SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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LIBERTY MUTUAL FIRE INSURANCE COMPANY as subrogee of STEVE MADDEN LTD,

Index No. 653626/2015

Plaintiff

- against -

720 LEX ACQUISITION LLC,

Defendant

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720 LEX ACQUISITION LLC,

Index No. 595889/2017

Third Party Plaintiff

- against -

STUDIO JS 2 ARCHITECTS, CLOUGH, HARBOUR & ASSOCIATES, TRICARICO ARCHITECT & DESIGN, SHERRI BUILDERS, JIM WEBBER & ASSOCIATES, and ALAN KINNARD CARPENTRY & CONSTRUCTION INC.,

Third Party Defendants

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DECISION AND ORDER

APPEARANCES:

For Plaintiff
Marina O'Keeffe Esq.
Clausen Miller PC
28 Liberty Street, New York, NY 10005

For Defendant
Michael Stonberg Esq.
Stonberg Moran, LLP
505 8th Avenue, New York, NY 10018

LUCY BILLINGS, J.S.C.:

I. UNDISPUTED FACTUAL AND PROCEDURAL BACKGROUND

On January 3, 2007, Steve Madden Ltd and defendant landlord 720 Lex Acquisition LLC entered a lease for commercial premises at 720 Lexington Avenue, in New York County. On June 8, 2013, water entered through the roof of defendant's building, flooding the leased premises. Plaintiff Liberty Mutual Fire Insurance Company had issued an insurance policy to the commercial tenant in defendant's building, Steve Madden Ltd, covering the leased premises. After incurring water damage to the leased premises due to the flood that originated on the roof of defendant's building, Steve Madden Ltd submitted a claim under the insurance policy from plaintiff, which indemnified Steve Madden Ltd pursuant to the policy for the damages from the flooding.

Plaintiff commenced this action as the subrogee of Steve Madden Ltd, seeking to recover from defendant plaintiff's payment of $732,009.40 to Steve Madden Ltd pursuant to the policy. As Steve Madden Ltd's subrogee, plaintiff claims that defendant's negligence in maintaining a defective roof drain caused water to accumulate on the roof and flood the premises, trespassing on and damaging Steve Madden Ltd's leased premises, and breaching the lease and covenant of quiet enjoyment. Defendant in turn commenced a third party action against contractors who had performed work on the premises. Defendant now moves for summary judgment dismissing the complaint, C.P.L.R. § 3212(b), on the ground that Steve Madden Ltd waived any rights of subrogation in the tenant's lease with defendant.

II. THE LEASE AND THE INSURANCE POLICY

The parties stipulate that the court may consider the lease between Steve Madden Ltd and defendant and their insurance policies as authenticated and admissible for purposes of defendant's motion for summary judgment. The lease provides in § 8.1 that:

> (j)(i) Tenant shall obtain and keep in full force and effect during the term of this lease at its own cost and expense . . . a policy with general commercial liability and property damage insurance written on an occurrence basis . . . , naming Owner and Tenant as insureds against any and all claims for personal injury, death or property damage occurring in, upon, adjacent to, or in any way connected with the Premises or any part thereof . . . .
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> . . .
>
> (v) Owner shall cause each insurance policy carried by Owner insuring the Premises against loss, and Tenant shall cause each insurance policy carried by Tenant and insuring the Premises and its fixtures and contents against loss, to be written in a manner so as to provide that the insurance company waives all rights of recovery by way of subrogation against Owner or Tenant in connection with any loss or damage covered by any such policy. . . .

Aff. of Michael L. Stonberg Ex. E, at 12-13.

In lease § 12.2, entitled "Release; Waiver of Subrogation; Contractual Liability Endorsement," the lease provides that:

> The parties hereto each, on behalf of their respective insurance companies insuring the property of either Landlord or Tenant against any such loss, waive any right of subrogation that such insurance company(ies) may have against the other, as the case may be.

Id. at 21. Steve Madden Ltd's insurance policy from plaintiff also provides, under "CONDITIONS," that:

> X. Subrogation
>
> 1. If we make payment for a loss, you will assign to

> us all your rights of recovery against any party for that loss. We will not acquire any rights of recovery you have waived prior to the loss. . . .

Stonberg Aff. Ex. F, at 49.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Parties to a commercial transaction are free to allocate the risk of loss to third parties through insurance and waivers of subrogation. Gap v. Red Apple Cos., 282 A.D.2d 119, 124 (1st Dep't 2001); Interested Underwriters at Lloyds v. Ducor's Inc., 103 A.D.2d 76, 77 (1st Dep't 1984), aff'd 65 N.Y.2d 647 (1985). See Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d 412, 418-19 (2006); Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d 153, 157, 160-61 (1977). Parties are also free to waive their insurer's right of subrogation, barring the insurer from recovering any payments for claims covered by the waiver. Kaf-Kaf, Inc. v. Rodless Decorations, Inc., 90 N.Y.2d 654, 660-61 (1997); Tower Risk Mgt. v. Ni Chunp Hu, 84 A.D.3d 616, 616 (1st Dep't 2011); Great Am. Ins. Co. of N.Y. v. Simplexgrinnell LP, 60 A.D.3d 456, 457 (1st Dep't 2009). Waivers of subrogation in a lease negotiated between two sophisticated parties at arm's length are enforceable as long as the waivers are clear and unequivocal. Viacom Intl., Inc. v. Midtown Realty Co., 193 A.D.2d 45, 53 (1st Dep't 1993).

A. The Lease's Provision Waiving Subrogation Bars Plaintiff's Claims.

The plain terms of the lease between Steve Madden Ltd and defendant waived "any right of subrogation" of both parties' insurers. Stonberg Aff. Ex. E, at 21. Steve Madden Ltd's

insurance policy from plaintiff recognized this waiver, as plaintiff agreed it will not acquire any rights of recovery Steve Madden Ltd waived prior to the loss. Since Steve Madden Ltd waived its insurer's right of subrogation, plaintiff did not acquire any right of subrogation for the loss, thus barring plaintiff's claims against defendant. Kaf-Kaf, Inc. v. Rodless Decorations, Inc., 90 N.Y.2d at 661; Brito-Galbez v. 841-853 Broadway Assoc., LLC, 110 A.D.3d 549, 550 (1st Dep't 2013); Tower Risk Mgt. v. Ni Chunp Hu, 84 A.D.3d at 616; Great Am. Ins. Co. of N.Y. v. Simplexgrinnell LP, 60 A.D.3d at 457.

Plaintiff maintains that the waiver of subrogation provision does not apply to plaintiff's claims for breach of the lease, breach of the covenant of quiet enjoyment, and trespass because the lease does not exempt defendant from liability for these claims. Whether defendant is liable under the lease for these claims, however, is irrelevant, as lease § 12.2 provides that Steve Madden Ltd and defendant "waive any right of subrogation" of their insurers. Thus, even if Steve Madden Ltd had recourse under the lease or otherwise against defendant for its breach of the lease, breach of the covenant of quiet enjoyment, or trespass, Steve Madden Ltd waived plaintiff's right of subrogation to pursue these claims. No provision of the lease or of any statute limits the scope of the waiver or exempts claims for breach of contract, breach of the covenant of quiet enjoyment, or trespass from the waiver, which therefore bars these claims along with any other claims. Abacus Fed. Sav. Bank

v. ADT Sec. Servs., Inc., 18 N.Y.3d 675, 681 (2012); Cresvale Intl. Inc. v. Reuters Am., Inc., 257 A.D.2d 502, 505 (1st Dep't 1999).

B. The Waiver of Subrogation Provision Bars Plaintiff's Claims of Gross Negligence.

Plaintiff further maintains that the waiver of subrogation provision does not bar plaintiff's claims stemming from defendant's gross negligence because a party may not contract away liability for its own gross negligence. Although a party may not contractually "insulate itself from damages caused by grossly negligent conduct," Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 18 N.Y.3d at 681; Sommer v. Federal Signal Corp., 79 N.Y.2d 540, 554 (1992), a contractual provision that waives subrogation rights or requires one party to insure another is distinct from a provision that exempts a party from liability. Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc., 18 N.Y.3d at 681; Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v. Valden Assoc., 46 N.Y.2d 653, 656-57 (1979); Great Am. Ins. Co. of N.Y. v. Simplexgrinnell LP, 60 A.D.3d at 456-57. The lease provisions here do not exempt defendant from liability for its own gross negligence, but merely require each party to obtain insurance and waive any subrogation rights. Just as the waiver of subrogation provision applies to claims for breach of contract, breach of the covenant of quiet enjoyment, and trespass, the waiver applies to claims arising from defendant's gross negligence and bars those claims as well.

C. The Insurance Procurement and Waiver of Subrogation Provisions Do Not Violate New York General Obligations Law § 5-321.

Finally, plaintiff maintains that the lease's insurance procurement and waiver of subrogation provisions violate New York General Obligations Law § 5-321 and therefore are unenforceable because they do not require the parties to purchase the same insurance coverage. Under the lease, Steve Madden Ltd must maintain insurance covering "the Premises and its fixtures and contents," and defendant must maintain insurance covering only "the Premises." Stonberg Aff. Ex. E, at 12. This lack of mutuality, however, does not violate General Obligations Law § 5-321. Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d at 418-19; Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d at 160-61; Brito-Galbez v. 841-853 Broadway Assoc., LLC, 110 A.D.3d at 550.

General Obligations Law § 5-321 prohibits contracts that free a landlord from all liability to a tenant for the landlord's own negligence, leaving the tenant with no recourse for losses incurred from the landlord's acts or omissions. Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d at 160-61; A to Z Applique Die Cutting v. 319 McKibbin Street Corp, 232 A.D.2d 512, 513 (2d Dep't 1996). The waiver of subrogation provision here does not contract away the landlord's liability for its own negligence in violation of General Obligations Law § 5-321, but permissibly assigns the risk of loss from any negligence to the parties' respective insurers. Great N. Ins. Co. v. Interior Constr.

Corp., 7 N.Y.3d at 418-19; Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d at 161; Insurance Co. of N. Am. v. Borsdorff Services, Inc., 225 A.D.2d 494, 494 (1st Dep't 1996; Viacom Intl., Inc. v. Midtown Realty Co., 193 A.D.2d at 53. Since the parties' assignment of their risk of loss to their respective insurers provided the tenant Steve Madden Ltd an avenue for recovery through its insurer, through which the tenant in fact was compensated for its loss as the lease intended, General Obligations Law § 5-321 is not implicated. Great N. Ins. Co. v. Interior Constr. Corp., 7 N.Y.3d at 418-19; Hogeland v. Sibley, Lindsay & Curr Co., 42 N.Y.2d at 161.

Moreover, the lease here imposes a mutual obligation on the parties to obtain insurance and a mutual waiver of their insurers' rights of subrogation regarding any claim either party might maintain, even though the parties' respective claims might differ. See A to Z Applique Die Cutting v. 319 McKibbin Street Corp, 232 A.D.2d at 512-13. The lease neither imposes "the sole obligation" to obtain insurance on the tenant, nor requires only the tenant to waive its insurer's right of subrogation. Id. at 513. Both parties to the lease agreed to procure insurance and seek compensation for their losses through their respective insurers, which would not have recourse against either party. Both parties did procure insurance waiving their insurers' recourse. Yet the tenant's insurer seeks to recover from the landlord payments to the tenant for a loss, in derogation of that agreement.

Nor is there any lack of mutuality in the scope of insurance coverage required of each party to the lease. Where the lease requires the insurance carried by the tenant to insure "the Premises and its fixtures and contents," the lease is referring to the premises and to the fixtures and contents owned by the tenant. Stonberg Aff. Ex. E, at 12. See 1515 Broadway Fee Owner, LLC v. Seneca Ins. Co., Inc., 90 A.D.3d 436, 437 (1st Dep't 2011); Jenel Mgt. Corp. v. Pacific Ins. Co., 55 A.D.3d 313, 313 (1st Dep't 2008). The contents in premises occupied and used by the tenant ordinarily belong to it. The fixtures may belong to the landlord or the tenant, but, if the fixtures belong to the landlord, they are part of the premises and would be referred to as "their" (a plural possessive), the premises', fixtures. If they belong to the tenant, they are not part of the premises leased from the landlord and thus are referred to as "its" (a singular possessive), the tenant's, fixtures. In the lease, moreover, "Tenant" is the proximate precedent noun before "its fixtures." This construction also comports with lease § 6.1 regarding fixtures, which provides that:

> All fixtures . . . attached to, or built into, the Premises at the commencement of or during the term of this Lease shall be and remain part of the Premises and be deemed the property of the Landlord except if installed . . . at the expense of the Tenant . . . .

Stonberg Aff. Ex. E, at 9. See 23 E. 10 L.L.C. v. Albert Apt. Corp., 91 A.D.3d 573, 574 (1st Dep't 2012). In this event the fixtures are the "Tenant's Property." Stonberg Aff. Ex. E, at 9. See Second on Second Café, Inc. v. Hing Sing Trading, Inc., 66

A.D.3d 255, 271-72 (1st Dep't 2009).

The landlord would not risk any loss for damage to the tenant's fixtures or contents in the premises, but the tenant, of course, would. The lease required both parties to procure insurance covering their respective interests. Therefore, while the parties to the lease held different insurable interests, when the parties agreed to allocate their risks of loss to their insurers, they mutually allocated each of their risks of loss that they each might incur.

III. PLAINTIFF'S OPPOSITION BASED ON C.P.L.R. § 3212(f)

C.P.L.R. § 3212(f) permits the court to deny summary judgment when "facts essential to justify opposition may exist but cannot then be stated," and disclosure is necessary to reveal those facts. Figueroa v. City of New York, 126 A.D.3d 438, 439 (1st Dep't 2015). See Nascimento v. Bridgehampton Constr. Corp., 86 A.D.3d 189, 192 (1st Dep't 2011); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Griffin v. Pennoyer, 49 A.D.3d 341, 341 (1st Dep't 2008). Plaintiff asks the court to deny defendant summary judgment until plaintiff has been provided an opportunity to conduct depositions. Under C.P.L.R. § 3212(f), however, plaintiff must show that its depositions of defendant or other witnesses may lead to evidence necessary to oppose defendant's motion and that that evidence is exclusively within defendant's knowledge and control. Santana v. Danco Inc., 115 A.D.3d 560,

560 (1st Dep't 2014); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d at 563; Kent v. 534 East 11th Street, 80 A.D.3d at 114. Plaintiff must support such a contention with more than "mere hope or conjecture." Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010). See Kent v. 534 East 11th Street, 80 A.D.3d at 114; MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010).

Plaintiff may not merely speculate that deposition testimony may raise factual issues. Kent v. 534 East 11th Street, 80 A.D.3d at 114; Barnes-Joseph v. Smith, 73 A.D.3d at 495; MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d at 405. By failing to specify any facts that depositions or other disclosure might reveal to defeat defendant's motion, however, plaintiff offers nothing more than speculation that disclosure might support plaintiff's opposition to summary judgment. In fact, both defendant's motion and plaintiff's opposition present purely legal questions regarding interpretation and application of the lease between defendant and its tenant and their insurance policies and whether the contractual provisions on which defendant relies are enforceable. No depositions or other disclosure would defeat summary judgment on these issues. Therefore the lack of disclosure is not a basis to deny summary judgment.

IV. CONCLUSION

For all the reasons explained above, the court grants defendant's motion for summary judgment dismissing this action.

C.P.L.R. § 3212(b). This decision constitutes the court's order and judgment of dismissal.

DATED: October 25, 2018

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.