

<b>Old Republic Gen. Ins. Corp. v Scala Contr. Co., Inc.</b>
2021 NY Slip Op 30481(U)
February 18, 2021
Supreme Court, New York County
Docket Number: 653234/2018
Judge: Louis L. Nock
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK PART IAS MOTION 38EFM

Justice

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OLD REPUBLIC GENERAL INSURANCE CORP.,
Individually, and a/s/o CAPE CHURCH ASSOCIATES,
L.L.C. and T.G. NICKEL & ASSOCIATES,

Plaintiff,

INDEX NO. 653234/2018

MOTION DATE 03/13/2019,
05/11/2020

MOTION SEQ. NO. 003 005

- v -

SCALA CONTRACTING CO., INC., SCOTTSDALE
INSURANCE COMPANY, RED HOOK CONSTRUCTION
GROUP-II, L.L.C., CERTAIN UNDERWRITERS AT
LLOYDS, LLOYD'S AMERICA, INC., GENERAL STAR
INDEMNITY CO,

Defendants.

DECISION + ORDER ON
MOTION

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LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 84, 85, 86, 87, 88,
89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 121, 122, 123, 124,
125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138

were read on this motion to/for DISMISSAL

Upon the foregoing documents, the motions (motion sequences 003 and 005) of
defendant Red Hook Construction Group-II, L.L.C. ("Red Hook") to dismiss the complaint are
consolidated herein for decision and granted, in accordance with the following memorandum.

Background

In this action, Plaintiff Old Republic General Insurance Corp. ("Plaintiff"), individually,
and as subrogee of non-parties Cape Church Associates, L.L.C. ("Cape Church") and T.G.
Nickel Associates, LLC ("TG Nickel"), seeks defense and indemnification from defendants
Scottsdale Insurance Company ("Scottsdale"), Certain Underwriters at Lloyds, Lloyd's America,

Inc. (“Lloyds”), and General Star Indemnity Co (“Gen Star”) (together, the “Insurance Defendants”), and contribution and indemnification from Red Hook and Scala, in connection with an underlying claim and suit for personal injuries brought by non-party Celidonio Molina Campos (“Campos”). Cape Church is the owner of real property located at 149 Church Street, New York, New York (“the Premises”) (complaint ¶ 16). Sometime prior to March 2017, Cape Church hired TG Nickel to perform certain renovation and construction work at the Premises (*id.* ¶ 17). TG Nickel then entered into a contract with Red Hook to perform certain work at the Premises, including demolition work, and Red Hook, in turn, retained Scala to perform demolition work at the Premises (*id.* ¶¶ 18-19). On or about March 1, 2017, Campos, an employee of Scala, allegedly suffered an injury at a construction site at the Premises while removing a wood floor joist at cellar level when pieces of the joist broke, striking him (*id.* ¶ 20).

On March 21, 2017, Campos commenced an action against Cape Church and Red Hook in this court captioned *Celidonio Molina Campos v. Cape Church Associates, et al.*, Index no. 153142/2017, seeking damages for his injuries (the “underlying action”) (*id.* ¶ 21, exhibit A). Plaintiff, the issuer of a commercial general liability policy to TG Nickel, agreed to accept the defense and indemnity of Cape Church as an additional insured under Plaintiff’s policy pursuant to the contract between Cape Church and TG Nickel (*id.* ¶ 22). Cape Church appeared in the underlying action and filed an answer that asserts cross-claims against Red Hook for contribution, common law indemnification, and contractual indemnification (*id.*, exhibit C). On June 8, 2018, Campos commenced a second action against TG Nickel, captioned *Celidonio Molina Campos v. T.G. Nickel & Associates, LLC*, Index no. 155433/2018. Both actions were consolidated under the underlying action by an order dated October 8, 2018 (Sup Ct, New York County 2018, Cannataro, J., Index no 153142/2017, NYSCEF Doc no 74). Cape Church and TG

Nickel also later commenced a third-party action in the underlying action against Red Hook and Scala, asserting causes of action for contribution, common law indemnification, contractual indemnification, and breach of contract against both Cape Church and TG Nickel.

On June 27, 2018, Plaintiff commenced this action for defense and indemnification in connection with the underlying action. As it pertains to movant Red Hook, the complaint filed in this action alleges that the contract between TG Nickel and Red Hook required Red Hook to defend and indemnify Cape Church and name Cape Church as an additional insured on its insurance policy for any damages arising out of Red Hook's work at the Premises, and that Red Hook was required to obtain insurance to cover the work and to also name Cape Church and TG Nickel as additional insureds (complaint ¶¶ 23-24). The complaint asserts causes of action against Red Hook for common law indemnity, contractual indemnification, and breach of contract (*id.* ¶¶ 33-51). On January 14, 2019, Plaintiff commenced a second action in this court as subrogee of TG Nickel, captioned *Old Republic General Insurance Corp., Individually, and a/s/o T.G. Nickel & Associates, LLC v Scala Contracting Co., et al.*, Index no 650230/2019, which seeks defense and indemnification from Scala, Red Hook, and the Insurance Defendants. These actions were consolidated by an order of this court dated March 13, 2020 (NYSCEF Doc no 38).

By its first motion (motion sequence 003), defendant Red Hook moves pursuant to CPLR 3211 (4) to dismiss the complaint as against it on the grounds that causes of action asserted by Plaintiff as subrogee of Cape Church were also asserted as cross-claims against it by Cape Church in the underlying action. Red Hook's second motion (motion sequence 005), is virtually identical to the first, and seeks the same relief, but is addressed to the complaint filed in the action commenced on January 14, 2019, which has since been consolidated with this action.

Plaintiff opposes both motions and argues that this court should exercise its discretion to deny the motion to dismiss, and also asserts that Red Hook is a necessary party to the action.

### Discussion

Pursuant to CPLR 3211 (a) (4), “[t]he court has broad discretion to dismiss an action on the ground that another action is pending between the same parties arising out of the same subject matter or series of alleged wrongs, and it is inconsequential that different legal theories or claims were set forth in the two actions” (*Shah v RBC Capital Markets LLC*, 115 AD3d 444, 444-445 [1st Dept 2014]). “The critical element is that both suits arise out of the same subject matter or series of alleged wrongs” (*Cherico, Cherico & Assocs. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009] [internal quotes omitted]). “A motion made pursuant to CPLR 3211 (a) (4) should be granted where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter” (*Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703, 705 [2d Dept 2006]; see *White Light Productions, Inc. v On The Scene Productions, Inc.*, 231 AD2d 90, 93 [1st Dept. 1997][dismissal is warranted under CPLR 3211[a][4] “to avoid the potential for conflicts that might result from rulings issued by courts of concurrent jurisdiction”). “[S]ubstantial, not complete, identity of parties is all that is required to invoke CPLR 3211 (a) (4)” (*Syncora Guar. Inc. v J.P. Morgan Securities LLC*, 110 AD3d 87, 96 [1st Dept 2013]). Generally, a substantial identity of parties “is present when at least one plaintiff and one defendant is common in each action” (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990]).

In accord with these principles, dismissal of the complaint as against Red Hook is appropriate. At the outset, the claims asserted by Plaintiff in this action are duplicative of both the cross-claims asserted by Cape Church in the underlying action and the claims asserted by

Cape Church and TG Nickel against Red Hook in the third-party action in the underlying case. This constitutes a waste of judicial resources and raises the danger of conflicting rulings relating to the same subject matter (*see Diaz v Philip Morris Cos., Inc.*, 28 AD3d 703 [2d Dept 2006]). The fact that Plaintiff also appears in this action as subrogee of Cape Church and TG Nickel does not change this result because there is substantial identity of parties, as Plaintiff, Cape Church, and TG Nickel are united in interest with respect to the duplicative claims (*Syncora*, 110 AD3d at 96 [“[S]ubstantial, not complete, identity of parties is all that is required to invoke CPLR 3211 [a] [4]”). To the extent that Plaintiff relies on *Winkelman v Excelsior Ins. Co.* (85 NY2d 577 [1995]) for the proposition that it should be permitted to maintain a second, duplicative, action as subrogee, *Winkelman* is inapposite because Plaintiff has not made a showing that it has paid its insured the policy limits such that it would invoke the doctrines set forth in *Winkelman* (85 NY2d at 582 [Upon payment of the loss, “an insurer who has paid the policy limits possesses the derivative and limited rights of the insured and may proceed directly against the negligent third party to recoup the amount paid.”]). Moreover, *Winkelman* addressed a circumstance where the injured parties had delayed commencing an action against the alleged tortfeasor, which is distinguished from the present case where other, duplicative, actions to determine the respective rights of the injured party and Plaintiff’s subrogors are already pending in this court. Finally, Plaintiff’s reliance on *Bello v Employees Motor Corp.* (240 AD2d 527 [2d Dept 1997]) and *White v Nationwide Mut. Ins. Co.* (228 AD2d 940 [3d Dept 1996]) for the proposition that Red Hook is a necessary party is misplaced, as these cases are only applicable where a personal injury plaintiff seeks a declaration that the defendant insurance company was required to defend and indemnify the alleged tortfeasor, which is not the case here. As such, Red Hook is not a

necessary party to this action and dismissal of the complaint as against Red Hook is appropriate; thus, both motions are granted.

Accordingly, it is

ORDERED that defendant Red Hook Construction Group-II, L.L.C.'s motions to dismiss (motion sequences 003 and 005) are granted, and the complaint is dismissed in its entirety against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This will constitute the decision and order of the court.

ENTER:

*Louis L. Nock*

<u>2/18/2021</u>			<u>LOUIS L. NOCK, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE