Atlantic Mut. Ins. Co. v 650 Park Ave. Corp.
2010 NY Slip Op 31852(U)
July 3, 2010
Supreme Court, New York County
Docket Number: 109444/2006
Judge: Louis B. York
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SCANNED ON 7/14/2010

[* 1]

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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Index Number : 109444/2006

ATLANTIC MUTUAL INSURANCE

VS.

650 PARK AVENUE

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

on 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

FILED JUL 14 2010 COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 7/7/10

J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2
---X
ATLANTIC MUTUAL INSURANCE COMPANY
a/s/o IRWIN & LINDA METZGER

Plaintiffs,

-against-

650 PARK AVE CORP., WEST NEW YOK
RESTORATION, INC., & DNA CONTRACTING
LLC,

Defendants.
---X

Index No.: 109444/2006

FILED
JUL 14 2010
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J:

In this tort action, DNA Contracting ("DNA") moves for summary judgment for all claims asserted by Atlantic Mutual Insurance Company ("Atlantic Mutual") and all cross-claims asserted by 650 Park Avenue Corporation ("650 Park Avenue"). For the reasons stated below, the Court grants DNA summary judgment against Atlantic Mutual's claims and denies DNA summary judgment against 650 Park Avenue's cross-claims.

Background

DNA is a contractor that entered into a contract with 650 Park Avenue, a building owner, to perform exterior restoration and waterproofing work. The contract is dated May 26, 2000. DNA subcontracted the work to Metras Construction Company ("Metras"), who agreed to indemnify DNA for any property damage relating to its work. Metras performed the exterior restoration and waterproofing work sometime after May 26, 2000, but before January of 2001. On January 22, 2001, Irwin and Linda Metzger, residents of Apartment 11B, reported extensive water damage in their apartment.

The damage resulted in: (1) a lawsuit brought by Barkly Coverage Corp. a/s/o 650 Park Avenue against DNA; and (2) an insurance claim filed by Atlantic Mutual a/s/o Irwin Metzger against DNA. The lawsuit resulted in a Stipulation of Discontinuance dated April 26, 2002, and a release dated April 30, 2002, in favor of DNA upon payment of $9,000 made by Metras's insurer, Zurich American Insurance Company ("Zurich"), to Barkly Coverage Corp. a/s/o 650 Park Avenue. The release discharged DNA and Metras from all causes of actions "arising out of property damaged and/or lost on January 19, 2001." As a result of the insurance claim, Zurich issued a check made payable to Atlantic Mutual a/s/o Irwin Metzger as "full and final settlement of all subrogation claims" in the amount of $52,791.51.

Mrs. Metzger hired a contractor, Abigail Hess, to repair the wood floor that was damaged in January 2001. Either in the late fall of 2001 or the early spring of 2002, Mrs. Metzger noticed a portion of the wood floor that Abigail Hess repaired had risen. Mrs. Metzger reported the raised wood problem to Atlantic Mutual in the summer of 2003. As a result of the property damage claimed in 2003, Atlantic Mutual paid out approximately $180,000 to the Metzgers, $144,017.48 for living expenses and $37,000.00 for actual repairs. Atlantic Mutual filed the current lawsuit to recover the $180,000.00.

<u>Analysis</u>

The Court will first decide if Atlantic Mutual has discontinued its action against DNA. DNA argues that it has and presents a Stipulation Discontinuing Action signed by the attorneys for the parties on November 9, 2009. The Court agrees with DNA and concludes that Plaintiff's action against DNA is discontinued.

Secondly, the Court will decide if the settlement that released DNA from liability from property damaged and/or lost on January 19, 2001 precludes 650 Park Avenue's claim against DNA for the raised floor damage Mrs. Metzger reported in the summer of 2003. DNA argues that the settlement precludes 650 Park Avenue from asserting any cross-claims against DNA. The property damage in the current lawsuit was reported on July 15, 2003, but the release barred any claims arising out of property damage sustained in January 2001. Nevertheless, DNA argues that the latter damage is related to the former damage because the raised wood that Mrs. Metzger reported in 2003 was first discovered in the late fall of 2001 and is in the exact same spot where the initial damage occurred. Thus, DNA argues that the two instances of damage are "one and the same." DNA also argues that the release precludes the current action because a release is operative "not only to all controversies and causes of action between releaser and releases which had, by that time, actually ripened into litigation, but also to all such issues which might then have been adjudicated as a result of pre-exiting controversies." *Broyhill Furntiure Indus. v. Hudson Furniture Galleries*, 61 A.D. 3d 554, 555, 877 N.Y.S.2d 72, 74-75 (1st Dept 2009).

DNA's argument proves nothing given the facts in the present dispute. DNA argues that the present claim over the raised wood should be precluded because it was an issue that might have been adjudicated at the time the parties signed the release. Unless 650 Park Avenue is capable of time travel it would have no way of knowing that there was a problem with raised wood at the time it signed the release. Both parties signed the release on April 30, 2002; the raised wood was first

reported in July of 2003. Clearly, 650 Park Avenue did not release the rights of a claim based on raised wood if it was unaware of the raised wood at the time it signed the release.

DNA's "one and the same" argument is equally weak. "Releases are contracts whose interpretation is governed by general principles of contract law." *Dury v. Dunadee*, 52 A.D.2d 206, 208, 383 N.Y.S.2d 748, 750 (4th Dept 1976). "Where the language of the release is limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone, and will not release other claims, demands or obligations." *Lexington Ins. Co. v. Combustion Eng. Inc.*, 264 A.D.2d 319, 322, 693 N.Y.S.2d. 146, 148 (1st Dept 1999). The settlement releases DNA from any debt, claim, etc, "arising out of property damaged and/or lost on January 19, 2001." The settlement does not release DNA from *any* property damage that could have been caused by Metras's (the subcontractor's) negligence in its exterior restoration and waterproofing work performed in 2000. Rather, the settlement only releases DNA from liability from any property that was damaged or lost on January 19, 2001. Thus, if more damage arises on a day subsequent to January 19, 2001, DNA can still be on the hook even if the damage stems from the same allegedly negligent work. That exact situation is currently before the Court. The raised wood floor might be related to the damage from January 19, 2001; however, the floor did not rise until several months after January 19, in the fall of 2001. Thus, 650 Park Avenue's claim against DNA for the raised floor is still actionable.

The next issue is whether the Court should preclude Mr. Fein's expert testimony. DNA argues that 650 Park Avenue should be precluded from using Stanley Fein as an expert because it did not serve Mr. Fein's expert disclosure within sixty days of Plaintiff's filing of the Note of Issue. DNA is correct in its assertion that 650 Park Avenue violated the Court's rules; 650 Park Avenue failed to serve the expert disclosure within the 60 days of Plaintiff's filing of the Note of Issue pursuant to Rule 4 of the Court's Rules.

Nevertheless, the Court does not believe Mr. Fein's expert testimony should be precluded. The Appellate Division has "encouraged trial courts to look to less...draconian measures" than preclusion, especially when no party is prejudiced from the untimely submission. *Mead v. Rajadhyax' Dental Group*, 34 A.D.3d 1139, 1141, 824 N.Y.S.2d 790, 793 (4th Dept 2006). And, trial courts generally have broad discretion when deciding if preclusion is appropriate. *Id.* DNA has not alleged that the late submission has prejudiced it. Therefore, following the Appellate Division's recommendation, the Court will not preclude Mr. Fein's affidavit. However, a monetary sanction is imposed against 650 Park Avenue's counsel in order to "deter future non compliance with court rules" and to provide a measure of compensation to DNA Contracting. *Phillips v. Lepow*, 2008 N.Y. Misc. LEXIS 9138, 2008 NY Slip Op 32359U, *13 (Sup Ct, Albany County 2008).

Finally, the Court will decide whether there is a genuine issue of material fact as to whether DNA's negligence caused the raised floor damage. DNA argues that Stanley Fein's affidavit provides evidence insufficient to withstand summary judgment because his opinions are speculative, conclusory, and without probative

value. "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundations,...the opinion should be given no probative force and is insufficient to withstand summary judgment." *Diaz v. New York Downtown Hospi.*, 99 N.Y.2d 542, 544, 754 N.Y.S.2d 195, 197 (2002). Mr. Fein's affidavit, however, is not conclusory or speculative. Mr. Fein's conclusions were not made out of thin air; rather, he looked to credible evidence in reaching his conclusions – the engineer's report. There appears to be a genuine disagreement between the two experts. One expert concludes from the engineer's report that DNA's waterproofing work could have caused the 2003 damage, or at the very least, should have prevented the damage, while the other expert concludes from the engineer's report that a pre-existing condition caused the damage. To obtain summary judgment, the movant must demonstrate the absence of any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 318 (1985). Because there is a triable issue of fact, the Court cannot grant summary judgment to DNA on 650 Park Avenue's cross-claims.

Therefore it is

ORDERED that DNA's motion for summary judgment dismissing Atlantic Mutual's claims is severed and granted, and the Clerk of the Court is directed to enter judgment in favor of DNA and against Plaintiff together with costs and disbursements; and it is further

ORDERED that DNA's motion for summary judgment dismissing 650 Park Avenue's cross-claims is denied; and it is further

ORDERED that David Frank, Esq. shall pay to DNA the sum of $250 as a condition for allowing Stanley Fein's testimony to be submitted late.

Date: ~~June 28~~ July 13, 2010

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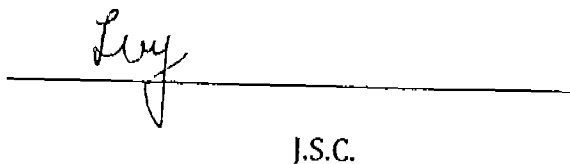

J.S.C.

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