

Wausau Underwriters Ins. Co. v Gamma, USA, Inc.

2016 NY Slip Op 32966(U)

May 6, 2016

Supreme Court, Queens County

Docket Number: 708796/2015

Judge: Carmen R. Velasquez

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IA Part 38
Justice

WAUSAU UNDERWRITERS INSURANCE COMPANY,
as subrogee for TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK and THE NEW
SCHOOL,

-against-

GAMMA, USA, INC., ET AL.

Index
Number 708796 2015

Motion
Date February 8, 2016

Motion Seq. No. 2

X

The following numbered papers read on this motion by proposed intervenors Tishman Construction Corporation of New York (Tishman) and The New School pursuant to CPLR 1012 and 1013 granting the movants the right to intervene in and move to dismiss this action, pursuant to CPLR 3211(a)(3) and (7) dismissing this action in its entirety and/or pursuant to CPLR 3212 dismissing this action as a matter of law; and on the cross motion by the plaintiff Wausau Underwriters Insurance Company (Wausau) pursuant to CPLR 602(a) consolidating this action with the related action *Harripersaud v The New School, et al*, Index No. 7237/13 pending in Supreme Court Queens County.

Papers
Numbered

- Order to Show Cause - Affidavits - Exhibits..... EF 25-45
- Notice of Cross Motion - Affidavits - Exhibits... EF 52-57
- Answering Affidavits - Exhibits..... EF 59-65
- Reply Affidavits..... EF 66-69

Upon the foregoing papers it is ordered that this motion and cross motion are determined as follows:

Plaintiff Wausau, an insurance carrier commenced this subrogation action. In the underlying personal injury action, the plaintiff, Arjune Harripersaud, an electrician alleges he was injured tripping over a wire or cable at a construction project at the New School. The general contractor for the construction project was Tishman. Tishman hired several subcontractors

including Gamma, USA, Inc. (Gamma); FMB, Inc. (FMB); W5 Group, LLC a/k/a Waldorf (W5); Construction & Realty Safety Group, Inc. (Construction & Realty) and Fred Geller Electrical, Inc. (Geller). As part of the project Tishman established a Contractor Controlled Insurance Program (CCIP). Pursuant to the CCIP, Tishman and the New School and most subcontractors were covered under the same general liability and other necessary insurance policies for the project. Under the terms of the CCIP, Tishman has a \$500,000 retention for claims arising under the CCIP, which includes any claims against enrolled subcontractors. Thus, Tishman agreed to cover the first \$500,000 of any claim against any enrolled entity. The parties to the CCIP also agreed to waive any claims against each other. Geller was not a part of the CCIP and maintained their own insurance coverage with Wausau. Further Tishman and The New School were additional insured under the insurance policy that Geller had with Wausau. Harripersaud was an employee of Geller. Harripersaud commenced a lawsuit against Tishman and the New School. The lawsuit triggered coverage that Geller owed to Tishman and New School pursuant to its subcontract of the job and that Wausau was obligated to defend as a result of Tishman and The New School being additional insureds. Wausau seeks to pursue claims in this action as the subrogee of the rights held by Tishman and The New School against Gamma, FMB, W5 and Construction & Realty. The defendants subcontractors that Wausau brought this action against were all a party of the CCIP.

First, the Court must determine if Tishman and The New School can intervene. The motion to intervene is granted. CPLR 1012(a)(2) provides that any person may be permitted to intervene in any action when the representation of the persons' interest by the parties is or may be inadequate and the person is or may be bound by the judgment. Additionally, under CPLR 1013, the court, in its discretion, may permit a person to intervene "when the person's claim or defense and the main action have a common question of law and fact." It is of little practical significance whether an application is sought pursuant to CPLR 1012 or 1013, and a motion for leave to intervene should be granted where the intervenor has a real and substantial interest in the outcome of the litigation (*Wells Fargo v McLean*, 70 AD3d 676 [2d Dept 2010]; *Berkoski v Board of Trustees of Inc. Vil. of Southampton*, 67 AD3d 840 [2d Dept 2009]; *Matter of Bernstein v Feiner*, 43 AD3d 1161 [2d Dept 2007]). Here, the proposed intervenors have an interest in this proceeding as they would be directly bound by any judgment in this action as under the CCIP.

The Court turns next to the intervenors' motion to dismiss the complaint. On a motion to dismiss a court must accept as true the allegations of the complaint and give the plaintiff the benefit of

every favorable inference to determine if the allegations fit within a cognizable legal theory (see *Leon v Martinez*, 84 NY2d 83 [1994]; *Baker v Town of Wallkill*, 84 AD3d 1134 [2011]; *Konidaris v Aeneas Capital Mgt., LP*, 8 AD3d 244 [2004]). Subrogation is an equitable doctrine which 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 NY2d 654 [1997]). Wausau's subrogation rights are limited to any rights held by the putative subrogors (*Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d 366 [1990]; *Humbach v Goldstein*, 229 AD2d 64 [2d Dept 1997]). Where a party has waived its right to subrogation, its insurer has no causes of action (*State Farm Ins. Co. v J.P. Spano Constr., Inc.*, 55 AD3d 824 [2008]). Here the CCIP and anti-subrogation rule prevents Tishman and The New School from asserting these claims against the subcontractor defendants, therefore, these claims cannot be asserted by Wausau. When setting up the CCIP and permitting the defendants subcontractors named in this action to be enrolled contractors, Tishman and the New School waived their common law right to transfer the risk and seek reimbursements from those defendants. Since, Tishman is barred from making these claims there is no claim that Wausau can inherit as subrogee. Additionally, an insurer, does not have a right of subrogation against its own insured "for a claim arising from the very risk for which the insured was covered" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 468 [1986]). The rule against allowing a subrogation right to extend beyond a third-party and to reach its own insured would permit an insurer, in effect, "to pass the incidence of the loss...from itself to its own insured and thus avoid the coverage which its insured purchased" (*Id.* at 472). Here, due to Tishman's obligation to defend the subcontractors, the anti-subrogation rule bars these claims against the subcontractors (see *Stranz v New York State Energy Research and Development Authority (NYSERDA)*, 87 AD3d 1279 [4th Dept 2011]). Furthermore, the claims that Wausau seeks to assert here are in actuality claims against Tishman, as the insurer of the subcontractors, and places Wausau in a direct conflict of interest with Tishman and, thus, violates the anti-subrogation rule.

Finally, Wausau has not paid a loss, therefore, it is not entitled to commence a subrogation action at this time (see *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577 [1995]). Therefore, the motion to dismiss is granted and the complaint must be dismissed in its entirety.


In light of the dismissal of the complaint the cross motion to consolidate is denied as moot.

Accordingly, the motion by the proposed intervenors is granted, and Tishman and The New School are granted the right to intervene in this action.

Upon intervention, the motion by Tishman and The New School to dismiss is granted, and the action is dismissed.

The cross motion by the plaintiff to consolidate this action with *Harripersaud v The New School, et al*, Index No. 7237/13, pending in Supreme Court Queens County, is denied as moot.

Dated: May 6, 2016


CARMEN R. VELASQUEZ, J.S.C.

FILED
MAY 18 2016
COUNTY CLERK
QUEENS COUNTY