State Farm Fire & Cas. Co. v MC Constr. Consulting Inc.

2022 NY Slip Op 33014(U)

September 7, 2022

Supreme Court, New York County

Docket Number: Index No. 153624/2022

Judge: Dakota D. Ramseur

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DAKOTA D. RAMSEUR** **PART** **34M**

Justice

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STATE FARM FIRE & CASUALTY COMPANY A/S/O BHAVIT PATEL,

Plaintiffs,

- v -

MC CONSTRUCTION CONSULTING INC., GROGAN & ASSOCIATES INC., M AT BEEKMAN CONDOMINIUMS

Defendants.

---X

INDEX NO. 153624/2022

MOTION DATE 08/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 16, 17

were read on this motion to/for DISMISS.

Plaintiff insurance company, State Farm Fire & Casualty Co. (plaintiff), commenced this action seeking recovery for alleged property damage caused by water infiltration into a condominium unit owned by plaintiff's subrogor, Bhavit Patel (Patel). Defendants Grogan & Associates, Inc. (Grogan) and M at Beekman Condominiums (Beekman) (collectively, defendants), now move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) on the ground that the subrogation waiver contained in the condominium's bylaws protects defendants from liability. Plaintiff opposes the motion arguing that the defendants failed to submit the insurance policy that contains the subrogation waiver, and the waiver does not apply to Grogan because the subrogation waiver in the condominium bylaws does not specify that managing agents are covered. The motion is opposed. For the reasons explained below, the defendants' motion is granted.

This action arises from water damage to a unit owned by Patel in the M at Beekman building located at 345 East 50th Street in Manhattan. Beekman owns the common areas of the building. Grogan was the condominium's managing agent in May 2019. According to the moving papers, the water damage occurred on May 13, 2019, as a result of the alleged negligence of defendant MC Construction Consulting Inc., which was hired to do repair work at the building. Plaintiff paid its subrogor for the damage to the unit pursuant to its insurance policy and commenced this action to obtain reimbursement of those funds.

A motion pursuant to CPLR 3211(a)(1) is granted when the documentary evidence conclusively establishes a defense to a claim as a matter of law (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). Dismissal of a complaint pursuant to 3211 (a)(7) is warranted where the facts in the pleadings fail to state a cognizable cause of action or where "the factual allegations or inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle*

Mexican Grill, Inc., 28 NY3d 137, 142 [2017]). When deciding a CPLR 3211 motion to dismiss, the pleadings are afforded liberal construction, the facts as alleged in the complaint are taken as true, the movant is given the benefit of every possible favorable inference, and the court only determines whether the facts as alleged fit within any cognizable legal theory (*Leon*, 84 NY2d at 87-88).

Subrogation "allows an insurer to stand in the shoes of its insured and seek indemnification for third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 N.Y.2d 654, 660 [1997]). According to defendants Grogan and Beekman, they are entitled to dismissal of the complaint because the condominium's bylaws contain a waiver of subrogation by plaintiff's subrogor that bar's plaintiff's action, and that waiver extends to Grogan as managing agent.

Section 5.2 of the condominium bylaws mandate, for insurance carried by the condominium, that:

> "All policies of physical damage insurance shall contain waivers (a) of subrogation, (b) of any defense based on coinsurance, (c) of any reduction of pro-rata liability of the insurer as a result of any insurance carried by Unit Owners, and (d) of invalidity arising from any acts of the insured or any Unit Owners ..."

(NYSCEF doc. no. 10, ex 1 to Grogan aff]). The bylaws further state:

> "Unit owners are advised to carry other insurance for their own benefit, provided that all such policies shall contain waivers or [sic] subrogation against the Condominium and the Board of Managers and further provide that the Liability of the carriers issuing insurance obtained by the Board of Managers shall not be affected or diminished by reason of any such additional insurance carried by any Unit Owner."

(*id.*)

Subrogation waiver provisions have been found by courts to be "generally valid and enforceable" (*Liberty Mut. Ins. Co. v Perfect Knowledge*, 299 AD2d 524, 526 [2d Dept 2002], *citing Gap v Red Apple Cos.*, 282 AD2d 119, 124 [1st Dept. 2001]). "Where a condominium by-law mandates that any resident-obtained insurance policy contain a subrogation waiver, the presence of that obligation alone suffices to bar subrogation actions-whether or not the policy in fact contains the required waiver" (*Nationwide Prop. & Cas. Ins. Co. v Johnson*, 2020 N.Y. Slip Op 50477[U], *2 [Sup Ct, NY County April 20, 2020], citing *Agostinelli v Stein*, 17 AD3d 982, 984-985 [4th Dept 2005]; *see also Allstate Indem. Co. v Virfra Holdings LLC*, 2013 N.Y. Slip Op. 33924[U], * 3 [Sup Ct, NY County July 3, 2013], *affd* 124 A.D.3d 528 [1st Dept 2015] [finding that subrogation waiver relinquished any right to recover for damages irrespective of whether subrogor took out policy that also contained a subrogation waiver]). Here, the bylaws contain a subrogation waiver. As such, that defendants did not include a copy of the insurance policy between plaintiff and its subrogor is not fatal to the defendants' motion because the policy is not dispositive of the enforceability of the subrogation waiver contained in the bylaws.

In opposition to defendants' motion, plaintiff does not assert that the waiver is invalid on its face or that defendant Beekman is not covered by the subrogation waiver. Therefore, the only question before the court is whether Grogan, as the managing agent, is also covered by the subrogation waiver. Plaintiff argues that the subrogation waiver does not apply to Grogan because the waiver clause does not specifically mention the managing agent. Defendants assert that a reading of the agreement as a whole indicates that the subrogation waiver was intended to apply to the managing agent. Defendants point to another provision of the bylaws that states, that the limitation on personal liability was intended to extend to managing agents when entering into agreements on behalf of the condominium. Section 2.15 states, in relevant part:

> "Liability of the Board of Managers.
>
> (A) No member of the Board of Managers or officers of the Condominium shall have any personal liability to the Condominium or to any Unit Owner for damages for any breach of duty in his capacity as Manager or officer
>
> ....
>
> (C) The Unit Owners shall indemnify and hold harmless each of the Managers against all contractual liability to others... It is intended that the Managers shall have no personal liability with respect to any contract made by them on behalf of the Condominium (except as Unit Owners). ...*Every agreement made by the Board of Managers or by the Managing Agent on behalf of the Condominium shall provide that the Manager or the Managing Agent, as the case may be, are acting only as agent for the Unit Owners and shall have no personal liability thereunder (except as Unit Owners.*)"

(NYSCEF doc. no. 10 [emphasis added]). Section 2.3 of the bylaws states the following:

> "Managing Agent. The Board of Managers may employ a Managing Agent to ... perform such duties and services as the Board of Mangers shall authorize or direct, including, but not limited to, the duties listed in Sections 2.2(A), (C), (D) and (Q) hereof. The Board of Managers may delegate to the Managing Agent all of the powers granted of the Board of Managers by these By-Laws other than the powers set forth in Sections 2.2(B), (E), (G), (H), (I) [,] (J), (K), (L), (M), (O), (P), (R), (S) and (W) hereof."

(*id.*).

When taken as a whole, the bylaws demonstrate that Grogan, when acting on behalf of the condominium, is essentially standing in the stead of Beekman and therefore would be protected equally from liability to third parties (*see General Acc. Ins. Co. v 80 Maiden Lane Assoc.*, 252 AD2d 391, 392 [1st Dept 1998]; *Ins. Co. of N. Am. v Borsdorff Servs. Inc.*, 225 AD2d 494, 494 [1st Dept 1996]; *see also Philadelphia Indem. Ins. Co. v B&L Mgt. Co. LLC*, 60 Misc 3d 1207[A] *3 [Sup Ct, NY County June 28, 2018] [granting defendant managing agent's motion for summary judgment and dismissing complaint on ground that the parties intended subrogation waiver to

include managing agent where lease agreement mentioned managing agent in other provisions of the lease and it was clear that managing agent was acting as an agent of the owner]). Here, defendant Grogan was acting as an agent on behalf of the condominium when it retained the services of defendant MC Construction to do construction and make repairs to the building. Therefore, Grogan is covered under the subrogation waiver (*see Pilsener Bottling Co., Inc. v Sunset Park Indus. Assoc.*, 201 AD2d 548, 549 [2d Dept 1994] ["A reading of the entire lease illustrates that the parties intended to include agents or employees … under the subrogation-waiver clause of the lease. It appears that the parties anticipated that the parties would operate through employees, agents, or servants"]).

Contrary to plaintiff's arguments, applying the subrogation waiver clause to defendant Grogan does not violate General Obligations Law § 5-321, which relates to "[a]ny lease of real property." As the unit herein does not relate to a lease of real property, GOL § 5-321 is inapplicable.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss pursuant to CPLR 3211 is granted and the complaint against defendants Grogan & Associated Inc. and M at Beekman Condominiums is dismissed; and it is further

ORDERED that a preliminary conference shall take place on December 6, 2022 at 10:00 a.m.; and it is further

ORDERED that the aforesaid defendants shall serve a copy of this decision and order upon all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.

9/7/2022
DATE

DAKOTA D. RAMSEUR, 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