148 Magnolia, LLC v Merrimack Mut. Fire Ins. Co.

2010 NY Slip Op 30470(U)

March 8, 2010

Supreme Court, New York County

Docket Number: 111200/07

Judge: Jane S. Solomon

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SCANNED ON 3/9/2010

[* 1]

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

PRESENT: Solomon **PART** 55

Index Number : 111200/2007

148 MAGNOLIA, LLC

vs.

MERRIMACK MUTUAL FIRE INS.

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO.

MOTION DATE 9/14/09

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-8
Answering Affidavits — Exhibits Notice of Motion	9-19
Replying Affidavits	20-21

Cross-Motion: ✓ Yes No

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

N.B. - Pre-trial conf. scheduled for 4/12/10 at 2 PM.

FILED
MAR 09 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/8/10

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION ✓ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST ☐ REFERENCE

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

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148 MAGNOLIA, LLC, LOGEO ASSOCIATES, LLC, RYFI, LLC and TOJA ENTERPRISES, LLC,

Plaintiffs,

-against-

MERRIMACK MUTUAL FIRE INSURANCE COMPANY, RAL SERVICES, INC., THE HEFFNER AGENCY, INC., and PUBLIC CONTRACTING NYC, INC.,

Defendants.

Index No.: 111200/07

DECISION and ORDER

FILED
MAR 09 2010
COUNTY CLERK'S OFFICE
NEW YORK

JANE S. SOLOMON, J.:

Defendant Merrimack Mutual Fire Insurance Company (Merrimack) moves for summary judgment dismissing the complaint and all cross-claims as against it, and declaring that it is not obligated to indemnify plaintiffs' claim for property damage due to a fire and for business interruption loss. Defendant RAL Services, Inc. (RAL) cross-moves for summary judgment in its favor on the ground that it has no liability if Merrimack's motion is granted.

This matter arises from a fire that occurred at 148 Chambers Street in Manhattan (the Premises) on May 4, 2007. Plaintiffs 148 Magnolia, LLC, Logeo Associates, LLC and RYFI, LLC purchased the Premises as tenants in common in June 2005. They planned to develop the property as a condominium, with plaintiff

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Toja Enterprises, LLC (Toja) as the sponsor and managing agent.[1] In furtherance of this plan, Toja entered into a construction contract with defendant Public Contracting NYC, Inc. (Public Contracting) to perform a gut renovation of the Premises. Public Contracting in turn hired subcontractors.

Plaintiffs contacted RAL, an insurance broker, to procure insurance for the Premises. At the time, work had not yet begun. RAL obtained a business owner's policy from Merrimack, which is distinguishable from a builder's risk policy. A builder's risk policy may cover damages arising from construction accidents that occur in a gut renovation; the business owner's policy generally does not.

In connection with the project, a plumbing contractor, MPS Plumbing and Heating (MPS), was hired to install a new sprinkler system in the Premises (EBT of Zuoxi Li, Notice of Motion Ex. H). MPS produced a witness for deposition who testified that when he came to install new pipes, the old sprinkler system already was disconnected and nearly completely removed (id., at 27). This was approximately two months before the fire. At the time of the fire, work on installing a new

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[1] In their complaint, and in the papers opposing these motions, plaintiffs make no distinction between these four entities. That is, it is alleged that all plaintiffs suffered the same loss, all plaintiffs hired RAL, all plaintiffs procured insurance from Merrimack, etc.

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sprinkler system was not yet complete, and the system was not operational.

Plaintiffs allege that the fire resulted in approximately $2 million in property damage, and another $700,000 in lost business income. They put in a claim to Merrimack, which disclaimed on the grounds that plaintiffs failed to disclose material information regarding the construction project (Disclaimer Letter, Affirmation in Opposition of Craig Blumberg, Esq., Ex. E). In part, the disclaimer relied upon an endorsement which states that the insurance will be automatically suspended if plaintiffs failed to notify Merrimack of a suspension or impairment to protective safeguards in the Premises, including the sprinkler system. Merrimack also states that it does not insure unoccupied buildings, and does not issue builder's risk policies.

Plaintiffs' principal, James Stockwell, said at his deposition that he did not know that the sprinkler system was disconnected, and he never authorized anyone to do so. He also stated that RAL was aware of plaintiffs' intention to renovate the Premises, and they relied upon RAL's expertise as an insurance broker to obtain the appropriate policy. Plaintiffs further state that plaintiffs told RAL about the renovation, and an RAL employee informed Merrimack of it. RAL wrote to plaintiffs that it had gotten permission to do improvements on

the Premises under the Merrimack policy, and that this was less costly than obtaining a builder's risk policy (Aff. Of John Gillespie, Esq., Ex. C).

Plaintiffs sued Merrimack for breach of contract in denying their claim, and sued RAL for negligence and breach of contract in failing to obtain the appropriate policy. Merrimack and RAL cross-claimed against one another and the other defendants, but did not seek declaratory judgment.

The evidence that the sprinkler system was disabled for a significant period of time before the fire is uncontested. Stockwell's lack of knowledge that the system was disconnected is not a defense, because plaintiffs were charged with maintaining the sprinkler system and notifying Merrimack if it was not operational. Were the sprinkler failure a fortuitous occurrence, plaintiffs would not be charged with knowing about it, and indeed, the loss would probably be covered by the Merrimack policy if that were the sole basis for disclaimer. However, the plumber's testimony shows that it was not fortuitous or momentary, but was the condition of the building for several weeks as a result of the renovation work. Even if Merrimack was informed that renovation work was being performed, that did not relieve plaintiffs of the obligation to maintain a functional sprinkler system, or to inform Merrimack when the system was disconnected. The policy language requiring plaintiffs to

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maintain an operational sprinkler in the Premises is clear and enforceable. Accordingly, Merrimack's motion for summary judgment is granted.

As a threshold matter, plaintiffs' argue that RAL's cross-motion should be denied because it was made more than 60 days after the note of issue was filed (*see, Brill v City of New York*, 2 NY3d 648 [2004]). Since the cross-motion is conditioned upon the grant of Merrimack's timely motion, it is timely under the circumstances.

RAL contends that it too is entitled to summary judgment if Merrimack's disclaimer is a result of plaintiffs' failure to inform Merrimack that the sprinkler was disconnected, because said failure was the proximate cause of the disclaimer, and not RAL's procurement of the wrong policy. However, RAL's principal, Richard Longo, said at his deposition that builder's risk policies usually have a similar provision to Merrimack's requiring notice if the sprinkler system is disconnected, but not all do. There is evidence that a builder's risk policy was more appropriate to the risk. There remains a question of fact as to whether, under the facts presented, plaintiffs would have been denied insurance coverage had an appropriate builder's risk policy been obtained.

Finally, although Merrimack is entitled to summary judgment dismissing the complaint and cross-claims against it, it

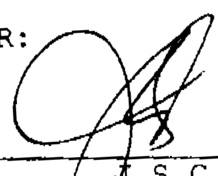
did not plead a claim for declaratory judgment as requested in the motion, so that relief is denied. Accordingly, it hereby is

ORDERED that the motion for summary judgment by Merrimack is granted, and the complaint and all cross-claims by and against Merrimack are severed and dismissed, with costs and disbursements to Merrimack as taxed by the Clerk of the Court, and the Clerk shall enter judgment accordingly; and it further is

ORDERED that RAL's cross-motion for summary judgment is denied; and it further is

ORDERED that remaining counsel shall appear in Part 55, 60 Centre Street, Room 432, New York, NY, on April 12, 2010 at 2 PM for a pre-trial conference.

Dated: March 8, 2010

ENTER: 

J.S.C.

JANE S. SOLOMON

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