Insurance Co. of the State of Pennsylvania v Consolidated Edison Co. of N.Y., Inc.
2017 NY Slip Op 31153(U)
May 30, 2017
Supreme Court, New York County
Docket Number: 102326/11
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA a/s/o 140 BW LLC, and CHARTIS EUROPE S.A. a/s/o UNION INVESTMENT REAL ESTATE,

Plaintiffs,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

140 BW LLC and HINES INTERESTS LIMITED PARTNERSHIP,

Third-Party Defendants.

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Index No. 102326/11
Motion Sequence 009

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

In this subrogation action, third-party defendants 140 BW LLC ("140 BW") and Hines Interests Limited Partnership ("Hines") move pursuant to CPLR 3211(a)(1)[1] and CPLR 3211(a)(7)[2] to dismiss the third-party complaint on the ground that it is not permitted under New York law. Defendant/third-party plaintiff Consolidated Edison Company of New York, Inc. ("Con Edison") argues in opposition that the third-party action is necessary in order to protect its right to seek

[1] CPLR 3211(a)(1) provides that a party may move to dismiss a complaint based upon documentary evidence.

[2] CPLR 3211(a)(7) provides that a party may move to dismiss a complaint on the ground that the pleading fails to state a cause of action.

contribution and indemnification from the third-party defendants.[3] As more fully set forth below, the motion is granted in part and denied in part.

BACKGROUND

On March 13, 2010, a fire erupted at a residential building located at 140 Broadway in Manhattan ("the Building") which resulted in substantial physical damage to the Building itself as well as economic losses to the Building's owner, 140 BW, and to 140 BW's parent company, Union Investment Real Estate ("Union"). At the time of the fire and for several years prior thereto the Building was managed by Hines.

After the fire 140 BW and Union recovered their losses through their insurance carriers, The Insurance Company of the State of Pennsylvania ("ISCOP") and Chartis Europe S.A. ("Chartis"), who are the plaintiffs in the main subrogation action herein ("Plaintiffs"). In total, ISCOP fully paid 140 BW's claim for $21,255,846.90 and Chartis fully paid Union's claim for $261,392.[4]

ISCOP and Chartis brought the within subrogation action against Con Edison to recover the costs of the loss on February 23, 2011.[5] They allege that Con Edison caused the fire by allowing water to flood out from its transformer vaults and network protection rooms into the Building's electrical switch gear room. In 2012 and 2013, the subrogees of some of the Building's tenants brought four more subrogation actions in this court against Con Edison for damages their subrogors allegedly sustained as a result of the fire. These five actions were consolidated for joint trial by order dated April 2, 2014 (Shlomo Hagler, J.) and the consolidated actions were assigned to me on

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[3] Con Edison thereafter amended its third-party complaint to include a claim for damages sustained by reason of the third-party defendants' negligence. The third-party defendants respond that Con Edison's negligence claim is time-barred (CPLR 214; CPLR 3211(a)(5)).

[4] Affidavit of Matthew Kirby-Smith, sworn to July 29, 2016, exhibits A-B. Mr. Kirby is the general manager of 140 BW's current managing agent, Jones Lang Salle, Inc.

[5] It is undisputed on this motion that ISCOP and Chartis are subrogated to the rights of 140 BW and Union with respect to their losses.

or about June 27, 2016. On August 1, 2016 Plaintiffs filed a third amended complaint to which Con Edison asserted 17 affirmative defenses in its answer. Its sixth, seventh, eighth, and ninth affirmative defenses and its first and second counterclaims all attribute the Building's losses to 140 BW's own culpable conduct.

On July 1, 2016, Con Edison filed the within third-party complaint by which it asserted a single cause of action for contribution and indemnification. In lieu of answering 140 BW and Hines filed this motion to dismiss. They argued that because the third-party complaint only seeks contribution and indemnification, Con Ed was essentially asking for an offset to Plaintiffs' claim which can only be asserted as an affirmative defense or counterclaim, not as a separate third-party action.

Con Ed then filed an amended third-party complaint on December 1, 2016 which added a cause of action against 140 BW and Hines for negligence. At a court appearance on December 5, 2016 counsel for 140 BW and Hines was granted leave to supplement his motion papers to address Con Ed's new allegations.

DISCUSSION

In subrogation cases such as this one, subrogors 140 BW and Union ceased to be the real parties in interest when ISCOP and Chartis fully reimbursed them for their loss. In turn ISCOP and Chartis assumed the right to seek recovery on the loss. *See NYP Holdings v McClier Corp.*, 65 AD3d 186, 189 (1st Dept 2009); *Delta Trading Corp. v Effective Plumbing Corp.*, 259 AD2d 346, 347 (1st Dept 1999); *Antonitti v City of Glen Cove*, 266 AD2d 487, 489 (2d Dept 1999).

The question presented by this case is whether the defendant in a subrogation action may commence a third-party action against the insureds/subrogors for contribution and/or recovery on a claim of negligence. The parties do not cite to and the court is not aware of any First Department decisions on this issue. Movants however rely upon the Third Department decision *State v*

Poprícki, 89 AD2d 391 (3d Dept 1982) in which New York State brought suit against an individual (Popricki) whose vehicle collided with a State-owned vehicle being driven by a State employee (Piatt) in the course of his employment. Popricki answered the State's complaint by asserting as an affirmative defense that the accident resulted from the State's or the State's agents' negligence. He also commenced a third-party action against Piatt for contribution in the event that the State recovered against him in the main action. The Third Department dismissed the third-party complaint (*id.* at 394):

> The question arises whether the impleader action will serve any purpose aside from duplicating the main action. Since the parties concede that Piatt was acting within the scope of his employment, it is clear that the State will be liable for any negligence attributable to Piatt and must indemnify him for losses occasioned by such negligent conduct . . . . There is no conceivable basis, then, upon which the third-party defendant can be held responsible by way of contribution to the third-party plaintiff . . . .

The court reasoned that since Piatt was acting within the scope of his employment the State was bound to indemnify him, rendering the third-party action unnecessary. The court further held (*id.* at 395):

> Here, the dismissal of the third-party complaint would not diminish Popricki's rights in any respect. Since the main action was commenced in Supreme Court, defendant's right to a jury trial remains intact. Nor has Popricki been deprived of his rights to contribution anticipated in the third-party action. In his answer, Popricki specifically asserted as an affirmative defense that the accident resulted from negligence of the State or "some other person", i.e., the State's agent. By so doing, Popricki raised the issue of contribution in the main action. . . . Under these circumstances, there is no need for a separate third-party claim which, in effect, would serve only to further complicate the proceedings and create a needless duplicity of pleadings.

While persuasive, *Poprícki* did not involve subrogation and it is not exactly on point. A more recent Third Department decision, *Peerless Ins. Co v Michael Beshara, Inc.*, 75 AD3d 733 (3d Dept 2010), did involve subrogation, and I find that it fully supports movant's position. In *Peerless*, the Third Department held that a defendant in a subrogation action may counterclaim against the plaintiff/subrogee based on the alleged acts or omissions of the subrogor, but only to the extent of the subrogee's claim. *Id.* at 736; *see also U.S. Underwriters Ins. Co. v Greenwald*, 31 Misc. 3d

1206(A), 2010 NY Misc. LEXIS 6622, *6 (Sup. Ct. NY Co. Oct. 14, 2010, Madden, J.); *In re Mission Constr. Litig.*, 2013 US Dist. LEXIS 124926, *57 (SDNY Aug. 30, 2013). The *Peerless* court also held that if a defendant sought "affirmative recovery" against the subrogee, not just a mere offset, it would have to bring an "independent action." *Peerless*, 75 AD3d at 736. This court hereby adopts *Peerless'* reasoning and holding.

Con Edison claims it has the basis for such an independent action based upon its amended third-party complaint which alleges that 140 BW and Hines negligently damaged Con Edison's property, causing Con Edison to incur emergency response costs as a result of the March 13, 2010 fire. Even if this was true, such an affirmative claim is clearly time-barred by CPLR 214, which provides that negligence and property damage actions may only be brought within three years of the accrual of such claims. Since Con Edison's property damage and emergency response costs claim first accrued on the date of the fire, more than six years before Con Edison filed its December 1, 2016 third-party action herein, such claim must be dismissed as untimely.[6] Inasmuch as Con Edison's remaining third-party claim for contribution and indemnification can do no more than offset its liability in the main action, the "affirmative recovery" exception does not apply. *Peerless*, 75 AD3d at 736; *Popricki*, 89 AD2d at 394.

Consistent with *Peerless*, courts in other jurisdictions have held that third-party actions by alleged tortfeasors against insureds/subrogors are generally not permitted and should be dismissed. As an example, *Wausau Underwriters Ins. v Shisler*, 1999 US Dist. LEXIS 11201 (E.D. Pa. July 19, 1999) is substantially similar to the case at bar. In that case, plaintiff insured the owner (Halpern) and lessee (Green) of a building that was damaged in a fire allegedly due to the negligence of a

[6] Aside from being time-barred, Con Edison's emergency response cost claim may not be actionable under New York law. *See Koch v Consolidated Edison Co.*, 62 NY2d 548, 560 (1984) ("public expenditures made in the performance of governmental functions are not recoverable"); *County of Erie v Colgan Air, Inc.*, 711 F.3d 147, 154 (2d Cir. 2013) ("public services provided in response to an emergency are just that — public services — and therefore are not subject to reimbursement.")

foreman (Shisler). Plaintiff fully paid the insurance claims of both the owner and lessee and commenced a subrogation action against the foreman. The foreman filed a third-party complaint against both the owner and lessee, who then filed a motion to dismiss the third-party complaint. In granting the motion, the court held that because the plaintiff insurer had paid the total loss incurred by the owner and lessee, any finding of liability against them only served to eliminate or to reduce the insurer's recovery from the foreman (*id.* at *10):

> Any finding of responsibility on the part of Green and/or Halpern does not create a liability to Wausau, but rather, would merely serve to eliminate or reduce Wausau's recovery from Shisler. In other words, Green and Halpern can never be liable to pay damages to Shisler for the losses, which were actually sustained by Green and Halpern. As an insurer cannot subrogate against its own insured, Wausau has no claim against Green or Halpern for which either could be liable.

The *Wausau* decision has been cited with approval by other Pennsylvania courts and by federal courts in Washington, New Hampshire, and New Jersey. *E.g., Dyvex Indus. v Agilex Flavors & Fragrances, Inc.*, 2015 US Dist. LEXIS 162566 (MD Pa. Dec. 4, 2015); *USAA Cas. Ins. Co. v Metro. Edison Co.*, 2013 US Dist. LEXIS 76350 (MD Pa. May 31, 2013); *Travelers Cas. & Sur. Co. v Wash. Trust Bank*, 2014 US Dist. LEXIS 123582 (ED Wash. Sept. 3, 2014); *Phoenix Mut. Fire Ins. Co. v Stanley Convergent Sec. Solutions, Inc.*, 2013 US Dist. LEXIS 16724 (DNH Feb. 7, 2013); *Am. Fire & Cas. Co. v Material Handling Supply, Inc.*, 2007 US Dist. LEXIS 31574 (DNJ Apr. 27, 2007). Congruent with this court's adoption of the reasoning in *Peerless*, I also find that *Wausau* "is well reasoned and persuasive". *Dyvex* at *12. As noted by the *Am. Fire & Cas. Co.* court, *Wausau* is consistent with the anti-subrogation principle, that "since an insurance company cannot subrogate against its own insureds, it would be futile to permit their joinder. The proposed new parties cannot be held jointly liable with [defendant] to plaintiff because plaintiff has no independent basis of liability against its own insureds." *Am. Fire & Cas. Co.*, 2007 US Dist LEXIS 31574, at *8-9.

There is a distinction between the *Peerless-Wausau* line of cases and the case at bar that is worth noting. Unlike the former, where the third-party defendants and the subrogors were the same entities, in this case the makeup of the parties is somewhat different. Third-party defendant Hines is not Plaintiffs' subrogor and it cannot be said that Plaintiffs assumed Hines' rights or otherwise stepped into its shoes.

Movants assert that this distinction is inconsequential because Hines was 140 BW's agent at the time of the fire. *See, e.g., Hodges v Royal Realty Corp.*, 42 AD3d 350, 351 n.1 (1st Dept 2007) (there exists an agency relationship between a building owner and its property manager). To support their position movants submit a copy of their Property Management Agreement for 140 Broadway.[7] Such Agreement does authorize Hines to act on 140 BW's behalf, but it only requires 140 BW to indemnify Hines for Hines' own negligence if Hines was acting within the scope of its authority. *Id.* §§ 7, 14. Movants argue that Hines must have been acting within the scope of its authority since Con Edison makes no allegation in its pleadings to the contrary and because Hines and 140 BW have not filed cross-claims against each other. Without the benefit of discovery, this court cannot make that determination. Moreover, even if Hines and 140 BW were united-in-interest, it would not change the fact that Con Edison could have a valid cause of action against Hines and must have some way of asserting claims against it. Since Hines is not Plaintiffs' subrogor Con Edison cannot seek relief from Hines through defenses or counterclaims in the main action, and Con Edison must therefore be permitted to maintain a third-party action against it.

In light of the foregoing, it is hereby

ORDERED that the motion by 140 BW and Hines to dismiss the third-party complaint is granted in part and denied in part; and it is further

[7] Reply Affidavit of Matthew Kirby-Smith sworn to October 20, 2016, Exhibit 1 ("Agreement").

ORDERED that Con Edison's first cause of action in its third-party complaint for negligence is dismissed in its entirety as time-barred; and it is further

ORDERED that, as against 140 BW, the remainder of third-party complaint is dismissed in its entirety; and it is further

ORDERED that the motion is otherwise denied as against Hines, and the remainder of the third-party complaint shall continue as against it.

The Clerk of the Court is directed to enter judgment and mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 5.30.17

SHERRY KLEIN HEITLER, J.S.C.