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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN J.S.C. Justice

FILED
OCT 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

PART 36

The American Ins. Co. on its own behalf and as subrogee of Irith Landau,
-v-
Hotel Carlyle Owners Corporation

INDEX NO. 108826/11

MOTION DATE

MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1, 2, 3

Answering Affidavits — Exhibits ____ | No(s). 3, 4, 5

Replying Affidavits ____ | No(s). 6

Upon the foregoing papers, it is ordered that this motion ~~is~~ by defendant Hotel Carlyle Owners Corporation to dismiss/summary judgment is denied, in accordance with the attached memorandum decision.

Dated: 10/17/13

DORIS LING-COHAN, J.S.C.

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

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

[* 2]

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

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THE AMERICAN INSURANCE COMPANY, on its own behalf and as subrogee of IRITH LANDEAU,

Plaintiff,

-against-

HOTEL CARLYLE OWNERS CORPORATION,

Defendant.

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Index No. 108826/2011

Decision/Order

Motion Sequence No.: 002

Hon. Doris Ling-Cohan:

In this subrogation action, defendant, Hotel Carlyle Owners Corporation (Owners Corporation), moves for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing plaintiff subrogee The American Insurance Company's (American) complaint, or, pursuant to CPLR 3211 (c), granting it summary judgment. As detailed below, defendant Owners Corporation's motion is denied.

Background

The Hotel Carlyle is a combination hotel and cooperative apartment building. In 1997, Irene Landeau (Landeau), as the representative of Formato A.G. (Formato), entered into a proprietary lease for an apartment at the Hotel Carlyle. Section 1.1 of the lease requires the lessor, Owners Corporation, to keep in good repair, among other things, the drain pipes, gutters, and, walls, except the interior surfaces of the apartment walls, unless the repairs thereto were required by the lessor's acts,

negligence, or failure to make repairs which it was required to make. Interior repairs to the apartment, its pipes, fixtures, and furnishings, except as otherwise provided by the lease, were to be made by the lessee. Lease § 2.7. The lease's damage section (1.3 [a]) provides that, if the apartment were to be damaged by fire or another cause which was covered via extended coverage insurance, the lessor would, "with reasonable dispatch," fix or replace, at its cost, such things as the walls, floors, pipes and ceilings, but not the fixtures, furniture, or decorative items which had been installed by the lessee or its predecessors in title, nor the wall paper and floor coverings. Lease section 1.8, which relates to the lessor's immunities, provides, in relevant part, that the lessor would not be liable for injury to property due to the elements or caused by rain leaking or flowing from outside or from the hotel's pipes or drains, unless caused by the lessor's negligence.

Also contained in the lease is a waiver of subrogation clause (§ 1.10), which recites

> "Lessor and Lessee hereby release each other from any and all liability or responsibility to the other or anyone claiming through or under Lessor or Lessee by way of subrogation or otherwise for any loss or damage to property caused by fire or any of the extended coverage casualties, even if such fire or other casualty shall have been caused by the fault or negligence of Lessor or Lessee or anyone for whom Lessor or Lessee may be responsible, provided, however, that this release shall be applicable and in force and effect only with respect to loss or damage occurring during such time as Lessor's or Lessee's insurance

> policies shall contain a clause or endorsement to the effect that any such release shall not adversely affect or impair such insurance policies or prejudice the right of Lessor and Lessee to recover thereunder and further provided that such waiver shall be limited to the proceeds of such insurance policies. Lessor and Lessee agree that they will request their insurance carriers to include in each of their policies a suitable clause or endorsement, as aforesaid, provided that no extra cost shall be charged therefor, and upon request, Lessor and Lessee shall each advise the other whether or not it has been able to obtain such a clause or endorsement in its policies."

The lease permitted Formato to designate any of its officers, directors, stockholders, principals, and employees as among those permitted to use the apartment as a private dwelling. Lease, § 2.4 (a). Formato was also permitted to enter into short-term and long-term subleases of the apartment, the latter of which had to be approved by the Board or by the lessees owning a majority of the shares in the corporation. Lease, § 2.4 (e).

At some unspecified time after the lease was executed, Landeau moved into the apartment. On June 9, 2009, the apartment was flooded during a rainstorm, thereby damaging the ceilings, doors, windows, moldings, walls, as well as furniture and other personal property. The cause of the flood was a clogged leader line, which ran from the building's roof, down an exterior wall, and under a terrace located above the subject apartment. The leader line was owned and controlled by Owners Corporation, which, after the flood, snaked the line to unclog it.

Landeau filed a claim with her insurance carrier, American,

which assigned a claims adjuster, James Buckelew (Buckelew), who inspected the premises and investigated the flood's cause. Ultimately, American paid Landeau $70,701.28 to repair the apartment and remediate its water condition. According to Buckelew, at one point, it was "agreed with" Alexandra Tscherne (Tscherne), Hotel Carlyle's Director of Residences, that the cost of the repairs would be split between American and Owners Corporation, "as per the Proprietary Lease," but, thereafter, "Hotel Carlyle" refused to split those costs and also denied Buckelew's request to split the cost of the water remediation. Buckelew aff., ¶¶ 6, 8.[1]

A subrogation claim was submitted by American to Owners Corporation's general liability carrier, Tokio Marine & Nichido Fire Insurance Co., Ltd. (Tokio), which claim was referred to its claims administrator, Certus Claims Administration, LLC (Certus). It appears that Certus' representative, Janice Orlowski (Orlowski), advised American that the claim or part of it should have been referred to Owners Corporation's first-party insurer. On January 19, 2010, American, which was only aware of the identity of Owners Corporation's general liability carrier, attempted to ascertain from Orlowski the identity of the first-

[1] As the within motions are being denied, and as discovery, trials and appeals are costly, the parties are encouraged by the court to continue their settlement discussions.

party carrier, but Orlowski was unaware of the identity of that carrier, and after fruitlessly exhausting her resources, she suggested, on January 20, that American contact the hotel owner and reach out to a specific person at the hotel itself to get the owner's contact information. It is not clear as to whether American followed such alleged advice.

Eventually, American retained counsel, who, by letter of June 16, 2010, advised Orlowski that he believed that Owners Corporation was responsible for the clogged leader line, which damaged Landeau's apartment and its contents, and that he would be filing for arbitration between Certus's insured and American. On June 29, 2010, American's counsel spoke with Certus' representative Orlowski, advising that he needed to review Owners Corporation's first-party coverage, because part of American's subrogation claim needed to be handled by first-party insurance and because, on the issue of mutuality, American's counsel wished to ascertain whether the first-party policy provided for waiver of subrogation. Orlowski did not know who the first-party insurer was, but indicated that she would try to obtain that information from the broker. She further advised that Tokio had denied coverage based on the mutual waiver of subrogation, and that if Certus and American could not informally resolve their differences, they would have to be resolved via arbitration. By letter of July 30, 2010, Orlowski informed American's counsel that

she had obtained a copy of the first-party insurer Missouri Standard Fire Insurance's policy, which she believed contained a mutual subrogation waiver.

The Instant Action

A year later, American, as Landeau's insurer and subrogee, commenced this action against Owners Corporation. The complaint recites that Landeau subleased the apartment before June 9, 2009, and that American issued a policy to her insuring the apartment against various perils, including water. The complaint seeks to recoup the $70,701.28, paid to Landeau, on the grounds that Owners Corporation was negligent in its maintenance of the hotel; that in acting or in failing to act, Owners Corporation created a nuisance; that Owners Corporation, in causing water to enter the apartment trespassed on that property; and that Owners Corporation, in failing to repair a part of the apartment, occupied by Landeau, pursuant to the terms of the lease, breached the lease. The answer denies that Landeau subleased the apartment and alleges 10 "affirmative defenses," including that, under the proprietary lease's terms, American's subrogor waived American's subrogation rights.

Discussion

The movant on a summary judgment motion bears the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised

by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Where a moving party makes its required showing, the burden shifts to the other side to demonstrate the existence of a material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986). Also, "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue or where the issue is even arguable, since it serves to deprive a party of his day in court [internal citations omitted]" *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 (1st Dept 1987).

On a motion to dismiss a complaint for failure to state a cause of action, "facts pleaded in the complaint must be taken as true and are accorded every favorable inference ... . However, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration ... ." *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999) (internal quotation marks and citation omitted); *Gertler v Goodgold*, 107 AD2d 481, 485 (1st Dept 1985), *affd* 66 NY2d 946 (1985). "A motion to dismiss based on documentary evidence, pursuant to CPLR 3211 (a) (1), may be appropriately granted 'only where the documentary evidence utterly

refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326; *see Norment v. Interfaith Ctr. of N.Y.*, 98 AD3d 955, 955-956)." *North Shore Towers Apts. Inc. v Three Towers Assoc.*, 104 AD3d 825, 827 (2d Dept 2013). Documents which are "essentially undeniable" constitute documentary evidence under the statute. *Fontanetta v John Doe* 1, 73 AD3d 78, 84-85 (2d Dept 2010). Deposition transcripts, affidavits, and trial testimony are not documentary evidence, but judicial records and instruments which reflect out-of-court transactions (such as, deeds and contracts which have contents which are basically undeniable), are documentary evidence. *Id.* Applying such principles herein, Owners Corporations' motion is denied, as the submitted documentary evidence fails to conclusively establish that plaintiff's complaint fails to state a cause of action and movant failed to establish entitlement to judgment as a matter of law.

In seeking dismissal and/or summary judgment, Owners Corporation asserts that Landeau, who alleges that she is the apartment's sub-lessee, is bound by the release and waiver of subrogation provisions contained in the lease which she signed as Formato A.G.'s agent. In support of this contention, Owners Corporation submits an affirmation by its counsel, a copy of the lease, and a copy of the insurance policy Landeau obtained from American. Owners Corporation maintains that, under the lease's

release and waiver of subrogation clause, Landeau agreed to release Owners Corporation from liability for property damage, even if caused by Owners Corporation's negligence, to the extent that the damage was covered by insurance which permitted waiver of subrogation. Owners Corporation observes that Landeau's policy's subrogation clause provides that, prior to a loss, "an **insured** may waive, in writing, all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us." Finkelstein aff., Ex. D (emphasis in the original). Owners Corporation also appends a copy of the insurance policy issued to it by Tokio, which contains a "waiver of transfer of rights of recovery against others to us" endorsement which waives Tokio's right to recover against all individuals and entities as required by contract, "because of payments [Tokio] make[s] for injury or damage arising out of [Owners Corporation's] ongoing operations ... ." *Id.*, ex. F.

Based on the lease's release and waiver of subrogation provisions, and the fact that the "lessor and lessee's insurance policies permit waiver of subrogation, thereby satisfying the only other conditions required for the waiver of subrogation clause to be enforceable" (Owners Corporation's Memorandum of Law, 4; Finkelstein aff., ¶ 15), Owners Corporation asserts that it has established that the waiver of subrogation clause is valid, and

that it constitutes an "iron clad" defense. Owners Corporation therefore contends that this action must be dismissed.

Significantly, however, it does not appear that Landeau signed the lease in her individual capacity, but, rather, as a representative of Formato. Thus, it has not been conclusively established by the submitted documentary evidence, that Landeau is in fact bound by the waiver of subrogation clause in the lease. Further, if Landeau was in fact a sublessee, and Owners Corporation's papers are devoid of evidence refuting the complaint's allegation that she was, Owners Corporation did not demonstrate that the requirements of the lease were incorporated into any sublease. *See e.g. Gulf Ins. Co. v Quality Bldg. Contr., Inc.*, 58 AD3d 595, 597 (1st Dept 2009); *Continental Ins. Co. v Faron Engraving Co., Inc.*, 179 AD2d 360 (1st Dept 1992)(sublease incorporated by reference the provisions of the lease which included a waiver of subrogation provision). Thus, the motion to dismiss and/of for summary judgment by Owners Corporation is denied, as it has not satisfied its burden on this motion.

Accordingly, it is

ORDERED that the motion by defendant Hotel Carlyle Owners Corporation to dismiss and/or for summary judgment is denied; it is further

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

entry; and it is further

ORDERED that all parties shall appear before this court for a previously schedule discovery conference **on November 21, 2013, at 9:30 a.m., Room 428, 60 Centre Street, NY, NY. On or before October 31, 2013,** *counsel for the parties shall confer* (in person or by telephone), as to the settlement of this case and as to stipulating to an expedited discovery schedule, with respect to any outstanding discovery. **On or before November 15, 2013,** counsel shall supply this court with a joint letter, detailing the results of such discussions; such letter shall be sent to the court in an envelope with a copy of this order attached to the outside of the envelope; and it is further

ORDERED that **a note of issue shall be filed for this case on or before December 30, 2013.**

Dated: 10/17/13

Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\American Ins Co. v Hotel Carlyle brendler.wpd