SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 161891/2018

ATLANTIC SPECIALTY INSURANCE COMPANY A/S/O GERSCHEL & COMPANY, INC.,

Plaintiff,

MOTION SEQ. NO. 001

- v -

600 PARTNERS CO., L.P., 600 FEE, LLC, and H F Z CAPITAL GROUP LLC,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS.

In this subrogation action, defendants 600 Partners Co., L.P. and 600 Fee, LLC ("owners") move for summary judgment dismissing all claims and cross claims against them. Plaintiffs oppose the motion. After consideration of the parties' contentions, as well as a review of the applicable statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff's subrogor, Gerschel & Company, Inc. ("Gerschel"), was a commercial tenant on the 16th floor of owners' building at 600 Madison Avenue, New York ("the building"). Defendant HFZ Capital Group LLC (HFZ) was also a commercial tenant on that floor. (NYSCEF Doc. No. 12, complaint, pars. 11-15).

The March 2005 lease between Gerschel and owners ("the lease") provided, in paragraph 9, entitled "Destruction, Fire and Other Casualty," that the tenant, Gerschel,

"acknowledges that [owners] will not carry insurance on Tenant's furniture and/or furnishings or any fixtures or equipment, improvements, or appurtenances removable by Tenant," and refers to articles 62 and 63 (NYSCEF Doc. No. 15, lease, par. 9). Article 62 of the March 2005 Rider to the Lease, entitled "Waiver of Subrogation," provides, in relevant part, in subsection A:

> "Anything in this lease to the contrary notwithstanding, (Owners) and Tenant (Gerschel) shall each endeavor to secure an appropriate clause in, or an endorsement upon, each fire or extended coverage or rent or business interruption insurance policy obtained by it and covering the Building, the demised premises or the personal property, fixtures, equipment located therein or thereon, pursuant to which the respective insurance companies waive subrogation or permit the insured, prior to any loss, to agree with a third party to waive any claim it might have against such third party"

(*id.*, lease rider, article 62 at 18).

In subsection D of article 62, the parties agreed that:

> "Each party agrees to look first to any insurance in its favor (including rent loss or business interruption, as the case may be) before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty. Subject to Sections (A), (B) and (C) of this Article, but only insofar as may be permitted by the terms of the insurance policies carried by it, each party hereby releases the other with respect to any claim (including a claim for negligence) which it might otherwise have against the other party for loss, damage or destruction with respect to its property by fire or other casualty (or for rent loss or business interruption) occurring during the Term, to the extent covered by the insurance that it maintains (or, if greater, that it was required to maintain by the terms of Article 52 hereof or elsewhere herein)"

(*id.*).

Article 52 required Gerschel to obtain general liability policies for bodily injury and property damage liability, personal injury liability, contractual liability and fire and legal liability (*id.* at 14).

In accordance with the lease, Gerschel obtained commercial general property and liability coverage, effective December 31, 2017 through December 31, 2018, which contained a waiver of subrogation provision as indicated in the lease (NYSCEF Doc. No. 19, Gerschel policy). Section IV of the "Schedule of Coverage Extensions" portion of Gerschel's policy, entitled "Blanket Waiver of Subrogation," provides:

> "Section IV – Transfer of Rights of Recovery Against Other to Us Condition is amended to add the following:
> We will waive any right of recovery we may have against any person or organization because of payments we make for injury or damage arising out of your ongoing operations done under a written contract or agreement with that person or organization and included in "your work" or the "products-completed operations hazard." This waiver applies only to persons or organizations with whom you have a written contract, executed prior to the "bodily injury" or "property damage", that requires you to waive your rights"

(NYSCEF Doc. No. 20, commercial general liability coverage form, schedule of coverage extensions, section 4 at 3 of 7).

Owners had a commercial line insurance policy, effective June 30, 2017 through June 30, 2018, which, in the "Commercial Property Conditions" section, also waived subrogation in accordance with article 62 of the Lease (*see* NYSCEF Doc. No. 17,

Owners' insurance policy). Specifically, in the section entitled "Transfer Of Rights Of Recovery Against Others To Us," the policy provided:

> "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 to your Covered Property or Covered Income.
>
> 2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
>
> a. Someone insured by this insurance;
>
> b. A business firm:
>
> (1) Owned or controlled by you; or
>
> (2) That owns or controls you; or
>
> c. Your tenant.
>
> This will not restrict your insurance"

(NYSCEF Doc. No. 18, Transfer of Rights provision in Owners' policy).

On January 7, 2018, a water condenser valve on the Building's 16th floor froze, thawed, and then burst, causing water damage to the premises and/or to Gerschel's property (*id.*, compl, para. 16). Gerschel filed an insurance claim for

$270,360.39 with plaintiff, paid its deductible of $2,500.00, and plaintiff then paid Gerschel the balance of $267,860.39 (*id.*, compl, paras. 19-21).

Plaintiff thereafter commenced the captioned action asserting two causes of action. The first alleges that Gerschel's property damage loss occurred as a result of owners' negligence and seeks to recover the amount it paid Gerschel plus the deductible. The second claim, against HFZ, seeks the same damages based on HFZ's alleged negligence (NYSCEF Doc. No. 12, compl).

Both defendants answered the complaint, denying the allegations and asserting various affirmative defenses. Defendant HFZ also asserted a cross claim for contribution and indemnification against owners, alleging that, if plaintiff was caused to suffer damages through any negligence and/or breach of contract other than its own, those damages arose in whole or part from owners' acts or omissions (NYSCEF Doc. No. 5).

Owners now move for summary judgment dismissing the claim and the cross claim on the ground that Gerschel waived any right of subrogation pursuant to the lease. They contend that this waiver is valid because both they and Gerschel each procured an insurance policy permitting such waiver of subrogation (NYSCEF Doc. No. 11). They assert that plaintiff insurer is prohibited from bringing negligence claims against them under the mutual waiver of subrogation provisions in the two policies.

Plaintiff denies that the waiver of subrogation clauses are enforceable on the ground that there is no mutual covenant in the lease requiring both Gerschel and owners to procure insurance, thereby violating General Obligations Law ("GOL") section 5-321 (NYSCEF Doc. No. 25).

LEGAL CONCLUSIONS

Owners' motion for summary judgment is granted only to the extent that the complaint is dismissed as against it, and is otherwise denied.

"Subrogation is an equitable doctrine that allows an insurer to 'stand in the shoes' of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*State Farm Ins. Co. v J.P. Spano Constr., Inc.*, 55 AD3d 824, 825 [2d Dept 2008], quoting *North Star Reins. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]; *see Travelers Indem. Co. v AA Kitchen Cabinet & Stone Supply, Inc.*, 106 AD3d 812, 813 [2d Dept 2013]). Parties in a commercial transaction are free to use insurance and waivers of subrogation to allocate the risk of loss to third parties (*see Gap v Red Apple Cos.*, 282 AD2d 119, 124 [1st Dept 2001]; *see also Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 418-419 [2006]). Commercial parties also are free to waive their insurer's right of subrogation, which bars the insurer from recovering payments made to its insured covered by the waiver (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660-661 [1997]; *Tower Risk Mgt. v Ni Chunp Hu*, 84 AD3d 616, 616 [1st Dept 2011]). These waivers are enforceable as long as they are clear and unequivocal (*Viacom Intl. v Midtown Realty Co.*, 193 AD2d 45, 53 [1st Dept 1993]), and apply to the claim or specific damages sought (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d at 660; *Tower Risk Mgt. v Ni Chunp Hu*, 84 AD3d at 616). Where a party has waived its right to subrogation, its insurer has no subrogation claim for negligence (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d at 660).

Here, the parties clearly agreed in the lease to waive their subrogation rights for "loss, damage or destruction with respect to its property by fire or other casualty (or for rent loss or business interruption) during the Term to the extent covered by the insurance it maintains" (NYSCEF Doc. No. 15, Lease rider, article 62). That provision required that each party's insurance policy contain a clause permitting a waiver of subrogation. It is undisputed that each policy contained such a clause. The damage or loss here was due to a water leak which falls within "other casualty," and, in fact, was covered by Gerschel's policy and, thus, clearly falls within the waiver. Because both Gerschel and owners waived their right to subrogation and each obtained insurance that allowed them to do so, plaintiff insurer is barred from recovery in this action (*see Allstate Indem. Co. v Virfra Holdings, LLC*, 124 AD3d 528, 528 [1st Dept 2015] [waiver of subrogation provision precluded action because loss was of precise nature of that contemplated by the waiver]; *Payson v 50 Sutton Place S. Owners, Inc.*, 107 AD3d 506, 506 [1st Dept 2013] [same]; *State Farm Ins. Co. v J.P. Spano Constr., Inc.*, 55 AD3d at 825).

In the lease, the parties agreed that this waiver of subrogation applies if both obtain insurance policies acknowledging the waiver. While neither the waiver provision nor the lease, on its face, required that owners obtain insurance, it presumed that both would do so (*see e.g. Footlocker, Inc. v KK&J, LLC*, 69 AD3d 481, 482 [1st Dept 2010] [where lease only requires tenant to obtain insurance, but the landlord defendants submitted proof of insurance covering for the risk of fire, and this satisfied its obligation under waiver of subrogation clause]; *Duane Reade v Reva Holding Corp.*, 30

AD3d 229, 232 [1st Dept 2006] [waiver of subrogation "is necessarily premised on the procurement of insurance by the parties"] [internal quotation marks and citation omitted]; *Liberty Mut. Ins. Co. v Perfect Knowledge*, 299 AD2d 524, 526 [2d Dept 2002] [same]). In any event, owners did obtain insurance with a clause permitting a waiver of subrogation in accordance with the lease.

Plaintiff's contention that the waiver of subrogation clause here violates GOL section 5-321 is without merit. That section provides that:

> "[e]very covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable"

Courts have consistently held that waiver of subrogation clauses do not violate GOL section 5-321, because rather than exempting a lessor from liability resulting from its negligence, the lessor and tenant just allocate the risk of liability, as between themselves, to third parties " through the device of insurance" (*Viacom Intl. v Midtown Realty Co.*, 193 AD2d at 53; *see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d at 418-419; *Hogeland v Sibley, Lindsey & Curr Co.*, 42 NY2d 153, 160 [1977]; *747 Third Ave. Corp. v Killarney*, 225 AD2d 375, 377 [1st Dept 1996] [subrogation waiver did not violate GOL section 5-321]; *see also Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v Valden Assoc.,* 46 NY2d 653, 656-657 [1979] [finding waiver of subrogation clause did not violate analogous provision GOL section 5-323]). Moreover,

such clauses may be valid even if only one party is obligated by the lease to obtain insurance (*see Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d at 418-419; *Hartford Steam Boiler Inspection & Ins. Co. v Woodstock '99*, 6 AD3d 1085, 1086 [4th Dept 2004]). The cases upon which plaintiff relies (*see* NYSCEF Doc. Nos. 26-30) either are non-binding lower court cases and/or predate *Kaf-Kaf v Rodless Decorations* (90 NY2d at 660), *Allstate Indem. Co. v Virfra Holdings, LLC* (124 AD3d at 528), *Tower Risk Mgt. v Ni Chunp Hu* (84 AD3d at 616) and *Footlocker, Inc. v KK&J, LLC* (69 AD3d at 482).

Here, even though the lease only required Gerschel to obtain insurance, once owners actually obtained their own insurance policy, which permitted such waiver, the waiver of subrogation provision became enforceable (*see Footlocker, Inc. v KK&J, LLC*, 69 AD3d at 482). There was no violation of GOL section 5-321 because the waiver clause did not exempt owners, as landlords, from liability. It merely reflected the parties' agreement to assign their risk of loss to their respective insurers. Gerschel had an avenue for recovery for its loss through its insurer, and was, in fact, compensated for its loss as the lease intended it to be. Therefore, GOL section 5-321 is not implicated (*see Liberty Mut. Fire Ins. Co. v 720 Lex Acquisition LLC*, 62 Misc 3d 1221[A], 2018 NY Slip Op 51979[U], at * 3 [Sup Ct, NY County 2018]).

Owners have thus demonstrated their prima facie entitlement to summary judgment dismissing the complaint as a matter of law by presenting evidence that plaintiff's claims are barred by the waiver of subrogation clause in owners' lease with plaintiff's insured Gerschel (*see Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d at 660-661) and, in opposition, plaintiff failed to raise any triable issue of fact.

However, the branch of owners' motion seeking dismissal of HFZ's cross claim for contribution and indemnification is denied. Owners failed to make any arguments in support of this branch of their motion, much less establish their prima facie entitlement to such relief *(see Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). "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, 853 [1985]).

Therefore, in light of the foregoing, it is hereby:

ORDERED that defendants 600 Partners Co., L.P. and 600 Fee, LLC's motion for summary judgment is granted to the extent that the complaint against them is dismissed, with costs and disbursements to these defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the motion is otherwise denied; and it is further

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

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the parties are to contact the Clerk of Part 2 to request a bar-coded preliminary conference form, which they are to complete and return to the Court to be so-ordered; and it is further

ORDERED that this constitutes the decision and order of the court.

10/21/2020
DATE

KATHRYN E. FREED, J.S.C.

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