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

PRESENT: PART 35

Index Number : 109484/2004

RLI INSURANCE CO

VS

TURNER/SANTA FE

Sequence Number : 007

SUMMARY JUDGMENT

INDEX NO. 109484/04

MOTION DATE 1/17/07

MOTION SEQ. NO. 007

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

This motion is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that, in this second action for subrogation, defendants Burgess Steel, LLC. and Luna Mechanical, Inc.'s motion for summary judgment dismissing plaintiff Jazz at Lincoln Center's complaint is granted, and the complaint is severed and dismissed as to these defendants, with costs and disbursements as taxed by the Clerk of Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 3/7/07

J.S.C.

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

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 35

RLI INSURANCE CO., AMERICAN HOME ASSURANCE CO., and ACE PROPERTY AND CASUALTY INSURANCE CO.,

Index No.: 109484/04

Plaintiffs,

DECISION/ORDER

-against-

TURNER/SANTA FE, A JOINT VENTURE, LUNA MECHANICAL, INC., BURGESS STEEL, LLC., ABC PARTNERSHIP, XYZ CORPORATION, JOHN DOE and JANE DOE (1-10 FICTICIOUS NAMES),

Defendants.

JAZZ AT LINCOLN CENTER,

Index No.: 109856/05

Plaintiff,

-against-

LUNA MECHANICAL, INC., BURGESS STEEL, LLC., ABC PARTNERSHIP, XYZ CORPORATION, JOHN DOE and JANE DOE (1-10 FICTICIOUS NAMES),

Defendants.

Edmead, J.:

MEMORANDUM DECISION

This consolidated subrogation action stems from a fire that occurred on April 8, 2003 at the AOL/Time Warner Building located at 10 Columbus Circle in New York, New York (the premises). In this second action for subrogation, defendants Luna Mechanical, Inc. (Luna) and Burgess Steel, LLC (Burgess) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Jazz at Lincoln Center's (Jazz) complaint on the ground that it is, in effect, a

subrogation action for the benefit of Jazz's builder's risk insurance provider, Zurich American Insurance Company (Zurich American), which is barred by virtue of an enforceable waiver of subrogation provision contained in the construction management agreement between Jazz and non-moving party and construction manager Turner/Santa Fe. Alternatively, Burgess and Luna assert that Jazz's action must be dismissed, because it is barred by the principle of anti-subrogation, as both Burgess and Luna are additional insureds under Jazz's builder's risk insurance policy issued by Zurich American. Jazz's complaint alleges that it sustained damages as a result of negligence, breach of contract, breach of express and implied warranties, and gross negligence of the defendants.

Pursuant to a stipulation dated January 24, 2006, this second action was consolidated for discovery and joint trial with the first action, entitled RLI Insurance Company, et. al. v Turner/Santa Fe, Index No. 109484/04, another subrogation action arising from the same fire.

BACKGROUND

Jazz is a not-for-profit arts organization dedicated to producing and broadcasting various jazz events such as concerts, national and international tours, residencies, educational programs, weekly national radio and television programs, recordings and publications. Prior to April 8, 2003, Jazz entered into an agreement with Columbus Centre, LLC (Columbus) in which the premises was to be constructed for and owned and operated by Jazz for use as a performing arts center. According to this agreement, Columbus was obligated to construct the shell and core of that part of the building that was to be occupied by Jazz, leaving Jazz responsible for the interior fit-out work.

On December 1, 1998, Jazz and Turner/Santa Fe entered into a construction management

agreement, wherein Turner/Santa Fe was to provide construction management services for the fit-out work at the premises. Pursuant to this construction management agreement, Turner/Santa Fe hired defendant Burgess as its structural steel subcontractor to perform work in connection with the fit-out work. In addition, Turner/Santa Fe hired PJ Air Conditioning Corporation (PJ Air), which in turn hired defendant Luna to perform HVAC work at the site.

During the performance of their work, Luna and Burgess each maintained a construction shanty on the sixth floor of the premises owned by Jazz. The shanties were used to store various drawings, on-site tools and radios. In the early hours of April 8, 2003, a fire broke out on the sixth floor of the premises where defendants' construction shanties were located.

As a result of the fire, Jazz sustained damages in the amount of $5,106,456.67. Jazz had a deductible of $25,000.00. Jazz submitted a claim to Zurich American for its damages, and Jazz received payment from Zurich American in the proper amount to cover the property damage caused by the fire. Jazz concedes that this action is an action sounding in subrogation for the benefit of Zurich American for reimbursement of monies paid out to Jazz by Zurich American for damages caused by the fire.

DISCUSSION

"Where a defendant is the proponent of a motion for summary judgment, it has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law" (Flores v City of New York, 29 AD3d 356, 358 [1st Dept 2006]; Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (Mazurek v Metropolitan Museum of Art, 27

AD3d 227, 228 [1st Dept 2006]; see also Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 [1978]; Grossman v Amalgamated Housing Corp., Inc., 298 AD2d 224, 226 [1st Dept 2002]).

"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, Inc., 90 NY2d 654, 660 [1997]; Winkelmann v Excelsior Insurance Co., 85 NY2d 577, 581 [1995]; American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc., 307 AD2d 939, 941 [2d Dept 2003]). Parties to a commercial transaction are free to allocate the risk of liability to third parties through insurance and deployment of a waiver of subrogation clause (Atlantic Mutual Insurance Company v Elliana Properties, 261 AD2d 296, 296 [1st Dept 1999]).

"While parties to an agreement may waive their insurer's right of subrogation, a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears" (Kaf-Kaf, Inc. v Rodless Decorations, Inc., 90 NY2d at 660; Atlantic Mutual Insurance Company v Elliana Properties, 261 AD2d at 296).

Defendants Burgess and Luna assert that the waiver of subrogation provision contained in the construction management agreement between Jazz and Turner/Santa Fe bars Jazz's claim sounding in subrogation against Burgess and Luna for reimbursement of payments made by Zurich American to cover the fire damage to the premises. Specifically, Schedule C of the construction management agreement, entitled "Required Insurance," provides that neither party would assert a claim against the other for any claims covered by owner Jazz's builder's risk

insurance policy with Zurich American. Specifically, paragraph B of Schedule C, entitled "Owner Insurance," provides, in pertinent part, that:

> Owner [Jazz] shall secure and maintain "all risk" builder's risk insurance, on a completed value basis ... covering, at least, fire and extended coverage ... for the full replacement value of the Work, with a deductible selected by Owner. Coverage under Builder's Risk Insurance maintained by Owner shall not extend to the Core and Shell, any equipment owned or rented by Construction Manager or any Subcontractor used in the performance of the Work. Except for claims within the deductible not exceeding $25,000 for which Construction Manger assumes responsibility ... . Construction manager [Turner/Santa Fe] waives any claims which it may have against Owner and Owner waives any claims which it may have against Construction Manager and its Subcontractors with respect to any damage or destruction of the Work, the Project, work of any Separate Contractor, or any other property of Owner or any other Person occurring in connection with the Work but only to the extent such damage or destruction is covered by Owner's Builder's Risk Insurance [emphasis in original]

(Amended Notice of Motion, Exhibit F, Schedule C, paragraph B, at C-4).

Here, Jazz does not contest that the construction management agreement between Jazz and Turner/Santa Fe contains a valid and enforceable waiver of subrogation provision whereby Jazz agreed to waive any claims which it may have against Turner/Santa Fe and its subcontractors Burgess and Luna with respect to any damage or destruction of the work, the project, work of any separate contractor, or any other property of Jazz, to the extent such damage or destruction is covered by Jazz's builder's risk insurance policy.

Instead, Jazz alleges that Burgess and Luna's failure to construct shanties and/or to ensure that their shantics were constructed with fire retardant wood constituted conduct rising to the level of "gross negligence." As such, Jazz contends that the waiver of subrogation provision at issue does not apply in this case. While a waiver of subrogation clause may shield a defendant

from liability for ordinary negligence, it will not protect a defendant from liability for gross negligence (Federal Insurance Company v Honeywell, Inc., 243 AD2d 605, 606 [2d Dept 1997]). "Gross negligence in this context is defined as conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing [quotation marks and citations omitted]" (Gold Connection Discount Jewelers, Inc. v American District Telegraph Company, Inc., 212 AD2d 577, 578 [2d Dept 1995]; Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd., 81 NY2d 821, 823-824 [1993] [failure to wire a skylight, while perhaps suggestive of negligence or even "gross negligence" as used elsewhere, did not evince the recklessness necessary to abrogate plaintiff's agreement to absolve defendant from negligence claims]).

Here, Jazz has failed to present evidence that defendants Burgess and Luna failed to construct their shanties out of fire retardant wood, or that their failure to do so rose to the level of gross negligence, so as to support its contention that the waiver of subrogation provision at issue does not apply. Paul Logan (Logan), the project engineer hired by Jazz as part of an in-house team for the project at the premises, testified that the source of the fire was never identified, and that no particular contractor had been identified as to being responsible for the fire. In addition, Logan testified that there were at least a dozen shanties in the area where the fire originated, and it was never determined as to which shanty was the one where the fire originated. Although Logan was aware that Jazz was suing Luna and Burgess for not constructing their shanties out of fire retardant material, he did not know on what basis Jazz was making this claim.

In fact, Logan did not know whether or not Luna or Burgess failed to use fire retardant materials in the construction of their shanties, or whether or not their failure to use fire retardant material was the cause of the fire. In addition, Logan could not identify what Luna or Burgess

might have done that was negligent, careless or reckless in relationship to the fit-out work at the premises or to the fire.

Paul Vallario (Vallario), Burgess's field superintendent, testified that he could not remember specifically what kind of wood Burgess's standard-size 10 foot by 12 foot free-standing shanty was made out of, or if the shanty was made of fire retardant wood. However, it should be noted that Vallario later located and provided a purchase order for a fire retardant shanty that was purchased by Burgess for the project (see Reply Affirmation, Exhibit L, Response to Demands Made at Burgess Steel Deposition). Vallario also noted that, although a Luna employee had told him that the fire started in a Luna shanty, nobody really knew how the fire started.

Douglas De Phillips (De Phillips), a Turner/Santa Fe project executive, stated that he did not know if the shanties at issue were marked as fire retardant, though it was Turner/Santa Fe's policy to look for the fire retardant stamp on any wood that came into the job site. De Phillips also stated that prior to the fire, he had never been physically present in either Luna or Burgess's shanty.

Although Jazz alleges that dismissal of the complaint is premature at this juncture as additional discovery is needed in order to reveal evidence of gross negligence on the part of Burgess and Luna, pre-answer motions to dismiss have been granted where the complaint fails to set forth actions by defendants evincing a reckless disregard or smacking of intentional wrongdoing (see Retty Financing, Inc. v Morgan Stanley Dean Witter & Company, 293 AD2d 341, 341 [1st Dept 2002]).

In addition, contrary to Jazz's contention, the waiver of subrogation provision in this case

is not circumvented by Jazz's allegations of a breach of contract on the part of Burgess and Luna. Initially, it should be noted that there is no privity of contract between Jazz and defendants. In addition, Jazz's claim of breach of contract does not arise from a breach of the terms of the construction management agreement between Jazz and Turner/Santa Fe, but only from an alleged violation by Burgess and Luna of a provision of the Turner/Santa Fe safety program manual which requires that fire retardant construction materials be used in shanties located at the job site. Additionally, all fire retardant wood used was to have the M.E.A. numbered stamp, as required by the Building Code of the City of New York.

Here, Jazz has failed to establish that, by allegedly failing to comply with the project safety manual requirement that shanties be made with fire retardant wood, Burgess and Luna breached a contractual obligation owed to Jazz that is separate and distinct from any claim sounding in negligence. As such, not only has Jazz failed to present evidence that establishes that defendants even violated the safety program manual requirements, as discussed prior, but Jazz has failed to demonstrate how such an alleged violation was in breach of any contract with Jazz, so as to defeat defendants' motion for summary judgment dismissing Jazz's complaint.

Jazz also asserts that the waiver of subrogation provision at issue is not enforceable as to Jazz's $25,000 deductible in this matter. However, the waiver of subrogation provision at issue applies to "any claims which [Jazz] may have against Construction Manager and its Subcontractors with respect to any damage or destruction of the Work ... ." Thus, as the waiver of subrogation provision applies to "any claims," not just subrogated claims, Jazz is barred from seeking the return of its deductible, as well. Thus, defendants' Burgess and Luna are entitled to summary judgment dismissing Jazz's complaint in its entirety on the ground that it is, in effect, a

subrogation action which is barred by virtue of an enforceable waiver of subrogation provision contained the construction management agreement between Jazz and Turner/Santa Fe.

Further, as defendants Burgess and Luna are identified as additional insureds under the policy, Jazz's claim is also barred by the principle of anti-subrogation. Pursuant to the requirements of the construction management agreement with Turner/Santa Fe, Jazz secured a builder's risk insurance policy with Zurich American, policy number IM 3709678-00, with effective dates of March 22, 2002 through March 22, 2005 (the policy). Paragraph 1 of the "Declarations" portion of the policy identifies the insureds under the policy as follows:

> 1. A. NAMED INSURED(S):
> Jazz at Lincoln Center
>
> B. ADDITIONAL INSURED(S):
> To the extent required by the contract or subcontracts for the INSURED PROJECT* and then only as to their respective interests may appear, the following are recognized as Additional Insureds:
>
> The City of New York, Turner Construction and its' subcontractors, as their interest may appear
>
> All hereinafter referred to as the INSURED.

(Amended Notice of Motion, Builder's Risk Insurance Policy, Exhibit I, Declarations, at 1).

The subcontract between Turner/Santa Fe and its subcontractors set forth that the "Owner [Santa/Fe] shall effect and maintain fire insurance as indicated in Exhibit B." Exhibit B requires that all insurance protect against claims arising out of the work, regardless of whether the work was performed by the subcontractors or anyone directly employed by the subcontractors (Amended Notice of Motion, Turner/Santa Fe Subcontract, Exhibit G, at 17).

Further, Paragraph 18 of the policy, entitled "Subrogation," provides as follows:

SUBROGATION

If the company pays a claim under this Policy, it will be subrogated, to the extent of such payment, to all the INSURED's rights of recovery from other persons, organizations and entities. ... .

The Company will have no rights of subrogation against:

A. Any person or entity, which is a NAMED INSURED or an ADDITIONAL INSURED;
B. Any other person or entity, which the INSURED has waived its rights of subrogation against in writing at the time of loss; ...

(Amended Notice of Motion, Builder's Risk Insurance Policy, Exhibit I, Declarations, at 15).

It is well-settled that 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 Reinsurance Corporation v Continental Insurance Company, 82 NY2d 281, 294 [1993]; Pitruzello v Gelco Builders, Inc., 304 AD2d 303, 303 [1st Dept 2003]). However, "the anti-subrogation bar operates only to the extent of defendants insurable interest" (St. Paul Fire & Marine Insurance Company v L.E.S. Subsurface Plumbing Company, Inc., 266 AD2d 139, 139-140 [1st Dept 1999]; Commerce & Industry Insurance Company v Admon Realty, Inc. (168 AD2d 321, 322-323 [1st Dept 1990])).

Here, Jazz does not contest that Luna and Burgess are subcontractors of Turner/Santa Fe, that its builder's risk insurance policy with Zurich American identifies Luna and Burgess as additional insureds, and that the policy itself contains a waiver of subrogation provision prohibiting subrogation against both named insureds and additional insureds. Instead, Jazz contends that the action against defendants is not barred by anti-subrogation principles, because Burgess and Luna are only entitled to additional insured status under the policy to the extent required by contract or subcontracts for the insured project, but "only as to their respective

interests may appear," thus limiting their interest to their own personal property at the project site.

However, although Jazz asserts that defendants' "respective interests" as additional insureds under the policy are limited to defendants' personal property, for example, their tools and equipment at the project site, in fact, the coverage afforded under the policy between Zurich American and Jazz extends to the "full replacement value of the Work," which encompasses more than defendants' personal property.

In addition, the intention for the policy to cover more than defendants' personal property at the project site is also evidenced in a policy provision entitled Part B-EXCLUSIONS AND LIMITATIONS, which clearly provides that the policy does not insure "[c]ontractors tools, machinery, plant and equipment including spare parts and accessories, whether owned, loaned, hired or leased, and property of similar nature not destined to become a permanent part of the INSURED PROJECT*" (Amended Notice of Motion, Zurich American Policy, Exhibit I, at 7). To adopt plaintiff's contention that defendants are additional insureds only to the extent of their insurable interests in their personal property, and then to exclude these interests, would negate any coverage afforded to defendants as additional insureds.

Further, Jazz's reliance on Commerce & Industry Insurance Company v Admon Realty, Inc. (168 AD2d at 321, supra) for his contention that anti-subrogation does not apply in the instant case because the damage that occurred was outside the scope of the insurance policy is misplaced. In Commerce & Industry Insurance Company, the endorsement naming the defendant as an additional insured limited coverage to liability arising out of the ownership, maintenance or use of that part of the premises which was leased to the named insured. In that case, anti-

subrogation did not apply, as the damages arose in an area which was not leased to the named insured.

In contrast, in the instant case, defendants Burgess and Luna were additional insureds under Jazz's builder's risk policy, which applied to the entire loss due to fire, minus the exclusions covered by the policy. Thus, defendants Burgess and Luna are also entitled to summary judgment dismissing Jazz's complaint because it is barred by the principle of anti-subrogation.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that, in this second action for subrogation, defendants Burgess Steel, LLC. and Luna Mechanical, Inc.'s motion for summary judgment dismissing plaintiff Jazz at Lincoln Center's complaint is granted, and the complaint is severed and dismissed as to these defendants, with costs and disbursements as taxed by the Clerk of Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

DATED: March 7, 2007

ENTER:

Carol Robinson Edmead, J.S.C.

FILED
MAR 12 2007
COUNTY CLERK'S OFFICE
NEW YORK