

**Certain Underwriters at Lloyd's, London v Forty
Seventh Fifth Co. LLC**

2020 NY Slip Op 34264(U)

December 23, 2020

Supreme Court, New York County

Docket Number: 156417/2018

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

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

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CERTAIN UNDERWRITERS AT LLOYD'S,
LONDON, Subscribing to Policy Number
B1353DY1702834000 as Subrogees of
ROMAN MALAKOV DIAMONDS LTD., ROMAN
MALAKOV LLC, ELIZE INTERNATIONAL, INC.
d/b/a ELIZE'S DIAMOND & FINE JEWELRY,
and M&G DIAMONDS LLC d/b/a M.G.
DIAMOND,

Index No. 156417/2018

Plaintiffs

- against -

DECISION AND ORDER

FORTY SEVENTH FIFTH COMPANY LLC and
ALLSTATE SPRINKLER CORP.,

Defendants

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LUCY BILLINGS, J.S.C.:

Plaintiff Certain Underwriters at Lloyd's, London, moves for
summary judgment dismissing the eighth affirmative defense
claiming a waiver of subrogation raised by defendant Forty
Seventh Fifth Company LLC. C.P.L.R. § 3212(b) and (e). It
cross-moves for summary judgment dismissing the complaint and any
cross-claims against it. C.P.L.R. § 3212(b).

I. THE DOCUMENTARY EVIDENCE AND THE PARTIES' POSITIONS

The incident that gave rise to this action occurred January
8, 2018, when a sprinkler pipe burst in the first floor ceiling
of a building at 1 West 47th Street, New York County. Aff. of
Roshel Malakov ¶¶ 3-5. Forty Seventh Fifth is the building's

owner. Id. ¶ 2. Plaintiff claims that Forty Seventh Fifth retained co-defendant Allstate Sprinkler Corp. to maintain the sprinkler system in the building. Aff. of Mark Ian Binsky Ex. D ¶¶ 40-41.

Plaintiff's subrogors, Roman Malakov Diamonds Ltd., Roman Malakov LLC, Elize International, Inc., and M&G Diamonds LLC, maintained a jewelry shop on the building's first floor. Malakov Aff. ¶¶ 2-5. They sustained damage to their inventory of jewelry during the flooding that followed the burst sprinkler pipe.

The parties dispute which unit on the building's first floor plaintiff's subrogors actually occupied January 8, 2018. In support of Certain Underwriters' motion, Roshel Malakov, an owner of each of the subrogors, authenticates a 2006 lease between Forty Seventh Fifth and Elize International Inc. for "Store A," Malakov Aff. Ex. A, at 1, which he attests was the subrogors' unit. Id. ¶ 2. In support of Forty Seventh Fifth's cross-motion, however, building manager Brian Kern attests that Elize International Inc. and the other subrogors instead had occupied "Store C" since 2015, when they assumed that unit's lease after the former tenant's eviction. Aff. of Richard C. Prezioso Ex. D (Aff. of Brian Kern) ¶¶ 2-3. Kern attaches, but does not authenticate on personal knowledge, a 2011 lease between Forty Seventh Fifth and the former tenant, non-party Shenoa Co. Inc., and several court ordered stipulations confirming that Elize

International Inc. assumed the tenancy of "Store C" in 2015. Nevertheless, the moving and cross-moving parties agree that these questions are not dispositive, since the leases for both "Store A" and "Store C" include identical provisions regarding waiver of subrogation.

In support of Certain Underwriters' motion, Malakov authenticates a "Jewelers Block insurance policy" issued by Lloyd & Partners, Malakov Aff. ¶ 6, to "Roman Malakov Diamonds Ltd. and/or Elize's Diamond & Fine Jewelry and/or M.G. Diamond and/or Roman Malakov Inc.," bearing policy number B1353DY1702834000 and in effect from November 19, 2017, through November 19, 2018. Id. Ex. B, at 1 (of 26). Plaintiff also presents an "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" insurance policy issued by Affiliated FM Insurance Company (AFM) to Forty Seventh Fifth, bearing policy number KM130 and in effect from June 30, 2017, to June 30, 2018. Aff. of Mark Ian Binsky Ex. H, at 5-6. Although this AFM policy is unauthenticated and inadmissible, Certain Underwriters concedes that the policy includes a valid waiver of subrogation provision. The key support for Certain Underwriters' motion is that its Lloyd & Partners policy does not include such a waiver.

Forty Seventh Fifth insists that its losses are actually covered by a liability insurance policy issued by Chubb Group of Insurance, Prezioso Aff. ¶ 9, to "HWI GLOBAL PROPERTIES LLC C/O HUGH WOOD INC.," bearing policy number 9949-19-06 REU and in

effect from June 30, 2017, to June 30, 2018. Id. Ex. E, at 1. Again, this policy is unauthenticated and inadmissible. Even were the court to consider this policy, it nowhere mentions Forty Seventh Fifth. Nor does Forty Seventh Fifth explain the relationship, if any, between Forty Seventh Fifth and HWI Global Properties.

Forty Seventh Fifth also maintains that plaintiff's subrogors breached their lease by failing to obtain a liability insurance policy that named Forty Seventh Fifth as an additional insured, id. ¶¶ 7, 16, but interposes no such counterclaim in this action. In reply, moreover, Malakov authenticates a commercial general liability policy issued by the Hanover Insurance Group to Roman Malakov Diamonds Ltd., bearing policy number ZHY 7571626 14 and in effect from March 18, 2017, through March 18, 2018. Reply Aff. of Roman Malakov ¶ 5, Ex. A. Forty Seventh Fifth was named as an "additional insured" on the Hanover Insurance Group policy. Id. ¶ 5.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the moving parties must make a prima facie showing of entitlement to judgment as a matter of law through admissible evidence, eliminating all material issues of fact. C.P.L.R. § 3212(b); Friends of Thayer Lake LLC v. Brown, 27 N.Y.3d 1039, 1043 (2016); Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP, 26 N.Y.3d 40, 49 (2015); Voss

v. Netherlands Ins. Co., 22 N.Y.3d 728, 734 (2014); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012). Only if the moving parties satisfy this standard, does the burden shift to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. De Lourdes Torres v. Jones, 26 N.Y.3d 742, 763 (2016); Nomura Asset Capital Corp. v. Cadwalader Wickersham & Taft LLP, 26 N.Y.3d at 49; Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). If the moving parties fail to meet their initial burden, the court must deny summary judgment despite any insufficiency in the opposition. Voss v. Netherlands Ins. Co., 22 N.Y.3d at 734; Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005). In evaluating the evidence for purposes of the parties' motions, the court construes the evidence in the light most favorable to the opponents. Stonehill Capital Mgt. LLC v. Bank of the W., 28 N.Y.3d 439, 448 (2016); De Lourdes Torres v. Jones, 26 N.Y.3d at 763; William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh, 22 N.Y.3d 470, 475 (2013); Vega v. Restani Constr. Corp., 18 N.Y.3d at 503.

III. PLAINTIFF'S MOTION

Certain Underwriters seeks summary judgment dismissing Forty Seventh Fifth's eighth affirmative defense, which claims that a waiver of subrogation bars this action. The moving and cross-moving parties concede that this question turns of the interpretation of Article 9(e) of the lease ("Destruction, Fire and Other Casualty"), which provides that:

Nothing contained hereinabove shall relieve Tenant from liability that may exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, including Owner's obligation to restore under subparagraph (b) above, 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 permitted by law, Owner and Tenant each hereby releases and waives all right to recovery with respect to subparagraphs (b), (d) and (e) above, against the other, or anyone claiming through or under each of them, by way of subrogation or otherwise. The release and waiver herein referred to shall be deemed to include any loss or damage to the demised premises and/or to any personal property, equipment, trade fixtures, goods and merchandise located therein. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release and waiver shall not invalidate the insurance.

Malakov Aff. Ex. A, at 2; Prezioso Aff. Ex. D (Kern Aff.) Ex. A, at 2 (emphasis added).

The waiver of subrogation in Article 9(e) of the lease, by its terms, is ineffective because, even though Forty Seventh Fifth's AFM property damage policy includes a valid waiver of subrogation provision, Aff. of Mark Binsky ¶ 18, Ex. H, the waiver of subrogation provision in the subrogors' Lloyd &

Partners policy limits the waiver to enumerated entities that do not include landlords such as Forty Seventh Fifth. The Lloyd & Partners policy provides:

WAIVER OF SUBROGATION CLAUSE

It is hereby understood and agreed that the Insured shall be at liberty to enforce or not, as they please, any rights that they may have against customers and/or persons authorized by the Insured to wear and/or carry the Property Insured on their behalf and/or persons or companies, including but not limited to Banks, Armoured Car Carriers, Entrustment Holders, Private Clients, Security Companies, Auction Houses and/or Gemological Laboratories in respect of any loss covered by this Policy of Insurance.

Malakov Aff. Ex. B, at 16 (of 26). This waiver of subrogation applies only to the subrogors' claims against "customers" and entities authorized to carry their insured property (i.e., jewelry), but not to claims against a landlord. This provision does not satisfy the requirement in Article 9(e) of the lease that a waiver of subrogation will be permitted regarding claims between the tenant and Forty Seventh Fifth if both obtained insurance policies that authorize the waiver of subrogation.

A waiver of subrogation provision may not be enforced "beyond the scope of the specific context in which it appears." Kaf-Kaf, Inc. v. Rodless Decorations, 90 N.Y.2d 654, 660 (1997); Forbes v. City of New York, 272 A.D.2d 221, 221 (1st Dep't 2000). See S.S.D.W. Co. v. Brisk Waterproofing Co., 76 N.Y.2d 228, 234-35 (1990); Footlocker, Inc. v. KK&J, LLC, 69 A.D.3d 481, 481 (1st Dep't 2010). Waiver of subrogation provisions in leases that

require a landlord and a tenant both to obtain insurance policies permitting waiver of subrogation are enforced only upon evidence that both parties actually did obtain such policies. E.g., Allstate Indem. Co. v. Virfra Holdings, LLC, 124 A.D.3d 528, 528 (1st Dep't 2015); Tower Risk Mgt. v. Ni Chunp Hu, 84 A.D.3d 616, 616 (1st Dep't 2011). Where one of the parties did not obtain such insurance, however, a waiver of subrogation provision that requires both to obtain the insurance does not bar subrogation. Footlocker, Inc. v. KK&J, LLC, 69 A.D.3d at 481; Goldstein Footwear v. Admon Realty, 168 A.D.2d 321, 322-23 (1st Dep't 1990).

An insurance policy that places limits on a waiver of subrogation, as does the subrogors' Lloyd & Partners policy, requires a closer inquiry before the waiver may be enforced. The waiver may not apply, for example, to damage to a tenant's premises that emanated from adjacent premises, which were losses caused by an act outside the scope of the landlord-tenant relationship. One Beacon Ins. Co. v. French Inst. Alliance Francais NYC, 50 A.D.3d 388, 389 (1st Dep't 2008). The waiver of subrogation provision in the Lloyd & Partners policy includes an analogous limitation. It grants plaintiff's subrogors the discretion to waive claims against (1) "customers" or (2) entities authorized to "wear and/or carry" the subrogors' jewelry, including "Banks, Armoured Car Carriers, Entrustment

Holder, Private Clients, Security Companies, Auction Houses and/or Gemological Laboratories." The waiver of subrogation in the Lloyd & Partners policy thus is more circumscribed than the waiver in the AFM policy.

While Forty Seventh Fifth maintains that its liability insurance policy from Chubb Group of Insurance covers its losses in this action, that policy and Roman Malakov Diamonds Ltd.'s commercial general liability policy from Hanover Insurance Group both are irrelevant to the claims in this action. The subrogors' claims arose from alleged damage to their personal property, not from any exposure to liability as a result of their own conduct. The Lloyd & Partners and AFM policies pertain here because they both insure against property damage claims.

Forty Seventh Fifth also maintains that, as the landlord, it was one of the entities authorized to "carry" Malakov's property described in the Lloyd & Partners policy's waiver of subrogation provision. Forty Seventh Fifth cites no admissible evidence based on personal knowledge, Residential Credit Solutions, Inc. v. Gould, 171 A.D.3d 638, 642 (1st Dep't 2019); Clarke v. American Truck & Trailer, Inc., 171 A.D.3d 405, 406 (1st Dep't 2019), contractual provision, or legal authority, however, to support this proposition. Malakov replies that neither he nor any of the subrogors' employees ever granted Forty Seventh Fifth or any of its employees permission to touch or carry the

subrogors' jewelry. Reply Aff. of Roshel Malakov ¶ 3.

In sum, the mere fact that the Lloyd & Partners policy and the AFM policy include waiver of subrogation provisions does not satisfy Article 9(e) of the lease. The provisions in the lease and in the Lloyd & Partners policy regarding waiver of subrogation do not bar Certain Underwriters' claims against Forty Seventh Fifth because the Lloyd & Partners policy does not permit the insureds to waive the subrogation of claims for losses caused by a landlord's alleged negligence. Therefore Certain Underwriters is entitled to summary judgment dismissing Forty Seventh Fifth's eighth affirmative defense of waiver of subrogation. C.P.L.R. § 3212(b) and (e).

Finally, Forty Seventh Fifth urges that, if the court determines that the lease's waiver of subrogation provision does not bar Certain Underwriters' claims against Forty Seventh Fifth, then the subrogors would be liable to it for breach of the lease because they did not obtain an insurance policy with an enforceable waiver of subrogation provision. Although "waiver of subrogation clauses are 'necessarily premised on the procurement of insurance by the parties,'" Footlocker, Inc. v. KK&J, LLC, 69 A.D.3d at 482, those clauses do not themselves create the obligation to purchase insurance. A separate lease provision would set forth that obligation. E.g., A to Z Applique Die Cutting v. 319 McKibbin St. Corp., 232 A.D.2d 512, 512-13 (2d

Dep't 1996). Here, Forty Seventh Fifth does not identify a lease provision that required the subrogors to obtain the specified insurance. More importantly, Forty Seventh Fifth has not claimed against plaintiff or its subrogors for breach of a contract in this action. Therefore the court may not grant or deny relief on that basis.

IV. FORTY-SEVENTH FIFTH'S CROSS-MOTION

Forty Seventh Fifth seeks summary judgment dismissing Certain Underwriters' complaint against Forty Seventh Fifth. The complaint names Forty Seventh Fifth as a defendant in the first, second, and fifth causes of action, which respectively claim negligence, gross negligence, and breach of a contract. Forty Seventh Fifth bases its cross-motion for summary judgment entirely on the grounds that the waiver of subrogation in Article 9(e) of the lease bars all Certain Underwriters' subrogated claims against Forty Seventh Fifth. It does not raise any further ground even in reply. Since the court has found no such bar, Forty Seventh Fifth fails to demonstrate its entitlement to summary judgment dismissing Certain Underwriters' claims against Forty Seventh Fifth. It does not even mention Allstate Sprinkler's cross-claims, let alone demonstrate a basis to dismiss them. Therefore the court denies Forty Seventh Fifth's cross-motion. C.P.L.R. § 3212(b).

V. CONCLUSION

For the reasons explained above, the court grants the motion by plaintiff Certain Underwriters at Lloyd's, London, for summary judgment dismissing defendant Forty Seventh Fifth Company LLC's eighth affirmative defense claiming a waiver of subrogation. C.P.L.R. § 3212(b) and (e). The court denies defendant Forty Seventh Fifth Company LLC's cross-motion for summary judgment dismissing the complaint and any cross-claims against Forty Seventh Fifth Company LLC. C.P.L.R. § 3212(b).

DATED: December 23, 2020



LUCY BILLINGS, J.S.C.

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J.S.C.