

<b>Seneca Ins. Co. v Related Cos., L.P.</b>
2017 NY Slip Op 30298(U)
February 15, 2017
Supreme Court, New York County
Docket Number: 652106/12
Judge: Marcy Friedman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 60PRESENT: Hon. Marcy Friedman, J.S.C.SENECA INSURANCE COMPANY a/s/o 437  
WEST 16<sup>TH</sup> STREET LLC,*Defendant.**Plaintiff,*

– against –

Index No.: 652106/12

THE RELATED COMPANIES, L.P., and 17<sup>TH</sup>  
AND 10<sup>TH</sup> ASSOCIATES, LLC

DECISION/ORDER

x

In this subrogation action, plaintiff Seneca Insurance Company (Seneca), as the subrogee of 437 West 16<sup>th</sup> Street LLC (16<sup>th</sup> Street LLC or the LLC), seeks to recover insurance proceeds paid to 16<sup>th</sup> Street LLC for property damage and lost rents allegedly sustained as a result of construction on an adjoining property. Defendant 17<sup>th</sup> and 10<sup>th</sup> Associates LLC (17<sup>th</sup> LLC) is the owner of the adjoining property, and defendant The Related Companies, L.P. (Related) is the guarantor of the owner's obligations under a Zoning Lot Development Agreement (ZLDA) (Maguire Aff. In Supp., Ex. A). In a separate action (16<sup>th</sup> Street LLC action, Index No. 600100/07), 16<sup>th</sup> Street LLC sued the same defendants for indemnification, pursuant to the ZLDA, for damages allegedly sustained as a result of the construction.<sup>1</sup> After a bench trial in that action, this court rendered a decision and order, dated April 17, 2015, determining the categories of damage that were caused by the construction. After a continued bench trial, the court rendered a decision and order, dated June 27, 2016, awarding judgment in favor of 16<sup>th</sup> Street LLC and against defendants for the damage, in the amount of approximately \$1.192

<sup>1</sup> By stipulation in the 16<sup>th</sup> Street LLC action, e-filed on August 30, 2016, the parties have corrected the placement of commas in the parties' names. The names, as used in the body of decision, reflect this correction.

million, and staying entry of judgment pending resolution of 16<sup>th</sup> Street LLC's claim for interest and attorney's fees. By decision and order, also dated February 15, 2017, the court vacated the stay of entry of judgment, set the date from which interest should be awarded, and referred the matter to a Special Referee for a hearing on the LLC's reasonable attorney's fees. The facts regarding the LLC's damage claims are discussed at length in the 2015 and 2016 decisions and will not be repeated here. In this action, Seneca moves for summary judgment holding that defendants are liable to Seneca for the amount it paid to 16<sup>th</sup> Street LLC or, alternatively, the "amount to be determined" by the court in the 16<sup>th</sup> Street LLC action,<sup>2</sup> as well as for Seneca's attorney's fees.

It is undisputed that Seneca paid 16<sup>th</sup> Street LLC insurance proceeds in the amount of \$952,424.00. (Joint Statement, ¶ 10.) According to Seneca, it paid this amount to 16<sup>th</sup> Street LLC based on three documents: 1) the estimate of defendants' expert Rimkus Consulting Group, Inc. for damages to 16<sup>th</sup> Street LLC's building in the amount of \$743,943.73; 2) \$77,457.00 for Mueser Rutledge's fees for monitoring during the construction; and 3) \$131,523.00 for lost rents. (See Maguire Aff. In Supp., ¶ 20, Exs. J, N, O.)<sup>3</sup>

As a general rule, "[s]ubrogation is the principle by which an insurer, having paid losses of its insured, is placed in the position of its insured so that it may recover from the third party legally responsible for the loss." (Winkelmann v Excelsior Ins. Co., 85 NY2d 577, 581 [1995].)

With a minor exception discussed below (*infra* at 6), defendants do not dispute that the amounts paid by Seneca for the damage to the building and for the Mueser Rutledge fees were for categories of damages that were caused by the adjacent construction. Nor do defendants

---

<sup>2</sup> This motion was brought before the June 27, 2016 decision determining the amount to be paid by defendants to 16<sup>th</sup> Street LLC for damage caused by the construction.

<sup>3</sup> These three items total approximately \$500.00 more than the amount paid by Seneca.

dispute that the April 17, 2015 and June 27, 2016 decisions after trial of the 16<sup>th</sup> Street LLC action held defendants responsible for these categories of damages. Defendants contest Seneca's entitlement to additional damages for lost rents and attorney's fees. Moreover, defendants assert that Seneca cannot recover against them in this action for amounts paid to 16<sup>th</sup> Street LLC because the LLC has been awarded a judgment in its own action, which includes the amounts paid by Seneca to the LLC. Defendants thus contend that a judgment in Seneca's favor in this action would result in a double recovery against defendants for the damage for which they have been found liable, and that Seneca's remedy for recovery of the benefits paid to 16<sup>th</sup> Street LLC is to seek a set-off against the LLC.

#### Lost Rents

Defendants oppose Seneca's claim for benefits paid to 16<sup>th</sup> Street LLC for lost rents, based on this court's holding in the 16<sup>th</sup> Street LLC action that the LLC failed to present sufficient evidence to demonstrate that losses of rents were sustained. (Apr. 17, 2015 Decision at 10-11.) Contrary to Seneca's contention, that finding was a finding on the merits by which Seneca is bound.

Seneca contends that it has contractual subrogation rights against defendants that differ from, and are not strictly derivative of, 16<sup>th</sup> Street LLC's rights, and therefore differ from its rights as an equitable subrogee. It further contends that under the contracts it is entitled to the amount of benefits it paid, regardless of whether the amounts were determined to be recoverable by this court in the 16<sup>th</sup> Street LLC action. (Def.'s Supp. Reply Aff., ¶¶ 4-10.) In support of this contention, Seneca relies on the Subrogation Receipt, dated January \_\_, 2009, which provides in pertinent part:

"The Undersigned hereby assigns, sets over, transfers and subrogates to the said Insurer, all the rights, claims, interest, choses or things in action to the extent

of the amount paid as aforesaid, which the Undersigned may have against any person, persons, or corporation, who may be liable, or hereafter adjudged liable for the loss or damage aforesaid, and hereby authorizes and does empower the said Insurer to sue, compromise, or settle in the name of the Undersigned or otherwise, and the said Insurer is hereby fully substituted in the place of the undersigned and subrogated to all rights in the premises to the limited extent of amount so paid."

(Maguire Aff. In Supp., Ex. F [emphasis in original].)

This provision does not by its terms confer greater rights on Seneca than its rights as an equitable subrogee. Nor does the provision authorize Seneca to sue for damages for which its insured has already unsuccessfully sued, and Seneca cites no authority to the contrary. Seneca's reliance on Spectra Audio Research, Inc. v Chon (62 AD3d 561 [1<sup>st</sup> Dept 2009]) is misplaced. In that case, the insured had not commenced an unsuccessful action for damages, and the Court held that the insurer was authorized, pursuant to contract (i.e., the subrogation receipt) and CPLR 1004, to sue for damages in the name of its insured. The Court also held that the subrogation receipt authorized the insurer to sue not only for the amount of benefits paid to its insured but also for the insured's uncompensated damages. Here, in contrast, as stated above, 16<sup>th</sup> Street LLC's claim in its own action for lost rents was denied on the merits. Spectra does not override the doctrine of collateral estoppel.

As to Seneca's rights under the equitable subrogation doctrine, it is well settled that an insurer's rights against a third party as equitable subrogee

"accrue upon payment of the loss and are based upon the principle that in equity an insurer, which has been compelled under its policy to pay a loss, ought in fairness to be reimbursed by the party which caused the loss. The rights of an insurer as equitable subrogee against a third party are derivative and limited to such rights as the insured 'would have had against such third party for its default or wrongdoing.' Thus, the insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured."

(Federal Ins. Co. v Arthur Andersen & Co., 75 NY2d 366, 372 [1990] [internal citations omitted].) The Courts have thus held that where an insurer's subrogor has brought a prior action against an alleged wrongdoer and has unsuccessfully sought to recover damages in that action for a particular category of damages, the determination of the prior action "is entitled to preclusive effect on the issue of the plaintiff's [i.e., insurer's] entitlement to recoup the benefits it paid to its subrogor" for that item of damages. (State Farm Mut. Auto. Ins. Co. v Baltz Concrete Constr., Inc., 29 AD3d 777, 778 [2d Dept 2006] [insurer not entitled to recover benefits paid to insured for extended economic loss where insured unsuccessfully sought to recover such damages from defendants in a prior action]; State Farm Mut. Auto. Ins. Co. v Polge, 258 AD2d 911 [4<sup>th</sup> Dept 1999].)

The court further holds that the collateral estoppel doctrine applies here to Seneca's claim for lost rents. The court rejects Seneca's contention that this court's determination in the 16<sup>th</sup> Street LLC action disallowing lost rents is not entitled to preclusive effect because Seneca was not in privity with 16<sup>th</sup> Street LLC. Seneca argues that 16<sup>th</sup> Street LLC assigned its claims to Seneca before defendants asserted their defense to 16<sup>th</sup> Street LLC's lost rents claim in the 16<sup>th</sup> Street LLC action, and that privity would have existed only if the assignment had occurred after the assertion of the defense. In support of this contention, Seneca relies on Gramatan Home Inv. Corp. v Lopez (46 NY2d 481, 486-487 [1979]), which holds that "an assignee is deemed to be in privity with the assignor where the action against the assignor is commenced before there has been an assignment." As the Court of Appeals explained: "In that situation, at the time the assignee succeeded to the rights of the assignor, the subject matter of the assignment was then embroiled in litigation and was subject to the claims of third parties and the assignee is charged with notice that his rights to the assignment are subject to competing claim." (*Id.*)

Assuming for purposes of this motion that this reasoning applies where, as here, the assignor itself brought the prior action, the court finds that 16<sup>th</sup> Street LLC made the assignment to Seneca after the LLC commenced its action against defendants. More particularly, the 16<sup>th</sup> Street LLC action was commenced in 2007. Seneca paid the insurance benefits to 16<sup>th</sup> Street LLC in 2009, and the LLC gave Seneca a subrogation receipt dated January 2009, in which it expressly assigned its rights. Seneca unpersuasively argues that the assignment was made at the time the policy was issued. The policy merely provides for transfer of the insured's rights to the insurer upon payment, and thus states: "If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment." (Policy, Commercial Property Conditions, I at CP 00900788 [Maguire Aff. in Supp., Ex. C].) As Seneca was in privity with 16<sup>th</sup> Street LLC, its claim for recovery from defendants of its payment to the LLC for lost rents is barred.

#### Seneca's Other Claims for Repair Damages

Seneca's de minimis claim for repair of the flagpole in the amount of \$500.00 (Supp. Aff. In Opp., Ex. C) is also barred by collateral estoppel, as this court's determination of the 16<sup>th</sup> Street LLC action disallowed repairs on the sidewalk. (See Apr. 17, 2015 Decision at 10.) Defendants do not identify any other items that were paid by Seneca but disallowed in the 16<sup>th</sup> Street LLC action.

#### Seneca's Claim for Attorney's Fees

Defendants oppose Seneca's claim that it is entitled, pursuant to section 4.2 (B) of the ZLDA, to attorney's fees for enforcement of its claims against defendants. This section provides, in pertinent part: "Developer [17<sup>th</sup> LLC] hereby agrees to indemnify and hold Owner [16<sup>th</sup> Street LLC] harmless from and against any claims, loss, cost or expense, including

reasonable attorneys fees and disbursements, which Owner may suffer by reason of Developer's performance of the Construction Easements Work or the construction of the New Buildings."

Related guaranteed Developer's obligations under section 4.2 (B) of the ZLDA. (Guaranty, McGuire Aff. In Supp., Ex. B.) In the 16<sup>th</sup> Street LLC action, this court (Fried, J., now retired), held that the LLC was entitled to indemnification for its attorney's fees for an intra-party claim. (437 W. 16<sup>th</sup> St., LLC v 17<sup>th</sup> & 10<sup>th</sup> Assocs., LLC, 27 Misc 3d 1230 [A] \* 3-4, Index No. 600100/07, May 29, 2010].) This court held that that decision was law of the case, declined to exercise its discretion to reconsider the decision, and approved 16<sup>th</sup> Street LLC's attorney's fees in an amount that remains to be determined. (See Feb. 15, 2017 Decision, at 2.)

Seneca is subrogated to the LLC's rights under the ZLDA pursuant to the subrogation receipt and the equitable subrogation doctrine. The LLC assigned its rights under the receipt "to the extent of the amount paid." Seneca did not make a payment to the LLC for its attorney's fees in connection with the LLC's action against defendants to enforce the ZLDA. On the contrary, the LLC, not Seneca, advanced the legal fees in order to establish defendants' liability under the ZLDA for the damage caused by the construction. Under these circumstances, Seneca does not have a viable claim for its attorney's fees in connection with the instant action.

#### Seneca's Right to Recovery in the Instant Action

As the record on this motion demonstrates, in the 16<sup>th</sup> Street LLC action, judgment was awarded in favor of 16<sup>th</sup> Street LLC and against defendants 17<sup>th</sup> LLC and Related for damages to the LLC's building and for Mueser Rutledge fees in an amount that exceeds the total paid by Seneca to the LLC for these two categories of damages. In the 16<sup>th</sup> Street LLC action, the court held on the merits that 16<sup>th</sup> Street LLC was not entitled to damages for lost rents and flagpole

work—items which were included in the total sum paid by Seneca to 16<sup>th</sup> Street LLC. As held above, Seneca cannot recover those two items here.

The more difficult issue is whether Seneca can recover here against defendants for the categories of damages for which 16<sup>th</sup> St. LLC has already been awarded judgment against the same defendants in its own action. As all parties to this action acknowledge, a double recovery against defendants for the same damages must be avoided. In the 16<sup>th</sup> Street LLC action, the parties also agreed that a double recovery would be improper.

More particularly, in the 16<sup>th</sup> Street LLC action, this court granted the LLC's motion to preclude defendants from producing evidence of Seneca's payment of insurance benefits. In rejecting defendants' claim that the payment of such benefits was a collateral source payment pursuant to CPLR 4545 (c), this court reasoned that the statute did not apply to the LLC's claim for reimbursement of damage pursuant to the ZLDA, which was a contractual indemnification claim, and not a negligence claim. The decision expressly stated: "That is not to say that plaintiff should have a double recovery. It is to say, rather, that the remedy for the defendants and/or the procedure to insure against a double recovery lies elsewhere than under CPLR 4545 (c)." (Nov. 6, 2013 Order, attaching so ordered decision on the record on October 30, 2013 [NYSCEF No. 212]; Sept. 20, 2013 Transcript in 16<sup>th</sup> Street LLC Action, at 15-23.) The LLC's counsel in fact expressly confirmed at the time of argument of the motion that "we [the LLC] are not entitled to double recovery here. If we got a million from the insurance company we cannot get the same one million here." (*Id.* at 15-16.) He further suggested that a double recovery would be avoided because, once the LLC obtained a judgment in its action, Seneca "is going to be coming to us with their subrogation receipt, and say okay, now we need to settle up." (*Id.* at 17.)

Seneca submits no authority that it may recover against defendants in this action the same damages that 16<sup>th</sup> Street LLC, its insured, has already recovered in its own action against defendants. As the Court of Appeals has explained:

“Equitable subrogation is premised on two related concepts. First, that the party who causes injury or damage should be required to bear the loss by reimbursing the insurer for payments made on behalf of the injured party. Second, that the injured party should not recover twice for the same harm—once from its insurer and again from the wrongdoer. Therefore, if an injured party receives monies from the tortfeasor attributable to expenses that were paid by its insurer, the insurer may recoup its disbursements from its insured; but when the wrongdoer does not pay damages for an insured’s medical expenses, generally the insurer, as subrogee, has been allowed to seek recovery directly from the tortfeasor.

There is, however, an important limitation on recovery under the doctrine of equitable subrogation. If the sources of recovery ultimately available are inadequate to fully compensate the insured for its losses, then the insurer—who has been paid by the insured to assume the risk of loss—has no right to share in the proceeds of the insured’s recovery from the tortfeasor.”

Fasso v Doerr, 12 NY3d 80, 87 [2009] [internal citations and quotation marks omitted]; Teichman v Community Hosp. of Western Suffolk, 87 NY2d 514 [1996].) Seneca does not dispute that this authority, although developed in the personal injury context, is applicable to this property damage case. In any event, Seneca does not cite any case that has authorized an insurer to obtain a second judgment against the party responsible for damage, where its insured has already obtained a judgment against the responsible party for the same damage.<sup>4</sup> To the extent that Seneca argues that 16<sup>th</sup> Street LLC sought, and in its own action was awarded, “amounts of damage not covered by [the LLC’s] policy of insurance issued by Seneca (Maguire Supp. Aff. In Supp., ¶ 19), this court categorically rejects that assertion. Seneca’s payments to the LLC for damages to the building and for Mueser Rutledge fees are payments for the very categories of

---

<sup>4</sup> Winkelmann v Excelsior Insurance Co. (85 NY2d 577, *supra*), on which Seneca relies, is not to the contrary. The Court there rejected the insured’s contention that the insurer as “equitable subrogee must delay seeking recovery from the tortfeasor until the insured has exhausted its efforts to collect from the third-party tortfeasor.” (*Id.* at 583-584.) The action did not involve duplicative judgments.

damages that the LLC was awarded in its own action. To the extent that Seneca seeks damages for lost rents and the flagpole item, those claims are barred, as held above, by the collateral estoppel doctrine. The court accordingly holds that Seneca may not recover against defendants in this action for any of the items of insurance benefits paid to 16<sup>th</sup> Street LLC.

Seneca further appears to argue that the court may order an off-set of amounts paid by Seneca to 16<sup>th</sup> Street LLC against the judgment awarded to the LLC in the 16<sup>th</sup> Street LLC action. (Sept. 29, 2016 Transcript [Tr.] at 7-8.) 17<sup>th</sup> LLC and Related also argue that Seneca's recovery is from its insured, and appear to support a set-off against the judgment in 16<sup>th</sup> Street LLC's favor in its own action. (Defs.' Memo. In Opp. at 18; Tr. at 14.) This court may not, in the context of this action, order an off-set, as 16<sup>th</sup> Street LLC is not a party to this action and has not had an opportunity to be heard on the issue.

The court notes, however, that after this action was commenced in 2012, Seneca moved to join this action with the 16<sup>th</sup> Street LLC action or to intervene in that action, which had been commenced in 2007. (Fox Aff. In Opp., Ex. G.) By decision on the record on December 4, 2012, the transcript of which was so ordered on December 14, 2012, the court denied the motion, on the ground that the actions were at materially different stages and the 16<sup>th</sup> Street LLC action was trial ready. (Id., Ex. J.) The circumstances have now changed. In the 16<sup>th</sup> Street LLC action, the court has now determined the categories of damage that are recoverable against defendants, pursuant to the ZLDA, as a result of the adjacent construction, and has fixed the amount of all damages recoverable in that action, except the amount for attorney's fees. In the instant action, the court now holds that Seneca may not proceed directly against defendants in light of the judgment in the 16<sup>th</sup> Street LLC action. If so advised, Seneca may move to renew its

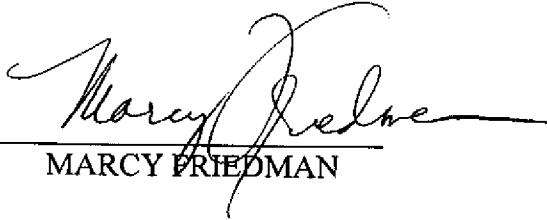
motion for leave to intervene, subject to the right of 16<sup>th</sup> Street LLC and defendants to oppose the motion.

It is accordingly hereby ORDERED that the motion of Seneca Insurance Company for summary judgment is denied; and it is further

ORDERED that this action is dismissed.

This constitutes the decision and order of the court.

Dated: New York, New York  
February 15, 2017

  
\_\_\_\_\_  
Marcy Friedman