

Fireman's Fund Ins. Co. v Chapman

2021 NY Slip Op 31144(U)

April 9, 2021

Supreme Court, New York County

Docket Number: 153721/2020

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

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INDEX NO. 153721/2020

FIREMAN'S FUND INSURANCE COMPANY A/S/O
12 EAST 97TH STREET OWNERS, INC. AND
OTHER INTERESTED INSURED UNDER THE
APPLICABLE POLICY OF INSURANCE,

MOTION DATE

MOTION SEQ. NO. 001

Plaintiffs,

- v -

DECISION + ORDER ON MOTION

CHRISTINE CHAPMAN, PEBBLE CRAFT, INC.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10-32
were read on this motion to dismiss

By notice of motion, defendant Pebble Craft, Inc. moves pursuant to CPLR 3211(a)(7)
for an order dismissing the complaint and the cross claims of defendant Christine Chapman.
Plaintiff and Chapman oppose.

I. PLEADINGS

A. Complaint (NYSCEF 2)

In its complaint, plaintiff sues as subrogor of its insured, 12 East 97th Street Owners, Inc.,
to recover for property damage sustained by Owners in a fire on June 15, 2017 at the premises
located at 12 East 97th Street in Manhattan.

Plaintiff alleges that defendant Chapman resided at the premises in apartment 2I, and that
in or around October 2014, Chapman hired Pebble Craft to perform renovation work in her
apartment, including the installation, replacement and/or repair of a light fixture in a closet; the
light fixture was left unprotected with the bulb bare.

On or about June 15, 2017, the light bulb made contact with combustible material in the closet and ignited the fire, causing damage to Owners's property.

Plaintiff asserts a claim for negligence against defendant based on their failure to:

- a. adequately, properly and safely erect, assemble, inspect, install, renovate, operate and maintain the subject light fixture in the Unit and/or its internal components to avoid the risk of fire;
- b. properly inspect, maintain, and/or certify the subject light fixture in a safe and prudent fashion;
- c. properly insulate the subject bulb in the light fixture to avoid the ignition of a fire;
- d. properly and adequately supervise the work being done by its contractors, servants, agents, employees and/or workmen;
- e. properly install, renovate and/or maintain the light fixture in a fashion to prevent fire hazards;
- f. ensure that combustible materials were not stored on or within close proximity to the subject light fixture in the Unit;
- g. retain competent, licensed employees, agents, servants, workers, contractors, and/or subcontractors, with the requisite skills and abilities to properly install, renovate and/or maintain the subject light fixture.
- h. store combustible materials in a safe and proper manner so as to protect the Premises from damage caused by fire;
- i. adhere to the applicable state and local building codes, and/or regulations and/or the common standards and practices of the trade and industry in connection with the inspection, installation, maintenance and repair of the subject light fixture, including but not limited to the failure to install any type of protective covering over the unprotected bulb that Defendants knew or should have known would be in close contact with the storage of combustible materials;
- j. ensure the careful utilization of heat sources near combustible materials;
- k. recognize the obvious hazard presented by the storage of combustible materials in or within close proximity to the unprotected bulb in the subject light fixture;
- l. properly and adequately supervise the work being done by contractors, subcontractors, servants, agents, employees and/or workmen;
- m. observe the improper placement of combustible materials on or within close proximity to the subject light fixture and remediate the problem prior the occurrence of the Fire;
- n. do those things which were necessary for safety, preservation and protection of Plaintiff's Insureds' premises; and
- o. use due care and proper skill under the circumstances.

B. Chapman's answer and cross claims (NYSCEF 5)

Chapman denies plaintiff's allegations and asserts cross claims against Pebble

Craft for contribution, common law and contractual indemnity, and failure to maintain insurance.

C. Pebble Craft

In lieu of answering, Pebble Craft filed the instant motion.

II. MOTION TO DISMISS

A. Pebble Craft (NYSCEF 11)

Pebble Craft argues that plaintiff states no viable claim against it as it owed no duty of care to plaintiff's insured, and that for the same reason, the cross claims also must be dismissed. In any event, it maintains that the cross claims are legally insufficient. Pebble Craft denies that any of the exceptions permitting a party to be liable to another with whom it did not contract apply here, as, specifically, there is no allegation that it launched a force or instrument of harm merely by installing Chapman's light fixture, observing that plaintiff does not allege that it improperly installed the fixture or that it caused the fixture to come into contact with combustible material.

And, as it may not be held liable to plaintiff in negligence, the cross claims must also be dismissed. In any event, the common law indemnity cross claim fails as it alleged that Chapman was directly, rather than vicariously, negligent, and absent a contract between them containing an indemnity requirement, there is no basis for Chapman's contractual indemnity or failure to procure insurance cross claims.

In a supporting affidavit, Pebble Craft's principal states that there was no written contract between it and Chapman for the work it performed, and that at all times, Chapman was named as an additional insured under its commercial liability insurance policy. He attaches a copy of a certificate of insurance which reflects that both Owners and Chapman are named as additional insureds. (NYSCEF 12, 18).

B. Plaintiff (NYSCEF 21)

Plaintiff asserts that it states a cause of action for negligence against Pebble Craft by alleging that it “negligently, and in violation of all applicable State and local building codes and/or regulations, installed a bare light fixture with no protective covering in an enclosed closet used to store clothing and other combustible materials, thus launching the force of harm that led directly to the fire at issue which the FDNY Fire Marshal determined was caused by the ‘Heat from Light Bulb.’” It observes that contractors owe a duty to landowners to perform their work properly and non-negligently, and also that discovery has not yet begun and it has not had the chance to examine Pebble Craft’s records or depose its witness.

According to plaintiff, Pebble Craft’s installation of an unprotected light fixture in Chapman’s closet violated the National Electric Code, which addresses the acceptable types of light fixtures that may be installed in clothes closets. Plaintiff argues that Pebble Craft thereby launched a force or instrument of harm, ie, the unprotected light fixture, which directly caused the fire.

C. Chapman (NYSCEF 23, 24)

Chapman maintains that as Pebble Craft negligently installed the light fixture in her closet, it is directly responsible for the fire that occurred, and thus maybe held liable in common law indemnity and contribution.

Moreover, she asserts that Pebble Craft agreed to obtain insurance to cover the work it performed and to name her as an additional insured, and that the certificate of insurance proffered by Pebble Craft is insufficient to establish the existence of such coverage. In any event, the certificate reflects that the applicable coverage period ended in January 2015, it is undisputed that Pebble Craft performed work for her through June 2015, and the policy is “occurrence-

based,” covering only occurrences during the coverage period, rather than “claims-based,” and thus, coverage of the fire which did not occur until 2017 is precluded. Chapman also alleges that Pebble Craft tendered the claim to a different insurance company than the one named in the certificate, thereby raising an issue as to what insurance coverage it had actually procured.

And, as it is not alleged that Chapman acted negligently, Pebble Craft may be held liable to her for common law indemnity and contribution.

D. Reply (NYSCEF 28)

Pebble Craft denies having launched a force or instrument of harm, observing that even if it left the light fixture uncovered, the fire occurred two years after its work and Chapman had a duty to ensure that her clothes did not come in contact with the light. It also argues that Chapman should have covered the light fixture, and that it had no continuing duty to monitor the fixture.

Pebble Craft submits a copy of an insurance declaration page reflecting that it had insurance coverage during the complete period of its work for Chapman (NYSCEF 32), and denies that it had a contractual duty to indemnify Chapman. And, as plaintiff has alleged that both Chapman and it were directly or actively negligent, Chapman may not maintain its contribution and common law indemnity claims against it.

III. ANALYSIS

“In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff ‘the benefit of every possible favorable inference.’” (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3rd 324, 334 [2013] quoting *AG Capital Funding Partners LP v State St Bank & Trust Co.*, 5 NY3rd 582, 591 [2005]). “The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action

cognizable at law.” (*511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] quoting *Polonetsky v Better homes Depot, Inc.*, 97 NY2d 46, 54 [2001]).

As plaintiff is not a party to the contract between Chapman and Pebble Craft, Pebble Craft may only be held liable in negligence to plaintiff if it, “in failing to exercise reasonable care in the performance of [its] duties,” “launche[d] a force or instrument of harm.” (*Espinal v Melville Snow Contractors, Inc.*, 98 NY2d 136, 140 [2002]). In other words, a contractor that “undertakes to render services and then negligently creates or exacerbates a dangerous condition may be liable for any resulting injury.” (*Id.* at 141-142).

Here, plaintiff, in its complaint, alleges that Pebble Craft launched a force or instrument of harm by failing to cover the light fixture it had installed in Chapman’s closet, thereby violating the National Electric Code and failing to exercise reasonable care in the performance of its work. Based on these allegations, and the Fire Marshal’s finding that the fire was caused by combustible material coming in contact with the uncovered light, plaintiff sufficiently states a cause of action for negligence against Pebble Craft.

Pebble Craft does not demonstrate that Chapman’s cross claim for failure to maintain insurance is not viable. Even if it constitutes sufficient proof of actual insurance coverage, the certificate of insurance submitted by Pebble Craft covers only the period through January 2015, even though it continued its work for Chapman until June 2015. The certificate also names the insurer as Tower Insurance Company, although Pebble Craft later submits a declaration page of an insurance policy issued to it by Wesco Insurance Company. The Wesco policy, while covering the period at issue, contains no indication that Chapman was named as an additional insured.

However, as plaintiff alleges that both Chapman and Pebble Craft were actively negligent

by, respectively, permitting combustible material to come in contact with the bare light and installing an uncovered light fixture, Chapman may not assert a contribution or common law indemnity claim against Pebble Craft. (See e.g., Bd. of Mgrs. of Olive Park Condominium v Maspeth Props., LLC, 170 AD3d 645 [2d Dept 2019] [common law indemnity claim properly dismissed as complaint alleged both defendants actively negligent]; Ramirez v Almah, LLC, 169 AD3d 508 [1st Dept 2019] [indemnity and contribution claims properly dismissed as contractors were sued for their own alleged negligence]).

And, absent a contract requiring Pebble Craft to indemnify Chapman, her contractual indemnity claim likewise fails. (Herrero v 2146 Nostrand Ave. Assocs., LLC, AD3d , 2021 WL 1216393 [1st Dept 2021] [as no contract existed imposing obligations on contractors, contractual indemnification claim dismissed]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the motion to dismiss by defendant Pebble Craft, Inc., is granted to the extent of dismissing the cross claims of Christine Chapman for contribution, and common law and contractual indemnity, and is otherwise denied; and it is further

ORDERED, that Pebble Craft, Inc. file its answer to the complaint within 20 days of the date of this decision.

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BARBARA JAFFE, J.S.C.

4/9/2021
DATE

CHECK ONE:

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<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

