Neighborhood Partnership Hous. Dev. Fund Co., Inc. v West 132nd St. LLC
2017 NY Slip Op 31433(U)
July 6, 2017
Supreme Court, New York County
Docket Number: 653867/2015
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., *by and through its subrogee* Mt. Hawley Insurance Company,

Plaintiff,

- against -

WEST 132ND STREET, LLC, NY RESIDENTIAL PROPERTY WORKS LLC and WEST 132ND STREET CLUSTER L.P.,

Defendants.

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Index Number: 653867/2015

Decision and Order

Motion Seq. Nos.: 002, 003

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 6, were used on defendant's motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint, and plaintiff's motion, pursuant to CPLR 3212, for summary judgment:

	Papers Numbered:
Defendant's Motion to Dismiss (Seq. 002)	
Notice of Motion - Affirmation - Exhibits	1
Affirmation in Opposition - Exhibits	2
Reply Affirmation	3
Plaintiff's Motion for Summary Judgment (Seq. 003)	
Notice of Motion - Affirmation - Exhibits	4
Affirmation in Opposition - Exhibits	5
Reply Affirmation - Exhibits	6

Upon the foregoing papers, defendant's motion to dismiss is denied, and plaintiff's motion for summary judgment is granted.

Background

In this action, plaintiff, Mt. Hawley Insurance Company ("Hawley"), as subrogee of Neighborhood Partnership Housing Development Fund Company, Inc. ("NPHDFC"), seeks contractual indemnification from defendants for the $250,000 it paid to settle an underlying Labor Law personal injury lawsuit, and damages for defendants' alleged breach of contract for failure to procure insurance on behalf of NPHDFC.

Briefly, NPHDFC, as Sponsor, and defendant West 132nd Street LLC ("West 132nd"), as Manager/Developer, entered into a Site Development and Management Agreement (the "Agreement"), for the redevelopment and rehabilitation of real property at West 131st and 132nd Streets in Manhattan. Under the Agreement, West 132nd agreed to, inter alia, "direct the operation and redevelopment of" the property. The Agreement identifies non-party A. Aleem Construction, Inc. ("Aleem") as the contractor performing the redevelopment/rehabilitation work. The Agreement also contains an indemnification and insurance procurement provision, requiring West 132nd: (1) to indemnify NPHDFC "from and against any and all liabilities, obligations, claims, causes of action, judgments, damages, … arising from or relating to … any accident, injury to … persons occurring in, on or about the Property … including without limitation, in connection with the Work" (Agreement, Article VIII, Section 8.6); and (2) to procure various types of insurance coverage naming

NPHDFC as additional insured on West 132nd's insurance policies, and to cause Aleem to procure the same insurance for the benefit of NPHDFC (Agreement, Article VIII, Section 8.2-8.4). As is here pertinent, Aleem procured the required insurance from Hawley. The Hawley policy named NPHDFC and West 132nd as additional insureds for the redevelopment project.

On December 21, 2007, Mahamadou Gory, an employee of Aleem, commenced an action against NPHDFC and Aleem to recover for personal injuries sustained while working at the redevelopment project; the complaint was later amended to add West 132nd and NY Residential as defendants (the "Gory Action"). NPHDFC cross-claimed against West 132nd for contractual indemnification for any damages NPHDFC would be liable to pay Gory.

Hawley provided NPHDFC, its additional insured, with a defense and indemnification in the Gory Action. However, Hawley disclaimed coverage for West 132nd in the Gory Action upon the ground of late notice. Thus, West 132nd commenced, in the Gory Action, a third-party action against Hawley and others seeking a declaration that Hawley's disclaimer was invalid and that Hawley owes West 132nd a defense and indemnity for Gory's claims. By Decision and Order dated July 9, 2010, the court (Lucindo Suarez, J.), dismissed West 132nd's third-party complaint as against Hawley, finding that Hawley's disclaimer of coverage to West 132nd was "timely" (the "July 2010 Order").

The merit to NPHDFC's contractual indemnification cross-claim against has also been determined. By Decision and Order dated January 28, 2014, the Appellate Division, First Department, found that NPHDFC "is entitled to summary judgment on its contractual indemnification claim" against West 132nd (the "App. Div. Order"). On July 8, 2015, the Gory Action settled for the sum of $250,000, with the settlement payment "funded by [NPHDFC's] insurance carrier, RLI/Mt. Hawley Insurance Company." The terms of the settlement were read into the record in open-court; Gory agreed to the terms; and NPHDFC reserved its right to "proceed to seek indemnification of all the funds that [Hawley] will extend to settle this action against [West 132nd]."

Procedural History

The instant complaint names RLI as subrogee/plaintiff, and West 132nd, NY Residential Property Works LLC ("NY Residential"), and West 132nd Street Cluster LP ("Cluster") as defendants. The complaint alleges, inter alia, that: NY Residential and Cluster are each "affiliated with," a "subsidiary of," a "related company of," and the "alter-ego of" West 132nd; that based upon the Agreement and the App. Div. Order, NPHDFC is entitled to contractual indemnification from defendants in the sum of $250,000; and that defendants breached their agreement "to obtain insurance coverage" on behalf of NPHDFC.

By motion dated January 27, 2016, defendants moved, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint. By motion dated March 25, 2016, plaintiff cross-moved to amend the complaint to add Hawley as plaintiff in place and instead of RLI. By Decision and Order dated June 27, 2016 (the "June 2016 Order"), this Court granted plaintiff's motion to amend the complaint, and granted in part defendants' motion to dismiss, but only to the extent that NY Residential and Cluster were dismissed, finding that the complaint properly stated causes of action against West 132nd. The June 2016 Order found that "[c]ontrary to defendants' argument, the anti-subrogation rule does not bar Mt. Hawley's subrogation claims because West 132nd is not an insured under Mt. Hawley's policy for the Gory action; the July 8 Order makes that clear." Thus, the Court reasoned, "dismissal of the complaint as against West 132nd is not warranted."

West 132nd now moves, again, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint. In opposition, plaintiff submits that West 132nd does not present any new facts or issues, and seeks, pursuant to NYCRR 130-1.1, sanctions against West 132nd's counsel for frivolous conduct, as it is the same motion that was made in January 2016, and the Court has already rendered a decision on this exact issue.

Plaintiff now moves, pursuant to CPLR 3212, for summary judgment. After a few adjournments, some on consent, some by court order, West 132nd e-filed its opposition on February 15, 2017, and plaintiff e-filed its reply on February 24, 2017. Plaintiff argues that it is unduly prejudicial that West 132nd had 117 days to oppose the motion when it only had two weeks to reply, and, thus, that the summary judgment motion should be decided unopposed.

Discussion

I. West 132nd's Motion to Dismiss

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action).

In view of the foregoing, and in light of the June 2016 Order rendering a decision on this very issue, the complaint adequately states causes of action against West 132nd for contractual indemnification and breach of contract for failure to procure insurance. Quoting directly from the June 2016 Order, this Court found that:

> Far from conclusively establishing a defense to the complaint, the documentary evidence – the Agreement, the Gory Action third-party pleadings, the July 8 Order, the App. Div. Order, and the transcript of the July 8, 2015 settlement – establish the merit to plaintiff's claims. The Agreement and App. Div. Order establish NPHDFC's right to contractual indemnification from West 132nd for any amounts paid to settle the Gory Action; the Agreement establishes West 132nd's obligation to procure insurance on NPHDFC's behalf (and the complaint sufficiently alleges breach thereof); and, as noted above, the Gory Action third-party pleadings and transcript of settlement establish that Mt. Hawley is the proper insurer/subrogee. Contrary to defendants' argument, the anti-subrogation rule does not bar Mt. Hawley's subrogation claims because West 132nd is not an insured under Mt. Hawley's policy for the Gory Action; the July 8 Order makes that clear. See Fitch v Turner Const. Co., 241 AD2d 166, 171 (1st Dep't 1998) (insurer of "third-party plaintiff who does not insure a third-party defendant should be permitted to assert its right of subrogation against that third-party defendant"); see also Dillion v Parade Mgmt. Corp., 268 AD2d 554, 556 (4th Dep't 2000). Thus, dismissal of the complaint as against West 132nd is not warranted.

Accordingly, West 132nd's motion to dismiss is hereby denied.

II. Plaintiff's Motion for Summary Judgment

As a preliminary matter, the Court will address West 132nd's argument that plaintiff's summary judgment motion is premature because issue has not yet been joined, as it has not served an answer. The Court finds this argument unavailing. Pursuant to CPLR 320(a), West 132nd has appeared in this action by filing motions to dismiss and, thus, issue has been joined, and plaintiff's motion for summary judgment is not premature. See Paulus v Christopher Vacirca, Inc., 128 AD3d 116, 120 (2d Dept 2015) ("A defendant appears when, inter alia, he or she makes a motion which has the effect of extending the time to answer, such as a motion to dismiss pursuant to CPLR 3211") (internal quotations omitted); see also Finn v Church for the Art of Living, Inc., 90 AD3d 826, 827 (2d Dept 2011) ("the Supreme Court did not err in considering the plaintiff's motion for summary judgment, which was made before issued was joined, since the parties charted a summary judgment course by treating the motion as if issue had been joined") (internal quotations omitted).

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062

(1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980). To prove breach of contract, a plaintiff must show: (1) the existence of a contract; (2) plaintiff's performance thereunder; (3) defendant's breach thereof; and (4) resulting damages. See Harris v Seward Park Housing Corp., 79 AD3d 425, 426 (1st Dept 2010).

Plaintiff has established its entitlement to summary judgment against West 132nd on its (1) contractual indemnification and (2) failure to procure insurance claims. (1) The App. Div. Order already addressed plaintiff's contractual indemnification claim and found that "[g]iven the absence of any evidence of negligence on its part, [NPHDFC] is entitled to summary judgment on its contractual indemnification claim against defendant West 132nd Street." Thus, NPHDFC, by and through its subrogee Hawley, is entitled to full and complete contractual indemnification from West 132nd to the full extent of the settlement paid to the underlying plaintiff. See Mahoney v Turner Constr. Co., 37 AD3d 377, 380 (1st Dept 2007) ("Given the absence of any showing that the indemnitee was negligent, the indemnification provision is not, as contended, void ... on the ground that it would indemnify [the indemnitee] for its own negligence"). (2) Pursuant to the Agreement, West 132nd agreed to obtain insurance coverage on NPHDFC's behalf, the breach of which renders West 132nd liable to NPHDFC for any amounts that may be recovered against it. The fact that Aleem procured an insurance policy that names both NPHDFC and West 132nd as additional insured has no bearing on whether West 132nd fulfilled its contractual obligation to procure additional insurance for NPHDFC. West 132nd has failed to allege facts to the contrary, and this Court finds no basis to believe otherwise.

Furthermore, the July 2010 Order, affirmed by the App. Div. Order, makes clear, as a matter of law, that Hawley's West 132nd disclaimer was effective, and that West 132nd is not an additional insured under the policy. Thus, the anti-subrogation rule does not apply. See Millennium Holdings LLC v Glidden Co., 27 NY3d 406, 416 (2016) (court "did not extend application of the antisubrogation rule to non-insured parties ... If we were to extend application of the antisubrogation rule to all non-covered third parties, an insurer who fulfills its obligation to pay on the risks insured by the relevant policy would essentially be foreclosed from the ability to subrogate. For this reason it is essential ... that the third party against whom the insurer seeks to exercise its rights of subrogation is not covered by the relevant insurance policy").

Plaintiff's request for sanctions is hereby denied. The Court, in its discretion, finds that while West 132nd's counsel may have attempted to re-litigate an issue that the Court had previously decided, his conduct does not rise to the level of frivolous conduct such that sanctions are warranted.

The Court has considered West 132nd's other arguments and finds them unavailing.

Accordingly, plaintiff's motion for summary judgment is hereby granted. Thus, plaintiff is entitled to full reimbursement of the settlement it incurred in the instant action, in the sum of $250,000, it paid to the underlying plaintiff in the Gory Action, and full reimbursement of the defense costs, in a sum to be determined at an attorney's fee hearing.

Conclusion

Defendant's motion to dismiss is denied; and plaintiff's motion for summary judgment is granted. The clerk is hereby directed to grant summary judgment in favor of plaintiff and against defendant West 132nd Street, LLC in the sum of $250,000, plus statutory interest, and costs and disbursements.

Plaintiff's request for reasonable attorney's fees and costs is hereby severed and referred to a special referee to hear and report (CPLR 4311). In order to obtain a hearing with a special referee, plaintiff may submit to Room 119 a copy of this Decision & Order and notice of entry, together with a Special Referee Info Sheet (http://nycourts.gov/courts/1jd/supctmanh/refpart-infosheet-10-09.pdf).

Dated: July 6, 2017

Arthur F. Engoron, J.S.C.