Kookmin Best Ins. Co., Ltd. v Curtis Roberts Real Estate LLC
2022 NY Slip Op 31769(U)
June 2, 2022
Supreme Court, New York County
Docket Number: Index No. 160103/2019
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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KOOKMIN BEST INSURANCE CO., LTD. A/S/O CEDRA HEALTHCARE LLC,

Plaintiff,

- v -

CURTIS ROBERTS REAL ESTATE LLC, WYNNE PLUMBING AND HEATING CORP.,

Defendant.

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INDEX NO. 160103/2019

MOTION DATE 05/27/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for JUDGMENT - SUMMARY.

BACKGROUND

Plaintiff commenced this subrogation/negligence action claiming property damage and business interruption in the amount of $272,372.58 as a result of a sprinkler leak that originated on the vacant fourth floor of 724 Elton Avenue, Bronx, New York (the Building) on January 9, 2018. Plaintiff's insured, Cedra Healthcare LLC (Cedra), is a tenant of the first floor of the Building. Curtis Roberts Real Estate (Owner) is the owner of the Building. Wynne Plumbing and Heating Corp (Wynne) is alleged to have made repairs after the flood and to have inspected the sprinkler system periodically prior to the incident.

PENDING MOTION

On April 29, 2022, Owner moved for summary judgment. On May 27, 2022, the motion was submitted and the court reserved decision. As the court finds that Cedra waived its right of

subrogation pursuant to the parties' lease agreement, the motion is granted, and the complaint is dismissed as against Owner, except as to the claim for the $1000.00 dedductible.

ALLEGED FACTS

Cedra is a commercial tenant at the Building pursuant to a written lease between Cedra and Owner. Section 7(C) of the lease provides that Owner is an additional insured on Cedra's liability insurance. Section 7(G) of the lease provides that Cedra shall obtain insurance policies for fire or extended coverage to which Cedra's insurance company waives subrogation or a right to recovery against Owner. At page 35 of the policy Owner is made an additional insured under plaintiff's insurance policy. At page 90, section K(1), the waiver of subrogation in lease is permitted.

Owner alleges the flood was caused by a broken tee attached to a sprinkler pipe on the fourth floor. This sprinkler pipe was a part of dry sprinkler system, that was operated by air pressure not water. As this sprinkler system was dry, Owner alleges it did not have to inspected for becoming frozen before the flood. Wynne repaired the tee on the sprinkler pipe after the flood. Owner alleges it "periodically" inspected the sprinkler before the incident, and that Wynne inspected the same sprinkler system periodically before the incident.

The sprinkler system was in place when Owner purchased building in around 2010 or 2011, On the date of the incident, Curtis Robert performed the roles of superintendent and porter for the building on behalf of Owner. Owner alleges that at no time before this flood did it create or have actual or constructive notice that this tee on the sprinkler pipe would break causing a flood.

DISCUSSION

In order to prevail on a motion for summary judgment, the moving party must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851 (1985)*; Zuckerman v. City of New York,* 49 N.Y.2d 557 (1980). Absent such a *prima facie* showing, the motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hospital,* 68 NY2d 320, 324 [1986]).

However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson v Waisman,* 39 AD3d 303, 306 [1st Dept 2007], citing *Alvarez,* 68 NY2d at 324). "[A]ll of the evidence must be viewed in the light most favorable to the opponent of the motion" (*People v Grasso,* 50 AD3d 535,544 [1st Dept 2008]). "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact" (*Martin v Citibank, N.A.,* 64 AD3d 477,478 [1st Dept 2009]; *see also Sheehan v Gong,* 2 AD3d 166,168 [1st Dept 2003] ["The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues"], *citing Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]).

Owner argues it is entitled to summary judgment based upon the antisubrogation rule, waiver of subrogation and its lack of negligence.

Antisubrogation Rule

Plaintiff's insurance policy contains "ADDITIONAL INSURED-MANAGERS OR LESSORS OF PREMISES" endorsement, which specifically sets forth the scope of plaintiff's liability coverage for Owner. The endorsement states Owner is “also an also insured, but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises leased to you and shown in the Schedule.”

Based upon the foregoing, Owner is only an additional insured under the liability section of plaintiff's insurance policy for risks of loss originating in the premises leased to Cedra. The lease defines the premises leased as the first floor and not the fourth floor of the Building. Owner acknowledges the flood was caused by a broken tee attached to a sprinkler pipe on the fourth floor. As such, the risk of loss did not originate in the premises leased to Cedra.

It is well established that the antisubrogation rule does not apply where the insurance policy in issue does not cover the risk of loss being alleged. *Glens Falls Ins. Co. v. City of New York*, 293 A.D.2d 568 (2d Dept. 2002); *Commerce & Industry Insurance Company v. Admon Realty, Inc*., 168 A.D.2d 321 (1st Dept. 1990); *Public Service Mutual Ins. Co. v. Windsor Place Corp*., 238 A.D.2d 142 (1st Dept. 1997).

In *Commerce & Industry*, tenant's insurer brought a subrogation action against the owner and managing agent of the building for damages sustained in two separate incidents. The managing agent was listed as an additional insured under the liability section of tenant's insurer's policy. Tenant's insurer claimed that the alleged incident originated outside of the leased premises. In reversing the trial court's granting of summary judgment, the First Department held:

> Furthermore, Concourse is named as an additional insured only in regard to the liability section of the policy. The endorsement naming Concourse as an additional named insured, however limits such coverage to "liability arising out of the ownership, maintenance and use of that part of the premises . . . leased to the named insured." Plaintiff argues that the claim is

outside the ambit of the endorsement since it is alleged that damage occurred to plaintiff's property when pipes froze and broke due to a non-functioning boiler which is located not in that part of the premises leased to plaintiff, but in another. Plaintiff also alleges that in the other loss a fire was allowed to spread because of a sprinkler pump, not located in that part of the premises, had been turned off. Thus defendants are not entitled to summary judgment on their "additional insured" argument. Id. at 656.

In *General Accident Fire & Life Assur. Corp. v. Travelers Ins. Co.*, 162 A.D.2d 130 (1st Dept. 1990), the court found no coverage for the building owner as additional insured under the tenant's policy when the incident occurred outside of the tenant's premises as defined by the lease.

In this action, the additional insured liability coverage for Owner was limited to claims originating in the premises leased to Cedra, to wit, the first floor and adjacent yard, not the vacant fourth floor where the sprinkler leak originated. As such, the antisubrogation rule does not bar plaintiff's claim.

The two cases relied upon by Owner on this point, *Hammer v. ACC Constr. Corp.*, 193 A.D.3d 455 (1st Dept. 2021) and *Pitruzello v. Gelco Builders, Inc.*, 304 A.D.2d 302 (1st Dept. 2003), are inapplicable to the case at bar because neither case raises an issue regarding the alleged risk of loss not being covered under the policy.

Waiver of Subrogation

Section 7(G) of the parties' lease provides in pertinent part:

> Tenant shall procure a clause in, or endorsement on, each of its policies for fire or extended coverage insurance covering the Premises and personal property, fixtures or equipment located therein, pursuant to which the insurance company waives subrogation or consents to a waiver of right of recovery against Landlord. Tenant agrees not to make claims against or seek to recover from, Landlord for loss or damage to its property or property of others covered by such insurance.

It is agreed that the policy permits such waivers.

Owner argues that based on the waiver of subrogation in the Lease and the fact that the policy permits it the subrogation claim must be dismissed. Owner relies upon *Admiral Indemnity Co. v. Johnson*, 189 A.D.3d 428 (First Dept. 2020); *General Acc. Ins. Co. v. 80 Maiden Lane Associates*, 252 A.D.2d 391 (First Dept. 1998); *Great Northern Ins. Co. v. Interior Const. Corp*., 7 N.Y.3d 412 (First Dept. 2006). The court agrees.

The court does not find plaintiffs attempts to distinguish these cases convincing, nor does the court find that that the lease provision is unenforceable pursuant to General Obligations Law §5-321 as argued by plaintiff. This lease is not void per the General Obligations Law, but a valid agreement "negotiated at arm's length by two sophisticated business entities". *Great N. Ins. Co. v. Interior Const. Co*., 7 N.Y.3d 412 (Ct. App. 2006); *45 Broadway Owner LLC v. NYSA-ILA Pension Trust Fund*, 107 A.D.3d 629 (1st Dept. 2013).

Movant Has Failed to Make A Prima Facie Case as To Entitlement as A Matter of Law on The Issue of Negligence

There remains the claim for the $1000.00 insurance deductible which is not subject to dismissal based on the waiver of subrogation claim, because it was not an amount covered by the insurance.

Owner's moving papers do not address specific maintenance requirements as pertain to the sprinkler system. Owner failed to submit any records regarding maintenance.

Assuming *arguendo*, Owner had met its initial burden in this regard, Owner's allegation that no maintenance was required is rebutted by plaintiff's expert who opines:

> … a properly maintained dry sprinkler system should not experience a pipe break or leak water under normal use and service conditions. There is no evidence whatsoever that the sprinkler piping or a sprinkler head on the fourth floor had sustained damage from any one-time unforeseen event on the date of loss, such as an impact, or that the system had activated due to a fire. The reported failure of the sprinkler pipe is consistent with deferred maintenance of the sprinkler system due to negligence of the defendants

Based on the foregoing, the Court finds that Owner failed to establish entitlement to summary judgment on the issue of negligence and that plaintiff has raised triable issues of fact in regards to same.

Finally as to plaintiff's argument that the motion is premature, the dismissal granted is based on the waiver of subrogation clause, no alleged outstanding discovery was asserted in regards to the need to address that issue and as to the remaining claims further needed discovery can proceed in due course.

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the motion of CURTIS ROBERTS REAL ESTATE LLC for summary judgment is granted to the extent of dismissing the subrogation claim against it and denied as to the cause of action for the $1000.00 deductible; and it is further

ORDERED that, within 20 days from entry of this order, CURTIS ROBERTS REAL ESTATE LLC shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that the parties appear for a virtual status conference on July 26th, 2022 at 2pm; and it is further

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

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6/2/2022
DATE

SABRINA KRAUS, 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**