

Gluck v Mapfre Ins. Co. of N.Y.
2020 NY Slip Op 35809(U)
October 9, 2020
Supreme Court, Rockland County
Docket Number: Index No. 031375/2016
Judge: Rolf M. Thorsen
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SUPREME COURT: STATE OF NEW YORK
COUNTY OF ROCKLAND

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CHAIM GLUCK and MALKE GLUCK,

Plaintiffs,

-against-

MAPFRE INSURANCE COMPANY OF NEW YORK,

Defendant.
-----X

MAPFRE INSURANCE COMPANY OF NEW YORK,

Third-Party Plaintiff,

-against-

WELL DONE HOMES, AT AIR SOLUTIONS,
ADVANCED GUTTERS, INC., VALLEY
FRAMES, UPSTATE ROOFING and ABC
CORPORATIONS 1-10,

Third-Party Defendants.
-----X

HON. ROLF M. THORSEN, A.J.S.C.

Third-Party Plaintiff, Mapfre Insurance Company of New York (hereinafter "Mapfre"), Plaintiffs' insurer, commenced the within third-party action against Third-Party Defendants Well Done Homes ("Well Done Homes"), AT Air Solutions ("AT Air"), Advanced Gutters, Inc. ("Advanced Gutters"), Valley Frames ("Valley Frames"), and Upstate Roofing ("Upstate Roofing") (collectively referred to as "Third Party Defendants") seeking common law indemnification and contribution.¹ Specifically, Mapfre alleges that in the event Mapfre is found liable in the underlying action brought by Plaintiffs, Mapfre is entitled to indemnification and contribution from all of the Third-Party Defendants due to their negligence in

¹ Third-Party Defendants Well Done Homes and Valley Framers have not appeared in this action and default judgments have been entered against them. See, NYSCEF Doc. Nos. 30 and 161. Thus, references made to the "Third Party Defendants" do not include them.

causing the underlying damages to Plaintiffs' residence.² The Third-Party Defendants now move for summary judgment. Mapfre also moves for summary judgment on its third-party complaint.³ As alternate relief, Advanced Gutters and AT Air move for severance of the third-party action. The Court has considered the following papers on the motions, which the Court has consolidated for the purpose of the within Decision:

1. Advanced Gutters' Notice of Motion (#016) and Affirmation in Support with Exhibits A through P attached thereto;
2. Upstate Roofing's Affirmation in Opposition and Exhibit 1 attached thereto;
3. Mapfre's Opposition (to all Third-Party Defendants' motions for summary judgment);⁴
4. Advanced Gutters' Reply Affirmations and Exhibit A attached;
5. AT Air's Notice of Motion (#017), Attorney's Affirmation in Support and Exhibits A through M attached thereto, Affidavit and Memorandum of Law;
6. Advanced Gutters' Affirmation in Partial Opposition and Exhibits A and B attached thereto;
7. AT Air's Attorney Affirmation in Reply;
8. Upstate Roofing's Notice of Motion (#019), Affirmation in Support and Exhibits A through J attached thereto;
9. Advanced Gutters' Affirmation in Opposition and Exhibits A and B attached thereto;
10. Mapfre's Notice of Motion (#020), Supporting Affirmation in Support and Exhibits A through VV attached thereto;
11. Advanced Gutter's Affirmation in Opposition and Exhibit A attached thereto;
12. AT Air's Attorney's Affirmation in Opposition; and
13. Mapfre's Reply Affirmation (NYSCEF Doc. No. 331).

The facts underlying these actions, briefly stated, are as follows: Plaintiffs entered into a contract with Well Done Homes to provide construction and renovation work on their home located at

² In Plaintiffs' action against Mapfre, Plaintiffs allege two causes of action for breach of contract arising out of Mapfre's failure to pay the entire amount of damages they claim they are entitled to under their homeowners' insurance policy.

³ Mapfre has also moved for summary judgment with respect to the Plaintiffs' complaint sounding in breach of contract. That motion will be decided in a separate Decision and Order.

⁴ Although Mapfre's Opposition (NYSCEF Doc. No. 325) is in response to all three third-party defendants' motions for summary judgment, it was only uploaded onto NYSCEF with respect to Motion #016.

8 Suffern Place in Monsey, New York. Well Done, in turn, subcontracted with the Third-Party Defendants for their specific services. It is undisputed that AT Air installed the HVAC system prior to the siding work performed by Upstate Roofing and prior to the installation of the gutters performed by Advanced Gutters. It is also undisputed that several months after the completion of the work, Plaintiffs' sustained water damage to their home due to a condensate pipe leak.⁵ Plaintiffs submitted a claim for damages to Mapfre seeking \$290,015.04 in "dwelling damages" and another \$39,088.23 in "additional living expenses." After its investigation into the damages claimed and its determination of coverage, Mapfre issued a check to Plaintiffs in the amount of \$9,086.77. Plaintiffs thereafter commenced an action against Mapfre for breach of contract alleging that Mapfre grossly underpaid their claim. Mapfre, in turn, brought this third-party action against all of the Third-Party Defendants seeking common law indemnification and contribution. Specifically, Mapfre alleges that "if [it] is held liable to Plaintiffs, Mapfre is entitled to indemnification and/or contribution from the Third-Party Defendants as a result of their negligence contributing to the loss alleged in the original Complaint." See, Advanced Gutters' Exhibit G.

Turning first to Mapfre's cause of action seeking common law contribution, "[c]ontribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person.'" Godoy v. Abamaster of Miami, Inc., 302 A.D.2d 57, 62 (2d Dept. 2003), quoting, 23 NY Jur 2d, Contributions, Indemnity and Subrogation §24. It is "a common law right of apportionment among tortfeasors based on their actual degrees of fault as determined by the fact-finder." See, Alexander, Vincent C., Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 1006 to 2200, C1401:1, at 501 (1997 ed.). In other words, a cause of action for common law contribution, which has been codified in CPLR §1401, is available among joint tortfeasors who are subject to liability for the same injury. Thus, "[w]here ... liability is not based upon culpability, the appropriate concept is indemnification, rather than contribution." Godoy v. Abamaster of Miami, Inc. 302 A.D.2d at 62.

Applied here, Mapfre is not a joint tortfeasor for purposes of a common law right of contribution. Mapfre concedes that it is not a joint tortfeasor. As Plaintiffs' insurer, Mapfre clearly did not perform any of the work that caused the condensate pipe leak that allegedly resulted in the damages to Plaintiffs' home. Any claim

⁵ The extent of the damages caused by the leak, however, is in dispute.

for contribution would be available for the third-party defendants to make against each other. Moreover, the "injury" allegedly caused by Mapfre, i.e., economic loss to Plaintiffs' based on its alleged breach of contract, is not the same as the "injury" caused by the third-party defendants, i.e., the condensate pipe leak allegedly caused by their negligence. As such, summary judgment in favor of the third-party defendants must be granted with respect to Mapfre's contribution claim.

With respect to Mapfre's cause of action for common law indemnification, "[t]he right to indemnity stands upon the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled ... to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him." Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 468 (1892).

Under this principle, and in light of the respective burdens of the parties seeking summary judgment,⁶ and based on this Court's review of the aforementioned papers, the Court finds that the Third-Party Defendants have failed to establish their entitlement to judgment as a matter of law.⁷ Moreover, with respect to Mapfre's motion for summary judgment, although the Court finds that Mapfre has established its entitlement to judgment as a matter of law, its motion must nevertheless be denied as the Third-Party Defendants, in opposition, have raised triable issues of fact.

Based on the foregoing, it is hereby

ORDERED that Advanced Gutters' motion for summary judgment is granted with respect to Mapfre's claim for contribution and it is denied with respect to Mapfre's claim for indemnification; and it is further

ORDERED that AT Air's motion for summary judgment is granted with respect to Mapfre's claim for contribution and it is denied with respect to Mapfre's claim for indemnification; and it is further

ORDERED that Upstate Roofing's motion for summary judgment is granted with respect to Mapfre's claim for contribution and it is

⁶ See, Zuckerman v. New York, 49 N.Y.2d 557, 562 (1980).

⁷ Even if this Court found that the Third-Party Defendants established their entitlement to judgment as a matter of law, the papers submitted in opposition to their respective motions raise triable issues of fact to warrant denial of the motions.

denied with respect to Mapfre's claim for indemnification; and it is further

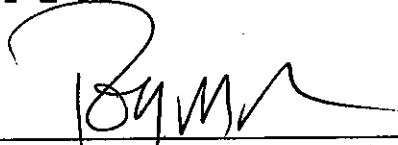
ORDERED that Mapfre's motion for summary judgment as to its third-party complaint is denied; and it is further

ORDERED that Advanced Gutters' and AT Air's motion for severance is denied.⁸

The foregoing constitutes the Decision and Order of this Court.

ENTER

Dated: October 9, 2020
New City, New York


HON. ROLF M. THORSEN
Acting Supreme Court Justice

TO: NYSCEF

⁸ The reasons for denying the motion for severance are set forth in this Court's Decision and Order dated October 8, 2020, wherein the Court denied Mapfre's motion for severance.