

**Allianz Global Risks US Ins. Co. v Tishman Constr.
Corp. of N.Y.**

2011 NY Slip Op 33677(U)

August 9, 2011

Supreme Court, New York County

Docket Number: 150136/2010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Allianz Global Risks

Plaintiff (s),

INDEX NO.

150136/10

MOTION DATE

- v -

MOTION SEQ. NO.

001

Tishman Const Corp of NY
Defendant(s). *et al*

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

and Prelim Cont scheduled for Oct 20, 2011 @ 1:30pm in Part 10

AUG 09 2011

Dated: _____

J. GISCHE
HON. JUDITH J. GISCHE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X

Allianz Global Risks US Insurance Company
a/s/o Yeshiva University
Plaintiff (s),

DECISION/ ORDER
Index No.: 150136/2010
Seq. No.: 001

-against-

PRESENT:
Hon. Judith J. Gische
J.S.C.

Tishman Construction Corporation of New York
and Sirina Fire Protection Corp.,

Defendant (s).

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Notice of Motion, FMM affirm., JS affirm., exhibits	1
RCC "response to motion, exhibits	2
FMM reply	3

Upon the foregoing papers the decision and order of the court is as follows:

Gische J.:

Defendants move, pre-answer, to dismiss the complaint. Plaintiff opposes the motion. Defendants claim that by operation of Yeshiva University's ("Yeshiva") Owner Controlled Insurance Program ("OCIP") and the agreement between Yeshiva and Tishman, plaintiffs have no right to sue defendants. They further claim that the action should be dismissed because it violates the rule against subrogation. Plaintiffs have submitted an unsworn response and exhibits in opposition to the motion. They argue that the this action is not prohibited by either the OCIP, the Yeshiva/Tishman contract or the Chartis insurance policy and that the anti-subrogation rules are not violated.

In considering a motion to dismiss, the court is required to give the pleadings a liberal construction and accept the facts alleged as true. CPLR §3211. Leon v. Martinez, 84 N.Y.2d 83 (1994); EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (2005). To the extent the motion to dismiss is based upon documentary evidence, the documents relied upon must definitively establish a basis for dismissal. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st dept. 1995). The parties have each submitted extrinsic evidence in their papers. While extrinsic documents may be freely relied upon to preserve in-artfully pleaded but potentially meritorious claims, they may only be considered to defeat a complaint if it definitively disposes of plaintiff's claims. Zanett Lombardier v. Ltd v Maslow, 29 AD3d 495 (1st Dept. 2006); Bronxville Knolls Inc. v. Webster Town Center Partnership, supra.

The complaint alleges that Allianz Global Risks US Insurance Company ("Allianz") is the property insurer of Yeshiva and that it is suing as its subrogee. It claims that on January 3, 2005 defendant Tishman construction Corporation of New York ("Tishman") entered into a contract ("Yeshiva/Tishman contract") with Yeshiva to serve as the general contractor/construction manager for the Michael F. Price Center for Genetic and Translation Medicine at the Albert Einstein College of Medicine at Yeshiva University ("Price Center") (complaint ¶6). It is alleged that Tishman hired co-defendant Sirina Fire Protection Corp. ("Sirina") to install the fire suppression system at that Price Center (complaint ¶7). The complaint further alleges that on June 28, 2007 a sprinkler pipe coupling holding together two sections of the a water pipe that was part of the fire suppression system failed, causing extensive water damage at the Price Center (complaint ¶¶8,9). Plaintiffs claim that the sprinkler coupling failed because it was

improperly installed (complaint ¶¶11). A claim for damage was filed by Yeshiva and paid by Allianz, its insurer, in the amount of \$550,000 (complaint ¶¶ 14, 15). In this subrogation action, Allianz is seeking to recover the sum it paid out to Yeshiva against the defendants, who it claims caused the damage in the first place.

The documents primarily relied upon by defendants are the OCIP, the AIG/Chartis insurance policy and the Yeshiva /Tishman contract.

An insurer, as insured's subrogee, stands in the shoes of its subrogor and is subject to any claims or defenses which may be raised against the subrogor. Allstate Ins. Co. v. Stein, 1 NY3d 416 (2004). If a subrogor lacks standing to bring an action, then the subrogee likewise has no right to bring suit. Symonds v. Progressive Ins. Co., 80 AD3d 1046 (3rd dept. 2011). There are two issues before the court. One is whether the documents relied upon conclusively establish that Yeshiva has no right to sue defendants. If Yeshiva has no right to sue defendants directly, then neither does Allianz. The second issue is whether as a matter of law, the rules against subrogation prevent Allianz from suing defendants.

The OCIP is a program by which Yeshiva controlled the insurance of all subcontractors and all on-site activities in connection with the construction of the Price Center. Under the OCIP, Yeshiva obligated itself to procure, pay premiums and administer the following insurance coverage: Workers Compensation/Employers Liability, commercial General Liability and Excess Liability. With the exception of certain exclusions, not applicable here, the OCIP applied to all subcontractors working at the Price Center and that "each contracting party [was] required to incorporate [the OCIP] manual in its entirety into their subcontract agreements."

In connection with the commercial General Liability Insurance and Excess Liability Insurance the OCIP provides:

"III. Description of Insurance coverage.....4. Mutual Waiver of Property Damage and right of Recovery

To the extent of coverage provided by Yeshiva University and AIG, the Contractor has waived its rights to recover physical damage or loss to its property against the subcontractors and all sub-contractors. As such the subcontractors and their sub-contractors shall also agree to waive any and all rights each may have to recover physical damage or loss to the property of each against the Contractor, its Designees, Subcontractors and their sub-contractors engaged in the project construction. The waiver of this right of recovery for property damage shall be binding upon any property, automobile or equipment insurer as respects any subrogation rights which an insurer may possess by virtue of any payment of damage or loss. "

VI. Accident/Claims Reporting Procedures-Overview....2. General Liability & Property Damage Liability to Third Parties.... This policy provides coverage for claims or suits brought by a third party who has suffered bodily injury and/property damage. Coverage is extended to include employees for acts of negligence as long as they are acting within the scope of their employment. General Liability claims are separate from those involving a motor vehicle and include slip-and-falls, falls from heights, falling objects, false arrest, wrongful eviction, slander and libel, etc.

The OCIP contains a rider which was last revised April 20, 2005. The rider provides in pertinent part:

A. Owner Controlled Insurance Program

The Owner (Yeshiva University) shall purchase from and maintain in a company or companies lawfully authorized to do business in the jurisdiction in the [Price Center] Project is located, an owner controlled Insurance Program (OCIP). The OCIP will provide Worker's compensation, General Liability, and Excess Liability Insurance in order to protect the Owner, The construction Manager and all OCIP participating contractors and subcontractors...from the claims set forth below which may arise out of or result from the operations under this Agreement. With

respect to the Project, the OCIP shall cover:

- a. Worker's Compensation claims applicable to the on-site operations
- b. Claims due to Bodily Injury, Sickness of Disease
- c. Personal Injury Liability Claims
- d. Claims for damages or injury to a third party arising out of on-site operations."

M. Waiver of Subrogation

The Construction Manager and contractors waive all rights of subrogation and recovery against the Owner, their designee(s), broker(s), and any other contractor of all tiers to the extent of any loss of or damage to which is insured under the OCIP.

Notwithstanding the foregoing and not by way of limitation, the same Construction Manager and contractors each waive their rights of subrogation and recovery for damage to any property or equipment, against the Owner, the construction Manager, their designee(s) or any other contractor of any tier. Each contractor shall require all subcontractors to similarly waive their rights of subrogation and recovery in their respective subcontract agreements with respect to the work."

In connection with the OCIP, Yeshiva obtained insurance from Chartis (formerly AIG). Yeshiva also obtained separate property insurance from Allianz.

Defendants have provided selected endorsements from the Chartis policy.

Under those endorsements, Yeshiva waives any right of recovery that it has against any person or organization that is an insured under this policy. Named insureds under the policy include "all contractors and/or subcontractors/ consultants and/or subconsultants for whom the owner or agent's owner are responsible to arrange insurance to the extent of their respective rights or interests."

On or about November 24, 2004 the Yeshiva/Tishman contract was made.

Paragraph 7.09 of such contract provides:

"The Construction Manager and owner waive claims against each other for consequential damages arising out of or relating to this contract. This mutual waiver includes: (a) damages incurred by the owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management of employee productivity or of the services of such persons; and (b) damages incurred by the Construction Manager for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit except anticipated profit arising directly from the work; (c) This mutual waiver is applicable, without limitation, to all consequential damages due to either party's termination in accordance with Article XV. Nothing contained in this subparagraph 7.09(c) shall be deemed to preclude an award of liquidated direct damages, when applicable, in accordance with the requirements of this Agreement."

The court finds that neither the OCIP, the Chartis policy nor the Yeshiva/Tishman contract require that this case be dismissed.

Dealing first with the Yeshiva/Tishman contract it does not prohibit Allianz from suing Sirina at all. It only applies to Yeshiva and Tishman. As to the waiver, by its terms it is limited to consequential damages as defined therein. It does not prevent either Yeshiva or Tishman from suing one another on matters related to the Price Center project, it only limits the scope of damages that are recoverable. Thus, the Yeshiva/Tishman contract is not a documentary basis to dismiss this action.

The waiver provisions under the OCIP also do not require that this action be dismissed. Although not expressly defined as such under the OCIP, it is implicit that Yeshiva is the Owner. The waiver provisions are contained within both the original OCIP and the rider. They are substantially similar. Insofar as pertinent to this inquiry, the contractors and subcontractors mutually waive subrogation as to each other. They also waive subrogation against the Owner. There is no express language in which the

owner waives claims of subrogation against the contractor, here Tishman or any subcontractor, including Sirina.

Just as persuasive is that the OCIP does not include insurance coverage for the property damage claims suffered by Yeshiva. The OCIP appears to cover property damage claims made by a third party. There is no provision cited to, or that the court could find, which pertained to losses incurred by the owner. Since the waiver in the OCIP is expressly limited to the insurance coverage that is the subject of the OCIP, even if there were waivers by Yeshiva (which there are not) they would be limited only to OCIP insurance. Even defendants in their moving papers acknowledge that the Allianz was not an OCIP insurer, but rather a "property insurer." (See: Frederick M. Molod, Esq. Affd. P.2 fn.1). Thus, whatever the scope of the waiver in the OCIP, it does not apply to non-OCIP insurance.

Finally the Chartis endorsements are simply irrelevant to the Allianz policy. Whatever the endorsement says and means, it is limited to the relationship between Chartis and its insured. It cannot bind another insurance company.

Consequently, there are no agreements in which Yeshiva has waived its right to sue the defendants herein for the property damage that is the subject of this action.

Based also on the OCIP, defendants argue the anti subrogation rules would bar this action. Yeshiva claim that under the OCIP, it is required to self-insure up to one million dollars. Yeshiva argues that Allianz is therefore seeking to recover as its subrogee, monies that it will ultimately have to pay, which is tantamount to Allianz suing its own insured. Pennsylvania General Ins. Co. v. Austin Powder, 68 NY2d 465 (1986). The reason why this argument fails is that neither the Chartis policy nor the OCIP deal

with this loss. Thus, any deductible or self insurance reserve under the OCIP is irrelevant. The language of the OCIP defines the scope of its property damage claims to those made by third parties. Consistent with the OCIP, the Chartis policy expressly excludes property damage in the care, custody or control of its insured, in this case Yeshiva.

Consequently this action does not violate any rules of subrogation.

CONCLUSION

In accordance herewith it is hereby

ORDERED that defendants' motion to dismiss the complaint is denied in its entirety, and it is further

ORDERED that the defendants are given leave to interpose an answer within 20 days of the date of this decision, and it is further

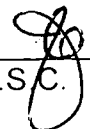
ORDERED that a preliminary conference is set for **October 20, 2011 at 9:30 a.m.**; no further notices will be sent, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
August 9, 2011

SO ORDERED:



J.G. J.S.C.