SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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ADMIRAL INDEMNITY A/S/O
THE GATSBY CONDOMINIUM,

Plaintiff,

-against-

FABIAN A. ONETTI,

Defendant

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Index No. 117663/06

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiff Admiral Indemnity ("plaintiff") as insurer of The Gatsby Condominium ("insured") seeks to recover $314,762.60 in property damage from Defendant Fabian A. Onetti ("defendant") on the grounds that defendant negligently allowed a fire to erupt in his apartment and defendant breached an agreement to properly maintain his apartment.

In this action, defendant seeks an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's subrogation action on the grounds that insured's bylaws contained a valid and enforceable waiver of subrogation.

Factual Background[1]

Defendant is a co-owner of Condominium Unit 9B (the "apartment") in the building located at 65 East 96th Street in New York (the "building"). Insured is a condominium association that owns the common areas of the building. On November 1, 2005, a fire occurred in the apartment. As a result of the fire, defendant sustained $314,762.50 in property damage. After

[1] The facts are taken from plaintiff's complaint (see defendant's motion, Exhibit A).

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the fire, insured made a claim under its insurance policy with plaintiff for the amount of the damage, minus a $2,500 deductible, and plaintiff paid insured $312,263.60.

Plaintiff's Contentions

Plaintiff contends that prior to the fire, defendant "entered into an agreement" to properly manage and maintain the subject premises (plaintiff's complaint, defendant's Exhibit A, paragraph 21). Plaintiff contends that the fire was caused by defendant's carelessness, recklessness and negligence (*id.* at paragraph 14). Defendant breached the agreement to properly maintain the apartment. Therefore, defendant is liable to plaintiff for $312, 263.60 and to insured for $2,500, for a total of $314,763.60.

Defendant's Motion for Summary Judgment

Pursuant to CPLR 3212, defendant moves to for summary judgment dismissing plaintiff's complaint on the grounds that the insured's by-laws contained a "valid and enforceable waiver of subrogation clause" (defendant's motion, paragraph 6, citing Exhibit C, a copy of the insured's bylaws). Defendant specifically cites Section 6.2 of the bylaws which reads, under the heading of "Insurance":

> 6.2.3 All policies of physical damage insurance shall contain, to the extent obtainable, *waivers of subrogation* and waivers of any defense based on (I) co-insurance, (ii) other insurance, (iii) invalidity arising from any acts of the insured, or (iv) pro rata reduction of liability and shall provide that such policies may not be cancelled or substantially modified without at least ten days' notice to all insureds, including all Unit Owners and Permitted Mortgagees.
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> 6.2.6 . . . To the extent either party is insured for loss or damage to property, each party will look to their own insurance policies for recovery .

Defendant also points out that his liability insurance policy, issued by Vigilant Insurance Company, allows a waiver of subrogation. Under the heading of "Transfer of Rights," the policy

reads: "*However, you may waive any rights of recovery from any other person or organization for a covered loss in writing before the loss occurs*" (defendant's Exhibit D). Defendant goes on to cite language from the insurance policy that plaintiff issued to the insured, which also contains language permitting a waiver of subrogation. Under the heading "transfer of Rights of Recovery Against Others to Us," the insured's policy reads:

> If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. *But you may waive your rights against another party in writing:*
> 1. Prior to a loss to your Covered Property or Covered Income.
> 2. After a loss to your Covered Property or Covered Income only if, at the time of loss, that party is one of the following:
>
> a. Someone insured by this Insurance;
> b. A business firm:
>
> (1) Owned or controlled by you; or
> (2) That owns or controls you; or
>
> *c. Your tenant*
>
> This will not restrict your insurance (Defendant's Exhibit E).

In his memorandum of law, defendant contends that a valid waiver of subrogation clause is a "*complete bar*" to plaintiff's cause of action and recovery. Because defendant's insurance policy and the insured's insurance policy both contain language permitting a waiver of subrogation, and because the bylaws apply to "all present and future Unit Owners," the plaintiff's claim is barred by the waiver of subrogation clause in the insured's bylaws (defendant's memorandum of law, p. 4, citing defendant's Exhibit D, p. 371).

Plaintiff's Opposition

In opposition, plaintiff contends that defendant's claim lacks merit. Section 6.2.3 only authorizes the waiver of subrogation; it is not an actual waiver of subrogation, plaintiff argues.

Section 6.2.6 only directs parties to look to their own insurance policies if they want to make a property damage claim. Further, the language in the both defendant's and the insured's insurance policies only authorizes the insured to include a waiver of subrogation in their policies. An authorization to waive subrogation "is fundamentally different from an actual waiver of subrogation," plaintiff argues (plaintiff's opposition, paragraph 3). Neither the bylaws nor the insurance policies contain actual waivers of subrogation, plaintiff argues. Because defendant has failed to provide grounds for dismissal plaintiff's actions, defendant's motion for summary judgment should be denied.

Defendant's Reply

Defendant argues in reply that "the intent and plain language of the by-laws could not be more explicit" in waiving subrogation (defendant's reply, paragraph 5). Citing the language in bylaws 6.2.3 and 6.2.6, defendant argues that insured's bylaws "unambiguously mandate that the parties look towards their own insurance policies for recovery thereby waiving subrogation" (id. at paragraph 7). Since defendant's and insured's policies permit the waiver of subrogation and the bylaws "in fact directed the waiver of subrogation," plaintiff's case should be dismissed, defendant concludes (id. at paragraph 10).

Analysis

Summary Judgment

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR ' 3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor *(Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d

851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 N.Y. Slip Op. 51390(U) [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR ' 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR '3212 [b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Defendant "must assemble and lay

bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413 NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

Waiver of Subrogation

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654, 660 [1997]; *Winkelmann v Excelsior Insurance Co.*, 85 NY2d 577, 581 [1995]; *American Ref-Fuel Co. of Hempstead v Resource Recycling, Inc.*, 307 AD2d 939, 941 [2d Dept 2003]). Parties to a commercial transaction are free to allocate the risk of liability to third parties through insurance and deployment of a waiver of subrogation clause *(Atlantic Mutual Insurance Company v Elliana Properties*, 261 AD2d 296, 296 [1st Dept 1999]). "While parties to an agreement may waive their insurer's right of subrogation, a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears" (*Kaf-Kaf* at 660; *Atlantic Mutual Insurance Company* at 296).

Here, defendant fails to establish the existence of a valid waiver of subrogation clause. He argues that the "plain" and "unambiguous" language of the bylaws waives subrogation. Defendant also cites the Fourth Department case of *Agostinelli v Stein*, 17 AD3d 982, 794 NYS2d 759 [4 Dept 2005] to support his proposition. However, this court, in following the First Department, holds that the language of the bylaws that defendant cites merely *authorized* defendant to obtain an insurance policy that contains a waiver of subrogation (Continental Insurance Company v 115-123 West 29th Street Owners Corp., 275 A.D.2d 604, 713 N.Y.S.2d 38 [1 Dept 2000] ["The parties fail to identify any language in the [insurance] policy that actually effects a waiver of subrogation" *id.*. at 605)]). Further, the First Department makes a distinction between language *endorsing* a waiver of subrogation and language *executing* a waiver of subrogation (*St. Paul Fire & Marine Ins. Co. v. L.E.S. Subsurface Plumbing Co., Inc.* 266 AD.2d 139, 699 NYS2d 31 [1 Dept 1999] [The "plain language of the subrogation waiver endorsement precludes a reading that it is self-executing, since it clearly contemplates that such waiver is executory and may only occur at the instance of the insured" (*id.* at 140)]).

In the case at bar, the language of bylaw section 6.2.3 can plausibly be read as only endorsing a waiver of subrogation, not as an actual waiver of subrogation. The bylaw provision states, "All policies of physical damage insurance shall contain, *to the extent obtainable,* waivers of subrogation" (*emphasis added*) (defendant's Exhibit C, p. 18). The phrase "to the extent obtainable" contemplates situations in which an owner would not be able to obtain insurance containing a waiver of subrogation.

Further, in his memorandum of law, defendant cites cases in which the courts held that a valid waiver of subrogation existed. Here, the existence of a valid waiver of subrogation clause is

contested, and defendant has failed to provide any conclusive documentary evidence that a waiver of subrogation exists. Defendant fails to point to any language in either his insurance policy or the insured's policy actually waiving subrogation. He points only to language in the policies *permitting* a waiver of subrogation. Thus, defendant has failed to demonstrate the absence of any material issues of fact justifying an order of summary judgment dismissing plaintiff's complaint.

Based on the foregoing, it is hereby

ORDERED that defendant's motion for an order for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint is denied; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon all parties within 20 days of entry.

That constitutes the decision and order of the Court.

Dated: 11/13/08

Hon. Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
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COUNTY CLERK'S OFFICE
NEW YORK