

ABC Carpet Co., Inc. v OV Constr., Inc.

2014 NY Slip Op 31641(U)

June 25, 2014

Supreme Court, New York County

Docket Number: 150086/11

Judge: Ellen M. Coin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

-----X
ABC CARPET COMPANY, INC.,

Plaintiff,

-against-

Index № 150086/11

OV CONSTRUCTION, INC.,

Defendant.

-----X
ELLEN M. COIN, J.:

Under motion sequence number 002, defendant OV Construction, Inc. (OV) moves for an order, pursuant to CPLR 3212, granting summary judgment and dismissing the complaint in its entirety. Plaintiff ABC Carpet Company, Inc. (ABC Carpet) opposes the motion and moves, under motion sequence number 003, for an order, pursuant to CPLR 3212, granting summary judgment against OV on the issue of liability. The motions, under motion sequence numbers 002 and 003, are consolidated for disposition.

ABC Carpet, which is in the carpet and homegoods retail business, commenced this action by filing its summons and complaint in the office of the New York County Clerk on or about April 6, 2011, to recover damages it allegedly incurred when its warehouse property, located at 1055 Bronx River Parkway, Bronx, New York (the property or warehouse, as appropriate), sustained damages from a rainstorm on June 14, 2008 (rainstorm). The rainstorm came on the heels of a devastating windstorm (windstorm) which, four days earlier, on June 10, 2008, also passed through the Bronx. The windstorm tore off a 6,000 square foot section of roofing materials from the northwest corner of the warehouse roof, and, according to ABC, ripped off awnings, took down fencing and caused assorted other damage to the property.

On or about June 10, 2008, ABC notified and filed a property claim with its insurer, Liberty Mutual Fire Insurance Company (Liberty Mutual), and on June 11, 2008, ABC hired OV to remove the debris caused by the windstorm, and to provide temporary roofing repairs to prevent further damage to its warehouse. It is undisputed that OV began its work on or before June 13, 2008, the day that an independent claims adjuster hired by Liberty Mutual came to inspect the warehouse.

The property insurance which ABC had obtained from Liberty Mutual was a Liberty Mutual Property RM Select Policy under policy number YU2-Y91-441156-018 (Liberty Policy). The Liberty Policy's effective policy period was April 1, 2008 to April 1, 2009, covering the property losses claimed as a result of the windstorm and rainstorm occurring on June 10 and June 14, 2008. ABC's claims included damages to the warehouse roof, HVAC units, signage, communication equipment, vans/trucks, much of the building's contents, such as carpets and furnishings, and the building itself. Initially recorded as separate losses stemming from two separate events, for reasons left unstated, Liberty Mutual ended up combining the damages sustained on June 10 and June 14, 2008, into a single loss (*see* OV's exhibit Q - Serious Property Loss Notice dated August 5, 2008). After several adjustments were made to ABC's property damage claim, Liberty Mutual settled with ABC, making payment to, or on behalf of, ABC.

In commencing this action, it is ABC's position that it is entitled to recover from OV because the temporary repair work performed by the subcontractor on or about June 13, 2008, ultimately failed to protect the warehouse from further damage and destruction when the rainstorm arrived on June 14, 2008. The complaint contains four causes of action sounding in negligence, breach of contract, breach of express and implied warranties, and gross

negligence/willful and wanton misconduct. Issue was joined by service of OV's answer on or about July 11, 2011. Included in OV's answer are five affirmative defenses premised on the statute of limitations, improper service, plaintiff's failure to state recoverable causes of action or to state a cause of action for breach of contract or warranty, and on the ground that the complaint is barred in full by the economic loss defense applicable to negligence claims for property damage.

Following discovery and the filing of the note of issue, the parties served their respective motions for summary judgment, setting forth many facts which are, generally, undisputed. They each also include additional "facts," which they each insist are undisputed and/or supported by irrefutable evidence, but which their opponent denies or disputes, including the effect of combining the two weather events into a single insurance loss, whether subrogation was waived, and whether documentary evidence conclusively establishes or conclusively disproves ABC's allegations of negligence.

Each party supports its motion with carefully selected portions of the deposition testimony of Paul Chapman (Chapman), president and vice chairman of ABC Carpets; Glen Walker (Walker), an independent claims adjuster who, through his company MSW Adjustment Group, Inc., was hired by Liberty Mutual to handle ABC's claim after the windstorm; and Michel¹ Gertsch (Gertsch), the owner and manager of OV.

In his deposition, Chapman provided a timeline of events starting with the wreckage caused by the windstorm on June 10, 2008. Chapman described the section of the warehouse where the damage occurred as having only one story, and he stated that on the day of the

¹ Mr. Gertsch's first name is alternately spelled out in the parties' papers as "Michele."

windstorm, he, along with other employees, went up to the roof to survey and photograph the winds' devastating effects. He stated that the windstorm "ripped off awnings off the building, took down fencing around the building. It caused property damage on the outside of the building . . . [and] [w]ithout being a roof expert, the roof was lifted, the second membrane was lifted from the first membrane and pushed back" (Chapman tr at 14). Chapman stated that he began calling roofers right away, and that due to its availability, he/ABC engaged the services of OV to temporarily protect the warehouse from further weather damage and water intrusion. Chapman explained that because there was no way to start more permanent repairs, he directed Gertsch, "to button up the roof, seal it, so I don't get any more water in. Then it would take time for the engineers or somebody to design the proper way of repairing it. All he did was button up" (*id.* at 30).

When asked about OV's methods and use of certain materials, Chapman repeated his instruction to Gertsch to seal up the building, but denied telling Gertsch/OV how to handle the repairs, or what materials to use. He confirmed that OV began its repair work immediately, acknowledged that OV's work took about five days to complete, and he approved the invoice prepared by Gertsch for payment. Chapman stated that when, on June 14, 2008, the rainstorm passed through the Bronx, it ripped off much of the protective covering ov had installed, and that additional damage occurred to the roof and to property inside the warehouse.

At Walker's deposition, he stated that he initially visited ABC's warehouse on June 13, 2008, in response to ABC's property insurance claim and on behalf of Liberty Mutual. He stated that he was able to see that a large section of the one-story roof had peeled back due to the windstorm, and that the emergency enclosure/repair work had begun, but was not complete

(Walker tr at 20, 22). He recalled being aware that another storm was due to arrive the following day, and that he discussed the need for getting the temporary repairs in place quickly with the public adjuster hired by ABC, a Mr. Davidson (*id.* at 36, 37). Walker also testified that he did not see “any evidence of tarps or any other typical emergency enclosure methods being used” at the time of the inspection, that he had no input into how the temporary repairs would be performed, and that he did not know what stage the temporary repair/enclosure was in when the rainstorm hit the following day, June 14, 2008 (*id.* at 35, 37, 39). He testified that when he returned to the site on June 17, 2008, he could see that although the temporary repair work appeared to have been completed, it was evident that ABC had sustained interior water damage, affecting rugs and furnishings, which had not been part of the claim stemming from the June 10, 2008 windstorm, including damage in areas that had been covered with temporary roof repairs (*id.* at 39-40, 44). When asked, Walker stated that his criticism of the manner in which the work had been completed pertained to a lack of proper drainage (*id.* at 45-46).

At his deposition, Gertsch testified about how OV operated, explaining that he was OV’s sole owner and the person who handled all aspects of the company’s business, which he acknowledged had closed down after only one year of operation. Gertsch stated that he handled the day-to-day work of accepting and pricing out jobs for OV, hiring workmen, deciding how work was to be performed and by which workmen, supervising their work, and billing for the jobs. He also stated that he was the person who decided what materials to use for a particular job and who purchased them (Gertsch tr at 32).

When asked about working for ABC, Gertsch explained that he, through one or more of his contractor businesses, including a now-defunct business called “Eurolighting Inc.,” had

performed various jobs for ABC on prior occasions, including roof work, over the course of 18-20 years, and that when Chapman called about the damage that had taken place on June 10, 2008, he went over immediately, in his role as owner and manager of OV. Although he could not remember the specific date, Gertsch remembered meeting with Chapman sometime around June 11, 2008, to see what needed to be done and that Chapman told him to start the work right away, and to do it “the cheap way” (*id.* at 62). When asked how long he had thought it would take to complete the work, Gertsch stated “I don’t know. I mean, any time I do this, a few days. I don’t know” (*id.* at 59). And when asked whether a contract had been prepared with respect to this job, Gertsch stated that he does not do contracts (*id.* at 46, 62).

Gertsch was asked a series of questions regarding the work OV performed at the warehouse. Gertsch defended his company’s work, suggesting, in different responses, that ABC/Chapman had not wanted him to do all the work he thought needed to be done. At one point Gertsch stated, in relevant part, “I do express at ABC it should be put back insulation, all kinds of thing. He say no, just put like this and that’s it for somebody and that’s what you do. . . You can’t complain if you don’t want to pay to get the right job what you can get” (Gertsch tr at 45). And when he was asked “[w]hen you install a temporary roof on a building, do you understand that that’s supposed to function as a real roof?” Gertsch responded “[y]eah, this is, he say, temporary. After, he wants it to be a fixed definitive. He put like this for water not to go inside” (*id.* at 46).

Gertsch testified about the materials that he used for the job, including blue tarps, glue, and a rubber membrane, stating that he used the tarps to cover exposed areas of the roof until he could get to them, and that he used tar to patch areas of the roof. In addition to explaining that he

was following Chapman's instructions by not placing insulation underneath the temporary roof membrane, he acknowledged that he did not install any drainage either, saying that it was not necessary due to the pitch of the roof on that side, but that OV did clean out the drain (*id.* at 67-71, 80, 93).

Gertsch could not recall how many days it took to complete the job, remembering only that it was a lot of work and that it involved multiple steps ranging from buying the necessary materials and tools, to gathering workmen, to cleaning up the mess on the roof, to laying tar and to rolling out the temporary membrane. He recalled that the job took almost a week, with his men working every day, including a weekend, and that the roof cleaning alone took more than one day (*id.* at 75-77, 85, 99).

When questioned about his billing procedures, Gertsch stated that it was his practice to bill a customer when the work was completed (*id.* at 48), that the bill he prepared for OV's work at ABC was on an invoice containing Eurotech Inc.'s name, that it was written in French (OV's aff in support, exhibit I),² and that it was dated June 14, 2008. Gertsch appeared unable to answer more specific questions about how he prepared the invoice due to issues he seemed to be having reading the exhibit at the deposition.³

Gertsch also testified that ABC called him in August of the same year, to come back and fix the temporary repairs, and then called him again a few months later to completely redo the entire roof. He stated that ABC also hired him to do to do other jobs during the interim (*id.* at

² ABC included in the same exhibit an English translation of the invoice originally prepared in French, together with a certificate of accuracy for the translation.

³ Gertsch was almost 80 years of age at the time of the deposition (DOB August 5, 1933).

87, 88).

Addressing OV's requested relief, it is OV's contention that ABC's negligence allegations are without merit given its undisputed failure to complain or object to payment for OV's work. Next, OV contends that ABC's recovery is barred by a waiver of subrogation. To this end, OV points out that ABC pressed Liberty Mutual into accepting the June 10, 2008 windstorm as the sole cause of all property damage sustained (*see* OV's notice of motion, exhibits K, L, O, P, Q). OV reasons that because the Liberty Policy contains a provision that "limits the benefits recoverable under the coverage to one "Named Storm," which in this case, was the June 10, 2008 storm, and because Liberty Mutual did, in fact, settle all of ABC's property claims as a single loss attributable to the windstorm, neither ABC nor its insurer may seek recovery with respect to the rainstorm. Stated another way, and citing *Kaf-Kaf, Inc. v Rodless Decorations* (90 NY2d 654 [1997]) and its progeny, OV asserts that Liberty Mutual "conformed the entire ABC Carpet claim, including any subrogation aspects, to the one storm, consistent with its policy's definition and terms which limits and confines the claim to a single storm, i.e. the Wind Storm of June 10, 2008" (affirmation of OV's counsel, ¶ 34). And having limited the entire claim of loss to a storm (the windstorm) that occurred before the storm upon which the instant claim is based (the rainstorm), subrogation related to the latter weather event was waived. Alternately, OV claims that the economic loss doctrine bars ABC from recovering damages for economic loss based on non-contractual, tort theories of liability. Lastly, OV offers general denials to ABC's allegations that it breached a contract or an express or implied warranty, and denials to ABC's allegations that it committed acts of gross negligence and/or misfeasance, omitting specific argument as to the bases for dismissing each of these remaining

causes of action.

In its opposition, and despite the fact that the complaint fails to mention Liberty Mutual or a property claim settlement, ABC does not deny that the action is being brought, in whole or in part, on behalf of Liberty Mutual, because, as the insurer, Liberty Mutual is entitled, through subrogation, to recoup damages from the purported tortfeasor.⁴ ABC also does not deny that it received payment from Liberty Mutual for damages stemming from the two storms. What it disputes are OV's arguments regarding a waiver of subrogation, negligence and the applicability of the economic loss doctrine, and whether OV has demonstrated entitlement to a dismissal of the complaint in its entirety.

Addressing the issue of subrogation, while it is undisputed that parties to an agreement may waive their insurer's right of subrogation, OV has failed to demonstrate, as a matter of law, that ABC waived Liberty Mutual's subrogation rights in this instance. Unlike *Kaf-Kaf, Inc. v Rodless Decorations*, where the plaintiff, Kaf-Kaf, Inc., was a fire victim tenant whose insurance company paid it for its property damage claims and then attempted to recover, through subrogation, from the insurer of its landlord, defendant Rodless Decorations, but was prevented from doing so by the waiver of subrogation contained in the written lease between Kaf-Kaf and Rodless Decorators, no such waiver exists here. It is acknowledged by all parties that there was no written contract between ABC and OV, and, therefore, no written subrogation clause as

⁴ While in some states, the insured remains the real party in interest with an exclusive right to pursue a tortfeasor (see *Knob Noster R-VIII School Dist. v Dankenbring*, 220 SW3d 809, 816 (Mo Ct App WD 2007), in New York it is more common for the insurance company to pursue a subrogation action. Nevertheless, here, as in *Trump-Equitable Fifth Ave. Co. v H.R.H. Constr. Corp.* (106 AD2d 242 [1st Dept], *aff'd* 66 NY2d 779 [1985]), the insured is the plaintiff, which, as subrogee, commenced an action, seeking recovery on behalf of its insurer.

between them. The subrogation clause on which OV attempts to rely is contained in the Liberty Mutual policy. The clause, set forth at CONDITIONS § J (1), provides:

“If **we** make payment for a loss, **you** will assign to **us** all **your** rights of recovery against any party for that loss. **We** will not acquire any rights of recovery **you** have waived from to the loss. **You** agree to cooperate and not to waive, prejudice, settle or compromise any claim against any party after the loss has occurred”

(see OV’s notice of motion, exhibit B). This clause, which does not effect a waiver of the insurer’s right to subrogation, both authorizes subrogation when payment is made for a loss, and recognizes the circumstances under which subrogation might be waived. As stated by the Court of Appeals in *Kaf-Kaf, Inc. v Rodless Decorations* (90 NY2d at 660), “a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears,” and this clause does not create a waiver of subrogation as between Liberty Mutual’s insured, ABC, and a contractor. Furthermore, and despite OV’s vigorous arguments on this point, Liberty Mutual’s post-rainstorm decision to combine the two weather events into a single loss (tied to the June 10 windstorm) also does not act to create a subrogation waiver (with respect to the June 14 rainstorm) prior to that event or loss, nor does it substitute for a valid, enforceable subrogation waiver. Accordingly, OV’s reliance on CONDITIONS § J (1), to preclude recovery, is misplaced.

Also misplaced is OV’s reliance on the limitations of liability language set forth in the Named Storm endorsement, as the weather occurrence of June 10, 2008 does not fall within the policy’s definition of a Named Storm. The Liberty Policy defines a Named Storm as: “[a]ny storm or weather disturbance that is named by the U.S. National Weather Services Tropical Prediction Center” (see Liberty Policy, DEFINITIONS § T), and there is no evidence before the

court that the June 10, 2008 windstorm was named by the U.S. National Weather Services Tropical Prediction Center. OV's attempt to elevate it to that status by denominating it as "Wind Storm of June 10, 2008" (*see* affirmation of OV's counsel, ¶ 34), or by showing that it was listed as an "event" in the City of New York's "Hazard Mitigation Plan 2014" (ABC's reply aff, exhibit A), is inadequate and unavailing.

Next, OV's attempt to bar ABC's claims based on the economic loss doctrine, a rule "which denies the purchaser of a defective product a tort action against sellers, manufacturers, installers and servicers for purely economic losses sustained as a result of the defective product" (*Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 306 [1st Dept 2010], *affd* 18 NY3d 341 [2011]), is also unavailing. Rather than claiming that the products/materials used by OV were defective, ABC premised its tort claims on criticism of OV's choice of materials and of the manner and methods used by this contractor to effect the temporary repairs. As such, the economic loss doctrine does not apply.

The remaining substantive issue OV addressed (the central issue in ABC's motion for summary judgment) is whether OV performed the temporary repairs in a negligent manner. However, as set forth below, the arguments both parties present raise material questions of fact which do not properly lend themselves to summary judgment resolution.

In support of its motion, ABC submits the portions of the deposition witnesses' testimony that it deems relevant, together with copies of photographs of the damaged roof, and the June 14, 2008 (French) invoice. ABC also submits, and relies to a great extent, on an affidavit prepared by Michael Mozes (Mozes), a certified roofing expert.

In his affidavit, Mozes reports that he was the individual called upon by Liberty Mutual

on or about June 13, 2008, to conduct an inspection of the roof and assess the value of the damage that occurred as a result of the June 10, 2008 windstorm. According to Mozes, who states that he had been informed that “the Subject Roof had failed after a windstorm that occurred on June 10, 2008, and that water penetrated the Subject Roof and building after a subsequent rainstorm that occurred on June 14, 2008” (Mozes aff, ¶ 8), he did not arrive at the site until after the rainstorm, on June 17, 2008. At that point, he met up with the insured and the public adjuster (Davidson), and photographed, examined, and performed certain tests on the roof. He reduced his findings to a report dated July 11, 2008, attached as “exhibit B” to his affidavit, which he summarized in his sworn affidavit.

According to Mozes, the windstorm caused a 64' x 91' square foot area in the northwest corner of the one-story roof to peel back onto itself, exposing corrugated metal roof deck. The peel back itself created holes and gouges in the roof's membrane in other areas of the roof, thereby exposing the warehouse to water penetration (*id.* ¶ 12). He also noted in his affidavit that the affected section of the roof did not have proper sloping to allow for water drainage, that several of the roof's drains were clogged, and that the temporary repairs, which allowed for the ponding of water to occur, did not prevent water penetration. His professional opinion was that a reasonable prudent roofer would have used different materials, such as a felt base sheet and bituminous roof mastic and a rubber membrane roof, and would have addressed the sloping and drainage problems using other means, such as drainage scuppers.

Next, ABC offers Gertsch's testimony to establish that he does not bill a client until the work is complete, and that he was responsible for determining the method and materials used in effectuating the temporary repairs (Gertsch tr 32, 48). From these acknowledgments, ABC

contends that: (1) the fact that he billed ABC on June 14, 2008, constitutes conclusive evidence that OV had completed its work when the rainstorm arrived; and (2) the fact that OV's choice of materials and temporary repairs were inadequate and improperly performed constitutes conclusive evidence of negligence.

ABC then offers Walker's deposition testimony to establish that the interior damage to rugs and furniture occurred after the June 14, 2008 rainstorm, and it offers Chapman's testimony to establish that he left it up to Gertsch/OV to determine what methods and materials to use.

Based on this evidence, it is ABC's contention that it has proven, chiefly through its expert, that OV performed the temporary repairs in a negligent manner, and that had it not been for OV's negligent actions and/or omissions, it would not have sustained further damages to its warehouse as a result of the rainstorm.

OV's opposition to ABC's motion, like its own motion for summary judgment, points to ABC's approval of the invoice for payment for the temporary repairs, OV's receipt of payment, and to ABC's decision to hire OV a few months later to perform permanent repairs to the roof, as conclusive proof that the subject work was performed in a nonnegligent manner. OV also submits a copy of what purports to be another invoice from OV to ABC pertaining to the same temporary repair work. This invoice is dated June 30, 2008 (OV's aff in opp, exhibit A).

With respect to the use of certain materials instead of others, OV points out that it was at Chapman's direction that Gertsch/OV did not place insulation underneath the temporary roof membrane and that it completed the temporary work as cheaply as possible. OV also contends that the photographic evidence of pooling on the rubberized sheeting actually contradicts ABC's claim that water penetrated the materials OV used.

It is undisputed that despite OV's efforts to prevent further damage to the warehouse, the warehouse did, in fact, sustain additional damages due to the penetration of water from the June 14, 2008 rainstorm. However, it is well settled that:

“the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue (*Moskowitz v Garlock*, 23 AD2d 943, 944) or where the issue is even arguable (*Barrett v Jacobs*, 255 NY 520, 522), since it serves to deprive a party of his day in court. Relief should be granted only where no genuine, triable issue of fact exists (*see, Werfel v Zivnostenska Banka*, 287 NY 91)”

(*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]). It is also well settled that the function of summary judgment is issue finding, not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]), and that the motion court should not pass on issues of credibility (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

Here, the parties emphasize different aspects of the documentary proof and the deposition testimony, and ask the court to draw conclusions based on their respective interpretations of such evidence. However, it is the function of the jury to marshal the evidence and determine whether, and to what extent, to credit and/or draw inferences from the documentary and oral evidence, not the motion court (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). Material questions of fact remain as to whether OV performed the temporary repairs in a negligent manner, including when OV completed its work and /or what effect, if any, the occurrence of the second weather event four days after the windstorm had on OV's ability to complete the work.

Accordingly, it is

ORDERED that the motions for summary judgment, under motion sequence numbers 002

and 003, are denied.

Dated: June 25, 2014

ENTER:



A.J.S.C.

HON. ELLEN M. COIN