JEMB Realty Corp. v New Cingular Wireless PCS, LLC
2020 NY Slip Op 32916(U)
September 3, 2020
Supreme Court, New York County
Docket Number: 159298/2019
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

JEMB REALTY CORP.,

Plaintiff,

- v -

NEW CINGULAR WIRELESS PCS, LLC, AT&T MOBILITY LLC

Defendant.

----------X

INDEX NO. 159298/2019

MOTION DATE 08/31/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46 (Motion 002)

were read on this motion to/for VACATE ORDER/RENEWAL.

In this subrogation action to recover damages for injury to property and breach of contract, the plaintiff moves, inter alia, pursuant to CPLR 5015(a)(1) to vacate this court's January 8, 2020 order. In that order, the court granted, upon the plaintiff's default, the defendants' motion to dismiss the complaint as barred by a release. The plaintiff also requests the court to vacate its default, consider its opposition papers, and deny the motion to dismiss. The defendants oppose the motion. The motion is granted, the court's January 8, 2020 order is vacated, and the defendants' motion to dismiss the complaint thereupon is denied.

The plaintiff alleges in its complaint that the defendants negligently caused flood damage to its real property by failing to maintain the air conditioning unit in the 9th-floor equipment room of its building. It also asserts that the defendants breached the subject lease by failing to keep the air conditioning unit in good, working order. The plaintiff contends that it sustained two discrete losses as a consequence of flooding caused by the defendants' failure to maintain the air- conditioning unit---one on August 17, 2015, and one on September 5, 2017. The plaintiff

further asserts that its casualty insurer, Liberty Mutual Fire Insurance Company (Liberty Mutual), which paid out on the plaintiff's claim of loss, was subrogated to its rights, and that Liberty Mutual was entitled to recover, from the defendants, the amounts that it had paid to the plaintiff.

The defendants, relying upon an October 5, 2018 settlement agreement and general release, which had been executed by the plaintiff's president, Joseph L. Jerome, moved pursuant to CPLR 3211(a)(1) and (a)(5) to dismiss the complaint on the grounds that documentary evidence provided a complete defense to the action, and that the action was barred by a written, executed release. In his affidavit, James Hormann, the defendants' vice president for construction and engineering, authenticated the copy of the settlement agreement and release that was annexed to the defendants' moving papers. The agreement was executed on behalf of the named plaintiff, JEMB Realty Corp. (JEMB), and Herald Center Department Store, L.P. (Herald), as releasors, which were together defined in the settlement agreement and release as "Herald Center." It was also executed on behalf of the named defendants, New Cingular Wireless PCS, LLC, and AT&T Mobility, LLC, which were together defined therein as "New Cingular." Pursuant to paragraph 17 of the settlement agreement and release, in consideration of the payment of money by the two defendants and the provision of remediation services to clean up flood damage, JEMB and Herald

> "unconditionally, irrevocably and generally release[d] to the fullest extent permitted by law, relating to any and all claims concerning the August 17, 2015 and September 5, 2017 incidents: [the defendants] of and from all causes of action, claims, suits, debts, accounts, covenants, disputes, agreements, promises, damages, judgments, executions and demands whatsoever in law or in equity, whether known or unknown, suspected or unsuspected, forseen [sic] or unforeseen."

The plaintiff did not oppose the defendants' motion. Consequently, this court, by order dated January 8, 2020, granted the defendants' motion, upon the plaintiff's default, concluding that the release barred this action. The court denied, as redundant, the defendants' request to dismiss the complaint on the alternative ground that documentary evidence provided a complete

defense to the action (*see Sotomayor v Princeton Ski Outlet Corp*., 199 AD2d 197, 197 [1st Dept 1993]).

The plaintiff now seeks to vacate the January 8, 2020 order on the ground of excusable default. To vacate the order on that ground, the plaintiff must demonstrate both a reasonable excuse for its default in opposing the defendants' motion and a potentially meritorious opposition to the motion (*see Dokaj v Ruxton Tower Ltd. Partnership*, 91 AD3d 812, 813 [2d Dept 2012]; CPLR 5015[a][1]). In this case, the plaintiff is required to demonstrate a potentially meritorious cause of action in order to establish the existence of potentially meritorious opposition to the motion (*see Santiago v Valentin*, 125 AD3d 459, 459-460 [1st Dept 2015]).

The determination of what constitutes a reasonable excuse for a default generally lies within the sound discretion of the motion court (*see Gecaj v Gjonaj Realty & Mgt. Corp.*, 149 AD3d 600, 602 [1st Dept 2017]). In the instant motion, the plaintiff's attorney explains that, although the defendants had agreed to an adjournment of the motion to dismiss, an attorney in his office who was tasked with filing the signed stipulation of adjournment neglected to do so in a timely manner, thus causing the motion to be deemed fully submitted without opposition. The court agrees with the plaintiff that this instance of law office failure constitutes a reasonable excuse for failing to oppose the motion to dismiss the complaint, especially given the absence of any evidence of willful or contumacious conduct on the plaintiff's part (*see Alliance for Progress, Inc. v Blondell Realty Corp*., 179 AD3d 629, 629 [1st Dept 2020]).

The court also agrees with the plaintiff that it not only has a potentially meritorious opposition to the motion, but that its opposition is *actually* meritorious. The court rejects the defendants' contention that the release set forth at paragraph 17 of the settlement agreement and release was unambiguous and unconditional, at least as it related to the subrogation rights of Liberty Mutual, JEMB's casualty insurer. In this regard, the plaintiff points to paragraph 3 of the settlement agreement and release, which provides as follows:

"The Payment Amount is to be paid by New Cingular as follows:

> "a. New Cingular will pay Herald Center a total of _____ for its deductibles concerning the August 17, 2015 and September 5, 2017 incidents within thirty days following execution of the Agreement;
>
> "b. New Cingular will submit into an escrow account to pay Herald Center's further costs relating to repair work arising from the September 5, 2017 incident ("the Escrow Amount:) subject to the following conditions:
>
> "(1) Herald Center must first submit documentation, including invoices and payment records, showing that it has expended in repairs and replacement work (which work includes labor, materials, taxes, surcharges, and any other cost or expense paid by Herald Center in connection with making repairs) relating to the September 5, 2017 incident (the "Repair Work"); (2) New Cingular will agree to distribution of escrow funds for reasonable replacement and installation costs taking into account depreciation values; (3) the amount being paid by New Cingular for the further repairs will be capped at _____. *This does not alter or affect any subrogation rights of Herald Center's insurer, Liberty Mutual Insurance Company,* or any other tenants"

(emphasis added). The plaintiff also submits the signed and acknowledged December 18, 2007 subrogation release that it tendered to Liberty Mutual in the face amount of $1,068,429.27.

Inasmuch as JEMB and Herald are together defined in the settlement agreement and release as "Herald Center," and the payments to "Herald Center" do not "alter or affect" Liberty Mutual's subrogation rights, the plain and natural meaning of the contractual language of paragraph 3(b)(3) (*see Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]) is that, notwithstanding the provisions of paragraph 17, JEMB reserved the subrogation rights of its insurer. There is no merit to the defendants' contention that the general release set forth in paragraph 17 impliedly waived the subrogation rights of JEMB's insurer, as expressly set forth in paragraph 3(b)(3); where a general release includes "no express waiver" of a the subrogation rights of a releasor's insurer, a waiver cannot be implied (*Matter of State Farm Mut. Auto. Ins. Co. v City of Yonkers*, 21 AD3d 1110, 1113 [2d Dept 2005]). All of the authority cited by the defendants for the proposition that the execution of a general release waives an insurer's subrogation rights involved general releases that were unambiguous and unconditional in their terms, and in which the releasor executed the release *without reserving subrogation rights* (*see Daimler Chrysler Ins. Co. v New York Cent. Mut. Fire Ins. Co.*, 125 AD3d 518, 519 [1st Dept

2015]; *Progressive Ins. Co. v. Sheri Torah, Inc*., 44 AD3d 837, 838 [2d Dept 2007]; *Ziegler v Raskin,* 100 AD2d 814, 816 [1st Dept 1984]).

The copy of the agreement that was submitted by the defendants left blank spaces at paragraph 3(b)(3) in connection with the particular amounts that they agreed to pay to JEMB and Herald in consideration of the release. Crucially, notwithstanding this omission, the defendants submit no evidence to establish that any money that they did pay pursuant to paragraph 3(b)(3) constituted only a portion of the full consideration, or that the reservation of Liberty Mutual's subrogation rights was thus somehow limited only to that portion.

The court also rejects the defendants' contention that JEMB lacks standing to prosecute this subrogation action on behalf of Liberty Mutual. CPLR 1004 provides, in relevant part, that

> "Except where otherwise prescribed by order of the court, an . . . insured person who has executed to his insurer . . . a . . . subrogation receipt, . . . may sue or be sued without joining with him the person for or against whose interest the action is brought."

Thus, a releasor-subrogor such as JEMB may prosecute a subrogation action in its own name, on behalf of its insurer-subrogee, here Liberty Mutual, without joining the latter as a party plaintiff (*see Pennsylvania General Ins. Co. v Austin Powder Co.*, 68 NY2d 465, 470 n 3 [1986]), provided that the subrogor submits documentary proof in the form of an assignment or subrogation receipt (*see id*.; *Oversea Chinese Mission v Well-Come Holdings, Inc*., 145 AD3d 634, 635 [1st Dept 2016]). Inasmuch as JEMB has submitted the relevant subrogation receipt on this motion, it has demonstrated that it has standing to pursue Liberty Mutual's subrogation claims against the defendants. It has also demonstrated that, at the very least, those claims were reserved by paragraph 3(b)(3) of the settlement agreement and release, and not waived by paragraph 17 thereof. Whether the defendants may have other defenses to the subrogation claims is an issue not before the court.

Hence, JEMB has demonstrated a meritorious opposition to the motion to dismiss, and a potentially meritorious cause of action.

The court notes that, inasmuch as the plaintiff did not oppose the initial motion to dismiss the complaint, it may not now move to "renew" its opposition to that motion (*see Arcila v Incorporated Village of Freeport*, 231 AD2d 660, 661 [2d Dept 1996]).

In light of the foregoing, it is,

ORDERED that the plaintiff's motion to vacate this court's order dated January 8, 2020 is granted, and that order be, and hereby is, vacated; and it is further,

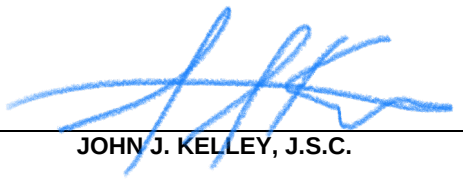
ORDERED that, upon the vacatur of the order dated January 8, 2020, the papers now submitted by the plaintiff in opposition to the defendants' motion to dismiss the complaint are accepted and have been considered by the court; and it is further,

ORDERED that, upon the vacatur of the order dated January 8, 2020, the defendants' motion to dismiss the complaint is denied; and it is further,

ORDERED that the parties shall appear remotely, via the Microsoft Teams computer application, for a preliminary conference on October 15, 2020, at 10:30 a.m., and the court shall send an e-mail link to the counsel for the parties in connection with that preliminary conference; and it is further;

ORDERED that the Clerk of the court and the clerk of the Trial Support Part shall mark this matter RESTORED.

This constitutes the Decision and Order of the court



9/3/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		**CASE DISPOSED**			x	**NON-FINAL DISPOSITION**	
	x	**GRANTED**		**DENIED**		**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**