Memorandum of Decision on Motion

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

Mercer Insurance Company of New Jersey Inc. a/s/o Richard Dieterly
v.
All State Jersey Central Electric, Inc. and Jersey Central Power & Light Company a/n/a First Energy Company

Docket No. HNT-L-629-10

Motions for Summary Judgment and Adjournment of Trial Date

Opposed

Argued: December 2, 2011
Decided: December 2, 2011
The Honorable Peter A. Buchsbaum, J.S.C.

Facts and Procedural Posture:

This matter is a subrogation action brought by plaintiff, Mercer Insurance Company of New Jersey Inc., seeking reimbursement from defendant, Jersey Central Power & Light Company, to reimburse sums paid to the insured, Richard Dieterly, for damages resulting from a fire in his home. Defendant files the instant summary judgment motion asking the Court to hold as a matter of law that it is not liable for the costs incurred. Alternatively, defendant files a motion to adjourn the trial date for sixty days to allow defendant to obtain an impartial jury. Plaintiff files a cross-motion for summary judgment asking the Court to adjudicate that defendant is liable for the damages to Mr. Dieterly's home as a matter of law. As the Court has previously granted summary judgment in favor of co-defendant, All State Jersey Central Electric, Inc., on October 12, 2011, either of the current summary judgment motions, if granted, would dispose of the entire matter and eliminate the need for trial.

On February 13, 2009, a severe windstorm swept the region, resulting in a tree falling and disrupting power to Mr. Dieterly's property. Mr. Dieterly received electrical power service through defendant. Mr. Dieterly's property was covered by a homeowners insurance policy issued by plaintiff. After Mr.

Dieterly lost power, defendant's chief lineman, Kevin Seelinger, arrived at the property and took a volt reading to ensure that there was good voltage before restoring power. After the power was restored, a fire erupted in Mr. Dieterly's second-floor bedroom where a television and VCR/DVD player were plugged in. Mr. Dieterly was thereafter compensated for his property damage loss by plaintiff. Plaintiff now seeks reimbursement from defendant for these costs.

In its summary judgment motion, defendant asserts that there is no evidence that the fire in Mr. Dieterly's residence was caused by its sole negligence. Defendant contends that the fire could have been caused by a defect in the television and VCR/DVD player. Moreover, defendant claims immunity from plaintiff's subrogation claim under New Jersey Supreme Court cases that prohibit liability of utility companies as a matter of public policy. Further, defendant contends that its Tariff for Service, as approved by the New Jersey Board of Public Utilities, precludes liability under these circumstances. The Tariff for Service limits its liability to sole negligence by stating in relevant part:

> [Defendant] will not be responsible for any damage or injury arising from the presence or the use of Service provided to the Customer by [Defendant] after it passes from [Defendant's] facilities to the Point of Delivery, unless such damage or injury is caused by the sole negligence or willful misconduct of [Defendant]. Any damage or injury arising from occurrences or circumstances beyond [Defendant's] reasonable control, or from its conformance with standard electric industry system design or operation practices, shall be conclusively deemed not to result from the negligence of [Defendant].

Def.'s Certification, Exh. C at §4.01. The interruption of service in Mr. Dieterly's home, defendant asserts, was caused by a natural disaster – the windstorm. Moreover, defendant contends that a defect in the television or VCR/DVD unit could have caused the fire that occurred after the power was restored. Since it was not solely negligent in causing the fire, defendant continues, it cannot be held responsible as a matter of law for the losses sustained by Mr. Dieterly and therefore should not be compelled to compensate plaintiff for the resulting costs.

In opposition, plaintiff asserts that defendant's sole negligence did, in fact, cause the fire. Plaintiff's liability expert, Larry Wharton, opined that defendant's crew did not follow industry accepted procedures when it reconnected the service drop to the weatherhead to restore service to Mr. Dieterly's home. Had the crew followed the correct procedures and checked the voltage at the weatherhead or inspected the connections at the service pole before restoring power, Mr. Wharton opines, the fire could have been prevented. Therefore, plaintiff concludes, defendant is not saved by the protections of the Tariff for Service. Further, plaintiff contends that the New Jersey Supreme Court cases that defendant cites (as set forth below) are distinguishable from the case at bar because it was the direct negligence of defendant's crew, not a storm-related service interruption, that caused the damage here.

As an alternative to its summary judgment motion, defendant files an additional motion seeking adjournment of the trial for sixty days. As the basis for this request, defendant contends that an adjournment is necessary to allow the public outcry and harsh criticisms associated with defendant's performance in this region during Hurricane Irene and the October 2011 snow storm to subdue. Defendant sets forth at length media coverage illustrating negative opinions held toward defendant by the general public. Without an adjournment of the trial, defendant asserts, it will be impossible for defendant to obtain a fair and impartial jury. Plaintiff opposes the adjournment motion by contending it is "untimely, unwarranted and specious". See Pl.'s opposition at 3. If the Court should grant the adjournment, plaintiff alternatively requests that defendant post a bond or cash deposit of $400,000.

Analysis:

"A motion for summary judgment is not unlike the unveiling of a statue. The motion substantially supported requires the opposition to remove the shielding cloak and demonstrate the existence of a controversial issue concerning a material fact." *Templeton v. Scudder,* 16 N.J. Super. 576, 585 (App. Div. 1951).

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). "Summary judgment procedure pierces the allegations of the pleadings to show that the facts are

otherwise than as alleged." *Judson v. Peoples Bank & Trust Co.,* 17 N.J. 67, 75 (1954) (citation omitted).

"[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." *Brill v. Guardian Life Ins. Co.,* 142 N.J. 520, 530 (1995). Accordingly, "when the evidence is 'so one-sided that one-party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Id. (citation omitted).

The parties resisting a summary judgment motion must provide record citations to the moving party's Statement of Material Facts. R. 4:46-2(b). Where the opposition does not so provide, the opposition must fail. Here, plaintiff has provided proper opposition to defendant's motion for summary judgment.

Addressing first the issue of defendant's negligence, both parties agree that under the Tariff for Service, defendant will not be responsible unless its sole negligence was the cause of the damage to Mr. Dieterly's property from the fire. See Def.'s Certification, Exh. C at §4.01. Defendant is correct that a natural disaster – the windstorm – caused the interruption of service that predicated the need for service to be restored. However, defendant has not precluded the contention that its sole negligence was the cause of the actual fire that followed the restoration of service. Although defendant points to the possibility that a defect in Mr. Dieterly's television and VCR/DVD unit could have caused the fire, plaintiff's expert, Mr. Wharton (the Engineering Consulting for Wharton Engineering, LLC), clearly opines that defendant's negligence in failing to follow standard industry practice was the cause of the fire:

> [T]he JCP&L crew did not follow industry recognized and established procedures when they reconnected the service drop to the weatherhead on February 13, 2009. Specifically, the crew and JCP&L knew that the service drop had been severed at or near the weatherhead and the weatherhead had been pulled from the side of the house by the force of a tree limb falling on the service drop the previous day. They should have been aware of the possibility that the

> connections may have been damaged at the service pole as well. It is apparent that they did not check the voltage available at the weatherhead before the main breaker was turned on at the service panel. Had the voltage been checked they would have realized a problem existed. It is also apparent that they did not examine the condition of the connections between the service drop and secondary cable at the service pole prior to re-energizing the house.
>
> It is the writer's concluding opinion that the February 13, 2009 fire at the Dieterly residence was caused by the failure of JCP&L personnel to follow industry accepted practice while reconnecting service at the weatherhead. Had they checked the voltage at the weatherhead or inspected connections at the service pole prior to re-energizing the home the fire should have been prevented.

Pl.'s Certification, Exh. H at 5. Defendant has not presented expert testimony that contradicts Mr. Wharton's opinion. In the face of evidence that supports the conclusion that defendant's negligence was the sole cause of the fire at the Dieterly residence, defendant cannot claim exoneration as a matter of law based on the protections of the language limiting defendant's liability in the Tariff for Service.

However, that conclusion does not settle the issue here, where the claim is based on subrogation. Regardless of whether defendant was, in fact, solely negligent for the damages here, the New Jersey Supreme Court analyzed situations where liability is asserted on the part of a utility company on the basis of negligence in the context of a subrogation claim asserted by an insurance company that has compensated the insured for losses:

> When, as here, an insurance carrier which has satisfied a loss it was paid to cover, seeks to recoup by asserting a claim its insured has against another with respect to that loss, the final question must be whether justice would be furthered by that course.

Weinberg v. Dinger, 106 N.J. 469, 490 (1987). In *Weinberg*, a fire erupted in an apartment complex as a result of inadequate water pressure at nearby fire hydrants. Id. at 472. The plaintiffs asserted negligence on the part of the utility company in "negligently fail[ing] to inspect, maintain, and repair its water system, resulting in water pressure inadequate for fire fighting." Id. The New Jersey Supreme Court rejected a subrogation claim brought by the insurance company who compensated the insured for the losses resulting from the fire on the basis of public policy. Id. at 492-93. As its rationale, the New Jersey Supreme Court explained that "subrogation is an equitable doctrine" rather than "absolute right", id. at 489. The Court explained:

> We believe that the imposition on a water company of liability for subrogation claims of carriers who pay fire losses caused by the company's negligent failure to maintain adequate water pressure would inevitably result in higher water rates paid by the class of consumers that paid for the fire insurance. The result of imposing subrogation-claim liability on water companies in such cases would be to shift the risk from the fire-insurance company to the water company, and, ultimately, to the consumer in the form of increased water rates. Thus, the consumer would pay twice -- first for property insurance premiums, and then in the form of higher water rates to fund the cost of the water company's liability insurance. We find this result contrary to public policy.

Id. at 492. As a result, the Court held that the carrier's subrogation claims were unenforceable, d. at 493, while overriding prior precedent and finding the utility liable for first party claims. The New Jersey Supreme Court thereafter extended the *Weinberg* subrogation carve-out to other types of utility companies in *Franklin Mutual Ins. Co. v. Jersey Central Power & Light Co.*, 188 N.J. 43, 46-47 (2006).

An exception to the *Weinberg* subrogation carve-out, however, was enunciated by the Appellate Division in *E & M Liquors, Inc. v. Public Service Elec. & Gas Co.,* 388 N.J. Super. 566 (App. Div. 2006), certif. denied, 189 N.J. 646 (2007). *E & M* also involved an electric utility. A high voltage wire had

fallen. It was flopping around for fifty minutes before power was cut. During that time the wire caused a fire which destroyed the insured building. The insurers brought a subrogation action to recoup their payments. The Appellate Division drew a distinction between negligent failure resulting from a service interruption and direct negligence on the part of a utility company. Id. at 570. "We do not read either *Weinberg* or *Franklin Mutual* to immunize a primary tortfeasor from liability in a subrogation action." Id. Rather, a utility company may be liable for its direct negligence in a subrogation action. Id. (internal citations omitted). Noting that "[i]mmunity from wrongful acts is not favored", the Court concluded, "[w]e see no basis to extend the limited immunity for subrogation claims against public utilities to claims for damages for negligent actions precipitating property damage claims." Id.

A fellow Superior Court applied this same logic in *Ebert v. S. Jersey Gas Co.*, where a utility company was held liable for its negligence in failing to properly install, inspect, and maintain its gas lines, resulting in a fire at the plaintiffs' residence. 260 N.J. Super. 104, 109 (L. Div. 1992). The defendant utility company presented the same contention as defendant does here – that it is not liable in the subrogation action as a result of public policy. Id. at 106. The Court disagreed, and ruled:

> [Defendant utility company] is subject to a duty to properly install and thereafter inspect and maintain its system. That duty is an important one in that the product, natural gas, has dangerous propensities if allowed to get out of control. [Defendant utility company] although a public utility must be accountable for its negligence and cannot be allowed to pass on such costs to a fire insurance carrier.

Id. at 109.

Here, this Court faces precisely the same situation as described above.[1] Plaintiff does not rest on inadequate service due to the storm. Rather, plaintiff alleges direct negligence

[1] The Court must note that plaintiff failed to cite either of the highly applicable cases mentioned above. See also *Bongo v. N.J. Bell Telephone,* 250 N.J. Super. 524 (L. Div. 1971) denying immunity from property damages caused by a utility's negligently driven car.

on the part of defendant in this subrogation action for defendant's failure to follow standard industry practice in reconnecting the service at the weatherhead, resulting in the fire to Mr. Dieterly's residence. Plaintiff's expert, Mr. Wharton, specifically opined that defendant's direct negligence in this regard was the sole cause of the fire and resulting damage to Mr. Dieterly's property. See Pl.'s Certification, Exh. H at 5. This direct negligence presents the exact scenario by which the exception to the *Weinberg* carve-out applies. Under these circumstances, defendant cannot claim that it should be awarded summary judgment because it is immunized from subrogation claims on the basis of public policy. No such immunity exists in the presence of evidence of direct negligence, as exists here. Thus, defendant's application for summary judgment must be denied.

The Court now turns to plaintiff's motion for summary judgment on liability. It is adjourned for two weeks for reasons stated on the record.

Further, defendant's motion to adjourn the trial date for sixty days is **GRANTED.** The Court believes it unlikely that prejudice will exist where the issues mainly relate to quantifiable expenses for repairs. However, the case is not old, and this is a first listing. A two month delay as requested by defendant will at least advance the appearance of objectivity.

Conclusion:

For the foregoing reasons, defendant's motion for summary judgment is **DENIED,** plaintiff's cross-motion for summary judgment is **ADJOURNED**, and defendant's motion to adjourn the trial date for sixty days is **GRANTED.**