

Federal Ins. Co. v James
2011 NY Slip Op 31939(U)
July 6, 2011
Sup Ct, NY County
Docket Number: 105505/07
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 9

105505/2007

FEDERAL INSURANCE

JAMES IVAN

004

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read 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

motion and cross-motion are decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court.

FILED

JUL 12 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/6/11

Paranipagallo
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: IAS PART 19

-----X
FEDERAL INSURANCE COMPANY, as subrogee of
RICARDO DeZUBIAURRE,

Plaintiff,

-against-

IVAN JAMES and JESSICA PERRY,

Defendants.

Index No.:105505/07
Action No.: 1
Mot. Seq.: 004
Submitted: March 16, 2011

-----X
ECONOMY PREMIER ASSURANCE COMPANY,
as subrogee of MARK GHUNEIM,

Plaintiff,

-against-

IVAN JAMES and JESSICA PERRY,

Defendants.

Index No.: 402484/08
Action No.: 2
Mot. Seq.: 001
Submitted: March 16, 2011

-----X
USAA CASUALTY INSURANCE COMPANY as
subrogee of CAROL M. COHEN,

Plaintiff,

-against-

JESSICA PERRY, JOHN DOE CONTRACTOR, and
JOHN DOE,

Defendants.

Index No.:102940/08
Action No.: 3
Mot. Seq.: 002
Submitted: March 16, 2011

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Appearances: Attorney for Federal Insurance
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Bay Shore, New York 11706
631-969-7777

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Law Offices of Jan Meyer & Associates, P.C.:
1029 Teaneck Road, Second Floor
By Solomon Rubin, Esq.
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201-862-9500

Attorney for James:
no appearance

SALIANN SCARPULLA, J.:

The three joined subrogation actions herein, all of which arise out of the same May 9, 2006 incident, have been consolidated for joint trial and discovery. In each of the three actions, defendant Jessica Perry ("Perry") moves pursuant to CPLR 3212 for summary judgment dismissing, as against her, the complaint of the respective subrogated insurer. Her motions are based upon the waiver of subrogation provision contained in the by-laws of the Printing House Condominium (hereinafter "the By-Laws"), located in the building at 421 Hudson Street, New York, New York ("the Building"). Plaintiffs Federal Insurance Company ("Federal") and Economy Premier Assurance Company ("Economy") cross-move in their respective actions for summary judgment in their favor. Plaintiff USAA Casualty Insurance Company ("USAA") cross-moves pursuant to CPLR 3025 (b) for an order granting it leave to amend its complaint

On May 9, 2006, the date of the incident at issue, Perry owned condominium unit #603 in the Building. The three insured subrogors of the three plaintiff insurance companies were owners/occupants of other condominium units in the Building. Their apartments and certain contents therein were damaged as the result of a water leak that occurred in Perry's apartment on that date. Perry states that she contracted with defendant Ivan James ("James"), an independent contractor, to perform certain renovation and remodeling work in her apartment. She asserts that she did not direct or control the work that he performed, and that she was out of the country when the loss occurred on May 9, 2006. Perry maintains that she is not liable for any damages that James may have caused.

In Action 1, Federal seeks to recover property damages sustained by its insured, Ricardo DeZubiaurre ("DeZubiaurre"), the owner/occupant of units 402 and 403 in the Building, as a result of Perry's alleged negligent conduct in causing a water leak in the Building. In Action 2, Economy seeks to recover property damages sustained by its insured, Mark Ghuneim ("Ghuneim"), the owner/occupant of unit 303 in the Building, as a result of Perry's alleged negligent conduct in causing a water leak in the Building. In Action 3, USAA Casualty Insurance Company ("USAA") seeks to recover property damages sustained by its insured, Carol M. Cohen ("Cohen"), the owner/occupant of unit 503 in the Building, as a result of Perry's alleged negligent conduct in causing a water leak in the Building.

Pursuant to the By-Laws, the occupants of the units of the Building were permitted to obtain insurance for their own benefit, provided that all such insurance policies contained waivers of subrogation. Article V, section 2 of the By-Laws, entitled "Insurance" states, in part "Unit Owners shall not be prohibited from carrying other insurance for their own benefit provided that all such policies shall contain waivers of subrogation and further provided that the liability of the carriers issuing insurance obtained by the Board of Managers shall not be affected or diminished by reason of any such additional insurance carried by any Unit Owner." DeZubiaurre, Ghuneim and Cohen each procured a policy of insurance that contained a provision permitting waiver of subrogation.¹ Perry argues that, pursuant to the terms of the By-Laws and the applicable policies of insurance, Federal, Economy and USAA are precluded from maintaining their property damage subrogation actions against her, and her motions for summary judgment should be granted.

Perry argues that the benefit of requiring unit owners who procured insurance to obtain policies with waiver of subrogation provisions is to protect those parties from litigation against each other. *Schiller v Community Tech.*, 78 AD2d 762, 763 (4th Dept

¹The Federal policy, at page Y-1, in a section entitled "Transfer of rights," states, in part "you may waive any rights of recovery from another person or organization for a covered loss in writing before the loss occurs." The Economy policy, at page M-1, in a paragraph entitled "Our Recovery Right," states, in part "[y]ou may waive in writing before a loss all rights of recovery against any person." The USAA policy, at page 16, in a paragraph entitled "Subrogation," states, in part "[a]n insured may waive in writing before a loss all rights of recovery against any person."

1980). Perry further asserts that she is not liable for James' negligent acts because one who retains an independent contractor is not liable for his or her negligence.

In Action 1, Federal cross-moves for summary judgment in its favor against Perry in the amount of \$70,581.11, plus interest from May 9, 2006, based upon the terms of an agreement between Perry and Printing House Condominium ("Printing House"), as well as the terms of the By-Laws; or, in the alternative, granting judgment in its favor against Perry, on liability, with the amount of damages to be subsequently determined at trial. Federal also asserts that Perry's summary judgment motion should be denied due to her failure to produce required discovery or to appear for a deposition.

Federal asserts that, on or about May 9, 2006, its subrogor DeZubiaurre sustained \$70,581.11 in damages in apartments 402 and 403 in the Building as a result of work being performed by James in Perry's unit. Pursuant to a policy of insurance then in force and effect, it reimbursed its subrogor. On September 22, 2009, this Court granted a default judgment in its favor against James in the amount of \$92,652.30, but no part of the judgment has yet been satisfied.

In Action 2, Economy cross-moves for summary judgment against Perry in the amount of \$18,998.08, plus interest from May 9, 2006, on the same grounds as Federal. Federal and Economy argue that pursuant to Article V, section 14 of the By-Laws, a unit owner is required to obtain the written consent of the Residential Committee prior to performing apartment renovations. Perry allegedly executed a letter agreement sent to her

relevant insurance information or insurance certification for James and did not to appear for a deposition. Thus, Federal and Economy request that, if the court denies their motions, Perry's summary judgment motions as against them should also be denied, due to various questions of fact, including those arising from the work performed by James, Perry's role in this work, Perry's obligations under the By-Laws and Alteration Agreement, as well as other issues that may arise at her deposition.

Federal and Economy explain that, as subrogees of DeZubiaurre and Ghuneim, respectively, they are entitled to maintain a cause of action against Perry because "a subrogee stands in the shoes of the subrogor and is entitled to all of the latter's rights, benefits and remedies." *United States Fid. & Guar. Co. v Smith Co.*, 46 NY2d 498, 504 (1979). Federal and Economy argue that the enforcement of subrogation waiver clauses is limited, and that such a waiver "cannot be enforced beyond the scope of the specific context in which it appears." *Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 (1997). They read the waiver of subrogation clause, located in Article V, section 2 of the By-Laws, as limiting waivers of subrogation to the Board of Managers only.

In the alternative, Federal and Economy argue that, even if this Court determines that the subject waiver of subrogation clause applies to other unit owners, the Alteration Agreement supersedes the relevant By-Laws and requires a unit owner "to indemnify the Managing Agent, Tenants and Occupants of all apartments, against any damage to persons or property suffered as a result of your work, whether of [*sic*] not caused by

negligence ...” Therefore, Federal and Economy conclude that Perry’s motions should be denied, because she was required to hold harmless all residents of the Building against any claims for damage resulting from work performed on her behalf.

Perry counters that Federal and Economy have only asserted causes of action against her based upon her alleged “negligence, carelessness and/or recklessness” and that their pleadings do not contain a breach of contract cause of action. She asserts that Federal and Economy have not demonstrated any act of negligence by her and do not have any basis to request summary judgment against her for the relief they seek in their complaints. Perry further argues that Article V, Section 2 of the By-Laws does not contain any limitations on the applicability of the subrogation waiver based on any specific underlying theory.

In Action 3, Perry moves for summary judgment against USAA on identical grounds as in Actions 1 and 2. In opposition, USAA argues that Perry is not shielded by the waiver of subrogation, because she failed to procure an insured contractor as required by the Alteration Agreement. Further, USAA cross-moves under CPLR 3025(b) for leave to amend its complaint to assert a cause of action for breach of the Alteration Agreement and contractual indemnification under paragraph 8 of the Alteration Agreement.

Discussion

Subrogation is an equitable doctrine that 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. *See Kaf-Kaf, Inc. v Rodless Decorations*, 90 N.Y.2d 654, 660 (1997). “Waiver of subrogation provisions, which reflect the parties’ allocation of the risk of liability between themselves to third parties through the device of insurance, are generally valid and enforceable.” *Liberty Mutual Ins. Co. v Perfect Knowledge*, 299 A.D.2d 524, 526 (2nd Dep’t 2002) (citations omitted); *see also Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 N.Y.2d 654, 660 (1997) (recognizing subrogation waiver clauses in the co-op by-laws as valid and binding on the insurers). An insured’s breach of an agreement to obtain a waiver of subrogation in an insurance policy nonetheless prevents its insurer from maintaining a subrogation action. *See Greater New York Mut. Ins. Co. v 45 Overlook Terrace Owners Corp.*, 2009 N.Y. Slip. Op. 31420U, * 6 (Sup. Ct., New York County, June 26, 2009) (citations omitted).

Here, the waiver of subrogation provision in Article V, section 2 of the By-Laws applies to actions brought between unit owners within the Building. The provision does not provide that it applies, as the plaintiffs argue, only to claims brought by unit owners against the Board of Managers.

Given the “physical proximity and interdependence of the units” (*Schiller v Community Tech.*, 78 AD2d at 763) in condominium apartments, certain types of damage, including fire or water damage, often extend beyond an individual unit. In a case in which the Fourth Department discussed a similar waiver of subrogation provision in a condominium’s offering plan, it stated that, in light of the “particular insurance needs of

condominium owners,” it found that the required waivers were effective “with respect to subrogation claims brought against other condominium unit owners.” *Id.* This court likewise agrees that nothing in the language of the By-Laws indicates that the waiver of subrogation provision therein should apply only to claims as against the Board of Managers and finds that the waiver of subrogation provision was meant to apply in claims between unit owners as well.

Waiver of subrogation clauses apply to negligence claims such as those alleged by Federal and Economy. *See Viacom Intl., Inc. v Midtown Realty Co.*, 193 A.D.2d 45, 53-54 (1993). The allegations in Federal’s and Economy’s bills of particulars are that Perry negligently hired and retained James. A claim for negligent hiring, however, is also barred by the waiver of subrogation clause. *See Atlantic Mut. Ins. Co. v Elliana Props.*, 261 A.D.2d 296 (1st Dep’t 1999).

While Federal and Economy refer to the Alteration Agreement, Actions 1 and 2 sound only in negligence, and not in breach of contract. The complaints and bills of particulars all reflect this. Federal’s and Economy’s bills of particulars specifically state, in response #6, that “[b]reach of contract is not claimed at this time.” Accordingly, because Federal and Economy did not assert in their pleadings a breach of contract cause of action, they may not assert Perry’s alleged breach of the Alteration Agreement as a ground to award them summary judgment or as a ground to deny Perry’s summary judgment motion. Additionally, as the waiver of subrogation clause under Article V,

Section 2 of the By-Laws bars the causes of action for negligence in Actions 1 and 2, Perry's motions as against Federal and Economy are granted, and Federal's and Economy's cross-motions are denied.

With respect to Action 3, USAA correctly argues that the subrogation provision in the By-Laws, even if it were valid, would not apply if it is determined that Perry violated her contractual obligation in paragraph 8 of the Alteration Agreement requiring use of a contractor carrying at least a \$1,000,000 insurance policy. See *Viacom Intl., Inc.*, 193 A.D.2d at 54. However, at the present stage in litigation, it is only USAA that may possibly recover under paragraph 8 of the Alteration Agreement. USAA's original complaint, just as Federal's and Economy's, pleads negligence, but USAA has cross-moved under CPLR 3025(b) to add causes of action for breach of contract and contractual indemnification against Perry. It attaches a copy of the proposed amended complaint to its motion papers, alleging that, as Cohen's subrogee, it has a cause of action against Perry for breach of the Alteration Agreement.

CPLR 3025(b) provides that leave to amend a pleading shall be freely given, upon such terms as may be just. Mere lateness is not a barrier to the amendment; the party opposing amendment of a pleading must establish potential for significant prejudice. *Abdelnabi v New York City Tr. Auth.*, 273 A.D.2d 114, 115 (1st Dep't 2000). Prejudice is not found in the mere exposure of a party to greater liability. *Loomis v Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981).

Here, if it is determined that Perry was bound by the Alteration Agreement with Orb and the Board of Managers, USAA, as Cohen's subrogee, would be a third-party beneficiary of the Alteration Agreement. *Edge Mgt. Consulting, Inc. v Blank*, 25 A.D.3d 364 (1st Dept 2006) (condominium's board of managers entered into alteration agreement with unit owner on behalf of all unit owners, and other unit owners are thereby third-party beneficiaries). While there are outstanding issues as to whether Perry exhibited sufficient assent through course of conduct to be bound by the Alteration Agreement, whether she used an insured contractor, and what, if any relationship there was between James and the parties identified on the Certificate of Insurance that Perry submitted to Orb, USAA is granted leave to amend its complaint to pursue its breach of contract claims.

Accordingly, it is

ORDERED that, as to Action 1, defendant Jessica Perry's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that, as to Action 1, plaintiff's cross-motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, as to Action 2, defendant Jessica Perry's motion for summary judgment is granted and the complaint is dismissed; and it is further

ORDERED that, as to Action 2, plaintiff's cross-motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, as to Action 3, defendant Jessica Perry's motion for summary judgment is denied; and it is further

ORDERED that, as to Action 3, plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to the amend to the extent that the third and fourth causes of action in the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed first and second causes of action and those causes of action are stricken; and it is further

ORDERED that the defendants shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a conference in Room 279, 80 Centre Street, on August 17, 2011, at 2:15 PM.

Dated: July 5 2011
New York, New York

ENTER:

Saliann Scarpulla
J.S.C.
SALIANN SCARPULLA

FILED

JUL 12 2011

NEW YORK
COUNTY CLERK'S OFFICE