

Foremost Signature Ins. Co. v Nucor Constr. Corp.
2017 NY Slip Op 32015(U)
September 20, 2017
Supreme Court, New York County
Docket Number: 655526/2016
Judge: Kathryn E. Freed
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

-----X
FOREMOST SIGNATURE INSURANCE COMPANY,
Plaintiff,

INDEX NO. 655526/2016

MOTION DATE _____

MOTION SEQ. NO. 001

- v -

NUCOR CONSTRUCTION CORP., DONNELLY MECHANICAL
CORP., WILLIAM C. GERAKARIS PLUMBING & HEATING
CORP.,

DECISION AND ORDER

Defendant.

-----X
The following e-filed documents, listed by NYSCEF document numbers 7-17, 27, 31-42, 44,
were read on this application for _____ Dismissal

Upon the foregoing documents, the
motion is granted. _____

In this subrogation action, commenced by plaintiff Foremost Signature Insurance Company (Foremost), insurer of The New York State Nurses Association (Nurses), against defendants Nucor Construction Corp. (Nucor), Donnelly Mechanical Corp. (Donnelly) and William C. Gerakaris Plumbing & Heating Corp. (Gerakaris), and arising from an insurance claim for property damage incurred by Nurses on February 15, 2016, Nucor moves, pursuant to CPLR 3211(a)(1), for dismissal of the complaint and all cross claims against it. After oral argument, and after a review of the parties' motion papers and the relevant statutes and case law, the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff alleges that on February 26, 2013, Nurses entered into a contract with Nucor to renovate its office condominiums located on the 3rd and 4th floors of 131 West 33rd Street, New York, New York (the premises). This contract had a substantial completion target date of June 1, 2013. Nucor was to build out the 4th Floor HVAC mechanical room and install exterior louvers. This work was substantially completed on July 10, 2013.

On December 9, 2014, Nurses entered into another contract with Nucor (the December 2014 Agreement), which involved the renovation of its 2nd floor office condominium and additional renovations to the 3rd and 4th floors. On February 12, 2016, Nucor and its subcontractor, defendant Donnelly, allegedly entered the premises and improperly sealed the 4th floor HVAC mechanical room exterior louvers, allowing frigid air to enter the space. On February 15, 2016, the frigid air in the area caused two sprinkler heads located on the 4th floor, one sprinkler head located on the 3rd floor, and water pipes leading to the kitchen/break room on the 4th floor, to freeze and burst, causing damage to the premises in the amount of \$36,213.17. Nurses thereafter filed a property damage claim with plaintiff, its property insurer. Plaintiff paid the claim to Nurses, and, in its role as subrogee, commenced an action against Nucor, Donnelly and Gerakaris seeking to recover the amount it paid.

Nucor moves to dismiss the complaint and all cross claims asserted against it based on documentary evidence. The documentary evidence consists solely of the December 2014 Agreement between Nurses and Nucor, which includes a waiver of subrogation provision. Nucor argues that this provision is clearly applicable to the property damage in this case. Thus, Nucor contends that plaintiff, as subrogee, is precluded from bringing a claim against it.

In opposition, plaintiff argues that the December 2014 Agreement does not apply to this particular property damage, and that the subject provision does not prevent a subrogation action. Plaintiff claims that the damage relates to an agreement executed by Donnelly, to which Nucor was not a party. Plaintiff asserts that Nucor's role in the work that led to the damage was not subject to the December 2014 Agreement. Defendants Donnelly and Gerakaris do not oppose Nucor's motion.

In reply, Nucor argues that the work leading to the alleged damage was covered by the December 2014 Agreement, and that the waiver of subrogation provision is broad enough to cover this matter.

LEGAL CONCLUSIONS

In order to prevail on a CPLR 3211 (a) (1) motion to dismiss, a moving party must show that the documentary evidence presented conclusively refutes plaintiff's allegations (*see AG Capital Funding Partners, L.P. v State Street Bank & Trust Co.*, 5 NY3d 582, 590-591 [2005]). Nucor relies on the construction contract it executed with Nurses. Although plaintiff does not question the validity of the December 2014 Agreement, the parties dispute the proper interpretation thereof.

"When parties set down their agreement in a clear, complete document, their writing should, as a rule, be enforced according to its terms" (*Gladstein v Mastorella*, 71 AD3d 427, 429 [1st Dept 2010]). Language in a contract will be deemed unambiguous only if it has a definite and precise meaning, and where there is no reasonable basis for a difference of opinion (*see Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 429 [1st Dept 2011]).

“Subrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss” (*Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995]). Nucor cites section 17.3.3 of the December 2014 Agreement, the pertinent portions of which are set forth below:

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the others, . . . for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to Section 17.3 or other property insurance applicable to the Work, except such rights as they have to proceeds of such insurance held by the Owner as fiduciary.

* * *

The policies 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, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurance interest in the property damaged.

Article 1 of the December 2014 Agreement defines the “Work of the Contract” as that described in the Contract Documents, which are enumerated in Article 6. Those documents include drawings of work to be performed on the HVAC units and mechanical room on the 4th floor of the premises. This is the area where the alleged damage initially occurred. There are also references to HVAC units on the 2nd and 3rd floors in Article 6, areas in which the damage allegedly expanded. Work is also defined, in section 7.3, as “the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor’s obligations.”

This Court finds that the broad waiver of subrogation provision covers the damage which is the subject of this action. Since the said provision is applicable here, plaintiff is barred from seeking recovery based on the claim by its insured Nucor. Thus, the complaint is dismissed insofar as it sets forth claims against Nucor. Since Donnelly and Gerakaris do not oppose the motion, this Court dismisses all cross claims asserted against Nucor as well.

Therefore, in light of the foregoing, it is hereby:

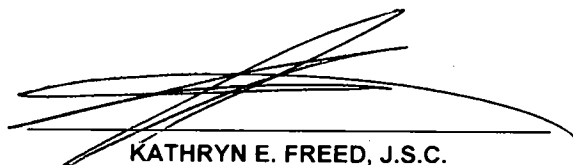
ORDERED that defendant Nucor Construction Corp.'s motion is granted and the complaint and all cross claims asserted against it are dismissed, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that this constitutes the decision and order of the court.

9/20/2017

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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CASE DISPOSED
GRANTED
SETTLE ORDER
DO NOT POST

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DENIED

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NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

☐

OTHER

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REFERENCE