

28 E. 4th St. Hous. Corp. v Yen

2010 NY Slip Op 30245(U)

January 29, 2010

Supreme Court, New York County

Docket Number: 600928/06

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON Justice

PART 55

28 E 4th St.

INDEX NO. 600928/06

MOTION DATE 1/8/10

- v -

MOTION SEQ. NO. 03

Yun. Amey

MOTION CAL. NO. _____

The following papers, numbered 1 to 21 were read on this motion to/for Intervene

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

3
4-16
17-21

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in
accordance with the entered memorandum decision
and order.

N.B. - compliance conf. scheduled for
2/22/10 at 11 AM.

FILED
FEB 03 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1-29-10

JANE S. SOLOMON J.S. S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
28 EAST 4TH STREET HOUSING CORP.,

Plaintiff,

Index No.: 600928/06

-against-

DECISION and ORDER

AMY YEN, DAVID HU, DAVID HU ARCHITECTS,
PLLC, L.G.B. DEVELOPMENT INC., and
RIZWAN ABDUS SALAM, P.E.,

Defendants.

-----x
L.G.B. DEVELOPMENT, INC.,

Index No. 590391/07

Third Party Plaintiff,

-against-

LYNBROOK GLASS & ARCHITECTURAL METALS
CORP. and ALL STAR TAPING,

Third Party Defendants,

-----x
L.G.B. DEVELOPMENT, INC.,

Index No. 590084/08

Second Third Party Plaintiff,

-against-

PHASE 1 REMOVALS, INC. and DRAGON CONTAINER
SERVICE, INC. a/k/a DRAGON CONTAINER
CORP.,

Second Third Party Defendants,

-----x
SOLOMON, J.:

Before the court are two motions: motion 003 is by
defendant Amy Yen and her liability insurance carrier, Great
Northern Insurance Company (Great Northern), to permit Great
Northern to intervene as Yen's subrogee. Third-party defendants
Phase 1 Removals, Inc. (Phase 1), Dragon Container Service, Inc.

FILED
FEB 03 2010
NEW YORK
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a/k/a Dragon Container Corp (Dragon), and Lynbrook Glass & Architectural Metals Corp. (Lynbrook Glass) cross-move to dismiss the third-party complaints of defendant L.G.B. Development Inc. (LGB). In motion 05, LGB moves to dismiss the complaint and Yen's cross claims.

FACTS

This case arises from an apartment renovation gone bad. Yen is the tenant and owner of shares appurtenant to a top-floor apartment in a cooperative apartment building in Greenwich Village owned by plaintiff 28 East 4th Street Housing Corp. (Owner). Under the terms of her lease, Yen was required to obtain Owner's approval before making alterations, and she indemnified Owner against all claims arising from any act by her contractors. She received approval from Owner pursuant to an alteration agreement that provided that she accepted sole responsibility for all aspects of the alteration work. Yen hired architect defendants David Hu and David Hu Architects, PLLC (Hu), and engineer defendant Rizwan Abdus Salam, P.E. (Salam), to design a new skylight.

Yen hired LGB as general contractor. Their written agreement, an AIA standard form contractor's agreement, provides among other things that neither party shall assign the contract "as a whole" without the written consent of the other party (LGB Agreement, Ex. H to Aff. of Richard J. Gottlieb, Esq. in support

of LGB's motion, paragraph 13.2.1). The LGB Agreement also provides for a waiver of subrogation for damages caused to property that is covered by property insurance (LGB Agreement, paragraph 11.3.7). LGB hired sub-contractors, including the third-party defendants.

In 2002, sub-contractors cut a whole in the roof over Yen's apartment for the skylight, which apparently was not properly supported, so the structure gave way, causing part of the building facade to fall away, and damaging interior walls and floors. In addition, Carlo Frua (Frua), the tenant and owner of shares appurtenant to the apartment below Yen's, complained that his apartment was damaged. Frua also complained that contractors dropped heavy roofing material through the hole in the roof to Yen's apartment floor and stored refuse material in Yen's apartment that stressed her floor, and further damaged his ceiling.

Owner commenced this action for negligence and breach of contract. Elements of the damages included property damage to the building, as well as losses incurred by Frua that he sought to recover from Owner.¹ Yen has cross-claims against Hu, LGB and Salam for contribution and indemnification.

In 2008, Yen settled Owner's claim against her for

¹ Frua commenced a separate action against Owner, Yen and LGB (index number 105822/06), which is before another justice of this court.

\$275,000, and Frua's claim against her for \$120,000. Owner discontinued its lawsuit against Yen, and assigned to her all of its claims and cross-claims in the lawsuits (Affirmation of Stephen H. Marcus, Esq., in support of motion, Ex. H). The settlements were paid by Great Northern as Yen's insurer.

DISCUSSION

LGB contends that Yen's claims sound in contribution, and under General Obligations Law § 15-108, Yen waived any claim she might have had for contribution when she settled with the Owner. GOL § 15-108(c) provides that "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." LGB argues that Great Northern's subrogation rights can be no greater than defendant Yens' rights so that Great Northern's claims are similarly barred. It further contends that there was a waiver of subrogation provision in Yen's agreement with LGB that precludes Great Northern's subrogation claim. Phase 1, Dragon and Lynbrook Glass adopt LGB's contentions, and further argue that the Yen-LGB agreement precludes the subrogation or assignment of Yen's rights without LGB's written consent, which was not obtained here. In addition, the third party defendants argue that the intervention is untimely and that the third party claims fail to state viable causes of action for contribution and indemnification.

Having paid the Owner's and Frua's claims against Yen,

Great Northern is properly subrogated to Yen's claims (see *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995] ["subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss"]). The amendment reflecting same is appropriate (see *McHale v Anthony*, 41 AD3d 265, 266 [1st Dept 2007]).

Moreover, GOL § 15-108 poses no bar to Yen/Great Northern's pursuit of its cross claims as they sound in indemnification rather than contribution (see *McDermott v City of New York*, 50 NY2d 211 [1980]). Any liability on Yen's part would be pursuant to indemnification provisions in her proprietary lease and alteration agreement with Owner, and is vicarious liability for the negligence of her contractor, subcontractors or design professionals. Consequently, pursuit of her cross claims are not barred by GOL § 15-108. Moreover, Yen has a contractual indemnification claim against LGB, and there is no evidence presented on these motions to suggest any negligence by Yen that would preclude common law indemnification (see *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643 [1988]).

The clause in the agreement between Yen and LGB providing for a waiver of subrogation for a covered loss does not apply here. The waiver of subrogation clause relates to a covered loss for damages to Yen's property, not to her liability

to others for damages to their property that implicates her liability insurance (see paragraph 11.2), so the waiver of subrogation is not applicable to liability insurance payments for damages to other property (*S.S.D.W. Co. v Brisk Waterproofing Co.*, 76 NY2d 228, 230 [1990]).

Likewise, the contentions by Phase 1, Dragon and Lynbrook Glass that the non-assignment language in Yen's contract with LGB precludes Great Northern's subrogation to Yen's right thereunder is without merit. First, the clause precludes assignment of the contract as a whole, and does not preclude subrogation arising from the contractor's having damaged the property of others (see *New York Board of Fire Underwriters v Trans Urban Construction Co.*, 91 AD2d 115, 119-120 [1st Dept 1983], *affd* 60 NY2d 912 [1983]). Indeed, Yen did not assign the "contract as a whole." Further, the non-assignment provision recognizes the right of successors and assigns under the agreement, which appears to have been included for this very purpose.

The third-party defendants argue that Great Northern's intervention is barred under the statute of limitations. Great Northern's capacity to assert a subrogation claim only arose when it settled the claims against Yen approximately nine months before it filed this motion. Under the circumstances, Great Northern acted promptly in seeking to intervene to pursue Yen's

cross claims as well as those assigned to by the settling parties. Great Northern clearly is united in interest with Yen, and there is no prejudice as it has merely stepped into her shoes on issues that relate back to her timely-made cross-claims (CPLR 1013).

Finally, with respect to the third party claims, Phase 1 and Dragon contend that they are entitled to dismissal of the third-party complaint against them pursuant to CPLR 3211 because their work did not result in any damage to the building. This branch of the cross-motion is denied because the third-party complaint states a viable claim for contribution that is not rebutted by counsel's opinion (see, CPLR 3212[b]). LGB admits, however, that it has no contractual indemnification claims against Phase 1, Dragon or Lynbrook Glass, so those claims are dismissed. Accordingly, it hereby is

ORDERED that the motion to intervene by Yen and Great Northern is granted, and the Yen's answer with cross-claims is amended in accordance with the answer and amended cross-claims annexed to the motion at Ex. M; and said pleading is deemed served upon receipt of a copy of this decision and order which is being mailed to counsel by my staff; and it further is

ORDERED that the cross-motions to dismiss by Phase 1, Dragon and Lynbrook are granted to the extent that LGB's claims for contractual indemnification are dismissed, and otherwise the

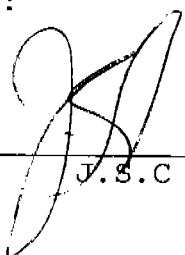
cross-motions are denied; and it further is

ORDERED that the motion by LGB (sequence number 05) is denied; and it further is

ORDERED that all counsel shall appear for a compliance conference in Part 55, 60 Centre Street, Room 432, New York, NY, on February 22, 2010 at 11 AM.

Dated: January 29, 2010

ENTER:



J.S.C.

JANE S. SOLOMON

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