STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE COMPANY, subrogee of WILLIAM CUMMINGS and BEVERLY CUMMINGS,

Plaintiff-Appellee,

v

BRADFORD TEEPLE, d/b/a DOCTOR DETAIL,

Defendant-Appellant.

UNPUBLISHED
December 13, 2005

No. 262299
St. Clair Circuit Court
LC No. 05-000076-CK

Before: White, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In this breach of contract action, defendant pursues an interlocutory appeal by leave from an order denying summary disposition on plaintiff's claim. We reverse and remand.

This action arises out of a commercial lease executed between defendant and plaintiff's insured, lessors of the building in which defendant's business was located. After a fire substantially damaged the leased premises, plaintiff paid its insureds' claim and brought the instant action seeking damages under the contract. The lease provision in issue provides as follows:

> Landlord shall carry fire and extended coverage insurance on the building in which the Premises are located, which insurance shall contain a waiver of subrogation provision as to Tenant. Tenant shall maintain insurance on his equipment-vehicles and on the contents, which insurance shall contain a waiver of subrogation provision as against the Landlord. Tenant shall indemnify Landlord against any and all liability which might arise directly, or indirectly, out of Tenant's use and occupancy of the premises, other than Landlord's own negligence except as covered by Tenant's insurance containing a waiver of subrogation clause, including, but not by way of limitation, indemnification against any and all liability for damages to any person or property in or about the Premises, and Tenant shall, at its own cost and expense, obtain and keep in force, for its own benefit and the benefit of the Landlord, public liability insurance with coverage of at least $100,000 to any individual and $300,000 for each accident, together with property damage insurance with coverage of at least $50,000 for

each accident; a duplicate certificate of issuance of such insurance shall be furnished to Landlord.

Defendant's sole argument on appeal is that this Court's decision in *New Hampshire Ins Group v Labombard*, 155 Mich App 369; 399 NW2d 527 (1986) precludes plaintiff's recovery, thus, summary disposition should have been granted. We review a denial of summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10)[1] entitles the movant to summary disposition where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). We consider "the pleadings, depositions, admissions, and documentary evidence" in the light most favorable to the non-moving party. MCR 2.116(G)(5); *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005).

In *Labombard*, a tenant permitted her three-year-old daughter to play with matches, causing a fire that rendered the landlord's building uninhabitable. *Id.* at 370. After paying insurance proceeds to the landlord, the plaintiff insurer was subrogated to the landlord's claims for the loss. *Id.* Pertinent lease provisions bound the tenant to maintain the premises, excepting reasonable wear and tear, and to "observe all fire and other regulations imposed by any government authority" and underwriter regulations reducing fire hazards. *Id.* at 373.

In *Labombard*, this Court held that "absent an express and unequivocal agreement by a tenant to be liable to the lessor or the lessor's fire insurer in tort for negligently caused fire damage to the premises, the tenant has no duty to the lessor or insurer which would support a negligence claim for such damages." *Id.* at 377. *Labombard* concluded that the rental agreement in issue "did not address the issue of defendant's liability for fire damage to the premises resulting from her negligence." *Id.* at 374.

Defendant misapprehends *Labombard*'s applicability to his appeal. This is not a case involving a question of whether someone can be held liable for a breach of a duty owed. Rather, this appeal turns on a straightforward application of the rules of contract interpretation. *Sprik v Regents of Univ of Michigan*, 43 Mich App 178, 186; 204 NW2d 62 (1972).

The lease provision in issue serves to allocate the risk of loss between these two business parties against loss by fire. Under the terms of the provision, each party agreed to insure, at its own expense, its own property against loss by fire. Specifically, the first sentence of the lease provision expressly shifts entirely to lessors the risk of loss to the building due to fire regardless of fault, while the second sentence shifts to defendant the risk of loss to defendant's "equipment-vehicles" and "the contents" of the building regardless of fault. See generally *Reliance Ins Co v East-Lind Heat Treat, Inc*, 175 Mich App 452; 438 NW2d 648 (1989); *Stefani v Capital Tire,*

[1] Defendant also brought his motion pursuant to MCR 2.116(C)(8). Because the circuit court ruled that genuine issues of material fact remained, review under MCR 2.46(C)(10) is appropriate. *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1998).

Inc, 169 Mich App 32; 425 NW2d 500 (1988). The general requirement of the second sentence that defendant maintain insurance on its own property is broad enough to include fire insurance. Thus, the parties have "allocate[d] between them the cost or expense of risks of property damage." *Mayfair Fabrics v Henley*, 97 NJ Super 116, 124; 234 A2d 503 (1967).

The lease provision evidences an intent by the parties to the lease to look only to insurance to recover for loss due by fire, thereby reliving each from liability. See *id.* at 124-126 (and cases cited therein); *Tuxedo Plumbing & Heating Co, Inc v Lie-Nielsen*, 245 Ga 27, 28; 262 SE2d 794 (1980). This allocation of risk also allows the parties to avoid subrogation exposure. Indeed, the intent to impact subrogation rights in expressly indicated in both the first and second sentences of the lease provision. Under the terms of the first sentence, lessors cannot recover from defendant for liability the lessors agreed to cover with insurance. See *Tuxedo Plumbing & Heating Co, supra* at 29. "It is well-established that the subrogee acquires no greater rights than those possessed by the subrogor." *Auto-Owners Ins v Amoco Production Co*, 468 Mich 53, 59; 658 NW2d 460 (2003). Therefore, plaintiff cannot recover from defendant what lessors would not be able to recover.

Plaintiff's argument below and on appeal focuses on the third sentence of the lease provision. Specifically, plaintiff argues that because defendant was obligated to indemnify the lessors "against any and all liability which might arise . . . out of Tenant's use and occupancy of the premises, . . . including . . . indemnification against any and all liability for damages to any person or property in or about the premises," defendant was thereby obligated to reimburse the lessors for any loss resulting from the fire.

As noted, the first sentence of the lease provision was intended to provide the mechanism by which to compensate the lessors in the event that a fire consumed the premises. This mechanism placed the obligation on the lessors to procure fire insurance "on the building." Therefore, because the lessors were adequately protected with respect to fire under the first sentence, providing for such a loss under the third sentence would be superfluous. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998). In other words, it seems unlikely that the lessors included the first sentence as a prophylactic in the event of the tenant's breach of his purported obligation under the third sentence.

A more natural reading of the third sentence is that it was contemplating the lessors' recovery of damages paid to third parties resulting from the tenant's use of the premises. "Indemnity is a right which inures to a person who has discharged a duty which is owed by him but which, as between himself and another, should have been discharged by the other." 42 CJS, Indemnity, § 2, p 72. In other words, the third sentence established an indemnity agreement whereby "any and all" third party liability arising out of the tenant's "use and occupancy of the premises" was ultimately to be borne by the tenant as "primary wrongdoer." *Id.*, § 2, p 73. This interpretation is supported by the reference to the tenant's duty to obtain "public liability insurance" protecting against injuries to persons and property "in or about the premises." See Black's Law Dictionary (7th ed) (defining "public liability insurance" as "[a]n agreement to cover a loss resulting from one's liability to a third party").

Given the clear language of the lease, the trial court improperly denied defendant's motion for summary disposition.

We reverse and remand for entry of an order granting summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder