Anthousa, Ltd. v County of Suffolk
2015 NY Slip Op 32509(U)
December 8, 2015
Supreme Court, Suffolk County
Docket Number: 11-15298
Judge: Peter H. Mayer

SHORT FORM ORDER

INDEX No. 11-15298
CAL. No. 15-00491OT

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-10-15 (#003)
MOTION DATE 7-17-15 (#004)
MOTION DATE 8-10-15 (#005)
ADJ. DATE 8-14-15
Mot. Seq. # 003 - MD
004 - MotD
005 - MotD

---X

ANTHOUSA, LTD.,

Plaintiff,

- against -

COUNTY OF SUFFOLK and THE LONG ISLAND POWER AUTHORITY,

Defendants.

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COUNTY OF SUFFOLK,

Third-Party Plaintiff,

- against -

A.L.A.C. CONTRACTING CORP.,

Third-Party Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Long Island Power Authority, dated June 12, 2015, and supporting papers (including Memorandum of Law dated__); and by the defendant A.L.A.C., dated June 24, 2015; (2) Notice of Cross Motion by the County of Suffolk, dated July 15, 2015, supporting papers (including Memorandum of Law dated July 17, 2015); (3) Affirmation in Opposition by the plaintiff, dated July 30, 2015, and July 9, 2015, and supporting papers (including affidavit of Simon Gianacopoulos dated July 31, 2015); (4) Reply Affirmation by the Long Island Power Authority, dated August 13, 2015, and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Long Island Power Authority for an order granting summary judgment in its favor dismissing the complaint and the cross claim asserted against it pursuant to CPLR § 3212 is denied; and it is further

ORDERED that the motion by defendant A.L.A.C. Contracting Corp. for an order granting summary judgment dismissing the third-party complaint is granted as to the first cause of action, but is otherwise denied; and it is further

ORDERED that the motion by defendant County of Suffolk for an order granting summary judgment in its favor dismissing the complaint and the cross claim asserted against it pursuant to CPLR §3212 is denied; and it is further

ORDERED that the branch of defendant County of Suffolk's motion for an order granting summary judgment on its claim for contractual indemnification, contribution, and insurance coverage against third-party defendant A.L.A.C. Contracting Corp. is granted as to indemnification and contribution but denied, with leave to renew, as to insurance coverage; and it is further

ORDERED that the branch of defendant County of Suffolk's motion for an order permitting leave to amend the third-party complaint pursuant to CPLR § 3025 is granted.

Plaintiff commenced this action to recover for damage to its property located at 275 East Main Street, Patchogue, New York. Plaintiff alleges that the Long Island Power Authority ("LIPA") and the County of Suffolk ("Suffolk") caused flooding to the basement of its building. LIPA has answered and cross claimed against Suffolk. Suffolk has answered, cross claimed against LIPA, and impleaded its contractor, A.L.A.C. Contracting Corp. ("ALAC"). Plaintiff alleges that from 2009 until December of 2010, the basement of 275 East Main Street flooded through an electrical panel. The electrical panel was connected to a manhole, known as a pullbox, owned by Suffolk County, which was connected to a utility pole.

Anthousa Corp. has owned the subject property since 1998. Anthousa Corp. is owned by Panagiota Hionias and is operated by Simon Gianacopoulos, her father. Plaintiff operated the Oasis dinner at the subject location until 2002 or 2003. Thereafter, the property was rented to a Portuguese restaurant. In 2007, by eminent domain, Suffolk took five feet of plaintiff's property in order to widen the roadway and create a right turn lane from Montauk Highway to northbound Route 112. The five feet

of property, taken by Suffolk, included the manhole, which was sealed by asphalt, and contained plaintiff's electrical hookup. The restaurant was evicted in February of 2010 for non-payment of rent. Gianacopoulos contacted LIPA to disconnect the tenant's electric service and two to three weeks after the eviction, observed the construction of a sidewalk, and the manhole stripped of the asphalt covering. As the snow melted, and it rained, he observed water leaking from the electrical box in the basement. He went that day to the LIPA office and made an appointment. Two days later a LIPA technician advised Gianacopoulos that since the electric box was customer owned, the leak was the customer's responsibility. He decided to wait until Suffolk finished the work in front of the premises and later contracted a private electrical company to address the leak. Plaintiff's complaint alleges that Suffolk altered the grade and drainage which caused the flooding. Plaintiff also alleges that LIPA maintained the electric lines leading into the property in such a manner that caused the flooding.

LIPA now moves for summary judgment in its favor and dismissal of the cross claim pursuant to CPLR § 3212. In support of the motion, LIPA submits among other things, the pleadings, examination before trial transcripts of Simon Gianacopoulos, Stanley J. Humin III, Matthew Boffoli, James Domozych, plaintiff's expert engineers report, answers to interrogatories, and various work records. In opposition, plaintiff submits, among other things, the examination before trial transcript of Stanley Humin III, and the affidavit of Simon Gianacopoulos.

ALAC moves for summary judgment for an order dismissing the third-party complaint asserted by Suffolk against it. In support of the motion, ALAC submits, among other things, the pleadings, the transcript of Simon Gianacopoulos' 50-h hearing testimony, transcripts of the examinations before trial of Simon Gianacopoulos, Stanley J. Humin III, Matthew Boffoli, and James Domozych, various work records, photographs of the manhole, answers to interrogatories, and the contract. Plaintiff takes no position on the motion.

Suffolk also moves for summary judgment in its favor and dismissal of the cross claims pursuant to CPLR § 3212. In the alternative, Suffolk seeks summary judgment on its third-party complaint against third-party defendant ALAC for contractual indemnity, contribution, and insurance coverage. Pursuant to CPLR § 3025, Suffolk seeks permission to amend the third-party complaint against ALAC. In support of the motion, Suffolk submits, among other things, the notice of claim, the transcript of Simon Gianacopoulos' 50-h testimony, the pleadings, the transcripts of examinations before trial of Simon Gianacopoulos, Stanley J. Humin III, Matthew Boffoli, James Domozych, the contract between Suffolk and ALAC, various daily work records, and photographs. In partial opposition, ALAC does not oppose Suffolk's application for summary judgment, but does oppose the alternative branches of the motion for indemnification, insurance coverage, and amendment of the third-party complaint. Plaintiff opposes that branch of Suffolk's motion which seeks summary dismissal of the complaint.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***,

172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

LIPA has established its prima facie entitlement to summary judgment dismissing the complaint and cross claim against it on the basis that it is undisputed that it did not have any involvement in the removal of the asphalt that covered the manhole, and did not own, install, or maintain the electrical conduit through which water entered plaintiff's building from the manhole. LIPA also contends that it did not create the condition that caused water to collect on plaintiff's property and did not owe a duty to plaintiff to remedy the condition.

In opposition, plaintiff has established from LIPA's own records, that on February 10, 2010, and again on March 19, 2010, plaintiff requested that the electrical service in the building be "turned off." In a residential setting, LIPA does a final reading and turns the electrical service off. For a commercial customer, LIPA does a final reading and asks the customer to turn off the breaker and does not physically disconnect the service. LIPA's records establish, consistent with plaintiff's testimony, that on May 17, 2010, plaintiff reported that water was entering the basement through the electric box. On May 18, 2010, a service technician, Gary Steedman, observed the extraordinarily dangerous water leak and still did not shut off the power to the building from the pole number 1093 claiming it was plaintiff's problem. It was not until December 10, 2010, that the power was finally disconnected. Plaintiff maintains that the failure to actual shut off the electricity to the manhole, and ultimately plaintiff's building, was negligent as the leak could not be stopped until the power was shut off. Plaintiff has also alleged that when the road was widened, utility pole number 1093 had to be moved. When the pole was moved, an open conduit was left that connected into the Suffolk owned manhole. Plaintiff maintains that the failure to properly seal that open conduit contributed to the flood. LIPA concedes that the open conduit existed. As such, plaintiff has raised issues of fact that preclude summary judgment. First, LIPA had a duty to terminate electrical service on February 10, 2010. Whether the failure to do so contributed to plaintiff's loss is a question for the trier of fact. Second, plaintiff has produced evidence that the open conduit between pole number 1093 and the manhole contributed to the damage alleged, the extent of which is a question for the trier of fact.

ALAC moves for summary judgment dismissing the third-party complaint as asserted by Suffolk against it. ALAC has established its prima facie entitlement to summary judgment in its favor as to the first cause of action asserted in the third-party complaint, but has not established its entitlement to summary judgment in its favor as to the second and third causes of action.

The first cause of action alleged by Suffolk against ALAC is that ALAC was required, as contractor, to secure "the proper insurance for its performance of maintenance and custodial services at the John P. Cohalan Court Complex located at 400 Carleton Avenue, Central Islip, New York, including commercial general liability insurance." It is undisputed that the subject property of the litigation herein is 275 East Main Street, Patchogue. Accordingly, the first cause of action is dismissed.

The second cause of action alleged by Suffolk against ALAC demands contractual indemnity and a defense in the prime action. ALAC has not established its prima facie entitlement to summary judgment in its favor as to this cause of action. The third-party complaint refers to the correct contract,

and the clear, unambiguous language in that contract, as discussed at length below, requires ALAC to provide indemnification, contribution, and a defense. ALAC has not established that plaintiff's water damage predated ALAC's work. ALAC maintains that the triggering clause of the contractual language for indemnification and contribution is "damages...arising out of the acts or omissions or negligence of the contractor in connection with the services described in or referred to in this document." In that, ALAC claims that it was not negligent, and did not perform work until after the leak was first discovered, the contract is not triggered. When a contract utilizes the term "arising out of" a broad scope of coverage is intended by the parties. " 'Arising out of' " is ordinarily understood to mean originating from, incident to, or having connection with." (***Maroney v New York Cent. Mut. Fire Ins. Co.***, 5 NY3d 467,472, 805 NYS2d 533 [2005]). While only a causal link to the alleged damage must be shown, here the evidence against ALAC is significant. Suffolk's witness, Stanley Humin III testified at his examination before trial that ALAC removed the asphalt that covered the manhole. Excavating work by ALAC, while allegedly documented by ALAC as occurring between March 18 thru March 22, 2010, according to Humin, was done more than two weeks prior due to the relocation of the utility pole. Thus, a question of fact exists as to when ALAC performed work at plaintiff's building.

The third cause of action alleged by Suffolk against ALAC demands common law indemnification and contribution. ALAC has not established its prima facie entitlement to summary judgment in its favor as to this cause of action. While ALAC maintains that it did not perform work on the manhole, or the area in front of the subject property prior to March 18, 2010, and therefore could not be the cause of the water leak, the significant admissible evidence to the contrary raises a material issue of fact.

Suffolk has not established its prima facie entitlement to summary judgment in its favor dismissing the complaint and dismissal of the cross claim as asserted against it. It is undisputed that Suffolk, since June 7, 2007, was the owner of the manhole or pull box. The source of the flooding was owned, operated, and controlled by Suffolk. Thereafter, Suffolk, through its contractors removed the asphalt covering the manhole, which caused the flooding. Suffolk has not shown that the unsealed manhole and the open conduit into it was not the cause of the flooding condition. Suffolk's position that it did not commence construction adjacent to plaintiff's premises until March 18, 2010, is factually disputed by Gianacopoulos in both his affidavit and examination before trial testimony. Moreover, Suffolk's own witness, Stanley Humin III, testified at his examination before trial, that because of the relocation of the utility pole, the excavating work was done more than two weeks prior to March 18, 2010. Even if the court were to accept Suffolk's position that construction did not commence until March of 2010, as owner of the manhole, Suffolk had a duty, since 2007, to ensure that its newly acquired property did not cause harm to its neighbor.

Turning to that branch of Suffolk's motion on its claim against ALAC for contractual indemnity, contribution, and insurance coverage, Suffolk has established its prima facie entitlement for summary judgment based upon the express terms of the contract between the parties. In relevant part the contract provides:

> The contractor agrees it shall protect, indemnify and hold harmless the County and its officers, officials, employees, contractors, agents and other persons from and against all

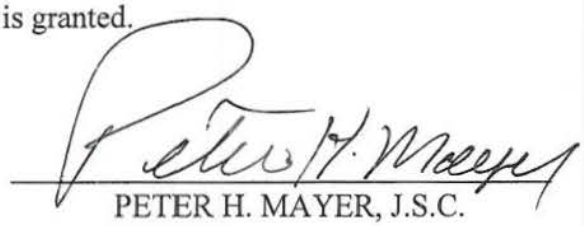
> liabilities, fines, penalties actions, damages, claims, demands, judgments, losses, costs, expenses, suits of action and reasonable attorneys' fees arising out of the acts or omissions of the contractor in connection with the services described or referred to in this document. The contractor shall defend the County and its officers, officials, employees, contractors, agents, and other persons in any suit, including appeals, or at the County's option, pay reasonable attorney's fees for the defense of any such suit arising out of the acts or omissions or negligence of the contractor, its officers, officials, employees, subcontractors or agents, if any, in connection with the services described or referred to in this document.

The contact terms are clear and unequivocal. Suffolk has established its right to contractual indemnity (***Masciotta v Morse Diesel International, Inc.***, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]). As the agreement also provides that ALAC be insured, Suffolk has demonstrated its right to summary judgment regarding insurance coverage (***Kinney v G.W. Lisk Co.***, 776 NY2d 215, 557 NYS2d 283 [1990]). However, in that the third-party complaint refers to different contract regarding maintenance and custodial services at the John P. Cohalan Court Complex located at 400 Carleton Avenue, Central Islip, New York, rather than the construction project at issue here, summary judgment is denied, with leave to renew upon amendment of the third-party complaint, as discussed below.

As to the branch of Suffolk's motion to amend the third-party complaint, generally, leave to amend or supplement a pleading "shall be freely given" (CPLR 3025 [b]), unless the proposed amendment is palpably insufficient as a matter of law, patently devoid of merit, or would prejudice or surprise the opposing party (*see* ***Maldonado v Newport Gardens, Inc.***, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; ***Lariviere v New York City Tr. Auth.***, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; ***Gitlin v Chirinkin***, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2d Dept 2008]). However, when an amendment to a complaint is sought on the eve of trial, "judicial discretion in allowing such amendments should be 'discreet, circumspect, prudent and cautious' . . . and should be exercised sparingly" (***Morris v Queens Long Is. Med. Group, P.C.***, 49 AD3d 827, 828, 854 NYS2d 222 [2d Dept 2008]; *see* ***Comsewogue Union Free School Dist. v Allied-Trent Roofing Sys., Inc.***, 15 AD3d 523, 790 NYS2d 220 [2d Dept 2005]).

Here, the amended complaint seeks to correct and identify the specific contract between the parties and the application can not be said to prejudice or surprise ALAC, as it fully participated in extensive discovery between and among the parties herein. Accordingly, that branch of Suffolk's motion for an order to amend the third-party complaint is granted.

Dated: December 8, 2015



PETER H. MAYER, J.S.C.