

**50 Gramercy Park N. Owners Corp. v GPH Partners,
LLC**

2017 NY Slip Op 31201(U)

June 5, 2017

Supreme Court, New York County

Docket Number: 103736/2011

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

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50 GRAMERCY PARK NORTH OWNERS CORP.,

Plaintiff,

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--against--

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GPH PARTNERS, LLC (SPONSOR), GPH INVESTORS LLC, RFR GRAMERCY PARK, LLC, S/A GRAMERCY LLC, ABY ROSEN, MICHAL FUCHS, IAN SCHRAGER, and MICHAEL OVERINGTON,

DECISION AND ORDER

Defendants.

-----x
GPH PARTNERS, LLC (SPONSOR), GPH INVESTORS LLC, RFR GRAMERCY PARK, LLC, S/A GRAMERCY LLC, ABY ROSEN, MICHAL FUCHS, IAN SCHRAGER, and MICHAEL OVERINGTON,

Third-Party Plaintiffs,

--against--

PACE PLUMBING CORP., AMROSINO DEPINTO & SCHMEIDER, P.C., BRENNAN BEER GORMAN/ARCHITECTS, L.L.P., ISMAEL LEYVA ARCHITECT, P.C., EUROTECH CONSTRUCTION CORP., CONVENTIONAL STONE & MARBLE CORP., PATTI & SONS, INC., EPIC MECHANICAL CONTRACTORS, LC, JAMES F. VOLPE ELECTRIC CONTRACTING CORP., S&C PRODUCTIONS CORPORATION, HOFFMAN FLOOR COVERING CORP., and JOHN DOE 1-3, being fictitious names of contractors, design professionals or material suppliers potentially responsible for the allegations of the Complaint,

Third-Party Defendants.

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GPH PARTNERS, LLC (SPONSOR), GPH INVESTORS LLC, RFR GRAMERCY PARK, LLC, S/A GRAMERCY LLC, ABY ROSEN

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MICHAL FUCHS, IAN SCHRAGER, and
MICHAEL OVERINGTON,

Second Third-Party
Plaintiffs,

-against-

LEND LEASE (US) CONSTRUCTION
LMB, INC., f/k/a BOVIS LEND
LEASE LMB, INC.,

Second Third-Party
Defendants.

-----x

JEFFREY K. OING, J.:

Preliminary Statement

Plaintiff, a residential cooperative corporation owned by individual shareholders, commenced this action against defendants, the cooperative sponsor, promoters, and prior owner, seeking damages for, among other things, construction and design defects. The cooperative sponsor, promoters, and prior owner commenced a third-party action against various designers, architects, and subcontractors, seeking damages for breach of contract and seeking indemnification. The cooperative sponsor, promoters and prior owner then commenced a second third-party action against second third-party defendant, the construction manager, seeking damages for breach of contract and seeking indemnification.

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Relief Sought

Second third-party defendant, Lend Lease (US) Construction LMB, Inc. f/k/a Bovis Lend Lease LMB, Inc. ("Bovis"), the construction manager and general contractor, now moves to dismiss the second third-party complaint of the first-party defendants/second third-party plaintiffs GPH Partners, LLC ("Sponsor"), GPH Investors LLC, RFR Gramercy Park, LLC, S/A Gramercy LLC, Aby Rosen, Michal Fuchs, Ian Schragger, and Michael Overington (collectively, "GPH"), former owner, sponsor, and promoters of the offering plan for the cooperative, arguing that GPH's claims seeking damages for breach of contract, and seeking contractual and common indemnity, are barred by the anti-subrogation doctrine.

Factual Background

Plaintiff owns a 17-story Manhattan cooperative building located at 50 Gramercy Park North. The building was built in 1924 and adjoins a 19-story building known as 2 Lexington Avenue. The cooperative sponsor owns the Gramercy Park Hotel ("Hotel"), which is located at 2 Lexington Avenue pursuant to a ground lease with the fee owner of 2 Lexington Avenue. In 2007, 50 Gramercy Park North, the 17-story building, was converted into residential cooperative apartments. The offering plan for the cooperative project included 23 residential apartments and 27 storage lockers, to be used by the residential cooperative and the Hotel.

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There are various easements granted between plaintiff and the Hotel. One such easement permits the Hotel to use and occupy approximately 8,100 square feet of space in the sub-cellar, cellar, and first/lobby floor of the building, for a restaurant and service area for the Hotel. The Hotel also has an easement to use and occupy approximately 5,700 square feet of space in the sub-cellar, cellar, first/lobby floor, on a shared basis with the plaintiff, for use as an access corridor and mechanical spaces.

In 2004, at the start of the cooperative conversion project, GPH hired Bovis to perform construction management and general construction work on the project, and on November 1, 2004, GPH and Bovis entered into a Construction Management Agreement (the "Agreement"). Pursuant to Article 15 of the Agreement, GPH agreed to procure and maintain, during the term of the project, and at its sole expense, an Owner Controlled Insurance Program ("OCIP"), which provided, among other things, general commercial liability coverage. The OCIP policy named Bovis as an additional named insured and, in compliance with the Agreement, included a waiver of subrogation against Bovis, as construction manager. Pursuant to Article 16 of the Agreement, Bovis was required to obtain insurance coverage for its professional liability and pollution liability. Article 16.8 set forth, in relevant part, that "[a]ll insurance policies required above as they apply to [GPH] shall be written as primary policies not contributing with,

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or in excess of, any insurance carried by [GPH]." There is no dispute that both GPH and Bovis obtained insurance, as provided in the Agreement. The construction and cooperative conversion process was completed in 2007, at which time ownership of the 17-story cooperative building was conveyed to plaintiff.

Procedural History

On March 28, 2011, plaintiff commenced this action against GPH seeking damages for construction defects, misappropriation of space, misappropriation of utilities, breach of fiduciary duty, self-dealing, and breach of the offering plan. Plaintiff made specific allegations regarding defective plumbing, defective HVAC operations, defective electrical installation, failure to build to code, as well as claims regarding the Hotel's misuse of the entry space and the cellar/sub-cellar space.

On October 7, 2013, GPH commenced a third-party action against various designers, architects, and contractors, asserting a breach of contract cause of action, as well as asserting contractual and common law indemnity claims.

On February 4, 2016, GPH commenced a second third-party action against Bovis alleging an action in breach of contract, and contractual and common law indemnification. In the second third-party complaint, GPH alleges that the problems raised by plaintiff in the main action are the result of Bovis's failure to properly perform its construction and construction management duties.

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Contentions

Bovis now moves for summary judgment dismissing the second third-party complaint on the ground that, pursuant to the terms of the Agreement, GPH cannot bring this action because it has no right of subrogation against Bovis. Bovis notes that Article 15.3 of the Agreement expressly provides that GPH waived its right of subrogation and recovery against Bovis, as the construction manager, to the extent that any loss or damage is covered by the OCIP. Bovis claims that the design and construction defects alleged by plaintiff in the main action, are all covered under the OCIP. Bovis argues that although it procured professional liability and pollution liability insurance, plaintiff's claims, as set forth in the main action, do not arise from professional liability or pollution related defects. Thus, pursuant to the anti-subrogation doctrine, the second third-party complaint must be dismissed.

In opposition, GPH argues that Bovis did not establish prima facie entitlement to summary judgment dismissing the second third-party complaint because the waiver of subrogation only waives subrogation for losses that are covered under the OCIP. GPH claims that Bovis, however, did not establish, as a matter of law, that plaintiff's alleged losses, due to design and construction defects, are covered by the OCIP. Moreover, GPH argues that, pursuant to section 16.8 of the Agreement, the

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insurance procured by Bovis is primary to any insurance procured by GPH, thus, Bovis cannot rely on the coverage of the OCIP until it establishes, as a matter of law, that the losses due to the defects alleged by plaintiff, are not covered under its own professional liability and pollution liability policies. GPH also argues that Bovis's motion is premature because there has been no discovery in this case.

In reply, Bovis argues that because it did not do any design work on the project it cannot be liable for any of the design defects alleged by plaintiff. Bovis argues further that some of the allegations in the complaint have no connection to the work performed by Bovis, including the allegations regarding the Hotel's misuse of certain shared areas. Bovis also argues that the professional liability and pollution liability policies it procured do not apply to the allegations in the complaint.

Discussion

The proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

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Bovis argues it is entitled to dismissal of the second third-party action based upon the anti-subrogation rule. "Subrogation, an equitable doctrine, entitles an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (North Star Reins. Corp. v Continental Ins. Co., 82 NY2d 281, 294 [1993] quoting Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465, 471 [1986]). The subrogation doctrine allocates responsibility for the loss to the party who ought to pay it, thus, avoiding freeing the wrongdoer from liability because the insured party had the foresight to obtain insurance coverage (Id.).

The anti-subrogation doctrine, however, provides that an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered (see Pennsylvania Gen. Ins., 68 NY2d at 468). "Public policy requires this exception to the general rule both to prevent the insurer from passing the incidence of loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer's incentive to provide a vigorous defense for its insured" (North Start Reins., 82 NY2d at 294-295; see also Pennsylvania Gen., 68 NY2d at 471-472).

Here, although GPH and Bovis are not an insured and insurer, the anti-subrogation doctrine applies to an action, such as this

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one, where an owner seeks coverage from a general contractor or construction manager (see New York City Dept. of Transp. v Petric & Assoc., 132 AD3d 614, 615 [1st Dept 2015]; Maksymowicz v New York City Dept. of Educ., 232 AD2d 223, 224 [1st Dept 1996]). Bovis, however, fails to establish prima facie entitlement to summary judgment dismissing the second third-party complaint (see Calderone v Town of Cortlandt, 15 AD3d 602 [2d Dept 2005] [movant must affirmatively demonstrate the merits of its claim to sustain a motion for summary judgment]).

In support of its summary judgment motion, Bovis argues that the construction and design defects alleged by plaintiff in the main action are covered under the OCIP, and not under its professional and pollution liability policies. Bovis, however, does not proffer a copy of the OCIP or its professional and pollution liability policies. Coverage cannot be determined in the absence of the language of the policies. Bovis cannot prevail on a motion for summary judgment by merely stating the defects alleged by plaintiff are not covered under the OCIP, without any evidentiary support for such a claim (cf. DeFreese v Ryan Sanitation Corp., 125 AD2d 289 [2d Dept 1986] [In reversing the motion court, the appellate court held that because the defendants failed to submit evidentiary support for their motion, the grant of summary judgment was improper]).

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Moreover, pursuant to the terms of the Agreement, the insurance coverage procured by Bovis is primary to the coverage available under the OCIP. Bovis does not, however, proffer an affidavit of a person with personal knowledge of the work it performed on the project. Thus, again, Bovis failed to demonstrate that plaintiff's claims are not covered under its own policies in the first instance (see Castro v New York University, 5 AD3d 135 [1st Dept 2004] [The affidavits of movant failed to assert facts from personal knowledge and as such, the affidavits lacked any probative value.]).

Without factual support for its contention that there is no coverage under its own insurance policies, which are primary to the OCIP, Bovis failed to sustain its initial burden of tendering evidentiary proof in admissible form sufficient to warrant judgment in its favor as a matter of law (see Aetna Cas. & Sur. Co. v Island Transp. Corp., 233 AD2d 157 [1st Dept 1996]).

Accordingly, it is

ORDERED that Bovis's motion for summary judgment dismissing the second third-party complaint is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/5/17



HON. JEFFREY K. OING, J.S.C.