Philadelphia Indem. Ins. Co. v Buffalo Hotel Supply Co., Inc.
2017 NY Slip Op 30192(U)
February 1, 2017
Supreme Court, Tompkins County
Docket Number: EF2015-0101
Judge: Eugene D. Faughnan

At a Motion Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 2nd day of December, 2016.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

PHILADELPHIA INDEMNITY INSURANCE COMPANY, as subrogee of COUNTRY CLUB OF ITHACA, NY, INC.,

Plaintiff,

-vs-

BUFFALO HOTEL SUPPLY COMPANY, INC., HALCO MECHANICAL, ALLIED ELECTRIC COMPANY, and TYCO INTEGRATED SECURITY, LLC,

Defendants.

DECISION AND ORDER

Index No. EF2015-0101
RJI No. 2016-0018-M

EUGENE D. FAUGHNAN, J.S.C.

This matter is before the Court on the motion by Tyco Integrated Security, LLC. ("Tyco") to dismiss Philadelphia Indemnity Insurance Company's ("Philadelphia Indemnity" or "Plaintiff") claims against Tyco, and all cross-claims against Tyco. Tyco's motion is made pursuant to CPLR §3211(a)(1), a defense founded upon documentary evidence, and CPLR §3211(a)(7), failure to state a claim upon which relief may be granted.[1]

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[1]Tyco also filed a separate motion, for a *pro hac vice* admission, which was granted from the Bench, and is the subject of a separate Order, but does not bear on this Decision and Order.

Plaintiff is subrogee of Country Club of Ithaca ("Country Club") and brought this action seeking monetary damages after a ruptured sprinkler pipe caused water damage to the Country Club on January 23, 2014. On that date, an employee of the Country Club discovered leaking water, but not until well after it had started, and caused damage.

The Country Club had contracted with Tyco's predecessor in interest, ADT, on May 28, 2014 to install or maintain the water flow system at the Country Club.[2] Plaintiff contends that it did not receive any notification of the leaking water from ADT or the Fire Department, despite the fact that the system did detect the water, and generated warnings.

On October 5, 2015, Plaintiff commenced suit against Tyco and others, asserting causes of action for negligence, gross negligence and/or otherwise failure to use due care in installing and/or maintaining the alarm system. A Supplemental Summons and Amended Complaint were filed on May 4, 2016. The three other named defendants filed answers to the Amended Complaint. Tyco made the instant motion to dismiss.

Defendants Halco Mechanical ("Halco") and Buffalo Hotel Supply Co, Inc. ("Buffalo Supply") opposed Tyco's motion, on the basis that even if the contractual limitation of liability barred Plaintiff's claim, it should not defeat the claims of defendants for contribution and/or indemnity. The motion was adjourned on two occasions, and Plaintiff also submitted opposition before the matter was ultimately argued.

The contract between the Country Club and ADT contained provisions that included a waiver of subrogation (meaning that the Country Club would look to its insurer in the event of a loss, and waived its insurer's right of subrogation); a cap on any claims for loss of 10% of the annual service charge or $1,000, whichever is greater (in this case it is the $1,000); and a one

[2]The original contract was with ADT Security Services, which changed its name to TycoIS in June, 2012.

year time limitation for bringing an action for any loss.

Tyco's motion asserts that, based on the terms of the contract between the Country Club and ADT, Plaintiff is prohibited from even bringing this suit due to the waiver of subrogation rights, and further, that the action is untimely, since the contract provides for a one year time limitation. Tyco further contends that any liability is capped by the contract language to $1,000. Tyco's position is that the contract is the only relationship between the Country Club and Tyco, and, as such, this matter falls into the category of documentary evidence of CPLR 3211(a)(1), which can be determined at this juncture.

Plaintiff argues that the motion should be denied because there is an issue of fact as to whether the damages were caused by Tyco's "grossly negligent" conduct, which should render the contractual provisions unenforceable; and whether a tort duty existed together with the contractual duties. The Plaintiff asserts that the determination of whether this is a situation of simple mistake, or gross negligence is a question of fact.

"In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction". *Goshen v. Mutual Life Ins. Co.*, 98 NY2d 314, 326 (2002), *see Leon v. Martinez*, 84 NY2d 83, 88 (1994). The Court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory". *Goldman v. Metropolitan Life Ins.*, 5 NY3d 561, 570-571 (2005); *see Arnav Indus.v. Brown, Raysman, Millstein, Felder & Steiner*, 96 N.Y.2d 300, 303 (2001); *Leon v. Martinez, supra*.

"Dismissal pursuant to CPLR 3211 (a) (1) may be warranted if there is documentary evidence that conclusively establishes a defense to a claim as a matter of law." *Maldonado v. DiBre*, 140 AD3d 1501, 1505 (3rd Dept. 2016); *see New York State Workers' Compensation Bd. v. Consolidated Risk Servs., Inc.*, 125 AD3d 1250, 1256 (3rd Dept. 2015); *see also, Leon, supra* at

88. To prevail on a motion to dismiss pursuant to CPLR 3211(a)(1), the movant must demonstrate that "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *R.I. Is. House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890, 893 (2nd Dept. 2008), *quoting Goshen v. Mutual Life Ins. Co.*; *see HSBC Bank USA, N.A. v. Decaudin*, 49 AD3d 694, 695 (2008). "Materials that clearly qualify as documentary evidence include documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable." *Ganje v. Yusuf,* 133 AD3d 954, 956-957 (3rd Dept. 2015); *citing Midorimatsu, Inc. v. Hui Fat Co.*, 99 AD3d 680, 682 (3rd Dept. 2012), *lv dismissed* 22 NY3d 1036 (2013) (internal quotation marks and citations omitted).

On a motion to dismiss pursuant to CPLR 3211 (a) (7) for failure to state a claim, the court "must afford the complaint a liberal construction, accept the facts as alleged in the pleading as true, confer on the [nonmoving party] the benefit of every possible inference and determine whether the facts as alleged fit within any cognizable legal theory." *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 141 AD3d 785, 788 (3rd Dept. 2016); *Torok v. Moore's Flatwork & Founds., LLC*, 106 AD3d 1421, 1421 (3rd Dept. 2013) [internal quotation marks and citation omitted]; *see Tenney v. Hodgson Russ*, LLP, 97 AD3d 1089, 1090 (3rd Dept. 2012).

"As a general rule, parties are free to enter into contracts that absolve a party from its own negligence (*see Melodee Lane Lingerie Co. v. American Dist. Tel. Co.*, 18 NY2d 57, 69, 218 NE2d 661, 271 NYS2d 937 [1966]) or that limit liability to a nominal sum (*see Florence v Merchants Cent. Alarm Co.*, 51 NY2d 793, 795, 412 NE2d 1317, 433 NYS2d 91 [1980])." *Abacus Fed. Sav. Bank v. ADT Security Servs., Inc.,* 18 NY3d 675, 682-683 (2012); *see also Colnaghi, USA v. Jewelers Protection Servs. Ltd.*, 81 NY2d 821 (1993). However, public policy forbids a party from "insulat[ing] itself from damages caused by grossly negligent conduct" *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 (1992); *Colnaghi, supra; Abacus, supra.* "Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial

contract, must 'smack[] of intentional wrongdoing' " *Sommer* at 554, *quoting Kalisch-Jarcho, Inc. v City of New York*, (1983). "It is conduct that evinces a reckless indifference to the rights of others" *Id.; Abacus, supra.* However, as noted by the Court of Appeals, "[a] distinction must be drawn between contractual provisions which seek to exempt a party from liability … and contractual provisions … which in effect simply require one of the parties to the contract to provide insurance for all of the parties." *Abacus* at 684 (citations omitted).

Plaintiff's allegations do not rise to the level of reckless indifference or intentional wrongdoing to vitiate the terms of the contract. Plaintiff alleges that Tyco failed to perform its contractual obligations to maintain and/or install the alarm system within the Country Club. *See e.g. Colnaghi, supra* at 824 (failure to wire a skylight "while perhaps suggestive of negligence or even 'gross negligence' as used elswhere, does not evince the recklessness [to abrogate the agreement]"); *David Gutter Furs v. Jewelers Protection Servs*, 79 NY2d 1027 (1992) (expert's opinion as to additional protective measures did not raise issue of fact on reckless indifference); *cf. Abacus, supra* (allegation that defendants had knowledge for lengthy time that equipment had been malfunctioning and failed to investigate or alert Plaintiff did raise an issue of reckless indifference to the rights of others). "Delayed or inadequate response to an alarm signal, without more, is not gross negligence." *Hartford Ins. Co. v. Holmes Protection Group*, 250 AD2d 526, 528 (1st Dept. 1998); *Consumers Distrib. Co. v. Baker Protective Servs.*, 202 AD2d 327 (1st Dept. 1994).

In the present situation, Plaintiff's complaint only avers Tyco's failure to properly maintain and/or install the alarm system. Without more, this is insufficient to constitute gross negligence. Therefore, the agreement is enforceable.

Moreover, the Court notes that the waiver of subrogation (as opposed to those situations where defendant attempts to exempt itself from liability) would also bar this action against Tyco. "[A] waiver of subrogation bars not only claims of negligence but also claims of gross

negligence." *Great American Ins. Co. v. Simplexgrinnell LP,* 60 AD3d 456 (1st Dept. 2009); *see e.g. Abacus, supra.*

In *Great American*, the parties' agreement provided that the customer would look exclusively to its insurer to recover for any damages and that the customer would release the alarm company by way of subrogation. The waiver of subrogation in the present case is nearly identical to that in *Great American.* Here, the contract provides that the Country Club would "look exclusively to [its] insurer to recover for injuries or damage in the event of any loss or injury and [the Country Club] releases and waives all right of recovery against [defendant] arising by way of subrogation." This waiver is enforceable against claims of negligence and gross negligence, and therefore bars Plaintiff's claims against Tyco. In *Abacus,* although the Court concluded that the allegations were sufficient, if proven, to constitute gross negligence, the Court of Appeals held that the waiver of subrogation acted as a total defense to the claims of the Plaintiff. The same situation is presented in this case, and leads this Court to the conclusion that the waiver of subrogation would act as a bar, even if gross negligence were alleged.

Furthermore, the Court agrees with Tyco that any would be barred by the contractual limitation that an action be commenced within one year. Parties may agree to shorten statutes of limitations if not unreasonably short. *See e.g. Kozemo v. Griffith Oil Co.*, 256 AD2d 1199 (4th Dept. 1998). There is nothing unreasonable in that agreement, and Philadelphia is bound by it as well, as it stands in the shoes of its insured. Therefore, the action is untimely as against Tyco.

Plaintiff has also cited *Sommer* in support of its claim that a tort action can be maintained in this instance. The "Court of Appeals has identified 'borderland situations' where '[a] legal duty independent of contractual obligations may be imposed by law as an incident to the parties' relationship'" *Reade v. SL Green Operating Partnership, LP* 30 AD3d 189, 190 (1st Dept. 2006), *quoting Sommer,* 79 NY2d at 551 and *citing New York Univ. v Continental Ins. Co.*, 87 NY2d at 316-317. "A tort obligation is a duty imposed by law to avoid causing injury to others. It is

'apart from and independent of promises made and therefore apart from the manifested intention of the parties' to a contract (Prosser and Keeton, Torts § 92, at 655 [5th ed]). Thus, defendant may be liable in tort when it has breached a duty of reasonable care distinct from its contractual obligations, or when it has engaged in tortious conduct separate and apart from its failure to fulfill its contractual obligations. The very nature of a contractual obligation, and the public interest in seeing it performed with reasonable care, may give rise to a duty of reasonable care in performance of the contract obligations, and the breach of that independent duty will give rise to a tort claim." *New York Univ, supra* at 316. In *Sommer*, the Court of Appeals "held that a fire alarm company owed its customer a duty of reasonable care independent of its contractual obligations, and that notwithstanding a contractual provision exculpating the alarm company from damages flowing from its negligence, it could be held liable in tort for its gross failure to properly perform its contractual services. The alarm company's duty, separate and apart from its contract obligations, arose from the very nature of its services--to protect people and property from physical harm (see, Prosser and Keeton, op. cit., § 92, at 656-657)." *Id.* at 317. Noting the catastrophic consequences that could flow from defendant's failure to perform its contractual obligations with due care, the municipality's fire-safety regulations illustrated the public interest in the careful performance of the fire alarm services contract. *Id.; See also Duane Reade, supra.* Such an allegation is lacking here. There is no allegation "of a legal duty independent of the contract with [Tyco]" (*Great American,* 60 AD2d at 457), and the harm "does not rise to the level required to transform it from contractual to tortious in nature." (*Verizon New York*, 91 AD3d at 182).

Plaintiff's allegations here, even if accepted as true, would constitute only a breach of the contract, but not a tort. The only relationship between Plaintiff and Tyco is the contract itself, and no duty has been identified that could give rise to any liability on the part of Tyco. There are no allegations of violations of statutes or rules, or other public safety concerns that would impose any such duty.

Tyco has also moved dismissing the cross-claims of Halco and Buffalo Supply for contribution or indemnification. Tyco argues that the only claim Plaintiff had was for breach of contract, and therefore, there can be no contribution; and there is no claim for indemnification because the underlying action alleges independent wrongdoing by each of the defendants separately.

Common-law indemnification applies to avoid unjust enrichment, accomplished by shifting a loss by "placing the obligation where in equity it belongs" *McDermott v City of New York,* 50 NY2d 211, 217 (1980). Common-law indemnification avoids unfairness and unjust enrichment by "recogniz[ing] that [a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled to indemnity" *Id.* (internal quotation marks and citation omitted). The doctrine "permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party. Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" *Hackert v. Emmanuel Cong. United Church of Christ*, 130 AD3d 1292, 1295 (3rd Dept. 2015).

Here, Halco and Buffalo Supply can only be liable to Plaintiff based upon their own respective actions. Thus, if they bear any responsibility, it would be as a result of their own action, and not vicarious due to Tyco's conduct. Accordingly, there can be no claim for indemnification.

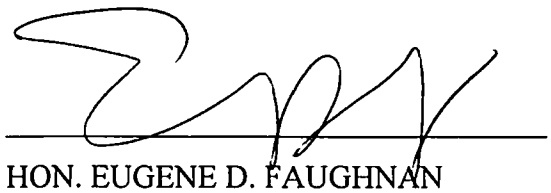
With respect to contribution, there must be tort liability for any claim of contribution to prevail. *See e.g. Bd. Of Educ. Of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley,* 71 NY2d 21 (1987). As previously discussed, there is no viable tort claim here; the only relationship between Plaintiff and Tyco is under the contract, and Plaintiff's claim is for breach of the contract. As such, the claims of Halco and Buffalo Supply for contribution based on

Tyco's alleged breach of contract, is insufficient as a matter of law. Accordingly, there can be no claim for contribution.

Based upon all the foregoing, Tyco's motion to dismiss all claims against it is GRANTED.

This constitutes the **DECISION AND ORDER** of the Court. The transmittal of copies of this Decision and Order by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: February 1, 2017
Ithaca, New York



HON. EUGENE D. FAUGHNAN
Supreme Court Justice

The following papers were received and reviewed by the Court in connection with this motion:

1) Tyco's Notice of Motion filed June 9, 2016, with affidavit of James Gunning, dated June 8, 2016 and affidavit of Matthew Larkin, Esq, dated June 9, 2016, with Exhibits and Memorandum of law;
2) Affirmation of Erin k. Skuck, dated August 17, 2016, on behalf of Buffalo Supply, in opposition to Tyco's motions;
3) Affirmation of Kevin R. VanDuser, dated August 17, 2016, on behalf of Halco, in opposition to Tyco's motions;
4) Reply affirmation of Matthew Larkin dated November 30, 2016, with attached Exhibits, and affidavit of James Gunning dated November 30, 2016, and Memorandum of Law;
5) Affirmation of Eliot L. Greenberg, dated November 30, 2016, on behalf of Plaintiff, in opposition to Tyco's motions.