

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WAUSAU UNDERWRITERS INSURANCE, : CIVIL ACTION
as subrogee of HALPERN AND :
COMPANY, INC. and GREEN CIRCUITS, :
INC., Plaintiffs :
: :
v. :
: :
WILLIAM SHISLER, :
Defendant / Third-Party Plaintiff :
: :
v. :
: :
HALPERN AND COMPANY, INC. and :
GREEN CIRCUITS, INC., :
Third-Party Defendant : NO. 98-5145

MEMORANDUM AND ORDER

HUTTON, J.

July 19, 1999

Presently before the Court are the following: Motion to Dismiss the Third-Party Complaint pursuant to Rules 12(b)(6) of the Federal Rules of Civil Procedure by Third-Party Defendants Halpern and Company, Inc. and Green Circuits, Inc. (Docket No. 16), the Answer of Plaintiff Wausau Underwriters Insurance (Docket No. 17), the Answer of Third-Party Plaintiff William Shisler (Docket No. 22), and Third-Party Defendants' Reply Brief (Docket No. 23). For the reasons that follow, the Third-Party Defendant's Motion to Dismiss is **GRANTED**.

I. BACKGROUND

A. Plaintiff's Complaint

On September 28, 1998, Plaintiff Wausau Underwriters Insurance ("Wausau"), as subrogee of Halpern and Company, Inc. ("Halpern") and Green Circuits, Inc. ("Green") filed a Complaint against Defendant William Shisler ("Shisler"). Plaintiff's Complaint alleged the following facts. On December 3, 1997, a fire occurred at a facility owned by Halpern and leased to Green, which is located at 1260 North 31st Street, Philadelphia, Pennsylvania. The fire caused damage to the real and personal property of Halpern and Green.

Wausau is the subrogee of Green and Halpern. Wausau provided first party insurance coverage for Halpern and Green for damages sustained in the fire. Under the terms of the insurance policy, Wausau paid money to Halpern and Green for losses sustained as a result of the fire. By payment of insurance proceeds to Green and/or Halpern, Wausau became subrogated to the rights of Green and Halpern to recover its losses from a potentially responsible third-party, i.e., someone other than Green and Halpern. The damage sustained by Halpern and Green were caused by Shisler's negligence and breach of contract.

On October 29, 1998, Shisler filed his Answer and Affirmative Defenses. Shisler alleged that he was not labile to Wausau. He claimed that at all times he was acting as the employee, borrowed

servant, servant or agent of Green and/or Halpern, and that if Shisler were negligent, then his negligence is imputed to Green and/or Halpern and Wausau. Shisler asserted that Green, Halpern, and/or Wausau were contributorily and/or comparatively negligent.

B. Third-Party Complaint

On November 5, 1998, Shisler filed a Third-Party Complaint against Green and Halpern. The Third-Party Complaint alleges the following facts. On or about November 11, 1997, Green and/or Halpern hired Shisler to work as a foreman on their second shift. Green and/or Halpern trained, instructed, and supervised Shisler's work. Shisler was under their control at all relevant times with respect to the method and manner in which he worked for them. Shisler acted as the employee, borrowed servant, servant, or agent of Green and/or Halpern.

On December 3, 1997, a fire occurred purportedly causing damage to the property of Green and Halpern as well as business interruption losses. The fire and the claimed damages sustained by Wausau, Green, and Halpern were caused by the carelessness and negligence of Third-Party Defendants Green and Halpern. Third-Party Defendants Green and Halpern are solely liable to Plaintiff Wausau. Green and/or Halpern are solely liable to Plaintiff Wausau jointly and severally or in the alternative, liable to Defendant and Third-Party Plaintiff Shisler for indemnification and/or contribution.

On February 22, 1999, the Third-Party Defendants filed the instant motion moving the Court to dismiss the Third-Party Complaint. On March 2, 1999, the Plaintiff filed an Answer to this motion. In its Answer, Wausau states that it does not oppose the relief sought by the Third-Party Defendants. On March 23, 1999, Defendant and Third-Party Plaintiff Shisler filed his Answer to the motion to dismiss his Third-Party Complaint. The Third-Party Defendants filed a Reply Brief on March 31, 1999. The Court now considers the Third-Party Defendants' Motion to Dismiss the Third-Party Complaint.

II. MOTION TO DISMISS STANDARD

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v. Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

When considering a motion to dismiss a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),¹

¹ Rule 12(b)(6) states as follows:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of

this Court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citing Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988)). The Court will only dismiss the complaint if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 249-50 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

A motion to bring in a third-party defendant is governed by Federal Rule of Civil Procedure 14(a) which provides in pertinent part:

At any time after commencement of the action a defendant party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise, the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

Fed. R. Civ. P. 14(a). A primary purpose of Rule 14 is to avoid circuity of action and multiplicity of litigation. Dysart v. Marriott Corp., 103 F.R.D. 15, 18 (E.D. Pa. 1984); 6 Charles A. Wright et al., Federal Practice and Procedure § 1442 (1990). In

the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted

Fed. R. Civ. P. 12(b)(6).

pursuit of this goal, courts have liberally construed Rule 14. Con-Tech Sales Defined Benefit Trust v. Cockerham, 715 F.Supp. 701, 704 (E.D. Pa. 1989).

III. DISCUSSION

The ground upon which Third-Party Defendants Halpern and Green base their motion pursuant to Fed. R. Civ. P. 12(b)(6) is this:

Defendant's [Shisler's] Third Party Complaint against Third-Party Defendants Halpern and Green for indemnity and/or contribution fails to state a claim upon which relief can be granted under F.R.C.P. 12(b)(6) because Wausau, as subrogee of Halpern and Green, stands in the shoes of Halpern and Green and the defenses available against Halpern and Green. See Fed. R. Civ. P. 14(a) (making it improper to join a party who is not already a party to the action). Accordingly, the issue before the Court is whether Shisler has stated a claim against Green and Halpern upon which relief may be granted, or has Shisler merely reiterated his defenses to Wausau's claim in the form of a claim against Green and Halpern. The Court finds that it is the latter.

"Once the insurer has paid a claim to the insured, it may then stand in the shoes of the insured and assert the insured's rights against the tortfeasor. 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." Daley-Sand v. West American Insurance

Company, 387 Pa.Super. 630, 564 A.2d 965 (1989). In such a case, the insurer is subject to any defenses which the third-party has against the insured. Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 919 (3d Cir. 1999). The basic idea of subrogation is that of substituting the insurer for the insured in the insured's action against a third party. United States Fire Ins. Co. v. Royal Ins. Co., 759 F.2d 306, 309 (3d Cir. 1985). Upon discharging a liability, an insurer becomes equitably subrogated and may assert the insured's claims against third parties. Greater New York Mut. Ins. Co. v. North River Ins. Co., 85 F.3d 1088, 1095 (3d Cir. 1996); Cf. Brinkley v. Pealer, 341 Pa.Super. 432, 491 A.2d 894, 898 (1985) (insurer's payment to insured renders insurer insured's subrogee and places insured in precise position of insurer); see also Barry R. Ostranger & Thomas R. Newman, Handbook on Insurance Disputes § 13.05 (1995).

In this case, it is undisputed that Wausau paid the total loss incurred by Green and Halpern as a result of the fire. After paying this sum, Wausau fulfilled its contractual obligation to Green and Halpern. Subsequently, under the terms of the insurance policy, Wausau became vested with the subrogation rights from the Third-Party Defendants to pursue that amount from the alleged tortfeasor, Shisler. The relationship between Wausau, as the insurer, and Green and Halpern, as insured, was that of subrogor and subrogee. Puritan Insurance Company v. Canadian Universal

Insurance, 775 F.2d 76, 80-81 (3d Cir. 1985); City of Philadelphia v. National Surety Corporation, 140 F.2d 805, 808-808 (3d Cir. 1944) (applying Pennsylvania law); National Fire Insurance Company of Hartford v. Daniel J. Keating Co., 35 F.R.D. 137, 139 (W.D. Pa. 1964).

Any finding of responsibility on the part of Green and/or Halpern does not create a liability to Wausau, but rather, would merely serve to eliminate or reduce Wausau's recovery from Shisler. In other words, Green and Halpern can never be liable to pay damages to Shisler for the losses, which were actually sustained by Green and Halpern. As an insurer cannot subrogate against its own insured, Wausau has no claim against Green or Halpern for which either could be liable. See Magner v. Associated Ins. Companies, Inc., Civ.A. No.93-1932, 1994 WL 570178, (E.D. Pa. Oct. 17, 1994) (Hutton, J.) (citing Keystone Paper Converters, Inc. v. Neemar, Inc., 562 F.Supp. 1046 (E.D.Pa. 1983) (concluding that "an insurer may not subrogate against an insured). Accordingly, Shisler has not stated a claim upon which relief may be granted, and his Third-Party Complaint must be dismissed.

An appropriate Order follows.

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GREEN CIRCUITS, INC., :
Third-Party Defendant : NO. 98-5145

O R D E R

AND NOW, this 19th day of July, 1999, upon consideration of the Motion to Dismiss the Third-Party Complaint pursuant to Rules 12(b)(6) of the Federal Rules of Civil Procedure by Third-Party Defendants Halpern and Company, Inc. and Green Circuits, Inc. (Docket No. 16), the Answer of Plaintiff Wausau Underwriters Insurance (Docket No. 17), the Answer of Third-Party Plaintiff William Shisler (Docket No. 22), and Third-Party Defendants' Reply Brief (Docket No. 23), IT IS HEREBY ORDERED that the Third-Party Defendant's Motion to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that:

(1) Defendant Shisler's Third-Party Complaint against Third-Party Defendants Halpern and Company, Inc. and Green Circuits, Inc. is **DISMISSED**.

BY THE COURT:

HERBERT J. HUTTON, J.