

**Greater N.Y. Mut. Ins. Co. v Nasarre**

2009 NY Slip Op 31420(U)

June 26, 2009

Supreme Court, New York County

Docket Number: 102510/08

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON

PART 55

Index Number : 102510/2008  
**GREATER NEW YORK MUTUAL**  
 VS.  
**NASARRE, TERESA**  
 SEQUENCE NUMBER : 002  
 SUMMARY JUDGMENT

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

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

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

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

this motion to/for \_\_\_\_\_

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

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

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

PAPERS NUMBERED

1-3

4-5

6-7

Cross-Motion:    Yes     No

Upon the foregoing papers, it is ordered that this motion

*is denied*

*with accompanying memo*

**FILED**

JUN 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/26/09

*[Signature]*  
HON. JANE S. SOLOMON    J.S.C.

Check one:     FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:    DO NOT POST

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

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

-----X  
GREATER NEW YORK MUTUAL INSURANCE  
COMPANY as subrogee of 45 OVERLOOK  
TERRACE OWNERS CORP.,

Index No. 102510/08

Plaintiff,

-against-

TERESA NASARRE,

Defendant.

-----X  
JANE S. SOLOMON, J.S.C.:

DECISION and ORDER

**FILED**  
JUN 30 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

INTRODUCTION

In this subrogation action for property damage, defendant moves for summary judgment under CPLR 3212. The motion is granted for the reasons set forth below.

BACKGROUND

Plaintiff brings this property damage action as subrogee of 45 Overlook Terrace Owners Corp. ("Overlook"), its insured under a policy numbered 1131M91314 (the "Policy"). Defendant Teresa Nasarre ("Nasarre") is a shareholder and tenant in the cooperative apartment building owned by Overlook. Plaintiff claims that Nasarre negligently caused water damage to Overlook's premises and seeks \$243,454.35, the amount it paid for the loss. Nasarre leased her apartment pursuant to a proprietary lease (the "Lease"), which was in effect when the flood occurred.

The Lease contained a "Waiver of Subrogation" provision, which reads:

Lessor agrees to use its best efforts to obtain a provision in all insurance policies carried by it waiving the right of subrogation against the Lessee; and, to the extent that any loss or damage is covered by the Lessor by any insurance policies which contain such a waiver of subrogation, the Lessor releases the Lessee from any liability with respect to such loss or damage. In the event that the Lessee suffers loss or damage for which the Lessor would be liable and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage.

(Proprietary Lease, attached as Exh. E to Affirmation in Support of Barbara L. Hall, ¶ 4(d).)

The Policy clause entitled "Transfer of Rights of Recovery Against Others to Us" provides:

If any person or organization to or from 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 2. After a loss to your covered Property or Covered Income only if, at the time of loss, that party is one of the following: a. Someone insured by this insurance; b. A business firm: (1) owned or controlled by you or (2) that owns or controls you; or c. Your tenant. This will not restrict your insurance.

(Commercial Property Conditions, attached as Exh. D to Affirmation in Support of Barbara L. Hall, p.2.) The Policy provision entitled "Subrogation" reads:

If we pay for a loss, we may require you to assign to us your right of recovery against others. You must do all that is necessary to secure our rights. We do not pay for a loss if you impair this right to recover. You may waive your right to recover from others in writing before a loss occurs.

(Policy Endorsement, attached as Exh. C to Affirmation in Opposition of David S. Smith, p.24). Nasarre's insurance policy also did not contain a waiver of subrogation, but like Overlook's policy, it allowed Nasarre to waive subrogation in a separate writing.

#### DISCUSSION

In support of her motion, Nasarre first argues that Overlook waived its right to subrogation in the Lease. In the event that the Court rejects this argument, she contends that plaintiff should be equitably estopped from maintaining this action. This argument is supported by her position that Overlook violated the Lease by failing to use its "best efforts" to obtain a waiver of subrogation against Nasarre in its insurance policy. If the motion is denied, Nasarre seeks leave to amend her answer to assert affirmative defenses for equitable estoppel and breach of contract based on the violation of the Lease.

Plaintiff argues that Overlook never waived the right to subrogation under the Policy, refuting defendant's contention that subrogation was waived in the Lease. It argues that a lease provision which conditions a release of a party obtaining a waiver of subrogation in its insurance policy is not triggered unless the waiver is set forth explicitly in the policy.

Plaintiff relies on *Continental Insur. Co. v. 115-123 West 29<sup>th</sup> Street Owners Corp.*, 275 A.D.2d 604 (1<sup>st</sup> Dept. 2000) for the proposition. In response to the equitable estoppel argument, plaintiff asserts that Nasarre cannot prevail because she violated the same provision that she claims Overlook breached. It relies on the fact that, like Overlook, Nasarre also did not obtain a waiver of subrogation in her insurance policy.

Plaintiff correctly contends that Overlook did not explicitly waive its right to subrogation. Nothing in the Policy itself constituted a waiver, and there is no separate writing to establish that a waiver occurred under the terms of the Policy. Nasarre's argument that the provision in the Lease effectuated a waiver according to the Policy is without merit. The Lease contemplated a waiver in an insurance policy, but there is none; the Lease does not by its terms contain a waiver (see *115-123 West 29<sup>th</sup> Street Owners Corp.*, 275 A.D.2d at 605). Nevertheless, Nasarre's motion should be granted based on her argument that Overlook breached the lease by failing to use its "best efforts"

to waive subrogation in its insurance policy.

It is well established that an insured's breach of an agreement to obtain a waiver of subrogation in an insurance policy prevents its insurer from maintaining a subrogation action (see *Agostinelli v. Stein*, 17 A.D.3d 982 [4<sup>th</sup> Dept. 2005]; *Wise Underwriting Agency v. Tranel, Inc.*, 2007 N.Y. Slip Op. 32568(U) [Trial Order], 2007 WL 2815356 [Sup. Ct. N.Y. Co. Aug. 8, 2007]; and *Continental Ins. Co. v. Boraie*, 288 N.J. Super. 347, 672 A.2d 274 [N.J. Super. Ct. 1995]). A breaching party may also be directly liable for its failure to obtain a waiver (*747 Third Avenue Corp. v. Killarney*, 225 A.D.2d 375 [1<sup>st</sup> Dept. 1996]; *Federated Mutual Insur. Co. v. Woodstock '99, LLC*, 190 F. Supp.2d 324 [N.D.N.Y. 2002]).

Here, while the Lease did not require that Overlook succeed in obtaining a waiver of subrogation, it did obligate Overlook to use its "best efforts" to do so. Plaintiff cannot maintain this action unless its insured lived up to this obligation. Plaintiff submits no evidence to show that Overlook made any effort at all to obtain a waiver, so that it fails to refute Nasarre's assertion that Overlook did not use its "best efforts". Having stepped into Overlook's shoes, plaintiff is precluded, by Overlook's breach, from suing defendant for its payment of the loss.

115-123 West 29<sup>th</sup> Street Owners Corp. does not compel a

different result. That case confirms that no waiver exists without specific language, but it does not address the "best efforts" issue here. Last, the argument that Nasarre cannot rely on the waiver provision because she breached it herself is belied by the fact that the "best efforts" provision applies only to Overlook.

CONCLUSION


Accordingly, it hereby is

ORDERED that defendant's motion for summary judgment is granted and plaintiff's complaint is dismissed; and it further is

ORDERED that the Clerk shall enter judgment accordingly with costs and disbursements as taxed.

Dated: June 26, 2009

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**

JUN 30 2009

COUNTY CLERK'S OFFICE  
NEW YORK

**HON. JANE S. SOLOMON**