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

PRESENT: HON. MILTON A. TINGLING PART 44

[redacted]

Nelson, DR. STAN 107645/06

V

Jereissati, Mr. Carlos.

Sj. 001

INDEX NO.

MOTION DATE 9/17/08

MOTION SEQ. NO.

MOTION CAL. NO.

[redacted]

Is 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

FILED
FEB 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

In this property damage action, defendant Hotel Carlyle Owners Corp. (Hotel Carlyle) moves, pursuant to CPLR 3212, for an order dismissing the complaint and any and all cross claims against it.

Defendants/third-party plaintiffs Carlos Jereissati, Mrs. Jereissati, Indian Wells Properties, Inc. (Indian Wells) and Great Northern Insurance Company (GNIC) cross-move, pursuant to CPLR 3212, for an order granting summary judgment against Hotel

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

Dated: 2/10/09

Mat
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Carlyle for conditional indemnity for any settlement and/or judgment against them.

For the following reasons, the motion and cross motion are denied.

In April 1989, plaintiffs, as lessees, entered into a proprietary lease (the Lease) with respect to Apartment No. 1604-1605 (the Apartment) within the Hotel Carlyle, as lessor, located at 76th Street and Madison Avenue, New York, New York.

On June 15, 2003, a water pipe ruptured at the Hotel Carlyle allegedly causing property damage to the Apartment. According to the amended complaint, plaintiffs believed the initial source of the water came from the apartment located above plaintiffs', to wit, apartment no. 1703-1705, which was leased by Indian Wells (*see* Proprietary Lease between Hotel Carlyle and Indian Wells; Affidavit of Herbert M. Selzer, Ex. A). Indian Wells, a former New York corporation, was dissolved and liquidated.[1] While the Jereissatis deny owning or operating Indian Wells, it seems that at the time of the incident they were residing in apartment 1703-1705. On December 30, 2003, GNIC, on behalf of the Jereissatis, advanced plaintiffs $50,000.00 as advanced payment, should a determination of liability be made against the Jereissatis.

Paragraph 1.10 of the Lease, entitled "Waiver of

[1] It is not clear from the record as to when the dissolution occurred.

Subrogation" provides:

> Lessor and Lessee hereby release each other from any and all liability or responsibility to the other or anyone claiming through or under Lessor or Lessee by way of subrogation or otherwise for any loss or damage to property caused by fire or any of the extended coverage casualties, even if such fire or other casualty shall have been caused by the fault or negligence of Lessor or Lessee or anyone for whom Lessor or Lessee may be responsible, provided, however, that this release shall be applicable and in force and effect only with respect to loss or damage occurring during such time as Lessor's or Lessee's insurance policies shall contain a clause of endorsement to the effect that any such release shall not adversely effect or impair such insurance policies or prejudice the right of Lessor and Lessee to recover thereunder and further provided that such waiver shall be limited to the proceeds of such insurance policies. Lessor and Lessee agree that they will request their insurance carriers to include in each of their policies a suitable clause or endorsement, as aforesaid, provided that no extra charge shall be charged therefor, and upon request, Lessor and Lessee shall each advise the other whether or not it has been able to obtain such a clause or endorsement in its policies.

Plaintiffs obtained an insurance policy through CHUBB Masterpiece, to cover the Apartment (the Policy). The Policy was in effect at the time of the alleged loss.

Under the "Transfer of Rights" provision, the Policy states: All of your rights of recovery will become our rights to the extent of any payment we make under this policy. A covered person will do everything necessary to secure such rights; and do nothing after a loss to prejudice such rights. However, you may waive any rights of recovery from another person or organization

for a covered loss in writing before the loss occurs (*see* Chubb Masterpiece Policy, p. Y-1, Notice of Motion, Exh. G).

In order to grant summary judgment, there must be no material or triable issues of fact presented (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Esteva v City of New York*, 30 AD3d 212 [1st Dept 2006]). The movant must proffer admissible evidence to make a prima facie showing that establishes the cause(s) of action "sufficiently to warrant the court as a matter of law in directing judgment" (CPLR 3212 (b); *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Esteva*, 30 AD3d 212).

Once the moving party has made this showing, the burden is on the opposing party to demonstrate "the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure so to do" (*Zuckerman*, 49 NY2d at 560; *see also Sheridan v Bieniewicz*, 7 AD3d 508 [2d Dept 2004]).

Hotel Carlyle argues that plaintiffs executed the Lease which contains a waiver of subrogation provision, wherein plaintiff's released Hotel Carlyle from any and all liability or responsibility for any loss or damage, provided that they obtained an insurance policy which permits such a waiver.

Under New York law, "[s]ubrogation, an equitable doctrine, 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, Inc.*, 90 NY2d 654, 660 [1997]; *see also Duane Reade v Reva Holding Corp.*, 30 AD3d 229 [1st Dept 2006]). A waiver of subrogation clause is therefore "premised on the procurement of insurance by the parties" (Duane Reade, 30 AD3d at 232, quoting *Liberty Mutual Ins. Co. v Perfect Knowledge, Inc.*, 299 AD2d 524, 526 [2d Dept 2002]).

Here, plaintiffs argue that: (1) the waiver of subrogation clause is not applicable to this case, since they are seeking out-of-pocket expenses, for which they received no reimbursement from any third party; and (2) even if found to be covered under the subrogation clause, Hotel Carlyle has not established mutuality required to enforce the waiver of subrogation.

Plaintiffs claim that, since it is seeking recovery on its own behalf, i.e., the monies not reimbursed from their property insurer, the case is not a subrogation action, and therefore the waiver or subrogation is inapplicable. Hotel Carlyle counters that plaintiffs fail to submit proof that the monetary amount sought by plaintiffs is not covered by plaintiff's insurance carrier or subject to a deductible, and further, that no disclaimer of coverage has been provided (*see The Gap, Inc. v Red Apple Cos., Inc.*, 282 AD2d 119 [1st Dept 2001]). This court agrees.

Plaintiffs next argue that even if the subrogation clause is

applicable, Hotel Carlyle has not established mutuality. While waiver of subrogation provisions are valid and enforceable in New York, such provisions are not enforceable when there is no mutual requirement for both the landlord and the tenant to obtain insurance (*A to Z Applique Die Cutting, Inc. v 319 McKibbin Street Corp.*, 232 AD2d 512, 513 [2d Dept 1996]).

Here, Carlyle fails to provide evidence of an insurance policy containing a waiver of subrogation, but rather contends, in its reply, that the lease waiver language indicates that either insurance policy containing the waiver language is sufficient (*see* Reply at ¶ 11). Specifically, Hotel Carlyle points to the lease waiver provision language which provides: "that this release shall only be applicable and in force and effect only with respect to loss or damage occurring during such time as Lessor's or Lessee's policies contain such clause or endorsement ..." (emphasis added). However, the provision further provides, "Lessor and Lessee agree that they will request their insurance carriers to include in each of their policies a suitable clause or endorsement" (emphasis added). By its terms, it is clear that the waiver was conditioned upon both parties obtaining insurance policies with such a clause. Since Hotel Carlyle failed to submit its insurance policy, the motion for summary judgment must be denied (*see e.g. Commerce & Industry Ins. Co. v Admon Realty, Inc.*, 168 AD2d 321, 323 [1st Dept

1990]).

Defendant/third-party plaintiffs, Jereissati, Mrs. Jereissati, Indian Wells and GNC cross-move against Hotel Carlyle for summary judgment granting the aforementioned defendant/third-party plaintiffs conditional indemnity. "There are two categories of indemnity - contractual, which is not at issue here - and common-law" (*City of New York v College Point Sports Ass'n*, — AD3d — , 2009 WL 146570, at *9, 209 NY App Div LEXIS 405, at ** 28 [2d Dept 2009] [citation omitted]). Common law indemnification has been defined as "nothing short of simple fairness to recognize that '[a] person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other, is entitled [by equity] to indemnity'" (*id.*, citing *McDermott v City of New York*, 50 NY2d 211, 217 [1980], quoting Restatement [First] of Restitution § 76).

The moving co-defendants/third-party plaintiffs argue that "if plaintiffs prove that they incurred damage as a result of water infiltration from a clogged drain pipe between the 16th and 17th floors, [] the foregoing occurrence was due to the Hotel Carlyle's failure to inspect and maintain the condition of the building's common systems," which would then obligate Hotel Carlyle to indemnify the moving co-defendants/third-party plaintiffs for any liability. However, plaintiff's allege that

the initial source of the water came from Apartment 1703-1705, to which Indian Wells was the Lessee.

Specifically, Section 1.1 of the Lease provides:

> "Lessor shall keep or cause to be kept in good repair ... roofs, gutters, terraces, balconies ... and all pipes for carrying water ... through the Hotel, and drain pipes ... together with all plumbing heating and other apparatus intended for the general service of the Hotel, except those portions of any of the foregoing which it is the duty of the Lessee to maintain and keep in good repair as provided in Section 2.7 hereof...."

(*see* Proprietary Lease between Hotel Carlyle and Indian Wells, Section 1.1, p. 5).

However, section 2.7 provides, in relevant part: "... Lessee shall be responsible for the maintenance or replacement of any plumbing, plumbing fixtures ... that may be in the Apartment" (*see* Proprietary Lease between Hotel Carlyle and Indian Wells, § 2.7, p. 21).

At this stage of the proceedings, the moving co-defendants/third-party plaintiffs' motion is premature, as questions of fact remain as to whether the property damage was due to plumbing issues in the common area of the Hotel or the apartment above plaintiffs', and/or as a result of either Hotel Carlyle's or Indian Wells' failure to correct any such problems. (*see* Sections 1.1 and 2.7 of the Proprietary Lease). Therefore the cross motion is denied.

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Hotel Carlyle Owners Corp. is denied; and it is further

ORDERED that the cross motion by defendants/third-party plaintiffs Carlos Jereissati, Mrs. Jereissati, Indian Wells Properties, Inc. and Great Northern Company for summary judgment is denied.

DATED: February 10, 2009