New York Mar. & Gen. Ins. Co. v 320 Parsonage Lane, LLC
2016 NY Slip Op 31064(U)
June 8, 2016
Supreme Court, New York County
Docket Number: 159208/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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NEW YORK MARINE & GENERAL INSURANCE COMPANY, a/k/a NEW YORK MARINE UNDERWRITERS & TECHNOLOGY INSURANCE COMPANY a/s/o FISCHER MILLS BUILDING CONDOMINIUM,

Plaintiffs,

-against-

320 PARSONAGE LANE, LLC, LAWRENCE H. GUFFEY, LUCY M. GUFFEY, and SPAN ARCHITECTURE, LLC,

Defendants.

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Index no. 159208/14

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, JSC:

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By notice of motion, defendants Lawrence H. Guffrey, Lucy M. Guffey, and 320 Parsonage Lane, LLC (collectively, movants) move pursuant to CPLR 3212 for an order granting them summary dismissal of the complaint and any cross claims against them. Plaintiffs oppose.

This action arises from a water leak that allegedly resulted from the rupture of a frozen water pipe and caused property damage to the condominium building at issue. Plaintiffs allege that the pipe froze due to an open window in movants' unit. Plaintiffs are the property insurers for the condominium's Board of Managers and claim to be subrogated to the Board's rights. They seek here reimbursement for monies paid to and/or on behalf of the Board for the damage. (NYSCEF 16).

Defendants argue that the Board waived its right to subrogation, submitting as evidence a copy of the condominium's by-laws which, *inter alia*, require the Board to obtain and maintain insurance for physical damage, and to waive subrogation. They also submit copies of plaintiffs' insurance policies which provide that the Board may waive the right to subrogation in writing before the occurrence of a covered loss. Alternatively, the Guffey defendants seek dismissal on the ground that they did not own the unit when the damage occurred; rather, 320 Parsonage owned it. (*Id.*).

Plaintiffs contend that movants failed to establish, *prima facie*, that the Board waived its right to subrogation, as the by-laws evidence only what the Board was required to do, not whether it complied. They also argue that movants were likewise obligated to obtain an insurance policy containing a waiver of subrogation clause, and that absent evidence that they obtained such a policy, any waiver by the Board would be void. Plaintiffs otherwise observe that the Guffeys do not demonstrate that they were not negligent, and that in any event, the motion is premature and discovery is needed to determine their negligence. (NYSCEF 30).

In reply, movants assert that as the by-laws require a waiver of subrogation and as plaintiffs' insurance policies recognize the waiver, a waiver has occurred, regardless of whether movants obtained their own insurance. Movants now offer copies of decisions of other justices of this Court wherein summary judgment was granted against plaintiff insurance companies based on similar facts. They deny that discovery is needed as plaintiffs' subrogation waiver renders the underlying claims moot. (NYSCEF 39).

At oral argument, plaintiffs argued that movants improperly submitted caselaw on reply. (NYSCEF 47).

New legal arguments may be raised for the first time in a reply brief. (*See Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413 [2013] [even if plaintiff presented new legal argument in reply brief, trial court was not prohibited from considered it]). Here, movants made the same legal argument in both their moving and reply papers, and supplemented their argument in reply by submitting relevant caselaw, which plaintiff had an opportunity to address during oral argument. I thus consider their authority.

In *Agostinelli v Stein*, the Appellate Division, Fourth Department, held that under facts similar to those set forth here, a condominium's by-laws, which required that the condominium's Board's insurance policies contain waivers of subrogation, barred subrogation actions brought by the condominium's insurers. (17 AD3d 982 [2005], *lv denied State Farm Ins. Co. v Stein*, 5 NY3d 824). In *Allstate Indem. Co. v Virfra Holdings, LLC*, the Appellate Division, First Department, affirmed the dismissal of a subrogation action where the insurance policies and a condominium's by-laws contained waiver of subrogation clauses. (124 AD3d 528 [1st Dept 2015]). Other justices of this court have held similarly. (*See Pacific Indem. Co. v DRP Holdings, LLC*, Sup Ct, New York County, Sept. 10, 2014, Moulton, J., index No. 155389/13; *Fed. Ins. Co. v James*, 2011 WL 2941330, 2011 NY Slip Op 31939[U] [Sup Ct, New York County]).

It is irrelevant whether movants also procured required insurance coverage (*Allstate Indem. Co. v Vifra Holdings LLC*, 2014 WL 978321, 2014 NY Slip Op 30623[U] [Sup Ct, New York County]), and the cases cited by plaintiffs arise in the commercial, rather than residential, context, and are inapposite (*id.*; *cf. Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654 [1997] [enforcing waiver of subrogation clause contained in commercial lease, and observing that both landlord and tenant obtained insurance policies with waiver of subrogation clauses]).

In light of this result, I need not address movants' other arguments.

Accordingly, it is hereby

ORDERED, that the motion of defendants Lawrence H. Guffrey, Lucy M. Guffey, and 320 Parsonage Lane, LLC for summary judgment is granted, and the complaint and all cross claims against them are severed and dismissed; it is further

ORDERED, that the clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:

Barbara Jaffe, JSC

DATED: June 8, 2016
New York, New York