SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE **PART** IAS MOTION 12EFM

Justice

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WESCO INSURANCE COMPANY,

Plaintiff,

- v -

GARFIELD S. MONCRIEFFE and DIT AUTO SALES, INC.,

Defendants.

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INDEX NO. 151828/2019

MOTION DATE _____

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4-18 were read on this motion to dismissal.

By notice of motion, defendants move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint against them based on a lease between plaintiff's subrogor and defendant. Plaintiff opposes.

I. BACKGROUND

By commercial lease dated March 1, 2006, plaintiff's subrogor leased to defendant Moncrieffe premises located at of 4150A Boston Road, Bronx, New York for a five-year term. In article 8(b) of the lease, the two agreed, in pertinent part, as follows:

> Neither [plaintiff's subrogor] nor [Moncrieffe] shall be liable to . . . any insurance company (by way of subrogation or otherwise) insuring the other party for any loss or damage to any building, structure, or other tangible property . . . to the extent of insurance proceeds collected by or benefits afforded to the injured, damaged or liable party, even though such loss or damage might had been occasioned by the negligence of such party, its agents or employees.
>
> Notwithstanding the foregoing, provided that such a waiver shall not be contrary to the provisions of or invalidate any applicable insurance policy, [plaintiff's subrogor] and [Moncrieffe] hereby waive any rights each may have against the other on account of any loss of (sic) damage occasioned to landlord or tenant, as the case may be or their

> respective property, the premises, its contents or to other portions of the premises, arising from any risk generally covered by fire and extended coverage insurance; and the parties 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 it may have against Landlord or Tenant, as the case may be.

(NYSCEF 9).

The two also agreed, in article 20(e), that:

> Nothing contained hereinabove shall relieve a tenant from liability that may exist as a result of damage 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 that such insurance is in force and collectible and to the extent permissible by law, [plaintiff's subrogor] and [Moncrieffe] each hereby releases and waives all rights 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 provid[ing] that such a release and waiver shall not invalidate the insurance.

(*Id.*).

There is no dispute that following the expiration of the lease on March 1, 2011, defendant stayed on as a month-to-month tenant, that sometime thereafter, but before December 28, 2016, a fire occurred on the premises, and that at that time, defendant DIT Auto operated a car repair shop on the premises, with Moncrieffe's consent.

In its verified complaint, filed on February 20, 2019, plaintiff alleges that it insured plaintiff's subrogor and that the fire was due to defendants' carelessness, recklessness, and negligence. Thus, plaintiff paid its subrogor $102,814.78, less a $5,000 deductible, thereby becoming subrogated to its subrogor's interests. It advances causes of action against defendants for negligence and, as against Moncrieffe, breach of contract for failing to purchase rental insurance naming plaintiff's subrogor. (NYSCEF 7).

II. CONTENTIONS

A. Defendants (NYSCEF 5)

Defendants claim that the waiver of subrogation provisions set forth in the lease establish a defense to plaintiff's cause of action for negligence as a matter of law and that it should be dismissed pursuant to CPLR 3211(a)(1) and (7). They allege that as plaintiff's subrogor waived its right to subrogation, plaintiff has no valid claim. Moreover, to the extent that the insurance policies of plaintiff's subrogor or defendants contain no provision governing the release of claims, the waiver provisions are enforceable. In any event, they argue, ambiguities in the lease should be construed against plaintiff as its subrogor drafted it. (NYSCEF 5).

B. Plaintiff (NYSCEF 11)

Plaintiff maintains that as defendants offer no evidence that its subrogor or Moncrieffe had obtained the required insurance or that any policy obtained allows for a waiver of subrogation, Moncrieffe fails to demonstrate his entitlement to dismissal pursuant to CPLR 3211(a)(1). In any event, it argues that taking the facts set forth in the complaint as true, there is no basis for dismissal pursuant to CPLR 3211(a)(7). Moreover, absent any documentary evidence that DIT was a party to the lease, it can claim no rights thereunder, and thus, there is no basis to dismiss the complaint as against it. Plaintiff also observes that defendants offer no evidence that DIT succeeded to Moncrieffe's interest or of the existence of a written agreement between plaintiff's subrogor and DIT.

C. Defendants' reply (NYSCEF 12)

In reply, defendants contrast articles 8 and 20 of the lease, observing that only the latter contains a provision that the requisite mutual release from liability "shall be in force only if both releasors' insurance policies contain a clause providing that such a release and waiver shall not

invalidate insurance." Defendants thus maintain that "to the extent that" the policies of plaintiff's subrogor or defendants do not contain the requisite language," article 20 is "invalid," whereas the omission of such language from article 8(b) means that subrogation is waived. In any event, they assert that their insurance policy, even if if not compliant with the referenced language of article 20, absent such language in article 8, subrogation is waived. In the alternative, defendants contend that the two articles are inconsistent, thereby rendering the lease ambiguous as to the waiver of the right to subrogation. Consequently, the lease must be construed against the drafter, plaintiff's subrogor, and in favor of Moncrieffe.

Relying on a printout from the New York State Department of State, defendants assert that DIT's entity status is inactive and dissolved by proclamation as of April 25, 2012, more than four years before the fire and that Moncrieffe was its chief executive officer. (NYSCEF 14). Thus, "to the extent that [Moncrieffe] was operating [DIT] as a d/b/a on the day of the accident, [DIT] would be the same as Moncrieffe under the lease."

Defendants now submit an insurance policy, effective from February 4, 2016 to February 4, 2017, naming "DIT Auto Sales Inc. d/b/a Bronx Network Transmissions & General Repair" as the insured (NYSCEF 13) but claim it is immaterial as a tenant's failure to procure insurance without the landlord's knowledge does not result in liability for resulting damages where the landlord had procured its own insurance. In such a case, damages are limited to out-of-pocket losses such as premiums, deductibles, copayments, and future premiums. Here, they assert, plaintiff's sole damages would be what it had paid to its subrogor.

D. Plaintiff's sur-reply (NYSCEF 15)

In a sur-reply, plaintiff urges that the policy be disregarded as defendants failed to offer it in their initial motion but that even if the policy is considered, it covers DIT, doing business as

Bronx Network Transmissions & General Repair, not Moncrieffe, and it contains no waiver of subrogation. (NYSCEF 16). Moreover, even if DIT was dissolved by proclamation, it is estopped from pleading its dissolution to avoid its obligations when it holds itself out as a corporation. Having continued to operate DIT in 2016, when the policy was issued, Moncrieffe cannot claim that DIT no longer existed, and as DIT was not party to the lease, it could not have waived subrogation.

Plaintiff also observes that defendants offer no evidence that it was Moncrieffe who had filed to do business under the assumed name. Rather, the policy reflects that DIT had used the assumed name, and as the policy names DIT only, it proves that Moncrieffe did not procure insurance. Thus, he too cannot claim a waiver of subrogation. And even had Moncrieffe been named on the policy and even had DIT signed the lease, plaintiff observes that the policy submitted by defendants "clearly and unequivocally preserved" the right to subrogate in clause 12 as follows:

> After we make a payment under this policy, the right anyone we protect has to recover damages from another, is transferred to us. Anyone we protect is required to do all they can to secure this right, and do nothing to harm it....

As the lease requires that waivers of subrogation be mutual, and absent a waiver in the policy offered by defendants, plaintiff maintains that the waiver of subrogation in its policy is unenforceable. It otherwise asserts that absent discovery, the authority relied on by defendants relating to contract ambiguity are inapposite.

III. ANALYSIS

> 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 (*see, Pennsylvania Gen. Ins. Co. v Austin Powder Co.,* 68 NY2d 465). 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 (*see, S.S.D.W. Co. v Brisk Waterproofing Co.,*

76 NY2d 228).

(*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]).

Here, while the lease permits a waiver of subrogation, plaintiff's subrogor and Moncrieffe had agreed in article 8(b) that the waiver of subrogation would be enforceable if not "contrary to the provisions of or invalidate any applicable insurance policy . . ." and in article 20(e) that the waiver would be enforceable only if both insurance policies provide that the waiver not invalidate insurance. Having belatedly submitted an insurance policy on reply without explanation beyond claiming that it is irrelevant, defendants fail to sustain their burden of going forward with evidence demonstrating their right to dismissal. (*See Qureshi v Vital Transportation, Inc*., 173 AD3d 1076 [2d Dept 2019] [submission of documentary evidence for first time on reply improper]).

Article 8(b) provides no recourse to defendants nor is there any ambiguity in the lease. (*See e.g., Wausau Underwriters Ins. Co. v Gamma USA, Inc*., 166 AD3d 928 [2d Dept 2018] [ambiguity does not exist merely because parties interpret provisions differently]). Rather, article 20(e) is more specific than article 8(b) which pertains to insurance generally, while article 20 pertains specifically to destruction, fire, and other casualty. That article 8(b) is silent as to the requirement of mutuality in the parties' insurance policies does not render the provisions inconsistent or ambiguous. Even if inconsistent, the specific provision controls over a general provision. (*DeWitt v DeWitt*, 62 AD3d 744 [2d Dept 2009]).

As Moncrieffe is not named in the policy, he cannot rely on the waiver of subrogation nor may he defend against the claimed breach of the lease. (*See e.g. Ntl. Abatement Corp. v Ntl. Union Fire Ins. Co. of Pittsburgh, PA*, 33 AD3d 570 [1st Dept 2006] [party not entitled to coverage if not named as insured or additional insured on face of policy]; *see also Lee v Lancer*

Ins. Co., 104 AD3d 612 [1st Dept 2013] [reformation of insurance policy to list owners of company as insureds not warranted as every application for insurance listed company as only applicant and owners not personally listed]). Additionally, the policy contains no waiver of subrogation and DIT is estopped from relying on its dissolution. (*See Metered Appliances, Inc. v 75 Owners Corp*., 225 AD2d 338 [1st Dept 1996] [dissolved corporation could not seek to nullify lease after receiving its benefits]).

For all of these reasons, it is hereby

ORDERED, that defendants' motion to dismiss this action is denied in its entirety, and defendants are directed to serve and file their answer within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on March 18, 2020 at 2:15 pm in Room 341 at 60 Centre Street, New York, New York.

12/20/2019
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE