SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

----------x

MAIN STREET AMERICA ASSURANCE COMPANY
a/s/o LAMELA & SONS, INC.,

Plaintiff,

-against-

VERTICON, LTD., SATIN FINE FOODS, INC.,
SATIN REALTY ASSOCIATES, LLC,

Defendants.

----------x

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF005849-2020
Motion Date: March 5, 2021

The following papers numbered 1 to 7 were read on Defendants' motion for dismissal of the Complaint and imposition of sanctions, and Plaintiff's cross motion to amend the caption:

Notice of Motion - Affirmation / Exhibits - Memorandum.. 1-3

Notice of Cross Motion - Affirmation / Exhibits - Memorandum 4-6

Reply Affirmation / Exhibits 7

Upon the foregoing papers it is ORDERED that the motions are disposed of as follows:

This is an insurance dispute arising out of the settlement of an underlying personal injury action entitled *Lamela v. Verticon, Ltd. et al.*, Ulster County Index No. 11-4377. The Complaint of plaintiff Main Street America Assurance Company ("Main Street") as subrogor of Lamela & Sons, Inc. ("Lamela") asserts a cause of action sounding in subrogation against defendant Verticon, Ltd. ("Verticon"), and causes of action against defendants Satin Fine Foods, Inc.

and Satin Realty Associates, LLC (collectively, "Satin") for impairment of Main Street's subrogation rights and unjust enrichment.

A. The Underlying Action and Litigation in the Third Department

Relevant factual background is set forth in detail in the Appellate Division, Third Department's decision in *Lamela v. Verticon, Ltd.,* 185 AD3d 1319 (3d Dept. 2020):

> Plaintiffs were injured when an unsecured wall collapsed, displacing a motorized scissor lift that plaintiffs operated while performing demolition work on a construction site. During the course of their work, plaintiffs moved the lift in close proximity to the unsecured wall. Plaintiffs were employed by third-party defendant [Lamela], and the accident occurred in a warehouse that was owned by defendant [Satin]....Defendant Verticon, Ltd. was the general contractor and contracted with Lamela, as well as defendant Accurate Refrigeration Design, LLC, to serve as subcontractors. Employees of Accurate's subcontractor, defendant Cooler Panel Pros, Inc., were constructing the wall that collapsed when the accident occurred. Plaintiffs commenced this action alleging negligence and violations of the Labor Law.
>
> In July 2014, Supreme Court granted plaintiffs' motion for partial summary judgment, finding Verticon and Satin strictly liable pursuant to Labor Law §240(1). Defendants thereafter agreed to a settlement of plaintiffs' claims – specifically, defendants and plaintiffs agreed on a total payment of $3.2 million, to be apportioned under an agreement by which Verticon and Satin would pay $2,199,999, Accurate would pay $1 and Cooler would pay $1 million. Although Lamela did not participate in or contribute to the settlement, its counsel was present at the time the settlement was announced and objected. Releases were thereafter signed providing that plaintiff James Lamela would receive $500,000 and plaintiff Robert Lamela would receive $2.7 million.
>
> Subsequently, Verticon and Satin filed an amended third-party complaint seeking contractual indemnity against Lamela based upon the indemnification clause contained in the contract, which required Lamela to indemnify both Verticon and Satin. Lamela answered the amended third-party complaint and, among other things, asserted cross claims against Verticon seeking common-law indemnity and contribution. Lamela then moved for summary judgment dismissing the amended third-party complaint, and Verticon and Satin cross-moved for summary judgment on the indemnity claim. Verticon withdrew its motion prior to decision and Supreme Court granted that aspect of the motion in which Satin sought contractual indemnity and denied Lamela's motion for summary. Lamela appealed, and this Court affirmed....

> Following the appeal, Lamela remitted approximately $2 million to Satin, thereby satisfying its contractual indemnity obligation to that entity. Soon thereafter, Verticon moved for summary judgment seeking dismissal of Lamela's cross claims asserting, among other things, that the indemnification provision contained in the contract between Lamela and Verticon bars Lamela from seeking common-law indemnity. Supreme Court granted Verticon's motion and dismissed Lamela's cross claims. Lamela appeals.
>
> Although this appeal stems from the dismissal of Lamela's cross claim seeking common-law indemnity, we would be remiss not to address the background of this case relative to this issue. As made abundantly clear by Lamela, both in this appeal and the prior appeal before this Court, Lamela is dissatisfied with the allocation of the settlement proceeds between Satin and Verticon and how the allocation impacted Lamela's indemnity obligation to Satin. Lamela's claim stems from its belief that the insurance company, which represented both Satin and Verticon, acted in bad faith by apportioning the larger share of the settlement to Satin, which was concededly not negligent and only vicariously liable as the owner (*see* Labor Law §240[1]). Lamela asserts that this is unfair because it posits that if Verticon was actually negligent, and if an accurate – larger – share of the settlement was allocated to Verticon based upon its negligence, Lamela's contractual indemnity obligation to Satin would have been decreased proportionately. However, even if all of this were true, we cannot fashion a common-law indemnity right where none exists, since we would be waving an obligation out of whole cloth, one that was neither bargained for nor is permissible under the law. Here, Lamela's novel upstream common-law indemnity claim fails for two reasons: (1) indemnification is governed by the contract and only goes one way – in favor of Verticon; and (2) Lamela is seeking indemnity for a voluntarily assumed contractual obligation flowing to Satin, rather than one imposed vicariously, or otherwise, by operation of law. As such, Supreme Court properly granted Verticon's motion for summary judgment and dismissed Lamela's cross-claim for common-law indemnity.

Id., 185 AD3d at 1320-21.

B. Contractual / Insurance Relationships of the Parties to the Underlying Action

Having lost at every turn, Main Street / Lamela commenced the present action against Verticon and Satin. Before proceeding to analyze Main Street's claims, it is essential first to identify the parties to the underlying personal injury action, to understand their labyrinthine contractual and insurance relationships, and to understand their role in the accident and in the settlement of the underlying action.

1. The Parties

-- Satin was the owner of the premises where the accident occurred.

-- Verticon was Satin's general contractor.

-- Verticon in turn contracted with subcontractors Lamela and Accurate.

-- Accurate in turn contracted with sub-subcontractor Cooler.

Satin's liability as owner under Labor Law §240(1) was purely vicarious. There was no negligence on its part. All of the other parties – Verticon, Lamela, Accurate and Cooler – were involved either in an operational or supervisory capacity in the work which led to the accident. Each of them may have been negligent, and the negligence of each may potentially have contributed to the accident.

2. Contractual / Insurance Relationships

So far as is pertinent to this case:

-- Satin possessed rights of contractual and common law indemnity against Verticon

-- Satin and Verticon possessed rights of contractual indemnity against Lamela.

-- Verticon was insured by TIC.

-- Satin was an additional insured under Verticon's TIC policy.

-- Lamela was insured by Main Street.

-- Verticon was an additional insured under Lamela's Main Street policy.

-- Accurate was insured by the Hartford Insurance Company ("Hartford").

-- Satin and Verticon were additional insureds under Accurate's Hartford policy.

3. The Litigation and Settlement of the Underlying Action

As additional insureds of Accurate under the Hartford policy, Satin and Verticon tendered their defense of the underlying action to Accurate / Hartford. Hartford accepted the tender. Satin, pursuant to its right of contractual indemnity, and Verticon, as additional insured under the Main Street policy, tendered their defense of the action to Lamela / Main Street. Main Street declined the tender, and, per the Third Department, breached its contractual obligation to indemnify Satin. Hartford, having accepted the tender of Satin's and Verticon's defense, was in a position to control the defense of the action and to shape the allocation of the settlement proceeds among the parties accepting responsibility. The allocation was as follows:

Verticon	$200,000.00	(Paid by TIC)
Satin	$2,199,999.00	(Paid by Hartford)
Accurate	$1	
Cooler	$1,000,000.00	

Lamela / Main Street did not participate in the settlement and vigorously objected to this allocation.

C. Satin's Judgment Against Lamela / Main Street For Contractual Indemnity

Satin recovered the entirety of the $2,199,999.00 it paid in settlement of the injured plaintiff's claims from Lamela / Main Street pursuant to its right of contractual indemnity. At the direction of Satin's counsel, the judgment was paid by Lamela / Main Street to Hartford.

As the Third Department observed, the allocation of the personal injury action settlement was anomalous in that by far the greatest share was allocated to the only party – Satin – whose liability was wholly vicarious. The negative impact of this allocation upon Lamela / Main Street

was described by the Third Department in these terms:

> Lamela is dissatisfied with the allocation of the settlement proceeds between Satin and Verticon and how the allocation impacted Lamela's indemnity obligation to Satin. Lamela's claim stems from its belief that the insurance company, which represented both Satin and Verticon, acted in bad faith by apportioning the larger share of the settlement to Satin, which was concededly not negligent and only vicariously liable as the owner (*see* Labor Law §240[1]). Lamela asserts that this is unfair because it posits that if Verticon was actually negligent, and if an accurate – larger – share of the settlement was allocated to Verticon based upon its negligence, Lamela's contractual indemnity obligation to Satin would have been decreased proportionately.

Lamela v. Verticon, Ltd., supra, 185 AD3d at 1321.

D. Legal Analysis

1. Main Street's Subrogation Claim Against Verticon Is Barred by the Antisubrogation Rule

"Subrogation, an equitable doctrine, entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse [cit.om.]. Subrogation allocates responsibility for the loss to the person who in equity and good conscience ought to pay it, in the interest of avoiding absolution of a wrongdoer from liability simply because the insured had the foresight to procure insurance coverage [cit.om.]. The right arises by operation of law when the insurer makes payment to the insured [cit.om.]." *Northstar Reinsurance Corporation v. Continental Ins. Co.,* 82 NY2d 281, 294 (1993).

"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 [cit.om.]. Public policy requires this exception to the general rule both to prevent the insurer from passing the incidence of loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer's

incentive to provide a vigorous defense for its insured [cit.om.]." *Northstar, supra,* 82 NY2d at 294-295.

Here, Main Street purports to assert a subrogation claim in its capacity as subrogee of Lamela, its insured, against Verticon. However, there is, in actuality, no such claim. Main Street, having reimbursed Lamela for its liability to Satin in contractual indemnity, is actually attempting to assert *Satin's* rights against Verticon. Hence, Main Street is effectively suing as subrogee of Lamela as subrogee of Satin.

There is yet one more step to the analysis. "New York law does not distinguish, for purposes of the antisubrogation rule, between subrogation claims brought directly against an insured and claims brought against a common insurer." *NYC Department of Transportation v. Petric & Associates, Inc.,* 132 AD3d 614, 615 (1st Dept. 2015); *Ohio Cas. Ins. Co. v. Trans-continental Ins. Co.,* 372 Fed.Appx. 107, 112 (2d Cir. 2010); *Houston Cas. Co. v. Prosight Specialty Ins. Co.,* 2020 WL 4340383 at *4 (S.D.N.Y., July 28, 2020). It was Hartford, as Satin's insurer, not Satin itself, that paid Satin's share of the underlying personal injury settlement. So, what Main Street is really attempting to assert here are Hartford's rights as subrogee of Satin against Verticon. In essence, then, Main Street sues Verticon as subrogee of Lamela as subrogee of Hartford as subrogee of Satin.

Since Verticon and Satin are both insureds under the Hartford policy, Main Street's claim as subrogee of Hartford is in actuality a claim by Hartford against its own insured, which is barred by application of the antisubrogation rule. *See, Stein v. Yonkers Contracting, Inc.,* 244 AD2d 476, 477 (2d Dept. 1997). Since the antisubrogation rule would bar Hartford's claim against Verticon, it bars Main Street's claim as Hartford's subrogee as well: "A subrogee 'is

subject to any defenses or claims which may be raised against the subrogor. Thus, a subrogee may not acquire any greater rights than the subrogor' (*Solomon v. Consolidated Resistance Co. of America,* 97 AD2d 791, 792...)." *Wausau Underwriters Ins. Co. v. Gamma USA, Inc.,* 166 AD3d 928, 930-931 (2d Dept. 2018).

Main Street's cause of action against Verticon is therefore barred as a matter of law. Main Street's proposal to amend the caption to allege that it sues as subrogee of Satin is unavailing, as that would not alter the fact that it is effectively alleging a claim by Hartford against its own insured, which is barred by the antisubrogation law. Therefore, the First Cause of Action in the Complaint is dismissed, and Plaintiff's motion to amend the caption is denied.

2. Main Street's Claim Against Satin For Alleged Impairment of Subrogation Rights Against Cooler, Verticon and Accurate Is Without Merit

Cooler was not an insured under the Hartford policy. The sum of $1million dollars was paid by Cooler or on its behalf – independent of the Hartford policy – in settlement of the injured plaintiffs' claims against it, whereupon Cooler was released from liability. If and to the extent that any claims which Main Street may have had against Cooler survive the operation of General Obligations Law §15-108, Satin has done nothing to impair them.

Satin, Verticon and Accurate were all co-insureds under the Hartford policy. For the reasons shown in Point "1" above, (1) any subrogation claim by Main Street against them would involve an assertion of *Hartford's* rights as subrogee of Satin, and (2) an insurer is barred by the antisubrogation rule from asserting a subrogation claim against its own insured. Thus, Main Street had no subrogation rights against Verticon and Accurate that Satin could impair.

Main Street argues that Satin should have maintained insurance coverage independent from Verticon and Accurate in order to preserve Lamela's subrogation rights (Mem., p. 7). However, Lamela / Main Street having breached its contractual obligation to indemnify Satin for its liability to the injured plaintiffs, it cannot now in good faith assert that Satin should not have availed itself of its additional insured status under the Hartford policy.

Main Street further argues that Satin's acceptance of additional insured coverage should have the effect of preventing it from seeking indemnification from Lamela because Satin's receipt of additional insured coverage satisfied its need for indemnification and released the named insured from liability to Satin (Mem., p. 11). However, Lamela / Main Street was obliged to raise that defense in opposition to Satin's claim against Lamela for contractual indemnity. Satin having obtained a final judgment against Lamela for contractual indemnity, Main Street is now barred by the principles of *res judicata* from claiming that Satin's acceptance of additional insured coverage barred it from seeking indemnity from Lamela.

Finally, Main Street argues:

> Where Satin, its codefendants, and its insured combined to manufacture a settlement that allowed Satin to recover from Lamela while simultaneously attempting to prevent Lamela from asserting subrogation rights, that use of the antisubrogation rule should be viewed as an actionable impairment of subrogation. (Mem., p. 10)

Main Street's notion that the application of the antisubrogation rule may result in an actionable impairment of subrogation rights turns the doctrine on its head. There is no support in law for Main Street's contention. Furthermore, as noted above, subrogation is an "equitable doctrine" (*Northstar Reinsurance Corporation v. Continental Ins. Co., supra*, 82 NY2d at 294), and the equities do not favor Main Street here.

Main Street occupies the position it now finds itself in because it breached its contractual obligation to indemnify Satin and declined to accept a tender of the defense. Main Street had an opportunity to control the defense and settlement of the underlying personal injury action, but chose instead to sit on the sidelines, and while it has consistently objected to the allocation of responsibility for the settlement as among Satin, Verticon and Hartford, it never moved to set that settlement aside. Under the circumstances, the Court sees no warrant for a ruling that would deform and render uncertain the application of the antisubrogation rule.

In view of the foregoing, the Second Cause of Action in the Complaint is deficient in law and must be dismissed.

3. Main Street's Claim Against Satin for Unjust Enrichment Is Without Merit

Main Street has tendered no formal opposition to Defendants' motion for dismissal of the claim against Satin for unjust enrichment. In any event, the claim is wholly without merit. Satin did not receive Hartford's payment of $2,199,999.00: that money was paid to the injured plaintiffs in settlement of their claims. Neither did Satin receive the money paid by Main Street in satisfaction of Satin's judgment against Lamela for contractual indemnification: at the direction of Satin's counsel, that money was paid to Hartford.

Satin was not negligent. Its liability to the injured plaintiffs was wholly vicarious. Hence, there is nothing "unjust" in its having neither paid nor received any money in connection with this matter. Whether or not *Hartford* has been unjustly enriched by being wholly relieved of monetary responsibility for its putatively negligent insureds – Verticon and Accurate – is another matter, but that question is not presently before the Court.

In view of the foregoing, the Third Cause of Action in the Complaint is dismissed.

4. Defendants' Motion For Sanctions

In view of the curious facts underlying this case and the anomalous nature of the personal injury settlement that has brought the parties to this pass, the Court concludes that Main Street's advocating for an extension or modification of existing law was not wholly unreasonable, neither was it undertaken primarily to harass or maliciously injure the Defendants, nor was it advanced by material factual statements that were false. *See,* 22 NYCRR 130-1.1. Accordingly, Defendants' motion for sanctions is denied.

It is therefore

ORDERED, that the Defendants' motion for dismissal is granted, and Plaintiff's complaint is hereby dismissed, and it is further

ORDERED, that Defendants' motion for sanctions is denied, and it is further

ORDERED, that Plaintiff's cross-motion to amend the caption is denied.

The foregoing constitutes the decision and order of the Court.

Dated: March 19 , 2021 E N T E R
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.