VIGILANT INSURANCE COMPANY a/s/o MICHAEL ROHATYN, Plaintiff, v. ADT SECURITY SERVICES, INC. and FRONTIER COMMUNICATIONS CORP., Defendants.

10 Civ. 3066 (BSJ)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2011 U.S. Dist. LEXIS 25355

March 8, 2011, Decided

COUNSEL: [*1] For Vigilant Insurance Company, as subrogor of Michael Rohatyn, Plaintiff: Paul Arthur Tumbleson, Hoey, King,& Epstein, New York,, NY.

For ADT Security Services, Inc., Defendant: Brian McElhenny, LEAD ATTORNEY, Goldberg Segalla LLP(Mineola), Mineola, NY.

For Frontier Communication Corporation, Defendant: Jack L. Cohen, Law Offices of Charles J. Siegel, New York, NY.

For Frontier Communication Corporation, Cross Claimant: Jack L. Cohen, Law Offices of Charles J. Siegel, New York, NY.

For ADT Security Services, Inc.\xB8Cross Defendant: Brian McElhenny, LEAD ATTORNEY, Goldberg Segalla LLP(Mineola), Mineola, NY.

JUDGES: BARBARA S. JONES, UNITED STATES DISTRICT JUDGE.

OPINION BY: BARBARA S. JONES

OPINION

Memorandum and Order

BARBARA S. JONES

UNITED STATES DISTRICT JUDGE

Plaintiff Vigilant Insurance Company ("Vigilant" or "Plaintiff") brings this subrogation action to recover damages it paid to its insured, Michael Rohatyn, from Defendants ADT Security Services, Inc. ("ADT") and Frontier Communications Corp. ("Frontier"). ADT has moved, under *Federal Rule of Civil Procedure 12(c)*, for judgment on the pleadings to dismiss Plaintiff's purported claims of gross negligence, breach of warranty, and breach of contract arising from [*2] a fire that occurred at the Rohatyn premises on February 23, 2008 and to dismiss co-Defendant's cross-claim for contribution. [1] ADT's motion is GRANTED for the reasons that follow.

1 Plaintiff commenced this action on February 19, 2010 by filing a Summons with Notice in New York State Supreme Court, naming ADT and Frontier as defendants. The Complaint was served on April 20, 2010. ADT subsequently filed Notice of Removal transferring the matter to this Court. On June 7, 2010, ADT filed the instant motion. Defendant Frontier also brings a cross-claim against ADT for contribution. To date, there has not been any discovery.

BACKGROUND [2]

2 The following facts are drawn from the Complaint and assumed to be true for the purposes of this motion.

ADT is a corporation that manufactures, designs, installs, and maintains alarm systems. In the summer of 2008, ADT installed an alarm system at Rohatyn's vacation home in Red Hook, New York. The alarm system was connected via telephone line to an ADT central station which monitored the system. Defendant Frontier Communications Corporation provided the telephone service, including line installation and maintenance, to the Rohatyn premises.

In or about October [*3] of 2008, Rohatyn observed an "error message" on the keypad of his ADT system. Rohatyn advised ADT of this problem. Between October 19, 2008 and February 22, 2009, ADT did not receive any test signals from the Rohatyn premises at the ADT central station. Nevertheless, ADT did not inspect, repair, or otherwise service the alarm system.

On February 23, 2009, a fire originated at the Rohatyn premises. The ADT alarm system failed to send a signal to the ADT central station due to the disconnected telephone service. As a result of the fire and the failure of the alarm system to operate, the Rohatyn premises and property were severely damaged. Following the fire, Rohatyn submitted a claim to Vigilant. Vigilant has paid the claim in the sum of at least $1,857,826.56 and has become subrogated to the rights of Rohatyn against the defendants.

Vigilant alleges three causes of action in its complaint against ADT and Frontier. Vigilant claims that ADT and Frontier owed a duty to Rohatyn to properly examine, monitor, test, install, inspect, service, maintain and repair the alarm and telephone systems. Vigilant claims that the damage to the premises and property as a result of the fire was caused solely [*4] by the "gross negligence, carelessness and recklessness" of the defendants. In the Complaint, Vigilant also alleges breach of warranty and breach of contract. [3] In addition, co-defendant Frontier brings a cross-claim against ADT for contribution. ADT now moves to dismiss these claims pursuant to *Federal Rule of Civil Procedure 12(c)*.

3 In its Affirmation in Opposition it appears that Plaintiff abandons its breach of warranty and breach of contract claims. Vigilant concedes that "[t]he waiver [of subrogation] provision is found in the service contract between ADT and Rohatyn" but argues that "its enforcement should be limited to contractual claims related to that agreement." (Aff. In Opp. ¶ 15.) In putting forth its gross negligence claim, Vigilant argues that "ADT owed Mr. Rohatyn a duty of reasonable care that is independent of its contractual obligations. The Court should find that Vigilant has standing to pursue recovery for its damages based on ADT's breach of its extra-contractual duties." (Aff. in Opp. ¶12.) Plaintiff thus abandons its breach of warranty and breach of contract claims in light of the waiver of subrogation provision. Accordingly, the Court will only address the legal [*5] sufficiency of the remaining claim for gross negligence asserted against ADT.

STANDARD FOR *RULE 12(c)* JUDGMENT ON THE PLEADINGS

A motion for judgment on the pleadings pursuant to *Federal Rule of Civil Procedure 12(c)* is analyzed under the same standard applicable to a motion to dismiss for failure to state a claim under *Rule 12(b)(6)*. See *Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994)*. Accordingly, when issuing a judgment on the pleadings, "the court is required to accept the material facts alleged in the complaint as true." *Frasier v. Gen. Elec. Co., 930 F.2d 1004, 1007 (2d Cir. 1991)* (citation omitted). A court is also required to read a complaint generously, drawing all reasonable inferences from its allegations in favor of the plaintiff. See *Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 515, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972)*. A court should not, however, credit "mere conclusory statements" or "threadbare recitals of the elements of a cause of action." *Stephenson v. Citco Group Ltd., 700 F. Supp. 2d 599, 619 (S.D.N.Y. 2010)* (quoting *Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009))*.

"The purpose of *Rule 12(c)* motions is to test the legal sufficiency of a plaintiff's complaint, and the court's [*6] inquiry is limited to whether plaintiff pleads sufficient facts to state claim for relief that is plausible on its face." *Pallonetti v. Liberty Mut., No. 10 Civ. 4487, 2011 U.S. Dist. LEXIS 14529, 2011 WL 519407, at *2 (S.D.N.Y. Feb. 11, 2011)* (internal quotation marks and citation omitted). "A claim has facial plausibility when the pleaded factual content allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S. Ct. at 1940*. Thus, the plaintiff is obliged to provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)* (internal quotation marks and citation omitted).

DISCUSSION

On May 28, 2004, Rohatyn and ADT entered into a Residential Services Contract (the "Contract") whereby, for a fee, ADT agreed to provide Rohatyn with equipment and monitoring service for fire and burglary protection. (Contract, appended to ADT's Mem. in Supp. as Ex. A.) [4] In support of the instant motion, ADT submitted the Residential Services Contract between it and Rohatyn. [5]

> 4 For the purposes of this motion, Vigilant stipulates that this is a true and complete copy [*7] of the agreement between ADT and Rohatyn. (Pl.'s Aff. in Opp.¶ 13.)
>
> 5 The contract between Rohatyn and ADT is clearly integral to the Plaintiff's Complaint and its claims and therefore may be considered by the Court. See *Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007)*; see also supra note 4.

The Contract contains a waiver of subrogation provision, as well as exculpatory and limitation of liability provisions. Pursuant to Paragraph 5 of the Contract, Rohatyn explicitly acknowledges and agrees that ADT is not an insurer, and, in the event of any loss or damage to the property, Rohatyn will look exclusively to his insurer to recover damages. Moreover, the contract states: "YOU WAIVE ALL SUBROGATION AND OTHER RIGHTS OF RECOVERY AGAINST [ADT] THAT ANY INSURER OR OTHER PERSON MAY HAVE AS RESULT OF PAYING ANY CLAIM FOR LOSS OR INJURY TO ANY OTHER PERSON." (hereinafter "waiver of subrogation provision" Contract ¶ 5.) [6]

> 6 Paragraph 5 of the Contract is printed in bold and all-capitalized text, and states, in full:
>
> WE ARE NOT AN INSURER. WE ARE NOT AN INSURER AND YOU WILL OBTAIN FROM AN INSURER ANY INSURANCE YOU DESIRE. THE AMOUNT YOU PAY US IS BASED UPON THE SERVICES WE PERFORM AND THE LIMITED [*8] LIABILITY WE ASSUME UNDER THIS CONTRACT AND IS UNRELATED TO THE VALUE OF YOUR PROPERTY OR THE PROPERTY OF OTHERS LOCATED IN YOUR PREMISES. IN THE EVENT OF ANY LOSS OR INJURY TO ANY PERSON OR PROPERTY, YOU AGREE TO LOOK EXCLUSIVELY TO YOUR INSURER TO RECOVER DAMAGES. YOU WAIVE ALL SUBROGATION AND OTHER RIGHTS OF RECOVERY AGAINST US THAT ANY INSURER OR OTHER PERSON MAY HAVE AS A RESULT OF PAYING ANY CLAIM FOR LOSS OR INJURY TO ANY OTHER PERSON.

Vigilant argues that this waiver of subrogation provision is unenforceable against its claim for gross negligence. Vigilant claims that the waiver provision in the service contract should be limited to contractual claims related to that agreement, and ADT owed Rohatyn a duty of reasonable care that is independent of its contractual obligations. (Pl's Aff. in Opp. ¶¶ 15-18.) Vigilant also argues that public policy forbids the enforcement of a waiver of subrogation clause when the damages result from grossly negligent conduct. (Pl's Aff. in Opp. ¶¶ 19-21.) These arguments are unavailing.

A. ADT Did Not Owe Rohatyn a Legal Duty Independent of the Contract.

Vigilant claims that ADT owed Rohatyn a duty of reasonable care that is independent of its contractual [*9] obligations, and therefore the waiver of subrogation provision of the Contract should not insulate ADT from liability. This argument fails as a matter of law.

The relationship between ADT and Rohatyn was defined by the Contract wherein Rohatyn contracted with

ADT to install and monitor his alarm system. Under New York law, "an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty." *Rick v. New York Cent. & Hudson Riv. R.R. Co., 87 N.Y 382, 398 (1882)*. The contractual relationship between an alarm company and its subscriber does not generally give rise to such a separate tort duty. See *Spengler v. ADT Sec. Servs., Inc., 505 F.3d 456, 458 (6th Cir. 2007)*.

Plaintiff cites Sommer v. Federal Signal Corp. for the proposition that ADT can be held liable in tort for its failure to perform its contractual obligations. *79 N.Y.2d 540, 593 N.E.2d 1365, 583 N.Y.S.2d 957 (1992)*. However, in Sommer, the defendant was "franchised and regulated" by New York City to monitor the alarm system of a 42-story building and report directly to the fire department as part of the City's "comprehensive scheme of fire-safety regulations requires certain buildings -- including [plaintiff]'s [*10] -- to have central station fire service." [7] *Id. at 552* (citing Administrative Code of the City of New York (now *section 27-972 [f]* and *[g]*)) . The court determined that the alarm company can only be held liable in tort for its gross failure to perform its contractual services in the rare cases where such a public interest is implicated. See *Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 77 A.D.3d 431, 433-34, 908 N.Y.S.2d 654, 656-57 (1st Dep't 2010)* (discussing Sommer).

> 7 The Court in Sommer further noted that, "[c]entral station operators . . . may be penalized for failing to transmit alarm signals, provide qualified operators, and other acts and omissions. Fire alarm companies thus perform a service affected with a significant public interest; failure to perform the service carefully and competently can have catastrophic consequences." *Sommer, 79 N.Y.2d at 552-53* (citations omitted).

Here, Rohatyn chose to have a fire alarm system installed in his home and chose to have ADT monitor that system. Vigilant did not plead that Rohatyn was required by code or regulation to have his fire alarm monitored or that ADT had a special relationship with a city or country whereby ADT was required [*11] to report to the fire department. ADT's obligation to install, monitor, maintain, and test the alarm system arose only under the Contract. Simply put, ADT did not owe Rohatyn an independent duty to perform its contractual obligations with care and skill. See *Clemens Realty, LLC v. N.Y. City Dep't of Educ., 47 A.D.3d 666, 667, 850 N.Y.S.2d 172, 173 (2d Dep't 2008)* ("Simply alleging a duty of due care does not transform a breach of contract action into a tort claim."). Thus, Plaintiff's allegations of tortious conduct fail to allege the necessary violation of a legal duty independent of the contract with defendant. If ADT breached any duty to Rohatyn, it would amount to a breach of contract and would be governed by the remedies set forth and agreed upon by the parties in the Contract.

B. The Waiver of Subrogation Provision in the Contract Constitutes a Defense to All Plaintiff's Claims, Including Gross Negligence.

The Contract's waiver of subrogation provision deprives Plaintiff of standing to sue ADT. It is undisputed that Vigilant became subrogated to the rights of Rohatyn against ADT by virtue of paying Rohatyn's claim and now brings this action as Rohatyn's subrogee. (Compl. ¶ 20). [*12] However, in the Contract, Rohatyn voluntarily waived all of his rights of subrogation against ADT. (Contract ¶ 5.)

Plaintiff argues that, as a matter of public policy, a waiver of subrogation clause is not enforceable against an allegation of gross negligence. Plaintiff rightly notes that public policy in New York will not permit a defendant to insulate itself from liability for its own grossly negligent conduct via an exculpatory provision. See *Met. Prop. & Cas. Ins. v. Budd Morgan Ctr. Station Alarm Co., 95 F. Supp. 2d. 118, 122 (E.D.N.Y. 2000)*. However, at issue here is a waiver of subrogation rather than an exculpatory provision. The Court of Appeals has held, "[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 a contract to provide insurance for all of the parties." *Board of Educ., Union Free Sch. Dist. No. 3 v. Valden Assoc., 46 N.Y.2d 653, 657, 389 N.E.2d 798, 416 N.Y.S.2d 202 (1979)*.

A waiver of subrogation provision that precludes a claim for gross negligence does not violate New York public policy as it does not "exempt a party from liability. See *Great Am. Ins. Co. of N.Y. v. Simplexgrinnell LP, 60 A.D.3d 456, 456-57 874 N.Y.S.2d 465, 465-66 (1st Dep't 2009)*. [*13] Rather, such a provision only requires one of the parties to provide insurance for all of the parties and thereby provide a predetermined source of recovery.

Id. The Appellate Division recently held that a similar waiver of subrogation provision in a contract between a bank and an alarm monitoring company "constitutes a defense to all of plaintiff's claims, including gross negligence." *Abacus, 77 A.D.3d at 433-34*. As such, the waiver of subrogation provision in the Contract is enforceable regardless of Plaintiff's allegation of gross negligence. The Contract thus precludes Plaintiff's claims and ADT's motion to dismiss is GRANTED.

C. Frontier's Cross Claim for Contribution.

Frontier has alleged no independent claims against ADT. In its Answer, Frontier alleges a cross-claim seeking contribution in the event that any judgment is rendered in favor of Plaintiff against Frontier. (See Frontier Answer with Cross-cl.)

As previously noted, ADT's liability to Vigilant can only be for breach of contract. See supra. It is well-established that contribution does not lie in contract cases. See *Board of Educ. v. Sargent, Webster, Crenshaw & Folley, 125 A.D.2d 27, 29, 511 N.Y.S.2d 961 (3d Dep't 1987)*. [*14] Because Plaintiff has not alleged a viable tort claim against ADT, there can be no cross-claim for contribution on the part of Frontier because such a claim requires two common tortfeasors. Id.; see also *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs., 109 A.D.2d 449, 492 N.Y.S.2d 371, 375-76 (1st Dep't 1985)* ("The right to contribution and apportionment of liability among alleged multiple wrongdoers arises when they each owe a duty to plaintiff or to each other and by breaching their respective duties they contribute to plaintiff's ultimate injuries."). ADT has established that it neither owed a duty to the Plaintiff nor owed an independent duty to Frontier. As such, Frontier's cross-claim for contribution must be dismissed.

CONCLUSION

For the reasons set forth above, the Court finds that Vigilant and Frontier have failed to allege facts sufficient to state a claim for which relief may be granted and ADT's motion to dismiss both Vigilant's claim and Frontier's cross-claim is GRANTED.

SO ORDERED:

Dated: New York, New York

March 8, 2011

/s/ Barbara S. Jones

Barbara S. Jones

UNITED STATES DISTRICT JUDGE