

Zurich Am. Ins. Co. v BFP One Liberty Plaza Co.

2009 NY Slip Op 31776(U)

July 30, 2009

Supreme Court, New York County

Docket Number: 602422/05

Judge: Emily Jane Goodman

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SCANNED ON 8/6/2009
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 602422/2005
ZURICH AMERICAN INSURANCE
VS.
BFP ONE LIBERTY PLAZA
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n 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

is denied

as attached

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

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/30/09

[Signature]
EMILY JANE GOODMAN *c.*

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: IAS PART 17

-----X

ZURICH AMERICAN INSURANCE COMPANY,

Plaintiff,

Index No. 602422/05

-against-

BFP ONE LIBERTY PLAZA CO., LLC and
GENERAL REINSURANCE CORP.,

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this action alleging negligence, gross negligence, breach of contract, res ipsa loquitur, and breach of the covenant of quiet enjoyment, defendant BFP One Liberty Plaza Co., LLC (BFP) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted against it, or, in the alternative, pursuant to CPLR 3211, dismissing plaintiff's complaint as against BFP. Plaintiff Zurich American Insurance Company (Zurich) has settled its claims as against defendant General Reinsurance Corp. (General Re), and General Re has not responded to this motion.

FACTS

This action arises out of water damage resulting from a burst valve on the supplemental air conditioning system, which caused water to pour into the 22nd floor of the office building at One Liberty Plaza (the Building), and to leak from there to

the 21st floor. Zurich was a tenant in the Building, and occupied several floors, including the 21st floor. General Re was a tenant occupying the 22nd floor, pursuant to a sublease

with the Bank of Nova Scotia. The faulty valve was located on a horizontal pipe located above the drop ceiling on the 22nd floor.

Zurich retained an engineer, Yehoshua Ghilad, M.E. (Ghilad), to determine the cause of the flood. His affidavit sets forth the location of the valve, saying that the pipe and valve assembly ran through General Re's space in the suspended ceiling area. Ghilad states that it is his "opinion, within a reasonable degree of engineering certainty, that this incident was caused by the fitting failure due to improper installation, lack of maintenance or over-tightening which caused the fitting metal failure and subsequent burst." Affirm. in Oppos., Ex. B, ¶ 8.

The deposition testimony establishes that there had been no prior leaks from the valve, nor had there been any complaints of water leaking from either the ceiling of the 22nd floor, or from the 22nd floor to the 21st floor. The testimony also establishes that tenants were responsible for the supplemental air conditioning system, from the point at which it entered their leased premises, and the Building was responsible only for the vertical risers supplying the supplemental systems. The lease with the Bank of Nova Scotia supports this conclusion, providing that "Tenant, at its expense, shall be responsible ... for all

the repair, maintenance and replacement of (1) Tenant's internal air distribution system to the point at which the same connects to the main distribution duct for the Premises" Ex. P to

Notice of Motion, ¶ 13.01. It further limits the landlord's obligation to

make all repairs with respect to the public portions of the Building and the plumbing, heating, ventilating, air conditioning and other Building systems serving the Premises to the point or connection where the same enter (or connect with the riser, conduit, duct, line, or shaft, as the case may be, that enters) the Premises on the floors on which the Premises are located.

Id. Beyond the point where the connection enters the leased premises, such obligation falls on the tenant.

The lease with Zurich contains a provision holding the landlord harmless against any loss unless that loss is caused by the negligence or willful misconduct of the landlord. Ex. O to Notice of Motion, ¶ 18.02. The lease further contains a waiver of subrogation clause, and includes a release with respect to any claim, including for negligence, for which that party has, or is required to obtain, insurance. *Id.*, ¶ 9.04.

Zurich commenced this action against General Re and BFP asserting eight causes of action: (1) negligence as against BFP based upon BFP's alleged failure to maintain, inspect and repair the HVAC system, and its failure to prevent the rupture of the valve; (2) negligence as against General Re on the same bases; (3) gross negligence as against BFP for failure to inform General

Re of its responsibilities to service and maintain the HVAC system; (4) gross negligence as against General Re for failure to inform BFP of its responsibilities to service and maintain the HVAC system within BFP's space; (5) breach of contract as against BFP for permitting Zurich's property to be damaged; (6) breach of contract as against General Re, based upon Zurich's alleged status as a third-party beneficiary, for permitting Zurich's property to be damaged; (7) res ipsa loquitur against both defendants; and (8) breach of the covenant of quiet enjoyment against both defendants.

As stated previously, Zurich settled with General Re. BFP now moves to dismiss the complaint as against it, or for summary judgment dismissing the complaint and cross claims. Thus, the only causes of action at issue on this motion are the first, third, fifth, seventh and eighth.

DISCUSSION

Triable Issues of Fact

Negligence and Contractual Claims

Zurich maintains that there are triable issues of fact as to whether BFP was responsible for the maintenance and installation of the valve that broke. BFP presents copies of the lease, which demonstrate that the horizontal pipes on the supplemental air conditioning system are the responsibility of the tenant, as well as testimony from BFP building personnel, who attest that the

Building is responsible only for the vertical risers, and that the tenants are responsible for the portion of the system that extends from the vertical risers into the tenant's premises. BFP also presents evidence that General Re had inquired into the possibility of BFP performing maintenance on the tenant portion of the supplemental air conditioning system, but after receiving an estimate, did not engage BFP for that purpose. Thus, contrary to the allegations in the third cause of action, the evidence submitted demonstrates that General Re knew of its responsibility to maintain the tenant portion of the supplemental air conditioning system, and in any event, such knowledge was imparted by the lease. Consequently, BFP has presented a prima facie showing of entitlement to summary judgment dismissing both negligence causes of action, and the breach of contract cause of action.

In opposition, Zurich relies on the testimony of Zurich's former Facilities Director, who, when asked if she knew who was responsible for the valve, answered "I would presume it was building management." Ex. J to Notice of Motion, at 41. Zurich concludes that this is testimony that BFP owned, maintained, and was responsible for the valve. Zurich's construction is not supported by the testimony. Rather, the testimony indicates that she did not know - she was surmising, which is not evidence.

Zurich also relies on the fact that BFP's engineers

responded to the emergency, and repaired the leak and cleaned up the premises. This is not evidence that BFP was responsible for the valve. It merely indicates that it took the action necessary

to limit the damage to the Building and the affected space.

Zurich's conclusion that "it seems plausible" that, because BFP responded, "it was responsible for the installation and/or maintenance of the valve at issue" (Affirm. in Oppos., at [unnumbered] 6) is not sufficient to raise an issue of fact. Rather, Zurich is relying on mere hope or surmise, which is insufficient to oppose a motion for summary judgment. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Finally, Zurich relies on the affidavit of its expert as to the cause of the valve failure. Setting aside the fact that the expert was unable to ascertain whether the cause was faulty installation, faulty maintenance, or over-tightening of the valve, the cause of the failure is irrelevant. BFP was not responsible for the installation or maintenance of that valve. Therefore, it cannot be held responsible for its failure, regardless of the cause.

Res Ipsa Loquitur

BFP contends that there is no basis for the res ipsa loquitur cause of action, because there is no showing that the instrumentality was within the exclusive control of BFP.

In order to establish a basis for invoking the doctrine of

res ipsa loquitur, a plaintiff must allege that the event is the type that would not ordinarily occur without someone's negligence, it must be caused by an instrumentality that is within the exclusive control of the defendant, and it must not result from any contribution by the plaintiff. *Kambat v St. Francis Hosp.*, 89 NY2d 489, 494 (1997).

Here, the complaint does not even allege that the valve was in BFP's control, but in General Re's exclusive control. Ex. A to Notice of Motion, Complaint, ¶ 11. Further, the testimony supports the conclusion that it was in General Re's control, and there is no evidence that BFP had any control, much less exclusive control, over the valve. Zurich does not address this argument. Since BFP has shown that it did not have exclusive control over the supplemental air conditioning system, the cause of action for res ipsa loquitur fails, and that cause of action is dismissed.

Breach of Covenant of Quiet Enjoyment

Zurich also fails to address the cause of action for breach of the covenant of quiet enjoyment. BFP contends that Zurich did not suffer either actual or constructive eviction by the landlord, as is required to establish a breach of the covenant of quiet enjoyment. *Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 120-121 (1958); *Gramer v Turits*, 271 AD2d 644, 645-646 (2d Dept 2000). Here, Zurich has not presented any evidence

refuting BFP's showing that it did not engage in any wrongful acts that deprived Zurich of the beneficial use and enjoyment of the premises. Thus, the eighth cause of action is also

dismissed.

Waiver of Subrogation

BFP contends that Zurich cannot pursue a claim against it because there is a waiver of subrogation provision in the lease which precludes this action. Zurich maintains that the waiver of subrogation does not apply to its claim for breach of contract.

The court need not reach the question of the applicability of the waiver of subrogation clause. Zurich has not demonstrated that it has either a negligence claim or a contractual claim against BFP, because it has failed to produce any evidence that BFP had any duty to maintain the valve in question, in the face of BFP's evidence that there was no such duty. Accordingly, there is no basis to seek indemnity from BFP.

General Re's Cross Claims

General Re asserted cross claims against BFP for indemnity and contribution. However, BFP has made a prima facie showing that it had no duty to maintain the supplemental air conditioning system, and that General Re, as subtenant of the Bank of Nova Scotia, had that obligation. General Re did not oppose this motion, and, as a result, no triable issue of fact has been raised. Therefore, General Re's cross claims against BFP are

dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendant BFP One Liberty Plaza Co., LLC is granted and the complaint and all cross claims are dismissed as against it with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court.

Dated: July 30, 2009

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
AUG 06 2009
COUNTY CLERK'S OFFICE
NEW YORK