Hanover Ins. Co. v Chelsea 8th Ave. LLC
2009 NY Slip Op 30417(U)
February 20, 2009
Supreme Court, New York County
Docket Number: 101214/07
Judge: Doris Ling-Cohan
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SCANNED ON 2/26/2009

[* 1]

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

PRESENT: Hon. Doris Ling-Cohan, Justice PART 36

Index Number : 101214/2007

HANOVER INSURANCE

vs

CHELSEA 8TH AVENUE

Sequence Number : 001

DISMISS ACTION

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion to dismiss is denied in accordance with the attached decision/order.

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/20/09

JUSTICE DORIS LING-COHAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 36
--------------------------------------x
HANOVER INSURANCE COMPANY a/s/o
IMC BRAND MANAGEMENT, INC.,

Plaintiff,

Index No.: 101214/07

-against-

DECISION AND ORDER

CHELSEA 8TH AVENUE LLC,

Motion Seq. No.: 001

Defendant.
--------------------------------------x
DORIS LING-COHAN, J.:

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

FACTUAL BACKGROUND

Defendant seeks summary judgment, pursuant to CPLR 3212 dismissing the action based on a waiver of subrogation clause in the lease between defendant and plaintiff's insured. Defendant also seeks sanctions, pursuant to 22 NYCRR § 130-1.1, alleging that plaintiff knowingly instituted a frivolous action.

Plaintiff's insured is a commercial tenant in a building owned by defendant. Plaintiff's insured acquired its lease on September 1, 2003, as the assignee of the previous commercial tenant. Allegedly, the premises leased by plaintiff's insured suffered property damage when some construction was being performed at the building. Prior to the incident in question, defendant purchased the premises from the original landlord, subject to all existing leases.

The lease in question contains the following provision:

> "... 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 any one 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 only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance."

[¶9, Notice of Motion, Exh. C]. On October 10, 2005, the date of the alleged occurrence, both parties were insured under policies that permitted such waivers if the waiver was in writing and executed prior to the subject loss.

Plaintiff seeks recovery of the payment it made to its insured based on a property damage claim allegedly occasioned by defendant's gross negligence in performing construction work at the premises. Prior to the instant motion, defendant requested plaintiff to dismiss the action voluntarily, but allegedly failed to provide plaintiff with a complete copy of the lease. Plaintiff asserts that the copy of the lease it received was missing the page that contains the waiver provision. The complete lease is attached to the instant motion.

DISCUSSION

"The proponent of a summary judgment motion must make a

prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Subrogation 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 obligated to reimburse the insured. *Pennsylvania General Ins. Co. v Austin Powder Co.*, 68 NY2d 465 (1986). However, courts have consistently held that waivers of subrogation provisions are enforceable, and such clauses will preclude negligence claims of subrogated insurance carriers who have paid their insureds. *Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654 (1997); *Seneca Insurance Co. v City of New York*, 35 AD3d 248 (1st Dept 2006); *Duane Reade v Reva Holding Corp.*, 30 AD3d 229 (1st Dept 2006).

In opposition to the instant motion, plaintiff cites *St.*

Paul Fire and Marine Ins. Co. v Universal Builders Supply (317 F Supp 2d 336 [SD NY 2004], *aff'd as mod.* 409 F3d 169 [2d Cir 2005]), for the proposition that waiver of subrogation provisions are inapplicable to instances in which the injury is caused by the third party's gross negligence. However, this is a misreading of the decision.

In the appeal, which affirmed the district court's dismissal of the action, the Second Circuit stated that

> "[i]t is important, however, to distinguish between [such] exculpatory clauses and indemnity contracts that simply shift the source of compensation without restricting the injured party's ability to recover. The latter agreements are not contrary to public policy unless they purport to indemnify a party for damages that were intentional. The New York Court of Appeals has held that a party may obtain insurance as protection against its own gross negligence [internal quotation marks and citations omitted]."

St. Paul Fire and Marine Ins. Co. v Universal Builders Supply, 409 F3d 73, 85 (2d Cir 2005). Therefore, such waiver provisions, even for conduct that is alleged to be grossly negligent, preclude subrogation actions.

However, waiver of subrogation provisions do not bar suits seeking to recover a portion of the loss that falls within the deductible portion of the insured's policy, because that deductible amount, by its nature, is not a recoverable insured loss. *The Gap, Inc. v Red Apple Companies, Inc.*, 282 AD2d 119 (1st Dept 2001); *see also Duane Reade v Reva Holding Corp.*, 30 AD3d 229. Therefore, plaintiff, as its insured's legal assignee,

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may seek the return of the deductible portion of the policy. *Federal Insurance Co. v Honeywell, Inc.*, 243 AD2d 605 (2d Dept 1997).

According to the policy submitted, it appears that plaintiff's insured had a $2,500.00 deductible, and as the insured's subrogee, plaintiff may seek that sum from defendant.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendant's motion for summary judgment is denied; and it is further

ORDERED that plaintiff's recovery is limited to the amount of the deductible in its insurance policy with IMC Brand Management, Inc.; and it is further

ORDERED that based upon the above, defendant's motion seeking sanctions against plaintiff is denied; it is further

ORDERED that within 30 days of entry of this order, defendant shall serve a copy upon plaintiff with notice of entry.

Dated: 2/20/09

Doris Ling-Cohan, J.S.C.

FILED
FEB 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

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