

NYP Holdings, Inc. v McClier Corp.

2008 NY Slip Op 32088(U)

July 22, 2008

Supreme Court, New York County

Docket Number: 0601404/2004

Judge: Herman Cahn

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

PRESENT: Hon. Herman Cahn PART 49
Justice

NYP HOLDINGS INC.,

INDEX NO. 601404/04

- v -

MOTION DATE _____

McCLIER CORPORATION, ET AL

MOTION SEQ. NO. 18

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION IN MOTION SEQUENCE**

FILED

JUL 25 2008

COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED: _____

J.S.C.

Dated: July 22, 2008

Herman Cahn

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

-----X
NYP HOLDINGS, INC.,

Plaintiff,

-against-

Index No. 601404/04

McCLIER CORPORATION, LEONARD J. SKIBA, FRANCIS
N. CAVALIER, CONSOER TOWNSEND ENVIRODYNE
ENGINEERS, INC., TOWNSEND ENVIRODYNE
ENGINEERS OF NEW YORK, INC., SERGIOS DE LOS
REYES and MICHAEL LORCZAK,

Defendants.

-----X
McCLIER CORPORATION, LEONARD J. SKIBA, FRANCIS
N. CAVALIER,

Third-party Plaintiffs,

-against-

RUTURRA & SONS CONSTRUCTION COMPANY, INC.,
BOTTO MECHANICAL CORPORATION, FRED GELLER
ELECTRICAL, INC., PILE FOUNDATIONS
CONTRACTORS, INC., INTERSTATE IRON WORKS
CORP., LYNBROOK GLASS & ARCHITECTURAL
METALS CORP., PROTO CONSTRUCTION &
DEVELOPMENT CORP., ASM MECHANICAL SYSTEMS,
BASS MECHANICAL CORP., STALLONE TESTING
LABORATORIES, INC., S.D.L. CONSTRUCTION CORP.
f/k/a/ BLANDFORD LAND DEVELOPMENT CORP., FIRST
WOMEN'S FIRE SYSTEMS CORP., ARCHITECTURAL
ROOFING & SIDING, INC., and BAYSIDE FENCING, INC.,

Third-party Defendants.

-----X

HERMAN CAHN, J.:

This action is before the Court on the third-party defendants' motions for summary

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judgment against the third-party plaintiff.

The claims in the main action were asserted by plaintiff NYP Holdings, Inc. against defendant/third-party plaintiff McClier Corporation, and arise out of alleged design and construction defects. NYP Holdings is the owner of the *New York Post*. McClier is alleged to have been hired by NYP Holdings as the architect and engineer for a new printing plant to be constructed for the *New York Post*, to be located at 132nd Street and the East River, Bronx, New York (the project).

McClier was to coordinate the project so that it would meet the needs of plaintiff and, to that end, was given complete and sole responsibility for the design and construction of the project.

Various third parties were allegedly retained by McClier to perform necessary services, including architectural and engineering services.

McClier allegedly failed to perform architectural design and engineering services, and to have failed to prepare contract documents for the project in accordance with professional standards.

The main complaint alleged defects in concrete slabs and steel beams and trusses resulting in inadequate support for the specified loads, excessive cracking and fissures throughout the project, and inadequate humidification, electrical, and plumbing systems.

McClier commenced a third-party action against many of the subcontractors and testing laboratories who were allegedly retained to work at the project, including third-party defendant Rutturra & Sons, Construction Company, Inc. In this third-party subrogation action, McClier seeks indemnification of almost the entire \$23.15 million lump sum amount its insurer, Lloyd's

of London, paid to NYP Holdings to settle the claims in the main action.

Ruturra & Sons, joined by several of the subcontractors (collectively, Ruturra), has moved for summary judgment against McClier, arguing that Lloyd's was a volunteer, whose payment to settle NYP Holding's claims was outside its contractual responsibility and, therefore, not subject to a claim for subrogation.

McClier opposes the motion on the ground that California law governs the issues raised, and that according to California law, Lloyd's was not acting as a volunteer and, therefore, it may pursue this claim for subrogation.

A movant's burden on a motion for summary judgment is to establish that there are no material issues of fact. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Once a movant has met this burden, the party opposing the motion must come forward with proof of the existence of a triable issue. *Indig v Finkelstein*, 23 NY2d 728, 729 (1968).

For what appears to be the first time in this litigation, which has been pending for more than three years, McClier contends that the insurance policy issued by Lloyd's to McClier's parent company, AECOM Technology Corporation, covered the claims asserted by NYP Holdings against McClier in the first-party action. Since AECOM is domiciled in California, McClier claims that California law governs the issues raised here. Under California law, apparently, Lloyd's would not be viewed as a volunteer, and could proceed with this claim against Ruturra.

Where the scope of a company's operations is nationwide, the principal location of the insured risk is the state where the company is incorporated, and where it has its principal place of business. *See Steadfast Ins. Co. v Sentinel Real Estate Corp.*, 283 AD2d 44, 50 (1st Dept 2001).

Broader choice-of-law principles, involving the “grouping of contacts,” and “center of gravity,” will be applied to determine choice of law principles only where the company’s operations and customers are widely dispersed. *Certain Underwriters at Lloyd’s, London v Foster Wheeler Corp.*, 36 AD3d 17, 22 (1st Dept 2006), *aff’d, for reasons stated*, 9 NY3d 928 (2007).

According to Ruturra, defendant McClier is a Delaware corporation with its office at 20 Exchange Place, New York, New York. The single location of the insured risk is New York City.

McClier cites *Certain Underwriters at Lloyd’s, London v Foster Wheeler Corp.* as authority for applying California law to the facts in this case. In *Foster Wheeler Corp.*, the insured was exposed to claims throughout the country for personal injuries related to asbestos. The court found that contract cases do not call for the “interest analysis” employed in tort cases, but considered the governmental interests of the competing jurisdictions, such as the regulation of conduct with respect to insured risks within the state, assuring fair treatment of the state’s domiciliaries, the availability of insurers, and regulating the conduct of insurance companies. “[T]he state of the insured’s domicile should be regarded as a proxy for the principal location of the insured risk,” stated the *Foster Wheeler* court. *Foster Wheeler Corp.*, 36 AD3d at 24. Locating the insured’s domicile turns on an inquiry into the insured’s principal place of business and its state of incorporation. Where the two differ, the insured’s principal place of business, rather than its state of incorporation, determines the insured’s domicile. *Id.* at 25.

In the present case, McClier is the insured, with a principal place of business in New York. New York is thus deemed to be the location of the insured risk, and New York law governs the parties’ dispute.

The domicile of McClier's parent company has no relevance to the choice-of-law determination. New York law will be applied to determine whether McClier's insurer, Lloyd's, became a volunteer when it settled with NYP Holdings.

Under New York law, the voluntary payment doctrine is a common-law doctrine that bars recovery of payments made voluntarily "with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law." *Dillon v U-A Columbia Cablevision of Westchester, Inc.*, 100 NY2d 525, 526 (2003). A "volunteer" in the insurance industry is one who pays a claim despite the fact that it falls within an exclusion from coverage. *Serio v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 18 AD3d 319 (1st Dept 2005); *National Union Fire Ins. Co. v Ranger Ins. Co.*, 190 AD2d 395 (4th Dept 1993).

[W]hen an insurer who is not acting under a mistake of material fact or law assumes the defense and indemnification of an insured when there is no obligation to do so, that insurer becomes a "volunteer with no right to recover the monies it paid on behalf of [the] insured."

Merchants Mut. Ins. Group v Travelers Ins. Co., 24 AD3d 1179, 1180 (4th Dept 2005) (citation omitted).

Ruturra's reliance on these cases is misplaced. In both *National Union* and *Merchant's Mutual*, the claim that the respective carrier "volunteered" to defend had been expressly excluded from the policy.

The terms "volunteer" and "subrogation" should not be interposed as a barrier to a valid claim for reimbursement, especially since subrogation rests on equitable principles, and can be employed to avoid unjust enrichment. *Mid-City Shopping Ctr. v Consolidated Mut. Ins. Co.*, 35 AD2d 1053, 1053 (3d Dept 1970).

Ruturra states that NYP Holdings commenced an action against McClier for failing to provide proper professional design services, and for failing to properly perform the construction. McClier's claims against the subcontractors are for defective construction. When McClier settled with NYP Holdings for \$23.9 million, there was no allocation between design errors or defective construction. Under the subject policy, Lloyd's paid \$23.15 million of the total settlement, for which it now seeks subrogation. According to Ruturra, Lloyd's own reservation of rights letter stated that the insurance policies provided coverage for errors and omissions in connection with professional services, but not for defective construction, and McClier acknowledged that it had no insurance coverage for claims based on defective construction. According to Ruturra, Lloyd's is the real party in interest, and Lloyd's has no claims against the third-party defendants, who acted only as construction subcontractors.

Ruturra's prima facie burden, on this motion, is to establish that Lloyd's paid the settlement under McClier's insurance coverage, to NYP Holdings, when there was no obligation for Lloyd's to do so. McClier must then come forward with proof that Lloyd's had an obligation to insure and defend McClier when it paid NYP Holdings.

Ruturra has stated a prima facie claim of entitlement to summary judgment on McClier's claims.

However, McClier has come forward with evidence that the settlement payment was made to NYP Holdings "under compulsion," or for the protection of some of its own interests, "and in discharge of an existing liability." *National Union Fire Ins. Co.*, 190 AD2d at 397.

McClier claims that Lloyd's decision to settle NYP Holdings' claims was made, in part, to eliminate a potentially greater liability from a jury's verdict. Over \$300 million had been

alleged in damages in the main action, and it was never clear what percentage of those damages was attributable to design errors and what percentage was attributable to construction defects. The \$23.15 million settlement was a small fraction of all of the claims alleged. Thus, McClier claims that the settlement also saved Lloyd's from the potential of paying millions of dollars in legal fees, had the first-party action proceeded to trial.

This conflicting evidence, on the issue of Lloyd's status as a volunteer, creates a question of fact which precludes summary judgment. The argument that a settling insurer is a "volunteer" and thus barred from making a subrogation claim should not be used without careful consideration. Its widespread use would discourage settlement, and might well require a separate "action within an action" on the issue of the insurer's liability whenever it is raised. This, however, is not to say that this contention should not be made in a proper case, i.e. where there is a real basis for arguing that an insurer settled on its own volition when not required to make payment under the insurance policy.

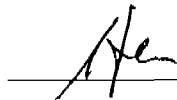
Ruturra's motion for summary judgment is denied.

Accordingly, it is

ORDERED that the third-party defendants' motions for summary judgment are denied.

Dated: July 22, 2008

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J.S.C.

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