

Travelers Prop. & Cas. Ins. Co. v A & R Kalimian Realty, L.P.
2007 NY Slip Op 33907(U)
November 30, 2007
Supreme Court, New York County
Docket Number: 0103459/2005
Judge: Shirley W. Kornreich
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH
Justice

PART 54

Index Number : 103459/2005
TRAVELERS INDEMNITY COMPANY.
vs
A&R KALIMIAN REALTY, L.P.
Sequence Number : 002
DISMISS

INDEX NO. _____
MOTION DATE 8/16/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

his motion to/for Summary

Judgment

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

PAPERS NUMBERED

1-2
3-4
5-6

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

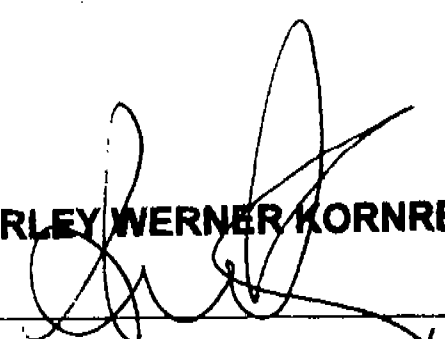
FILED

DEC 05 2007

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

HON. SHIRLEY WERNER KORNREICH



Dated: 11/30/07

J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

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

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

-----X
THE TRAVELERS PROPERTY & CASUALTY
INSURANCE COMPANY as Subrogee to the
Rights of THE FOUNDATION CENTER,

Plaintiff,

-against-

A & R KALIMIAN REALTY, L.P. and ARISTA
AIR CONDITIONING CORP.,

Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.

**DECISION
and
ORDER**

Index No.: 103459/05

In this subrogation action by The Travelers Property & Casualty Insurance Company ("Travelers"), defendant A & R Kalimian Realty, L.P. ("Owner") moves for summary judgment dismissing the complaint and all cross-claims against it on the ground that Travelers' right to subrogation was waived by its insured, The Foundation Center ("Tenant").

This action arises out of a frozen sprinkler pipe that burst on January 11, 2004 on the fifth floor of the Owner's premises located at 79 Fifth Avenue, New York, NY ("premises"). The water leak allegedly damaged the Tenant's premises, property and business. The complaint alleges that the accident was caused by the negligence of the Landlord and defendant Arista Air Conditioning Corp. ("Contractor"), a contractor allegedly responsible for maintaining the sprinkler, air conditioning and fire alarm systems on the fifth floor.

On April 1, 1998, the Owner and Tenant entered into a lease for the second and third floors of the premises for a term commencing April 1, 1998 and terminating July 31, 2008 ("Lease"). The waiver of subrogation clause in ¶ 9(e) of the Lease provides as follows:

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 and effect only if both releasors' insurance policies contain a clause providing that such release or waiver shall not invalidate the insurance and also, provided that such a policy can be obtained without additional premiums.

The Owner and Tenant procured liability policies from, respectively, Greater New York Mutual Insurance Company ("GNY") and Travelers. The Travelers and GNY policies contained identical provisions relating to subrogation, which read, in pertinent part, as follows:

I. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income....

This will not restrict your insurance.

Travelers argues that the waiver of subrogation provision in ¶9(e) of the Lease applies only to the total or partial destruction of the Tenant's demised premises. This argument was rejected by the Court of Appeals in construing an identical lease provision. *Kaf-Kaf v. Rodless Decorations, Inc.*, 90 NY2d 654 (1997). The Court of Appeals held that the language in ¶9(e) waiving subrogation as to "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

[* 4]

property damage and business interruption losses. The high Court noted that ¶9(e) explicitly included in the waiver of subrogation “personal property, equipment, trade fixtures, goods and merchandise located therein,” in addition to damage to the demised premises. *Continental Ins. Co. v. Faron Engraving Co.*, 179 A.D.2d 360 (1st Dept. 1992), is distinguishable because “the paragraph containing the waiver of subrogation applied only to destruction of the demised premises which rendered the premises unusable.” *Id.* at 361.

Travelers also contends that the Travelers and GNY policies do not effectuate a waiver of subrogation. Again, the Court of Appeals has determined this issue adversely to Travelers’ position in *Kaf-Kaf v. Rodless Decorations, Inc.*, *supra*, which, as already noted, contained an identical waiver of subrogation lease provision. In *Kaf-Kaf* the insurance policies procured by the tenant and landlord, respectively, contained the following waiver of subrogation clauses:

the insured may: (1) as respects property while on the premises of the insured, release others in writing from liability for loss prior to loss, and such release shall not affect the right of the insured to recover hereunder; and

This insurance shall not be invalidated should the Insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the property described herein.

These clauses are substantially similar to the clauses in the Travelers and GNY policies in the case before this court. They permit the insured to waive the insurer’s right to subrogation in writing prior to a loss without impairing the insured’s right to recover under its own policy. This is consistent with the language of ¶9(e) providing that the waiver of subrogation shall be in effect if the “releasers’ insurance policies contain a clause providing that such release or waiver shall not invalidate the insurance.” The language in the Travelers and GNY policies that the written waiver will not “restrict your insurance” operates to prevent the insurer from invalidating or

limiting coverage due to the written waiver of subrogation in the Lease. The result in *Kaf-Kaf* was the dismissal of the subrogation action, which dictates the result here.

Continental Insurance Company v. 115-123 West 29th Street Owners Corp., 275 AD2d 604 (1st Dept. 2000), relied on by Travelers, is distinguishable because the lease in that case required the insurance policies to contain a waiver of subrogation. The Lease in this case does not require the parties to procure a policy with a clause waiving subrogation. Instead, it permits the parties to waive subrogation so long as it will not invalidate the insurance.

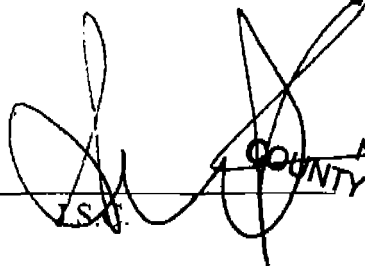
Hence, the Owner's motion for summary judgment is granted to the extent that Travelers' complaint against the Owner is dismissed. However, the Owner is not entitled to dismissal of the Contractor's cross-claims against it. The waiver of subrogation in the Lease does not apply to Travelers' claim against the Contractor, as there was no written waiver of subrogation regarding the Contractor prior to the loss. The Owner has not submitted any evidence to disprove that its negligence caused the accident or that the Contractor was solely at fault.

The remaining contentions of the parties have been considered and have been found to be without merit. Accordingly, it is

ORDERED that the motion by A & R Kalimian Realty, L.P., for summary judgment dismissing the complaint and all cross-claims against it is granted solely to the extent of dismissing the complaint against it by The Travelers Property & Casualty Insurance Company and in all other respects the motion is denied.

Dated: November 30, 2007

ENTER:



J.S.T.
FILED
DEC 05 2007
NEW YORK
COUNTY CLERK'S OFFICE