

Wesco Ins. Co. v Ratan Realty, LLC
2023 NY Slip Op 35061(U)
December 7, 2023
Supreme Court, Bronx County
Docket Number: Index No. 33718/2019E
Judge: Kim Adair Wilson
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12**

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WESCO INSURANCE COMPANY, on behalf and
as subrogee of 505 BRONX EQUITIES, LLC,
Plaintiff,

DECISION AND ORDER
Index No. 33718/2019E
Motion Seq. #: 001

-against-

**HON. KIM ADAIR WILSON
J.S.C.**

RATAN REALTY, LLC; TRIBOROUGH
CONSTRUCTION SERVICES, INC; JJSL
DEVELOPMENT, INC.; Z & T ENGINEERING, PC;
and METAL STONE CONSTRUCTION, INC.,
Defendants.

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Kim Adair Wilson, J.:

“NOTICE OF MOTION” (NYSCEF Doc 5), dated and filed May 4, 2020, respectively, by one Michael Savino, Esq. (Cozen & O’Connor), counsel for defendant Z & T Engineering, PC, seeking “an Order pursuant to CPLR § 3211(a)(7) directing that plaintiff Wesco Insurance Company’s complaint, dated November 18, 2019, be dismissed in its entirety as alleged against defendant Z & T Engineering, P.C.[.]” is decided as set forth below.

By filing a Summons and Verified Complaint on November 19, 2019, plaintiff Wesco Insurance Company (“Wesco”) commenced the underlying action against the defendants Ratan Realty, LLC; Triborough Construction Services, Inc.; JJSL Development, Inc., Z & T Engineering, P.C., and Metal Stone Construction, Inc., seeking monetary relief for structural damages caused to the residential apartment building located at 505 East 184th Street, Bronx, New York, allegedly caused by the defendants’ joint construction and/or excavation work at the adjacent premises located at 500-510 East 185th Street, Bronx, New York. The Complaint states that the residential building located at 505 East 184th Street, Bronx (hereafter “the Property”) is owned by 505 Bronx Equities, LLC (“505 LLC”), and is insured by plaintiff Wesco. On or about May 17, 2017, 505 identified structural damages to the Property amounting to \$1,646,582.00, for which it was indemnified by Wesco, who in turn became subrogated to 505 LLC’s rights as against the defendants. Finally, plaintiff alleges that the combined actions jointly and severally attributed to the defendants “interfered with the

proprietary rights of 505 Bronx Equities, LLC." Altogether, plaintiff Wesco has pleaded three causes of action against the defendants for (i) negligence; (ii) *res ipsa loquitur*; and (iii) interference with plaintiff's subrogor's proprietary rights, and is seeking to recover \$1,646,582.00, equivalent to the cost of the damages paid by Wesco to 505 LLC for the structural harms to the Property.

Motion Papers

Now, in the instant motion, defendant Z & T Engineering, P.C. ("Z & T") moved to dismiss all three causes action against it, pursuant to CPLR 3211(a)(7), on the grounds that plaintiff Wesco's Complaint fails to state a valid cause of action as against defendant Z & T.

In Z & T's "MEMORANDUM OF LAW IN SUPPORT OF Z & T ENGINEERING, P.C.'s MOTION TO DISMISS" (NYSCEF Doc 8), dated and filed May 4, 2020, Z & T advances several arguments, including, *inter alia*, its position that "a third-party plaintiff is not permitted to infer a duty owed to it from breach of a contract it is not a party to[.]" Z & T asserts that it was contracted by Ratan Realty, LLC ("Ratan") to provide professional design services, and that Z & T "did not physically undertake any excavation work at the project." Secondly, Z & T avers that Wesco has erroneously put forth an evidentiary doctrine of negligence law as its second cause of action, and in doing so has failed to assert any valid cause of action at all on the basis that there is "no recognized independent cause of action for *res ipsa loquitur*, citing *Abbott v. Page Airways* (23 N.Y.2d 502, 512 [1969]). Further, Z & T posits that plaintiff cannot proceed on a theory of negligence grounded in *res ipsa loquitur* without first establishing that Z & T owed a duty to the plaintiff. Z & T also argues that Wesco has failed to state its third cause of action, interference with plaintiff's subrogor's proprietary rights, with sufficient particularity as to give the defendants sufficient notice as to the material elements of its cause of action. Alternatively, Z & T asserts, albeit inaccurately, that plaintiff cannot maintain its third cause of action under a theory of private nuisance because the Complaint does not elicit either a "deliberate, intentional interference or allege extreme negligence to sustain a cause of action." Finally, movant avers that established New York State law bars Wesco from recovering purely economic losses for monies paid out to its insureds pursuant to any of its claims sounding in negligence, and therefore those claims must be dismissed.

Plaintiff's "AFFIRMATION IN OPPOSITION DEFENDANT'S MOTION TO DISMISS" (NYSCEF Doc 12), dated and filed July 17, 2023, and signed by Donald S. Domitrz, Esq. (Bruce Somerstein & Associates, P.C.), in response, asserts that all the defendants, "from the designer to the companies doing the actual work, also have a duty to not only the property owner they work for, but also the adjacent property owners, as professionals in their fields." Plaintiff also alleges, *inter alia*, that the damages sustained on the Property owned by 505 LLC are "the kind of property damage that cannot happen without negligence by a person(s) or Parties, as buildings do not move or shift without it." In so many words, plaintiff alleges that the very nature of the damages permits an inference of liability on the part of the defendants under the doctrine of *res ipsa loquitur*. Moreover, plaintiff alleges that Z & T's role as the construction project designer placed the instrumentality that caused the harm directly within its joint and exclusive control, irrespective of whether such individual defendant physically excavated the site.

In reply, by its "REPLY MEMORANDUM OF LAW IN SUPPORT OF Z&T ENGINEERING, P.C.'s MOTION TO DISMISS" (NYSCEF Doc 13), the movant argues that plaintiff's Affirmation in Opposition demonstrates the Complaint's insufficiency by plaintiff's failure to cite to its own Complaint to support its allegations, relying instead on "barebones allegations and legal conclusions," and the "unsupported statements of counsel." Z & T maintains that plaintiff's opposition papers failed to identify a valid duty owed to the plaintiff, and that plaintiff cannot conjure such a duty via vague references to some unspecified "professional duty," nor can it derive such solely from Z & T's contractual relationship with defendant Ratan. Finally, Z & T observes that plaintiff's opposition declined to further substantiate the validity of its second and third causes of action, which must therefore be dismissed for lack of evidentiary support in the Complaint.

Law and Application

A. Motion to Dismiss Standard

CPLR 3211(a) and its dismissal grounds are available for use by any party against whom a cause of action is asserted. CPLR 3211(a) is the principal authority to dismiss a cause of action, listing the various grounds on which a dismissal motion may be predicated.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the trial court must decide whether the pleading, within its four corners, states a cause of action. See *Qualified Personal Residence Trust of Doris Rosen Margetti*, 137 AD3d 965 (2d Dept. 2016). Although conclusory allegations are insufficient to state a cause of action (*Caniglia v. Chicago Tribute New York News Syndicate, Inc.*, 204 AD2d 233 [1st Dept. 1994]), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Dee v. Rakower*, 112 AD3d 204 (2nd Dept. 2013). Although the facts pleaded are presumed to be true and are accorded every favorable inference, “bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to such consideration.” See *WFB Telecommunications, Inc. v. NYNEX Corp.*, 188 A.D.2d 257, 259, (1st Dept. 1992), granting motion to dismiss. Furthermore, the prayer for relief does not determine the sufficiency of the complaint, and a prayer for the wrong relief does not require a dismissal for insufficiency so long as plaintiff demonstrates the right to some relief under the facts pleaded. A court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint. *Leon v. Martinez*, 84 N.Y.2d 83, 88, (Ct. App. 1994).

B. Negligence; Res Ipsa Loquitur; and Interference with Plaintiff's Subrogor's Proprietary Rights

With respect to the substantive legal issues raised in the instant motion, plaintiff's complaint alleged the following causes of action against all defendants: (i) negligence; (ii) *res ipsa loquitur*; and (iii) interference with plaintiff's subrogor's proprietary rights. For the

purposes of disposing of this motion, we shall analyze these causes of action independently, and solely as they are asserted against defendant Z & T.

1. Negligence

In New York State, a valid cause of action for negligence must assert (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Ferreira v. City of Binghamton*, 38 N.Y.3d 298, 308 (2022). Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 138 (2002). However, even where a contractual obligation exists, that obligation will generally not give rise to tort liability in favor of a third party (*Id.* at 138; citing *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 [1990]). Still, the New York State Court of Appeals has recognized three circumstances where a defendant may owe a duty of care to a third-party: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, “launche[s] a force or instrument of harm” (see *H.R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160 [1928]); (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties (see *Eaves Brooks, supra* at 226); and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (see *Palka v. Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579 [1994]). *Espinal v. Melville Snow Contractors, Inc., supra* at 140. In *492 Kings Realty, LLC v. 506 Kings, LLC*, (105 A.D.3d 991, 994 [2d Dep't 2013]), the Second Department upheld the dismissal of a negligence complaint against two defendants, the architect and the structural engineer, respectively, on the basis of evidentiary submissions conclusively minimizing the role that both defendants played in devising and implementing the safety methods used during the construction on the subject property, which subsequently caused a partial collapse on an adjacent lot.

Turning now to case at bar, plaintiff Wesco, by its Complaint, asserts, in relevant part, that “[o]n or about May 17, 2017, the construction and/or excavation work at the premises located 500-510 East 185th Street, Bronx, New York damaged the residential apartment building located at 505 East 184th Street, Bronx, New York, that was owned by 505 Bronx

Equities, LLC, and insured by the plaintiff[;]" and that "[s]aid damages were caused wholly and solely by reason of the carelessness, negligence and culpability of all defendants, their employees, servants, agents, contractors, sub-contractors and/or those acting on their behalf in the ownership, control, management, construction and/or excavation of the premises at 500-510 East 185th Street, Bronx, New York[.]" While sounding largely in negligence, the alleged facts do not clearly evoke any duty owed by defendant Z & T to Wesco or to its subrogors, neither of whom were parties to, nor intended beneficiaries of, Z & T's contract with Ratan. At first glance, the established rule that a service contract establishes no duty to third parties leans strongly to the negative on that issue. However, it remains to be determined whether the provided facts comport with one of the three exceptions delineated by the Court of Appeals in *Espinal v. Melville Snow Contractors, Inc.* (*supra*). Of the three, only the exception established in *H.R. Moch Co. v. Rensselaer Water Co.* (*supra*), which establishes a duty to third parties where the contractor, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm[.]" might conceivably be applied here. To date, neither party has proffered any evidence delimiting the degree of control exercised by defendant Z & T over the excavation and construction that occurred at 500-510 East 185th Street during the events in question, nor of the defendant's involvement in devising the safety protocols employed, and therefore this controverted issue of fact remains undetermined at this time. For that reason, the instant matter is also distinguished from the facts adjudicated in *492 Kings Realty, LLC v. 506 Kings, LLC* (*supra*).

Consequently, this Court determines that there is sufficient basis to preserve the plaintiff's first cause of action for negligence. Accordingly, the branch of movant Z & T's motion seeking dismissal, pursuant to 3211(a)(7), of plaintiff Wesco's first cause of action for negligence is **DENIED**.

2. *Res Ipsa Loquitur*

We now examine the second branch of defendant Z & T's motion, seeking dismissal of plaintiff's second cause of action for *res ipsa loquitur*.

Res ipsa loquitur is a doctrine of law that permits the fact finder to infer the defendant's liability, on the basis of circumstantial evidence, for the type of injury that, by its very nature, would not occur absent the negligence of a given party. *George Foltis, Inc. v. City of New York*, 287 N.Y. 108, 114 (1941). To avail himself of this inference, a plaintiff must demonstrate that "(1) the event [was] of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it [was] caused by an agency or instrumentality within the exclusive control of the defendant; (3) it [was not] due to any voluntary action or contribution on the part of the plaintiff." *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 226 (1986) (quoting *Corcoran v. Banner Super Market*, 19 N.Y.2d 425, 430 [1967]). *Res ipsa loquitur* merely constitutes an evidentiary rule that may be applied to reasonably determine the genesis of an injurious event where direct evidence of negligence is otherwise unavailable; however, it does not constitute a separate cause of action upon which a plaintiff might recover. *Abbott v. Page Airways, Inc.*, 23 N.Y.2d 502, 512, 245 N.E.2d 388 (1969).

In light of the above, this Court determines that plaintiff's second cause of action for *res ipsa loquitur* is invalid as an independent cause of action. However, plaintiff may still rely on that doctrine to establish liability for its negligence claim. Therefore, the second branch of defendant's motion to dismiss defendant's second cause of action for *res ipsa loquitur* is **GRANTED** as against defendant Z & T, only.

3. Interference with Plaintiff's Subrogor's Proprietary Rights

Plaintiff's third cause of action alleges interference with plaintiff's subrogor's proprietary rights as alleged in its Complaint.

As an equitable doctrine in the context of insurance, an insurance carrier, upon payment of a loss, becomes subrogated to the rights and remedies of its insured to proceed against a party primarily liable. *New York Bd. of Fire Underwriters v. Trans Urb. Const. Co.*, 91 A.D.2d 115, 119 (1st Dep't 1983). Further, the insurer is entitled to enforce the rights of the subrogor by an action in its own name, and without joining the insured as a party. *Ocean Accident & Guarantee Corp. v. Hooker Electro-Chem. Co.*, 240 N.Y. 37, 47 (1925).

Upon the foregoing, it is established New York State law that, upon making payment to an insured for their losses, Wesco became vested with the rights and remedies of the insured themselves to pursue recovery from an alleged third-party tortfeasor. Where a third-party's tortious conduct has damaged an insured party by way of interference with some specified right belonging to the insured, and for which the insurance carrier was obliged to provide compensation, the carrier would similarly be subrogated to the rights of the insured as against such third-party. It should be noted here that, contrary to defendant's assertions, Wesco is not barred from seeking recovery against Z & T after having indemnified 505 LLC for its losses, as such a result would undermine the very principle of subrogation, and is further contraindicated by the entire body of settled subrogation caselaw that has preceded this matter. Although Wesco's actual losses may be purely economic, in its assumption of the subrogor's rights it may prosecute its negligence claim as if the subrogor's injury were its own.

Plaintiff's allegations, afforded every favorable inference, plausibly assert that the defendant's allegedly negligent performance of its excavation and construction project on the neighboring premises interfered with 505 LLC's right to use and enjoy their property free from substantial interference caused by the negligent conduct or omissions the defendants, which appears to sound in the doctrine of private nuisance. Moreover, this Court disagrees with movant's contention that plaintiff must "allege extreme negligence to sustain a cause of action for private nuisance" (NYSCEF Doc 8, at p.2). In *Copart Indus., Inc. v. Consol. Edison Co. of New York* (41 N.Y.2d 564, 569 [1977]), one of the seminal cases on the subject of nuisance, the New York State Court of Appeals reasoned that a defendant may be held liable for a private nuisance if his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities. In *Copart*, the Court of Appeals' enunciation of the private nuisance standard clearly and intentionally distinguished the prong for negligence and recklessness from the prong for abnormally dangerous conditions or activities. Therefore, in concordance with the preceding analysis for plaintiff's negligence claim, the facts alleged in plaintiff's third cause of action, taken as true for the purpose of analyzing this motion to

dismiss, clearly state a cognizable legal theory (see *Dee v. Rakower, supra* at 204). In light of the above, upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that that branch of movant's motion to dismiss, pursuant to CPLR 3211(a)(7), dismissing plaintiff's third cause of action alleging interference with plaintiff's subrogor's proprietary rights, as alleged in the Complaint, is **DENIED**.

Accordingly, the branch of defendant Z & T's motion to dismiss plaintiff Wesco's third cause of action for interference with plaintiff's subrogor's proprietary rights is **DENIED** as against defendant Z & T, only.

Conclusion


Accordingly, defendant Z & T Engineering, P.C.'s motion to dismiss plaintiff Wesco's Complaint, pursuant to CPLR 3211(a)(7), as against it is **GRANTED** solely to the extent of dismissing plaintiff's second cause of action for *res ipsa loquitur* as against defendant Z & T, only, as stated herein. Further, it is hereby

ORDERED that the plaintiff's second cause of action for *res ipsa loquitur* is dismissed with respect to defendant Z & T Engineering, P.C., only; further it is

ORDERED that the moving defendant, Z & T Engineering, P.C., is directed to serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order, and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated December 7, 2023
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.