SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 107460/2004

ONEBEACON INS. CO.

VS

BURT'S RELIABLE INC.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 107460/04

MOTION DATE 7/26/07

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
SEP 05 2007
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Burt's Reliable for summary judgment dismissing the complaint and all cross-claims is denied; and it is further

ORDERED that the motion by Suffolk Security Systems, Inc. for summary judgment dismissing the complaint is granted; and it is further

ORDERED that Suffolk Security Systems, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: 8/30/07

HON. CAROL EDMEAD J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ONEBEACON INSURANCE COMPANY A/S/O
BARBARA J. KENNEDY,

Index No. 107460-2004

Plaintiff,

-against-

DECISION/ORDER

BURT'S RELIABLE INC. and SUFFOLK SECURITY SYSTEMS INC.,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

One Beacon Insurance Company ("plaintiff") commenced this action against defendants Burt's Reliable Inc. ("Burt's Reliable") and Suffolk Security Systems Inc. ("Suffolk") (together, the "defendants") for negligence and breach of contract against Burt's and for negligence, gross negligence, and breach of contract against Suffolk.

Burt's Reliable moves for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims in their entirety. Suffolk moves for summary judgment pursuant to CPLR 3212 dismissing the complaint. Both motions are consolidated for joint decision.

BACKGROUND

The instant action arose out of water damages incurred on or about February 21, 2003 at a home owned by plaintiff's subrogor, Barbara J. Kennedy ("Kennedy"), located in Cutchogue, New York (the "residence"), when a domestic hot water pipe[1] allegedly froze and burst (the "incident").

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[1] Domestic water pipes are used for such things as washing ones hands and bathing. They are different from heating pipes in that water does not usually circulate through them unless they are in use.

Prior to the incident, Kennedy contracted with Burt's Reliable for annual inspection, maintenance, and oil supply for the heating system in the residence ("service contract"). Approximately two years before the incident, Burt's Reliable replaced the oil burner at the residence. Thereafter, on or about December 30, 2002, Kennedy contracted with Suffolk to install and operate a freeze-guard alarm system in the residence (the "Agreement"). The alarm system sends an signal to a central monitoring station when the temperature in the home falls below freezing.

Burt's Reliable' Contentions

Burt's Reliable contends that the complaint should be dismissed because it owned no duty of care to Kennedy. The Service Contract called for an annual oil burner tune-up and emergency service. Additionally, the damage to the residence was not caused by the heating pipes, but by frozen domestic hot water pipes that were never under Burt's Reliable's control. The record before the Court indicates that the incident was caused by inadequate pipe insulation. However, even if a duty existed there was no breach because no act or omission by Burt's Reliable caused the damage. There is no evidence that that the incident was proximately caused by Burt's Reliable's contract for emergency services, annual inspections, and oil supply. Nor is there any no evidence that Burt's Reliable's services caused the domestic water pipes to freeze as there is no proof that the oil burner was not functioning properly.

Suffolk's Contentions

Suffolk contends that pursuant to paragraphs two (2) and eleven (11) of the Agreement, all claims arising from ordinary negligence were disclaimed, and that only gross negligence standards of liability apply. Thus, in order to prevail, plaintiff must prove that Suffolk was

grossly negligent with respect to the installation and maintenance of the alarm system. There is no evidence that Suffolk engaged in any conduct that evinces a reckless disregard for the rights of others or "smacks" of intentional wrong doing, so as to be found grossly negligent in the performance and completion of its duties. Additionally, the president of Burt's Reliable has stated that the alarm system did not activate because the heating system was operating at the time of the accident. Thus, plaintiff's claims for negligence must fail as against Suffolk.

Plaintiff's Opposition

As to Burt's Reliable, Plaintiff contends that Burt's Reliable owed a duty of care regarding the residence because even if it was not in control of the water pipes in residence, Burt's Reliable agreed to provide annual inspections, maintenance, and oil supply to the residence. Burt's Reliable was the primary supplier of oil for the heating system and actively involved in servicing the heating system (as evidenced by their replacement of the oil burner). Accordingly, Burt's Reliable had a duty to notify Plaintiff of any noticeable flaws or dangerous conditions with the heating system. This is supported by the expert's report which indicates that there were numerous problems with the heating systems's configuration such that these dangerous conditions "should have been recognized by any competent technician who would be expected to make a proper recommendation to the homeowner." Furthermore, a post-incident inspection of the residence revealed that numerous problems existed with the configuration of the heating system, including a common oil supply line without a prevention device.

As to Suffolk, Plaintiff contends that Suffolk's claims that general negligence principles are inapplicable to the instant matter is erroneous because the language to which Suffolk cites refers to system monitoring and maintenance issues, not the initial installation of the system.

The portions of the Service Agreement which absolve Suffolk from any liability pertain to the functioning of the off-site monitoring system, and not the initial installation. Thus, plaintiff is not required to prove gross negligence with respect to the installation. And, the evidence establishes that Suffolk improperly installed the freeze guard system at the residence, and that on the day of the incident, Kennedy did not receive a phone call or visit from Suffolk. Suffolk points out that Kennedy testified at her deposition that after the installation of the freeze guard was completed, she discovered that the wire connecting the freeze guard alarm to the heating system was disconnected. Although Kennedy requested that Suffolk investigate this matter, Suffolk neither called nor visited to follow-up on the complaint. Additionally, Plaintiff's expert, John Machado, determined that the water pipes burst as a result of "the failure of a boiler, which was compounded by the improper installation of a warning system designed to detect freezing temperatures and boiler problems." The expert concluded that the loss could have been prevented had the freeze guard system been completely and properly installed.

Suffolk's Reply

In reply, Suffolk contends that under paragraph 5 of the Agreement, Kennedy waived Suffolk's liability for negligent installation of the system, and thus, gross negligence is the sole, appropriate standard of liability.

Additionally, Suffolk contends that Plaintiff's observation that a certain disconnected wire caused the incident is unsupported by the post-incident inspection, and amounts to speculation insufficient to create a triable issue of fact. Moreover, plaintiff's post-incident inspection report fails to establish gross negligence or an improper installation of the freeze guard alarm system.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr., supra*]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). The motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a genuine factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212[b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). The "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62

NY2d 686 [1984]).

Burt's Reliable Motion for Summary Judgment

To establish a *prima facie* case of negligence, there must be the existence of a duty, a breach of that duty, and the breach of such duty must be the proximate cause of the plaintiff's injuries (see *Pulka v. Edelman,* 40 N.Y.2d 781, 390 N.Y.S.2d 393, [1976]). Absent a duty of care, there is no breach and no liability (*see Pulka v. Edelman, supra*).

Here, Burt's Reliable has established that it did not control the domestic hot water pipes which burst, and, that its Service Contract called for Burt's Reliable to service the heating system and respond to emergencies. Additionally, John Romanelli of Burt's Reliable testified that house felt warm when he arrived soon after the incident, evidencing that the oil burner was functioning properly.

Nonetheless, the report prepared by plaintiff's expert, Machado, raises triable issues of fact as to whether Burt's Reliable improperly installed the oil burner and whether Burt's Reliable alleged negligence in this regard was the proximate cause of incident. Specifically, the report criticizes the manner in which the replacement oil burner was connected to the existing system. According to the expert, his inspection revealed that the system installed by Burt's Reliable lacked a master-slave device that would have prevented the oil burner and the hot water heater from firing simultaneously and potentially causing a fuel starvation to either device. The expert claims that the oil burner suffered a fuel starvation, which in turn caused the temperature in the house to drop and the pipes to freeze. He explains that the house felt warm not because the oil burner was properly heating the house, but because the water flowing from the broken pipes was hot.

The expert's report also states that based on his inspection, his observations and tests support the conclusion that the heating system failure, which resulted in the pipe freezing and ultimate bursting of the pipes, "if further considered to be the result of complications created by apparent further negligence of the part of the fuel supply and service company; who failed to correct two significant conditions . . . ."

Accordingly, Burt's Reliable motion for summary judgment dismissing the complaint and all cross-claims is denied.

Suffolk's Motion for Summary Judgment

Suffolk's motion turns on whether the terms of the Agreement preclude claims brought against Suffolk based on principles of general negligence.

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*James v. Jamie Towers Housing Co., Inc.*, 294 AD2d 268, 743 NYS2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3d Dept. 1989]). The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms *(see e.g. R/S Assoc. v. New York Job Dev. Auth.*, 98 NY2d 29, 32, 744 NYS2d 358, *rearg denied* 98 NY2d 693, 747 NYS2d 411 [2002]; *W.W.W. Assoc. v. Giancontieri*, 77 NY2d 157, 162, 565 NYS2d 440 [1990]).

Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; *First Natl. Stores v. Yellowstone Shopping Ctr.*, 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22 NY2d 827, 292 NYS2d 1031 [1968]). Further, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

In the instant matter, paragraph 2 of the Agreement explicitly disclaims liability for damages occurring prior to, contemporaneous with, or subsequent to the execution of the Agreement. Paragraph 2 also limits Suffolk's liability to $250.00 in the event of property damage incurred arising out of the transmission of signals or monitoring of the system. Specifically, paragraph 2 provides, in pertinent part that Kennedy agreed as follows:

> that company and representatives are not liable for any loss or damage which may occur prior to, contemporaneous with, or subsequent to the execution of this agreement even if due to the improper performance of and/or failure to perform of the central station facilities, or breach of contract . . .or breach of warranty . . . or by loss or damage to facilities necessary to operate the system, transmit any signal or operate any central station; that should there arise any liability on the part of company or representatives for . . . property damage . . . which is in connection with, arises out of or from, or results from the transmission of signals, remote programing, electronic communication services or monitoring of any equipment or system, and/or the failure

> or improper dispatch of individuals to the premises, and/or the failure or improper operation of the central station facilities, and or the active or passive sole, joint or several negligence (including negligence per se and/or gross negligence) of representatives or company . . . including without limitation, acts, errors or omissions which occur prior to, contemporaneously with or subsequent to the execution of this agreement . . ., and/or claims(s) brought . . . in . . . breach of warranty . . . and/or breach of contract . . . and/or for contribution or indemnification, whether in contract, tort or equity, including without limitation, any several, direct, special, incidental, exemplary, punitive, statutory and/or consequential damages, irrespective of cause, such liability shall be limited to the maximum sum of $250.00 collectively for company and representatives, and this liability shall be exclusive.
>
> In the event that the subscriber wishes to increase the maximum amount of such limited liability, subscriber may, as a matter of right, obtain a higher limit by paying an additional amount for the increase in such limit of liability, but this higher limitation shall in no way be interpreted to hold company and representatives as an insurer.

A plain reading of this paragraph leads to the conclusion that it includes the installation process. It is uncontested that Suffolk installed the allegedly faulty monitoring system pursuant to such Agreement. Thus, the alleged improper installation of the system arises out of this Agreement, under which liability for "any" loss or property damage has been waived. It is well settled that "[a]bsent a statute or public policy to the contrary, a contractual provision absolving a party from its own negligence will be enforced" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992], *citing Melodee Lane Lingerie Co. v America Dist. Tel. Co.*, 18 NY2d 57, 69 [1966]). Since such installation purportedly occurred prior to, contemporaneous with, or subsequent to the execution of the Agreement, paragraph 2 of the Agreement is enforceable against of ordinary negligence, as alleged herein (*see Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992]).

However, such exculpatory provision does not extend to damages caused by a party's gross negligence (*Sommer*, 79 NY2d at 554, ["a party may not insulate itself from damages caused by grossly negligent conduct"], *citing Kalisch-Jaracho, Inc. v City of New York*, 58 NY2d

377, 384-85 [1983]).

This policy "applies equally to contract clauses purporting to exonerate a party from liability and clauses limiting damages to a nominal sum" (*Sommer*, 79 NY2d at 554).

Plaintiff's contentions to the contrary are unavailing. In opposition, plaintiff contends that phrase "even if" limits the exculpatory language to damages arising out of negligent performance of services at the off-site facilities. However, upon a reading of the entire clause, the Court concludes that it is plainly written so as to clarify that the exculpatory language would include such circumstances, and not exclude such circumstances.

To sustain a cause of action for gross negligence, it must be shown that the defendant failed to use even slight care or that his conduct was so careless as to demonstrate a complete disregard for the rights of others (*Greenwood v Daily News, L.P.*, 8 Misc3d 1002 [Sup. Ct, New York County 2005] *citing Sommer v Federal Signal Corp.*, 79 NY2d 540 [1992] and *Matter of Coniber v Hults*, 15 AD2d 252 [4th Dept 1962]).

The record fails to contain any evidence that the damages sustained at the residence resulted in any gross negligence of Suffolk. That the alarm system did not activate on the day of the incident, but did so approximately five months thereafter, and that Suffolk did not service the system between the date of installation and the date of the incident, does not rise to the level of gross negligence.

Accordingly, it is hereby

ORDERED that the motion by Burt's Reliable for summary judgment dismissing the complaint and all cross-claims is denied; and it is further

ORDERED that the motion by Suffolk Security Systems, Inc. for summary judgment

dismissing the complaint is granted; and it is further

ORDERED that Suffolk Security Systems, Inc. shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the Clerk may enter judgment accordingly.

Dated: August 30, 2007

Hon. Carol Robinson Edmead, J.S.C.