

ING Communications Inc. v 152-156 Realty Assocs., LLC
2012 NY Slip Op 30024(U)
January 6, 2012
Sup Ct, NY County
Docket Number: 112767/06
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C.
Justice

PART 10

Index Number : 112767/2006
ING COMMUNICATIONS
VS.
152-156 REALTY ASSOCIATES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

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

JAN 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: Jan 6, 2012

HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 10**

-----X
ING Communications Inc.,

Plaintiff (s),

-against-

152-156 Realty Associates, LLC and
AR Vays Contracting Corp.

Defendant (s).

-----X
AR Vays Contracting Corp.,

Third Party Plaintiff,

-against-

International Geotechnical
Structural Laboratories Inc. Corp.,
Scarano Architect, PLLC a/k/a
Scarano & Associates,

Third Party Defendants.

-----X

DECISION/ ORDER
Index No.: 112767/06
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Third Party
Index No.: 590423/09

FILED

JAN 10 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Papers	Numbered
AR Vays n/m (3212) w/DDS affirm, FV affid, exhs (sep back)	1,2
ING opp w/GD affirm, HC, JW, EH affids (sep backs)	3,4,5,6
AR Vays reply w/DDS affirm	7
Steno minutes (7/21/11)	8

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

GISCHE J.:

The court has before it a motion for summary judgment. Issue has been joined, discovery is completed and the note of issue was filed. Since this motion is timely, summary judgment relief is available and the motion will be decided on the merits ((CPLR § 3212; Brill v. City of New York, 2 N.Y.3d 648 [2004])).

Facts and Background

Unless otherwise provided, the following facts have been established:

This action and the action captioned New Hampshire Insurance Company a/s/o ING Communications, Inc. v. 152-156 Realty Associates, LLC, Supreme Court, New York County Index No. 116383/07 ("New Hampshire action") are related cases that were previously consolidated for joint trial only.

Whereas the New Hampshire case was commenced by it in its capacity as ING Communications, Inc.'s ("ING") subrogee, this action is brought by ING in its own name. The issue in both cases is the same: property damage arising from a construction project at 1725 Lexington Avenue, New York, New York, the building owned by defendant 152-156 Realty Associates, LLC ("152-156 Realty"). ING's building is located next door, at 1727 Lexington Avenue ("ING building"). A.R. Vays Contracting Corp. ("Vays") was hired by 152-156 Realty as the contractor for the project ("Vays project").

In the New Hampshire action, the subrogee seeks to recover the money it paid to its insured on its claim (\$470,000). In this action ING is suing for the difference between its claimed damages and the amount its insurance company paid on ING's claim (\$126,487.43).

Defendants 152-156 Realty and Vays previously moved for summary judgment in

the New Hampshire action on the basis of a settlement agreement between ING and the defendants before the Hon. Rosalyn Richter on March 24, 2005 ("settlement agreement") and a subsequent release dated March 29, 2005 ("release"). Defendants also argued that the other action was time barred.

Notably, the parties' settlement agreement provides as follows:

"The defendants, jointly and severally, agree to pay the plaintiff the sum of \$140,000 in full satisfaction of all claims and damages to date..."

In the release, ING agreed to release defendants from all claims concerning the ING building from the "beginning of the world to the date of this RELEASE."

In its decision and order of September 12, 2011 in the New Hampshire action, this court denied the motion for summary judgment. The September 12, 2011 decision and order in the New Hampshire action is incorporated herein by reference. In denying summary judgment, the court stated that the settlement agreement and release were not a bar to that action because the subrogee was claiming that ING's building had suffered property damage which was not covered by the settlement agreement and release. The court also decided that the New Hampshire action was not time barred because it was based upon new property damage alleged to have occurred in April 2005.

The motion presently before the court raises some identical issues. Here, Vays¹ has moved for summary judgment, based upon the same settlement agreement and

¹Although both 152-156 Realty and Vays are jointly represented in this and the New Hampshire actions, and both defendants moved for summary judgment in the New Hampshire action, here the only movant is Vays. It is unclear whether 152-156 Realty is still a party to this action and that issue is not addressed in any of the papers before the court.

release. Vays contends the release discharged all of ING's claims—past present and future—and that this action is for damages already settled. Vays also claims this action is time barred because ING seeks recovery for damages alleged to have occurred in 2004.

With respect to Vays' motion for summary judgment on the issue of damages, Vays contends that ING would reap a windfall, if it is allowed to recover the damages alleged in the complaint. Vays argues that not only did ING settle with the defendants and release them, the ING property is not as valuable as ING presents it to be. James Wang ("Wang"), ING's principal states that he bought the building at 1727 Lexington for \$510,000 in December 2003. After construction resumed in April 2005 and after the parties had settled their claims regarding the 2004 structural damage to the ING building, Wang contends he incurred damages of \$603,622.57 to repair the building. ING has received a claim payment of \$470,000 from New Hampshire (the policy limit) for the damages attributable to defendants' resumption of the excavation and construction work in April 2005. ING provides the sworn affidavit of its structural engineering consultant ("Hubschman") who states that he personally observed new and worsened cracks at the ING building in April 2005. ING's professional engineer ("Chen") provides a sworn affidavit as well setting forth similar observations.

In addition to its claim for property loss, ING has also asserted a claim for loss rent. According to Wang, the rent roll for the building was \$90,000 in 2005, but it would have been no less than \$180,000 in 2006 and \$162,000 in 2007. Wang states the building had no tenants after April 2005, when DOB issued a second stop work order, until Fall of 2007.

Discussion

A movant seeking summary judgment in its favor 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 N.Y.2d 851, 853 (1985). The evidentiary proof tendered, however, must be in admissible form. Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 (1979). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

In this court's prior decision in the New Hampshire action (incorporated herein by reference), the court denied defendants' motion for summary judgment on the basis that there questions of fact as to whether the damage to the ING building, which ING claims occurred as a result of the resumption of work by Vays on the building owned by 152-156 Realty amounts to new damage, beyond the damages reported in 2004, which are covered by the parties' settlement agreement and subsequent release. There is also an issue of fact whether such damage was caused by any actions on defendants' part, after defendants proceeded with construction at their property following the settlement agreement and release. The court also found that the release is "unambiguous in its intent to limit its scope to claims arising up to the date of the Release..." Having made this decision, Vays cannot obtain a different result in this action.

Subrogation is an equitable doctrine allowing 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, Inc., 90 N.Y.2d 654 [1997]). Although each of these cases has a different plaintiff, New Hampshire proceeded directly against the defendants as ING's subrogee. As ING's subrogee, New Hampshire stands in the shoes of its subrogor. Therefore, the two basic requirements for invoking collateral estoppel have been satisfied: (1) the identical issue was necessarily decided in another proceeding, it is decisive of the present action, and (2) defendant Vay had a full and fair opportunity to contest that issue in the other proceeding (D'Arata v. New York Cent. Mut. Fire Ins. Co., 76 N.Y.2d 659 [1990]).

Even if the result reached in this decision were not required by the doctrine of collateral estoppel, the court would reach the same conclusion based upon the same reasoning articulated in the September 12, 2011 decision in the New Hampshire action.

There are triable issues of fact whether the damage to the ING building, which ING claims occurred as a result of the resumption of work on the building owned by 152-156 Realty, worked on by Vays, amounts to new damage, beyond the damages reported in 2004, as covered by the parties' settlement agreement and subsequent release. A suit for damages claimed by ING to have occurred exclusively from the work performed after 2004 would not be barred by the Release.

There is also an issue of fact whether such damage was caused by any actions on defendants' part, after defendants proceeded with construction at their property. Vays has not met its burden of showing that ING does not have the damages claimed or that the monies New Hampshire paid were not, as ING claims, compensation for pre-April 2005. Through its submissions, ING has also raised triable issues of fact that it suffered loss of rental income and that the payments it received from New Hampshire did not fully

compensate it for its property damage claim. A suit for damages claimed by plaintiffs to have occurred exclusively from the work performed after 2004 would not be barred by the Release. Nor is this action time barred because it is based on events in April 2005 and it was commenced in or about September 12, 2006 (see also prior order in New Hampshire).

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that the motion brought by defendant A.R. Vays Contracting Corp. for summary judgment is denied; and it is further

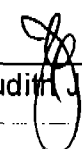
ORDERED that the Note of Issue has been filed, therefore this case is ready for trial; plaintiff shall serve a copy of this decision/order on the Office of Trial Support so the case can be scheduled for trial; and it is further

ORDERED that any relief requested but not addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the Court.

Dated: New York, New York
January 6, 2012

So Ordered:



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

FILED

JAN 10 2012

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