SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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LEXINGTON INSURANCE COMPANY AS SUBROGEE OF PEAK POWER ONE LLC,AND ALL OTHER NAMED INSUREDS UNDER POLICY NUMBER 4272116,

Plaintiffs,

- v -

GI ENDURANT LLC FORMERLY KNOWN AS ENDURANT ENERGY LLC, and PROFESSIONAL POWER PRODUCTS, INC.,

Defendants.

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INDEX NO. 161725/2014

MOTION DATE 07/13/2018

MOTION SEQ. NO. 005

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 005) 95, 96, 97, 98, 99, 100, 101, 102, 103, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for JUDGMENT - SUMMARY.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of defendant GI Endurant LLC (formerly known as Endurant Energy LLC) for summary judgment dismissing the complaint and the cross claims asserted against it is denied; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 59, Room 331, 60 Centre Street, New York, New York, on June 25, 2019, 11:00 A.M.

DECISION

In this subrogation action, defendant GI Endurant LLC s/h/a GI Endurant LLC (formerly known as Endurant Energy LLC) (Endurant) moves, pursuant to CPLR 3212, for summary judgment

dismissing the complaint and the cross claims asserted against it. Plaintiff Lexington Insurance Company (Lexington), as subrogee for Peak Power One LLC (Peak), and defendant Professional Power Products, Inc. (Professional), oppose the application.

Background

Peak is the owner of a generating facility located at One Penn Plaza, New York, New York (Facility).

Pursuant to a Plant Management Agreement dated October 6, 2009 (the Plant Agreement), Peak hired Endurant to serve as its engineer for the development of the Facility and to manage it after its completion.

Professional, as the system packager for the construction of the Facility, was responsible for producing pipe connections and drawings.

On December 11, 2011, generator no. 3 at the Facility malfunctioned, causing physical damage. After receiving a claim from Peak and others, Lexington adjusted the claim for $395,577.64 and paid out $295,517.65, excluding a $100,000 deductible, under policy no. 4272116.

Plaintiff Lexington, Peak's subrogee, commenced this action seeking damages of $395,577.64. Plaintiff alleges that defendants were negligent and that defendants breached a contract they had entered into with Peak.

The Parties' Contentions

Endurant moves for summary judgment dismissing the complaint and the cross claims asserted against it on the ground that all subrogation claims have been waived.

Article VI (J) of the Plant Agreement, titled "Insurance," reads, in relevant part:

> "Owner and Provider shall each obtain an appropriate clause in, or endorsement on, Owner's Property Policy or Provider's Property Policy (as the case may be) pursuant to which the insurance companies waive subrogation or consent to a waiver of right of recovery. Owner and Provider also agree that, having obtained such clauses or endorsements of waiver of subrogation or consent to a waiver of right of recovery, they shall not make any claim against or seek to recover from Owner or its affiliates, managers, shareholders, officers, directors, employees, trustees and agents or the Provider or its affiliates, their partners, members, mangers [sic], shareholders, officers, directors, employees, trustees and agents (as the case may be) for any loss or damage to its property or to the property of others resulting from fire or other hazards covered by Owner's Property Policy or Provider's Property Policy (as the case may be); provided, however, that the release, discharge, exoneration and covenant not to sue herein contained shall be limited by and be coextensive with the terms and provisions of the waiver of subrogation clause or endorsements or clauses or endorsements consenting to a waiver of right of recovery".

Endurant subsequently assigned a separate maintenance agreement to Peak by agreement dated July 28, 2014 (the Assignment).

Nonparty Chubb Group of Insurance Companies (Chubb), through nonparty Federal Insurance Company, issued policy no. 3711-14-75 CHI to Endurant, in effect from June 1, 2011 to June

1, 2012 (the Chubb Policy). Relevant to this action is a liability insurance endorsement altering the general conditions of the Chubb Policy as follows:

> "Transfer Or Waiver Of Rights of Recovery Against Others
>
> We will waive the right of recovery we would otherwise have had against another person or organization, for loss to which this insurance applies, provided the insured has waived their rights of recovery against such person or organization in a contract or agreement that is executed before such loss".

Lexington issued policy no. 4272116 to Peak, in effect from February 15, 2011 to February 15, 2012 (the Lexington Policy). Several provisions in Section D of the Lexington Policy discuss loss adjustment and settlement. Of particular relevance is paragraph 4, subsection D, titled "Subrogation," which provides, in part, that "[t]he Company will not acquire any rights of recovery that the Insured has expressly waived prior to a loss, nor will such waiver affect the Insured's rights under this Policy".

Thus, Endurant argues that plaintiff is contractually barred from maintaining a subrogation claim against it.

Plaintiff, in response, contends that Endurant relies on an overbroad interpretation of the waiver of subrogation clause. Plaintiff alleges that it actually paid Peak $674,470.64 on the adjusted claim after applying the $100,000 deductible, and that as the amount of the deductible falls outside the scope of the

subrogation waiver, Endurant's motion must be denied. Plaintiff argues, in addition, that one year after the date of the Plant Agreement, Peak and Endurant executed an agreement for maintenance on November 1, 2010 (the Maintenance Agreement). The Assignment terminated Endurant's rights under the Maintenance Agreement, and Endurant's rights under that agreement were transferred to Peak. Moreover, plaintiff points out, the Assignment stated that Endurant would indemnify Peak for any and all claims arising out of a service contract between Endurant and nonparty H.O. Penn Machinery Co., Inc. Plaintiff contends also that a question of fact exists as to whether the loss was caused by Endurant's failure to perform under the Maintenance Agreement. Lastly, plaintiff urges the court to deny the motion because Endurant did not raise the waiver issue as an affirmative defense in its answer.

Professional argues that Endurant failed to address its cross claims for contribution and indemnification, and that thus, the motion, insofar as it seeks dismissal of the cross claims, should be denied. As for the cross claims, in reply, Endurant contends that Professional waived its right to assert claims against Endurant based on the language contained in the close-out agreement between them.

Discussion

It is well settled that the movant on 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" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (see CPLR 3212). The "facts must be viewed in the light most favorable to the non-moving party" (Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (id., citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "[f]ailure 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" (Vega, 18 NY3d at 503 [internal quotation marks and citation omitted, emphasis in original]).

The equitable doctrine of subrogation "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" (Kaf-Kaf, Inc. v Rodless Decorations, 90 NY2d 654, 660 [1997]). The doctrine "is 'applicable to cases where a party is compelled to pay the debt of a third person to protect his [or her] own rights, or to save his [or her] own property'" (Broadway Houston Mack Dev., LLC v Kohl, 71 AD3d 937, 937 [2d Dept 2010], quoting Gerseta Corp. v Equitable Trust Co. of N.Y., 241 NY 418, 426 [1926]). Therefore, an insurer who pays a claim on behalf of its insured becomes equitably subrogated to the rights of its insured (see General Sec. Ins. Co. v Nir, 50 AD3d 489, 490 [1st Dept 2008]).

"[P]arties to an agreement may waive their insurer's right of subrogation" (Kaf-Kaf, Inc., 90 NY2d at 660). Such "waiver-of-subrogation clauses . . . 'reflect the parties' allocation of the risk of liability between themselves to third parties through the device of insurance" (State Farm Ins. Co. v J.P. Spano Constr., Inc., 55 AD3d 824, 825 [2d Dept 2008] [internal quotation marks and citation omitted]; Insurance Co. of N. Am. v Borsdorff Servs., 225 AD2d 494, 494 [1st Dept 1996] [describing a waiver of subrogation clause as "an allocation of risk provision"]). "Where a party has waived its right to subrogation, its insurer has no cause of action (State Farm Ins. Co., 55 AD3d at 825). Nevertheless, a waiver of subrogation "is necessarily premised on the procurement of insurance by the parties" (Duane Reade v Reva Holding Corp., 30 AD3d 229, 232

[1st Dept 2006] [internal quotation marks and citation omitted]). Hence, uninsured losses are not barred by a waiver of subrogation provision (Kaf-Kaf, Inc., 90 NY2d at 660 [stating that "a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears"]).

As an initial matter, Endurant was not required to plead the issue of waiver of the subrogation clause as an affirmative defense (see State Farm Ins. Co., 55 AD3d at 825; see also State Natl. Ins. Co. v Berakha, 22 AD3d 331, 332 [1st Dept 2005], rearg denied 2006 NY App Div LEXIS 1836 [1st Dept 2006] [granting the defendant's late motion to amend its answer to assert an affirmative defense of waiver of subrogation on the eve of trial because the plaintiff insurer was aware of the waiver clause]). Additionally, the Assignment does not affect the present action as the agreement was executed three years after the generator failure at the Facility. In any event, the subrogation waiver appears in the Plant Agreement, and the Assignment refers only to the Maintenance Agreement and a separate service contract.

Here, the broad waiver of subrogation provision contained in the Plant Agreement between Peak (and by extension, Lexington) and Endurant appears to bar at least a portion of plaintiff's claim, specifically, the amount plaintiff paid out, excluding the deductible (see Payson v 50 Sutton Place S.

Owners, Inc., 107 AD3d 506, 506 [1st Dept 2013] [granting the defendant summary judgment against the plaintiff who was "in no better position than her assignor"]; Tower Risk Mgt. v Ni Chunp Hu, 84 AD3d 616, 616 [1st Dept 2011] [finding that the waiver of subrogation clause in a lease barred the plaintiff's action]; Seneca Ins. Co. v City of New York, 35 AD3d 248, 249 [1st Dept 2006] [same]).

Despite the foregoing, plaintiff also seeks to recover the $100,000 deductible. An "uninsured segment of loss [such as a deductible] falls outside the ambit of 'risk insured against' for purposes of inclusion in the waiver of subrogation clause" (Gap v Red Apple Cos., 282 AD2d 119, 123 [1st Dept 2001], citing Federal Ins. Co. v Honeywell, Inc., 243 AD2d 605, 606 [2d Dept 1997]; ELC Beauty, LLC v AE Outfitters Retail Co., 2016 NYLJ LEXIS 4912, *12, NYLJ 1202777935072, at *7-8 [Sup Ct, NY County 2017]). To that end, plaintiff obtained insurance for a covered loss, but its coverage was limited with the assumption of a $100,000 deductible. Therefore, the deductible falls outside the scope of the waiver of subrogation provision (Gap, 282 AD2d at 123-124 [finding that the plaintiffs obtained insurance for the specific risk and that the waiver of subrogation provisions in their leases did not apply to their deductibles). Contrary to defendant's position, plaintiff, as Peak's subrogee, does not lack standing to assert a claim for this amount (see Hanover

Ins. Co. v Chelsea 8th Ave. LLC, 2009 NY Slip Op 30417[U], *5-6 [Sup Ct, NY County 2009] [stating that the plaintiff insurer, as its insured legal assignee, could assert a claim to recover the deductible). Thus, summary judgment dismissing the complaint against Endurant is not warranted.

As for Professional's cross claims for contribution and indemnification, Endurant failed to advance any arguments concerning the merits of those cross claims in its initial moving papers. Instead, Endurant waited until its reply to correct this deficiency, which is impermissible (see Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992]). Having never met its initial prima facie burden, Endurant's motion for summary judgment dismissing Professional's cross claims must likewise be denied.

5/13/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE