

Admiral Indem. Co. v Delins

2012 NY Slip Op 30708(U)

March 19, 2012

Supreme Court, New York County

Docket Number: 101124/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

**ADMIRAL INDEMNITY COMPANY A/S/O 155
PERRY STREET CONDOMINIUM,**

Plaintiff,

- v -

DARIS DELINS and PHILIP ANDERSON,
Defendants.

INDEX NO. 101124/11

MOTION SEQ. NO. 001

The following papers were read on this motion by defendant Daris Delins to dismiss the complaint and all cross claims asserted against it.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo)	<u>3</u>
Replying Affidavits (Reply Memo)	<u>4</u>

FILED
MAR 23 2012

Gross-Motion: Yes No

NEW YORK
COUNTY CLERK'S OFFICE

Motion sequence numbers 001 and 002 are consolidated in motion sequence number 001, defendant Daris Delins (Delins) moves, pursuant to CPLR 3211 (a)(1) and (7), to dismiss the complaint and all cross claims asserted as against her. In motion sequence 002, defendant Philip Anderson (Anderson) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims asserted as against him.

BACKGROUND

This is a subrogation action to recover for property damages allegedly sustained on August 24, 2010, when a toilet in unit 1B of the premises located at 155 Perry Street malfunctioned, causing water damage to the common areas of the building. Plaintiff Admiral Indemnity Company (Admiral) brought this action as the subrogee of 155 Perry Street Condominium (the Condominium). At the time of the occurrence, unit 1B was owned by Delins and was being rented by Anderson and LeighAnn Anderson (Notice of Motion, exhibit B). The Anderson's lease term ran from September 1, 2009 through August 31, 2010. To date, no discovery has been exchanged and Note of Issue has not been filed.

In motion sequence number 001, Delins contends that the action should be dismissed as against her because the Condominium by-laws contain a waiver of subrogation (Notice of Motion, exhibit C). The relevant section of the by-laws states:

"ARTICLE VII. INSURANCE AND INSURANCE TRUSTEE

All policies of physical damage insurance shall contain waivers of subrogation and of a reduction of pro rata liability of the insurer as a result of any insurance carried by Unit Owners or of the invalidity arising from any acts of the insureds including all mortgagees of the units and Unit Owners, and shall provide that such policies may not be cancelled or substantially modified without at least 10 days of prior written notice to all of the insureds, including all mortgagees of Units.

Unit Owners shall not be prohibited from carrying other insurance for their own benefit provided that such policies contain waivers of subrogation and further provided that the liability of the carriers issuing insurance procured by the Board of Managers shall not be affected to [s/c] diminished by reason of any such additional insurance carried by any Unit Owner" (*id.*)

Delins maintains that, since the by-laws mandate that an individual unit owner's insurance policy contain a waiver of subrogation clause, the instant claim is prohibited. Moreover, since the lease between Delins and Anderson states that the lease is subject and subordinate to the Condominium's by-laws, Anderson's cross-claims asserted as against her must also be dismissed. In opposition, Admiral argues that the Condominium's by-laws do not waive subrogation, but defer such issues to the controlling insurance policies. The Court notes, however, that Admiral has failed to provide a copy of the insurance policy in question.

In motion sequence number 002, Anderson adheres to Delins' arguments regarding the waiver of subrogation clause in the by-laws. Anderson points to Article I, Section 2 of the by-laws, which holds that any lessee of a Unit Owner must comply with the Condominium's by-laws (Motion, exhibit C). In opposition, Admiral repeats the same arguments used in opposition to

motion sequence number 001.

DISCUSSION

Motion Sequence 001

CPLR 3211 [a][7] provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded upon documentary evidence; or
7. the pleading fails to state a cause of action

"In order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v. Webster Town Center Partnership*, 221 AD2d 248, 248 [1st Dept 1995]; see *Juliano v. McEntee*, 150 AD2d 524 [2d Dept 1989]; *Demas v. 325 West End Ave. Corp.*, 127 AD2d 476 [1st Dept 1987]). A CPLR 3211(a)(1) motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]; see *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 152; *Ladenburg-Thalman & Co., Inc. v. Tim's Amusements*, 275 AD2d 243, 246 [1st Dept 2000]).

Upon a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments'" (*Foley v. D'Agostino*, supra; *Condon v. Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). "However imperfectly, informally or even illogically the facts may be stated, a complaint, attacked for insufficiency, is deemed to allege 'whatever can be implied from its statements by fair and reasonable intendment'" (*Foley v. D'Agostino*, supra). "[W]e look to the substance [of the pleading] rather than to the form" (*Foley v. D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]). On CPLR 3211 motions, the court affords the

pleadings a liberal construction, takes the allegations of the complaint as true, and provides plaintiff the benefit of every possible inference (*Goshen v Mutual Life Ins. Co. of N. Y.*, 98 NY2d 314, 326 [2002]). A motion to dismiss for failure to state a cause of action may be granted only where the complaint utterly fails to state any cognizable cause of action (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]). Any evidentiary material submitted by the defendant must show that a fact as claimed by the plaintiff is not a fact at all; otherwise, dismissal will not be granted (*Guggenheimer v Ginzburg*, 43 NY2d 268, 274-275 [1977]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.*, 262 A.D.2d 188 [1st Dept 1999].)

Subrogation is an equitable doctrine that "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*see Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]; *see also Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co.*, 74 AD3d 21 [1st Dept 2010]). "Waiver of subrogation provisions, which reflect the parties' allocation of the risk of liability between themselves to third parties through the device of insurance, are generally valid and enforceable" (*Liberty Mut. Ins. Co. v Perfect Knowledge*, 299 AD2d 524, 526 [2d Dept 2002]).

The by-laws of the Condominium are essentially an agreement among all of the parties which set forth their respective rights (*Board of Mgrs. of Vil. View Condominium v Forman*, 78 AD3d 627 [2d Dept 2010]), and the Condominium's by-laws provide for a waiver of subrogation claims for any amounts that would benefit the owners; accordingly, the instant subrogation action cannot be maintained (*Agostinelli v Allstate Ins. Co.*, 17 AD3d 982 [4th Dept 2005]).

In opposition to the instant motion, Admiral relies primarily on *Continental Insurance Company v 115-123 West 29th Street Owners Corp.* for the proposition that the Condominium's

by-laws are subordinate to the terms of the insurance policy itself (275 AD2d 604 [1st Dept 2000]). Admiral attaches to its opposition papers the case of *Admiral Indemnity Co. v Onetti* in which a defendant's summary judgment motion was denied on the basis that the condominium by-laws only authorize or endorse a waiver of subrogation, instead of containing an actual waiver of subrogation (2007 NY Slip Op 32388, *7 [Sup Ct, New York County 2008]). However, Admiral has failed to provide a copy of the insurance policy in question, and so whether or not that policy's provisions trigger the by-laws waiver provisions cannot be determined by the Court.

The Court finds that Delins' has met her burden of establishing a defense based upon documentary evidence, namely the Condominium by-laws. In opposition, Admiral failed to rebut Delins' motion with evidence in admissible form (see CPLR 3211[a][c]). Furthermore, the case at bar is distinguishable from *Onetti*, specifically regarding the waiver of subrogation provisions in the respective by-laws. The relevant by-law provision in the *Onetti* case states, "[a]ll policies of physical damage insurance shall contain, to the extent possible, waivers of subrogation" (2007 NY Slip Op 32388, *7 [Sup Ct, New York County 2008]) (emphasis added). In *Onetti*, the Court holds that the inclusion of the language "to the extent possible" within the by-laws can be read as merely endorsing a waiver of subrogation (*id.*). Furthermore, provisions from the controlling insurance policy were analyzed by the Court in *Onetti*. (*id.* at *3).

In the herein case, the applicable by-law provision states, in relevant part, "[a]ll policies of physical damage insurance shall contain waivers of subrogation" (Notice of Motion, exhibit C) (emphasis added). This Court finds that the language "shall contain" is distinguishable from *Onetti*, as it is more than just endorsing a waiver of subrogation (*id.*, cf. *St. Paul Fire & Mar. Ins. Co. v L.E.S. Subsurface Plumbing Co, Inc.*, 266 AD2d 139 [1st Dept 1999]). Additionally, the insurance policy relied upon by Admiral in its opposition was not provided to the Court.

Accordingly, Delins' motion to dismiss the complaint and all cross claims asserted as against her is granted.

Motion Sequence 002

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006][internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

In support of its motion, Anderson proffers that Admiral has no cause of action because Admiral's insured specifically waived all rights to subrogation and as a result is barred by contract. Furthermore, the documentary evidence submitted in support of the motion for summary judgment, according to Anderson, establishes that the parties contractually waived their respective rights to subrogation and thus Anderson is entitled to summary judgment as a matter of law. The Court agrees and finds that Anderson has met its prima facie burden of establishing his entitlement to summary judgment.

In opposition Admiral's argues that the relevant portions of the Condominium by-laws do not itself waive subrogation, but defers said issue to the controlling insurance policies. However, Admiral has failed to submit evidence in admissible form sufficient to rebut Anderson's summary judgment motion (see CPLR 3212[b]). Consequently and for the reasons discussed above, the Court finds Admiral has failed to raise issues of fact sufficient to warrant the denial of Anderson's motion. Thus, the herein motion is granted.

CONCLUSION

Based on the foregoing, it is hereby

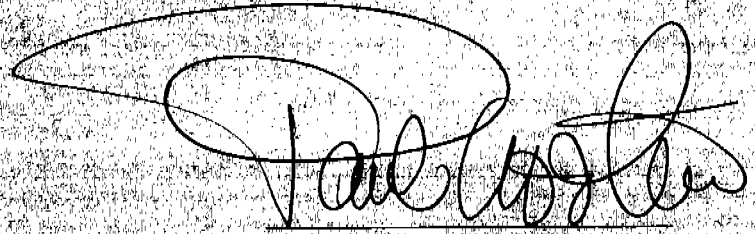
ORDERED that defendant Daris Delins' motion seeking to dismiss the complaint and all

cross-claims asserted as against her (Motion Sequence 001) is granted and the complaint is dismissed as against said defendant as well as all cross-claims, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that defendant Philip Anderson's motion for summary judgment dismissing the complaint and all cross-claims asserted as against him (Motion Sequence 002) is granted and the complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs and it is further,

ORDERED that counsel for Daris Delins is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court, who is directed to enter judgment accordingly, within 45 days of entry.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: 3-19-12

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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MAR 23 2012

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