Hartford Ins. v Paramount
2014 NY Slip Op 32245(U)
August 19, 2014
Supreme Court, New York County
Docket Number: 150165/2012
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Hartford Insurance

-v-

Paramount

INDEX NO. 150165/12
MOTION DATE 7/9/14
MOTION SEQ. NO. 002

The following papers, numbered 1 to ____, were read on this motion to/for ____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

Upon the foregoing papers, it is ordered that this motion is

In this negligence action, defendant Paramount Plumbing Co. of New York ("Paramount") moves for summary judgment dismissing the complaint of the plaintiff Hartford Insurance Company of the Midwest ("Hartford"), as subrogee of 53rd and Madison Tower Development, LLC (the "Owner").

Factual Background

This action arises out of fire that allegedly began in February 2009 inside the second floor tool shed belonging to Paramount, a plumbing subcontractor, at a construction site located at 510 Madison Avenue, New York, New York. It is alleged that Paramount was negligent in that its tool shed did not have a local sprinkler system installed, and thus, the fire was able to spread and cause damage and construction delays totaling at least $40 million (Complaint, ¶¶ 9-11). Hartford, as insurer of the Owner, paid the claim and commenced this subrogation action against Paramount alleging negligence.

In support of dismissal, Paramount argues that because the Owner waived all rights of subrogation and recovery against it, by extension, Hartford, which stands in the shoes of the Owner, waived such rights. The "Trade Contract" between the Owner and Paramount as "Contractor" required Paramount to enroll in a Contractor Controlled Insurance Program pursuant to an attached Rider (the "CCIP"), which required the Owner to maintain various types of insurance, including "Builder's Risk Insurance" (which paid the Owner's claim following the fire), and the Commercial General Liability Insurance ("CGL") (which has assumed Paramount's defense of this action). Under sections 4 and 15 of the CCIP, Paramount contends that the Owner waived all rights of subrogation and recovery against the Contractor to the extent of any

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: ____ ____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

loss and damage. Paramount also contends that the Fire Incident Report prepared by the Fire Department's Bureau of Fire Investigation did not establish that the fire originated in space that Paramount utilized, as the cause of the fire was "Not Ascertained." Thus, if the Owner's "loss or damage" was insured under the CCIP, the Owner waived its rights against Paramount. And, the Builder's Risk Insurance Policy was part of the CCIP, as such insurance is listed and described in subsection 4 of the CCIP as insurance required to be maintained. The Builder's Risk Insurance policy also allowed the Owner to waive its rights against another party in writing (see "section J"). Paramount also argues that the CGL Policy, which insured Paramount and is providing its defense herein, is also part of the CCIP. Thus, if a judgment were rendered in ths action against Paramount, the CGL Policy would pay such judgment, and thus reimburse Hartford for the payments it made to the Owner. Thus, regardless of whether the Builder's Risk or CGL Policy is ultimately responsible for paying the loss, Hartford cannot subrogate against Paramount since that loss is insured under the CCIP.

In opposition, Hartford "does not contest that waivers of subrogation as a matter of general law may be effective and enforceable," but challenges Paramount's interpretation of the provisions at issue. The contract provisions do not include a waiver of subrogation by the Owner and its subrogee in favor of contractors, including Paramount, with respect to the Builder's Risk policy. The only waiver by the Owner (and Hartford as its subrogee) in favor of contractors such as Paramount relates only to the CCIP, which does not include Builder's Risk coverage. All documents "are clear" that the CCIP does not include builder's risk coverage. The main contract, rider, CCIP manual and CCIP forms "clearly" indicate that the CCIP includes worker's compensation, employers, general and excess liability only; the builder's risk is not a part of the CCIP, and is described not as part of the CCIP, but the Construction Consultant Provided Coverage, differentiating it from the CCIP. The Contractor Controlled Insurance coverages (of workers' compensation, employers, general and excess liability), which is identified as CCIP, is not to be confused with the Construction Consultant Provided coverages and the Owner waived only as to the CCIP whereas the contractors waived as to both the CCIP and builder's risk. If the builder's risk was part of the CCIP, the language "and builder's risk" in the contractors' waiver provision would have been superfluous. Hartford also argues that section 15 of the policy does not mean there is a waiver of subrogation relative to the builder's risk in favor of contractors. Further, the main insurance provision in section 8 of the Trade Contract provides that the contractor, Paramount, is responsible for the builder's risk deductible. Thus, it cannot be said, as a matter of law, that the Owner waived its right under the policy.

In reply, Paramount argues that the Trade Contract makes clear that the fire is a loss that is insured under the CCIP. Hartford ignores the explicit language of the Trade Contract. The CCIP manual, which is not a contract between the parties, does not set forth any contractual obligations. And, even if the Builder's Risk policy is separate from the CCIP, Hartford does not contest Paramount's argument that the CGL Policy is insuring the loss by paying for Paramount's defense in this action, and that the Owner waived subrogation with respect to the CGL policy. Paramount also points out that Rider A provides that it supercedes any conflicting provision, and that "the CCIP [] includes liability and builder's risk . . . ." And, the clause Hartford relies upon controls what the Contractor, *i.e.*, Paramount, waived as to the Owner, and is irrelevant to what the Owner waived as to Paramount. The Trade Contract added the words "and Builder's Risk" to

the language that gives the Owner a full waiver of subrogation from Paramount in order to assure that contractors could not later seek to recoup the deductible from the Owner (he deductible was not part of the CCIP). Such addition is consistent with the aim of the CCIP which was to keep contractors responsible for the Builder's Risk deductible.

In a "supplemental" opposition, Hartford argues that there has been no discovery regarding the intent of the parties. And, that Paramount's motion is based solely on documents pursuant to CPLR 3211(a)(1). Further, the Court cannot grant dismissal solely on documents submitted by Paramount under an attorney affirmation as CPLR 3212 does not provide for such relief, as there is no affidavit by a person with knowledge or deposition. The terms of the agreements are ambiguous, and at a minimum, discovery is needed to resolve whether Hartford waived its right of subrogation.[1]

Discussion

Where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR §3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky,* 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Once this showing is made, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR §3212 [b]; *Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Carroll v Radoniqi,* 105 AD3d 493, 963 NYS2d 97 [1st Dept 2013]). The opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist," and the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also, Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

It "is well settled that an attorney's affirmation may serve as a vehicle to introduce documentary evidence on a motion for summary judgment (*Leonard v. City of New York*, 42 Misc. 3d 1202(A), 984 N.Y.S.2d 632 (Table) [Supreme Court, New York County 2013] *citing*

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[1] Paramount opposes the submission of this supplemental opposition, in that it violates Rule 14(c), and contradicts its earlier opposition that the documents are "clear" with the new claim that the documents are unclear and warrant discovery. In response, Hartford argues that its supplemental opposition was permissible under Rule 14(c), as it was submitted before the return date of the motion and because the supplemental opposition does not advance entirely different arguments, but maintains that the language is ambiguous, at best. The Court declines to address the supplemental opposition. In any event, the supplemental opposition fails to defeat the motion (see discussion, *infra*).

Lewis v. Safety Disposal Sys., 12 AD3d 324, 325 [2004], *citing Olan v. Farrell Lines*, 64 N.Y.2d 1092 [1985]). Therefore, the documents submitted by Paramount, *to wit*: the pleadings, the Trade Contract, insurance policies, and fire accident report are properly before the Court for consideration. Notably, Hartford never argues in its *initial* opposition papers, that further discovery is needed, or that the summary judgment motion is defective based on the failure of the movant Paramount to provide an affidavit from a witness with knowledge. Nor does Hartford, in its *initial* opposition papers, challenge the authenticity or veracity of the documents submitted. Instead, Hartford, argues that Paramount's *interpretation* of the terms of the Trade Contract and policies is faulty and that the documents do not indicate that the Owner intended to waive its subrogation rights.

Courts must construe a contract in a manner that avoids inconsistencies and reasonably harmonizes its terms (*Gessin Elec. Contractors, Inc. v. 95 Wall Associates, LLC*, 74 A.D.3d 516, 903 N.Y.S.2d 26 [1st Dept 2010] *citing James v. Jamie Towers Housing Co., Inc.*, 294 A.D.2d 268, 743 N.Y.S.2d 85 [1st Dept. 2002]; *Barrow v. Lawrence United Corp.*, 146 AD2d 15, 18, 538 NYS2d 363 [3rd Dept. 1989]). The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent (*see Slatt v. Slatt*, 64 NY2d 966, 967, 488 NYS2d 645, *rearg denied* 65 NY2d 785, 492 NYS2d 1026 [1985]). "The best evidence of what parties to a written agreement intend is what they say in their writing" (*Slamow v. Del Col*, 79 NY2d 1016, 1018, 584 NYS2d 424 [1992]).

"It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 6 [2004]; *Kolmar Americas, Inc. v. Bioversal Inc.*, 89 A.D.3d 493, 932 N.Y.S.2d 460 [1st Dept 2011] ("A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms")).

"A contract is ambiguous 'if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings'" (*Feldman v National Westminster Bank*, 303 AD2d 271 [2003], *lv denied* 100 NY2d 505 [2003]). However, mere assertion by a party that contract language means something other than what is clear when read in conjunction with the whole contract is not enough to create an ambiguity sufficient to raise a triable issue of fact (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 193 [1995]).

A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630, 638, 290 NYS2d 721, *rearg denied* 22` NY2d 827, 292 NYS2d 1031 [1968]).

Here, the unambiguous terms of the Trade Contract establish that the Owner waived its right to subrogation.

The Rider which contains the "Contract Insurance Requirements" at issue, initially states

that

> "THE CONSTRUCTION CONSULTANT (Mcgraw Hudson Construction Corporation) has decided to implement a Contractor Controlled Insurance Program (hereinafter referred to as "CCIP") that will provide *Workers' Compensation, Employer's Liability, General Liability and Excess Liability* for Construction Manager . . . , contractors and subcontractors of every tier . . . ." (Emphasis added).

Therefore, as Paramount points out, these four categories of insurance were identified as the types of coverages falling under the CCIP.

However, the Rider continues:

> Through a combination of insured and self-insured insurance programs THE CONSTRUCTION CONSULTANT . . . will provide and maintain in force the types of insurance listed in subsection (1) through (4) below *as part of the CCIP* for the eligible Contractor/Subcontractors"

Under the following subheading "THE CONSTRUCTION CONSULTANT Provided Coverage," subsection 4 is listed as "Builder's Risk Insurance" which "provides 'Special Cause of Loss" coverage on a "replacement basis."

Therefore, contrary to Hartford's contention, Builder's Risk is expressly included as CCIP coverage.

Several paragraphs below this section appears the following anti-subrogation clauses:

> "THE OWNER . . . waive[s] all rights of subrogation and recovery against the Contractor [Paramount] . . . to extent of any loss of damage, which is insured under the CCIP." (See page 5 of 14, PLT 5747).

Similarly, section 15 further below states, in relevant part:

> THE OWNER . . . waive[s] all rights of subrogation and recovery against the Contractor [Paramount] to the extent of any loss or damage, which is insured under the CCIP. . . .

"Subrogation, 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 N.Y.2d 654, 665 N.Y.S.2d 47 [1997]). Since these paragraphs clearly and unambiguously preclude the Owner from recovering for loss or damage which is insured under the CCIP, and the record clearly establishes that the loss at issue was so covered, Hartford's instant subrogation action is likewise barred (*see Tower Risk Mgt. v Ni Chunp Hu*, 84 A.D.3d 616, 922 N.Y.S.2d 780 [1st Dept 2011] (applying wavier of subrogation clause to bar action; *General Acc. Ins. Co. v 80 Maiden Lane Assoc.*, 252 A.D.2d 391, 675 N.Y.S.2d 85 [1st Dept 1998] (applying an anti-subrogation clause as

a bar to the action)).

Hartford's claim that the waiver of subrogation clauses are ambiguous lacks merit. That the waiver of subrogation clauses includes language "and builder's risk" does not render such term superflous, as this language appears in reference to the contractor's waiver of subrogation. Such language does not apply to the Owner. Thus, the plain meaning of the Owner's waiver cannot be "'subverted by straining to find an ambiguity which otherwise might not be thought to exist'" (*Uribe v. Merchants Bank of N.Y.*, 91 N.Y.2d 336, 341, 670 N.Y.S.2d 393, 693 N.E.2d 740 [1998], *quoting Loblaw, Inc. v. Employers' Liab. Assur. Corp.*, 57 N.Y.2d 872, 877, 456 N.Y.S.2d 40, 442 N.E.2d 438 [1982]).

Therefore, based on the foregoing, it is hereby

ORDERED that the motion by defendant Paramount Plumbing Co. of New York for summary judgment dismissing the complaint of the plaintiff Hartford Insurance Company of the Midwest, as subrogee of 53rd and Madison Tower Development, LLC, is granted and the complaint is hereby severed and dismissed as against defendant Paramount Plumbing Co. of New York; and it is further

ORDERED that defendant shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 8/19/14

HON. CAROL EDMEAD J.S.C.

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE