Community Assn. Underwriters of Am., Inc. v Advanced Chimney, Inc.
2021 NY Slip Op 33482(U)
July 22, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 604322/2019
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 604322/2019
CAL. No. 202000953OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

***P R E S E N T*:**

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 5/12/21
ADJ. DATE
Mot. Seq. #004 MG; CASEDISP

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COMMUNITY ASSOCIATION UNDERWRITERS OF AMERICA, INC. a/s/o WHITEWOOD AT NORTH HILLS CONDOMINIUM,

Plaintiff,

- against -

ADVANCED CHIMNEY, INC. and ADVANCED MAINTENANCE, INC., d/b/a ADVANCED CHIMNEY, INC.,

Defendants.

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de LUCA LEVINE LLC
Attorney for Plaintiff
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HANNUM FERETIC PRENDERGAST & MERLINO, LLC
Attorney for Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Advanced Chimney, Inc. and Advanced Maintenance, Inc.
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New York, New York 10006

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ADVANCED CHIMNEY, INC. and ADVANCED MAINTENANCE, INC., d/b/a ADVANCED CHIMNEY, INC.,

Third-Party Plaintiffs,

- against -

WHITEWOOD HOMES INC., WHITEWOOD AT NORTH HILLS ASSOCIATES, CARL VERNICK, THOMAS HALSTEAD and JUDITH KATZ,

Third-Party Defendants.

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WESTERMAN BALL EDERER MILLER ZUCKER & SHARFSTEIN, LLP
Attorney for Third-Party Defendant Carl Vernick
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MARTYN, MARTYN, SMITH & MURRAY
Attorney for Third-Party Defendants Thomas Halstead & Judith Katz
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Hauppauge, New York 11788

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ADVANCED CHIMNEY, INC. and ADVANCED MAINTENANCE, INC., d/b/a ADVANCED CHIMNEY, INC.,

Second Third-Party Plaintiffs,

- against -

SOIL MECHANICS DRILLING CORP.,

Second Third-Party Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the defendants, dated April 20, 2021, and supporting papers (including Memorandum of Law); (2) Plaintiff's Statement of Additional Material Facts, dated May 5, 2021, and supporting papers; (3) Plaintiff's Opposition to Defendant's Motion for Summary Judgment, dated May 5, 2021; and (4) Reply Affirmation by the defendants, dated May 10, 2021, and supporting papers (including Memorandum of Law); it is

ORDERED that the motion by the defendants for an Order pursuant to CPLR 3212, granting summary judgment dismissing all claims asserted against them, is granted.

This is a subrogation action to recover the sum of $523,573.14 allegedly paid by the plaintiff to its insured, Whitewood at North Hills Condominium, for damage to property caused by a fire that took place on February 12, 2016 at a multi-unit building in a condominium community located in Roslyn, New York. It appears that the insured was the owner of the common and structural elements of the building where the fire took place. The plaintiff claims that, sometime prior to the date of the fire, Thomas Halstead, a unit owner, hired the defendants to inspect, clean, maintain, repair, and perform other work on the chimney, chimney system, fireplace, and related components at his unit; that the fire originated in the area of the fireplace and chimney system in that unit; that the fire occurred because the defendants did not perform a complete and proper inspection in accordance with industry standards which would have revealed the defective condition that caused the fire, did not identify or cure the defective condition, did not properly hire, train, manage or supervise those charged with performing the work, and did not notify the unit owners that the fireplace and chimney system could not be used until the defective condition was repaired; and that the defendants launched "a force or instrument of harm" by conducting their inspections improperly and inadequately.

The plaintiff commenced this action on March 4, 2019. Following joinder of issue, the defendants commenced a third-party action against Whitewood Homes Inc. (general contractor),

Whitewood at North Hills Associates (original condominium sponsor), and Carl Vernick (engineer) as the parties responsible for what the defendants claim was the faulty construction of the building, and against Thomas Halstead and Judith Katz (the unit owners) for their alleged dangerous and negligent use of the chimney and fireplace. Carl Vernick, Thomas Halstead, and Judith Katz have all answered the third-party complaint, asserting claims contingent on the plaintiff's recovery against them; Whitewood Homes Inc. and Whitewood at North Hills Associates have not appeared or answered. The defendants subsequently commenced a second third-party action against Soil Mechanics Drilling Corp. as the party alleged to have employed Carl Vernick. Issue has not yet been joined in the second third-party action.

By Order dated February 26, 2021, the Court, *inter alia*, granted the plaintiff's motion for leave to amend its complaint, and denied the defendants' motion for summary judgment without prejudice to timely renewal upon joinder of issue on the amended complaint.

In its amended complaint, the plaintiff pleads four causes of action: one cause of action for negligence and one cause of action for breach of contract against each of the defendants. As the basis for its claims for breach of contract, the plaintiff alleges that its insured was the intended third-party beneficiary of a contract between Thomas Halstead and one or both of the defendants to inspect, clean, maintain, repair, and perform other work on the chimney, chimney system, fireplace, and related components at the unit.

Now, issue having been joined on the amended complaint, the defendants timely renew their motion for summary judgment. In support of their motion, the defendants contend, relative to the causes of action for negligence, that they did not owe the plaintiff's insured a duty of care; as to the causes of action for breach of contract, the defendants contend that the insured did not enter into any contracts with either of them, that the insured was not the third-party beneficiary of any relevant contract to which either defendant was a party and, in any event, that there was no breach of any contract to which either defendant was a party.

To obtain summary judgment on the merits of a case, it is necessary that a party establish its cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in its favor (CPLR 3212 [b]), and that it do so "by tender of evidentiary proof in admissible form" (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790, 792 [1979]; *accord* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once the requisite proof is offered, the burden shifts to the party opposing summary judgment; to defeat the motion, it must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *accord* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

Addressing first the causes of action for negligence, it is established law that a finding of negligence must be based on the breach of a duty, and that a contractual obligation, standing alone, will generally not give rise to a duty of care in favor of a third party unless one or more of the following exceptions apply, namely, (i) where the contracting party, in failing to exercise reasonable care in the performance of its duties, launches a force or instrument of harm by creating or exacerbating a

dangerous condition, (ii) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, or (iii) where the contracting party has entirely displaced the owner's duty to maintain the premises safely (***Espinal v Melville Snow Contrs.***, 98 NY2d 136, 746 NYS2d 120 [2002]).

With regard to the first *Espinal* exception, the Court finds the defendants' evidentiary proof sufficient to establish prima facie that they did not launch a force or instrument of harm. "[A] claim that a contractor exacerbated an existing condition requires some showing that the contractor left the premises in a more dangerous condition than he or she found them" (***Berger v NYCO Plumbing & Heating Corp***., 127 AD3d 676, 677, 7 NYS3d 204, 206 [2015]). Based on the report of the Nassau County Fire Marshal and the inspections and analyses of the parties' experts, it appears that the fire resulted not from any work performed by the defendants but from the presence of combustible material beneath the fireplace hearth which had been installed years prior to the fire. According to the Fire Marshal's investigation, the fire originated below the fireplace, and started as result of an apparent failure, malfunction or breakdown of a fireplace component allowing hot embers to come into contact with the combustible structural elements below. The parties' experts similarly concluded that the proximate cause of the fire was the inappropriate installation of wood in the combustion air intake beneath the fireplace hearth. Additionally, based on the affidavit and deposition testimony of Michael Steeneck, the defendants' owner and president, the deposition testimony of Thomas Halstead, and copies of the invoices evidencing the work performed by the defendants, it appears that the work performed by the defendants on the fireplace and chimney in June and July 2015 and January 2016 did not include any work on the fireplace hearth or on the combustion air intake beneath the fireplace hearth. Thus, the defendants having established that they "did nothing more than neglect to make the [fireplace] safer—as opposed to less safe—than it was before" (***Ileiwat v PS Marcato El. Co.***, 178 AD3d 517, 519, 115 NYS3d 269, 271 [2019]; *see* ***Bauerlein v Salvation Army***, 74 AD3d 851, 905 NYS2d 215 [2010]), the Court finds that they met their evidentiary burden.

As to the second and third *Espinal* exceptions, the Court likewise finds the defendants' evidentiary showing sufficient to establish their prima facie entitlement to summary judgment. Based on the deposition testimony of Lisette Reilly, who is employed by the management company for Whitewood at North Hills Condominium, it appears that the plaintiff's insured was not aware, prior to February 12, 2016, of any repairs, maintenance, cleaning or inspection of the fireplace or chimney at the subject unit, inasmuch as the unit owner was responsible for interior work and would not inform the insured as to the need for any such work; she also testified that she did not know if anyone at the management company had ever heard of the defendants prior to the date of the fire. Thomas Halstead similarly testified at his deposition that he did not recall any conversations with either the management company or the condominium board regarding cleaning or other work to be performed on his fireplace or chimney. As the defendants correctly note, a plaintiff cannot detrimentally rely on a contract of which it has no knowledge (*e.g.* ***Foster v Herbert Slepoy Corp.***, 76 AD3d 210, 905 NYS2d 226 [2010]). The defendants also established, prima facie, that their contractual undertaking was a limited one, not intended to displace the owners' duty to safely maintain the premises. Upon review of the deposition testimony of Michael Steeneck and Thomas Halstead, as well as the copies of the invoices provided, it appears that when the defendants were initially retained by the unit owners in June and July 2015, it was

to address an odor that lingered after the unit owners used the fireplace; that the defendants took steps at that time to eliminate the odor and to address other concerns brought to light after an inspection of the chimney; that when the defendants returned to the property in January 2016, it was to address a complaint regarding a similar odor emanating from the fireplace; that the defendants did not return again to the property after that; and that Halstead did not contact them to request that they return, even though they had again been unsuccessful in eliminating the odor.

With respect to the causes of action for breach of contract, the Court similarly finds the defendants' evidentiary proof sufficient to demonstrate their prima facie entitlement to summary judgment. While a third party may sue as a beneficiary on a contract made for its benefit, "an intent to benefit the third party must be shown * * * and, absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts" (***Port Chester Elec. Constr. Corp. v Atlas***, 40 NY2d 652, 655, 389 NYS2d 327, 330 [1976]). A third party's right to enforce a contract will be upheld if the third party is the only one who could recover for its breach, or if it is clear from the language of the contract that there was an intent to permit enforcement by the third party (***Dormitory Auth. of the State of N.Y. v Samson Constr. Co.***, 30 NY3d 704, 70 NYS3d 893 [2018]; ***Fourth Ocean Putnam Corp. v Interstate Wrecking Co.***, 66 NY2d 38, 495 NYS2d 1 [1985]). "[T]he parties' intent to benefit the third party must be apparent from the face of the contract" (***LaSalle Natl. Bank v Ernst & Young***, 285 AD2d 101, 108, 729 NYS2d 671, 676 [2001]). Here, upon review of the invoices provided as proof of the "contract" between the defendants and the unit owners, it is evident that they do not contain any provision expressly stating an intention to benefit the plaintiff's insured.

The plaintiff, in opposition, does not attempt to counter or even address any aspect of the defendants' evidentiary showing. Instead, the plaintiff claims a right to subrogation derived not from payments which it made to its insured, but for real property damage sustained by the unit owners. The plaintiff argues that it was required under the terms of its insurance policy to pay for damage to real property owned not only by its insured but also by the unit owners; that the majority of the proceeds paid under the policy as a result of the fire was, in fact, for real property damage sustained by the unit owners; and that to the extent the plaintiff paid for damages to real property owned by the unit owners, the plaintiff "steps into their shoes" as to any claims in tort or contract they may have arising from the defendants' work. The plaintiff's argument is rejected. Subrogation, in the context of insurance, is a transfer of rights which arises by operation of law when an insurer makes payment to or on behalf of its insured; the insurer obtains, to the extent of the payment, the rights of its insured against those persons causing the damage (***Federal Ins. Co. v Arthur Andersen & Co.***, 75 NY2d 366, 553 NYS2d 291 [1990]; 1 New Appleman New York Insurance Law § 3.05 [1] [2d ed]). Even were the Court to overlook the fact that the plaintiff's argument is inconsistent with the theory of its pleadings—that the plaintiff became subrogated to the rights and interests of *its insured* for all amounts paid under the policy and is suing *as subrogee of its insured*—and assuming, further, that some of the property damaged was owned by the unit owners, the plaintiff has offered no law to support its claim that the right of subrogation arises in the context of payments made by an insurer to or on behalf of persons *other than the insured*. Nor, in any event, has it been shown that the plaintiff made any payments to the unit owners following

the fire. To the contrary, it appears that the insurance proceeds were paid by checks issued and payable not to the unit owners, but to the insured.

Accordingly, summary judgment is granted dismissing the complaint, and the third-party complaint and second third-party complaint are hereby dismissed as academic, as are the various claims pleaded in the answers to the third-party complaint.

Dated: July 22, 2021

David T. Reilly, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

TO: CLARK & FOX
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