IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

FIDELITY & GUARANTY INS. CO	:	May Term, 2000
Plaintiff,	:	
v.	:	No. 1772
GROWTH EVOLUTION, INC. t/a	:	
ZANZIBAR BLUE	:	Commerce Program
Defendant,	:	
v.	:	Control No. 100195
ATLANTIC FIRE EQUIPMENT CO. INC.,	:	
d/b/a ATLANTIC FIRE EQUIPMENT INC.,:		
d/b/a ATLANTIC FIRE EQUIPMENT	:	
ENTERPRISES, INC.	:	
Additional Defendant	:	

ORDER

AND NOW, this 18th day of December, 2001, upon consideration of the Motion for Summary Judgment of Defendants Growth Evolution, Inc. t/a Zanzibar Blue ("Zanzibar") and Atlantic Fire Equipment Co. Inc., d/b/a Atlantic Fire Equipment Inc., d/b/a Atlantic Fire Equipment Enterprises, Inc.("Atlantic"), any response thereto, all other matters of record and in accordance with the Memorandum Opinion being filed contemporaneously with this Order, it is hereby ORDERED and DECREED that defendants' Motion for Summary Judgment is DENIED.

BY THE COURT:

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JOHN W. HERRON, J.

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MEMORANDUM OPINION

Defendants Growth Evolution, Inc. t/a Zanzibar Blue ("Zanzibar") and Atlantic Fire Equipment Co. Inc., d/b/a Atlantic Fire Equipment Inc., d/b/a Atlantic Fire Equipment Enterprises, Inc.("Atlantic") filed this motion for summary judgement to the complaint of Plaintiff Fidelity and Guaranty Ins. Co., ("F&G"). For the reasons set forth below, the motion for summary judgement is denied.

BACKGROUND

In May 1998, a fire at Zanzibar Blue, a restaurant located within the Bellevue building, allegedly caused damages to the Hyatt Corporation, d/b/a Park Hyatt Hotel at the Bellevue ("Hyatt"). Specifically, plaintiff [1] alleges that employees of Zanzibar negligently operated the kitchen so as to cause

[1]The plaintiff, Fidelity and Guaranty Insurance Company is asserting claims on behalf of its insured, Hyatt Corporation d/b/a Park Hyatt Hotel. Complaint, Fidelity & Guaranty Ins. Co. v. Growth

a fire which resulted in damage and destruction to the property of Hyatt. F&G, as insurer for Hyatt, has allegedly paid claims to cover these damages sustained by Hyatt. In May 2000, F&G commenced this subrogation action against Zanzibar and Atlantic in order to recover the amounts distributed to Hyatt. In October 2001, Zanzibar and Atlantic timely filed this motion for summary judgement.

DISCUSSION

A proper grant of summary judgment depends upon an evidentiary record that either (1) shows the material facts are undisputed or (2) contains insufficient evidence of facts to make out a prima facie cause of action or defense. Basile v. H & R Block, Inc., 777 A.2d 95 (Pa. Super Ct. 2001). Under Pa.R.C.P. 1035.2(2), if a defendant is the moving party, he may make the showing necessary to support the entrance of summary judgment by pointing to materials which indicate that the plaintiff is unable to satisfy an element of his cause of action. Id. The non-moving party must adduce sufficient evidence on an issue essential to its case and on which it bears the burden of proof such that a jury could return a verdict favorable to the non-moving party. Id. When the plaintiff is the non-moving party, "summary judgment is improper if the evidence, viewed favorably to the plaintiff, would justify recovery under the theory [he] has pled." Id. However, "[s]ummary judgment is proper when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Horne v. Haladay, 728 A.2d 954 (Pa.Super.Ct. 1999) (citing Pa.R.C.P. 1035.2). Summary judgment may only be granted in cases where it is "clear and free from doubt that the moving party is

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Evolution et. al., (May 2000, No. 1772, C. P. Phila.)¶¶ 1-6.

entitled to judgment as a matter of law." Id. (citations omitted).

I. There is a Material Issue of Fact as to whether F&G has a Recoverable Subrogable Interest Under the Policy Language and Facts Presented

In its motion for summary judgment, Zanzibar first argues that Hyatt is not a named insured in the policy issued by F&G. The proper construction of an insurance policy is a matter of law, which a court may properly resolve when ruling on a motion for summary judgment. Fisher v. Harleysville Ins. Co., 423 Pa.Super. 362, 621 A.2d 158 (1993). In interpreting an insurance policy, the court must ascertain the intent of the parties as manifested by the language of the written agreement. When the policy language is clear and unambiguous, the court will give effect to the language of the contract. Paylor v. Hartford Ins. Co., 536 Pa. 583, 640 A.2d 1234 (1994) (citations omitted). However, a provision is ambiguous "if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." Hutchison v. Sunbeam Coal Corp., 513 Pa. 192, 201, 519 A.2d 385, 390 (1986) (citations omitted). In such cases, it is well-settled that any ambiguity is to be resolved against the insurer. Koenig v. Progressive Ins. Co., 410 Pa.Super. 232, 599 A.2d 690 (1991) (citation omitted).

Here, Zanzibar argues that Hyatt is not a named insured and F&G therefore has no subrogable interest. An insurer's subrogation right is an equitable principle "deeply rooted in the realm of insurance contracts." Hagans v. Constitution State Service Company, 455 Pa.Super. 231, 239 687 A.2d 1145, 1149 (1996). Subrogation presupposes an actual payment and satisfaction of a debt or claim by the entity asking to be subrogee. Daley-Sand v. West American Ins. Co., 387 Pa.Super. 630, 564 A.2d 965 (1989). Our Superior Court has stated:

> It is well established that an action for subrogation is one based on considerations of equity and good conscience. The goal is to place the burden of the debt upon the person who should bear it. The right of subrogation may be contractually declared or founded in equity, but even if contractually declared, it is to be regarded as based upon and governed by equitable principles [citation omitted]. It has often been said that the equitable doctrine of subrogation places the subrogee in the precise position of the one to whose rights and disabilities he is subrogated.

Hagans, 455 Pa.Super at 240, 687 A.2d at 1149 (citations omitted).

Zanzibar argues that "discovery has revealed no documentation listing [Hyatt] as an insured of F&G at any relevant time hereto." Def's Mem. of Law at 8. Specifically, Zanzibar claims that the named insured on the insurance document is not Hyatt, but rather Preit-Rubin, Inc.,("Preit") the owners of the Bellevue building. Id. "No other named insured or additional insured is referenced in these declarations or in any other policy provision, endorsement, exclusion or other policy form." Def's Response to Pl's Reply Mem. of Law at 3. Therefore, since Hyatt is not a named insured, Zanzibar argues that F&G does not have a subrogable interest. This court disagrees.

F&G argues that Hyatt is a named insured under the relevant policy. It fails, however, to support this assertion with any reference to specific policy language. See, eg., Complaint at ¶14, Pl's Response at ¶¶ 10, 14-16; Pl's Response Mem of Law at 1. Nonetheless, even if Hyatt is not a named insured in the policy, this court finds as a matter of law that the policy contains provisions which could render F&G a proper subrogee of Hyatt. For instance, the policy provides in pertinent part:

> **P. Transfer of rights of Recovery Against Others to Us**
> If any person or organization *to or for whom* we make payment under this policy, has rights to recover damages for another, those rights are transferred to us to the extent of our payment...

Pl's Response Mem. of Law, Exh. G at 24 (emphasis added). The intent of F&G and Preit, as

manifested by the language of this clause, is clear. The policy unambiguously allows for F&G to assert rights based on the extent of its payments to any organization to which F&G makes a payment under the policy. Here, however, the parties dispute whether F&G paid Hyatt's claim under the policy. If it can be established that F&G paid the claim to Preit for Hyatt, F&G may then stand in the shoes of Hyatt and assert Hyatt's rights against Zanzibar and Atlantic.[2] Daley-Sand, 564 A.2d at 969 (explaining "the right to stand in the insured's shoes and to collect from the tortfeasor once it has paid the insured an amount representing the tortfeasor's debt is called the insurer's right to subrogation"). The documents presented by both parties, however, create material issues of fact as to F&G's payments to Hyatt.

Zanzibar, for instance, raises the material issues of whether Hyatt was ever paid the amount claimed by F&G and, further asserts that the only loss suffered directly by Hyatt was a management fee. Def's Motion for Summary Judgment at ¶¶ 12, 14. In support of this argument, Zanzibar attaches an invoice paid to Preit which Zanzibar claims "shows that the alleged damages were sustained by entities other than [Hyatt]." Def's Mem. of Law at 4; Exhibit C. Zanzibar also argues that if any

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[2]Moreover, even if the policy did not declare F&G's right of subrogation, the right is founded in equity. Daley-Sand v. West American Ins. Co., 387 Pa.Super. 630, 1150, 564 A.2d 965 (1989). However, the subrogation doctrine will not be invoked to protect mere volunteers. Beck v. Beiter, 146 Pa.Super. 114, 22 A.2d 90 (1941). As the court in Home Owners' Loan Corp. v. Crouse, 151 Pa.Super. 259, 262, 30 A.2d 330, 331 (1943) explained:

> " 'A mere volunteer or intermeddler who, having no interest to protect, without any legal or moral obligation to pay ... pays the debt of another is not entitled to subrogation, the payment in his case absolutely extinguishing the debt.'"

This court is not convinced that F&G, without any interest to protect, merely volunteered payment to Hyatt and therefore, has no recoverable subrogable interest. To the contrary, the insurance policy explicitly provides for a legal obligation for the payment of a claim by F&G to Preit for Hyatt. Therefore, even if the policy did not provide for the right, there exists for F&G an equitable right of subrogation.

damages were sustained by Hyatt, they would be limited to the Management Agreement. Pursuant to the Management Agreement signed between Hyatt and Preit's associates, Hyatt is entitled to a management fee equal to 3% of gross receipts, or $2,628.00, and not the $204,931.81 claimed by F&G. Id.

F&G directly disputes these material facts. F&G denies that Hyatt did not suffer a loss, or that the only loss suffered by Hyatt was a management fee. The mere fact that other entities such as Preit may have sustained damages due to the fire does not negate losses claimed by Hyatt. Instead, F&G argues that it paid $204,931.81 to Preit for Hyatt's damages.[3] Specifically, F&G argues that Hyatt lost revenue in the form of, inter alia, "business interruption, the loss of income from room rentals, cancelled banquets, lost revenue from each of its two restaurants, [and] additional expenses in the form of reassigning Grand Hyatt New York employees to the [Hyatt]." Pl's Reply at ¶ 12.

Zanzibar also argues that F&G has waived its subrogation rights. Def's Mem of Law at 8- 10. Specifically, Zanzibar argues that since Preit is the only named insured on the policy, and Preit, through its associates, executed a lease with Zanzibar which explicitly waived subrogation, then F&G, as subrogee of Preit has no rights of subrogation. Id. However, it is clear from the face of the lease that

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[3]Unfortunately, F&G does not provide this court with specific copies of checks paid out to Preit for Hyatt, but instead F&G attaches affidavits stating that payments were endorsed to Hyatt, and invoices which list the damages suffered by Hyatt. Pl's Reply Mem. of Law, Exhibits A, B, E. Relying on statements that the payments were tendered verges on testimonial evidence that would be precluded under the Nanty-Glo Rule. In fact, Zanzibar argues that F&G violates the Nanty-Glo Rule by relying solely on testimonial affidavits to establish that Hyatt is an additional insured under the policy. Def's Reply Mem. of Law to Pl's Response at 3. A party moving for summary judgment may not rely solely on its own testimonial affidavits or depositions or those of its witnesses to establish the non-existence of a genuine issue of material fact. Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A.2d 523 (1932).

Hyatt is not a party to that agreement between Zanzibar, Preit and its associates. Def's Mem of Law, Exhibit I.

Because there are genuine issues of material facts as to whether payments were tendered to Hyatt and the amount of damages to which F&G is entitled, this court denies the motion for summary judgment. Further, since it is not clear and free from doubt that Zanzibar is entitled to judgment as a matter of law, and both parties dispute the necessary element of damages, this court, pursuant to Pa.R.C.P. 1035.2, denies this motion for summary judgment.

CONCLUSION

For the reasons stated above, this court denies the defendants' motion for summary judgment.

BY THE COURT:

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JOHN W. HERRON, J.

DATE: December 18, 2001