Castle Point Ins. Co. v Command Sec. Corp.
2014 NY Slip Op 33881(U)
May 7, 2014
Supreme Court, Dutchess County
Docket Number: 4598/11
Judge: Maria G. Rosa
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SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

CASTLE POINT INSURANCE COMPANY a/s/o
ROYAL CARTING SERVICES, INC.,
Plaintiff,

DECISION AND ORDER

-against-

Index No: 4598/11

COMMAND SECURITY CORPORATION,
Defendant.

The following papers were considered in connection with defendant's motion for summary judgment and plaintiff's cross-motion:

Notice of Motion
Benard Affirmation in Support
Exhibits A - U
Memorandum of Law in Support

Notice of Cross Motion
Levinson Affirmation in Support of Cross Motion and in Opposition to Motion
Exhibits A - D
Aptman Affidavit
Panichi Affidavit
Cagwin Affidavit
Memorandum of Law in Support of Cross Motion and in Opposition to Motion

Benard Reply Affirmation

Royal Carting Service Co. is a provider of garbage and recyclable collection and disposal services. It operates a commercial facility and solid waste transfer station at 409 Route 82 in Dutchess County. Panichi Holding Corp., d/b/a Royal Carting Service Co. is the owner of the machinery and equipment located at the Route 82 facility. Watch Hill Holding Corp. owns the land and the buildings of the Royal Carting business. Emil Panichi owns 100% of the shares for Watch Hill Holding Corp. and is the majority shareholder of Panichi Holding Corp. d/b/a Royal Carting.

In the early morning hours of August 29, 2009, there was a fire in the Quonset building located at the rear of the Royal Carting facility. This building was used for the storage of trucks, truck parts and for truck maintenance and repair. Pursuant to a Security Services Agreement between Royal Carting Co.,[1] apparently signed by Emil Panichi on Royal Carting's behalf, and Command Security Corporation, Command Security provided security services to Royal Carting Service Co. when its own security employees were not available. A Command Security guard was on duty the morning of the fire.

As a result of the fire, pursuant to an insurance contract between Royal Carting Service Co. and Castlepoint Insurance Company, Castlepoint paid in excess of one million dollars for loss and damages to the building and to the business personal property. In addition to covering Royal Carting Service Co.,[2] the policy listed Watch Hill Holding Corp. and Panichi Holding Corp. as additional insureds.

Castlepoint commenced this action as the subrogee of Royal Carting Services, Inc. (hereinafter Royal Carting) against Command Security for negligence (first cause of action) and breach of contract (second and third causes of action). All three causes of action are based on the alleged negligence of Command Security's employee. Command now moves for summary judgment dismissing the complaint on the grounds that the proper parties were not named as subrogors; that there is no contractual indemnification between Royal Carting and Command;[3] that Watch Hill and Panichi are not third party beneficiaries to the Security Agreement; and that Command, through its employee, was not negligent. Plaintiff opposes the motion and cross-moves to add Watch Hill and Panichi as additional subrogors.

Summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms, Inc.*, 17 NY2d 57, 61 [1966]. "The proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." If a movant makes this showing, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

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[1]The parties do not argue that Royal Carting Service Co. and Royal Carting Co. are not the same entity.

[2]The complaint names Royal Carting Services, Inc. as the subrogor. However, the name of the subrogor on the insurance policy is Royal Carting Service Co., and the proposed amended complaint names Royal Carting Service Co. as the subrogor. This is the type of mistake or defect the court may disregard (CPLR 2001).

[3]Castlepoint's breach of contract claim is based on the alleged negligent performance of Command Security's employee's duties as set forth in the contract (*see* Plaintiff's Memorandum of Law, Point IV).

(*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving papers are insufficient, the opposing party need not respond with evidentiary proof (*see Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dep't 1999]).

Payment of Losses Under the Insurance Contract

Royal Carting submitted a sworn statement of loss to Castlepoint in the amount of $602,957.46 and a supplemental claim in the amount of $60,254.64 for business personal property. Watch Hill Holding Corp. (Royal Carting Service Co.) submitted a sworn statement of loss to Castlepoint in the amount of $386,990.75 for building coverage and a supplemental claim for $67,745.84. Royal Carting then submitted a sworn statement of loss to Castlepoint for extra expense in the amount of $38,109.35 (*see* Moving Papers at Ex U). Emil Panichi signed all the loss statements without reference to any business entity (*see id.*). In support of its motion and without any reference to the record, Command argues that Royal Carting did not receive any insurance payments for the losses sustained by the business property and real property and presumes that Mr. Panichi signed the claims as the principal of Panichi Holdings Corporation and Watch Hill Holdings. Consequently, Command has failed to tender proof in evidentiary form to meet its burden of proof that Royal Carting was not paid any insurance proceeds and, therefore, did not sustain damages (*see* CPLR 3212(b); *cf. Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [bare conclusory allegations, expressions of hope or unsubstantiated assertions are insufficient on summary judgment]). Thus, the court need not consider the opposing papers on this issue.

However, even if Command met its initial burden, Castlepoint has raised a triable issue of fact as to which entity was paid the insurance claim. The Managing Vice President avers that Royal Carting Service Co. was a named payee of the loss payments (*see* affidavit of Lowell Aptman in support of the cross motion at ¶6). Royal Carting's general counsel stated at his deposition that there is no account in the name of Panichi Holding Corp. and Watch Hill Holding Corp. Therefore, if a check had been made out to either entity, it could not have been deposited (*see* Moving Papers at Ex K, p 130). Consequently, the issue of the how much Royal Carting was paid and concomitantly the amount of Castlepoint's damages (in the event Command was negligent) cannot be summarily determined.

The Security Services Agreement

The Security Services Agreement (the "Agreement") between Command and Royal Carting states, in relevant part, that "the purpose of engaging Command is to present a visible presence, and to observe and report" (Moving Papers, Ex N, Preface). The Agreement further states that (*id.* at ¶ E):

> Client acknowledges that Command Security Corporation is not an insurer. The amounts payable to Command Security Corporation under this agreement are based upon the value of services rendered and are unrelated to the value of the Client's

> property or the property of others located in or about the client's premises. The client agrees to accept all risk of loss or damage to its premises, business and property of others on Client's premise occurring as the result of fire, theft or other casualty. Command shall be liable only for bodily injury, personal injury or property damage resulting from its negligence in performance of the services rendered under this agreement ...

Command argues it was not negligent under the terms of the Agreement. Castlepoint maintains that the security guard was negligent in failing to discover the fire, or, at the very least, that there are issues of fact in this regard.

Negligence

The Agreement broadly defines the duties of Command's employees to present a visible presence and to observe and report. During his deposition, James Morton, the Road Supervisor for Command at the time of the incident, expanded on the scope of the duties of Command employees (Moving Papers, Ex F). Command would provide security services when Royal Carting employees were unavailable. The security guard was responsible for facility protection, which included "[a]nything from signs of intrusion to malfunctioning of any facilities such as lights, any signs of... property damage which I would also assume would include fire watch" (*id.* at p 36).

Raymond Meyer was the Command security guard working at Royal Carting the evening of the fire. The only instructions he received was to patrol the yards and to open the gate at 5 a.m. for the Royal Carting employees to enter the facility (*id.* at Ex F, p 71). Patrolling the yards would require him pass by the front of the Quonset Hut. (*id.* at Ex G, pp 36 - 37, 40 -45). According to James Morton, Meyer told him he knew what his instructions were because he had previously worked at the location. James Morton explained that post orders were instructions for the guard, usually written out by the client, to be followed during his shift (*id.* at p 47; *see also* Ex O). However, Meyer claimed he did not receive any written or verbal post orders that evening (*id.* at Ex G, p 53).

Meyer did not know the times he conducted his tours but claimed he conducted them "periodically ... [n]ot on the hour not on the half hour." He did about eight tours that evening, walking the whole facility (*id.* at pp 49 -50). He conducted his last tour at approximately 4:30 a.m. (*id.* at p 50). Morton stated that the guard on duty was required to fill out a log book and a daily activity sheet, but Meyer testified at his deposition that he was not required to and did not write down his tours. (*id.* at Ex G, p 50). In support of its motion, however, Command submitted a "Daily Security Report" Meyer signed and dated August 28-29, 2009 (*id.* at Ex. Q). When confronted with the report, Meyer acknowledged filling it out, but did not recall when he did so. (*id.* at Ex G, p 57-58). The report indicates that he conducted six tours exactly on the hour starting at 11:00 p.m. and ending at 4:00 a.m. All entries state that the yard tour was made and "all normal" (*id.* at Ex Q).

Although the report indicates that Meyer left the premises at 5:00 a.m., Meyer testified at his deposition that he let the truck drivers in after 6 a.m. and left the premises at 6:30 (*id.* at Ex G, p 68). He further stated that between 5 and 6:30, he made "several tours" but did not log in the last tour at 6:30 (*id.* at pp 70, 82). Earlier in his testimony, however, he stated that he had made his last tour at 4:30 a.m. (*id.* at p 50). During his shift and when he left, Meyer did not see or smell any smoke or see any fire (*id.* at pp 68-69). Nor did he see any fire trucks (*id.* at p 68).

Royal Carting personnel reported the fire at about 5 a.m. (*id.* at Ex K, p 88). The fire department responded to the first alarm at 5:13 a.m. and the second alarm at 5:22 a.m. A request for an additional tanker was made at 5:53 a.m. (*id.* at Ex H, pp 34, 37, 124). Several fire departments responded to the scene (*id.* at pp 35-36). Scott Post, the district chief of the East Fishkill Fire District arrived on site at about 5:20 a.m. It was still pretty dark. He did not see any flames but did smell smoke (*id.* at pp 40, 42, 43). The glow of the fire was visible from the back corner of the building (id. at p 62), and radiant heat could be felt if someone passed within 10 feet of the building (id. at p 146).

The East Fishkill Fire Department report indicated that at the time the fire department arrived at 5:25 a.m., there was "heavy fire involvement throughout the building" (id. at Ex R). The Report concluded that:

> Due to the large amount of fire upon the Fire Department's arrival, it is believed this fire was burning for some time before the fire was reported. The metal building held the heat of the fire for an extended period of time before venting out. This caused an intense fire, and contributed to severe heating throughout the building. Large amounts of combustible materials contributed to a large fireload and intense fire. It appears the area of the grease truck had the most heat damage (rear left). Due to advanced stage of fire upon arrival, and the construction of the building contributing to the heat and fire damage, we could not determine an area of origin or determine the cause of this fire.

Although the surveillance video was not submitted, general counsel for Royal Carting testified at his deposition that he viewed the video and that sometime between 12 a.m. and 12:30 a.m., smoke started to appear. There was continuous smoke, and between 2 a.m. and 2:30 a.m. the smoke was very thick. Then, the camera started shaking and stopped working. The camera was later found in the yard (*id.* at Ex K, pp 94-95).

"Negligence cases by their very nature do not usually lend themselves to summary judgment since often, even if all parties are in agreement as to the underlying facts, the very question of

negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). In particular, "there is often a question as to whether the defendant or the plaintiff acted reasonably under the circumstances [which] ... can rarely be decided as a matter of law" (*DeCosmo v Hulse*, 204 AD2d 953, 954 [3d Dep't 1994]). Here, Meyer's own deposition testimony is inherently contradictory and issues of fact abound as to the scope of Meyer's duties and whether he was negligent in performing those duties. Moreover, Castlepoint has raised issues of material fact as to whether Meyer should have seen the smoke from the Quonset Hut and reported the fire. Thus, defendant has failed to demonstrate an entitlement to summary judgment on the issue of negligence.

Third Party Liability Under the Security Agreement

Command argues that Watch Hill and Panichi are not third party beneficiaries of the Security Agreement and, therefore, cannot recover under that contract. The Agreement between Command and Royal Carting specifically provides that the services rendered under the agreement "are solely for the benefit of the Client and neither this agreement nor any services rendered hereunder shall give rise to, or shall be deemed to or construed so as to confer any rights on any other party as a third party beneficiary or otherwise" (*id.* at ¶ E[4]). This express language establishes *prima facie* that Watch Hill and Panichi can not recover under a breach of contract theory. Plaintiff's conclusory assertion that Panichi, Watch Hill, and Royal Carting are united in interest, and therefore, Panichi and Watch Hill are first party beneficiaries under the contract is insufficient to establish a material issue of fact.

Defendant has further established an entitlement to judgment on plaintiff's allegation that Panichi and Watch Hill can recover in tort as third party beneficiaries of the contract. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). However, the Court of Appeals has outlined three exceptions in which a party to a contract "may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons" (*id.* at 140):

> 1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launch[es] a force or instrument of harm" [citation omitted];
> 2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties [citation omitted]; and
> 3) where the contracting party has entirely displaced the other party's duty to safely maintain the premises [citation omitted].

Contrary to Royal Carting's position, none of these exceptions apply. As to the first exception, there is nothing in the record which suggests that the security guard started the fire. In fact, the reports all indicate that the cause of the fire is undetermined.

As to the second exception, even assuming that the alleged third party beneficiaries were aware of the Security Agreement between Royal and Command *(see e.g. Foster v Slepoy Corp.*, 76 AD3d 210 [2d Dep't 2010]), plaintiff does not allege in its complaint, bill of particulars or even in the proposed amended complaint that Panichi or Watch Hill detrimentally relied on the Agreement (*see Santos v Deanco Servs.*, 104 AD3d 933 [2d Dep't 2013]). Nor does Castlepoint allege that Panichi or Watch Hill opted to forgo a fire alarm system because there were security guards present during the evenings and early mornings. Rather, Castlepoint conclusorily argues, for the first time in opposition to Command's motion for summary judgment, that "there was obviously detrimental reliance" (Memorandum of Law in Opposition, p 15). In light of the explicit language in the Agreement barring liability to third party beneficiaries and stating that the client was accepting all risk of loss or damage occurring from a fire. Castlepoint's conclusory assertion is insufficient to raise a triable issue of fact on whether Panichi or Watch Hill detrimentally relied on the Command's performance under the Agreement (*see North Fork Bank v Hamptons Mist Mgt. Corp.*, 225 AD2d 596 [2d Dep't 1996]).

Lastly, Royal Carting primarily provided its own security for the premises. It was only on Saturday evenings and on an as-needed basis that Command provided a security guard (*see* moving papers, Ex. F pp 32 - 35). In addition, the Agreement merely required that Command provide a "visible presence" and "observe and report." Such an agreement is not the type of "comprehensive and exclusive" agreement that will trigger third party liability. *Palka v Servicemaster Mgt. Servs. Corp.* (83 NY2d 579 [1994]).

The Cross Motion to Amend the Complaint

Plaintiff moves for leave to amend the complaint to add Panichi Holding Corp. and Watch Hill Holding Corp. as subrogors. As a general rule, leave to serve an amended pleaded shall be freely granted and should be granted absent prejudice or surprise (*see* CPLR 3025[b]; *McCaskey, Davies and Assoc., Inc. v New York City Health and Hosp. Corp.*, 59 NY2d 755 [1983]). However, where a proposed amendment is patently insufficient as a matter of law or is totally devoid of merit, leave to amend should be denied as a matter of law (*see Aponte v Union Free School Dist.*, 270 AD2d 295 [2d Dep't 2000].

For the reasons set forth above, plaintiff's proposed amended complaint fails to assert a theory under which Panichi or Watch Hill may recover damages based on Command's alleged negligence. (See *Aponte* and *Tayeh, supra*). Neither Panichi nor Watch Hill were parties to the contract between Royal Carting and the defendant, nor may they recover in tort under a third party beneficiary claim.

Accordingly, it is hereby

ORDERED that Command's motion for summary judgment plaintiff's cross motion for leave to amend are denied. The parties are directed to appear for a Pre Trial Conference on May 22, 2014 at 9:45 a.m.

The foregoing constitutes the decision and order of the court.

Dated: May 7, 2014
Poughkeepsie, NY

ENTER:

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.