

Admiral Indem. Co. v Kassouf

2015 NY Slip Op 30869(U)

May 18, 2015

Sup Ct, New York County

Docket Number: 151814/13

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X
ADMIRAL INDEMNITY COMPANY a/s/o THE TOWER
53rd CONDOMINIUM,

Plaintiff,

-against-

DECISION & ORDER
Index No.: 151814/13

JOYCE KASSOUF and AMG AMANA CONTRACTING, LLC,
-----X
Defendants.

AMG AMANA CONTRACTING, LLC,
-----X
Third-Party Plaintiff,

-against-

Third-party Index No.:
590976/13

WATTS REGULATOR COMPANY,
-----X
Third-Party Defendant.

-----X
JOAN KENNEY, J. :

Defendant/third-party plaintiff, AMG Amana Contracting, LLC (AMG), moves for an Order, pursuant to CPLR 3212, dismissing the complaint.

This is a negligence/property damage action in which plaintiff is a subrogee to The Tower Condominium (Tower), a condominium entity owning the premises located at 159 West 53th Street, New York, New York (the premises). Defendant, Joyce Kassouf (Kassouf), is the owner of Apartment 19A at the premises. Kassouf hired AMG to renovate the bathroom in her apartment. The work commenced in October 2012. AMG purchased a water supply line that was manufactured by third-party defendant Watts Regulator Company (Watts), and was installed by AMG on October 15, 2012. On October 17, 2012, there was a leak in Kassouf's bathroom which extended several floors below her apartment, resulting in severe property damage to the premises. The complaint alleges that AMG was negligent in the installation of the water supply line and liable for compensatory damages. Plaintiff states that it had issued an insurance policy to Tower for the damages claimed in the complaint. Because it paid Tower under that policy, plaintiff claims to be

the real party of interest. By stipulation dated January 15, 2015, the parties agreed to discontinue the action with prejudice against Kassouf.

After this action was commenced, AMG brought a third-party action against Watts, alleging that Watts sold a defective water supply line to AMG, and is primarily liable to plaintiff with respect to negligence. Thereafter, plaintiff commenced a separate action against Watts.

On February 25, 2014, the parties were notified that a federal court order from the United States District Court, Northern District of California, dated February 14, 2014, granted preliminary approval of a class action settlement involving a products liability suit against Watts. This Order enjoined all settlement class members, including the insurance companies representing members, from pursuing any litigation against Watts regarding an alleged failure of plastic nuts on Watts' connectors, until the final fairness hearing, which AMG states has not yet been scheduled.

AMG moves for summary judgment, seeking dismissal of the complaint because of the absence of any triable issues of fact. AMG contends that there is no evidence that shows that AMG is responsible for the water leak. Submitting deposition testimony from plaintiff's witness, Bujar Karce (Karce), a superintendent employed by Tower, AMG claims that Karce did not observe the installation of the water line or the leak, and has only speculated on the manner in which the incident occurred.

In addition, AMG contends that it had no legal duty of due care toward Tower or plaintiff, in the absence of any agreement related to the scope of AMG's work in the apartment owned by Kassouf. AMG states that its contractual obligations were confined to Kassouf.

AMG states that plaintiff cannot prove that AMG's actions were the proximate cause of the accident. AMG argues that Watts' failure to manufacture a safe product was a substantial factor in

bringing about the damage, and that there is no material proof that AMG improperly installed the water supply line. AMG relies on the deposition testimony of Hani Gheith, who personally installed the line on behalf of AMG, as well as a report and affidavit from Paul Dreyer, a professional engineer with National Forensics Consultants. Dreyer inspected the bathroom and the line after the accident and made the following statements: the base of the plastic nut attached to the toilet tank had failed, being split open around the base of the nut; there was no evidence of improper installation or over-tightening of the line; and the failure of the plastic nut connector to sustain pressure was the cause of the leak. AMG avers that this is sufficient evidence that AMG installed the line properly and did not act negligently.

AMG asserts that, as plaintiff has brought a separate action against Watts for the same incident that is the subject matter of this action, plaintiff may still recover damages incurred from Watts. AMG claims that its evidence, which allegedly absolves itself of any negligence, offers ample proof of Watts' liability as the manufacturer and designer of the water supply line.

In opposition, plaintiff contends that there is enough evidence to raise an issue of fact as to whether AMG owed a duty to a third-party like plaintiff, whether it installed the line negligently, and whether the allegedly negligent installation was the proximate cause of the accident.

Moreover, plaintiff claims that there is no conclusive proof that the defective part in the line is the same defect that is the subject of the class action, or that the line is actually manufactured by Watts.

Plaintiff contends that there is evidence that AMG owed some duty to Tower. According to plaintiff, Karce, in his deposition, testified that he had been notified by his employer that AMG would be performing work at Kassouf's apartment, and that while work was being done, he told

AMG employees to be careful in their performance. Plaintiff avers that this is some proof that Tower had reasonably relied on AMG to work in a non-negligent manner, to its detriment, as damages resulted from the work.

Plaintiff argues that AMG's negligence could have been a proximate cause of the accident. It submits an affidavit from Michael Walsh, an engineer who inspected the bathroom after the accident. Walsh asserts that the line installed was not manufactured by Watts and that the line was installed improperly with the use of wrenches to overtighten the coupling, as evidenced by scratches, scarring and marks. Plaintiff contends that, since AMG was the only party to install the line, an issue of fact exists as to whether AMG's installation was negligent and resulted in the leak.

In reply, AMG states that it owed no duty to Tower, that AMG and Tower had minimal interactions while AMG was working for Kassouf, and that no reasonable reliance developed on Tower's part.

Concerning the affidavit from Walsh, AMG argues that Walsh's conclusion is unsubstantiated, and that he fails to provide photos of the line or describe in any depth how the installation was done in such an allegedly defective manner. AMG claims that the report and affidavit provided by Dreyer are more detailed and are supported by hard evidence, absolving AMG of any negligence. AMG states that if there is proof that Watts did not manufacture the line, as plaintiff claims, then plaintiff should not have commenced a negligence suit against Watts.

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then, only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action (citation omitted).'" *Vega v*

Restani Constr. Corp., 18 NY3d 499, 503 (2012).

The first issue to determine is whether AMG owes any duty of due care to plaintiff. Plaintiff is Tower's subrogee and now stands in the shoes of Tower, seeking relief that allegedly could have been sought by Tower. AMG contends that its sole legal obligation in this situation was to Kassouf, to whom it was contractually obligated to perform in a reasonably proper manner.

“[[I]n the absence of a duty, there is no breach and without a breach, there is no liability (citations omitted).” *Sheila C. v Povich*, 11 AD3d 120, 125 (1st Dept 2004). A contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. *See Eaves Brook Costume Co. v Y.B.H. Realty Corp.* 76 NY2d 220, 226-227 (1990). AMG, in its moving papers, discusses exceptions to this rule, while concluding that none of them are applicable in this case. *Espinal v Melville Snow Contrs.*, (98 NY2d 136 [2002]) identifies three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care and potential liability in tort to third parties. There are: “(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, ‘launches a force or instrument of harm;’ (2) where the plaintiff detrimentally relies on the continued performance of the contracting party’s duties; and (3) where the contracting party has entirely displaced the other party’s duty to maintain the premises safely (citation omitted).” *See Espinal*, 98 NY2d at 140.

The court finds no evidence that in the course of its work for Kassouf, AMG displaced Kassouf’s duty to maintain the premises in a safe condition, or that it launched a force or instrument of harm by creating or exacerbating a dangerous or defective condition on the premises. Plaintiff’s claim that a Tower employee advised an AMG worker to be careful not to cause any damage to the area is not sufficient proof that Tower relied on AMG to its detriment. In fact, Karce testified that

his conversation with the AMG worker was the only one he had with AMG in the course of AMG's performance there. Karce did not state that AMG made any assurances to Tower with respect to its work there, or even responded to his remarks.

The court finds that plaintiff has failed to demonstrate an issue of fact with respect to a duty of due care owed by AMG which would preclude summary judgment. In the absence of a duty, AMG shall be dismissed from this action. The other issues raised by AMG need not be determined.

Accordingly, it is

ORDERED that defendant/third-party AMG Amana Contracting, LLC's motion for summary judgment dismissing the complaint is granted. 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 the Clerk is directed to enter judgment accordingly.

DATED: May 18, 2015

ENTER:



JOAN M. KENNEY J.S.C.
J.S.C.