

**AGCS Mar. Ins. Co. v LP Ciminelli, Inc.**

2016 NY Slip Op 31533(U)

August 11, 2016

Supreme Court, New York County

Docket Number: 652086/15

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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AGCS MARINE INSURANCE COMPANY a/s/o  
BCC Housing Development Corporation,

Index No. 652086/15

Plaintiff,  
  
-against-

**DECISION/ORDER**

LP CIMINELLI, INC., JMZ ARCHITECTS AND  
PLANNERS, P.C., SIMPLEX INDUSTRIES, INC. and  
FIXIT HEATING AND AIR CONDITIONING, INC.,

Defendants.  
-----X

**HON. CYNTHIA KERN, J.S.C.**

**Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1,2
Affidavits in Opposition.....	3,4
Replying Affidavits.....	5,6
Exhibits.....	7

Plaintiff AGCS Marine Insurance Company, as subrogor of BCC Housing Development Corp. ("BCC"), commenced the instant action seeking to recover the insurance proceeds it paid to BCC in connection with a property damage claim. Defendant Fixit Heating & Air Conditioning, Inc. s/h/a Fixit Heating and Air Conditioning, Inc. ("Fixit") now moves for an Order (a) pursuant to CPLR § 3025(b) granting it leave to amend its answer to add a more specific affirmative defense regarding waiver of subrogation; (b) pursuant to CPLR § 3211(a)(7) or, in the alternative, CPLR § 3211(c) dismissing plaintiff's complaint; or, in the alternative, (c) pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint. Defendant Simplex Industries, Inc. ("Simplex") separately moves for relief identical to that of Fixit. The action has been discontinued against defendants LP Ciminelli, Inc. ("LP") and JMZ Architects and Planners, P.C. ("JMZ"). The motions are consolidated for disposition and are

resolved as set forth below.

The relevant facts and procedural history of this case are as follows. On or about April 15, 2013, pursuant to a written contract, BCC, plaintiff's insured, as owner, hired defendant LP, as general contractor, to oversee the construction of a dormitory at 907 Upper Front Street, Binghamton, New York (the "subject premises"). Specifically, LP was hired to provide design-build services, including retaining an architect and providing design services and contractors to perform construction services (hereinafter referred to as the "LP Contract"). Additionally, the LP Contract provides as follows:

**§ A.11.4.1** Unless otherwise provided, [BCC] shall purchase and maintain...property insurance written on a builder's risk, "all-risk" or equivalent policy form in the amount...comprising total value for the entire Project at the site on a replacement cost basis without optional deductibles...This insurance shall include interests of [BCC], [LP], Contractors and Subcontractors in the Project.

**§ A.11.4.1.1** Property insurance shall be on an "all-risk" or equivalent policy form and shall include, without limitation, insurance against the perils of fire...and physical loss or damage including, without duplication of coverage,...flood...and shall cover reasonable compensation for [LP's] services and expenses required as a result of such insured loss.

**§ A.11.4.7 Waivers of Subrogation.** [BCC] and [LP] waive all rights against each other and any of their consultants, separate contractors described in Section A.6.1, if any, Contractors, Subcontractors, agents and employees, each of the other, and any of their contractors, subcontractors, agents and employees, for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this Section A.11.4 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by [BCC] as fiduciary. [BCC] and [LP], as appropriate, shall require of the separate contractors described in Section A.6.1, if any, and the Contractors, Subcontractors, agents and employees of any of them, by appropriate agreements written where legally required for

validity, similar waivers each in favor of other parties enumerated herein. The parties shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, even though the person or entity did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

Pursuant to the LP Contract, BCC procured a builder's risk insurance policy through plaintiff, bearing policy number MZ193050664 covering the work on the project, BCC, LP and the subcontractors. Thereafter, pursuant to a written subcontract, LP hired defendant Simplex to act as a contractor on the project. Simplex then hired defendant Fixit, pursuant to a written subcontract, to perform HVAC and plumbing work, including hot water piping. In or around August 2014, there was a leak in the subject premises that caused significant water damage to seven units. Thereafter, plaintiff paid BCC for its loss and, as subrogor of BCC, commenced the instant action against LP, JMZ, Simplex and Fixit asserting claims for breach of contract, breach of warranty and negligence based on plaintiff's assertion that defendants negligently performed certain plumbing work which caused the damage to the subject premises.

The court first turns to Fixit and Simplex's motions for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiff's complaint on the ground that the waiver of subrogation provision in the LP Contract bars plaintiff's claims against them. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the

burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

In the instant action, both Fixit and Simplex have established their *prima facie* right to summary judgment dismissing plaintiff’s complaint on the ground that plaintiff’s claims against them are barred by the waiver of subrogation provision in the LP Contract. The waiver of subrogation provision in the LP Contract provides that both BCC and LP waived all rights against each other and any contractors and subcontractors for damages caused by a loss covered by property insurance obtained by BCC. Initially, it is undisputed by the parties that Simplex is a “Contractor” and Fixit is a “Subcontractor” pursuant to the LP Contract’s definitions. Further, it is undisputed that the damages to the subject premises were caused by a covered loss under plaintiff’s policy with BCC. Thus, based on the waiver of subrogation provision in the LP Contract, plaintiff has waived its right to recover in subrogation from either Simplex or Fixit.

In response, plaintiff has failed to raise an issue of fact sufficient to defeat Fixit and Simplex’s motions for summary judgment. Plaintiff asserts that Fixit and Simplex are not entitled to summary judgment because they failed to execute waivers of subrogation in favor of BCC and LP. However, such assertion is without merit. There is absolutely no provision in the LP Contract which provides that the failure of a contractor or subcontractor to execute a waiver of subrogation in favor of BCC and LP prevents such contractor or subcontractor from benefitting from and invoking the waiver of subrogation clause in the LP Contract. The provision in the LP Contract upon which plaintiff relies as the basis for such assertion provides as follows:

[BCC] or [LP], as appropriate, shall require of the separate contractors described in Section A.6.1., if any, and the Contractors, Subcontractors, agents and employees of any of them, by

appropriate agreements written where legally required for validity, similar waivers each in favor of other parties enumerated herein.

However, nothing in that provision imposes a mutuality of obligation on non-signatories to the LP Contract. Moreover, plaintiff fails to cite any case law which provides that there should be an implied waiver of subrogation in the absence of any express language in the LP Contract. Further, there is no evidence in the record that either Simplex or Fixit were required, pursuant to their contracts, to execute such waivers.

Plaintiff's reliance on *Gulf Ins. Co. v. Quality Building Contractor, Inc.*, 58 A.D.3d 595 (2d Dept 2009) is misplaced as that case is distinguishable. In *Gulf Ins. Co.*, the court found that the plaintiff insurer was not barred from recovering against the architect on a project because the waiver of subrogation provision at issue did not include subcontractors, subcontractors of subcontractors or architects. However, in this case, the waiver of subrogation provision in the LP Contract is much more expansive and explicitly includes contractors and subcontractors like Simplex and Fixit.

To the extent plaintiff asserts that the waiver of subrogation clause is unenforceable because it is akin to an exculpatory clause, which is unenforceable under New York law, such assertion is without merit. In explaining the difference between an exculpatory clause and a waiver of subrogation provision, the Court of Appeals held as follows:

A distinction must be drawn between contractual provisions which seek to exempt a party from liability to persons who have been injured or whose property has been damaged and contractual provisions, such as those involved in this suit, which in effect simply require one of the parties to the contract to provide insurance for all of the parties. Absent any indication of overreaching or unconscionability, such provisions violate neither section 5-323 of the General Obligations Law nor any other public policy.

*Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v. Valden Assoc.*, 46

N.Y.2d 653, 657 (1979). Thus, as there is clearly a difference between an exculpatory clause and the waiver of subrogation provision at issue here, and as plaintiff has failed to offer any evidence of overreaching or unconscionability, the court finds that the waiver of subrogation provision is enforceable.

To the extent plaintiff asserts that Simplex and Fixit's motions for summary judgment must be denied pursuant to CPLR § 3212(f) on the ground that discovery remains outstanding, such assertion is without merit. It is well settled that "a claimed need for discovery, without some evidentiary basis indicating that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri v. Amper*, 51 A.D.3d 146, 152 (1<sup>st</sup> Dept 2008). Here, plaintiff has failed to provide any evidentiary basis indicating that discovery may lead to relevant evidence.

Finally, those portions of Simplex and Fixit's motions which seek an Order pursuant to CPLR § 3025(b) granting them leave to amend their answers to add a more specific affirmative defense regarding waiver of subrogation is denied as moot as this court has already dismissed the complaint as against Simplex and Fixit.

Accordingly, Simplex and Fixit's motions are granted to the extent that summary judgment is granted in their favor and the complaint is hereby dismissed as against them. This constitutes the decision and order of the court.

Dated: 8/11/16

Enter: \_\_\_\_\_

  
J.S.C.

**HON. CYNTHIA S. KERN**  
J.S.C.