

**Merrimack Mut. Fire Ins. Co. v Associated Fire
Protection, Inc.**

2020 NY Slip Op 30676(U)

March 5, 2020

Supreme Court, New York County

Docket Number: 160109/2017

Judge: John J. Kelley

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

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INDEX NO. 160109/2017

MERRIMACK MUTUAL FIRE INSURANCE COMPANY, as
subrogee of 11 EAST 22ND STREET, LLC, care of REM
RESIDENTIAL,

MOTION DATE 02/25/2020

MOTION SEQ. NO. 001

Plaintiff,

- v -

**DECISION + ORDER ON
MOTION**

ASSOCIATED FIRE PROTECTION, INC.,

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 22, 23, 24, 25, 26, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for

JUDGMENT - SUMMARY

In this subrogation action commenced by the plaintiff insurer to recover amounts it paid to its insured under a casualty insurance policy, the defendant, Associated Fire Protection, Inc. (AFP), moves for summary judgment dismissing the complaint. The plaintiff opposes the motion. The motion is granted, and the complaint is dismissed.

AFP provided fire-detection and sprinkler system maintenance and testing services to the plaintiff's insured, which owns property in Manhattan. On June 1, 2017, a pipe that was part of the sprinkler system burst in the insured's building, causing water damage. The plaintiff paid its insured's claims for casualty loss and damage and commenced this action against AFP, alleging that AFP was negligent in testing or maintaining the sprinkler system.

A February 1, 2017 agreement (hereinafter the 2017 agreement) between the building owner and AFP describes AFP's scope of work as follows:

"Supply labor and material to (1) 5-Year Hydrostatic and flow test

"• Pre-Test and Fire Official Test Included

“• This quote includes 2 men 1 day for the pre-test and 2 men one day on a separate appointment for the Fire Dept witnessed test. Customer is to coordinate the scheduling between NYFD and AFP.

“• This test requires removing or flipping the check valve on the FDC. Full access will be provided to techs on site to perform the test.”

The agreement also provided that the insured would

“release [AFP] from any liability for any event or condition covered by your insurance, even if due to our breach of contract, negligence, gross negligence, or any other theory of liability. This provision is also known as a waiver of subrogation.”

A waiver of subrogation clause in a contract between an allegedly negligent contractor and a property owner is generally enforceable against the owner's insurer, but only when the subject matter of the clause is within the scope of the specific context in which it appears (see *Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]; *Trump-Equitable Fifth Ave. Co. v H.R.H. Constr. Corp.*, 106 AD2d 242, 244-245 [1st Dept 1985]). Although the result of a waiver of subrogation means that an insurer does not have the right to stand in the shoes of its insured and recover against a tortfeasor,

“[s]uch a result would not . . . result in an illegal contracting away of liability by defendants of their own negligence, if negligence there was. When a similar waiver of subrogation clause was attacked as an illegal exemption from liability and invalid under General Obligations Law § 5-323, the Second Department characterized it as ‘not a contracting away of liability, but only of subrogation rights’ (*Board of Educ. v Valden Assoc.*, 60 AD2d 617, 618, *affd* 46 NY2d 653). As stated in more practical terms by the Court of Appeals, such a waiver of subrogation provision, ‘in effect simply [requires] one of the parties to the contract to provide insurance for all of the parties’ (*Board of Educ. v Valden Assoc.*, 46 NY2d 653, 657, *affg* 60 AD2d 617, *supra*)”

(*Trump-Equitable Fifth Ave. Co. v H.R.H. Constr. Corp.*, 106 AD2d at 245).

The proponent of a summary judgment motion must make a prima facie showing, by sufficient proof in admissible form, that there are no triable, material issues of fact. Once the movant meets this burden, the opponent must adduce proof in admissible form to raise a triable issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562

[1980]). AFP established its prima facie entitlement to judgment as a matter of law dismissing the complaint by demonstrating that the work causing the pipe to burst was undertaken in connection with the 2017 agreement and that the waiver of subrogation clause in the 2017 agreement barred the plaintiff's subrogation claims. In opposition, the plaintiff failed to raise a triable issue of fact. Hence, the court must award summary judgment to AFP dismissing the complaint.

The court rejects the plaintiff's contention that additional discovery is necessary to ascertain whether the waiver of subrogation clause in fact applies to the subject work. Contrary to the plaintiff's contention, it is irrelevant whether AFP's alleged negligence or breach of a contractual obligation occurred on June 1, 2017, when the subject pipe burst, or on March 27, 2017, when it drained the subject sprinkler system, or on some other occasion between February 1, 2017 and June 1, 2017 when the system was being tested.

The insurer's complaint against AFP alleges that:

"Defendant ASSOCIATED FIRE PROTECTION, INC owed a duty to plaintiff's subrogor, REM, to direct, manage, control, maintain and/or supervise the REM Premises in a safe, careful and workmanlike manner so as to prevent the pipe break from creating a water damage event and damaging the Premises and property of REM.

"Upon information and belief, the water damage occurred at the Insured's Premises due to the breach of the duties owed to REM by defendant ASSOCIATED FIRE PROTECTION, INC which were caused, in whole or in part, by the negligence, carelessness, negligence per se, recklessness, and negligent actions and/or omissions on the part of defendant ASSOCIATED FIRE PROTECTION, INC in its maintenance and/or control of the REM Premises."

The construction of an unambiguous contract is an issue of law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance (*see NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52 [1st Dept 2008]). The question of whether an ambiguity exists must be ascertained from the face of an agreement, without regard to extrinsic evidence (*see Warberg Opportunistic Trading Fund, L.P. v*

GeoResources, Inc., 112 AD3d 78 [1st Dept 2013]; *Schmidt v Magnetic Head Corp.*, 97 AD2d 151 [2d Dept 1983]).

There is no ambiguity as to whether the particularized scope of work articulated in the 2017 agreement fell within the ambit of the waiver of subrogation clause, or whether the allegations in the complaint describe work undertaken pursuant to that agreement. Rather, the clause purports to apply to any breach of contract, negligence, or gross negligence allegedly committed by AFP in performing the sprinkler system test subsequent to February 1, 2017, including the March 27, 2017 draining of the system or other disassembly or inspection of and adjustments to the pipes between February 1, 2017 and the incident of June 1, 2017.

Although CPLR 3212(f) permits a court to deny a summary judgment motion where "facts essential to justify opposition may exist but cannot then be stated," the plaintiff failed to demonstrate how further discovery might lead to relevant evidence (*see Alcor Life Extension Found. v Johnson*, 136 AD3d 464 [1st Dept. 2016]). "The 'mere hope' of [plaintiff] that evidence sufficient to defeat such a motion may be uncovered during the discovery process is not enough" (*Frierson v Concourse Plaza Assoc.*, 189 AD2d 609, 610 [1st Dept 1993]). In order to invoke CPLR 3212(f) to oppose AFP's motion, the plaintiff is "bound to show there was a likelihood of discovery leading to such evidence, i.e., that facts may exist but cannot be stated at that time" (*id.*) The plaintiff, however, fails to make such a showing here, as it does not explain what discovery is needed to oppose the motion, specifically failing to identify which documents might reveal any facts relevant to its contentions, or what testimony any proposed deposition witnesses might be able to proffer in connection therewith (*see Gyabbah v Rivlab Transp. Corp.*, 129 AD3d 447 [1st Dept 2015]).

The plaintiff's suggestion that the 2017 contract annexed to AFP's moving papers may not be the contract applicable to the work that caused the leak does not require a different outcome. As part of its opposition papers, the plaintiff submits an agreement between its insured and AFP dated June 2, 2016 (hereinafter the 2016 agreement). Pursuant to the 2016

agreement, the owner agreed to purchase a one-year Protection Plus Program from AFP. The 2016 agreement sets forth a price schedule for inspection and labor associated with the inspection and testing of 15 separate fire detection and suppression systems.

In the first instance, the tests enumerated in the 2016 agreement do not include a five-year hydrostatic and flow test, which is the subject of the 2017 agreement. Hence, there is no reasonable interpretation of the agreements that would permit a finder of fact to conclude that the 2016 agreement encompassed the March 27, 2017 drainage and hydrostatic testing that AFP established as the cause of the June 1, 2017 incident. Moreover, no one with personal knowledge submitted an affidavit making that assertion or stating that any work that actually caused the pipe to burst was undertaken in the course of one of the 15 tests and inspections enumerated in the 2016 agreement.

Even if there were a genuine disputed issue of fact as to whether the work that caused the burst pipe was undertaken in connection with the 2016 agreement, the court would be constrained to award summary judgment to AFP in event. Inasmuch as AFP established, prima facie, that the subject work was performed in connection with the 2017 agreement, it did not premise its waiver of subrogation argument on the 2016 agreement. Nonetheless, since the plaintiff raised the issues of whether the 2016 agreement was applicable and whether the waiver of subrogation defense consequently was inapplicable, the court, upon searching the record (*see generally* CPLR 3212[b]; *cf. Dunham v Hilco Constr. Co., Inc.*, 89 NY2d 425, 429-430 [1996]; *Charter School for Applied Tech. v Board of Educ. for City School Dist. of City of Buffalo*, 105 AD3d 1460, 1462 [4th Dep 2013]), notes that the 2016 agreement, at page five, contains the exact same waiver of subrogation language as is set forth in the 2017 agreement. Hence, even if the 2016 agreement encompassed the work that caused the burst pipe, the waiver of subrogation clause in that agreement would bar the plaintiff's claims against the defendant as well.

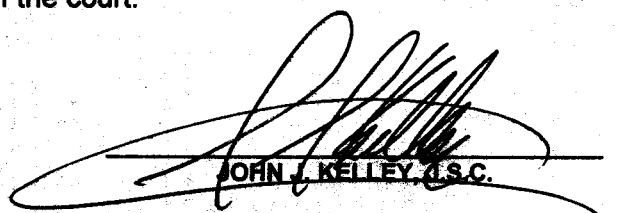
Accordingly, it is,

ORDERED that the defendant's motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further,

ORDERED that the Clerk of the court shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

3/5/2020
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE