SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JUSTICE DORIS LING-COHAN
Justice

PART 36

Index Number : 116410/2009
U.S. UNDERWRITERS INSURANCE
vs.
NEW REALTY REALTY
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to ____, were read on this motion to/for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits memo | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is for summary judgment is granted in accordance with the attached memorandum decision,

(consol, dated for disposition with motion sequence number 005)

FILED

OCT 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/11/12

_____, J.S.C.
JUSTICE DORIS LING-COHAN

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK IAS PART 36

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U.S. UNDERWRITERS INSURANCE COMPANY
As Subrogee of TIBET CARPET INC.,

Plaintiff

-against-

NEW REALTY REALTY CORP.,
GLOBE FIRE SPRINKLER CORPORATION,
THE PETZVEL CORPORATION and BUCKMILLER
AUTOMATIC SPRINKLER CORP.,

Defendants.

----------X

NEW REALTY REALTY CORP.,

Third-Party Plaintiff,

-against-

THE PETZVEL CORPORATION and BUCKMILLER
AUTOMATIC SPRINKLER CORP.,

Third-Party Defendants.

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Motion Seq. No.: 004 & 005

Index No. 116410/09

Index No. 590119/10

DORIS LING-COHAN, J.:

Motion sequence numbers 004 and 005 are consolidated for disposition.

The defendants The Petzvel Corporation (Petzvel) and Buckmiller Automatic Sprinkler Corp. (Buckmiller) move, pursuant to CPLR 3212, for an order granting summary judgment dismissing both the plaintiff's, and the third-party plaintiff's complaints (motion sequence number 004). The defendant, and the third-party plaintiff New Realty Realty Corp. (New Realty) moves, pursuant to CPLR 3212, for an order dismissing the complaint and cross claims (motion sequence 005). The plaintiff U.S. Underwriters Insurance Company (U.S. Underwriters) cross-

moves, pursuant to CPLR 3126, for an order striking the answers of the defendants New Realty, Petzvel, and Buckmiller.

This is a subrogation action by U.S. Underwriters, the insurer of a tenant, Tibet Carpet Inc. (Tibet), which suffered water damage to its rugs stored in the basement of 34 Howard Street, Manhattan. The source of the water leak allegedly was a feeder pipe, or coupling between the water main, and the fire suppression system. Pursuant to a written lease, Tibet was a commercial tenant, and the defendant New Realty was the landlord of the premises. Petzvel contracted with New Realty to perform statutorily required visual monthly inspections of the fire suppression system. Buckmiller, a fire sprinkler business, merely sent numerous letters to New Realty warning of the defective piping, and offering to repair same.

Petzvel argues that the broken pipe or coupling between the water main and the fire suppression system was not a part of the fire suppression system that Petzvel was contracted to inspect. Buckmiller argues that it was under no duty to maintain or repair the faulty pipe. New Realty argues that the plaintiff U.S. Underwriter's action is barred by a valid waiver of subrogation provision in the lease agreement.

U.S. Underwriters argues that the defendants spoliated evidence in that the pipe that failed is missing, and the paper maintenance records, soaked in the flood, should have been dried out, rather than discarded. U.S. Underwriters also argues that the submitted insurance policy is uncertified, and does not contain a waiver of subrogation.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The failure to make such showing

requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]).

Buckmiller and Petzvel's Motion for Summary Judgment (Motion Seq. No.: 004)

Buckmiller, by demonstrating that it was not hired to install, inspect, maintain, service, or repair the sprinkler system, and Petzvel, by demonstrating that it warned of the leaky pipe even though it was not a part of the sprinkler system, have met their burden of demonstrating the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"To establish a prima facie case of negligence, a plaintiff must prove(1) that defendant owed a duty to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (*Friedman v Anderson*, 23 AD3d 163, 164 [1st Dept 2005]). "Unlike foreseeability and causation, both generally factual issues to be resolved on a case by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts" (*Eiseman v State of New York*, 70 NY2d 175, 187 [1985] *citing De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 1055 [1983]). "The risk reasonably to be perceived defines the duty to be obeyed" (*Palsgraf v Long Is. R.R. Co.* 248 NY 339, 344 [1928]). In the instant case, Buckmiller owed no legal duty, as a matter of law.

The claim against Petzvel also fails as a matter of law. A party, such as Petzvel, that enters into a contract assumes a duty of care to third persons only: (1) where the contracting party, in failing to exercise reasonable care in the performance of its duties "launche[s] a force or instrument of harm" (*Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]); (2) where the plaintiff detrimentally relies on the continued performance of the contracting parties' duties (*Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]; and (3) where the contracting party has entirely displaced the other party's duty to safely maintain the premises (*Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 589 [1994]). Here, there was no force or instrument of harm launched, no detrimental reliance, and no entire displacement of New Realty's and Tibet's duty to safely maintain the premises. Therefore, Petzvel owed no duty of care to the plaintiffs, and therefore cannot be held liable in tort (*Lehman v North Greenwich Landscaping, LLC*, 16 NY3d 747 [2011]; *Brothers v New York State Elec. & Gas Corp.*, 11 NY3d 251 [2008]; *Fung v Japan Airlines Co., Ltd.*, 9 NY3d 351 [2007]).

New Realty's Motion for Summary Judgment (Motion Seq. No.: 005)

An insurer, who has fully satisfied its policy obligations, may pursue its subrogation claim against the third-party tortfeasor (*Fasso v Doerr,* 12 NY3d 80, 86 [2009]). In a claim made pursuant to an insurer's right to subrogation, the insurer stands in the shoes of the insured (*Blue Cross and Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200, 206 [2004]). "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, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]). Waiver is an intentional relinquishment of a known right and is not lightly presumed (*S&E Motor Hire Corp. v New York Indem. Co.*, 255 NY 69, 72 [1930]).

Paragraph (9) (e) of the lease between Tibet and New Realty provides, in relevant part:

> Nothing contained hereinabove shall relieve Tenant from liability that may exist as a result of damages from fire or other casualty. Notwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and **to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or anyone claiming through or under each of them by way of subrogation or otherwise**. The foregoing release and waiver shall be in force only if both releasors insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance [emphasis supplied].

The commercial property conditions section of the policy issued by U.S Underwriters to Tibet, at paragraph I provides in relevant part:

> 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 of your Covered Property ...This will not restrict your insurance** [emphasis supplied].

The lease agreement between the defendant New Realty and Tibet contains the foregoing waiver of subrogation clause, conditioned solely upon there being in each of New Realty's and Tibet's insurance policies a clause permitting a waiver of subrogation, and it is undisputed that each policy contains such a clause. Thus, the waiver of subrogation clause in the subject lease bars this action.

Contrary to its argument, the case cited in support by the plaintiff U.S Underwriters (*Continental Ins. Co. v 115-123 W. 29th St. Owners Corp.*, 275 AD2d 604 [1st Dept 2000]), actually supports the dismissal of its claim. In *Continental,* the First Department held that the plaintiff insurer could seek sprinkler system damages from defendant landlord, where the lease contained a waiver of subrogation language that was applicable only if the policy contained waiver of subrogation language, and the insurance policy did not contain waiver of subrogation

language. By contrast, in the instant case, the policy does contain waiver of subrogation language. The facts in *Continental Insurance Company* are distinguishable from the facts of the matter at bar. In *Continental Insurance Company*, the relevant language of the waiver of subrogation clause contained in a cooperative shareholder's proprietary lease provided that:

> In the event that Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage (*id* at 605).

The court interpreted the lease provision strictly according to its terms and determined that since the relevant insurance policy did not "contain a waiver of subrogation against the Landlord," but, rather, simply authorized the insured to waive its rights against another in writing, the release set forth in the lease is ineffective by its own terms.

The lease relevant to the matter at bar, on the other hand, contains no such limitation, but provides that the "foregoing release and waiver shall be in force only if both releasors insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance." Both insurance policies at issue contain a clause that waiver of subrogation "will not restrict" each party's insurance, which has been interpreted to mean that the insurance will not be invalidated by waiver of subrogation *(American Motorists Ins. Co. v Louis P. Ciminelli Constr. Co., Inc.*, 50 AD3d 1563, *rearg denied* 53 AD3d 1124 [4th Dept], *lv denied* 11 NY3d 708 [2008]). Therefore, the motion by New Realty for summary judgment, must also be granted.

Finally, there is no merit to U.S. Underwriter's argument regarding an alleged failure to certify the copies of the contracts submitted as exhibits on the motions. CPLR 3212 (b) governs the type of proof admissible in support of a motion for summary judgment, allowing consideration of affidavits, the pleadings, and other available proof such as depositions and

written admissions (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A proper and unrebutted foundation has been laid for the admission of the lease, and the insurance contracts at issue, sufficient to make out a prima facie showing of entitlement to judgment as a matter of law (*Commissioners of the State Ins. Fund v Beyer Farms, Inc.*, 15 AD3d 273 [1st Dept 2005] *lv denied* 5 NY3d 707 [2005]; *Briar Hill Apts. Co. v Teperman*, 165 AD2d 519 [1st Dept 1991] ; *Berrios v Lumbermens Mut. Cas. Co.*, 162 AD2d 365 [1st Dept 1990]). The burden then shifted to U.S. Underwriters to raise an issue of fact as to the content of the written contracts. However, U.S. Underwriters, despite the volume of its papers, is silent on this issue. Moreover, in its reply, New Realty has supplied a certified copy of its insurance policy, which is the same as the policy submitted as part of the original motion, and includes the same waiver of subrogation language; thus, U.S. Underwriter's is not prejudiced by its submission in the reply.

U.S. Underwriter's Cross-Motion to Strike

The property manager, Hing Fong, testified that the sprinkler system records were destroyed in the six-foot deep flood that inundated the basement. U.S. Underwriter's speculative assertion that the records could have been dried out, rather than discarded, is rejected.

The defective pipe was replaced when a repair was made, and nobody knows where it is. However, the plaintiff's adjustor was able to photograph it before it went missing. Again, despite the volume of its papers, U.S. Underwriter fails to share with the court either how it is prejudiced or what it hoped to learn by having the pipe. The testimony, and the documents, all agree that years before it burst, the pipe was in extremely poor condition as the result of a dog continually urinating on it.

Under the circumstances, the defendants should not be sanctioned for spoliation of evidence. Absent proof that the disposal of the records and the pipe was done in bad faith, the

court declines to impose the drastic sanction of striking the defendant's answer (*Ellis v Park*, 93 AD3d 502 [1st Dept 2012]; *Hall v Elrac, Inc.*, 79 AD3d 427 [1st Dept 2010]). Further, plaintiff has failed to show that it is unable to prove its prima facie case in the absence of the records or the pipe. *Cf. Herrera v. Matlin*, 303 AD2d 198 (1st Dept 2003)(where plaintiff was deprived of her ability to establish her *prima facie* case for medical malpractice against her doctor who lost the plaintiff's medical records).

Accordingly, it

ORDERED that defendants' motions for summary judgment (motion sequence numbers 004 and 005) are granted and the complaint, cross claims, and third-party complaint are all dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy upon plaintiff, with notice of entry.

Dated: 10/11/12

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\US underwriter v. new realty. suter.wpd