

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

FACTORY MUTUAL INSURANCE
COMPANY

v.

TOZOUR ENERGY SYSTEMS, INC.,
d/b/a TOZOUR-TRANE and
FLUIDICS, INC. a/k/a EMCOR
SERVICES FLUIDICS

v.

L.F. DRISCOLL, CO., LLC, TRANE,
INC., and BURNS MECHANICAL,
INC.

JUNE TERM, 2011

NO. 00757

COMMERCE PROGRAM

Control No. 13033156

DOCKETED

MAY 9 2013

C. HART
CIVIL ADMINISTRATION

ORDER

AND NOW, this *9th* day of *May*, 2013, upon

consideration of the motion for summary judgment of additional defendant, Burns Mechanical, Inc., and any response thereto, it is hereby

ORDERED

that the said motion is **GRANTED**.

BY THE COURT:

Glazer, J.

GLAZER, J.

Factory Mutual Insuranc-ORDOP



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FACTORY MUTUAL INSURANCE COMPANY	:	JUNE TERM, 2011
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	:	NO. 00757
v.	:	
	:	COMMERCE PROGRAM
TOZOUR ENERGY SYSTEMS, INC., d/b/a TOZOUR-TRANE and FLUIDICS, INC. a/k/a EMCOR SERVICES FLUIDICS	:	Control No. 13033156
	:	
v.	:	
	:	
L.F. DRISCOLL, CO., LLC, TRANE, INC., and BURNS MECHANICAL, INC.	:	

OPINION

GLAZER, J.

May 9, 2013

Before the court is the motion for summary judgment of additional defendant, Burns Mechanical, Inc. For the reasons set forth below, additional defendant's motion is granted.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff, Factory Mutual Insurance Company ("Factory Mutual"), instituted the present action on June 10, 2011 alleging breach of contract and negligence against defendants, Tozour Energy Systems, Inc. d/b/a Tozour-Trane ("Tozour") and Fluidics, Inc. a/k/a Emcor Services Fluidics ("Fluidics") as a result of the failure and explosion of an absorption chiller located in the sub-basement of the Comcast Center in Philadelphia, Pennsylvania ("Comcast Center"). Subsequently, Fluidics brought a joinder complaint against L.F. Driscoll, Co., LLC ("Driscoll"),

Trane, Inc. (“Trane”), and Burns Mechanical, Inc. (“Burns”). Fluidics alleges in its joinder complaint a count of negligence against all additional defendants and counts of strict liability and breach of warranty against additional defendant Trane. Further, additional defendant Driscoll instituted a cross-claim against Burns for common law contribution and indemnity and for breach of contract. See defendant Driscoll’s opposition to Burns’ motion for summary judgment, Exhibit 2.

Factory Mutual issued an insurance policy to Liberty Property Philadelphia Partnership IV, n/k/a Liberty/Commerz 1701 JFK Boulevard, L.P. (“owner”), with a term of May 1, 2009 through May 1, 2010 which provided insurance coverage for the Comcast Center. Prior to this agreement, on September 27, 2005, owner entered into an agreement with Trane (“Trane agreement”) to purchase a 950-ton, Horizon Stream two-stage absorption chiller to be installed in the sub-basement of the Comcast Center. In December 2005, the purchase order for the absorption chiller was then assigned to Driscoll. Pursuant to the assignment and assumption agreement, Driscoll was responsible for managing, scheduling, coordinating and directing the Trane Vendor Contract as to all aspects of performance unless otherwise specifically noted in the agreement. See additional defendant Burns’ motion for summary judgment, Exhibit D. Subsequently, as provided in the subcontract agreement between Driscoll and Burns, the absorption chiller was installed in the Comcast Center. See defendant Driscoll’s opposition to Burns’ motion for summary judgment, Exhibit 3.

On or around September 1, 2007, owner, through its property manager, Liberty Property Limited Partnership (“LPLP”) entered into a continuing service agreement (“Fluidics agreement”) which provided that Fluidics would perform operational services for the mechanical, electrical, plumbing and other building systems at the Comcast Center, including the

absorption chiller. See additional defendant Burns' motion for summary judgment, Exhibit G. Further, owner, through LPLP entered into another continuing service agreement with Tozour ("Tozour agreement") to provide services regarding the absorption chiller, which included: inspecting, testing, maintaining and repairing the equipment according to a schedule of maintenance attached to the agreement, and providing written reports to the owner in relation to those services. Id. at Exhibit H. On April 27, 2010, while owner was still insured by Factory Mutual, the absorption chiller exploded and expelled water and refrigerant, resulting in the flooding of the sub-basement of the Comcast Center (the "incident"). The incident allegedly caused extensive damage to sections of the chiller, effectively disabling it from operation. Moreover, the incident also allegedly caused damage to elevator equipment.

Driscoll's cross-claim asserts that Burns breached its contract by failing to indemnify Driscoll. Section 7.1 of Driscoll's contract with Burns provides:

To the fullest extent permitted by law, [Burns] hereby agrees to indemnify and hold harmless [Driscoll] ... from and against any and all claims, losses, damages, costs, expenses, suits, debts, actions, proceedings, causes of action, reasonable legal fees, and liability of any kind which [Driscoll] may incur, suffer, sustain, or be required to pay by reason of: (1) the injury to and/or death of any person or the damage to any property whatsoever caused or alleged to have been caused in whole or in part by any act or omission of [Burns] or (2) the failure of [Burns] to perform, or to perform properly, its obligations under this Agreement, including the failure of [Burns] to perform professional design services under this Agreement. Without limiting the generality of the foregoing, this indemnity shall be deemed to cover claims caused, or alleged to have been caused, in part, by the negligence of [Driscoll].

See defendant Driscoll's opposition to Burns' motion for summary judgment, Exhibit 2.

Additional defendant Burns now files the instant motion for summary judgment requesting that this court grant summary judgment and dismiss Burns from the case with

prejudice as there was no evidence or expert report that alleges negligent installation of the absorption chiller. Defendant Fluidics, who filed the joinder complaint against Burns, did not respond to the motion for summary judgment. However, additional defendant Driscoll opposes the instant summary judgment based on the ground that this court previously denied Driscoll's motion for summary judgment allegedly based on the same grounds and that there is still outstanding claims by Driscoll for contribution and indemnity and breach of contractual obligation. This court denied Driscoll's previous motion for summary judgment by order dated March 26, 2013 as issues of fact existed with respect to Driscoll's involvement in this matter. Moreover, this court further denied Driscoll's motion for reconsideration of this court's March 26, 2013 by order dated April 18, 2013. As explained below, additional defendant Burns' motion for summary judgment is granted.

DISCUSSION

The court shall enter judgment whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense that could be established by additional discovery. Pa.R.C.P. 1035.2. A motion for summary judgment is based on an evidentiary record that entitles the moving party to a judgment as a matter of law. See note to Pa.R.C.P. 1035.2. When considering the merits for summary judgment, a court views the record in the light most favorable to the non-moving party, and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. Jones v. SEPTA, 565 Pa. 211, 772 A.2d 435, 438 (Pa. 2001). Further, the court may grant summary judgment only where the right to such a judgment is clear and free from doubt. Marks v. Tasman, 527 Pa. 132, 589 A.2d 205, 206 (Pa. 1991).

The parties to this action have provided neither evidence nor expert reports as to how additional defendant Burns was negligent. Additional defendant Driscoll argues that because it was in charge of supervision of the installation that, “[i]f Burns did its job properly, Driscoll cannot be liable.” See defendant Driscoll’s opposition to Burns’ motion for summary judgment. Driscoll further argues that because the only claim against Driscoll is negligent supervision of the Burns installation of the chiller and the fact that this court already determined that there is an issue of fact with respect to that installation, the instant motion for summary judgment must be denied. Id.

However, Driscoll misinterprets this court’s previous determination. Driscoll alleges that the only claim against it was negligent supervision. Driscoll contracted with the owner to be responsible for managing, scheduling, coordinating and directing the Trane Vendor Contract as to all aspects of performance unless otherwise specifically noted in the agreement. See additional defendant Burns’ motion for summary judgment, Exhibit D. Defendant Fluidics opposed Driscoll’s motion for summary judgment. In Fluidics’ opposition, it alleged that Driscoll knew the absorption chiller had been malfunctioning during the installation due to manufacturing defects and failed to do anything about the malfunction thus creating an issue of fact as to the scope of Driscoll’s responsibility of management; what was required of them when managing, scheduling, coordinating and directing the Trane agreement as to all aspects of performance.

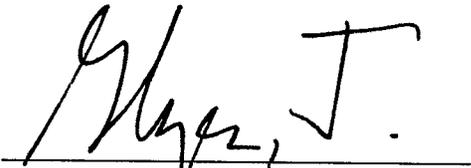
In the current motion for summary judgment, there is no allegation that Burns knew that the product was malfunctioning, there is no evidence that the installation was improper, and further, defendant Fluidics’, who joined Burns as an additional defendant, did not respond to the motion for summary judgment. Moreover, the agreement between Driscoll and Burns provides

for indemnification only in the instance that Burns was responsible for the damage. There is no evidence that suggests that Burns was responsible.

CONCLUSION

Based on the foregoing, summary judgment is granted in favor of additional defendant, Burns. Further, Driscoll's cross-claims against Burns are dismissed.

BY THE COURT:



GLAZER, J.