

Federal Ins. Co. v Firestone Bldg. Prods. Co.

2008 NY Slip Op 30422(U)

February 7, 2008

Supreme Court, New York County

Docket Number: 0121496/2003

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**
J.S.C.

PART 1

Index Number : 121496/2003
FEDERAL INSURANCE
VS.
FIRESTONE BUILDING PRODUCTS
SEQUENCE NUMBER : 005
SUMMARY JUDGEMENT

INDEX NO. 121496/03

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

s motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1,2

3,4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
FEB 14 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: February 7, 2008

MARTIN SHULMAN **J.S.C.**

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DEFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1

-----X

FEDERAL INSURANCE COMPANY a/s/o CIRCLE
INTERNATIONAL GROUP, INC.,
Plaintiff,

Index No. 121496/03

DECISION AND ORDER

-against-

FIRESTONE BUILDING PRODUCTS COMPANY
and J.P. PATTI COMPANY, INC.,
Defendants.

-----X

J.P. PATTI COMPANY, INC.,
Third Party Plaintiff,

Index No. 590247/04

-against-

WATSKY ASSOCIATES, INC.,
Third Party Defendant.

-----X

J.P. PATTI COMPANY, INC.,
Second Third Party Plaintiff,

Index No. 590776/05

-against-

MARCH ASSOCIATES,
Second Third Party Defendant.

-----X

MARCH ASSOCIATES,
Third Third Party Plaintiff,

Index No. 590169/07

-against-

FIRESTONE BUILDING PRODUCTS COMPANY,
Third Third Party Defendant.

-----X

SHULMAN, MARTIN, J:

Plaintiff commenced this subrogation action against defendant J.P. Patti Company, Inc. ("Patti"), a roofing subcontractor, and Firestone Building Products Company ("Firestone"), a roof manufacturer, alleging that Patti and Firestone were

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negligent in installing and manufacturing, respectively, the roof of a warehouse located at 55 Johnson Road, Lawrence, New York (the "building"), which was damaged in a windstorm in December 2000. Plaintiff ultimately discontinued the action and Patti discontinued its cross-claims against Firestone with prejudice and fully released Firestone from all liability with respect to the subject roof.¹ Patti subsequently brought third party actions against March Associates ("March"), the building project's general contractor, and Watsky Associates, Inc., a roofing consultant. March now brings this third third party action against Firestone.² Firestone moves for summary judgment dismissing the third third party complaint. March and Patti oppose the motion.

March's complaint seeks indemnification and/or contribution from Firestone in the event plaintiff recovers a verdict against March, based upon theories of negligence, strict liability, breach of implied warranty and breach of contract. In support of its motion for summary judgment, Firestone argues that the causes of action based upon negligence and strict liability must fail because March seeks to recover for purely economic losses. As a result, March's right to recovery, if any, is limited to its breach of warranty and/or contract claims. With respect to the breach of implied warranty and contract claims, Firestone contends that no privity exists between it and March and March is not a third party beneficiary to the contract between Patti and Firestone.

¹ Plaintiff and Patti discontinued the main action against Firestone based upon their belief that: 1) the roof failure was caused by winds exceeding 60 m.p.h.; and 2) the roof warranty did not cover damage caused by winds exceeding 55 m.p.h. Patti now claims that subsequent discovery revealed that the foregoing assumptions were erroneous and the main action should not have been discontinued against Firestone.

² BFS Diversified Products, LLC, Firestone's successor in interest, appeared in the third third party action.

SUMMARY JUDGMENT

"Where there is no genuine issue to be resolved at trial, the case should be summarily decided . . ." *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974). The proponent of a motion for summary judgment "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 issue of fact." *JMD Holding Corp. v. Congress Financial Corp.*, 4 N.Y.3d 373, 384 (2005). The movant's failure to make a prima facie showing, requires denial of the motion regardless of the sufficiency of the opposing papers. *Id.* However, if the movant makes such a showing, the burden shifts to the non-movant to demonstrate the existence of factual issues requiring trial. *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept., 2007). Summary judgment is appropriate where the non-movant's opposition to the motion is entirely conjectural and there is no genuine issue of fact to be resolved. *See, Shaw v. Time-Life Records*, 38 N.Y.2d 201, 207 (1975).

Negligence and Strict Liability

In the event that plaintiff or Patti recover a judgment against March, March's first and second causes of action seek contribution from Firestone based upon theories of negligence and strict liability. Firestone contends that economic loss damages, such as those plaintiff seeks, cannot be recovered based upon a tort theory of liability. In opposition, March argues that the economic loss doctrine does not apply to property

damage cases and, as such, Firestone was strictly liable to plaintiff, making Firestone a joint tortfeasor *vis a vis* March, from whom March can seek contribution.

The economic loss doctrine provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser of a product where the claimed losses flow from damage to the property only and personal injury is not claimed or at issue. *Amin Realty, LLC v. K&R Constr. Corp.*, 306 A.D.2d 230, 762 N.Y.S.2d 92 (2nd Dept., 2003), *citing Bocre Leasing Corp. v. General Motors Corp.*, 84 N.Y.2d 685, 621 N.Y.S.2d 497 (1995). The rule applies to economic losses to the product itself and consequential damages resulting from the alleged defect. *Id.* In such situations, the plaintiff is limited to recovery sounding in breach of contract or breach of warranty. *Manhattanville College v. James John Romeo Consulting Engineer, P.C.*, 28 A.D.3d 613, 813 N.Y.S.2d 767 (2nd Dept., 2006), *lv. to app. disp.* 8 N.Y.3d 852, 830 N.Y.S.2d 695 (2007).

Here, plaintiff seeks to recover damages for economic loss only, to wit, the cost of replacing the building's roof and related damages. As the manufacturer of the roofing materials Patti installed at the building, Firestone cannot be held liable to plaintiff, the ultimate purchaser of the roof, for damages for negligence and strict product liability. *See Ralston Purina Co. v. Arthur G. McKee & Co.*, 158 A.D.2d 969, 970 (4th Dept., 1990) (summary judgment granted to manufacturers of roofing materials dismissing property owner's negligence and strict liability claims). Nor can it be said that Firestone owed any duty to Patti, their relationship being purely contractual in nature. It follows that March's claim for contribution must fail. *See Trustees of*

Columbia Univ. v. Mitchell/Giurgola Associates, 109 A.D.2d 449, 454, 492 N.Y.S.2d 371, 376 (1st Dept., 1985)(in order to sustain a claim against manufacturer for contribution it is necessary to find that manufacturer owed a duty either to plaintiff or to the various defendants).³ Accordingly, Firestone's motion for summary judgment dismissing the first and second causes of action of March's third third party complaint is granted.

Breach of Contract and Breach of Warranty

March's third and fourth causes of action seek indemnification from Firestone for breach of warranty and breach of contract,⁴ respectively. March contends that it is a third party beneficiary to the contract between Patti and Firestone and to Firestone's limited warranty procured by Patti and issued to the building owner (plaintiff's insured). March bases its claimed status upon Firestone's alleged knowledge that "roofing subcontractors obtain warranties for the benefit of the owner and the general contractor." Lynn Opp. Aff. at ¶56.

Since it is undisputed that no contract exists between March and Firestone, March's right to recovery depends upon a showing that March was an intended third

³ While the court in *Trustees of Columbia Univ. v. Mitchell/Giurgola Associates*, *supra*, found that the manufacturer owed the plaintiff a duty under strict products liability law, March's reliance upon this decision is misplaced. The instant case is distinguishable since there are no allegations in this case that the product in question (to wit, the roof materials) was unreasonably dangerous.

⁴ The fourth cause of action is based upon the contract between Patti and Firestone, wherein Firestone agreed to indemnify Patti in the event that materials Firestone manufactured were defective. March asserts that if it is found liable to plaintiff, such liability is due to Patti's breach of its contract with March which required Patti to secure a proper indemnity from Firestone.

party beneficiary of either the warranty or the contract between Patti and Firestone, rather than a merely incidental beneficiary. *Pile Foundation Constr. Co., Inc. v. Berger, Lehman Associates, P.C.*, 253 A.D.2d 484, 486, 676 N.Y.S.2d 664 (2nd Dept., 1998). To establish that it is an intended beneficiary, the circumstances must indicate that Patti, as the promisee in its contract with Firestone, intended to give March the benefit of the promised performance. *Facilities Development Corp. v. Miletta*, 180 A.D.2d 97, 100-101, 584 N.Y.S.2d 491 (3rd Dept., 1992). The manifestation of any such intent between Patti and Firestone must be sufficient to make reliance by March both reasonable and probable. *Id.*

March argues that an issue of fact exists with respect to its claimed third party beneficiary status. The court disagrees. On this record, March fails to meet its burden of establishing that it is a third party beneficiary to either the warranty or the contract between Patti and Firestone. Specifically, March submits no evidence, from the warranty or contract language or otherwise, manifesting a mutual intent by the contracting parties (to wit, Firestone and Patti) to confer any right upon March as general contractor. *Pile Foundation Constr. Co., Inc. v. Berger, Lehman Associates, P.C.*, *supra*; *Amin Realty, LLC v. K&R Constr. Corp.*, *supra*, 306 A.D.2d at 231-232.

By comparison, the facts in the case at bar are readily distinguishable from those in *Ralston Purina Co. v. Arthur G. McKee & Co.*, *supra*, 158 A.D.2d at 970, wherein the court found an issue of fact as to whether plaintiff was a third party beneficiary of a subcontract where the subcontract contained a clause obligating the subcontractor to be bound by the terms and conditions of the general contractor's contract with the

owner. Given the foregoing determination, the court need not address the parties' arguments concerning the cause of the roof failure and whether Firestone provided the correct warranty and type of roof ordered by Patti. The court has considered the parties' remaining arguments and finds them lacking in merit.

Accordingly, it is

ORDERED that Firestone's motion for summary judgment is granted in its entirety and the third third party complaint is hereby dismissed. The Clerk is directed to enter judgment accordingly.

The parties to the main action and the first and second third party actions are directed to appear for a status conference on March 11, 2008 at 9:30 a.m., 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's decision and order. Courtesy copies of this decision and order have been sent to counsel for the parties.

DATED: New York, New York
February 7, 2008



HON. MARTIN SHULMAN, J.S.C.

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