SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARY V. ROSADO **PART** 33M

Justice

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UTICA FIRST INSURANCE COMPANY AS SUBROGEE OF SI WATERFRONT MANAGEMENT INC,

Plaintiff,

- v -

HOMEPORT I L.L.C., IRONSTATE HOLDINGS LLC,HP SERVICES INC.,A.J.D. CONSTRUCTION CO., INC.,CLAIRE CONSTRUCTION CORP.

Defendant.

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INDEX NO. 150448/2022

MOTION DATE 07/07/2022

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 59, 62, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 137, 141, 145, 149, 153, 157, 161, 165, 168, 171, 175, 179, 183, 186, 193

were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on April 18, 2023, where Nicholas K. Neonakis, Esq. appeared for Plaintiff Utica First Insurance Company as subrogee of SI Waterfront Management Inc. ("Plaintiff") and Victoria Benalcazar, Esq. appeared for Defendant AJD Construction Co., Inc. ("AJD"), AJD's motion to dismiss pursuant to CPLR § 3211(a)(7) and motion for summary judgment pursuant to CPLR § 3212 are denied, without prejudice.

I. Background

This is a subrogation action arising out of alleged damages stemming from the flooding of a building located at 24 Navy Pier Court, Staten Island, New York (the "Premises"). SI Waterfront Management Inc. ("Subrogor") occupied a portion of the premises to operate a restaurant named "Wynwood" (NYSCEF Doc. 1 at ¶ 30). Homeport allegedly owns the Premises (*id.* at ¶ 24). It is alleged that sometime prior to June 8, 2021 that significant construction work was done to the

plumbing and drainage lines at the Premises (*id.* at ¶ 32). Plaintiff alleges that Defendant Ironstate managed, coordinated, and performed this construction work (*id.* at ¶¶ 36-37). It is likewise alleged that AJD managed and supervised construction work at the Premises (*id.* at ¶¶ 42-44). It is alleged that as a result of negligent construction work, the Subrogor's restaurant flooded on June 8, 2021, and caused damages in excess of $350,000.00 (*id.* at ¶¶ 48-51). Plaintiff insured Subrogor's restaurant for property damages and loss of income (*id.* at ¶ 31). As a result of damage to Subrogor's restaurant arising from the flood, Plaintiff issued payments to Subrogor thereby gaining subrogation rights (*id.* at ¶ 53).

The record indicates that a sworn statement of loss and subrogation receipt were executed by Subrogor on September 16, 2021 (NYSCEF Doc. 76). A $50,000.00 partial payment was made on July 21, 2021, followed by a $249,250.00 payment on September 22, 2021, a $50,000.00 payment on October 27, 2021, a $750.00 payment and a $15,000.00 payment on November 9, 2021, a $50,000.00 payment on March 31, 2022, a $1960.63 payment and a $37,241.89 payment on June 27, 2022 (*id.*). The sworn statement of loss, dated September 16, 2021, reflects there was a $50,000.00 advance made from Plaintiff to the Subrogor, which comports with the July 21, 2021 payment of $50,000.00. This action was initiated via Summons and Complaint on January 14, 2022 (NYSCEF Doc. 1).

On April 4, 2022, AJD served its Answer (NYSCEF Doc. 11). On June 28, 2022, AJD made the instant combined motion to dismiss and motion for summary judgment (NYSCEF Doc. 46). AJD argues that Homeport and Subrogor executed a settlement agreement and release on September 20, 2021 (*see* NYSCEF Doc. 17). In the settlement agreement, Subrogor represented that it had not assigned its claims to any other party (*id.* at ¶ 11). The settlement amount was for a total of $384,452.30 (*id.* at ¶ 1). AJD argues, therefore, that Homeport has already paid damages

claimed in this action and the claims should be dismissed against AJD with prejudice because Plaintiff cannot establish that it has damages (NYSCEF Doc. 11 at ¶ 29).

Plaintiff filed opposition on September 14, 2022 (NYSCEF Doc. 105). Plaintiff argues neither it nor Homeport's insurer were parties to the alleged September 20, 2021 settlement agreement (*id.* at ¶ 23). Plaintiff asserts that prior to the September 20, 2021 settlement agreement, Plaintiff put Homeport on notice of its subrogation claim via a notice of claim dated June 24, 202 (*id.* at ¶ 24). Plaintiff argues that a general release signed by an insured after it receives payment from an insurer will not execute the insurer's right to subrogation if the settlement is made without the insurer's consent and if the alleged tortfeasor was on notice of the insurer's subrogation rights. Plaintiff also argues that the "made whole" doctrine does not bar its subrogation claims because allegedly, the damaged items Homeport compensated Subrogor for have minimal overlap with the items covered by Plaintiff's policy (*id.* at ¶¶ 49-50).

There was a reply filed on February 14, 2023 (NYSCEF Doc. 186).[1] It is argued that Homeport did not have knowledge about Plaintiff's subrogation claim and therefore the settlement agreement should apply (*id.*).

II. Discussion

A. Standard

Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact. (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012]). The moving party's "burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Jacobsen v New York City Health and Hosps. Corp.*, 22 NY3d 824, 833 [2014]).

[1] Another attorney claims to have filed a joint reply on January 17, 2023 (*see* NYSCEF Doc. 168).

Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. (*See e.g., Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 [1st Dept 2003]). Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (*see Banco Popular North Am. v Victory Taxi Mgt., Inc.*, 1 NY3d 381 [2004]).

When reviewing a motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

In assessing a motion to dismiss on the ground that an action may not be maintained because of a release, the allegations in the complaint are to be treated as true, all inferences that reasonably flow therefrom are to be resolved in the plaintiff's favor, and where the plaintiff has submitted an affidavit in opposition to the motion, it is to be construed in the same favorable light. At the same time, however, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration. (*see*

CPLR § 3211(a) (5); *see also Putnam v Kibler*, 210 AD3d 1458, 1459-1460 [4th Dept 2022] citing *Sachetti-Virga v Bonilla*, 158 AD3d 783, 784 [2d Dept 2018]).

As stated by the Court of Appeals, subrogation may arise either contractually or under the doctrine of equitable subrogation (*Millenium Holdings LLC v Glidden Co.*, 27 NY3d 406, 414 [2016]). The right of equitable subrogation arises from payment to the insured (*RLI Ins. Co. v Turner/Santa Fe*, 58 AD3d 413, 414 [1st Dept 2009] citing *J & B Schoenfeld, Fur Merchants, Inc. v Albany Ins. Co.*, 109 AD2d 370, 372-373 [1st Dept 1985]). Where an insurer pays for losses sustained by an insured arising from a tortfeasor, the insurer may recover money expended under the doctrine of equitable subrogation (*Fasso v Doerr*, 12 NY3d 80, 86 [2009]). If a tortfeasor pays money to the insurer attributable to expenses that were paid by the insurer, the insurer may recoup its disbursements from the insured. However, when the tortfeasor does not pay damages to the insurer, the insurer, as subrogee, may seek recovery directly from the tortfeasor (*id.* at 87).

The Court of Appeals has held that once an insurer acquires a right of equitable subrogation against a tortfeasor, an insured and the tortfeasor cannot, without the insurer's consent, agree to terminate an insurer's equitable subrogation rights via settlement, and any provision of a settlement agreement which purports to do so is unenforceable (*id.* at 88-89; *see also American Tr. Ins. Co. v Smiley*, 198 AD3d 557, 558-559 [1st Dept 2021]; *NYP Holdings, Inc. v McClier Corp.*, 65 AD3d 186, 189 [1st Dept 2009]). This rule applies even if the tortfeasor does not have direct knowledge of an insurer's right to subrogation but possesses information which would reasonably put the tortfeasor on notice of the insurer's right (*Ocean Acc. & Guar. Corp. v Hooker Electrochemical Co.*, 240 NY 37, 50-51 [1925]).

B. The Purported Settlement

The motion to dismiss/motion for summary judgment seeking dismissal of the claims against AJD based upon an alleged settlement between Subrogor and Homeport are denied, without prejudice, with leave to renew upon the completion of discovery and a more fully developed evidentiary record. Although AJD asserts that the settlement agreement pre-dated any right of subrogation, this argument appears to conflict with evidence proffered in opposition by Plaintiff. The "Subrogation Receipt" is dated September 16, 2021 (NYSCEF Doc. 76). The terms of that receipt reflect that Plaintiff was paying $315,000.00 to Subrogor for claims arising from a "pipe break" on June 8, 2021 (*id.*). It explicitly states that Subrogor:

> "[H]ereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said Insurance Company to sue, compromise or settle in the undersigned's name or otherwise all such claims and to execute and sign releases…of such claims in the name of the undersigned…
>
> Warranted no settlement has been made by the undersigned with any person or corporation against whom a claim may lie, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor release given by the undersigned without the written consent of the said Insurance Company…" (*id.*).

Likewise, a sworn statement in proof of loss was provided in opposition (NYSCEF Doc. 86). That document indicates that $50,000.00 had been advanced by Plaintiff to Subrogor. The Subrogor also covenanted:

> "[T]hat no release has been or will be given to or settlement or compromise made with any third party who may be liable in damages to the insured and the insured in consideration of the payment made under this policy hereby subrogates the said Company to all rights and causes of action the said insured has against any person, persons, or corporations whomsoever for damage arising out of or incident to said loss or damage to said property and authorizes said Company to sue in the name of the insured…" (*id.*).

Transaction documents indicate the $50,000.00 which is reflected in the sworn statement of loss was paid on July 21, 2021 (*id.*). Moreover, on June 24, 2021, a notice of claim was sent by Plaintiff's counsel to Homeport and Defendant Ironstate Holdings notifying them that (a) the Subrogor's damages amounted to an estimate in excess of $1,300,000.00; (b) Plaintiff may pursue a subrogation claim; (c) that evidence connected to the loss should be preserved for inspection by Plaintiff, and (d) advising of a joint inspection of the damaged property (*see* NYSCEF Doc. 79). It can be inferred, for purposes of a motion to dismiss/motion for summary judgment, that Homeport's insurer had received notice of this document, because on July 1, 2021, they notified Plaintiff's counsel of the claim representative handling this loss (*see* NYSCEF Doc. 87). Moreover, there was extensive coordination from Homeport's insurer regarding attending an inspection of the Premises (NYSCEF Doc. 88).

Pursuant to the $50,000.00 ostensibly provided to Subrogor on July 21, 2021, there is at a minimum an issue of fact as to whether this payment gave rise to Plaintiff's subrogation rights. Given this payment and the possible existence of subrogation rights, it follows that there is likewise an issue of fact as to whether the settlement agreement, which was not executed until September 20, 2021, and was purportedly made without the consent or knowledge of Plaintiff, is enforceable to estop Plaintiff's subrogation claims.

Moreover, since Subrogor assigned its right to settle any claims arising from the loss to Plaintiff on September 16, 2021 in both the sworn statement of loss and again in the subrogation receipt, prior to the execution of the settlement agreement, there is an issue of fact as to whether Plaintiff even had the authority to enter into the settlement agreement which AJD relies upon. Indeed, although the parties have largely framed their arguments in terms of equitable subrogation, these documents could give rise to contractual subrogation rights (*see Federal Ins. Co. v Arthur*

Andersen & Co., 75 NY2d 366, 371 [1990] [noting difference between equitable subrogation rights which accrue upon payment to insured, and contractual subrogation rights which accrue under an agreement with an insured]).

Further, considering Homeport and its insurer were on notice as early as June 24, 2021, of at a minimum, the potential of Plaintiff having a subrogation claim, they cannot claim to have relied in good faith that Plaintiff did not have a subrogation interest which would preclude enforceability of the settlement agreement (*see Aetna Cas. and Sur. Co. v Bekins Van Lines Co.*, 67 NY2d 901, 903 [1986]; *see also Group Health, Inc. v Mid-Hudson Cablevision, Inc.*, 58 AD3d 1029, 1030 [3d Dept 2009] citing *Winkelmann v Excelsior Ins. Co.*, 85 NY2d 577, 581 [1995] ["This doctrine of equitable subrogation must be liberally applied for the protection of its intended beneficiaries, i.e., insurers"]). Likewise, at this early stage in litigation, given conflicting affidavits, damage estimates, and payments, the Court cannot definitively say the "made whole" doctrine bars Plaintiff's claims (*see Fasso v Doerr*, 12 NY3d 80, 87 [2009]). For instance, the amount of payment by Plaintiff to Subrogor exceeds the purported settlement payment from Homeport to Subrogor, and Plaintiff has provided affidavit testimony indicating only $48,000.00 in paid expenses appear to be duplicative. Therefore, AJD's motion seeking dismissal based on a purported settlement between Subrogor and Homeport is denied, without prejudice.

Accordingly, it is hereby,

ORDERED that AJD's motion is denied in its entirety; and it is further

ORDERED that all parties are directed to appear for a preliminary conference with the Court on July 19, 2023 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York. In the event the parties agree to a proposed preliminary conference order prior to the date of the

conference, the parties are directed to submit the proposed order via e-mail to SFC-Part33-Clerk@nycourts.gov, which may obviate the need to appear at the conference; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order with notice of entry on all parties.

This constitutes the Decision and Order of the Court.

6/26 /2023
DATE

Mary V. Rosado
HON. MARY V. ROSADO, 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