

Atlantic Mut. Ins. Co. v R/F Landscape Architecture, P.C.
2010 NY Slip Op 32973(U)
October 19, 2010
Supreme Court, New York County
Docket Number: 600582/03
Judge: Judith J. Gische
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SCANNED ON 10/21/2010
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C.

PART 10

Index Number : 600582/2003
ATLANTIC MUTUAL INSURANCE
vs
RF LANDSCAPE ARCHITECTURE
Sequence Number : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

... numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.

FILED

OCT 21 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/19/10


HON. JUDITH J. GISCHE
J.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 10

-----X
ATLANTIC MUTUAL INSURANCE COMPANY
a/s/o ROBERT SOROS and MELISSA SOROS,

Decision and Order
Index № 600582/03
Seq. No 001

Plaintiff,

-against-

Present:
Hon. Judith J. Gische, JSC

R/F LANDSCAPE ARCHITECTURE, P.C., FORT-CICA
ROOFING & GENERAL CONTRACTORS INC. and
JIM SCHUTTE, INC.,

Defendants.
-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Def R/F Landscape n/m (3212) w/SAS affirm, exhs	1
Pltff's opp w/RCS affirm, exhs	2
Def Schutte opp w/TLF affirm, exhs	3
Def Fort-Cica opp w/DAS affirm, exhs	4
Def R/F Landscape reply w/SAS affirm, exhs	5

Upon the foregoing papers, the decision and order of the court is as follows:

JUDITH J. GISCHE, J.:

In this subrogation action, defendant R/F Landscape Architecture, P.C. (R/F Landscape) moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint as against it. The motion is opposed by plaintiff Atlantic Mutual Insurance Company (Atlantic Mutual) a/s/o Robert and Melissa Soros (Soros), and by movant's co-defendants Fort-Cica Roofing Company (Fort-Cica) and Jim Schutte, Inc. (Jim Schutte). Issue has been joined

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and plaintiff filed the note of issue on March 4, 2010¹. Since R/F Landscape has timely move for summary judgment, the motion can be decided on the merits (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The court's decision and order is as follows:

Arguments

Subrogation, which is "an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). It is on this theory that Atlantic Mutual, Soros' first-party property insurer, seeks to recoup money, in excess of \$1 million, which it paid out on a property damage claim made by its insureds pursuant to their Atlantic Mutual insurance policy. Recovery, through subrogation, is demanded from R/F Landscape, Fort-Cica, and Jim Schutte, the parties who performed the allegedly negligent waterproofing work at the Soros' property.

It is undisputed that a loss occurred sometime between July 19-20, 2002, when, following a heavy rain, water seeped and/or flooded into the Soros' townhouse located at 263 West 11th Street, New York NY (townhouse), causing extensive water damage to their property. It is also undisputed that the water damage occurred just two days after the defendants completed waterproofing work on the townhouse's south terrace roof, which sits above damaged areas of the townhouse.

According to R/F Landscape, at the time of the loss there was a written agreement (the

¹On July 25, 2003, the Commonwealth Court of Pennsylvania issued an order of liquidation for Legion Insurance Company, the insurer for R/F Landscape, which stayed prosecution of Atlantic Mutual's lawsuit. Approximately a year and a half later, the stay was lifted, and by March 2005, the defendants had served their answers, affirmative defenses and counterclaims in this matter.

Agreement) in effect between it and Robert Soros which contained a subrogation waiver shielding it from liability in this matter and therefore, entitling R/F Landscape to summary judgment on the claims Atlantic Mutual has asserted against it. Atlantic Mutual, Fort-Cica and Jim Schutte disagree, claiming that questions of fact exist as to whether the Agreement and the waiver were in effect at the time of the loss.

The following facts are taken from the complaint, affidavits and depositions, and from documents submitted in connection with the motion.

Between the years 1996 and 1998, the Soros townhouse underwent a total gut renovation (original renovation) which included replacing the roofing and installing a new membrane on the front and back (south and north) sides of the top floor, including the south terrace roof. In 2001, Soros engaged the services of R/F Landscape to perform two landscaping projects, one at their West 11th Street townhouse and the other at a their property at Enterprise Farm, Rhineback, NY (Rhinebeck). R/F Landscape's employee and company principal, Jonathan Farber (Farber), worked on garden design projects for both properties (garden projects). This work, which obligated R/F Landscape to observe both the installation and execution phases of the gardens, was performed pursuant to the Agreement. The Agreement's "effective as of" date was October 1, 2001, although it appears not to have been executed until October 30, 2001.² The Agreement does not include or reference any particular "end date."

It is undisputed that the garden work at both properties was completed prior to July 1, 2002, the date on which Farber received a call from Soros's assistant, Jon Gustafson (Gustafson) about what appeared to be a water leak in the townhouse. On July 2, 2002, Farber went to the

²There is no dispute as to the date the Agreement went into effect.

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townhouse and met with Gustafson, along with an architect and one or more contractors, including a roofer. Together, they performed an inspection and determined a course of action involving the south terrace. Farber took on the responsibility of sending the contractors' work proposals, both oral and written, to Gustafson and Soros, and he agreed to coordinate the schedule of the contractors and observe that the work was being performed in proper order.

As stated above, the defendants' waterproofing work was completed on July 18, 2002, and the damages occurred following a rain event on July 19, 2002. A post-flood investigation revealed that water had leaked through the townhouse's south terrace. Thereafter, on or about January 29, 2003, Atlantic Mutual commenced this action, naming as the defendants, the companies which had performed work in connection with the townhouse's roof and/or south terrace in the days leading up to the flood event. The complaint charges R/F Landscape, Fort-Cica and Jim Schutte with negligence and breach of contract because they failed to take proper steps to prevent water damage by: (1) improperly waterproofing the roof and terrace, not providing or installing proper sealing and/or flashing; (2) failing to use properly sized drainage equipment; and (3) permitting construction debris to clog the drains and hinder proper drainage.

R/F Landscape submits a copy of the Agreement including the subrogation waiver contained in Article 13. This article states:

- A. Client [Soros] and Landscape Architect [R/F Landscape] waive all claims to consequential damages for any claims or disputes arising out of or relating to this Agreement.
- B. In addition, Client and Landscape Architect waive all claims against each other to the extent covered by any applicable insurance during design or construction, including but not limited to claims for subrogation.

R/F Landscape also submits a copy of the underlying insurance policy and the sworn affidavit of

R/F Landscape's company president, Robert Rumsey³ (Rumsey), in its effort to show that the subrogation waiver was permitted under Soros's Atlantic Mutual insurance policy, that the Agreement was a general services contract, and that the Agreement's terms guided the parties' relationship throughout July 2002.

In his sworn affidavit, Rumsey avers that all of the work his company performed at the townhouse and at Rhinebeck, from October 1, 2001 forward, was performed pursuant to the Agreement, including "any work R/F Landscape performed with regard to the south terrace waterproofing project at 263 W. 11th Street in July of 2002" (Rumsey Aff., ¶ 4). Rumsey further asserts that "R/F Landscape Architecture was paid for the job pursuant to the terms of the October 2, 2001 agreement" (*id.*), and contends that R/F Landscape's obligations under Section 3.2 of the one-page "Exhibit A" annexed to the Agreement – which requires it to evaluate the work, to "become generally familiar with and keep the owner informed about progress and quality of work completed," and to "endeavor to guard owner against defects and deficiencies in the work"-- stand as further evidence that his company was performing pursuant to the Agreement at the time of the July 2002 waterproofing work. He concludes that because both the Agreement and its subrogation waiver were in effect at the time of the waterproofing work, R/F Landscape is entitled to summary judgment in its favor.

In their respective opposition papers, Atlantic Mutual and co-defendants Fort-Cica and Jim Schutte (together, the Opponents) do not dispute that R/F Landscape was paid by Soros based on the same hourly rate as is set forth in Article 5 of the Agreement, that the flood event involved the same location, the south terrace, that was included in the 2001 gardening projects,

³Rumsey was the individual who signed the Agreement on behalf of R/R Landscape.

and that its day-to-day "observational" responsibilities during the waterproofing work and gardening projects were substantially similar. However, the Opponents maintain that the waterproofing work, which was not commenced until after the completion of the garden projects, was independent of all past projects and was not covered by the Agreement or by any of its terms.

In support of their position, the Opponents submit copies of: Fort-Cica and Jim Schutte work proposals and invoices; work transmittal memos between R/F Landscape and Soros; a New York State capital improvement certificate pertaining to Fort-Cica's work on the south terrace; R/F Landscape's site reports, photographs and "notes to file," both before and after the flood event, and the deposition transcripts of Robert Soros and Farber, the individual most closely involved in the Soros projects at both locations.

The Opponents assert that the only "agreements" in effect at the time of the waterproofing work consisted of work proposals from the contractors, which were approved by R/F Landscape and by Robert Soros, and the transmittal memos on R/F Landscape letterhead which confirmed the schedule of the proposed work. They point out that not one of the documents exchanged by and between the various parties contains any reference to the Agreement or any language from which a reference could be inferred. Even the transmittal memos, which purport to clarify the relationship between the parties, are unavailing.

The July 3, 2002 transmittal to Fort-Cica provides as follows:

Same as last year, all contracts will be directly between you and the client, R/F Landscape Architecture is acting solely as an agent of the client and will observe the roofing work as requested by the client and certify contractor invoices for payment (emphasis added).

[* 8]

The July 8, 2002 transmittal memo to the Soros reads:

Same as last year, all contracts will be between you and the individual contractors. R/F Landscape Architecture will act solely as your agent and will observe all work as requested by you and certify contractor invoices for payment (emphasis added).

R/F Landscape contends that the words "same last year" demonstrate the nexus between the waterproofing work and the Agreement. The Opponents, however, view the same words as an indication of a working familiarity between the parties, and argue that "same as last year" falls short of the wording necessary to extend the terms of the Agreement to the July 2002 waterproofing work on the south terrace.

Finally, the Opponents submit the deposition transcript of Robert Soros, whose sworn testimony demonstrates that his understanding of which projects were contemplated, or covered, under the Agreement, varies with that of R/F Landscape and Farber. According to his testimony, about two or three years after the completion of the original renovation, Robert Soros noticed leakage in the townhouse beneath the area of the south terrace, and he called upon his assistant, Jon Gustafson (Gustafson), to take appropriate action. Robert Soros testified, in relevant part:

I believe he contacted John (sic) Farber who had just finished doing the work on our garden floor in our garden and he contacted him about potentially looking at the roof and seeing if there was something that could be done.

They were doing work on sort of an ongoing basis with our garden in the back. Honestly, I don't think this relates specifically to the roofing project. I think this is related more to the garden work they were doing in the back. We had some lingering issues as it related to both design and operational issues. We had some water elements in the garden that Jonathan was very helpful in solving

(Robert Soros Dep., at 30 and 34).

The Opponents argue that summary judgment must be denied because the documentary and testimonial evidence raise questions of material fact as to whether R/F Landscape’s liability is waived by the Agreement’s subrogation waiver. In the alternative, the Opponents argue that, even if the Agreement *was* in effect at the time of the flood event, it does not shield R/F Landscape from liability in this matter. This, they explain, is because the Agreement applies only to work performed on the outside of the Soros properties (while a majority of the damage occurred inside the townhouse), and because the damage was caused by issues relating to drainage, which is specifically excluded from coverage under Article 1 subsection (C). The Opponents also contend that the language of the subrogation waiver limits its applicability to insurance coverage “during design or construction” (Article 13 [B]).

Discussion

It is well settled that “[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The documents and transcripts⁴ submitted by the parties raise more questions about what work was contemplated under the Agreement and subrogation waiver than they resolve. Accordingly, movant has failed to demonstrate an absence of material issues of fact which necessarily precludes the granting of summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d

⁴Farber’s deposition testimony, which contradicts that of Robert Soros, supports movant’s contention that all parties understood that the waterproofing work was being performed pursuant to the Agreement. However, passing on witness credibility is not proper on a summary judgment motion (*S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

[* 10]
320, 324 [1986]).

Other than its preamble, which identifies the client as Robert and Melissa Soros and the location of the properties as 263 W. 11th Street, New York, New York, and Enterprise Farm Rhinebeck, New York, the Agreement contains no specific information as to any work proposed or agreed upon by these parties. A review of the invoices, corresponding proposals, and transmittal memos on R/F Landscape letterhead, reveals pricing and information related to the removal and replacement of the south terrace's planters, boxes, furniture, decking materials and membrane. Each document was approved by Soros and/or by Farber, as appropriate, and despite R/F Landscape's assertions to the contrary, its obligations under section 3.2 to evaluate the work, make sure the contractors keep to their schedules in the performance of their work, and to keep Robert and Melissa Soros current on the progress of the work, are not, for the purpose of summary judgment, sufficient to prove that the July 2002 waterproofing work was performed pursuant to the Agreement, especially in light of the exclusion of "drainage" from the Agreement's list of services, and the inclusion of the words "during design or construction" in the Agreement's waiver clause.

As stated in *Kaf-Kaf, Inc. v Rodless Decorations* (90 NY2d at 660), "[w]hile parties to an agreement may waive their insurer's right of subrogation, a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears." Inasmuch as the parties executed a boilerplate agreement which is ambiguous both as to the work contemplated under it, and as to the end date of the Agreement itself, it cannot be said, as a matter of law, that the subrogation waiver found in Article 13 was intended to cover the loss at issue in this dispute (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Conclusion

R/F Landscapes motion for summary judgment is denied for the foregoing reasons. Since the note of issue has been filed, this case is ready for trial. Plaintiff shall serve a copy of this decision order on the office of Trial Support so the case can be scheduled for trial.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
October 19, 2010

So Ordered:



Hon. Judith J. Gische, J.S.C.

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