SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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GREATER NEW YORK MUTUAL INSURANCE COMPANY AS SUBROGEE OF DERFNER MANAGEMENT, INC. AND ALL OTHER NAMED INSUREDS UNDER POLICY NUMBER 1131M90608

Plaintiff,

- v -

NAHIR INTERNATIONAL TRADING CORP.,

Defendant.

INDEX NO. 151493/2014

MOTION DATE _____

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number were read on this application to/for _____.

HON. KELLY O'NEILL LEVY:

Defendant Nahir International Trading Corp. moves, pursuant to CPLR 3212, for an order granting summary judgment against plaintiff Greater New York Mutual Insurance Company, as subrogee of Derfner Management, Inc. (Derfner), dismissing the complaint and all cross-claims against it. Plaintiff opposes and cross-moves, pursuant to CPLR 3212, for an order granting summary judgment against Defendant on the issue of liability.

BRIEF BACKGROUND

This action arises from an incident in which a fire allegedly erupted in Defendant's premises at 234 West 39th Street, Manhattan on June 6, 2012, causing damages. Derfner owns the building located at 234 West 39th Street, and Defendant was a tenant in the building at the time of the incident. Plaintiff, an insurance company, brings this subrogation action on behalf of

Derfner against Defendant, seeking the sum of $175,139.34, together with costs and disbursements and statutory interest.[1]

The controversy centers on whether the waiver of subrogation contained in paragraph 9(e) of the Standard Form of Store Lease entered into by Harold Derfner Co. LLC and Defendant entitled "Destruction, Fire and Other Casualty" is limited to the demised premises or includes all losses. Plaintiff argues that the waiver of subrogation provision in paragraph 9(e) specifically refers to the "demised premises" and therefore applies only to the destruction of Defendant's demised premises. Defendant argues that any language in 9(e) referencing the demised premises is "explanatory" in nature and thus the waiver of subrogation clause includes all losses. Both parties rely on the Court of Appeals decision *Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y.2d 654 (1997) for support.

ANALYSIS

Subrogation is the equitable doctrine that "allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused loss for which the insurer is bound to reimburse." *Id.* at 660. A waiver of subrogation provision therefore allocates the risk of liability to the insurer, and "[w]hile 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." *Id.*; *see also Gap, Inc. v. Red Apple Companies, Inc.*, 282 A.D.2d 119, 124 (1st Dep't 2001); *State Farm Ins. Co. v. J.P. Spano Const., Inc.*, 55 A.D.3d 824, 825 (2d Dep't 2008).

[1] The complaint states that "[u]pon information and belief, plaintiff adjusted the claim of its insured in the amount of $175,139.34 and paid its insureds $170,139.34 after application of a $5,000.00 deductible, with plaintiff thereby becoming subrogated to the claim of its insureds herein." ¶ 8.

Paragraph 9(e) of the Standard Form Loft Lease at issue in *Kaf-Kaf*, entitled "Destruction, Fire and Other Casualty" states, in pertinent part:

> "[E]ach 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, *Landlord and Tenant each hereby releases and waives all right of recovery against the other or any one 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 providing that such a release or waiver shall not invalidate the insurance and also, provided that such a policy can be obtained without additional premiums. *Tenant acknowledges that Landlord will not carry insurance on Tenant's furniture and/or furnishings or any fixtures or equipment, improvements or appurtenances removable by Tenant and agrees that Landlord will not be obligated to repair any damage thereto or replace the same*" (emphasis in original).

The *Kaf-Kaf* court concluded that the landlord's and the tenant's waiver of subrogation regarding "any claim against the other party for loss or damage resulting from fire or other casualty" was not limited to demised premises, but also encompassed the landlord's claims for loss of rent and the tenant's claims for personal property damage and business interruption losses. *Id.* at 660.

The Court of Appeals further reasoned that "[a]lthough subsections (a) through (d) in [paragraph 9] specify the 'demised premises,' the waiver of subrogation clause in subsection (e) is conspicuously devoid of any mention of the 'demised premises.'" Additionally, "subsection (e) makes explicit reference to items which clearly do not fall within the definition of 'demised premises,' such as 'furniture and/or furnishings or any fixtures and equipment, improvements or appurtenances removable by" the tenant "indicating that the application of the waiver clause was not intended to be limited to the 'demised premises.'" *Id.*

In the case at bar, paragraph 9(e) of the lease between Harold Derfner Co. LLC and Defendant states, in relevant part:

> "[E]ach 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 of 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*" (emphasis added).

Unlike in the lease analyzed in *Kaf-Kaf*, paragraph 9(e) of the instant lease specifically mentions the "demised premises." However, in *The Travelers Property v. A& R Kalimian Realty, L.P.*, 2007 WL 4307389 (Sup. Ct. N.Y. County 2007), citing *Kaf-Kaf*, a case with a lease provision like the one at bar, the court found that the waiver of subrogation clause was broad and encompassed loss of rent, personal property damage and business interruption losses. Paragraph 9(e) of the lease in *Travelers* states, in relevant part:

> "[E]ach 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 herby releases and waives all right of 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*" (emphasis added).

The pertinent lease language in *Travelers* is identical to that of the lease here. Plaintiff contends that the court in *Travelers* held contrary to the Court of Appeals in *Kaf-Kaf*, and argues that the explicit inclusion of the term "demised premises" in paragraph 9(e) necessarily limits the scope of the waiver of subrogation provision to apply to the "demised premises" only. A deeper analysis shows why both *Travelers* and *Kaf-Kaf* reach the same result despite differences in lease language and thus the waiver provision in the instant case bars Plaintiff's subrogation claim.

As discussed above and reiterated in *Travelers*, the Court of Appeals held that the waiver of subrogation clause set forth in the lease regarding "any claim against the other party for recovery for loss or other damage resulting from fire or other casualty" was broad and encompassed loss of rent, personal property damage and business interruption losses. The Court of Appeals noted that paragraph 9(e) explicitly included "personal property, equipment, trade fixtures, goods and merchandise located therein," in addition to damage to the demised premises.

In *Cresvale Intern. Inc. v. Reuters America, Inc.*, a property insurer sought to recover amounts it paid for tenant's fire-related property and business interruption losses. 257 A.D.2d 502 (1st Dep't 1999). The First Department held that the waiver of subrogation provision in the commercial lease regarding claims for any loss or damage to the tenant's property resulting from fire or other hazards covered by fire and extended coverage insurance was not limited to claims for property damage, but also encompassed any loss covered under tenant's property policy, including business interruption losses. Specifically, "the waiver clause applied to 'any loss or damage to [tenant's] property … resulting from fire or other hazards covered by such fire and extended insurance coverage.'" *Id.* at 505. The *Cresvale* court concluded "that the use of the words 'any loss,' followed by the disjunctive 'or,' requires a much broader reading" beyond "limiting the waiver to claims for property damages." The court cited the Third Department case *Coutu v. Exchange Ins. Co.*, 174 A.D.2d 241, 243 (3d Dep't 1992), noting that, "where two words in [an] exclusion clause [are] stated in disjunctive, they must be separately considered." *Id.*

It necessarily follows that, here, the disjunctives in the lease must require a much broader construction. As with the waiver of subrogation provisions in *Kaf-Kaf* and *Cresvale*, this court must construe the waiver of subrogation clause as extending to "any" loss. Furthermore, this

court must construe the waiver of subrogation clause as extending beyond the demised premises as it also uses the disjunctive "or" to make explicit reference to removable items which clearly do not fall within the definition of "demised premises," such as, "any personal property, equipment, trade fixtures, goods and merchandise." Accordingly, the subrogation claim is barred and Plaintiff's complaint is dismissed. *See Ins. Co. of N. Am. v. Borsdorff Servs., Inc.*, 225 A.D.2d 494, 494 (1st Dep't 1996) ("waiver of subrogation provisions barring one party's insurer from bringing a subrogation action against the other party to recover amounts paid out under the insurance policy, is valid and enforceable, as an allocation of risk provision, and thereby precludes this subrogation").

As mentioned above, a waiver of subrogation allocates the risk of liability to the insurer. *See Gap, Inc. v. Red Apple Companies, Inc.* at 124 (1st Dep't 2001); *State Farm Ins. Co. v. J.P. Spano Const., Inc.*, at 825 (2d Dep't 2008). Nevertheless, a waiver clause in an agreement does not preclude "one party from suing the other to recover for a loss to the extent that such loss is not required by the parties' agreement to be covered—and, in fact, is not covered—by insurance." *Reade v. Reva Holding Corp.*, 30 A.D.3d 229, 233 (1st Dep't 2006). Here, however, plaintiff insurer seeks the amount covered by it and paid out. In affording the parties freedom of contract, the waiver bars Plaintiff's claim of liability. *See Great American Ins. Co. of New York v. Simplexgrinnell LP*, 60 A.D.3d 456 (1st Dep't 2009) (holding that waiver of subrogation provision established defense to gross negligence claim); *see also Tower Risk Mgt. v. Ni Chunp Hu*, 84 A.D.3d 616 (1st Dep't 2011).

CONCLUSION AND ORDER

For the reasons stated above, the court finds that the waiver of subrogation provision covers all loses and Plaintiff's liability claim is necessarily precluded. Accordingly, it is hereby

ORDERED that defendant Nahir International Trading Corp.'s motion for an order granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that plaintiff Greater New York Mutual Insurance Company's cross-motion for an order granting summary judgment on the issue of liability is denied.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

6/19/2017
DATE

Kelly O'Neill Levy
KELLY O'NEILL LEVY, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED	[ ]	NON-FINAL DISPOSITION			
	[ ]	GRANTED	[ ]	DENIED	[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER	[ ]	SUBMIT ORDER			
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