

**Tower Risk Mg. v 41-06 Rest. Corp.**

2008 NY Slip Op 31805(U)

May 5, 2008

Supreme Court, Queens County

Docket Number: 0008413/2005

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19  
Justice

	<u>x</u>		
TOWER RISK MANAGEMENT, etc., et al.,		Index Number <u>8413</u>	2005
Plaintiff,		Motion	
- against -		Date <u>December 19,</u>	2007
41-06 RESTAURANT CORP., etc., et al.,		Motion Cal. Number <u>36</u>	
Defendants.		Motion Seq. No. <u>2</u>	
	<u>x</u>		

The following papers numbered 1 to 16 read on this motion by defendant 41-06 QB Restaurant Corp., d/b/a Bloom's Public House Restaurant & Grill (Bloom's) for an order granting summary judgment dismissing the complaint.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation	
Exhibits (A-N).....	1-4
Opposing Affirmation-Exhibits (A-G).....	5-7
Opposing Affirmation-Exhibits (A-F).....	8-10
Opposing Affirmation-Affirmation- Exhibits (A-F).....	11-13
Other Affirmation-Exhibits (A-B).....	14-16

Upon the foregoing papers this motion is determined as follows:

George Korakis and Christine Korakis (korakis) are the owners of the improved real property known as 41-06,08 and 10 Queens Boulevard, Long Island City, New York. The improved real property located at 41-06 Queens Boulevard, Long Island City, New York, was previously leased to KMKN, Ltd. who operated a restaurant on the premises and installed its exhaust and duct system. On January 9, 2001, the property owners, pursuant to an addendum to the lease agreement, assigned the lease to defendant 41-06 QB Restaurant Corp., d/b/a Bloom's Public House Restaurant & Grill (Bloom's). This action arises out of fire that occurred on August 21, 2003 at Bloom's and spread to the adjoining properties.

Plaintiffs Tower Risk Management, individually and on behalf of Virginia Surety Company, formerly known as Combined Specialty Insurance Company, the subrogee of George Korakis and Christine Korakis, allege that the fire was caused by an accumulation of grease in the restaurant's duct work. In the second cause of action against Bloom's, plaintiffs allege that the fire was caused by Bloom's recklessness, negligence and carelessness in its ownership, supervision, servicing, maintenance and repair of the restaurant's range hood, ducts and fire suppression system.

Bloom's asserts that this subrogated action is barred by the anti-subrogation clause set forth in its lease with Korakis. Bloom's further asserts that as Korakis, in a related action, admitted that Bloom's was not negligent, that the exhaust system did not violate any code requirements and that Bloom's maintained the exhaust system by hiring co-defendant Samiro Services Inc. d/b/a Scientific Fire Prevention (Samiro), plaintiffs cannot establish any liability on the part of Bloom's.

### **Subrogation and waiver**

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 a loss for which the insurer is bound to reimburse" (Kaf-Kaf, Inc. v Rodless Decorations, 90 NY2d 654, 660 [1997], citing Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465 [1986]). Thus, a waiver of subrogation clause, by which the parties to a contract prospectively waive any claim each one's insurer might otherwise acquire against the other party by way of subrogation, "is necessarily premised on the procurement of insurance by the parties" (Liberty Mut. Ins. Co. v Perfect Knowledge, Inc., 299 AD2d 524, 526 [2002]). As the Court of Appeals stated in Kaf-Kaf, "a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears" (90 NY2d at 660 [citation omitted]; see Duane Reade v Reva Holding Corp., 30 AD3d 229 [2006]).

Here, paragraph 9 of the lease agreement provides, in relevant part that:

[]Nothing contained hereinabove shall relieve Tenant from liability that might exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, 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 release and waive all rights of recovery against the other or anyone 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 provides that such a policy can be obtained without additional premiums.

Paragraph 93 of the lease agreement provides, in relevant part that:

Landlord and Tenant each hereby release the other from any and all liability or responsibility (to the other or anyone claiming through or under them by way of subrogation or otherwise) under fire and extended coverage or supplementary contract casualties, if such fire is caused by the fault or negligence of the other party, or anyone for whom such party may be responsible; provided, however, that this release shall be applicable and in force and effect with respect to loss or damage occurring during such times as the releasor's policies contain a clause or endorsement to the effect that any such release shall not adversely affect or impair such policies or prejudice the rights of the releasor to recover thereunder. Each of Landlord and Tenant agrees that its policies will include such a clause or endorsement so long as the same shall be obtainable without extra cost or if such cost shall be charged therefor, so long as the other party shall be obligated to pay such extra cost. If extra cost shall be chargeable therefor, each party shall notify the other party thereof and of the amount of the extra cost and the other party shall be obligated to pay the extra cost unless, within ten (10) days after such notice, it elects not to be obligated to so by written notice to the original party. If such clause or endorsement is not available, or if either party should not desire the coverage at extra cost to it, then the provisions of this Article shall not apply to the policy or policies in question."

Plaintiffs' have submitted a copy of its insurance policy, which contains the requisite endorsement or clause required under the lease and explicitly provides that the insured property owner could waive its rights against another party in writing and that it would not restrict the insured's insurance. It is noted that Bloom's is not named as an additional insured under Korakis' policy. Although Bloom's has not submitted a copy of its insurance policy, plaintiffs have submitted said policy. The only language set forth in the Bloom's policy pertaining to subrogation, states that "If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after the loss to impair our rights. At our request, the insured will bring 'suit,' or transfer those rights to us and help us enforce them." Since this language does not parallel the language set forth in the lease agreement or Korakis' insurance policy, the waiver of subrogation clause is not enforceable. Therefore, that branch of Bloom's motion which seeks to dismiss the complaint based upon the lease's waiver of subrogation clause is denied.

**Bloom's motion for summary judgment based upon Korakis' experts' affidavits**

Korakis, an owner of the subject real property, testified that he leased the premises to KMKKN, Ltd. who operated a restaurant known as Orchard's Restaurant. That tenant renovated the premises in 1979, whereby it removed and rebuilt the kitchen's exhaust system and duct work. Korakis stated at his deposition that he did not observe the kitchen after it was renovated and did not know if Orchard's Restaurant maintained the exhaust system.

Mark Fox and Ronan J. Conlon purchased said restaurant, and incorporated their business as 41-06 QB Restaurant Corp., doing business as Bloom's. Korakis assigned the lease to this corporation pursuant to an addendum agreement. Korakis stated that he never spoke with Mr. Fox or Mr. Conlon about the kitchen exhaust system, and never discussed whether an access panel existed on the duct system. He also stated that he had no knowledge as to whether the kitchen duct and exhaust system was being cleaned. Korakis stated that he believed that the owner of the restaurant was required to clean the exhaust and duct system. He stated that he believed that the fire started in the kitchen and extended into the exhaust hood.

The lease agreement gave Korakis a right of re-entry. However, there is no evidence that he retained any control over, or was contractually obligated to maintain or repair any of the property's fixtures, including the kitchen equipment, ventilation, heating and fire suppression systems. The lease agreement also provides in pertinent part, the following:

4. []Tenant shall, throughout the term of the lease, take good care of the demised premises and the fixtures and appurtenances therein[]

53. Tenant, at Tenant's sole cost and expense, shall maintain in good condition any and all ventilating, air-conditioning, heating and flame-suppressing equipment and all associated controls, motors, blowers, compressors, ducts, electrical or mechanical components installed in the demised premises or elsewhere in or upon the building of which the demised premises form a part, for ventilating, air-conditioning, heating or flame-suppressing service to the demised premises. Tenant shall install or replace at Tenant's sole cost and expense any and all equipment, devices, and components and any other equipment in the event that installation or replacement becomes necessary by reason of damage, wear or obsolescence, or requirement to conform with the laws and regulations of the City of New York or the State of New York or to conform with insurance rating specifications to eliminate 'unsafes' or rated hazards []Tenant further agrees that it shall, at its sole cost and expense, cause professional inspection, cleaning and degreasing of all ventilation ducts and associated equipment as required by law or any governmental agency having jurisdiction over the demised premises or as may be required by any insurer of the demised premises[]

Bloom's, in support of its motion, seeks to rely upon the affidavits of Kenneth M. Garside, a Professional Engineer, Licensed Fire Protection Inspector and Certified Fire and Explosion Investigator, and Larry A. Wharton, an electrical engineer, who were retained by Korakis. Mr. Garside and Mr. Wharton's affidavits were prepared and submitted in support of certain motions in a separate action entitled Murphy v. Phoenix Realty Group LLC, Index No. 5882/2005. The court notes that the Murphy action was settled in the Trial Scheduling Part on January 17, 2008 and all outstanding motions in that action have been denied as moot.<sup>1</sup> The court finds that Bloom's reliance upon the affidavits of Mr. Garside and Mr. Wharton is misplaced. Mr. Garside opines that the fire was caused by a kitchen fire whose flames extended and was fueled by an accumulation of grease behind the grease filters and

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<sup>1</sup> Pursuant to three orders of this Court dated May 1, 2008, the respective motions were denied as stated.

within the duct work above the ceiling. Although Mr. Garside in particular opined that Korakis did not violate the Building Code or the Fire Code, neither he nor Mr. Wharton offered any opinion as to whether Bloom's violated the applicable code provisions, having assumed the owner's statutory duty to maintain and clean the entire exhaust and duct system.

The evidence presented establishes that the prior tenant KMKCN, Ltd. made the renovations to the exhaust and duct system, and that Bloom's painted and installed new furniture, and replaced some appliances in the kitchen. There is no evidence that Bloom's renovated the ventilating, exhaust, heating or flame-suppression systems. However, the lease agreement required Bloom's to "cause professional inspection, cleaning and degreasing of all ventilation ducts and associated equipment as required by law." Bloom's entered into a five-year service agreement with Samiro Services Inc., d/b/a Scientific Fire Prevention (Samiro) on May 21, 2001. This court determined in a companion motion that Samiro is not liable in tort for injury to plaintiffs by order dated May 1, 2008. Of particular relevance here, is the court's determination that Samiro's service contract did not entirely displace either Bloom's or the property owner's duty to maintain the premises safely.

Section 27-4275 of the Administrative Code of the City of New York (Fire Prevention Code) provides that: "c. The entire exhaust system shall be inspected at least once every three months, by qualified employees of the owner or by a cleaning agency, and cleaned to remove deposits of residue and grease in the system. A record of such inspection and cleaning shall be kept on the premises for inspection." The service contract, however, was expressly limited to cleaning accessible areas, and Samiro did not assume the owner's statutory responsibility of inspecting and cleaning the entire exhaust system. The court therefore finds that a triable issue of fact exists as to whether Bloom's was negligent in its performance of the statutory duties which it assumed, in full, under the terms of its lease. In view of the foregoing, Bloom's motion to dismiss the complaint and all cross claims is denied.

Dated: May 5, 2008

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J.S.C.