

**ZURICH INSURANCE
COMPANY, AS PARTIAL
SUBROGEE OF BENNY'S
UPTOWN, L.L.C.**

*

NO. 2004-CA-0316

*

COURT OF APPEAL

*

FOURTH CIRCUIT

VERSUS

*

STATE OF LOUISIANA

**BRIDGEBRUCK
CONSTRUCTION COMPANY,
L.L.C., D/B/A CRESCENT
STRUCTURAL AND
RECOVERY**

*

*

CONSOLIDATED WITH:

CONSOLIDATED WITH:

**CLARK THOMPSON AND
TONI THOMPSON**

NO. 2004-CA-0317

VERSUS

**BRIDGEBRUCK
CONSTRUCTION COMPANY,
LLC D/B/A CRESCENT
STRUCTURAL, SCOTTSDALE
INSURANCE COMPANY,
BENNY'S UPTOWN LLC, AND
ABC INSURANCE COMPANY**

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 2001-7345 C/W 2001-10073, DIVISION "F-10"
Honorable Yada Magee, Judge**

**CHARLES R. JONES
JUDGE**

**(Court composed of Judge Charles R. Jones, Judge James F. McKay III, and
Judge Roland L. Belsome)**

Jeffrey C. Napolitano

Randy J. Hoth
JUGE, NAPOLITANO, GUILBEAU, RULI, FRIEMAN & WHITELEY
3838 North Causeway Boulevard
Suite 2500, Lakeway III
Metairie, LA 70002

COUNSEL FOR PLAINTIFF/APPELLANT

David E. Walle
Ernest L. O'Bannon
Christopher M. G'sell
BIENVENU, FOSTER, RYAN & O'BANNON
1010 Common Street, Suite 2200
New Orleans, LA 701122401

COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED

The Appellant, Zurich Insurance Company, Inc., a partial subrogee of Benny's Uptown, LLC, instituted a suit for subrogation against the Appellees, Scottsdale Insurance Company and Bridgebruck Construction Company, resulting from damages sustained to the building located at 938 Valence Street. Zurich devolutively appeals the judgment of the district court denying its Motion for New Trial. We affirm.

Clark and Toni Thompson initiated a suit against Bridgebruck,

Scottsdale, and Benny's Uptown for damages sustained to their property resulting from the collapse of the structure located at 938 Valence Street. Zurich then filed a petition for subrogation against Bridgebruck, and amended its petition to include Bridgebruck's liability insurer, Scottsdale. Upon the motion of Scottsdale, the matters were consolidated by the Civil District Court for the Parish of Orleans.

In response to Zurich's petition for subrogation, Scottsdale later filed a Motion for Summary Judgment seeking dismissal from the suit on the grounds that an insurer has no right of action against its own insured absent a showing of fraud by the insured. Bridgebruck also filed a Motion for Summary Judgment seeking dismissal from the suit. The district court granted the Motions for Summary Judgment, dismissing Zurich's suit against Scottsdale and Bridgebruck.

Subsequently, Zurich filed a Motion for New Trial on the grounds that the ruling of the district court was contrary to the law and evidence. The district court rendered judgment denying Zurich's Motion for New Trial. This judgment is the subject of the matter now before this Court.

Benny's Uptown owned a structure located at 938 Valence Street and

contracted with Bridgebruck to perform foundation and structural repairs to the property. In the course of Bridgebruck's work of elevating, shoring, leveling, and bracing the structure at 938 Valence Street, it collapsed onto a neighboring structure located at 932-34 Valence Street. The neighboring structure, which was owned by the Thompsons, suffered substantial damage along with the building at 938 Valence Street.

At the time of the incident, Zurich insured Benny's Uptown under a Builder's Risk Coverage Form, which also included Benny's subcontractors. Zurich paid Benny's Uptown \$70,368.25 in excess of the policy's \$500 deductible and sought subrogation against Bridgebruck and Scottsdale.

Zurich argues in this appeal that the district court erred in denying its Motion for New Trial. In its first assignment of error, Zurich contends that the district court erred in finding that its suit for subrogation against Bridgebruck and Scottsdale is barred by Louisiana's anti-subrogation rule. We disagree.

Jurisprudence in Louisiana has well-established that an insurer has no right of action in subrogation against an insured under its policy without demonstrating fraud on the part of the insured. *State Farm Fire & Casualty*

Comp. V. Sentry Indemnity Comp., 316 So.2d 185 (La. App. 3rd Cir. 1975); *Olinkraft, Inc. v. ANCO Insulation, Inc.*, 376 So.2d 1301 (La. App. 2nd Cir. 1979); *Boston Insurance Company v. Pendarvis*, 195 So.2d 692 (La. App. 1st Cir. 1967). Zurich asserts that whether an insurer has a right of subrogation against a contractor is determined by the intent of the parties. However, this Court finds that this assertion is misplaced.

In *Louisiana Fire Insurance Company v. Royal Indemnity Company*, 38 So.2d 807 (La. App. 2nd Cir. 1949), a fire damaged an unfinished building owned by the insured. The insurance company paid money to the insured resulting from damages caused by the fire, but sought subrogation against the defendant plumbing company and its insurance carrier for its alleged negligence in the damages sustained to the building. Although the insurance company sought to recover from the plumbing company, the defendant urged that the insurer's action could not be maintained because the policy endorsement included all labor and materials used in the construction of the building, including those of the defendant.

The court found that, "A reading of the builders' risk endorsement as a whole makes it evident that the parties intended to cover all or 'this

company's percentage' of the entire construction project.” *Id.* at 809. The court further found that although the language used in the policy did not directly state that the named materials had to be the property of the insured party, the policy language combined with the customs and practices of the building trade indicate that the building materials and tools brought by the various workmen and sub-contractors were necessary for the completion of the residence. *Id.* Accordingly, the court found that the language used in the policy had the effect of making the insurance company an insurer of the defendant and the other sub-contractors, as well as the named insured. *Id.*

In the case at bar, the Zurich policy insuring the property located at 938 Valence Street extends to Bridgebruck. The language of the policy specifically states:

10. INTEREST OF SUBCONTRACTORS, SUB-SUBCONTRACTORS, SUPPLIERS

We cover the interest which your subcontractors, your sub-subcontractors and your suppliers have in the covered property, but only while such property is situated at construction sites you have reported to us. This right does not impair any right of subrogation we would otherwise have.

Pursuant to this provision, subcontractors are covered during the time that

their property is located at the construction site. Since the labor and materials of Bridgebruck were incidental to the repairs of the structure at 938 Valence Street and present at the time of the structure's collapse, it is the obvious intent of the Zurich policy to include Bridgebruck as an insured.

Zurich further argues that courts have recognized an insurer's right to exclude an unnamed subcontractor; however, this point is not relevant to the instant suit. Although the Zurich policy makes a general reference to "subcontractors, sub-subcontractors, and suppliers," it clearly denotes coverage of the property of subcontractors located at the work site during the time of construction. As the repairs to the structure at 938 Valence Street were still underway at the time of its collapse, Bridgebruck, as a subcontractor, "had an interest therein and was insured under the terms and provisions of the policy."

See Glens Falls Insurance Company v. Globe Indemnity, 38 So.2d 139, 140 (La. 1948). Since Zurich has no right of action in subrogation to recover against Bridgebruck under the policy, we find no error by the district court.

In its second assignment of error, Zurich argues that the district court erred in granting Scottsdale and Bridgebruck's Motion for Summary Judgment. Specifically, Zurich maintains that a genuine issue of fact remains to the applicability of Louisiana's anti-subrogation rule. However, as the

language of the policy clearly indicates that Bridgebruck is an insured, there is no right of subrogation by Zurich. Accordingly, we find that this assignment of error is without merit.

DECREE

For the reasons stated herein, we affirm the judgment of the district court denying Zurich Insurance Company, Inc.'s Motion for New Trial.

AFFIRMED