

**American Motorists Ins. Co. v  
Manhattan Emergency Door Corp.**

2009 NY Slip Op 30296(U)

January 26, 2009

Supreme Court, Kings County

Docket Number: 20766/05

Judge: Martin M. Solomon

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At an IAS Term, Part 38 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 26th day of January, 2009.

P R E S E N T:

HON. MARTIN M. SOLOMON,  
Justice.

-----X

AMERICAN MOTORISTS INSURANCE COMPANY  
a/s/o ADVANCED FERTILITY SERVICES, P.C.,

Plaintiff,

- against -

Index No. 20766/05

MANHATTAN EMERGENCY DOOR CORP., et al.,

Defendants.

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The following papers numbered 1 to 18 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed_____	<u>1-2, 3-4, 5-6, 7-8</u>
Opposing Affidavits (Affirmations)_____	<u>9,10, 11,12,13,14,15</u>
Reply Affidavits (Affirmations)_____	<u>16, 17, 18</u>
_____Affidavit (Affirmation)_____	_____
Other Papers_____	_____

Upon the foregoing papers, defendants Yorkville Towers Housing Co. ("Yorkville") and R.Y. Management Co, Inc. ("RY") move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims. Defendants Leon D. DeMatteis Construction Corp. s/h/a Leon D. DeMatteis & Sons, Inc., Leon D. DeMatteis Construction Corporation, DeMatteis Organizations, Inc. and DeMatteis Organizations (hereinafter collectively "DeMatteis") move for an order, pursuant to CPLR 3212, dismissing

the complaint and all cross claims. Defendant Berley Industries, Inc., f/k/a Sam Berley Heating Corp. (“Berley”) moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims. By separate cross motion, Yorkville and RY cross-move for summary judgment on an additional ground not contained in its original motion.

Plaintiff American Motorists Insurance Company commenced this action to recover amounts paid to its insured and subrogor, Advanced Fertility Services, P.C. (“Advanced”), for damages sustained as the result of a water leak/moisture condition occurring in office space leased by Advanced in a building owned by Yorkville and managed RY, located at 1625 Third Avenue in New York, NY. Advanced, which has operated a fertility clinic in the subject space since 1985, was forced to suspend its business as the result of the water condition and associated mold problem, which was discovered on July 14, 2002. At the time, Advanced was insured under a “Kemper Premier Business Owners Special Policy” issued by plaintiff and procured by Advanced through the Keep Insurance Agency (“Keep”). As a result of the loss, plaintiff paid to Advanced \$459,000.00 for property damage, \$944,000.00 for business interruption, and an “Extra Expense” of \$30,00.00 for mold removal. In addition to the instant subrogation action, plaintiff commenced a separate action against Keep in Supreme Court, Westchester County for negligence and breach of contract claiming, inter alia, that Keep provided the subject policy to Advanced despite Advanced’s ineligibility for

coverage. By order dated March 14, 2008, the court granted plaintiff's motion for summary judgment against Keep on the issue of liability.

Yorkville and RY move for summary judgment dismissing the complaint on the ground that plaintiff's action is precluded under a waiver of subrogation provision in the lease between Yorkville and Advanced. Yorkville and RY further cross-move for summary judgment on the ground that plaintiff will be "made whole" by reason of its judgment against Keep, and any further damages awarded to plaintiff in the instant action would result in a windfall.

Paragraph 9 of the lease provides the following, in pertinent part:

9. (a) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this lease shall continue in full force and effect except as hereinafter set forth. (b) If the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be repaired by and at the expense of the Owner and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty according to the part of the premises which is usable. . . (d) If the demised premises are rendered wholly unusable or (whether or not the demised premises are damaged in whole or in part) if the building shall be so damaged that Owner shall decide to demolish it or to rebuild it, then, in any of such events, Owner may elect to terminate this lease by

written notice to Tenant, given within 90 days after such fire or casualty, or 30 days after adjustment of the insurance claim for such fire or casualty, whichever is sooner, specifying a date for the expiration of the lease, which date shall not be more than 60 days after the giving of such notice, and upon the date specified in such notice the term of this lease shall expire as fully and completely as if such date were the date set forth above for the termination of this lease. . .(e) Nothing contained hereinabove shall relieve tenant from liability that may exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, including Owner's obligation to restore under subparagraph (b) above, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Owner and tenant hereby releases and waives all right of recovery with respect to subparagraphs (b), (d), and (e) above, against the other or anyone claiming through or under each of them by way of subrogation or otherwise. The release and waiver herein referred to shall be deemed to include any loss or damage to the demised premises and/or to any personal property, equipment, trade fixtures, goods and merchandise located therein. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance.

The insurance policies issued to Yorkville and Advanced each contain an identical boilerplate subrogation provision which states the following, in relevant part:

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property. . .

This will not restrict your insurance.

Subrogation is an equitable doctrine that allows an insurer to “ ‘stand in the shoes’ of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse” (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). The right arises by operation of law when the insurer makes payment to the insured (*id.*). However, where a party has waived its right to subrogation, its insurer has no cause of action (*State Farm Ins. Co. v J.P. Spano Const., Inc.*, \_\_\_ AD3d \_\_\_; 2008 NY Slip Op 08118, [2<sup>nd</sup> Dept, Oct. 21, 2008]).

In opposition to Yorkville’s and RY’s motion for summary judgment, plaintiff argues that the lease provides a waiver and release of recovery only “with respect to subparagraphs (b), (d), and (e)” of paragraph 9, which plaintiff contends relates to damages incurred as the result of a loss to the “demised premises.” Plaintiff maintains that it is not seeking to recover

for a loss to the demised premises but rather for fixtures, personalty and business interruption. “[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms” (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]; see *R/S Assoc. v New York Job Dev. Auth.*, 98 NY2d 29 [2002]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). 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 [1978]). While the subparagraphs mentioned only refer to a loss to the “demised premises” the terms of paragraph 9 expressly state that the waiver and release “herein referred to shall be deemed to include any loss or damage to the demised premises and/or to any personal property, equipment, trade fixtures, goods and merchandise located therein.” Thus the waiver clearly applies to the losses suffered by Advanced.

Plaintiff also argues that the subrogation provision does not apply to Yorkville’s property manager, RY, since the provision refers only to “Owner” and “Tenant.” However, the lease’s provision regarding property loss and damage (paragraph 8), as well as the provision which confers a right of entry to the leased space to make repairs (paragraph 13) is expressly applicable to “Owner” and its “agents.” Therefore, a reading of the lease, as a whole, demonstrates that where issues involving the condition of the leased property or damages thereto are concerned, it was the intent of the parties that RY be deemed of equal

status to the “Owner,” and the lease must be interpreted to afford equal protection under the subrogation clause to RY (*see Insurance Co. of North America v Borsdorff Services, Inc.*, 225 AD2d 494 [1996]; *Pilsener Bottling Co. v Sunset Park Indus. Assocs.*, 201 AD2d 548 [1994]).

Finally, the case cited by plaintiff, *Continental Insurance Company v 115-123 West 29<sup>th</sup> Street Owners Corp* (275 AD2d 604 [2000]), is distinguishable from the facts of the matter at bar. In *Continental Insurance Company*, the relevant language of the waiver of subrogation clause contained in a cooperative shareholder’s proprietary lease provided that “[i]n the event that Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage.” The court interpreted the lease provision strictly according to its terms and determined that since the relevant insurance policy did not “contain a waiver of subrogation against the Landlord,” but rather simply authorized the insured to waive its rights against another in writing, the release set forth in the lease is ineffective by its own terms. The lease relevant to the matter at bar contains no such limitation, but provides that the “release and waiver shall be in force only if both releasors’ insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance.” Both insurance policies at issue contain a clause that

waiver of subrogation “will not restrict” each party’s insurance, which this court interprets to mean that the insurance will not be invalidated by waiver of subrogation.

Accordingly, Yorkville’s motion for summary judgment dismissing the complaint is granted. In light of this disposition, Yorkville’s cross motion for summary judgment on the ground that plaintiff is made whole by the judgment against Keep is rendered academic.

### **Motions of DeMatteis and Berley for Summary Judgment**

Among the alleged causes of the water condition in Advanced’s premises was the installation of “baffles” or “diverters” over the exterior louvers of the HVAC ducts which resulted in warm, moist air being redirected into the interior of the building instead of properly exhausted to an exterior “loading dock” area. There is no dispute that the “baffles” were installed by defendant Manhattan Emergency Door Corp. at the request of RY. DeMatteis and Berley maintain that the installation of the baffles, as well as rain seepage and a waste pipe leak, were the true proximate causes of Advanced’s damages and that the water and mold condition was unrelated to any original design or installation of the HVAC system during the construction of the building when DeMatteis and Berley served as general contractor and HVAC subcontractor, respectively. Advanced, on the other hand, citing the testimony and affidavit of its expert, engineer Jerome G. Levine, claims that the HVAC duct system was improperly installed with a “gap” between the subject ducts and the exterior louvers in the loading dock area, and if this “gap” were not present, then the moist air would

not have accumulated in the interior spaces abutting Advanced's offices and in turn would not have resulted in the water damage.

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 demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324). Once this showing has been made, the burden shifts to the party opposing the motion to lay bare its proof and present evidentiary facts sufficient to raise a genuine triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Mere conclusory assertions, devoid of evidentiary facts, are insufficient for this purpose, as is reliance upon surmise, conjecture, or speculation (*see Smith v Johnson Prods.*, 95 AD2d 675 [1983]). The existence and scope of an alleged tortfeasors duty is, in the first instance, a legal question for determination by the court (*see Di Ponzio v Riordan*, 89 NY2d 578, 583 [1997]). The general rule is that a contractor does not owe a duty of care to a noncontracting third party, with three exceptions: where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk (*Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]), or in other words launches "a force or instrument of harm" and thus creates or exacerbates a hazardous condition (*Castro v Maple Run Condominium Assn.*, 41 AD3d 412, 413 [2007]); second, where the plaintiff suffers injury as a result of reasonable reliance on the defendant's continued performance of a contractual obligation; or third,

“where the contracting party has entirely displaced the other party’s duty to maintain the premises safely” (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]). Advanced argues that a force or instrument of harm was launched as the result of the “gap” between the duct work and outer louver. There is no allegation that Advanced relied on a contractual obligation of either DeMatteis or Berley or that these defendants displaced a duty to maintain the premises.

At his examination before trial, Vincent Argiro, a former construction superintendent and current employee of RY, testified that Berley was the subcontractor in charge of the installation of the HVAC system in the subject building. There is no proof offered that DeMatteis, the general contractor for the original construction of the subject building, installed the duct work which Advanced alleges to have contributed, in part, to the water condition in the space leased by Advanced by reason of the defective “gap.” According to the testimony and affidavit of Berley’s president, Noah Berley, his company may have served as the HVAC subcontractor on the subject building’s construction, as Berley served as an HVAC subcontractor to DeMatteis on several projects, but Berley never performed the actual installation of HVAC duct work on any project. Rather, Berley subcontracted the installation work to a sheet metal subcontractor or “tin knocker.” Insofar as Advanced has not offered any proof to demonstrate that either DeMatteis or Berley performed the actual installation of the duct work, it has failed to raise an issue of fact as to whether these defendants

launched an instrument or force of harm so as to extend a duty on the part of these entities to Advanced or its subrogee.

As a result, the motions of DeMatteis and Berley for summary judgment dismissing the complaint and all cross claims are granted.

The foregoing constitutes the decision and order of the court.

E N T E R,

A handwritten signature in blue ink, appearing to be "Martin M. Solomon", written over the printed text "E N T E R,".

J. S. C.

**Hon. Martin M. Solomon S.C.J.**