American Scientific Light. Corp. v Hamilton Plaza Assoc.

Supreme Court of New York, Appellate Division, Second Department

November 2, 2016, Decided

2015-00549

Reporter
144 A.D.3d 614 *; 40 N.Y.S.3d 485 **; 2016 N.Y. App. Div. LEXIS 7036 ***; 2016 NY Slip Op 07152 ****

[**1]** American Scientific Lighting Corp., Respondent, v Hamilton Plaza Associates et al., Appellants. (And a Third-Party Action.) (Index No. 5674/08)

Counsel: **[***1]** Hannum Feretic Prendergast & Merlino, LLC, New York, NY (Michael J. White of counsel), for appellants.

Berg & David, PLLC, Brooklyn, NY (Sholom Wohlgelernter and Abraham David of counsel), for respondent.

Judges: MARK C. DILLON, J.P., SHERI S. ROMAN, SYLVIA O. HINDS-RADIX, FRANCESCA E. CONNOLLY, JJ. DILLON, J.P., ROMAN, HINDS-RADIX and CONNOLLY, JJ., concur.

Opinion

[*614] **[**486]** In an action to recover damages for injury to property, the **[*615]** defendants appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Silber, J.), dated January 30, 2014, as denied their motion for leave to amend their answer to assert the affirmative defense of waiver of subrogation and denied that branch of their separate motion which was for summary judgment dismissing the complaint insofar as asserted against the defendant Hamilton Plaza Associates.

Ordered that the order is modified, on the law, by deleting the provision thereof denying the defendants' motion for leave to amend their answer to assert the affirmative defense of waiver of

subrogation, and substituting therefor a provision granting that motion; as so modified, the order is affirmed insofar as appealed from, with costs to the **[***2]** plaintiff.

The plaintiff was a tenant of the defendant Hamilton Plaza Associates (hereinafter Hamilton) pursuant to a commercial lease. The lease provided that the plaintiff was to occupy the entire fourth floor of a building owned by Hamilton. In 2008, the plaintiff commenced this action against Hamilton, among others, alleging that, between October 2006 and November 2007, Hamilton failed to maintain the building's roof, resulting in the plaintiff's constructive eviction. In 2013, the defendants moved for leave to amend their answer to assert the affirmative defense of waiver of subrogation, and separately moved, inter alia, for summary judgment dismissing the complaint insofar as asserted against Hamilton. The Supreme Court denied the motions.

"In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Bernardi v Spyratos*, 79 AD3d 684, 688, 912 NYS2d 627 [2010]; *see* CPLR 3025 [b]; *Lucido v Mancuso*, 49 AD3d 220, 851 NYS2d 238 [2008]; *Unger v Leviton*, 25 AD3d 689, 811 NYS2d 691 [2006]). Here, the Supreme Court erred in denying the defendants' motion to amend the answer to assert an affirmative defense based on the waiver of subrogation provision in the lease between the plaintiff and Hamilton. The defense was not patently **[***3]** devoid of merit, and the plaintiff's claim of surprise and prejudice is unpersuasive considering that it was a party to the lease containing the waiver of subrogation provision (*see Rodless Decorations v Kaf-Kaf, Inc.*, 232 AD2d 620, 621, 648 NYS2d 710 [1996], *affd* 90 NY2d 654, **[****2]** 687 NE2d 1330, 665 NYS2d 47 [1997]). Moreover, the plaintiff was on notice of Hamilton's intention to rely on the provision as a defense by virtue of a prior motion by Hamilton for summary judgment which was denied without prejudice to renew upon the completion of discovery.

[*616] However, summary judgment dismissing the complaint insofar as asserted against Hamilton based on the waiver of subrogation provision was properly denied. "Subrogation, an equitable doctrine, 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, 687 NE2d 1330, 665 NYS2d 47 [1997]; *see Pennsylvania Gen. Ins. Co. v Austin Powder* ***[**487]*** *Co.*, 68 NY2d 465, 471, 502 NE2d 982, 510 NYS2d 67 [1986]). "While parties to an agreement may waive their insurer's right of subrogation, a waiver of subrogation clause cannot be enforced beyond

the scope of the specific context in which it appears" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d at 660).

In its bill of particulars, the plaintiff represented that it is not seeking to recover for damages for which it had been reimbursed by its **[***4]** insurance company. Rather, it was seeking to recover additional damages which were not covered by insurance. Moreover, it is undisputed that the insurance proceeds that were paid to the plaintiff were subject to deductibles in the total sum of $10,000. While Hamilton argues that the plaintiff has insurance coverage for some of the additional damages that it is seeking to recover in this action, it failed to demonstrate, prima facie, the absence of any triable issue of fact as to whether all of those damages were within the ambit of the waiver of subrogation clause. Such failure required the denial of summary judgment, regardless of the sufficiency of the plaintiff's opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 476 NE2d 642, 487 NYS2d 316 [1985]; *see also Gap v Red Apple Cos.*, 282 AD2d 119, 725 NYS2d 312 [2001]; *Federal Ins. Co. v Honeywell, Inc.*, 243 AD2d 605, 606, 663 NYS2d 247 [1997]). Dillon, J.P., Roman, Hinds-Radix and Connolly, JJ., concur.

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