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CJ-2021-991

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IN THE DISTRICT COURT IN AND FOR OKLAHOMA COUNTY
STATE OF OKLAHOMA

CJ - 2021-991

AFFILIATED FM INSURANCE COMPANY)
as subrogee of Devon Headquarters, L.L.C.,)
Plaintiff,)
v.)
BUDGET GLASS CLEANING, INC.,)
Defendant.)

Case No.

FILED IN DISTRICT COURT
OKLAHOMA COUNTY
MAR - 8 2021
50 RICK WARREN
COURT CLERK

PLAINTIFF'S ORIGINAL PETITION

Come now the Plaintiff, Affiliated FM Insurance Company as subrogee of Devon Headquarters, L.L.C., and for its causes of action against Defendant, Budget Glass Cleaning, Inc., alleges and states:

PARTIES

1. Plaintiff, Affiliated FM Insurance Company, is a commercial property insurance company domiciled in Rhode Island and authorized to engage in the insurance business in the State of Oklahoma, with its statutory home office located at 270 Central Avenue, Johnston, Rhode Island 02919. Plaintiff's subrogor, Devon Headquarters, L.L.C., is a domestic limited liability company, registered and authorized to conduct business in the State of Oklahoma, and duly formed and existing under the laws of the State of Oklahoma.

2. Defendant, Budget Glass Cleaning, Inc., is a domestic for profit business corporation, duly formed and existing under the laws of the State of Oklahoma, having its principal place of business in Rogers County, Oklahoma at 211 New Haven, Catoosa, Oklahoma 74015. Defendant may be served with process in this action by serving its Registered Agent as follows:

Budget Glass Cleaning, Inc.
c/o ARMANDO ROSALES
211 New Haven
Catoosa, Oklahoma 74015

JURISDICTION AND VENUE

3. At all times relevant to this lawsuit, Defendant was doing business in Oklahoma County, Oklahoma.

4. The acts and omissions of Defendant, as alleged below, caused the substantial destruction and damage to improvements and other property located in Oklahoma County, Oklahoma at 333 West Sheridan Avenue, Oklahoma City, Oklahoma 73102 and were the proximate cause of Plaintiff's damages.

5. Venue is proper in this Court because this cause of action is for damages to improvements, namely, Plaintiff's subrogor's building located at 333 West Sheridan Avenue, Oklahoma City, Oklahoma 73102, which is in Oklahoma County, Oklahoma.

6. Plaintiff seeks damages in excess of the amount required for diversity jurisdiction pursuant to Section 1332 of Title 28 of the United States Code. Therefore, both venue and jurisdiction are proper in Oklahoma County, Oklahoma.

FACTS

7. Plaintiff's subrogor, Devon Headquarters, L.L.C., owns the fifty story building commonly known as Devon Tower located in Oklahoma County, Oklahoma at 333 West Sheridan Avenue, Oklahoma City, Oklahoma 73102.

8. Devon entered into an Exterior Building Contract with Defendant Budget Glass Cleaning, Inc. effective November 1, 2015, pursuant to which Defendant Budget Glass agreed to, among other things, perform exterior cleaning services at Devon Tower.

9. As stated in the Exterior Building Contract, the external façade of Devon Tower is accessed from the roof via a GinD S-184 roofcar, and Defendant Budget Glass' workers were required to follow all operating instructions provided in the "GinD Service Manual" and "SkyRider Operation and Service Manual- Window Washing Equipment".

10. Devon Tower has a building maintenance unit (BMU) permanently located in the center of the building's rooftop that allows service of the entire building's façade.

11. Góndolas in Design, s.l. ("GinD") designed and manufactured the BMU, which was supplied and installed by Sky Rider Equipment Co., Inc. during the construction of Devon Tower between 2009 and 2012.

12. The Sky Rider Operation and Service Manual and GinD Operation and Maintenance Manual instructs operators to not work with the BMU if weather conditions are inadequate and states that "use is expressly forbidden if the wind speed is greater than 25 mph."

13. The Sky Rider Operation and Service Manual and GinD Operation and Maintenance Manual was provided to Defendant Budget Glass and was also made available on site.

14. At approximately 7:45 a.m. on May 15, 2019, two of Defendant Budget Glass' workers were using the BMU to perform exterior cleaning services at Devon Tower.

15. When Defendant Budget Glass' workers were in the basket (also called the cradle or platform) for the BMU and just over the edge near the top of the building, which is over 800 feet above ground level, they lost control of the BMU and the basket began smashing against the building's façade, causing significant damage and necessitating repairs.

16. Available weather data indicates that wind speeds were around 38 mph at approximately 830 feet above ground level the morning of the incident; therefore, the operation

of the BMU by Defendant Budget Glass' workers on the morning of May 15, 2019 was in violation of the BMU's operating instructions and the Exterior Building Contract.

17. At all relevant times, Devon was insured by Plaintiff under an insurance policy bearing policy number GS717 with effective dates from December 31, 2018 to December 31, 2019.

18. Pursuant to the terms and conditions of the insurance policy, Plaintiff has paid an amount not less than \$6,000,000 to date for the damages caused by Defendant Budget Glass' operation of the BMU and is subrogated to the rights of Devon.

CAUSES OF ACTION

Breach of Contract

19. A valid and enforceable contract was entered into between Devon and Defendant Budget Glass. Devon substantially completed and performed its obligations under that contract. Defendant Budget Glass materially breached express obligations in the contract, including but not limited to the obligation to perform the work by using any required procedures identified in the Exterior Building Contract, to ensure that each of Defendant Budget Glass' employees understood and complied with the procedures as outlined in the Exterior Building Contract and other applicable requirements in the Exterior Building Contract, to follow and comply with all Occupational Safety and Health Administration (OSHA) rules and guidelines governing the operation of the BMU, and to follow all operating instructions provided in the "GinD Service Manual" and "SkyRider Operation and Service Manual- Window Washing Equipment". Furthermore, Defendant Budget Glass materially breached duties imposed by law that arose from its contractual relationship with Devon, including but not limited to the obligation to perform the contract with care, skill, reasonable experience and faithfulness the thing agreed to be done.

Defendant Budget Glass' breach caused injury to Devon and Plaintiff as subrogee of Devon, including damages for the reasonable and necessary costs to repair the building, the reasonable and necessary costs of mitigation activities, and additional reasonable and necessary expenses that would not have been incurred but for Defendant Budget Glass' operation of the BMU. Plaintiff is also entitled to recover reasonable and necessary attorney's fees and costs under the provisions of the written contract as set out in paragraph 11, which provides in relevant part:

Should either party employ an attorney to enforce any of the provisions hereof, or to protect its interest in any matter arising under this Contract, or to recover damages for the breach thereof, the non-prevailing party (such non-prevailing party being defined as that party receiving the lowest net damages in any single proceeding) in any final judgment agrees to pay to the other party all reasonable costs, charges and expenses, including attorney's fees, expended or incurred in connection therewith by such other party.

Plaintiff as subrogee of Devon has complied with all the requirements of this section.

Negligence

20. Devon's damages covered by Plaintiff were caused in whole or in part by the negligent acts and omissions of Defendant Budget Glass. Defendant Budget Glass owed a duty to perform its work and operate the BMU in accordance with accepted industry standards and to exercise ordinary care to avoid injury to Devon's property. Defendant Budget Glass violated these duties by negligently operating the BMU in winds in excess of 25 miles per hour. Defendant Budget Glass' negligent acts and omissions include, but are not limited to:

- (a) allowing the basket for the BMU to smash against the building's façade;
- (b) failing to use ordinary care in the operation of the BMU;
- (c) performing its work in a manner that subjected Devon's property to the risk of harm;
- (d) operating the BMU in winds in excess of 25 miles per hour;
- (e) working with the BMU when the weather conditions were inadequate;

- (f) failing to properly determine the on-site wind velocities prior to operating the BMU;
- (g) failing to have a worker on the rooftop who knew how to operate the BMU and could have brought the basket for the BMU in safely; and
- (h) failing to act as a reasonably prudent person would have under the same or similar circumstances.

Each of these acts and omissions, separately or in combination with others, constitutes negligence on the part of Defendant Budget Glass and is a direct cause of the damages sustained by Plaintiff as subrogee of Devon.

JURY DEMAND

21. Plaintiff respectfully requests that this Court empanel a lawful jury to try this cause.

RESERVATION OF RIGHTS

22. Plaintiff specifically reserves the right to bring additional causes of action against Defendant Budget Glass and to amend this Petition as necessary.

WHEREFORE, Plaintiff prays for judgment against Defendant in excess of \$75,000.00, costs of this action, reasonable attorney's fees, prejudgment interest at the highest legal rate, post-judgment interest at the highest legal rate, court costs, and for such other and further relief, general or special, both at law and in equity, to which Plaintiff may show itself to be justly entitled.

Respectfully submitted,

BY:


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ATTORNEYS FOR PLAINTIFF

JURY TRIAL DEMANDED

ATTORNEY LIEN CLAIMED