

**Hunter Roberts Constr. Group, L.L.C. v Harleysville
Ins. Co. of N.Y.**

2019 NY Slip Op 31912(U)

July 2, 2019

Supreme Court, New York County

Docket Number: 160566/2017

Judge: Odessa Kennedy

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63

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HUNTER ROBERTS CONSTRUCTION GROUP, L.L.C.
and SEAPORT MANAGEMENT DEVELOPMENT
COMPANY, LLC,

Index No. 160566/2017
Motion Sequence 001

Plaintiffs,

- against -

HARLEYSVILLE INSURANCE COMPANY OF NEW
YORK, HARLEYSVILLE WORCESTER INSURANCE
and B & G ELECTRICAL CONTRACTORS OF N.Y., INC,

Defendants.

----- X
HARLEYSVILLE INSURANCE COMPANY OF NEW
YORK, HARLEYSVILLE WORCESTER INSURANCE
a/s/o HUNTER ROBERTS CONSTRUCTION GROUP,
L.L.C. and SEAPORT MANAGEMENT DEVELOPMENT
COMPANY, LLC,

Index No. 595244/2018

Third-Party Plaintiffs,

- against -

CURTIS PARTITION CORPORATION,

Third-Party Defendant.

----- X
HON. TANYA R. KENNEDY, J.S.C.;

In this action for declaratory relief, third-party defendant Curtis Partition Corporation (“Curtis Partition”), moves, pursuant to CPLR 3211(a)(2) and CPLR 3211(a)(7), to dismiss the third-party complaint of Harleystville Insurance Company of New York and Harleystville Worcester Insurance Company (collectively the “Harleystville Defendants”) for lack of subject matter jurisdiction and for failure to state a cause of action. The Court heard oral argument on the motion, which is denied for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

This declaratory judgment action arises out of the underlying personal injury action pending in Supreme Court, New York County, under index number 151458/2017 captioned *Deandria Gay v Seaport Management Development Company, LLC, Hunter Roberts Construction Group, LLC, and B & G Electrical Contractors of N.Y. Inc.* (“underlying action”) (Andrews Affirmation, Exhibit A). Mr. Gay alleged in the underlying action that he sustained personal injuries on January 5, 2017 during his employment with Curtis Partition while working at Pier 17 at the South Street Seaport (“the Project”) (*id.*, Exhibit A, ¶¶5-7). Mr. Gay also alleged in the underlying action that the named defendants failed to ensure proper and adequate lighting and violated New York Industrial Code Section 23-1.30 (*id.*, Exhibit B, ¶11).

The Harleystown Defendants are insurance companies which issued liability insurance policies to B&G Electrical Contractors of N.Y., Inc. (“B&G”), one of three defendants in the underlying action. The other two defendants in the underlying action, Hunter Roberts Construction Group, L.L.C. (“Hunter Roberts”) and Seaport Management Development Company, LLC (“Seaport”) tendered their defense and indemnification to Harleystown New York by correspondence, dated May 19, 2017, seeking coverage as additional insureds under a primary policy issued to B&G (Andrews Affirmation, Exhibit C). On June 8, 2017, Harleystown New York rejected the tender on the ground that the alleged accident in the underlying action did not arise out of B&G’s operations (*id.*).

Plaintiffs commenced this declaratory judgment action against B&G and its insurer, the Harleystown Defendants, on November 29, 2017 (*id.*, Exhibit B). Plaintiffs allege in their complaint, *inter alia*, that:

Prior to the date of Mr. Gay’s alleged accident, B&G entered into a contract with HUNTER ROBERTS pursuant to which B&G agreed to perform electrical work and services at the Project (“the Hunter Roberts – B&G Contract”).

Under the Hunter Roberts-B&G Contract, B&G was required to procure general liability insurance coverage naming HUNTER ROBERTS and SEAPORT as additional insureds with respect to claims arising out of B &G's work at the Project.

The HARLEYSVILLE DEFENDANTS issued liability insurance coverage to B&G that provided additional insured coverage to HUNTER ROBERTS and SEAPORT for claims arising out of B&G's operations, work, acts and omissions.

HUNTER ROBERTS and SEAPORT are named as additional insureds in the insurance policies issued by the HARLEYSVILLE DEFENDANTS.

(*id.*, Exhibit D, ¶¶20-21, 24, 26-27, 36-37).

On March 26, 2018, the Harleysville Defendants then commenced a third-party action against Curtis Partition for contractual indemnification (*id.*, Exhibit F). The Harleysville Defendants allege in the third-party complaint, *inter alia*, that:

If Plaintiffs are owed additional insured coverage by the HARLEYSVILLE DEFENDANTS, which the HARLEYSVILLE DEFENDANTS deny, then the HARLEYSVILLE DEFENDANTS are entitled by operation of law and the relevant insurance policies to subrogate Plaintiffs' rights with regard to the Underlying Gay Action.

If the HARLEYSVILLE DEFENDANTS owe additional insured coverage to HUNTER ROBERTS and SEAPORT, THE HARLEYSVILLE DEFENDANTS are entitled to subrogate to their claims against CURTIS PARTITION.

To the extent that the HARLEYSVILLE DEFENDANTS owe additional insured coverage to HUNTER ROBERTS and SEAPORT, the HARLEYSVILLE DEFENDANTS are entitled to indemnification from CURTIS PARTITION of all amounts paid to defend or indemnify HUNTER ROBERTS and SEAPORT in the Underlying Gay Action, pursuant to their contractual indemnity rights against CURTIS PARTITION.

WHEREFORE, pursuant to CPLR 1007, Harleysville demands that if Plaintiffs recover judgment against Harleysville, then the court award Harleysville a judgment against Curtis Partition in the amount of all sums obtained against Harleysville by Plaintiffs, together with costs and attorneys' fees and all other further relief as the court deems just and proper.

(*id.*, ¶¶ 14, 19, 20, p. 6).

ARGUMENTS

Curtis Partition now moves, pursuant to CPLR 3211(a)(2) and CPLR 3211(a)(7), to dismiss the third-party complaint for lack of subject matter jurisdiction and for failure to state a cause of action. Curtis Partition argues that this Court does not have subject matter jurisdiction over the claims asserted against it because there is no justiciable case or controversy involving Curtis Partition. Particularly, Curtis Partition notes that it never claimed that it is an insured under the insurance policies that the Harleystown Defendants issued to B&G, and that Curtis Partition had no contractual relationship with B&G or the Harleystown Defendants.

Further, Curtis Partition maintains that each claim the Harleystown Defendants assert in the third-party complaint is “purely hypothetical” and that the prayer for relief is “entirely contingent” (Supporting Memo of Law, p. 7). Therefore, Curtis Partition contends that the claims set forth in the third-party complaint are based on hypothetical disputes, which are non-justiciable and not ripe for adjudication.

Lastly, Curtis Partition argues that even if this Court has subject matter jurisdiction, dismissal is required because the third-party complaint fails to state a cause of action. Curtis Partition notes that the Harleystown Defendants have not paid any claims on behalf of plaintiffs and have no subrogation rights against Curtis Partition since the Harleystown Defendants are actively litigating against these entities over the issue of additional insured coverage.

Curtis Partition notes that it is enrolled in a Contractor Controlled Insurance Program (“CCIP”) which Hunter Roberts arranged through its insurance broker, Arch Insurance Company (“Arch”) (Zirpoli Affidavit, ¶7). Curtis Partition also notes that it qualifies as an insured under the insurance policy Arch issued to Hunter Roberts under the CCIP (*id.*, ¶9). Therefore, Curtis Partition maintains that allowing the Harleystown Defendants to stand in plaintiffs’ shoes and pursue their claims would violate New York’s antesubrogation rule. Curtis Partition further

contends that allowing the Harleystville Defendants to stand in plaintiffs shoes would undermine the purpose of the CCIP, which is to provide uniform coverage to the named insured and all enrolled contractors under a single policy.

In opposition, the Harleystville Defendants argue that their rights against Curtis Partition are justiciable and that the third-party complaint states a cause of action. According to the Harleystville Defendants, an insurer which may owe coverage to a putative insured is entitled to commence a contingent subrogation claim as a third-party action or as a separate action.

Additionally, the Harleystville Defendants argue, *inter alia*, that the antisubrogation doctrine applies to insurance companies and not to insureds, such as Hunter Roberts. The Harleystville Defendants also argue that the antisubrogation doctrine does not apply to separate policies, such as the Harleystville Policy under which Hunter Roberts seeks coverage. Further, the Harleystville Defendants argue that the antisubrogation doctrine does not preclude a subrogation claim by an insurer against a third-party non-insured.

DISCUSSION

A party may move for dismissal under CPLR 3211(a)(2) where the court does not have subject matter jurisdiction. CPLR 3001 provides that “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a *justiciable controversy* whether or not further relief is or could be claimed . . .” (emphasis added).

CPLR 1007 permits a defendant to implead a person who is not a party to the action “who is or may be liable” for all or part of the claim. “The language of CPLR 1007 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 citations omitted]).

In addition, “the parties to an insurance contract can covenant that the insurer shall have no right to sue the third party until the insurer's liability has been established or the claim paid in part or in full” (*id.* at 156). Therefore, since a contractual limitation is absent in this matter, the Harleysville Defendants would have the right to implead Curtis Partition (*see Cassell Vacation Homes v Commercial Union Ins. Cos.*, 121 AD2d 674, 675 [2d Dept 1986]).

Moreover, “the inter-pleader statute (CPLR 1007) permits a third-party action based on subrogation even where no payment has been made” (*id.* at 152). “[A]n insurer, upon being sued by its insured on the policy, may implead an alleged third-party tortfeasor responsible for the damage, injury, or loss, even if the insurer has not made any payments under the policy” (21 Carmody-Wait 2d § 123:63; citing *McCabe v Queensboro Farm Products, Inc.*, 22 NY2d 204 [1968]; *Krause v American Guar. & Liab. Ins. Co.*, *supra*; *Cassell Vacation Homes v Commercial Union Ins. Cos.*, *supra*). There is certainly a justiciable controversy when there is “potential liability” to pay for a party’s exposure in an underlying litigation (*Long Is. Light Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). The Court has subject matter jurisdiction as there is a justiciable controversy. Therefore, the Court denies that branch of the motion to dismiss pursuant to CPLR 3211(a)(2).

When evaluating a defendant’s motion to dismiss, pursuant to CPLR 3211(a)(7), the court “must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference” (*Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 [2016] citing *Goshen v Mutual Like Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

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, 659 [1997]). “An insurer, however, has no right of subrogation against its own insured for a claim

arising from the very risk for which the insured was covered” (*North Star Reins. Corp. v Continental. Ins. Co.*, 82 NY2d 281, 294 [1993]). “In other words, an insurer may not step into the shoes of its insured to sue a third-party tortfeasor -- if that third party also qualifies as an insured under the same policy -- for damages arising from the same risk covered by the policy” (*ELRAC, Inc. v Ward*, 96 NY2d 58, 76 [2001]). Additionally, the “antibusrogration rule should not be extended to distinct and separate policies” (*N. Star Reins. Corp. v Cont. Ins. Co.*, *supra* at 295 [1993] [citation omitted]).

The antibusrogration rule is inapplicable in this matter, as the insurer stepping into the shoes of the plaintiffs are the Harleysville Defendants and not Arch. Curtis Partition does not qualify as an insured under the Harleysville primary insurance policy or the Harleysville Worcester umbrella/excess policy. The branch of the motion to dismiss pursuant to CPLR 3211(a)(7) is denied because the third-party complaint sets forth a cause of action.

In accordance with the foregoing, it is

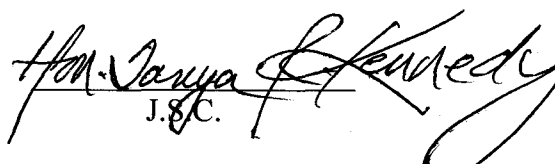
ORDERED that the motion by Curtis Partition Corporation to dismiss pursuant to CPLR 3211(a)(2) and (7) is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on August 7, 2019 at 2:15 p.m.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
July 2, 2019

ENTER:



J.R.C.

HON. TANYA R. KENNEDY