SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** 2
Justice

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OLD REPUBLIC GENERAL INSURANCE CORPORATION, A/S/O 801 AMSTERDAM, LLC,AND GOTHAM CONSTRUCTION COMPANY, LLC

Plaintiff,

- v -

CITY ELEVATOR CORP.,

Defendant.

INDEX NO. 655745/2016

MOTION DATE

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 39

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, it is ordered that the motion is **denied**.

Defendant City Elevator Corp. (City Elevator) moves for summary judgment (motion sequence No. 001) dismissing the verified complaint on the ground that plaintiff lacks standing to sue as a subrogee because it has not made any payment on behalf of its alleged subrogors, 801 Amsterdam LLC (801 Amsterdam) and Gotham Construction Company LLC (Gotham).

The complaint, which seeks indemnification, contribution, and damages for breach of contract, states that it is brought in "anticipatory subrogation . . . and in subrogation on behalf of its insureds ahead of the result of the underlying claim for personal injuries" (Complaint, ¶ 8).

Gotham and 801 Amsterdam are additional insureds under Old Republic Policy No. A2CG93370800, issued to nonparty Five Star Electric Corp. (Five Star), which is a third-party defendant in a workplace accident action pending in Supreme Court, New York County, captioned

Arcadio Torres v 810 [sic] *Amsterdam LLC and Gotham Construction Company LLC*, bearing index No. 115041/2010 (the Underlying Action).

On April 11, 2009, the plaintiff in the Underlying Action, nonparty Arcadio Torres (Torres), an employee of Five Star, allegedly fell over an I-beam and construction debris as he was stepping off a ladder onto the floor of a construction site located at 801 Amsterdam Avenue (the Premises), which was owned by 801 Amsterdam. Five Star, as a third-party defendant in the Underlying Action, impleaded City Elevator as a second third-party defendant in the Underlying Action. City Elevator performed construction-related services at the Premises pursuant to a contract.

Nonparty American Home Assurance Company (American Home), an AIG company, issued policy number GL2014197, which is an owner controlled insurance program (OCIP), or wrap-up, that covers both 801 Amsterdam and Gotham, as well as City Elevator.

The Old Republic policy, issued to Five Star, contains an additional insured endorsement, pursuant to which American Home contends that Old Republic has a primary, noncontributory duty to defend and indemnify Gotham and 801 Amsterdam in the Underlying Action.

On May 6, 2011, American Home issued a notice of tender (Exhibit B to McGuire Affirmation) to Five Star demanding that its carrier, Old Republic, assume the full defense and indemnification of 801 Amsterdam and Gotham in the Underlying Action. The notice of tender states that Five Star is obligated by contract to obtain a policy that

> "must name 801 Amsterdam and Gotham Construction as additional insured's [sic] and shall be endorsed to be primary and non contributory with any insurance otherwise covered by any of the additional insured's [sic]"

(*id.*).

On October 26, 2011, American Home sent a second notice of tender to Old Republic's claims administrator, Gallagher Bassett Services, Inc. (Gallagher Bassett) (Maguire Affirmation, Exhibit B). Gallagher Bassett responded by letter dated April 17, 2014, accepting the tender, but conditioning acceptance upon the dismissal of the third-party action filed against Five Star in the Underlying Action.

By two emails dated April 24, 2014 (Maguire Affirmation, Exhibit 1), Old Republic advised American Home that "if there is an enrolled contractor [in the OCIP Program] responsible for the rebar or the pile [of debris], they will be brought into the case" (*id.*).

AIG responded on the same date:

> "before we can agree to the transfer, as I had mentioned in an earlier email, Old Republic must agree that no third-party action will be instituted against any contractor enrolled in the AIG OCIP program"

(*id.*).

American Home argues that, as a subrogee, Old Republic has no standing to maintain this action since the tender was never accepted, it was agreed to only conditionally by Old Republic, and the condition was not agreed to, despite the allegation in the complaint that Old Republic accepted the tender (Complaint, ¶ 14).

Old Republic suing as a subrogee, does not allege that it has made any payment on behalf of its subrogors, inasmuch as there has been no resolution of the Underlying Action or any determination of fault. Payment is generally an element of an enforceable claim for equitable subrogation (*see Salzman v Holiday Inns*, 48 AD2d 258, 262 [2d Dept 1975], *mod on other grounds*, 40 NY2d 919 [1976]). Subrogation is an equitable doctrine, and "may be created by contract or by operation of law" (*J & B Schoenfeld, Fur Merchants, Inc. v Albany Ins. Co.*, 109 AD2d 370, 372 [1st Dept 1985]).

This action is for indemnification, which "arises from the equitable principle that the wrongdoer ought to bear responsibility for the loss" (*North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 291 [1993] [citation omitted]). "Indemnity may be distinguished from subrogation in that in an indemnity situation an obligor pays his own debt and then seeks reimbursement from a third party who, by express or implied obligation, may be the one actually responsible for its incurrence" (*Saltzman* at 262 [citation omitted]).

In order to maintain this indemnification action, it is not necessary that the subrogation or indemnification rights asserted are currently enforceable. CPLR 1007 authorizes a third-party action and "permits the defendant to implead any person who is or may be liable to him and is certainly broad enough to encompass contingent claims based on subrogation" (*Krause v American Guar. & Liab. Ins. Co.*, 22 NY2d 147, 152-153 [1968][internal quotation marks and citation omitted]).

The following holding by the Appellate Division, First Department, is dispositive of this motion: "there is no rule that a subrogation claim can be brought only by impleader under CPLR 1007. The claim may be brought either as an impleader or by separate plenary action. Indeed, the language of CPLR 1007 is permissive, rather than mandatory, and nowhere suggests that an impleader action is the only vehicle available to an insurer so situated. Plaintiff was not bound to wait until its liability was established in the underlying coverage action to bring this lawsuit" (*Hudson Ins. Co. v AK Const. Co., LLC*, 92 AD3d 521, 521 [1st Dept 2012][citations omitted]).

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

ORDERED that defendant City Elevator Company's motion for summary judgment dismissing the complaint is denied; and it is further

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

12/18/2017
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐	CASE DISPOSED	[X]	DENIED	[X]	NON-FINAL DISPOSITION
☐	GRANTED			☐	GRANTED IN PART
☐	SETTLE ORDER			☐	SUBMIT ORDER
☐	DO NOT POST			☐	FIDUCIARY APPOINTMENT

☐ OTHER

☐ REFERENCE