St. Paul Fire & Mar. Ins. Co. v FD Sprinkler, Inc.
2009 NY Slip Op 32042(U)
August 31, 2009
Supreme Court, New York County
Docket Number: 119021/06
Judge: Doris Ling-Cohan
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SCANNED ON 9/9/2009

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan PART 36

Index Number : 119021/2006

ST. PAUL FIRE & MARINE

VS.

FD SPRINKLERS

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion for summary judgment by defendants FD Sprinkler Inc + Woodworks Construction Co. is granted in accordance with the attached memorandum decision.

FILED
SEP 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 8/31/09

JUSTICE DORIS LING-COHAN

J.S.C.

Check one: FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY a/s/o Chelsea 27th Street Apartments, LLC and other interested insureds under policy number IM06502710,

Plaintiffs,

-against-

FD SPRINKLER, INC., WOODWORKS CONSTRUCTION CO., INC., ADT SECURITY SERVICES, INC., and BEAU DIETL & ASSOCIATES,

Defendants.

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BEAU DIETL & ASSOCIATES,

Third-Party Plaintiff,

-against-

GOTHAM CONSTRUCTION COMPANY, LLC and ADELLCO MANAGEMENT LLC,

Third-Party Defendants.

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Index № 119021/06

Motion Seq. No.: 002

FILED
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NEW YORK

DORIS LING-COHAN, J.:

Defendants FD Sprinkler, Inc. (FD Sprinkler) and Woodworks Construction Co. (Woodworks) jointly move for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint against them on the grounds that plaintiff's claims against them are barred by the doctrine of antisubrogation.

This action arises from water damage which occurred, on or about December 24, 2003, at premises located at 800 Sixth Avenue, New York, New York (the Premises). At all relevant times, the Premises were owned by Chelsea 27th Street Apartments LLC (Chelsea). The Premises were under construction (the construction project) when a sprinkler head, located in an

enclosed temporary bathroom on the 21st floor, accidently discharged, causing extensive water damage all the way down to the lobby. Apparently, the door to the temporary bathroom swung and struck the sprinkler causing it to discharge. The sprinkler head was installed by FD Sprinkler and the framing and construction of the temporary bathroom, including the door, were performed by Woodworks. Pursuant to two Trade Subcontracts, one dated December 17, 2002, and the other dated March 4, 2003, FD Sprinkler and Woodworks, respectively, were hired as subcontractors by the general contractor for the construction project, third-party defendant Gotham Construction Company LLC (Gotham).

Plaintiff St. Paul Fire and Marine Insurance Company (St. Paul) provided property insurance coverage to Chelsea under policy number IM06502710 (the Policy), and it is undisputed that Woodworks and FD are additional insureds under the Policy. The Policy is a builder's risk insurance policy which, typically, indemnifies a builder or contractor against accidental losses, damages, or destruction of property under construction for which the insured has an insurable interest (*see* 43 Am Jur 2d Insurance § 518; *see also Fireman's Fund v Structural Sys. Tech.*, 426 F Supp 2d 1009, 1025 [D Neb 2006]). The Policy and all relevant terms were in effect at the time of the damage and subsequent claim.

Following the December 24, 2003 sprinkler discharge event, St. Paul paid Chelsea $714,438 for the damage and necessary repairs to various parts of the Premises including, but not limited to the floors, walls, and elevators. St. Paul then commenced this action, by filing a summons and complaint, on or about December 22, 2006, to recover damages in subrogation from the parties responsible for negligently causing the damage to its insured's Premises. On or about March 29, 2007, issue was joined by service of defendants FD Sprinkler and Woodworks'

joint answer together with a cross claim for contribution and/or indemnification against co-defendants Beau Dietl & Associates (Beau Dietel) and ADT Security Services, Inc. (ADT).[1] On or about April 21, 2007, Beau Dietl commenced a third-party action against Gotham and property manager Adellco Management LLC (Adellco) for indemnification and apportionment of damages. On or about July 14, 2007, Gotham served its answer to both the complaint and third-party complaint, together with cross claims against Adellco. Discovery ensued, the note of issue was filed, on or about December 1, 2008, and subcontractors FD Sprinkler and Woodworks served the instant motion for summary judgment.

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). In fact, once payment is made, an insurance carrier "becomes subrogated to the rights and remedies of its assured to proceed against a party primarily liable without the necessity of any formal assignment or stipulation. The right arises by operation of law out of the underlying relationship between the parties" (*New York Bd. of Fire Underwriters v Trans Urban Constr. Co.*, 91 AD2d 115 [1st Dept] *affd* 60 NY2d 912 [1983] [internal citations omitted]). Accordingly, St. Paul is seeking subrogation in order to recover the monies it paid out on the underlying claim on the ground that it was the negligent acts and omissions of these subcontractors which caused the loss.

Movants assert that plaintiff's claims against them are barred by the doctrine of

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[1]By order, dated May 8, 2007, this court granted the unopposed motion by then-defendant ADT, for a dismissal of all claims and cross claims against it under New York County index number 119021/06.

antisubrogation (also referred to as antisubrogation rule), because they were named additional insureds under the Policy's Special Provision Endorsement, the section of the Policy which included all of the subcontractors working at the construction project as additional insureds (Policy, at 036). The New York courts have consistently held that, despite the general rules of subrogation, an insurer "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993] [internal citations omitted]). The public policy behind the rule is to prevent an insurer from "in effect, [passing] the incidence of the loss . . . from itself to its own insured and thus avoid the coverage which its insured purchased" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 471[1986] [internal quotation marks and citation omitted]). Another aim of the antisubrogation rule is to guard against the potential for conflict of interest that is inherent in these situations and that may affect an insurer's incentive to provide a vigorous defense for its insured (*id.* at 472; *Dillon v Parade Mgt. Corp.*, 268 AD2d 554, 555 [2nd Dept 2000]).

In its opposition, St. Paul argues that although FD Sprinkler and Woodworks are additional insureds on the Policy, they are not insureds for the damages at issue, and therefore, are not protected by the antisubrogation rule. St. Paul asserts that these subcontractors enjoyed only limited property insurance protection under the Policy, in that they were only covered for property damage to the extent of their respective financial interests "ATIMA," an abbreviation which means, as their interests may appear. [See Aff. in Opp at ¶9]. The language extending Policy coverage to the subcontractors provides:

All subcontractors as Additional Insureds, ATIMA. St. Paul does not waive its

> rights of subrogation. The insured is not permitted to release from liability any such subcontractor after a loss

(Policy at 36 § 3). St. Paul also points out that the limited nature of the coverage under the Policy is clearly evidenced by the fact that the written contracts required the subcontractors to procure comprehensive liability insurance coverage for themselves. However, the rule that "[a]n insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered . . . applies even where the insured has expressly agreed to indemnify the party from whom the insurer's rights are derived and has procured separate insurance covering the same risk" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d at 468).

Plaintiff also argues that the antisubrogation rule is not a complete bar to recovery and references a series of cases in which New York courts determined that the rule was not a defense for the subcontractors defending against subrogation claims. The most notable of the cited cases are *Paul Tishman Co. v Carney & Del Guidice* (34 NY2d 941 [1974]) and *St. Paul Fire & Marine Ins. Co. v L.E.S. Subsurface Plumbing Co., Inc.* (266 AD2d 139 [1st Dept 1999]).

In *Paul Tishman Co. v Carney & Del Guidice*, the Court of Appeals permitted subrogation against an additionally insured, stating, in relevant part, that:

> defendant's insurable interest under the [subject policy] was limited to its property interest in the building under construction - i.e., the tools, labor and material furnished or owned by the defendant. Since no part of the damages alleged by the plaintiff in this litigation was for destruction of any property owned or furnished by the defendant, it cannot be said that the defendant was a coinsured under the terms of the policy with respect to the loss caused by the fire

(34 NY2d at 942 - 943).

St. Paul Fire & Marine Ins. Co. v L.E.S. Subsurface Plumbing Co., Inc. was a

subrogation action involving a burst water pipe during construction. The insurer (once again, St. Paul), sought indemnification from a subcontractor who was named as an additional insured on a builder's risk insurance policy. The builder's risk insurance policy contained an endorsement, much like the instant Policy, providing for insurance coverage for the financial interests of the subcontractors for a loss as to "all materials, supplies, equipment and machinery intended for use in and to become a permanent part of construction work" (266 AD2d at 139 - 140). The Appellate Division determined that, because subcontractor L.E.S. Subsurface Plumbing Co., Inc. did not have an insurable interest in the property that was the subject of the loss, St. Paul was not barred by the doctrine of antisubrogation from seeking indemnification from the additional insured.

In these actions, as in the other relevant cases sited by plaintiff, the courts' decisions turned on whether the additional insured in each of these actions had an insurable interest in the property which was the subject of the loss. This court, likewise, must address the issue of movants' insurable interests.

An insurable interest is defined, under Insurance Law 3401, as any lawful and substantial economic interest in the safety or preservation of property from loss, destruction, or pecuniary damage. Under its Trade Subcontract, FD Sprinkler agreed that: "[a]ny Work performed by others that is damaged by this Subcontractor or its employees or agents shall be the sole responsibility of this Subcontractor to replace at no additional cost" (Kowalski Affirm., Exh. I, FD Sprinkler's Trade Subcontract's exhibit A, ¶ 23). Under Woodworks' Trade Subcontract, Woodworks similarly agreed that: "[a]ny Work performed by others that is damaged by this Subcontractor or his employees or agents shall be the responsibility of this Subcontractor to

replace at no additional cost to the Contractor" (Kowalski Affirm., Exh. H, Woodworks' Trade Subcontract's exhibit A, ¶ 41). As a result, both FD Sprinkler and Woodworks had an insurable interest in the parts of the Premises which were damaged on or about December 24, 2003, because both subcontractors had a contractual obligation to replace any work performed by others which was damaged by them (*New York Bd. of Fire Underwriters v Trans Urban Constr. Co.*, 91 AD2d 115 [1st Dept], *affd* 60 NY2d 912 [1983]). Additionally, the subcontractors' acknowledged obligation to procure comprehensive liability insurance coverage for themselves also does not alter the fact that St. Paul "has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered" (*North Star Reins. v Continental Ins. Co.*, 82 NY2d at 294 [internal citations omitted]). The cases cited by St. Paul are not controlling, rather, the prohibition and public policy against subrogating a claim against one's own insured, controls.

Finally, St. Paul argues that Special Provision Endorsement § 3, as referenced above, clearly states that: "St. Paul does not waive rights of subrogation. The insured is not permitted to release from liability any such subcontractor after a loss." However, the Policy's General Rules contains a section entitled "How State Law Affects This Policy" which reads that "any part of this policy that conflicts with state law is automatically changed to conform to the law." Accordingly, the language contained in section 3 is overridden by New York's doctrine of antisubrogation. "Indeed, the public interest in assuring integrity of insurers' relations with their insureds and in averting even the potential for conflict or interest in these situations must take precedence over the parties' private contractual arrangements" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d at 472).

FD Sprinkler and Woodworks have made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence that they are additional insureds under the Policy with an insurable interest in the subject loss (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In response, St. Paul has failed to demonstrate, by admissible evidence, that a material question of fact exists as to whether the subject loss placed these subcontractors outside the protections of the antisubrogation rule (*id.*, at 562 - 563).

Accordingly, it is

ORDERED that the motion for summary judgment is granted, and the complaint is severed and dismissed as against defendants FD Sprinkler, Inc. and Woodworks Construction Co., and the Clerk is directed to enter judgment in favor of these defendants, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of this action shall continue against ADT Security Services Inc. and Beau Dietl & Associates, along with the Third Party action by Beau Dietl & Associates against Gotham Construction Company, LLC and Adellco Management, LLC; and it is further

ORDERED that within 30 days of entry of this order, defendants FD Sprinkler, Inc. and Woodworks Construction Co. shall serve a copy upon all parties with notice of entry.

Dated: August 31, 2009

Hon. Doris Ling-Cohen, J.S.C.

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