

<b>Chubb Natl. Ins. Co. v Eyecrave Constr., Inc.</b>
2023 NY Slip Op 30318(U)
January 31, 2023
Supreme Court, New York County
Docket Number: Index No. 152889/2022
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

INDEX NO. 152889/2022

CHUBB NATIONAL INSURANCE COMPANY AS
SUBROGEE OF JACQUELINE GORDON,

MOTION DATE 09/07/2022

Plaintiff,

MOTION SEQ. NO. 002

- v -

EYECRAVE CONSTRUCTION, INC.,

DECISION + ORDER ON
MOTION

Defendant.

-----X

EYECRAVE CONSTRUCTION, INC.

Third-Party
Index No. 595331/2022

Plaintiff,

-against-

MAHARAL INCORPORATED

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61, 62, 63, 69, 72, 73, 75, 77, 78

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, Defendant/Third-Party Plaintiff Eyecrave Construction, Inc.'s ("Eyecrave") motion for summary judgment seeking dismissal of Plaintiff Chubb National Insurance Company as Subrogee of Jacqueline Gordon's ("Plaintiff" or "Chubb") Complaint is denied without prejudice.

I. Factual and Procedural Background

Plaintiff commenced this action on April 5, 2022 seeking to recoup damages paid to its insured incurred by Eyecrave's allegedly negligent toilet maintenance (NYSCEF Doc. 1). Plaintiff insured real and personal property located at One Morton Square, Apt. 2AW, New York, New

York (the “Insured Unit”) (*id.* at ¶¶ 4-5). It is alleged that Eyecrave was contracted by Third-Party Defendant Maharal Incorporated (“Maharal”) to perform work on the guest bathroom located at One Morton Square, Apt. 5AW, New York, New York (the “Neighboring Unit”) (*id.* at ¶ 7). Plaintiff alleges that Eyecrave was negligent in failing to install a new connector when reinstalling the toilet and sink, and that as a result, water leaked and damaged the Insured Unit (*id.* at ¶¶ 8-10).

Eyecrave answered on April 12, 2022 (NYSCEF Doc. 3). Eyecrave filed a Third-Party Summons and Complaint on April 20, 2022 (NYSCEF Doc. 5). The Third-Party Complaint named Maharal as a Third-Party Defendant and seeks (1) indemnification pursuant to a contract between the parties and (2) contribution for any negligence for which Maharal may be found liable (*id.*). Maharal answered the Third-Party Complaint on May 24, 2022 (NYSCEF Doc. 7) and filed an Amended Answer on June 1, 2022 (NYSCEF Doc. 15). On June 3, 2022, Maharal and Chubb executed a release wherein Chubb released Maharal from all claims which could be alleged against Maharal in the case at bar (NYSCEF Doc. 32).

Maharal is also insured by Chubb, and there is a separate lawsuit against Eyecrave wherein Chubb is suing Eyecrave as subrogee of Maharal (*see Chubb National Insurance Company A/S/O Maharal LLC, v Eyecrave Construction Inc.*, Sup. Ct., New York County, Index No. 156344/2022) (the “Parallel Litigation”). That action commenced on August 1, 2022. Eyecrave filed its Answer in that action on August 22, 2022. There has been no other action in the Parallel Litigation according to the docket aside from the filing of pleadings.

Maharal filed a motion to dismiss Eyecrave’s Third-Party Complaint on August 11, 2022 (NYSCEF Doc. 24). Eyecrave filed this motion for summary judgment on August 22, 2022 (NYSCEF Doc. 40).

According to the affidavit of the owner of Eyecrave, Thiago Penteago (“Penteago”), Maharal retained Eyecrave around July of 2018 to remove and replace two bathroom tiled floors and to reinstall a vanity and toilet (NYSCEF Doc. 67 at ¶¶ 4-7). Penteago stated in his affidavit that Eyecrave removed the old toilet, installed the new toilet, and used the same hose, provided by Maharal, that was connected to the old toilet when installing the new toilet (*id.* at ¶¶ 7-8). Penteago said there was no visible damage to the hose when installed, and that the hose appeared new (*id.* at ¶ 8). Penteago states the work was completed in November of 2018 (*id.* at ¶ 9). Penteago claims that the work done was inspected by Clinton Straube, the Building Superintendent, on a daily basis (*id.* at ¶ 10). The work was apparently approved by the New York City Department of Buildings (NYSCEF Doc. 55). The water damage which allegedly stemmed from the toilet hose occurred on July 26, 2020 (NYSCEF Doc. 1 at ¶ 9). Eyecrave argues in its motion papers that the Complaint should be dismissed because Chubb’s theory of negligence is too speculative (NYSCEF Doc. 56).

Plaintiff opposed Eyecrave’s motion by arguing that the motion is premature as there have not yet been depositions of key witnesses (NYSCEF Doc. 61). Moreover, Plaintiff argues only limited written discovery has been exchanged by the parties (*id.*). Plaintiff argues that there remains a genuine issue of material fact regarding whether a reasonable contractor would have replaced the 2015 toilet hose and used a new toilet hose during the process of removing and reinstalling the fixtures (*id.* at ¶ 6). Plaintiff argues it has proffered evidence through its experts who will testify that a reasonably prudent contractor, under the circumstances of this case, would have replaced the three-year old toilet connector to mitigate and prevent potential problems during the installation process (*id.* at ¶ 7). Indeed, Alan Fidellow (“Fidellow”) a cause and origin and forensic engineering expert, provided an affidavit in support of Plaintiff’s opposition (NYSCEF Doc. 63). Fidellow testified that to a reasonable degree of engineering certainty, for Eyecrave to

have performed its job in a workmanlike manner, Eyecrave should have installed a new toilet connector (*id.* at ¶ 5). Fidellow also stated in his affidavit that on May 20, 2021, he inspected the toilet connector at issue and confirmed that it had burst, which, to a reasonable degree of engineering certainty, caused the loss giving rise to this lawsuit (*id.* at ¶ 3).

## II. Discussion

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact.” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party’s “burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party.” (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. *See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1<sup>st</sup> Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

Further, CPLR § 3212(f) provides that “should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit...disclosure to be had and may make such other order as may be just.”

The Court finds that the instant motion is premature, as there have been no depositions to date, let alone a preliminary conference entering a discovery schedule. Indeed, this motion for summary judgment was made just four months after filing of the initial summons and complaint,

and only three months after an answer was filed on the Third-Party summons and complaint. As this is a fact intensive case, involving whether there was negligent installation of a toilet, Plaintiff is entitled to depose the contractor on site who allegedly caused the defective condition.

Indeed, the First Department recently held that summary judgment was premature as to a plaintiff's common law negligence claims where, as here, a defendant moved for summary judgment before being deposed and merely submitted an affidavit where the defendant averred that he "never received any complaints" about a condition giving rise to a loss (*Corona v HHSC 13th Street Development Corporation*, 197 AD3d 1025, 1026 [1st Dept 2021]; see also *Blackstock v Accede Inc.*, 194 AD3d 476, 477 [1st Dept 2021]; *Burke v Yankee Stadium, LLC*, 146 AD3d 720, 721 [1st Dept 2017]; *Blech v West Park Presbyterian Church*, 97 AD3d 443, 443 [1st Dept 2012]; *Gonzalez v Vincent James Management Co., Inc.*, 306 AD2d 226, 228 [1st Dept 2003]). Indeed, Pentego stated himself via sworn affidavit that "there was no visible damage to the flex hose upon installation" and therefore the condition of the hose at the time of installation, as well as the steps taken in re-installing the toilet from which the leak came, are exclusively in Eyecrave's knowledge and control. Plaintiff is entitled to depose Pentego regarding the installation of the toilet and the condition of the hose, as these issues are necessary in defending against any future summary judgment motion by Eyecrave.

The cases Eyecrave relies upon in support of its motion for summary judgment fail to show summary judgment is not premature. For instance, in *Butler-France v New York City Housing Authority*, there was testimony from a fire marshal assigned to investigate the cause and origin of the fire which was backed up by "cogent evidence", which showed movant NYCHA was not responsible for the fire (38 AD3d 433, 433-434 [1st Dept 2007]). There is no such report or testimony proffered by Eyecrave, but merely a self-serving and conclusory affidavit from

Eyecrave's owner (*see* NYSCEF Doc. 49). Likewise in *Colon v H & B Plumbing & Heating, Inc.*, there was a fire marshall's affidavit and deposition testimony which conclusively established that the Defendant contractor's work had nothing to do with the cause of the fire, but that the fire had instead been caused by a faulty refrigerator (305 AD2d 235, 236 [1st Dept 2003]). Again, there is no such conclusive evidence, nor any deposition testimony, in support of Eyecrave's motion.

Similarly, *Rivera v Adinolfi*, is inapposite to the procedural posture in our case (249 AD2d 55, 56-57 [1st Dept 1998]). In that case, deposition testimony was proffered, indicating the summary judgment motion in *Rivera* was made far later in discovery than the instant motion (*id.*). The same applies for *Utica First Ins. Co. v. Gristmill Earth Realty Corp.*, where the movant plumber had testified at his deposition and proffered such testimony in support of its motion for summary judgment (145 AD3d 1059, 1061 [2d Dept 2016]).

Although Eyecrave argues that Plaintiff's failure to respond to its statement of material facts requires this Court to deem those facts admitted, this Court disagrees. Plaintiff, in essence, refuted the facts in its own motion papers and through the affidavit of its expert (NYSCEF Docs. 61-63). Further, CPLR § 2001 permits this Court to permit a mistake, omission, defect or irregularity upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the omission may be disregarded.

Simply put at this early stage in litigation and based on the papers proffered by Eyecrave and Plaintiff, the Court is unable to grant a remedy as drastic as summary judgment. While a future summary judgment motion after further discovery may be decided differently, at this juncture, Eyecrave's motion for summary judgment is denied without prejudice.

Accordingly, it is hereby,

ORDERED that Defendant/Third-Party Plaintiff Eyecrave Construction, Inc.'s motion for summary judgment is denied without prejudice as it is premature; and it is further

ORDERED that the parties are directed to submit a proposed preliminary conference order on or before February 15, 2023 via e-mail to [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov). In the event the parties are unable to agree to a proposed preliminary conference order, the parties are directed to appear in-person for a preliminary conference on February 22, 2023 at 9:30 a.m. in 60 Centre Street, Room 442, New York, New York; and it is further

ORDERED that within ten (10) days of entry, counsel for Plaintiff shall serve, with notice of entry, a copy of this Decision and Order on all parties to this action; and it is further

ORDERED that such service may be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the Court.

1/31/2023  
DATE

*Mary V Rosado*  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE