

State Farm Fire & Cas. Co. v Rodriguez

2007 NY Slip Op 33744(U)

October 29, 2007

Supreme Court, Nassau County

Docket Number: 2583-06/

Judge: F. Dana Winslow

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SCA

**SHORT FORM ORDER
SUPREME COURT - STATE OF NEW YORK**

Present:
HON. F. DANA WINSLOW,

Justice

STATE FARM FIRE AND CASUALTY COMPANY
a/s/o GRACE MATTHEWS,

**TRIAL/IAS, PART 9
NASSAU COUNTY**

Plaintiffs,

MOTION DATE: 8/1/07

-against-

MOTION SEQ. NO.: 002

**SAN FRANCISCO RODRIGUEZ, TAD
CONSTRUCTION, INC., A&A CONSULTING
ENGINEERS, P.C. AND PHILIBERT
ENGINEERING, P.C.,**

INDEX NO.: 12583/06

Defendants.

The following papers read on this motion (numbered 1-3)

Notice of Motion.....1
Affirmation in Opposition.....2
Reply Affirmation.....3

Motion by defendant A&A Consulting Engineers, P.C. for summary judgment dismissing the complaint is denied. A&A's motion for summary judgment dismissing all cross claims is granted except as to defendant Philibert's cross claim for contribution.

This is an action for property damage caused by construction work on neighboring property. Plaintiff State Farm Fire and Casualty issued a homeowner's insurance policy to Grace and Trevor Matthews covering their 2-family dwelling located at 1133 Blake Avenue in Brooklyn. Defendant San Francisco Rodriguez is the owner of the adjoining property.

In May 2004, Rodriguez hired defendant A&A Consulting Engineers to draw plans to construct a three-family dwelling on his lot. According to the written agreement between Rodriguez and A&A Consulting, A&A was to file a set of plans and a permit application with the Building Department and undertake "the necessary actions" to obtain approval of the application. However, the agreement provided that A&A was not responsible for "supervision of actual construction" or construction costs. The plans prepared by A&A called for certain excavation

work to be performed and a concrete foundation to be laid. In this regard, the notes to the plans provide that, "Contractor shall provide all shoring, bracing, ...and excavations, etc. to accomplish all the work in an approved manner as per [Building Department regulations]." In November 2004, A&A filed the necessary documents with the Building Department, including a "TR1," or technical report, statement of responsibility form.¹

After the plans were prepared, Rodriguez entered into a written contract with defendant Tad Construction, Inc. to construct the building for \$230,000. Either Rodriguez or Tad hired defendant Philibert Engineering to conduct certain engineering work at the construction site.

On March 26, 2005, during the course of excavation, a backhoe operated by Tad collided with the exterior brick wall of Matthews' building. At that time, the western foundation wall of Matthews' property collapsed, impairing the structural integrity of the building. Although Tad appears to have admitted responsibility, State Farm maintains that factors other than the impact caused the foundation wall to give way. State Farm's expert claims that when Tad laid the foundation for Rodriguez' building, pressure from the wet concrete caused "lateral displacement" of Matthews' foundation wall. According to the expert, the wet concrete exerted pressure on the foundation wall because Tad placed the forms for the concrete directly against Matthews' wall without any means of lateral bracing. The expert further opined that excavation of the soil from Rodriguez' property disturbed the soil under Matthews' foundation wall and diminished its bearing capacity.

State Farm paid Matthews' claim and became subrogated to the insured's rights against whoever was responsible for the damage to the property. State Farm commenced this action, asserting a claim against Rodriguez for strict liability for damages caused by excavation and construction. State Farm also asserts claims for negligence against Tad, A&A, and Philibert Engineering. State Farm asserts that A&A was under a duty to inspect the excavation and foundation work and that its failure to inspect led to the damage to the insured's property. In their answers, Rodriguez and Philibert cross-claim against A&A for contribution or indemnity.

¹Although the actual TR1 has not been submitted to the court, it is clear that the "identification of responsibilities" section of the form requires the engineer to perform required inspections(See A&A's Ex. G, affidavit of Saeed Ainechi at ¶6).

Tad Construction has not appeared in the action.

A&A moves for summary judgment dismissing the complaint and all cross claims on the ground that it did not owe any duty to the owner of the adjoining property, and no action or inaction on its part caused the collapse of the foundation wall. A&A argues that it filed the TR1 form only as a “place holder,” in order to obtain approval of the plans, and that another engineer was to be retained to perform the required inspections. A&A further argues that because it did not receive any notice that the excavation or foundation work was about to commence, it was not under any duty to perform an inspection.² Alternatively, A&A requests dismissal based upon a document that Trevor Matthews signed on July 13, 2005. In the document, Matthews “certified” that he had received \$1,400 from Francisco Rodriguez and “this will be the only and final payment for the damage of my property.”³ A&A argues that the document operated as a release which discharged not only Rodriguez but also the other defendants.

The existence and scope of an alleged tortfeasor’s duty is usually a legal and policy-laden issue reserved for the court (*Palka v. Servicemaster Management Services Corp.*, 83 NY2d 579, 585 1994]). The court may consider logic, science, competing socioeconomic policies, and responsibilities which have been assumed by contract (*Id.*). The court may also consider the reasonable expectations of the parties and society generally, the danger of proliferation of claims, the likelihood of unlimited or insurer-like liability, and “disproportionate risk and reparation allocation” (*Peralta v. Henriquez*, 100 NY2d 139, 144 [2003]).

The court notes that an architect’s duty of professional care arises out of the contractual relationship between the architect and the client (*Sears, Roebuck & Co. v. Enco Associates*, 43 NY2d 389, 396 [1977]). Nevertheless, the architect’s duty of reasonable care is not owed solely to the party with whom the contract is made and may enure to the benefit of others (*White v.*

²§ 27-195 of the New York City Administrative Code provides that, “Before any work is commenced on an item of construction requiring controlled inspection, all persons responsible for such controlled inspection shall be notified in writing at least seventy-two hours prior to such commencement.”

³In the document, Matthews referred to himself as “Trevor Bascom.” He also identified his property as “1131 Blake Avenue,” which is actually the address of Rodriguez’ property.

Guarente, 43 NY2d 356, 363 [1977]). Courts are reluctant to extend an architect's duty to "an indeterminate class of persons" (*Gordon v. Holt*, 65 AD2d 344, 349 [4th Dep't 1979]). However, the duty may extend to a "fixed, definable, and contemplated group" who may rely upon the architect's services being performed properly (*White v. Guarente*, 43 NY2d at 362).

The court concludes that when an architect prepares plans that include excavation and foundation work, the architect's duty of reasonable care extends to an adjoining landowner. Because adjoining landowners are a fixed and definable class, there is no danger of unlimited or insurer-like liability. Moreover, an adjoining landowner may reasonably expect that an architect will exercise due care so as to avoid structural damage to neighboring property. An architect may be retained without an obligation to supervise construction. Nonetheless, because of the opportunity to inspect, the architect will have considerably more control over the project than will an adjoining landowner.

Although an architect may owe a duty of due care to an adjoining landowner, the duty is no broader than that owed to the architect's client. An architect is not under a duty to supervise construction unless that duty has been assumed in the contract with the client (*Board of Education v. Sargent, Webster, Crenshaw & Folley*, 146 AD2d 190, 196 [3d Dep't 1989]). Similarly, there may even be no duty of periodic inspection, if such a duty has not been assumed in the architect's contract (*Id.*). However, if the architect has assumed a duty to inspect and violates that duty, he will be liable for damage caused by the contractor which could have been avoided had the architect conducted a reasonable inspection (*Id.*). The court holds that if the architect has assumed a duty to inspect, the architect's duty also runs in favor of the adjoining landowner.

A&A's contract with Rodriguez did not expressly require A&A to perform inspections. However, a duty of due care may be imposed by statute or regulation as well as contract (*Rivera v. Nelson Realty*, 7 NY3d 530, 534 [2006]). By agreeing to file the necessary documents with the Building Department, and actually filing the TR1 statement of responsibility form, A&A assumed the responsibility of performing necessary inspections of Rodriguez' project.

A&A argues the because it did not receive notice that excavation or foundation work was about to commence, it was relieved of its duty to perform inspections. In *RCD Building v. Park Slope Condominiums*, 14 Misc.3d 1215A (Sup. Ct. NY Co. 2007), Justice Harkavy held that

failure to give the architect written notice that excavation or “underpinning” work was about to commence relieved the architect of liability to the adjoining landowner.⁴ This court respectfully disagrees with Justice Harkavy’s decision. When apportioning fault among tortfeasors, the fact finder must consider the relative culpability of each defendant based upon all the facts and circumstances of the case (CPLR § 1402; PJI 2:275; *Garrett v. Holiday Inns, Inc.*, 58 NY2d 253 [1983]). Thus, while the contractor’s failure to give 72 hours written notice as required by Administrative Code § 27-195 is relevant to the issue of apportionment of fault, it does not relieve the architect of his primary duty of inspection.

Where an insurer pays the loss sustained by its insured, it becomes an “equitable subrogee” and acquires the insured’s rights against the party who caused the loss (*Federal Ins. Co. v. Arthur Anderson & Co.*, 75 NY2d 366, 372 [1990]). The principle of subrogation is to be applied liberally (Id at 373). It may be applied where the insured’s claim is based upon ordinary negligence as well as the negligence of a professional (Id). However, the rights of an insurer as equitable subrogee are derivative and limited to such rights as the insured would have had against the third party for its default or wrongdoing (Id at 372). Thus, the insurer’s claim as subrogee is subject to whatever defenses the third party might have asserted against the insured (Id).

At common law, a release of one joint tortfeasor automatically released all others (*Williams v. Niske*, 81 NY2d 437, 442 [1993]). This rule was perceived as trapping litigants who would naturally assume that settlement with one party would have no effect on their ability to pursue another (Id). In 1972, General Obligations Law § 15-108 was enacted to abrogate the common law rule and encourage settlements. Although the statute refers to persons liable in tort for the same “injury” or wrongful death, it is also applicable to property damage actions (*Sommer v. Federal Signal Corp.*, 79 NY2d 540, 555 n. 5 [1992]). GOL § 15-108(a) provides that when a release or a covenant not to sue is given to one of two or more joint tortfeasors, it does not discharge any of the other tortfeasors from liability unless its terms expressly so provide. However, the settlement reduces the claim of the releasor against the other tortfeasors to the

⁴Because Justice Harkavy held that lack of written notice was fatal to the adjoining landowner’s claim against the architect, he did not reach the question of whether the architect assumed a duty to inspect by filing a TR1 (see footnote 7 of his decision).

extent of any amount stipulated by the release, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor's equitable share of the damages, whichever is greatest.

Since Matthews' document might be interpreted that it would be "the only and final payment" from Rodriguez, the court does not interpret it as an express discharge of the other tortfeasors. Thus, State Farm's right of subrogation against Tad, Philibert, and A&A is not effected. Since Matthews is not a party to the present action, the court expresses no opinion as to the effect of the document upon State Farm's subrogation rights as against Rodriguez (See *Weinberg v. Transamerica Ins. Co.*, 62 NY 2d 379 [1984]).

Pursuant to GOL § 15-108, the relative culpability of Rodriguez will determine the effect of the settlement upon the other defendants. The document recites that the consideration paid for it was \$1,400, and State Farm alleges that the amount of the property damage was \$99,318.51. If Rodriguez' equitable share of the damage is determined to exceed \$1,400, the other defendants would pay only their equitable shares of the verdict. If Rodriguez' equitable share is determined to be less than \$1,400, the other defendants would pay only the difference between the verdict and \$1,400, equitably apportioned among them (*Williams v. Niske*, supra, 81 NY2d at 440). If it were to be proved at trial that Matthews actually received an amount greater than \$1,400 from Rodriguez, the amounts to be paid by the other defendants would be calculated based upon the actual settlement figure. While the ultimate effect of the settlement with Rodriguez must await the trial, defendant A&A's motion for summary judgment dismissing the complaint is denied.

The court notes that neither Rodriguez nor Philibert has submitted opposition to A&A's motion for summary judgment dismissing their cross claims. Nevertheless, on a motion for summary judgment, it is the proponent's burden to make a prima facie showing of entitlement to judgment as a matter of law (*JMD Holding Corp. v. Congress Financial Corp.*, 4 NY3d 373, 384 [2005]). Failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Id).

Since Rodriguez and Philibert do not refer to any contractual indemnity provisions in their cross claims, the court regards their claims as being based upon contribution and common law indemnity. In a classic indemnification case, the party seeking indemnity has committed no

wrong, but by virtue of some relationship with the tortfeasor or obligation imposed by law, the party was held liable to the injured party(*Glaser v. Fortunoff*, 71 NY2d 643, 646 [1988]). In other words, where one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent(Id). Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tortfeasors is the only available remedy(Id).

State Farms's claim against Rodriguez purports to be based upon strict liability for damages arising from excavation and construction. Pursuant to Labor Law § 241(6), if an owner or contractor violates a specific regulatory requirement in the course of excavation or construction, he will be vicariously liable for an employee's resulting personal injury(*Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). There is no corresponding Labor Law provision for injury to property. Thus, as A&A notes, State Farm's cause of action against Rodriguez is actually based on negligence rather than strict liability. Neither Rodriguez nor Philibert has a claim for common law indemnity.

General Obligations Law § 15-108[c] provides, "A tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." As noted above, the jury will be required to apportion fault among all defendants, including Rodriguez. However, because Rodriguez waived his claim for contribution by settling with Matthews, A&A's motion for summary judgment dismissing Rodriguez' cross-claim for contribution is granted. Since A&A has failed to establish prima facie that it is entitled to judgment with respect to Philibert's cross claim for contribution, A&A's motion for summary judgment dismissing Philibert's cross claim is **denied** as to contribution and granted as to indemnity.

This constitute the Order of the Court.

Dated: 10/29, 2007

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J.S.C.

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