

<b>AXA Art Ins. Corp. v Fortress Fine Art Stor.</b>
2015 NY Slip Op 32331(U)
December 10, 2015
Supreme Court, New York County
Docket Number: 152982/2013
Judge: Jennifer G. Schechter
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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 57

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 AXA ART INSURANCE CORPORATION a/s/o  
 RICHARD AVEDON FOUNDATION, Inc.,

Index No. 152982/13

Plaintiff,

-against-

FORTRESS FINE ART STORAGE a/k/a FORTRESS  
 NEW YORK HOLDINGS, INC.,

Defendant.

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 JENNIFER G. SCHECTER, J.:

Defendant Fortress Fine Art Storage (Fortress) owns property located at 49-20 5th Street in Long Island City, New York. The Richard Avedon Foundation (Foundation) owns "a mural sized triptych photograph entitled, *The Chicago Seven*, September 25, 1969 (Artwork) (Affirmation in Support [Supp], Ex A at ¶ 5). While stored at Fortress' premises, the Artwork "sustained significant water damage to one of its panels and the Foundation timely notified [its insurer--plaintiff AXA Art Insurance Corporation (AXA)] of its claim" (Supp at ¶ 6).

In 2013, AXA commenced this action against Fortress. In its verified complaint, AXA alleges that it is the subrogee of the Foundation, that the Artwork was damaged as a result of a roof leak and that Fortress was negligent in maintaining its roof, resulting in damage to the Artwork (Supp, Ex A at ¶¶ 5, 11-12).

In 2014, the Foundation commenced a special proceeding against AXA, which was assigned Index Number 151435/2014 and is pending (Special Proceeding).

AXA moves for a stay of discovery pending determination of the Special Proceeding. It urges that "it would be unjust to force AXA to present its damages claim at an inquest without a determination in [the Special Proceeding]" (Supp at ¶ 10). It argues that there would be no prejudice to Fortress by staying disclosure (Supp at ¶ 12). It also moves for summary judgment as to liability "since there are no issues of fact that the subject incident . . . arose out of the negligence of defendant Fortress, who admitted both 'ownership' and control' of the subject premises" (Supp at ¶ 16). Without submitting any proof of the cause of the damage to the Artwork, AXA maintains that Fortress breached its duty and is automatically responsible for the damage because the Artwork was "stored and/or located within" Fortress' premises (Supp at ¶ 18).

Fortress cross-moves to dismiss the action pursuant to CPLR 3211(a)(7) on the ground that AXA has no right to subrogation because it did not make any payment to the Foundation and has not conceded liability for the claim (Affirmation in Opposition and in Support of Cross Motion [Cross] at ¶ 29).

Dispositive Motions

The parties' dispositive motions are denied. Neither party met the applicable burden of establishing entitlement to judgment.

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues (see *Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968]). The heavy burden is on the movant, through use of admissible evidence, to make a *prima facie* showing of entitlement to judgment (see *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]). "Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the Court against summary judgment. Indeed, the moving party's failure to make a *prima facie* showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.*).

AXA did not demonstrate through admissible evidence that Fortress was negligent. In its motion, it did not prove that the Artwork was damaged as a result of a roof leak, as alleged in its complaint, or that Fortress was responsible for the water damage. Its motion must be denied.

Nor has Fortress demonstrated that the complaint should be dismissed for failure to state a cause of action. "Unlike

on a motion for summary judgment where the court 'searches the record and assesses the sufficiency of the parties' evidence,' on a motion to dismiss the court 'merely examines the adequacy of the pleadings'" (*Davis v Boenheim*, 24 NY3d 262, 268 [2014] [citations omitted]). In fact, the court is obliged to accept the complaint's factual allegations as true and accord plaintiff the benefit of every possible favorable inference (*Mill Financial, LLC v Gillett*, 122 AD3d 98, 103 [1st Dept 2014]). In the complaint, AXA alleges, among other things, that based on the applicable insurance policy it is subrogated to its insured's right of recovery. This allegation is sufficient for purposes of stating a cause of action against Fortress. Fortress, moreover, has not even shown that the allegation is untrue. It was not until it submitted its reply that it even referenced the applicable insurance policy (Affirmation in Reply to Plaintiff's Opposition to Defendant's Cross-Motion at ¶ 7 and Ex A at K; see also Supplemental Memorandum at 2) and Fortress has not asserted, much less established, that AXA definitively did not make payments "to or for" the Foundation (emphasis added). Fortress has not demonstrated that AXA failed to properly plead a cause of action and its cross-motion to dismiss is therefore denied.

Stay

The motion for a stay is denied. AXA did not establish that it is entitled to a stay as a matter of right. There is no reason that this case dealing with subrogation and liability for the water damage should await adjudication of the Special Proceeding. Nor is there any indication that AXA will not proceed against Fortress depending on the outcome of the Special Proceeding. Although Fortress did not take a position on a stay of discovery because it moved for outright dismissal of the case, the Court is not inclined to altogether halt these proceedings unless the parties can establish that it would not make sense or would be a waste of resources to proceed. No one has done so here. Therefore, the parties are to appear for a conference on January 20, 2016 at 10:00 a.m. (Room 623, 111 Centre Street). At the conference, the timing of disclosure can be discussed and a schedule set.

There is no basis for any award of sanctions.

Accordingly, it is

ORDERED that the motion and cross-motion are DENIED.

This constitutes the Decision and Order of the Court.

Dated: December 10, 2015

  
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HON. JENNIFER G. SCHECTER