

One Beacon Ins. Co. v Axelrod

2007 NY Slip Op 31386(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0113519/2005

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMENT. **EMILY JANE GOODMAN**

PART 17

Index Number : 113519/2005

ONEBEACON

INDEX NO. _____

vs

AXELROD, HARVEY

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION**

FILED

MAY 30 2007

NEW YORK
COUNTY CLERKS OFFICE

Dated: 5/24/07

EMILY JANE GOODMAN ^{SC}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
ONE BEACON INSURANCE COMPANY A/S/O DIVATEX
HOME FASHIONS, INC.,

Plaintiff,

Index No.
113519/05

-against-

HARVEY AXELROD D/B/A S. AXELROD CO.,

Defendant.

-----x
EMILY JANE GOODMAN, J.S.C.:

Defendant Harvey Axelrod d/b/a S. Axelrod Co. (Axelrod) moves, pursuant to CPLR 3212, for an order granting summary judgment in his favor and dismissing the complaint in its entirety on the ground that this subrogation action is barred by the waiver of subrogation clause in the lease between the parties.

Axelrod is the owner and landlord of the premises at issue, located at 7 West 30 Street, New York, New York. Plaintiff's subrogor, Divatex Home Fashions, Inc. (Divatex), was a tenant at the 12th floor of the premises. Axelrod and Divatex entered into a lease agreement on October 11, 2004, which was in effect on March 1, 2005, the date of the alleged loss. The complaint alleges that, on that date, water was discharged into Divatex's premises as a result of defective conditions within the building which were due to Axelrod's carelessness, recklessness and negligence in the ownership, maintenance and control of the building. According to the complaint, the water caused Divatex to sustain property damage,

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business interruption and additional operating expenses in the sum of \$34,401.71. Under the terms of Divatex's insurance policy with plaintiff One Beacon Insurance Company (One Beacon), which included a \$1,000 deductible, One Beacon paid Divatex the sum of \$33,401.71. In the instant action, One Beacon seeks \$33,401.71 and Divatex seeks \$1,000 from Axelrod.

Axelrod argues that he is entitled to summary judgment based on the waiver of subrogation provision in the lease between him and Divatex. Paragraph 9 (e) of the lease states, in part:

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 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. 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. ... Tenant acknowledges that Owner 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 Owner will not be obligated to repair any damage thereto or replace the same.

Based on this provision, Axelrod argues that Divatex waived Axelrod's liability for any loss due to any cause when compensated by insurance. Axelrod states that, because One Beacon compensated

Divatex for its losses, the waiver of subrogation clause applies. Axelrod argues that One Beacon steps into Divatex's shoes, such that the waiver extends to One Beacon as well. Axelrod points out that the Court of Appeals upheld a similar waiver of subrogation provision in Kaf-Kaf, Inc. v Rodless Decorations, Inc. (90 NY2d 654 [1997]). Axelrod further states that, as required by paragraph 9 (e) of the lease, both its insurance policy and Divatex's policy contain clauses providing that such a release waiver would not invalidate the insurance.

In opposition to the instant motion, One Beacon argues that the mutual waiver of subrogation contained in paragraph 9 (e) of the lease should not be enforced because paragraph 62 of the rider to the lease only obligates Divatex to obtain insurance, without any corresponding obligation on the part of Axelrod. One Beacon asserts that

a lease which requires the tenant to hold the landlord harmless from liability and "places the sole obligation to obtain insurance and pay premiums upon the tenant" violates General Obligations Law § 5-321 and is unenforceable to the extent that it attempts to relieve the landlord of responsibility for damages to the tenant caused by the landlord's own negligence.¹

A to Z Applique Die Cutting, Inc. v 319 McKibbin Street Corp., 232

¹General Obligations Law § 5-321 provides that agreement in connection with 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. . . in the operation or maintenance of the demised premises. . . shall be deemed void as against public policy and wholly unenforceable."

AD2d 512 (2d Dept 1996), quoting Radius, Ltd. v Newhouse, 213 AD2d 614, 615 (2d Dept 1995). One Beacon argues that the case of Kaf-Kaf, Inc. v Rodless Decorations, Inc. (90 NY2d 654, supra), cited by Axelrod, is inapplicable because it does not address the issue of insurance procurement.

In response, Axelrod argues that A to Z Applique Die Cutting, Inc. (232 AD2d 512, supra), is distinguishable from the instant case, in that it was not a subrogation case, but rather in that case the tenant itself brought a negligence action against the landlord to recover for damage to tenant's inventory and equipment when sprinkler pipes in the premises froze and broke. Axelrod points out that the lease in A to Z Applique Die Cutting, Inc. contained language under which the owner was not to be liable to the tenant for any damages to tenant's merchandise, regardless of the cause of hazard. Axelrod argues that although paragraph 62 of the lease in the instant case requires Divatex to maintain liability insurance, there is nothing in the lease that states that Axelrod would not maintain insurance, and Axelrod was, in fact, insured.

Axelrod asserts that the case of Kaf-Kaf, Inc. v Rodless Decorations Inc. (90 NY2d 654, supra), is applicable and directly on point, in that it was a subrogation action in which the Court of Appeals held that the waiver between the parties was broad and plainly stated and applied to both parties to the lease. The Court

* 6]

of Appeals, according to Axelrod, held that this reflected the parties' intention to release any right of recovery against the other or anyone claiming through or under each of them by way of subrogation or otherwise. Axelrod asserts that such waiver of subrogation clauses are routinely upheld by courts when the insurance policies of the parties involved so provide, as in the instant case. Axelrod maintains that the waiver of subrogation clause contained in the lease should preclude One Beacon's negligence claims.

The Court cannot find that Alexrod violated GOL § 5-321 merely because the lease required Divatex to procure public liability insurance, but was silent as to Alexrod's obligation, where the waiver of subrogation provision contained language stating that the "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" (emphasis added). Thus, although there was no specific provision requiring that Alexrod obtain insurance, the waiver only applied in the instance where both releasors' did in fact obtain insurance.² Accordingly, this case is governed by Kaf-Kaf, Inc. v Rodless Decorations, Inc., 90 NY2d 654, supra. The lease at issue is far different from the lease in A to Z Applique Die Cutting, Inc. (232 AD2d 512, supra),

²Therefore, by the terms of the lease, had Alexrod not procured insurance, the release and waiver provision would have become unenforceable.

[* 7]
where the sole obligation to procure insurance was placed on the tenant.³

Accordingly, it is

ORDERED that the defendant's motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendant as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: May 21, 2007

ENTER:



J.S.C.
EMILY JANE GOODMAN

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³Further, A to Z was not a subrogation action, but rather involved the applicability of a hold harmless provision. Courts have routinely treated hold harmless provisions differently from subrogation provisions.