordered:

VL
Hon. Lynn R. Kotler, J.S.C.