

State Farm Fire & Cas. Co. v Tamagawa

2023 NY Slip Op 33118(U)

August 25, 2023

Supreme Court, Kings County

Docket Number: Index No. 510977/2021

Judge: Sharon A. Bourne-Clarke

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At **DEFAULT JUDGMENT MOTION PART** of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 320 Jay Street, Borough of Brooklyn, City and State of New York, on the **10th of July, 2023**

PRESENT: HON. SHARON A. BOURNE-CLARKE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: DJMP

STATE FARM FIRE & CASUALTY COMPANY a/s/o
MALIK GRAVES-PRYOR,

Plaintiff,

-against-

TAKU TAMAGAWA

Defendant(s).

DECISION AND ORDER

Calendar No.
Index No. 510977/2021

The following papers were read on this motion pursuant to CPLR 2219 (a):

Papers

NYSCEF Doc. Nos.

Notice of Motion – Order to Show Cause – Exhibits and Affidavits Annexed	No(s). 59-83
Answering Affidavits and Exhibits	No(s).
Replying Affidavits and Exhibits	No(s).

FACTS

Plaintiff STATE FARM FIRE & CASUALTY COMPANY a/s/o MALIK GRAVES-PRYOR (hereinafter referred to as “STATE FARM”) is a foreign corporation doing business in the State of New York. Defendant TAKU TAMAGAWA (hereinafter referred to as “TAMAGAWA”) is a resident of Kings County, State of New York. Defendant resides in a unit located at 1 Hanson Pl., Apt 16E, Brooklyn, New York. Subrogor and purported Intervenor

Plaintiff MALIK GRAVES-PRYOR (hereinafter referred to as “GRAVES-PRYOR”, is the owner of a unit located at 1 Hanson Pl., Apt. 15D, Brooklyn, New York.

In June, 2018, water loss occurred at the building located at 1 Hanson Pl., which originated in Apt 16E, in which the defendant resided. The water loss led to extensive water damage in the apartment unit belonging to the Subrogor. The Subrogor submitted a claim to his insurer STATE FARM, who paid the insurance claim for the damages to his real and personal property.

Plaintiff STATE FARM submitted that the water loss which led to the damage was the result of the negligence of defendant TAMAGAWA. Plaintiff submitted that TAMAGAWA was negligent and careless in the maintenance of the plumbing in his unit, Apt 16E, which led to the water loss. Plaintiff submits that due to their insurance policy, they have become subrogated to all rights of their Subrogor to recover against TAMAGAWA for monies paid in the underlying insurance claim. Plaintiff sued TAMAGAWA, seeking damages of at least \$600,790.96.

PROCEDURAL HISTORY

Plaintiff initiated this cause of action on May 10, 2021. Defendant filed an answer on July, 6, 2021. Defendant sought dismissal of the action and asserted several affirmative defenses; including that the Court lacks personal jurisdiction over the defendant due to non-service of process.

Defendant moved to dismiss the action on September 29, 2021, alleging that there was no service of the Summons and Complaint, and therefore the Court had no personal jurisdiction. On January 31, 2022, Plaintiff filed an affirmation in opposition to Defendant’s motion to dismiss. The motion was adjourned to March 6, 2022, by stipulation between the parties. Defendant’s motion to dismiss was denied in an order by Hon. Carolyn E. Wade, dated March 29, 2022.

Subrogor and purported Intervenor Plaintiff MALIK GRAVES-PRYOR moved to intervene in this action on August 10, 2022. GRAVES-PRYOR wished to assert his rights against defendant TAMAGAWA, and assert claims against plaintiff STATE FARM for bad faith and racially discriminatory insurance claims handling practices. GRAVES-PRYOR submitted that he had a right to intervene because STATE FARM was litigating in his name. On August 3, 2022, Defendant TAMAGAWA filed an affirmation in opposition to the motion to intervene. GRAVES-PRYOR withdrew his motion to intervene on August 16, 2022. On the same day, GRAVES-PRYOR, filed another notice of motion to intervene, seeking to move the Court on September 14, 2022.

The underlying action between STATE FARM and TAMAGAWA was discontinued by stipulation between the parties, and filed in NYSCEF on January 20, 2023.

Intervenor Plaintiff GRAVES-PRYOR, proposed an emergency Order to Show Cause (OTSC), filed on February 16, 2023. Intervenor Plaintiff sought a temporary restraining order (TRO), to restrain the parties from entering into any settlements of the underlying claims, prior to a hearing on Intervenor Plaintiff's motion to intervene. The emergency OTSC was signed by this Court on March 21, 2023. On May 15, 2023, plaintiff STATE FARM filed an affirmation in opposition to the OTSC. On May 22, 2023, defendant TAMAGAWA also filed an affirmation in opposition to the OTSC. Intervenor Plaintiff GRAVES-PRYOR filed a reply to STATE FARM and TAMAGAWA on May 24, 2023. Intervenor Plaintiff asserted that STATE FARM and TAMAGAWA improperly attempted to discontinue the action before allowing GRAVES-PRYOR's motion to intervene to be heard.

ARGUMENTS

GRAVES-PRYOR argues that the stipulation to discontinue between STATE FARM and TAMAGAWA is prejudicial, asserting that the intention behind the stipulation to discontinue was to avoid litigating the negligence claims and to deny GRAVES-PRYOR an opportunity to prosecute his own negligence claims.

He further argues that he is the only party that can adequately represent his interests in this action, and that STATE FARM has no right of subrogation until and unless he is made whole for all damages to his property. Intervenor Plaintiff cites *Fasso v Doerr*, 12 NY3d 80 [2009], which quotes from *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 580 [1995], and states “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””.

Plaintiff argues that GRAVES-PRYOR would not be prejudiced by a discontinuance of their action against TAMAGAWA.

Defendant argues that GRAVES-PRYOR’s claims are time barred by the three-year statute of limitations for negligence under NY CPLR § 214 (4).

OPINION

There are three main issues the Court must contend with in this case. Whether the made whole doctrine allows GRAVES-PRYOR to intervene in this action. Whether allowing the voluntary discontinuation of the action by STATE FARM and TAMAGAWA prejudices

GRAVES-PRYOR. And whether GRAVES-PRYOR's claims are time barred by the statute of limitations.

The made whole doctrine and the doctrine of equitable subrogation have been interpreted in the Court of Appeals in the cases of *Fasso* and *Winkelmann* cited by GRAVES-PRYOR. Neither case deals with quite the same circumstances as in the present case. In *Fasso* the court held that the made whole doctrine did not preclude an insurer from initiating a subrogation action against a tortfeasor, when the insured and the tortfeasor had already settled their claim. The court in *Winkelmann* allowed for an insurer to pursue a subrogation action against a tortfeasor even when the insured had not been compensated for all the losses incurred, but when the insured had been compensated for those losses that the insurance policy covers.

The issue before this Court is whether an insured party can intervene in a subrogation action by its insurer against an alleged tortfeasor, when the underlying insurance claim remains unsettled.

The question for the Court is whether the insured has been compensated for those losses that the insurance policy covers. According to the letter dated February 15, 2022, thus far STATE FARM has paid a total of \$606,266.47 in indemnity payments to GRAVES-PRYOR. This includes \$167,369.01 for building damages, \$42,152.75 for contents damages, \$17,045.40 for mold abatement, and \$379,699.31 for Additional Living Expenses (ALE). The insured has also submitted a claim for unpaid expenses which include \$996.38 for replacement costs for his contents, and \$60,584.70 for additional ALE benefits.

The clause relating to ALE benefits in the insurance policy states "when a Loss Insured causes the residence premises to become uninhabitable, we will cover the necessary increase in cost to maintain your standard of living for up to 24 months. Our payment is limited to incurred

costs for the shortest of: (a) the time required to repair or replace the premises; (b) the time required for your household to settle elsewhere; or 24 months.”

The motion papers submitted by GRAVES-PRYOR do not provide sufficient evidence to show that he has not been fully indemnified pursuant to the insurance policy. No receipts or bank statements have been submitted to show a “necessary increase in cost”, in the 24 months after he left his residence at 1 Hanson Pl.. Those claims can properly be brought in a separate breach of contract action against STATE FARM, if they remain unsettled.

The Court in *Winkelmann* cited from *Fed Ins. Co. v Arthur Anderson & Co.*, 75 NY2d 366, 374 and states “The claims of the insurer for amounts paid by it and the insured's claim for uninsured losses are divisible and independent, and “[p]ermitting the insurer to sue ... as equitable subrogee does not affect the insured's right to sue for the amount of the loss remaining unreimbursed”. *Winkelmann, supra* at 582.

Although this section in the *Winkelmann* opinion is in relation to the insured suing an alleged tortfeasor, the principle still applies. GRAVES-PRYOR’s rights to sue for unreimbursed losses pursuant to the insurance policy, against STATE FARM are not prejudiced by a settlement, or a stipulation of discontinuance between STATE FARM and TAMAGAWA. Therefore, GRAVES-PRYOR’s claims as against STATE FARM are **DISMISSED**.

The Court considers the rest of GRAVES-PRYOR’s claims as a negligence action against TAMAGAWA, which is time barred by the statute of limitations, pursuant to NY CPLR § 214 (4). Therefore GRAVES-PRYOR’s claims against TAMAGAWA are **DISMISSED**.

GRAVES-PRYOR’s motion to intervene is **DENIED**.

GRAVES-PRYOR's motion to vacate the STATE FARM and TAMAGAWA Stipulation to Discontinue is **DENIED**.

All other requests are **DENIED**.

This constitutes the Decision and Order of the Court.

ENTER:



8/25/23

SHARON A. BOURNE-CLARKE, A.J.S.C.