IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

HARTFORD INSURANCE COMPANY, as subrogee of Emory Hill Real Estate Service and EH Pencader I, LP,	)	
Plaintiff,	)	
v.	)	C.A. No. 08C-12-257 PLA
COMMUNITY SYSTEMS, INC. and GLENN WINER,	)	
Defendants.	)	

Submitted: February 17, 2009
Decided: April 16, 2009

UPON DEFENDANT COMMUNITY SYSTEMS, INC.'S
MOTION TO DISMISS
GRANTED

Amanda L.H. Brinton, Esquire, Law Offices of Amanda L.H. Brinton, Wilmington, Delaware, attorney for Plaintiff.

William J. Cattie, III, Esquire, Rawle & Henderson, LLP, Wilmington, Delaware, attorney for Defendant.

Glenn Winer, *pro se*.

ABLEMAN, JUDGE

I. Introduction

Before the Court is a Motion to Dismiss filed by defendant Community Systems, Inc. ("Community" or "Tenant"), seeking to bar the subrogation claims asserted in this lawsuit by plaintiff Hartford Insurance Company ("Hartford"). The question presented by this motion is whether, under the terms of a lease agreement, a tenant is a "co-insured" under the landlord's general fire insurance policy for the limited purpose of shielding the tenant from a subrogation claim by the landlord's insurance carrier, where it is alleged that the fire loss was caused by the tenant's negligence. Since the Court concludes that Community, as the tenant, is a co-insured with the landlord Emory Hill Real Estate Service and EH Pencader I, LP ("Emory Hill" or "Landlord"), the Motion to Dismiss must be granted.

II. Factual and Procedural Background

On January 4, 2007, a fire occurred in the human resources department of Community, whose offices were located in premises owned by Emory Hill. The property was occupied by Community pursuant to a lease agreement, dated June 3, 2003, which document has been incorporated into the Complaint. Hartford alleges that the fire was started in the human resources office by defendant Glenn Winer ("Winer") and spread to other areas of the insured property, causing both fire and water damage. It is

alleged that on the date of the incident, defendant Winer was an employee of defendant Community and was acting within the scope of his employment.

On the date of the fire, Hartford had in effect a contract of insurance with Emory Hill that insured against the risk of loss to the property located at 250 Corporate Boulevard, Newark, Delaware, which was occupied by Community pursuant to the lease agreement. Under the terms of its policy, Hartford paid out $47,212.85 for fire damage to the building. In this action, Hartford seeks to subrogate its loss by bringing suit for breach of contract and negligence directly against Community and Winer.[1] In its motion to dismiss, Community asserts that, under the terms of the lease, it made a direct contribution to the purchase of the insurance on the premises, and is thus a co-insured. It submits that as a co-insured, it is shielded from Hartford's subrogation claim.

[1]Defendant Winer has filed a letter requesting that "Community Systems Motion not pass as I was an Employee at the time of the incident. Community Systems is responsible for there [sic] Employees even thou [sic] I still maintain my innocence in the accident." Although Winer appears to seek denial of the motion, he is *pro se* in this case and the Court assumes that he does not fully appreciate the legal significance of either the motion or his response. The Court will therefore treat Winer's letter to mean that he too seeks dismissal.

III. Standard of Review

Upon a motion to dismiss, the Court subjects a statement of claim to a broad test of sufficiency.[2] Dismissal is appropriate only if it is reasonably certain "that the plaintiff could not prove any set of facts that would entitle him to relief."[3] A plaintiff's claim will not be dismissed unless it clearly lacks factual or legal merit.[4] When considering a motion to dismiss, the Court will accept all well-pleaded allegations as true.[5]

IV. Analysis

Generally speaking, subrogation is an equitable principle permitting substitution of one person in place of another with reference to a lawful claim, so that the one who is substituted succeeds to the rights of the other.[6] In the context of insurance, the right to subrogation is based on two premises: (1) a wrongdoer should reimburse an insurer for payments that the insurer has made to its insured, and (2) an insured should not be allowed

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[2] *C&J Paving, Inc. v. Hickory Commons, LLC*, 2006 WL 3898268 (Del. Super. Jan. 3, 2007).

[3] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998) (citing *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978)).

[4] *Diamond State Tel. Co. v. Univ. of Del.*, 269 A.2d 52, 58 (Del. 1970).

[5] *Spence v. Funk*, 396 A.2d at 968; *Wyoming Concrete Indus. Inc., v. Hickory Commons, LLC II*, 2007 WL 53805, at *1 (Del. Super. Jan. 8, 2007) (citing *Ramunno*, 705 A.2d at 1036).

[6] *See, e.g., Jeffries v. Kent County Vocational Technical Sch. Dist. Bd. of Educ.*, 743 A.2d 675, 678 (Del. Super. 1999) (quoting 73 AM. JUR. 2d *Subrogation* § 1 (1974)).

a double recovery from both the insured's insurer and the tortfeasor.[7] An insurer, however, cannot seek to subrogate against its own insured, even if the insured was negligent in causing the loss.[8]

The question of whether the law presumes that a tenant is co-insured under the landlord's insurance policy for the purpose of subrogation has been the subject of numerous decisions throughout the country, with a split of authority arising as a result of ideological differences in the guiding rationales.[9] The majority rule, and the one that represents the modern trend in the law, was articulated in the leading case of *Sutton v. Jondahl*.[10] There, the Oklahoma Court of Appeals held that, absent an agreement to the

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[7] *See* 73 AM. JUR. 2d *Subrogation* §§ 1, 2.

[8] *Lexington Ins. Co. v. Raboin*, 712 A.2d 1011,1015 (Del. Super. 1998) ("An insurer who pays a loss suffered by the insured is entitled to be subrogated *pro tanto* to any right of action which the insured may have against a third person whose tort caused the loss. . . . No right of subrogation exists, however, against the insured, co-insured, or where the wrongdoer is insured under the same policy." (footnotes omitted)).

[9] *See* 16 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 224:63 (3d ed. 1999); Robert Vanneman Spake, Jr., Note, *The Roof Is On Fire: When, Absent an Agreement Otherwise, May a Landlord's Insurer Pursue a Subrogation Claim Against a Negligent Tenant?*, 63 WASH. & LEE L. REV. 1743, 1751-60 (2006) (documenting various approaches); *Lexington*, 712 A.2d at 1015 n.17, 1016 n.21 (collecting cases); *compare Sutton*, 532 P.2d at 482 (presuming that tenant is coinsured under landlord's policy for subrogation purposes), *North River Ins. Co. v. Snyder*, 804 A.2d 399 (Me. 2002), *Peterson v. Silva*, 704 N.E.2d 1163 (1999), *Great Am. Ins. Co. v. Cahill*, 1997 WL 375099 (Conn. Super. Ct. June 24, 1997), *and U.S. Fire Ins. Co. v. Phil-Mar Corp.*, 139 N.E.2d 330, 333 (1956), *with Regent Ins. Co. v. Econ. Preferred Ins. Co.*, 749 F. Supp. 191 (C.D. Ill. 1990), *and Zoppi v. Taurig*, 598 A.2d 19 (N.J. Super. Ct. Law Div. 1990).

[10] 532 P.2d 478 (Okl. App. 1975).

contrary, the law presumes that a tenant is co-insured under a landlord's fire insurance policy. Therefore, a landlord's insurer cannot maintain a subrogation action against a tenant for damage to the insured property that is caused by the tenant's negligence.[11] What came to be known as the *Sutton* rule is based on the reasoning that the tenant is deemed to be an implied co-insured of the landlord, as a matter of law, because both parties have an insurable interest in the premises and the tenant's rent presumably includes some calculation of the landlord's fire insurance premium.

The Court in *Sutton* elaborated in forceful terms why the rule makes sense:

> [S]ubrogation should not be available to the insurance carrier because the law considers the tenant as a co-insured of the landlord absent an express agreement between them to the contrary . . . . This principle is derived from a recognition of a relational reality, namely, that both landlord and tenant have an insurable interest in the rented premises—the former owns the fee and the latter has a possessory interest. . . . And as a matter of sound business practice the premium paid had to be considered in establishing the rent rate on the rental unit. . . .
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> The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the

[11] 532 P.2d at 482.

> dwelling to provide fire protection for the realty (as distinguished from personal property) absent an express agreement otherwise. Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy. Perhaps this comes about because the companies themselves have accepted coverage of a tenant as a natural thing. Otherwise their insurance salesmen would have long ago made such need a matter of common knowledge by promoting the sale to tenants of a second fire insurance policy to cover the real estate.
>
> Basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary. The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently caused it. . . . For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant—a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord.[12]

The Delaware Superior Court expressly adopted the *Sutton* rule in *Lexington Insurance Co. v. Raboin*.[13] Recognizing the commercial reality that fire insurance purchased by a landlord has been obtained for the mutual benefit of the landlord and the tenant, the Court concluded that, absent an express agreement to the contrary, the modern trend is that fire insurance

[12] *Id.* (citations omitted).

[13] 712 A.2d 1011 (Del. Super.), *aff'd*, 723 A.2d 397 (Del. 1998) (TABLE).

purchased by a landlord has been obtained for the mutual benefit of the landlord and tenant. The liability insurer is therefore precluded from bringing a subrogation action against the negligent tenant.[14]

While the rule espoused in *Sutton* has been criticized for encroaching upon the contractual relationship between a landlord and its insurer, and for abrogating the common law principle that the burden of loss should be placed on the negligent party,[15] Delaware has nonetheless adopted the majority position because subrogation, as an equitable doctrine, invokes matters of policy and fairness. Several policies soundly support the anti-subrogation rule. First, duplication of insurance policies would constitute economic waste.[16] Secondly, the reasonable expectation of a tenant who is contributing to the premium payments is that it is a co-insured.[17] The fact that most fires are caused by negligent conduct, the commercial realities under which landlords insure the leased premises, and the fact that insurance companies expect to pay for negligently caused damage and adjust their

[14] *Id.* at 1016-17.

[15] *See, e.g.*, *Am. Family Mut. Ins. Co. v. Auto-Owners Ins. Co.*, 2008 SD 106, ¶¶ 23-26, 30-32, 757 N.W.2d 584, 592-94 (S.D. 2008).

[16] *See DiLullo v. Joseph*, 792 A.2d 819, 823 (Conn. 2002).

[17] *See Lexington*, 712 A.2d at 1016.

rates accordingly all provide additional justification for Delaware's adoption of the *Sutton* rule.

Moreover, even if the Court were faced with the issue as a matter of first impression, as this Court was in *Lexington*, it would conclude that the *Sutton* rule represents the better public policy, as it provides legal certainty.[18] It also prevents landlords from engaging in gamesmanship by requiring express subrogation provisions in leases so as to place tenants on notice that they need to purchase liability insurance.[19] Thus, I conclude that it is appropriate for a default rule to allocate to the landlord, and not the tenant, the responsibility of maintaining sufficient insurance to cover a claim.

Turning to the lease agreement in this case, taken as a whole, it clearly contemplates that the landlord, Emory Hill, will be responsible for carrying general fire and hazard insurance for the protection of the building and property occupied by Community. Community is responsible for payment of 7.18 percent of all premiums, as additional rental, for fire, all risk coverage and public liability insurance, as well as 7.18 percent of all

[18] *Tri-Par Invs., LLC v. Sousa*, 680 N.W.2d 190, 199 (Neb. 2004).

[19] *See id.*

premiums for rental insurance. Specifically, paragraph 5 further provides that:

> C. Landlord and Tenant hereby mutually waive all rights of subrogation and rights of recovery against each other, their agents, servants and employees for any and all losses occurring to the demised premises during the term of this Lease (or any renewal or extension thereof) whether or not caused by the negligence of Landlord or Tenant[,] their agents, servants, or employees or whether or not Landlord or Tenant, their agents, servants, or employees shall, in any way, have contributed to such loss.
>
> D. In the event Tenant's occupancy causes any increase in premiums for Fire, and All Risk Coverage Insurance or Rental Insurance on the Building and Site and Improvements of which the Premises are a part, above the rate for the least hazardous type of occupancy legally permitted in the leased premises, the Tenant shall pay the additional premiums by reason thereof. Bills for such additional premiums shall be rendered by Landlord to Tenant at such times as Landlord may elect and shall be due from and payable by Tenant when rendered, and the amount thereof shall be deemed to be, and be paid as additional rent.[20]

In essence, then, the lease agreement bars subrogation claims like those brought by Hartford in this action. Implicit in the language requiring Community to pay a 7.18 percent share of all premiums for fire, all risk coverage, and public liability insurance, is the assumption that the coverage purchased by Emory Hill would insure the tenant as well as the landlord. Emory Hill has thus assumed the risk of fire to the property for itself and on

[20] Docket 5, Ex. A.

behalf of Community, and of Winer as Community's employee, thereby avoiding the cost of duplicative or even triple coverage.

Hartford argues that it cannot be precluded from asserting a subrogation claim against Community because it is protected by language in its insurance policy that prohibits extending a waiver of subrogation to tenants absent an endorsement by Hartford, which it did not provide to the landlord in this case. Hartford further submits, without citation to any statute, rule, or case law, that "whatever effect the anti-subrogation provisions of the lease may have, that lease provision is violative of the . . . terms of the insurance policy and therefore may not be enforced to prevent Hartford's subrogation recoveries."[21] Also without citation to case law, and without even identifying the language of the policy to which it refers, Hartford contends that "if it is found that defendant Community is indeed an insured under the Hartford policy, then defendant Community's execution of the lease has itself violated the terms of the insurance policy."[22] Hartford maintains that the policy is therefore void as against defendant Community and that Community "may not employ the policy to shield it from its own

[21] Docket 7 (Pl.'s Resp. to Def. Community's Mot. to Dismiss), ¶ 4.

[22] *Id.*

negligence."[23] Hartford attempts to distinguish *Lexington* simply by stating "there is no indication that the insurance policy there prohibited extending a waiver of subrogation to those tenants."[24]

Not only are Hartford's contentions asserted without any supporting authority, but they directly contravene what is the settled law in a majority of jurisdictions and specifically in Delaware. Thus, irrespective of any of the identified terms in the policy insuring the property, the law in Delaware does not allow a landlord's insurer to maintain a subrogation claim against a tenant, in the absence of an express agreement in the lease. Accordingly, under the facts of this case and the law in Delaware, Community is unquestionably a co-insured under the policy, thereby necessitating dismissal of this lawsuit.

Hartford's emphasis on the insurance contract and its focus on whether or not it was in privity with Community clearly misses the point. The fundamental issue in this case is not whether the terms of the insurance policy disallow a waiver of subrogation, nor whether Hartford was required to give its consent to extend a waiver to Community. Rather, the question is whether the lease's allocation of risk to the landlord, and the tenant's

[23] *Id.*

[24] *Id.*, ¶ 3.

contribution of its share of the premiums, establishes Community as a co-insured under the landlord's policy as a matter of law. That question was solidly put to rest by this Court in *Lexington*, and Hartford has provided no basis whatsoever to disturb the sound reasoning that underlies that rule.[25]

V. Conclusion

Since the Court concludes that Community is a co-insured under Emory Hill's casualty insurance and Hartford has no right of subrogation against the tenant, the Motion to Dismiss is therefore granted.

IT IS SO ORDERED.

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[25] Hartford's failure to cite to any authority, from Delaware or elsewhere, is problematic. In fact, the only mention of case law pertinent to the subrogation issue is the case relied upon by Community that fully supports its Motion to Dismiss. Since the Court considers *Lexington* to be controlling in this case, Hartford's very limited effort to distinguish it, without supplying case law directly on point to support its own contrary conclusion, seriously weakens—if not totally undermines—Hartford's argument.

Moreover, Hartford's failure to provide any support for its legal arguments would ordinarily justify the ruling that those claims have been waived. *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008). Indeed, the Delaware Supreme Court has admonished counsel to provide supporting authorities for its contentions:

> In order to develop a legal argument effectively, the Opening Brief must marshal the relevant facts and establish reversible error by demonstrating why the action at trial was contrary to either controlling precedent or persuasive decisional authority from other jurisdictions. The failure to cite any authority in support of a legal argument constitutes a waiver of the issue on appeal.

The reasoning of the Supreme Court in connection with issues on appeal applies with equal force to legal arguments that are asserted by counsel in the trial courts. *Gonzalez v. Caraballo*, 2008 WL 4902686, at *3 (Del. Super. Nov. 12, 2008). Counsel is reminded that courts are not obligated to do her research for her. Counsel is placed on notice that, in the future, such arguments will be summarily rejected as waived due to lack of citation to authority.

Peggy L. Ableman, Judge

Original to Prothonotary