SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH **PART 29**
Justice

ZURICH AMERICAN INSURANCE COMPANY a/s/o SKANSKA USA BUILDING, INC. and a/s/o NEW YORK CITY ECONOMIC DEVELOPMENT CORP.,

Plaintiff,

- v -

AECOM USA, Inc.,

Defendant.

INDEX NO. 158953/2017

MOTION DATE 9/25/18

MOTION SEQ. NO. 001

DECISION AND ORDER

NYSCEF Doc Nos. 4–32 were read on this motion to dismiss.

Motion by Defendant AECOM USA, Inc. ("AECOM") pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended verified complaint of Plaintiff Zurich American Insurance Company ("Zurich") as subrogee of Skanska USA Building, Inc. ("Skanska") and as subrogee of New York City Economic Development Corp. ("NYCEDC") or, in the alternative, pursuant to CPLR 3212 for summary judgment in favor of AECOM and against Zurich is denied in its entirety.

BACKGROUND

Plaintiff Zurich commenced the instant action on October 6, 2017, by e-filing a summons and verified complaint (Riggiola affirmation, exhibit A ["complaint" or "original complaint"]). The complaint alleged, in sum and substance, that Defendant AECOM committed professional malpractice and breached its contract with Zurich's subrogors, Skanska and NYCEDC. The complaint alleged that AECOM, as tortfeasor, committed these acts in connection with its role as engineer on a project known as the East Midtown Waterfront Esplanade Project, which involved the construction of a pedestrian walkway and other improvements along the East River from 38th Street to 41st Street in Manhattan (the "Project"). The complaint further alleged that AECOM damaged the piers installed at the Project due to AECOM's design, errors, omissions, actions, and oversights. The complaint further alleged that, in March 2015, Skanska made a claim to Zurich for the damages, which Zurich accepted. The complaint then alleged that Zurich "has accepted the claim and paid to its insureds the sum of $1,173,637.35 (the "Zurich Payment") as a result of damages to the piers, which damage has resulted from the conduct of defendant AECOM."

On January 31, 2018, AECOM filed the instant pre-answer motion to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7) or, in the alternative, pursuant to CPLR 3212 for summary judgment in favor of AECOM and against Zurich. Defendant argues that AECOM

settled all claims against it that could be brought by NYCEDC against AECOM by means of a Release and Settlement Agreement, dated October 16, 2017, by and between AECOM and NYCEDC. (Riggiola affirmation, exhibit C.) Defendant further argues that AECOM did not have actual or constructive knowledge of Zurich's status as insurer, coverage as to the particular type of claim, or that Zurich was subrogated to the rights of Skanska or NYCEDC. Defendant further argues that Skanska did not have a contractual relationship with AECOM, was not in privity with AECOM, and was not an intended third-party beneficiary of the agreement between AECOM and NYCEDC.

In support of its motion, Defendant has annexed a 517-page "Consultant Contract", which is the contract between NYCEDC and AECOM. The document as cited to by movant is referenced in support of Defendant's argument that AECOM had no contract with Skanska and that the contract conferred no rights to Skanska as a third-party beneficiary.

Defendant has also annexed to its moving papers the affidavit of Robert K. Orlin, Esq., an officer of AECOM. Mr. Orlin indicated that AECOM settled with NYCEDC for $600,000.00 and was mutually released along with NYCEDC. Mr. Orlin stated that, "[u]ntil this lawsuit, AECOM was unaware of any payments made by Zurich [] to NYCEDC on behalf of Skanska [].

On February 20, 2018, Zurich filed an amended complaint ["Complaint" or "amended complaint"]. Notably, Zurich details in the Complaint that the Zurich Payment was made to Skanska in two installments: $578,900.00 on June 22, 2015, and $594,737.75 on February 3, 2016. Zurich then states that "[b]y virtue of its payments, and pursuant to the terms of its policy, [Zurich] has become subrogated to the extent of its payments to NYCEDC's rights to recovery and is therefore entitled to recover same from the defendant in this action." The Complaint then alleges that AECOM was "initially advised and given notice of [Zurich's] subrogation claim in written notice by letter issued by counsel for [Zurich] via vax and regular mail on June 7, 2016." The Complaint then details certain other communications relating to notice to AECOM about Zurich's subrogation claim. The Complaint then alleges that AECOM had notice of Zurich's claim and the pending litigation when it settled with NYCEDC on October 16, 2017.

The Complaint adds a cause of action for indemnification of Zurich by AECOM based upon that AECOM agreed in its consultant agreement for the Project to be solely responsible for all damage to property sustained during its operations and work under the agreement resulting from any negligence, fault, or default of AECOM.

On February 27, 2018, Plaintiff filed its papers in opposition to the instant motion. Plaintiff argues that Mr. Orlin's affidavit does not constitute documentary evidence under CPLR 3211 (a) (1). Plaintiff further argues that AECOM was on notice of this litigation, commenced October 6, 2017, when it settled with NYCEDC, on October 16, 2017. Plaintiff further argues that the October 16, 2017 Release and Settlement Agreement does not bar Zurich's subrogation claims in the instant case. Plaintiff then indicates that the Complaint moots those issues relating to claims Zurich may bring as subrogee of Skanska, as Plaintiff has not carried those claims over from the original complaint to the amended complaint.

On March 6, 2018, Defendant filed its reply papers. Defendant requests that the Court permit direct Defendant to direct its motion to dismiss at the Complaint rather than require Defendant to make a new motion. Defendant then argues that Zurich has not submitted evidence to corroborate its contention that "AECOM was on notice of Zurich's purported subrogation rights flowing from its settlement payment to Skanska which was paid to the NYCEDC." Defendant then argues that an annexed settlement agreement between Skanska and NYCEDC was executed on October 16, 2017, and resulted in the Zurich Payment being made from Skanska to NYCEDC on October 18, 2017, which falls within the five days contemplated in the agreement within which payment was to be made. (Youash affirmation, exhibit F.)

On reviewing the annexed agreement, it states by its terms in the first sentence that it is "made and entered into as of the 29th day of August, 2017." On the second page, in the right-hand margin, is handwritten, "10/16/17 P.A". A "Patrick Askew" signed the agreement on behalf of NYCEDC.

Defendant then argues that "Zurich was incapable of providing notice of a purported subrogation right, as Skanska did not settle the claim with NYCEDC until October 16, 2017." Defendant also argues that the affidavits and voicemail submitted in opposition turn Zurich's counsel into fact witnesses, are conclusory, contain double-hearsay, and should not be considered. Defendant further states that AECOM did not have actual notice of Zurich's subrogation claims when it settled with NYCEDC and that Zurich has failed to substantiate the claim. Defendant then states that Zurich has failed to produce a copy of its insurance policy with Skanska, which allegedly names both Skanska and NYCEDC as insureds for the Project.

Defendant argues that its exhibits submitted in its moving papers constitute documentary evidence for the purposes of CPLR 3211 (a) (1). Defendant argues that Mr. Orlin's affidavit may be used to establish the bona fides of the Release and Settlement Agreement and that, at any rate, it conclusively establishes that Plaintiff has no cause of action. Defendant then argues that the Court should not consider Plaintiff's affidavits as they do not constitute documentary evidence.

Defendant argues in reply, in sum and substance, that Zurich never put AECOM on notice of its subrogation rights as to NYCEDC and that Zurich did not have actual or constructive notice of those purported rights. Defendant further argues that Zurich did not indicate whether it was subrogee of NYCEDC as a result of the settlement between Skanska and NYCEDC.

On September 25, 2018, the parties appeared by counsel for oral argument on the motion. At oral argument, the parties reiterated the arguments made in the motion papers. Notably, movant conceded that the branch of its motion pursuant to CPLR 3212 for summary judgment was premature and requested that the Court consider the instant motion to dismiss. Further, Plaintiff argued that its subrogation claim accrued as of the payments it made to Skanska in 2015 and 2016, and that, under the policy, it could not have made those payments directly to NYCEDC.

DISCUSSION

In the first instance, the Court denies Defendant's motion pursuant to CPLR 3212 for summary judgment as premature. CPLR 3212 (a) provides, in pertinent part, that "[a]ny party may move for summary judgment in any action, after issue has been joined." Further, "summary judgment is unavailable to either side prior to joinder of issue absent CPLR 3211 (c) notice," with three exceptions. (*Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 320 [1st Dept 1987]; *see also Milhovan v Grozavu*, 72 NY2d 506, 508 [1988]; *Wadiak v Pond Management, LLC*, 101 Ad3d 474, 475 [1st Dept 2012].) Here, Defendant has made a pre-answer motion to dismiss, and issue has not been joined yet by Defendant by service upon Plaintiff of an answer. None of the *Four Seasons* exceptions are applicable here—the matter does not merely involve issues of law fully appreciated and argued by both sides, both sides did not request summary judgment treatment, and both sides have not made it unequivocally clear that they are laying bare their proof and deliberately charting a summary judgment course. To the contrary, Plaintiff objects to Defendant's summary judgment motion as premature. Moreover, Defendant conceded at the September 25, 2018 oral argument that its motion pursuant to CPLR 3212 is premature. As such, that branch of the motion which in the alternative sought summary judgment for the Defendant and against Plaintiff dismissing the complaint pursuant to CPLR 3212 is denied.

The Court will now consider the instant motion pursuant to CPLR 3211 (a) (1) and (7) to dismiss the Complaint. In the first instance, the Court agrees with Plaintiff that the branch of the instant motion which sought dismissal of claims brought by Zurich as subrogee of Skanska in the original complaint has been mooted by Plaintiff's amended complaint. As such, those branches of Defendant's motion are resolved as moot, and the documentary evidence submitted in the moving papers as Exhibit B, which was submitted in support of those resolved arguments, merits no further consideration in the instant analysis.

CPLR 3211 (a) (1) permits a party to move for judgment dismissing one or more causes of action asserted against it on the ground that a defense is founded upon documentary evidence. Dismissal under this provision "is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Alden Global Value Recovery MF, L.P. v KeyBank Natl. Assn.*, 159 AD3d 618, 621 [1st Dept 2018].) The documentary evidence must "conclusively refute the complaint's allegations." (*Lowenstern v Sherman Square Realty Corp.*, 143 AD3d 562, 562 [1st Dept 2016].)

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201–02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703–704 [2d Dept 2008].) "It is axiomatic that, on a motion brought pursuant to CPLR 3211, our analysis of a plaintiff's claims is limited to the four corners of the pleading." (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 Ad3d 96, 105 [1st Dept 2015], *aff'd* 30 NY3d 572 [2017].) "'The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.'" (*Sigmund Strauss, Inc. v East*

149th Realty Corp., 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994].) "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." (*Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2d Dept 2012], citing *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006].)

In the instant motion, the Court finds that Defendant's primary documentary evidence submitted in support of the motion, the October 16, 2017 Release and Settlement Agreement by and between AECOM and NYCEDC, does not conclusively establish a defense to Plaintiff's asserted claims for professional malpractice, breach of contract, or contractual indemnification. Further, the Court finds that Plaintiff has a cause of action as to those three claims.

As the Court of Appeals stated in *Fasso v Doerr*,

> "The right to subrogation accrues upon payment of the loss by the insurer and it generally cannot be imperiled by the insured. Once an insurer has paid a claim and the tortfeasor knows or should have known that a right to subrogation exists, the wrongdoer and the insured cannot agree to terminate the insurer's claim without its consent and such an agreement cannot be asserted as a defense to the insurer's cause of action."

(12 NY3d 80, 88 [2009] [internal quotation marks, citations, and emendations omitted]; *see also NYP Holdings, Inc. v McClier Corp.*, 65 AD3d 186 [1st Dept 2009].) "This doctrine of equitable subrogation must be liberally applied for the protection of its intended beneficiaries, i.e., insurers." (*Group Health, Inc. v Mid-Hudson Cablevision, Inc.*, 58 AD3d 1029, 1030 [3d Dept 2009], citing *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995] [other citations omitted].)

Here, applying this doctrine liberally, Zurich has shown to a level adequate to defeat a motion to dismiss that it paid the claim, albeit to Skanska, in two installments in 2015 and 2016. Zurich has further shown to the same level that, at minimum, issues of fact exist as to whether AECOM knew or should have known that Zurich had a right to subrogation on or before the execution of the October 16, 2017 Release and Settlement Agreement by and between NYCEDC and AECOM.

The Court disagrees with Defendant that the settlement agreement by and between Skanska and NYCEDC submitted as exhibit F in movant's reply papers demonstrates itself unambiguously that it was executed on October 16, 2017. The first sentence of that agreement indicates that the agreement was made on August 29, 2017. That the date October 16, 2017 was handwritten into the margin on the second page by an unidentified individual, perhaps with initials "P.A." introduces this ambiguity, far from conclusively establishing in and of itself the date upon which the document was signed by the parties to it. Moreover, there is no affidavit submitted in support of the motion to enhance Defendant's argument, raised in its reply papers and argued at the September 25, 2018 oral argument, that the handwritten date and initials conclusively establishes that that the settlement agreement was made on October 16, 2017.

Further, the Court disagrees with Defendant's argument that the October 18, 2017 payment conclusively establishes that the settlement agreement between Skanska and NYCEDC was made on October 16, 2017. It is ambiguous whether the agreement was made on August 29, 2017. Moreover, the original complaint states that Zurich "has accepted the claim and paid to its insureds the sum of $1,173,637.35 as a result of damages to the piers, which damage has resulted from the conduct of defendant AECOM."

Whether such allegations will prove to be true, or whether AECOM knew or should have known that Zurich had a right to equitable subrogation before it settled with NYCEDC, are issues for a timely motion for summary judgment or for trial. That the original complaint was filed on October 6, 2017, ten days before the Release and Settlement Agreement between NYCEDC and AECOM was entered into, itself raises an issue of fact as to whether Defendant had actual knowledge of Zurich's right of subrogation, regardless of Defendant's submissions indicating it had no such knowledge. The time for the Court to consider those submissions made via proof in admissible form will be on a summary judgment motion or at trial. As the Court previously found, it is premature, on this mere motion to dismiss, to go further as to such arguments.

As the Court stated at the September 25, 2018 oral argument, it would be inequitable to permit an insured to frustrate and defeat the rights of its insurer where the insurer has paid out on a claim for damages suffered by the insured, where the insured has either received the payout or contracted and agreed to receive the payout at a later date from the direct claimant, where the tortfeasor knew or should have known of the payment to the insured or the agreement to pay made between the claimant and the insured, and where the insured and tortfeasor subsequently entered into a release and settlement agreement terminating the insurer's claim without its consent.

(THIS SPACE IS INTENTIONALLY LEFT BLANK.)

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendant AECOM USA, Inc. pursuant to CPLR 3211 (a) (1) and (7) to dismiss the amended verified complaint of Plaintiff Zurich American Insurance Company as subrogee of Skanska USA Building, Inc. and as subrogee of New York City Economic Development Corp. or, in the alternative, pursuant to CPLR 3212 for summary judgment in favor of Defendant and against Plaintiff is denied in its entirety; and it is further

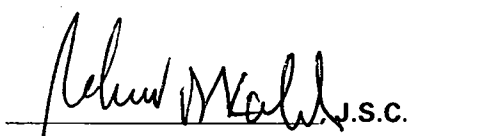
ORDERED that Defendant shall file and serve its answer per the CPLR; and it is further

ORDERED that, within 20 days of the date of the decision and order on this motion, Plaintiff shall serve a copy of this order with notice of entry upon Defendant; and it is further

ORDERED that the parties are directed to appear in Part 29, located at 71 Thomas Street, Room 104, New York, New York, 10013-3821, on December 18, 2018, at 9:30 a.m., for a preliminary conference.

The foregoing constitutes the decision and order of the Court.

Dated: September 25, 2018
New York, New York



HON. ROBERT D. KALISH J.S.C.

1. Check one:.....
2. Check if appropriate:..... MOTION IS:
3. Check if appropriate:.....

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE