

Wise Underwriting Agency v Tranel, Inc.

2007 NY Slip Op 32568(U)

August 8, 2007

Supreme Court, New York County

Docket Number: 0116676/2004

Judge: Walter Tolub

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

PRESENT: _____ PART _____

Justice

Index Number : 116676/2004

SBJ LIMITED

vs

TRANEL

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

a 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 *is denied in accordance with the accompanying memorandum opinion.*

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

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/8/07

Y

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
WISE UNDERWRITING AGENCY
as Subrogee of ARMED IMPEX CORP.

Plaintiff,

-against-

TRANEL, INC.,

Defendant.

FILED
AUG 20 2007
NEW YORK
COUNTY CLERK'S OFFICE

Index No.
116676/2004

TOLUB, J.:

By this motion, Defendant moves for an order granting summary judgment pursuant to CPLR §3212 based on its counterclaim for contractual indemnification. Plaintiff cross-moves for an order granting partial summary judgment dismissing Defendant's counterclaim. Defendant's motion is granted in its entirety. Plaintiff's cross-motion is denied.

Background

Armed Impex Corp. ("Armed Impex") is a company in the business of buying and selling oriental rugs. In July 1995, Armed Impex entered into a ten year lease ("Lease") with Defendant Tranel, Inc. ("Tranel") as owner/landlord for the 7th floor of 135 Madison Avenue, New York ("the premises").¹ In

¹ All of the business on the 7th floor of Defendant's building formed a corporation named Company 26 LLC ("Company 26") for the purpose of entering into only one lease with Defendant. Armed Impex is part of Company 26 and is required to abide by the terms of the Lease entered into with Defendant.

January 2004, a radiator valve on the 8th floor of the building malfunctioned, resulting in a flood that damaged the 7th and 8th floors. Armed Impex's antique rugs, stored on the 7th floor, were damaged. Armed Impex submitted a claim to their cargo insurer, WISE Underwriting Agency ("WISE").² WISE paid the insurance claim to Armed Impex and claims that it became subrogated to Armed Impex's rights pursuant to the insurance policy.

In November 2004, Plaintiff commenced a subrogation action against Defendant/landlord claiming that it should be reimbursed by Defendant for the alleged damage caused to Armed Impex's inventory. This claim is premised upon the contention that Armed Impex failed to comply with the Lease by failing to obtain an insurance policy containing a clause waiving any subrogation claims against the Defendant (see, *infra*). Defendant further argues that Armed Impex's breach of the Lease prevents Plaintiff from recovering under any subrogation provision in the insurance policy it had with Armed Impex. The Lease Agreement between Armed Impex and Defendant contained the following relevant provisions:

Paragraph 9 "Destruction, Fire and other Casualty"

² The name of Plaintiff was changed from SBJ Limited to WISE Underwriting Agency, Ltd. and it is agreed that the action be deemed to have been initially commenced by the newly named Plaintiff, WISE.

Nothing contained hereinabove shall relieve tenant from liability that may exist as a result of damage from fire or other casualty. **Notwithstanding the forgoing, each party shall look first to any insurance in its favor before making a 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 collectable and to the extent permitted by law, owner 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. If, and to the extent, that such waiver can be obtained only by the payment of additional premiums, then the party benefitting from the waiver shall pay such premiums within ten days after written demand or shall be deemed to have agreed that the party obtaining insurance coverage shall be free of any further obligation under the provisions hereof with respect to waiver of subrogation. 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. (emphasis added).**

Paragraph 66 "Insurance"

Tenant shall obtain and keep in force, at its own expense, with respect to the leased premises, a policy or policies of bodily injury and property damage insurance with an insurance company or companies in a form

reasonably satisfactory to Landlord which shall be in the minimum amount of \$1 million combined single limit per occurrence for bodily injury and property damage. Such policy or policies shall include Landlord's interest which Landlord named as an additional insured. Tenant shall deliver to Landlord such policy or policies or certificates evidencing such coverage, together with a receipt thereon evidencing payment of premium or other satisfactory proof thereof. Landlord shall have the right to require Tenant to reasonably increase the amount of coverage under such policy or policies. In the event of the Tenant's failure to comply in any respect herein, the Landlord may cause same to be done to the Tenant's account and the cost thereof, shall be deemed to be additional rent. **During the term hereby demised the landlord shall insure the building of which the demised premises are a part, and Tenant shall insure the demised premises and its fixtures and contents for the full replacement value under an "ALL RISK" type policy which shall include a waiver by the insurer of all right of subrogation against Landlord or Tenant in connection with any loss or damage thereby insured against.** Neither party, nor its agents, employees or guest shall be liable to the other party for loss or damage caused by any risk covered by such insurance. Each party shall deliver to the other satisfactory proof evidencing such coverage. If the release by either Landlord or Tenant as herein set forth shall contravene any law with respect to exculpatory agreements, the liability of the party in question shall be deemed not released but secondary to the other's insurer. (emphasis added).

Discussion

As with any motion for summary judgment, success is wholly dependent on whether the proponent of either of the respective motions has made a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (Wolff v New York City Trans. Auth., 21 AD3d 956 [2d Dept 2005], quoting Winegrad v New York University Med. Ctr., 64 NY2d 851, 853 [1985] [internal quotes omitted]). "A party is entitled to summary judgment if the sum total of the undisputed facts establish the elements of a claim or a defense as a matter of law" (Barr, Altman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2006] §37:80). "This means that none of the material elements of the claim or defense are in dispute" (Id). In order to defeat a motion for summary judgment, the opposing party must present facts in admissible form sufficient to require a trial of any issue of material questions of fact (Zuckerman v. City of New York, 49 NY 2d 557, 562 [1980]).

As a preliminary matter, the court must first address the issue of whether an insurer (Plaintiff), can proceed with a subrogation claim against a landlord when the insured (the tenant) fails to comply with the insurance requirements set forth

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in the Lease. Subrogation is an equitable doctrine which "entitles an insurer to stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (Dominion Ins. CO., Ltd. v. State, 305 AD2d 779, 781 [3d Dept 2003]). A third party is "one to whom the insurer owes no duty under the insurance policy through which its loss was incurred" (Id.). An insurer who pays claims against the insured for damages caused by the wrongdoing of a third party is entitled to be subrogated to the rights which the insured had against the third party (Ocean Accident & Guarantee Corporation v. Hooker Electro-Chemical Co., 240 NY 37, 47 [1925]); Hartford Acc. & Indem. Co. v. CAN Insurance Co., 99 AD2d 310, 312 [1st Dept 1984]). However, a subrogee has no greater or different right or remedy than that held by its subrogor, and is subject to any defense or claim of lack of insurance coverage which may be raised against the assured (Hartford Acc. & Indem. Co. v. CAN Insurance Co., 99 AD2d 310, 312 [1st Dept 1984]).

Under New York law, parties to a lease may agree to waive their insurer's right of subrogation (Locite VSI Inc. v. Chemfab New York Inc., 268 AD2d 869, 871 [3d Dept 2000]). By electing to waive this right to recovery, the insurer accepts the fact that

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the policyholder and the parties with whom it has contracted have allocated the risk of the insured to the insurer. More importantly, a waiver of subrogation provision is valid and enforceable within the scope of the specific context in which it appears (Kaf-Kaf Inc. v. Rodless Decorations, Inc., 90 NY2d 654, 660 [1997]; Insurance Co. of North America v. Borsdorff Services, Inc., 639 NYS2d 816, 816 [1st Dept 1996]; VSI Inc. v. Chemfab New York Inc., 268 AD2d 869, 871 [3d Dept 2000]).

In Seneca Ins. Co. v. City of New York, (35 AD3d 248, 249 [1st Dept 2006]) the landlord and tenant entered into a lease which absolved the landlord from all liabilities, but required the tenant to obtain "insurance coverage designating the landlord as an additional insured with a waiver of subrogation" (Id at 249). While the lease was in effect, the sprinkler system malfunctioned in the building. Seneca, as the insurer, paid the tenant's damage claim, and then commenced a subrogation action against the landlord of the property. This claim however, was rejected and ultimately dismissed because as subrogee, Seneca stood in the shoes of the tenant, and could not avoid the covenants of the lease waiving rights to subrogation (Id).

Similar to the insurer in Seneca, Plaintiff in this action seeks to recover the money it paid to Armed Impex for the damage

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caused by defendant's alleged negligence. Although the Lease between Armed Impex and Defendant provided that the tenant was to obtain a waiver of subrogation from the insurer, Armed Impex failed to do so, and therefore, breached the Lease. The tenant's failure to obtain the waiver of subrogation clause in its insurance policy constitutes a breach of the Lease. Had Armed Impex obtained an insurance policy with the waiver of subrogation, the instant action would be barred since Paragraph 9 of the Lease would prohibit the lawsuit. Plaintiff was only able to commence this action as a direct result of Armed Impex's failure to obtain the proper insurance policy. As in Seneca, the Plaintiff insurer, standing in the shoes of the tenant, is bound by the waiver of subrogation clause in the Lease.

Agreements directing a party to procure insurance are valid and enforceable in this State. The penalty for breaching an agreement to procure insurance is liability for the resulting damage. (Diaz v. City of New York, 5 AD3d 195 [1st Dept 2004]; Fragiacomo v. VHR Construction Corp., 241 AD2d 477 [2nd Dept 1997]). Inasmuch as the tenant, Armed Impex breached the Lease provision requiring them to obtain the waiver of subrogation, Defendant's motion for summary judgment on the counterclaim for

indemnification is granted because of said breach. As a result, Plaintiff's complaint must be dismissed.

Accordingly, it is

ORDERED that Defendant's motion for summary judgment on its counterclaim is granted: and it is further


ORDERED that Plaintiff's cross-motion for partial summary judgment of Defendant's counterclaim is denied; and it is further

ORDERED that Plaintiff's complaint is dismissed with costs and disbursements to the Defendant as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 8/8/07

ENTER:


HON. WALTER B. TOLUB J.S.C.

FILED
AUG 20 2007
NEW YORK
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