

**United Natl. Specialty Ins. Co. v  
Barta Trading Corp.**

2008 NY Slip Op 31153(U)

April 17, 2008

Supreme Court, New York County

Docket Number: 0114474/2005

Judge: Eileen A. Rakower

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PRESENT: RAKOWER Justice

PART 5

Index Number : 114474/2005

UNITED NATONAL SPECIALTY

vs

BARTA TRADING

Sequence Number : 002

RESTORE ACTION TO CALENDAR

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered \_\_\_\_\_ his motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1 (withdrawn)  
2, 3, 4, 5, 6  
7

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
APR 22 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 4/17/08

EILEEN A. RAKOWER  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

FOR THE FOLLOWING REASON(S):

... SHALL BE HELD TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X  
UNITED NATIONAL SPECIALTY INSURANCE  
COMPANY, as subrogee of PV&CO INC. and as  
Subrogee of PARTIDO REVOLUATONARIO  
DOMINICANO, INC. a/k/a LOCAL TIDON  
REVOLUTIONARY, and as Subrogee of EL  
PARAISO CORP. t/a COOTA'S PET SHOP,

Plaintiffs,

Index No.  
114474/05

- against -

DECISION/ORDER

BARTA TRADING CORP., 3859 TENTH  
AVENUE CORP., ARBIB & RABBA REALTY  
CO., LE FRANK MANAGEMENT CORP.,  
Defendants.

**FILED**  
APR 22 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
HON. EILEEN A. RAKOWER

Plaintiff, United National Specialty Insurance Company("United"), brings this action for reimbursement, through subrogation, of payments made to United's insureds for property damage claims associated with a fire that occurred in a furniture warehouse located at 3859 Tenth Avenue in the State and County of New York on December 16, 2003. An action was brought for wrongful death by the estate of Thomas Brick, a firefighter killed during the fire. Several other related actions were commenced and consolidated in this court pursuant to an order dated December 15, 2006.

United originally moved to restore its action to the trial calender but withdrew its motion upon information that the action was never dismissed. Thus, United's motion to restore is deemed withdrawn pursuant to a letter to this court stating the same dated March 7, 2008. Defendants 3859 Tenth Avenue Corp. ("Tenth Avenue") Arbib & Rabba Realty Co. ("Arbib")Lefrank Management Corp.('LeFrank") (collectively "the owners") cross move to dismiss United's complaint pursuant to CPLR 3211(a)(7), for failure to state a cause of action. Defendant Barta Trading Corp.

joins in defendants' motion. United opposes. Plaintiff in the Brick action submits an affidavit in response merely confirming that there is no motion to dismiss her complaint. No other parties in the related cases submit papers.

United is the insurer of Pv&Co, Inc ("PV"), Partido Revoluatonario Dominicano, Inc. ("Partido") and El Paraiso Corp. ("Paraiso"). Tenth Avenue is the owner of the subject building; Arbib is the landlord; and LeFrank is the managing agent. Barta leases space on the second floor of the building for the purpose of storing furniture. The Fire that is the basis for this action was determined to have been caused by a Barta employee carelessly extinguishing a cigarette in Barta's space. United paid out claims to its insureds for damage to their spaces on the first floor. United now seeks to step into the shoes of its insureds and is seeking to be reimbursed by the owners and Barta.

In support of their cross-motion, the owners submit the following: the order of consolidation dated December 15, 2006; the pleadings; three leases dated July 20, 2001, January 25, 2000 and December 15, 1998; correspondence between a lawyer for the tenant at the subject location and LeFrank; a United insurance policy for the policy periods of February 10, 2003 to February 10, 2004 and a Lloyd's of London policy for the period of February 18, 2003 to February 18, 2004. In opposition United submits the deposition transcript of John Lynn, Deputy Chief Fire Marshall for the New York City Fire Department; the deposition transcript of Willy Frankel, Vice President of LeFrank; and a report issued by Scientific Hazard Analysis, Inc.

The owners argue that United cannot sue its own insured. Also, the lease agreements entered into by the tenants of the subject premises contained a "waiver of subrogation" clause which prevents United from bringing the instant action for reimbursement against them.

Initially, United has "no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered." (North Star Reinsurance Corp. v. Continental Ins. Co., 82 NY2d 281[1993]). Here, the owners are listed as additional insureds on the PV policy, effective February 10, 2003 through the date of the fire. Thus, United's subrogation claims as against the owners are barred as a matter of law.

The lease agreements controlling the tenancy of United's insureds, at Section 9, state, in relevant part:

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 any one claiming through or under each of them by way of subrogation or otherwise. The release or 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.

Barta joins in the owners motion and also seeks dismissal for failure to state a cause of action. Firstly, Barta fails to append its own lease, and by way of attorney affirmation, joins in the arguments set forth by Owners. Barta is not an additional insured under the policy, and cannot seek to dismiss on that ground. While Barta does not append its own lease, it seeks to avail itself of the waiver of subrogation clause.

The First Cause of Action of United's complaint, as against Barta, states, in relevant part:

21. Smoking in a warehouse filled with highly combustible mattresses and packing materials created a foreseeable risk of fire.
22. Defendant Barta failed to prevent its employee from carelessly smoking inside its space and otherwise failed to take reasonable precautions against careless smoking.
23. The fire erupted as a result of careless smoking by a Barta employee, while the employee was acting within the scope of his employment with Barta, and in furtherance of Barta's business interests.

It is well settled that a "waiver of subrogation provision contained in a lease negotiated between two sophisticated parties . . . is valid and enforceable provided the intention of the parties is clearly and unequivocally expressed." (Viacom International, Inc. v. Midtown Realty Co., 193 AD2d 45[1st Dept. 1993]). The waiver of subrogation language contained in the lease agreements cited by Owners clearly and unequivocally waives the right of recovery as between tenant and owner and any party claiming through or under them. United argues that the subrogation waiver is inapplicable because "facts have been alleged and are supported by evidence which gives rise to a potential finding of gross negligence and that such a finding would invalidate the waiver."

Although the claims against the owners are barred, the claims against Barta, if taken as true, allege a cause of action sounding in gross negligence. While the clause in the lease may shield Barta for ordinary negligence, it will not protect it from liability for gross negligence. (Federal Ins. Co. v. Honeywell, Inc., 243 A.D.2d 605[2nd Dept. 1997]). In order to state a cause of action sounding in gross negligence, United must have alleged that Barta “intentionally performed [an] unreasonable act posing specific known or obvious risk highly likely to result in harm . . . and did so with conscious indifference as to outcome. (Baker v. 16 Sutton Place Apt. Corp., 2 AD3d 119[1st Dept. 2003]). “Gross negligence differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing.” (Lubell v. Samson Moving & Storage, Inc., 307 A.D.2d 215[1st Dept. 2003]).

In an attempt to supplement it’s showing that it has a cause of action sounding in gross negligence, United submits the deposition testimony of the Fire Marshall who conducted an investigation of the warehouse. According to the Marshall, when he entered the warehouse, furniture was “stacked to the ceiling,” leaving narrow aisles that were impassable, making it more difficult to operate effectively in fighting the fire.

The sole criterion when deciding a motion to dismiss based on failure to state a cause of action in the complaint is whether there is any cause of action cognizable at law from the four corners of the complaint. However, when the party opposing the motion submits evidentiary material to be considered in addition to the complaint, the question becomes whether the proponent of the pleading has a cause of action, not whether he has stated one. (Guggenheimer v. Ginzburg, 43 N.Y.2d 268[1977]).

Further, every favorable inference must be afforded the facts United alleges in its complaint and in the various motion papers submitted by it. (Held v. Kaufman, 91 N.Y.2d 425[1998]).

United’s allegation against Barta, that it created a foreseeable risk of fire by failing to prevent its employee from smoking in a warehouse containing highly combustible mattresses and packing materials, is enough to preclude dismissal. Barta, as the on-site tenant of the warehouse cannot claim that the intentional hazardous storage of the furniture and/or mattresses was done without its knowledge or direction. When viewing the complaint and the evidence submitted here, it can be said that

United has stated a cause of action sounding in gross negligence as against Barta.

Wherefore it is hereby

ORDERED that the cross-motion to dismiss United National Specialty Insurance Company's complaint as against 3859 Tenth Avenue Corp., Arbib & Rabba Realty Co., Lefrank Management Corp. is granted ; and it is further

ORDERED that the cross-motion to dismiss United National Specialty Insurance Company's complaint as against Barta Trading Corp. is denied ; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DATED: April 17, 2008

  
\_\_\_\_\_  
EILEEN A. RAKOWER, J.S.C.

**FILED**  
APR 22 2008  
COUNTY CLERK'S OFFICE  
NEW YORK