

**Utica Mut. Ins. Co. v Jan's Euro
Motors, Inc.**

2008 NY Slip Op 32277(U)

July 18, 2008

Supreme Court, Suffolk County

Docket Number: 0010145/2005

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 8-13-07
ADJ. DATE 1-16-08
MNEMONIC: # 001 - MG; CASEDISP

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UTICA MUTUAL INSURANCE COMPANY,	:	McCARTHY & McCARTHY
as subrogee of COMMACK AUTO	:	Attorneys for Plaintiff
COLLISION, INC.,	:	132 Fifth Avenue
	:	Kings Park, New York 11754
	:	
- against -	:	SCOTT LOCKWOOD, ESQ.
	:	Attorney for Defendants
JAN'S EURO MOTORS, INC. and	:	1600 Deer Park Avenue
JAN GIERTL,	:	Deer Park, New York 11729
	:	
Defendant.	:	
-----X		

Upon the following papers numbered 1 to 17 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 8 ; Notice of Cross-Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 15 ; Replying Affidavits and supporting papers 16 - 17 ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by the defendants, Jan's Euro Motors, Inc and Jan Giertl, pursuant to CPLR 3211(a)(1) and 3212 for summary judgment dismissing the complaint is granted pursuant to CPLR 3212 and the complaint of this action is dismissed.

This is an action for equitable subrogation wherein Utica Mutual Insurance Company (hereinafter Utica) as subrogee of Commack Auto Collision, Inc. seeks to recover monies in the amount of \$343,402.74 paid out pursuant to an insurance policy issued to Commack Auto Collision Inc. (hereinafter Commack) wherein it insured Commack against loss or damage to property located at 2153 Jericho Turnpike, Commack, New York, and against loss or damage to property of others in Commack's possession and control. It is asserted by the plaintiff that Jan's Euro Motors, Inc., (hereinafter Jan's), owned by Jan Giertl, transacted business pursuant to a sublease agreement with Commack on April 6, 2003 at 2153 Jericho Turnpike, Commack, New York when a fire occurred at the premises, which Utica alleges was caused by Jan's negligence.

Jan's seeks dismissal of the complaint of this action, asserting that it made payments for fire insurance to Commack pursuant to a sublease agreement and therefore the plaintiff is

precluded from maintaining a subrogation action against Jan's as such action is barred by the antisubrogation rule. Jan's further asserts that the complaint should be dismissed as asserted against Jan Giertl in his individual capacity in that he was the chief corporate officer for Jan's and signed that sublease as President for Jan's and did not sign the lease in his personal capacity, and that he is the agent of a disclosed principal, *i.e.* Jan's. In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; the affidavit of Jan Giertl; copies of the pleadings; a copy of the commercial lease dated November 1, 2001 with the annexed rider; and a copy of the insurance policy issued by Utica National Insurance Group/Graphic Arts Mutual Insurance Co. to Commack Auto Collision, Inc., Commack Auto Body at 2153 Jericho Turnpike, Commack, New York.

In opposing this motion, the plaintiff, Utica, has submitted, inter alia, an attorney's affirmation; affidavit of Peter M. Rincones, Jr. with curriculum vita and P.M.R. Report; affidavit of Daniel Karl with curriculum vita and report; affidavit of Diane Satriana with annexed records; affidavit of Raymond Morace; and a copy of the policy in effect at the time of loss.

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 issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The within action is treated as an action for summary judgment pursuant to CPLR 3212.

Jan's has asserted that on November 1, 2002, in its corporate capacity, it entered into a sub-lease with Commack. Paragraph 13 of the rider to that lease required the overtenant landlord (Commack) to maintain fire and hazard insurance coverage with extended coverage of the premises, and that the undertenant (Jan's) was to pay its pro rata cost of this insurance as additional rent. Paragraph 4 of the rider to the lease required the corporate defendant Jan's to pay \$75.00 per month as an additional rent "representing its pro rata share of the fire insurance premium for the building...". Paragraph 13 of that rider also provided in relevant part that the undertenant shall indemnify and save harmless the overtenant from any claims, suits,

causes of action or liabilities which arise with respect to the injury to persons or property or the loss of life sustained within the demised premises of the undertenant. Jan's therefore asserts that since it made the payments for fire insurance and that Commack was required to maintain the insurance on Jan's behalf that the plaintiff is precluded from maintaining a subrogation action.

Diane Satriana set forth in her affidavit that she was an employee of National Insurance Brokerage of New York, Inc. (hereinafter NIB) and was contacted on or before April 2, 2002 concerning an application by Commack to procure insurance for its auto repair business located at 2153 Jericho Turnpike, Commack, New York. Raymond Morace sets forth in his affidavit that he is employed in the underwriting department of Utica. Both of them state that the only entity or person requested by Commack to be a named insured was Commack Auto Collision, Inc. and that it was requested that Ilene Pelkofsky and Bernadette Pelkofsky appear as additional insureds, but at no time did Commack request that Jan's or Jan Gierl be named as an insured or that they appear on the policies issued by Utica with any type of insurable interest such as loss payee, mortgagee, or additional insured.

The issues to be determined in this motion are whether Jan's is an "insured" under the facts of this case, and whether or not subrogation is precluded against Jan's by Utica.

CPLR 1004 allows an insurer's subrogation claim to be prosecuted in the name of the insured, where the insured has "executed to his insurer either a loan or subrogation receipt, trust agreement, or other similar agreement." "Under New York law, an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which an insured is covered. Permitting recovery against an insured would be inequitable because it would permit an insurer, in effect, to pass the incidence of the loss from itself to its own insured and thus avoid the coverage which its insured purchased. The public interest in assuring integrity of the insurers' relations with their insureds and in averting even the potential for conflict of interest, requires denial of an insurer's right of subrogation (*Macmillan, Inc. v Fereal Insurance Company*, 764 F. Supp 38; 1991 U.S. Dist. Lexis 6625 [S.D.N.Y. 1992]).

No case on point has been found on the very issue presented in this action. However, in a similar situation involving a leased vehicle in the matter entitled *Pennsylvania General Insurance Company, as Subrogee of Anthony J. Krupa v Austin Powder Company, et al*, 68 NY2d 465, 510 NYS2d 67 [1986], a renter signed a contract with the car rental company in which it was agreed that the rental company's insurance would cover the rented vehicle and the renter would indemnify the rental company through a separate policy for liability resulting from the renter's use. After the rental company's insurance paid a claim for damages caused by the rental vehicle driven by the renter, the rental company brought a claim against the renter for indemnification. The rental company contended that the indemnification contract allocated risk of loss to the renter. The Court held that (1) the renter was an "additional insured" under the rental company's insurance; (2) the rental company had no indemnification claim in its own right because it suffered no out-of-pocket loss; (3) the rental company's indemnification claim was actually on behalf of the insurer because the insurer paid

the claim; and (4) the insurer had no right to subrogation from the renter who was an insured under the policy. The Court noted that the rule against subrogation claims against an insured was based largely in part on the potential conflict of interest that was inherent in such claims.

In the instant action, the sublease agreement required the overtenant landlord (Commack) to maintain fire and hazard insurance coverage with extended coverage of the premises, and the undertenant (Jan's) paid its pro rata cost of this insurance as additional rent. It is clear that the intent of the parties was that Commack was to obtain insurance on behalf of Jan's. In support of this motion, Utica submitted the report of its investigation into the April 6, 2003 fire, which contained the results of the interview with Jim Young (hereinafter Young), the owner of Commack. Young stated that Jan's lease called for the premium payment on the Traveler's Group policy insuring the overall building. Based upon the foregoing, although not individually named on the policy, Jan's is deemed to have been an insured under the policy at issue in that it paid its pro rata share of the premiums and it is undisputed that the loss occurred on the premises at 2153 Jericho Turnpike, Commack, New York, where Jan's was doing business. Although Commack did not separately name Jan's in the policy as an insured, it did specifically list the address of the premises to be covered by the policy obtained by Commack, including that section of the building occupied by Jan's.

Chrysler Leasing Corp. et al v Public Administrator, New York County, as Administrator of the Estate of Adolph Benson, Deceased, 85 AD2d 410, 448 NYS2d 181 [1st Dept 1982], involved builder's risk insurance policies providing property loss coverage for owners and contractors in connection with construction, customarily including language which extends the protection to property owned by subcontractors "as their interest may appear", and the issue has typically developed where the insurer has paid the owner or general contractor for damages to its property and then seeks to recover from the subcontractor on the claim either that the subcontractor had negligently caused the damage to the property or had agreed to indemnify the owner or general contractor. The Court set forth in one line of cases: it was adopting what has been called the "Louisiana Rule" which denies any right of recovery to the insurer, stating that, "[i]n essence, these decisions find that the subcontractor is a coinsured under the policy, that the policy insures the subcontractor to the extent of its interest from liability for negligence, and that the insurer is accordingly barred from recovery in a subrogation action from the subcontractor." The Court went on to state that "[a]mong the varied policy considerations advanced to support that result, the one most pertinent here is the conflict of interest inherent in a situation in which an insurer is permitted to recover from an insured who is under a duty to co-operate fully with his insurer." (see, ***Baugh-Belarde Constr. Co. v. College Utilities Corp.***, 561 P2d 1211 [Alaska 1977]; ***Transamerica Ins. Co. v Gage Plumbing & Heating Co.***, 433 F2d 1051 [10th Cir.Kan. 1970]; ***New Amsterdam Cas. Co. v Homans-Kohler, Inc.***, 305 FSupp 1017 [D.R.I. 1969]; ***United States Fire Ins. Co. v Beach***, 275 So2d 473 [La.App 2 Cir. 1973]). The Court also set forth that those decisions that have sustained recovery by an insurer against the subcontractor under builder's risk insurance policies have done so on the basis of a very different construction of the policies, and one that provides no clear support for the insurer's action. It further stated that the cases rejecting the "Louisiana Rule" draw a clear distinction between a subcontractor who is insured against property damage alone as opposed to a subcontractor who is additionally protected for his legal liability.

In **Continental Divide Insurance Company, a Colorado Corporation, v Western Skies Management, Inc.**, 107 P3d 1145 [Colo.Ct.App 2004], the Court stated that the rule is firmly established that an insurance company may not be subrogated to the claim of one insured against another insured even where the amount sought to be recovered is in excess of the coverage provided, and it stated that “[u]nder the doctrine of equitable subrogation, when an insurer has paid its insured for a loss caused by a third party, it may seek recovery from the third party (citations omitted). In such an action, the insurer ‘stands in the shoes’ of its insured. But an insurer generally has no right of subrogation against its own insured. Under the antisubrogation rule, an insurer may not seek recovery against its insured on a claim arising from the risk for which the insured was covered. This rule serves two purposes: (1) it prevents the insurer from passing the loss back to its insured, an act that would avoid the coverage that the insured had purchased; and (2) it guards against conflicts of interest that might affect the insurer’s incentive to provide a vigorous defense for its insured.” Such may be the case in the instant action in that Utica conducted an investigation into the fire and submitted the report with its findings wherein Utica concluded that the fire was a result of a malfunction of the furnace equipment which it claimed belonged to the tenant Jan’s. Utica now seeks to pass the loss back to a party who is the beneficiary of the insurance contract maintained by its insured (see, **Alinkofsky et al v Countrywide Insurance Company**, 257 AD2d 70, 691 NYS2d 479 [1st Dept 1999]). It is further noted that Detective Mike Komorowski of the Suffolk County, New York, Police Arson Squad’s Office investigated the fire and listed the fire cause as “Accidental-Furnace” and closed the case.

In **Chubb Insurance Co v DeChambre**, 439 Ill.App.3d 56 [Ill.App.Ct. 2004], a subcontractor damaged a building that was insured under a policy issued to the owner and general contractor. The insurer made payments on the owner’s behalf and then sued the subcontractor. Because the subcontractor was an additional insured under the owner’s policy, the trial court granted summary judgment based on the antisubrogation rule. The Court noted that, if allowed, subrogation would give rise to a conflict of interest because “it gives [the insurer] the incentive to pursue its own insured for a risk covered in the policy and for which the [subcontractor] has paid the premium, if perhaps indirectly.

In the instant action, Jan’s, the undertenant, has paid premiums for insurance pursuant to its sublease obligation with Commack, and has thus paid for insurance on the property indirectly, on a pro rata basis, even if not named by Utica on the policy, much as occurred in **Chubb Insurance**, supra. Thus, the policy concerns which underlie the rulings in **Chubb Insurance**, supra, **Chrysler Leasing Corp. et al v Public Administrator, New York County, as Administrator of the Estate of Adolph Benson, Deceased**, supra, and **Continental Divide Insurance Company, a Colorado corporation**, supra, are also manifest in this action. In that the sublease agreement is clear on its face that Commack was procuring insurance on the premises being sublet by Jan’s, and that money for the insurance premium was collected on a pro rata basis by Commack who failed to specifically name Jan’s on the policy, it would appear that a conflict would arise if Commack tried to make a claim against Jan’s for the damage which Utica claims was caused by Jan’s alleged negligence. Commack does not claim any out of pocket expenses as a result of the property damage, and therefore

has no indemnification claim either in its own right against Jan as indemnification does not arise until the indemnitee has actually sustained a loss (See, **Bay Ridge Air Rights v State of New York**, 44 NY2d 49, 404 NYS2d 73 [1978]). The Court finds that the language of the sublease agreement shows that Jan's was intended to benefit from the insurance being procured by Commack who failed to add Jan's to the policy as an additional insured. Thus Utica is attempting to benefit from its insured's failure to name Jan's as an insured on the policy when Jan's was paying the premium for it pro rata share. Had Jan's been named on the Utica policy, there would be no issue as to Utica being precluded by the antisubrogation rule.

In **Galante v Hathaway Bakeries**, 9 Misc2d 19, 167 NYS2d 277 [Ontario County 1957]), it was provided in the lease that the lessee would indemnify the lessor from any and all damages to the premises arising out of the lessee's negligence. In the instant action, the sublease provided in pertinent part at paragraph 13 of the rider that the undertenant shall indemnify and save harmless the overtenant from any claims, suits, causes of action or liabilities which arise with respect to the injury to persons or property or the loss of life sustained within the demised premises of the undertenant. In **Galante**, supra, the Court set forth that the defendant cited to the case of the **United States Fire Ins. Co. v Phil-Mar Corp**, 166 Ohio St. 85, affg. 102 Ohio App 561 [1956], wherein a lease agreement expressly contemplated that the landlord would carry fire insurance and that the tenant would pay any increased premium occasioned by the nature of his occupancy. Hence it was held that the insurance was carried for the benefit of the tenant. Likewise, in **Cerny-Pickas & Co. v Jahn Co.** 7 Ill.2d 393 [1955], there was a similar situation as in the **Phil-Mar** case, supra. In the case of **General Mills v Goldman**, 340 US 947, 71 SCt 532 [1952]) the Court stated at page 364 that fire insurance was contemplated in the lease. The Court in **Galante**, supra, stated that "[a]pparently evidence of such fact had been received upon the trial, and the Court held in effect that the insurance was for the benefit of both the landlord and the tenant and that neither the landlord nor its insurance carrier could hold the tenant liable for its negligent causing of the fire. In the case at bar, unlike **Galante**, supra, the loss from fire at the subject premises was covered by insurance as provided by the policy Commack procured from Utica, and the parties contemplated that fire insurance would be carried to protect the tenant's (Jan's) interest from loss by fire, whether or not resulting from negligence. It has not been established that Commack sustained any out of pocket expenses and Commack has no cause of action for negligence against Jan's. Thus Utica's subrogation claim against Jan's must fail.

"Subrogation has been defined as the substitution of one person in the place of another, so that the person who is substituted succeeds to the rights of the other in relation to a claim, and to its rights, remedies, or securities. Further, a person who is entitled to be subrogated to another person's rights, securities, or remedies must generally take these as they are, along with their burdens, and subject to any defenses which may be available either against the subrogee or against the other person. Thus, a subrogee does not acquire any greater rights than those of the person from whom the subrogee is substituted. In essence, the subrogee inherits both the strength and infirmity of the subrogor's position" (**Travelers Indemnity Company as subrogee of Robert and Tieysha Taylor v Zulfi Agoli and Jzaklun Dimoushsk**, 151 Misc2d 947, 574 NYS2d 134 [Kings County Civ. Ct. 1991]). "A subrogation claim is derivative of the underlying claim and the subrogee possesses only such rights as the

subrogor possessed, with no enlargement or diminution. A subrogee acquires only the right that the subrogor had, and so any subrogee may find its claim defeated by a defense based upon the subrogor's action or inaction. In such case, the subrogee's remedy is against the subrogor, for conduct that has prejudiced the subrogee's right" (***Palisades Safety and Indurance Association, as Subrogee of Grigory Belovskly v Richard Martinez and GEICO Insurance Company***, 9 Misc3d 1101A, 806 NYS2d 446, 2005 NY Slip Op 51366U [Kings County Sup. Ct. 2005]).

Based upon the foregoing, the Court finds that Commack, as subrogor, was required to provide the insurance on behalf of Jan's which paid its pro rata share of insurance premiums, and that Utica stands in the shoes of its insured, Commack, and is therefore barred by the antesubrogation rule from asserting a subrogation claim against Jan's as Jan's was indirectly insured by Utica who insured the entire premises.

Accordingly, the complaint of this action is dismissed as asserted against Jan Gierl and Jan's Euro Motors, Inc.

Dated: JUL 18 2008


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION