STATE OF VERMONT

SUPERIOR COURT
Windsor Unit

CIVIL DIVISION
Docket No. 348-6-14 Rdcv

VALERIE DUCHARME &
WALTER DUCHARME,
Plaintiffs

v.

IRON LANTERN, LLC &
FORO, LLC,
Defendants

DECISION
Defendants' Motion For Partial Summary Judgment (MPR #2)

Plaintiffs seek compensation for property damage to their home which was destroyed by a tree falling from neighboring property onto the home. In this motion, Defendants seek a ruling that the Plaintiffs' insurer's right of subrogation precludes Plaintiffs from recovering from Defendants. The Plaintiffs are represented by Michele B. Patton, Esq. and the Defendants are represented by Andrew C. Boxer, Esq.

Legal Standard

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). On summary judgment, the court does not consider the weight of the evidence. *Fritzeen v. Trudell Consulting Engineers, Inc.*, 170 Vt. 632, 633 (2000) (mem.). "It is not the function of the trial court to find facts on a motion for summary judgment." *Id.* Summary judgment is not a substitute for a determination on the merits of the claims if there is any evidence presented by the nonmoving party that creates an issue of material fact. *Id.* "Once the court determines that there is a triable issue, the inquiry is at an end." 10A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2728.

Facts

The following facts are undisputed:

1. The Plaintiffs own a home located on Route 4A West in Castleton, Vermont.

2. The Plaintiffs insured their home through Co-operative Insurance Companies (Coop), with a policy limit of $37,000.

3. The Defendants own a restaurant on property adjacent to the Plaintiffs' property.

4. The Defendants are also insured through Co-operative Insurance, with a policy limit of $1,000,000 per occurrence.

5. There is or was a pine tree on the Defendants' property which was struck by lightning in or around July of 2012. A limb came down on a fence near the boundary and the fence was damaged. After the incident, it was reported in insurance claim notes related to Defendants that the tree was "not a dead tree."

6. The Defendants took no action with respect to the pine tree after it was struck by lightning.

7. On December 21, 2012, in a severe windstorm, part of the pine tree fell on the Plaintiffs' property. A forester who examined the tree discovered that there was a rotten seam running from the fork of the leader past where the part had broken off.

8. The Plaintiffs made a homeowner's insurance claim to Co-operative Insurance, which assessed the Plaintiff's home as a total loss and paid the claim up to the policy limit of $37,000.

9. The Plaintiffs' valuation expert has assessed the cost to rebuild the Plaintiffs' home at $76,500. The Plaintiffs have valued their lost or damaged personal property at $17,582.04.

10. The Defendants' appraiser has assessed the value of the Plaintiffs' pre-accident home at $8,000.

The following issues are disputed:

1. The proximate cause of the tree falling on the Plaintiffs' property.

2. Whether Co-operative Insurance waived its subrogation claim regarding payments it made to Plaintiffs.

3. The admissibility of some of the above-referenced evidence, as raised by both parties.

Analysis

The Defendants move for summary judgment on two theories. First, they argue that the fact that the parties' properties are both insured by the same carrier is a bar to recovery. Second, they argue that the Plaintiffs cannot show that the Defendants had knowledge that the tree was a dangerous condition.

Subrogation

The Defendants' first theory is as follows: (1) both parties are insured by the same insurance carrier; (2) the insurance carrier has already paid the Plaintiffs up to the policy limit for damage sustained from this incident, namely $37,000; (3) the insurance carrier has a subrogation interest in any recovery the Plaintiffs obtain in court, up to the $37,000 paid on the claim; (4) the Plaintiffs cannot show total damages in excess of $37,000; and (5) the insurer can still subrogate and prevent the insured from collecting from Defendants' policy.

This does not appear to be a subrogation case in which the Coop is suing in the name of the insured on a right of subrogation, as no notice of subrogation was attached to the complaint. See V.R.C.P. 17(c) (requiring notice of subrogation to be attached to the pleadings). The carrier is not a party, and the Plaintiffs claim that the Coop has waived its right to make a subrogation claim. Nonetheless Defendants claim that there has been no valid waiver, and relying on an Illinois case, *Benge v. State Farm Mutual Automobile Insurance Company*, 697 N.E.2d 914, 915 (Ill. App. 1998), claim that the subrogation right defeats Plaintiffs' opportunity to recover from Defendants' Coop policy.[1] Whether the Coop, a nonparty, would assert any subrogation right it may possess is speculative, and the court cannot conclude that the Defendants are entitled to summary judgment based on rights a nonparty could possibly assert.

The crux of the Defendants' argument is that the Plaintiffs cannot show damage above the first $37,000 in which the insurance carrier has an interest. Relying on *Bean v. Sears Roebuck & Co.*, 129 Vt. 278 (1971) and *Kramer v. Chabot*, 152 Vt. 53 (1989), the Defendants assert that the only proper measure of damages in this case is diminution of value, and the Plaintiffs' diminution of value is $8,000, less than the carrier's subrogation rights.

Damages, however, are ultimately a jury question, and there is a clear dispute of material fact as to damages in this case, such that the Defendants cannot so readily assert that the Plaintiffs' damages must be less than $37,000. As the Plaintiffs note, the Vermont Supreme Court expressly rejected a hard-and-fast rule limiting damages to diminution of value in these types of cases in *Langlois v. Town of Proctor*, 2014 VT 130, ¶¶ 37–48, 198 Vt. 137. Instead, "the proportionality of cost-of-repair damages relative to the value of the property prior to a tort injury to property is part of the general inquiry on the reasonableness of damages," and it is up to the parties to produce evidence and argue to the jury that their measure of damages is more reasonable. *Id.* at ¶¶ 43, 47. The Plaintiffs have evidence that the damages they sustained were in excess of $100,000. The Defendants have evidence that the damages the Plaintiffs sustained were closer to $8,000. Which parties' evidence as to damages is more reasonable is an issue for the jury to determine. Summary judgment must be denied on Defendants' subrogation theory, as its success depends on the amount of damages.

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[1] The anti-subrogation rule provides that an insurer cannot recover by subrogation against its own insured or a coinsured under the same policy. See generally *Union Mutual Fire Insurance Company v. Joerg*, 2003 VT 27, ¶ 6, 175 Vt. 196 (describing subrogation and the anti-subrogation rule). Defendants argue that the anti-subrogation rule does not apply because the Plaintiffs and Defendants have separate Coop policies, and that as a result, Plaintiffs cannot recover.

Knowledge of Dangerous Condition

The Defendants' second theory is that the Plaintiffs have failed to show evidence that the Defendants' knew parts of the pine tree could fall and damage the Plaintiffs' property. Relying on a New York case, *Ivanic v. Olmstead*, 66 N.Y.2d 349 (N.Y. 1985), the Defendants assert that the Plaintiffs must prove the tree had outward signs of decay in order to make out a prima facie case.

It is undisputed in this case that the pine tree was struck by lightning prior to parts of it falling on the Plaintiffs' property, and the Defendants took no action with respect to the tree after it was struck by lightning. There are genuine disputes as to the condition of the tree between July and December of 2012. Whether the tree was dangerous, whether the Defendants should have known the tree was dangerous, and whether the Defendants' conduct was accordingly reasonable are all questions that a jury must determine. Given the disputed evidence, a jury could infer that it was unreasonable to do nothing with the tree after it was struck by lightning—or it could not. As such, summary judgment must be denied.

Evidentiary Issues

Finally, both parties have raised evidentiary issues regarding exhibits introduced on these motions. The Plaintiffs have raised the collateral source rule with respect to insurance payments made by Co-operative Insurance, and the Defendants have raised admissibility issues with respect to the e-mail stating that Co-operative did not intend to pursue subrogation. To the extent any of these issues remain pending at the commencement of trial, they are better resolved on motions in limine.

Order

The motion for summary judgment is *denied.*

Dated this 25th day of April, 2016.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge