

Admiral Indem. Co. v Nova Restoration of NY Inc.

2013 NY Slip Op 32994(U)

November 19, 2013

Sup Ct, NY County

Docket Number: 155472/12

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ADMIRAL INDEMNITY COMPANY A/S/O THE
COBBLESTONE LOFTS CONDOMINIUM,
Plaintiff,

INDEX NO. 155472/12

MOTION SEQ. NO. 001

-against-

NOVA RESTORATION OF NY INC.,

Defendant.

The following papers were read on this motion by defendant for summary judgment pursuant to CPLR 3212.

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

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

In this subrogation action, Nova Restoration of NY Inc. (defendant) moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Also before the Court is a cross-motion by Admiral Indemnity Company (plaintiff), pursuant to CPLR 3212, for summary judgment on the issue of liability. Discovery in this matter is not complete and the Note of Issue has not been filed.

BACKGROUND

This is a subrogation action that arises from an insurance claim of property damage incurred on March 3, 2011, as a result of a water leak, at the premises located at 28 Laight Street, New York, New York (premises). The premises was owned by Cobblestone Lofts Condominium (Cobblestone). Defendant was a contractor retained to perform roof and deck replacement at the premises. On August 13, 2010, defendant entered into a written contract

with Cobblestone (Contract) with respect to this work, wherein Article 17 provides that the parties were to procure and maintain property insurance for the premises. Cobblestone purchased a policy from the plaintiff which was effective for the period of March 1, 2011 to March 1, 2012, and provided commercial property damage coverage with policy limits of \$22 million.

After the subject property damage occurred, measures were taken to repair the damage caused by the leak. The cost of repair was covered under the insurance policy. After plaintiff made payment to Cobblestone for the repair, it assumed the rights of a subrogor and brings this suit to recover the cost of repair, including the owner's deductible. Plaintiff alleges that it is entitled to damages pursuant to the terms of the Contract between Cobblestone and defendant, as well as the policy.

Defendant brought the herein motion for summary judgment, pursuant to CPLR 3212, to dismiss the complaint, claiming that plaintiff's policy includes a waiver of subrogation provision which is applicable to the property damage incident here. According to defendant, the provision is unambiguous as to whether subrogation is allowed in such an event. Thus, defendant argues that plaintiff is precluded from commencing an action of this nature.

Plaintiff opposes this motion and cross-moves for partial summary judgment on the issue of liability, pursuant to CPLR 3212. Plaintiff contends that the nature of this incident is not covered under the waiver of subrogation provision, which is specific as to when subrogation is allowed. Plaintiff avers that a proper interpretation of the policy would demonstrate that this action is allowed. Moreover, plaintiff states that the evidence demonstrates that there is no issue of fact as to what had occurred at the premises and who was liable for the property damage. Plaintiff seeks a judgment on the issue of liability, contending that an assessment of damages can be determined at a later time.

STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, “the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212[b]).

When deciding a summary judgment motion, the Court’s role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Defendant is moving for summary judgment on the ground that plaintiff’s policy expressly provides that a subrogation suit is not allowable under the specific circumstances underlying this action. “An insurance contract is to be interpreted by the same general rules

that govern the construction of any written contract and enforced in accordance with the intent of the parties as expressed in the language employed in the policy" (*Throgs Neck Bagels. v GA Ins. Co. of N.Y.*, 241 AD2d 66, 69 [1st Dept 1998]). Thus, unambiguous terms are usually given their "plain and ordinary meaning" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). "Courts 'may not make or vary the contracts of insurance to accomplish [their] notions of abstract justice or moral obligation'" (*Teichman v Community Hosp. of W. Suffolk*, 87 NY2d 514, 520 [1996] [internal citation omitted]).

"Subrogation is the principle by which an insurer, having paid the losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss" (*Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995]). Section 17.3.3 of the Contract provided that when the parties proceeded to procure a policy:

"The policy shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had a insurance interest in the property damaged."

Cobblestone's policy included the following in its "Commercial Property Conditions" provision:

"If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income." (CP 00 90 07 88 at p.2).

The language of the policy incorporated the waiver of subrogation language contained in the Contract.

According to defendant, an unambiguous interpretation of the policy indicates that the waiver of subrogation provisions in the aforesaid policy precludes plaintiff's action. Plaintiff, in response, asserts that the waiver clause, section 17.3.3, as it appears in the Contract, is limited in scope to "damages caused by fire or other causes of loss to the extent covered by property

insurance obtained pursuant to paragraph 17.3 or other property insurance applicable to the Work.” The Work is defined in paragraph 7.3 of the contract as “the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations.” Plaintiff points out that the first page of this contract describes the project as “Roof and Deck Replacement.” Plaintiff contends that the waiver of subrogation would only apply to work involving roof and deck replacement. However, in this action, the property damage involved damage to the interior areas of an apartment on the premises. Plaintiff argues that since the damage did not involve the roof or deck of the premises, the waiver provision in Cobblestone’s policy, which was purchased pursuant to the terms of the Contract, is not applicable. Plaintiff claims that it is not barred from bringing this subrogation suit.

In opposition, defendant refers to article 6 of the Contract, entitled “Enumeration of Contract Documents” which details documents to be included within the meaning of “Work.” Section 6.1.2 includes the Project Manual, of which page 3 contains “General Conditions.” Section B of “General Conditions” provides: “Any areas outside of the actual construction area, which are utilized or damaged by the construction, shall be returned to their original condition prior to the end of the job.” Moreover, section 7.1 of the Contract states that “The Contract Documents are enumerated in article 6 and consist of this Agreement (including, if applicable, Supplementary and other Conditions of the Contract). ... ”

Section 11.3.5. of the General Conditions, provides:

“If during the Project construction period the Owner insures properties, real or personal or both, at or adjacent to the site by property insurance under policies separate from those insuring the Project ... the Owner shall waive all rights in accordance with the terms of Section 11.3.7 for damages caused by fire or other causes of loss covered by this separate property insurance.”

It is defendant’s position that Cobblestone procured a policy that provided a waiver of

subrogation rights with respect to damages that occurs on all of the premises, and if caused by defendant's work, is not limited to the roof and deck areas. Therefore, defendant argues that plaintiff's action is still barred, regardless of where the area of damage occurred.

Upon an examination of Cobblestone's policy, the covered property provision is a broad one, one which includes damage to property outside of the construction site. The Commercial Property Conditions provision states that plaintiff maintains the option of waiving subrogation rights to other parties via a written document prior to the date of loss. In this case, such writing consists of the Contract, which provided strong waiver of subrogation terms. By incorporating these terms into the policy, it is clear that the coverage is extended to those areas beyond the construction site, including the subject apartment, where the alleged water damage occurred.

Since the waiver of subrogation provision is applicable here, plaintiff is barred from seeking recovery based on its insured's claim. As for the cross-motion, defendant is correct in asserting that it cannot be held liable for any property damage claim since the waiver of subrogation provision is valid. Thus, the cross-motion is denied and this suit is dismissed.

In its motion, defendant seeks reimbursement of attorney's fees as part of its damages. Attorney's fees are considered incidents of litigation and are not generally available as damages in the absence of statutory or contractual authority (*see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). In this case, there is no evidence of the aforesaid authority, and defendant is not entitled to such fees.

CONCLUSION

Accordingly, it is

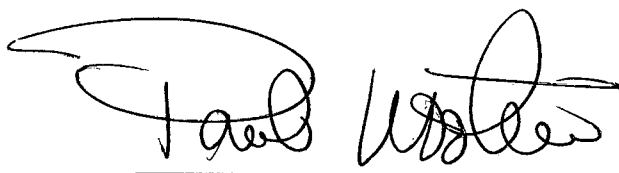
ORDERED that defendant Nova Restoration of NY Inc.'s motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further,

ORDERED that plaintiff Admiral Indemnity Company's cross-motion for summary judgment is denied; and it is further,

ORDERED that counsel for defendant Nova Restoration of NY Inc. is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 11/19/13



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE