

Travelers Prop. & Cas. Ins. Co. v 23rd Street Prop.
2009 NY Slip Op 33391(U)
April 6, 2009
Sup Ct, New York County
Docket Number: 102312/05
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

THE TRAVELERS PROPERTY & CASUALTY INSURANCE
COMPANY a/s/o INTERPUBLIC GROUP COMPANIES,
Plaintiff,

Index No.: 102312/05

Motion Date: 12/02/08

- v -

Motion Seq. No.: 08

23RD STREET PROPERTIES, WILLIAMS REAL
ESTATE CO., INC., IBEX CONSTRUCTION,
L.L.C., and HOME DEPOT U.S.A., INC.,
Defendants.

Motion Cal. No.: 124

23RD STREET PROPERTIES, WILLIAMS REAL
ESTATE CO.,
Third-party Plaintiffs,

Third-Party
Index No.: 102312/05

- v -

ENVIRONMENTAL SERVICE OF NEW YORK, INC.,
Third-party Defendant.

NY'S SUPREME COURT
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The following papers, numbered 1 to 10 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3 - 6

7 - 10

FILED

APR 16 2009

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers,

Defendants 23rd Street Properties and Williams Real Estate,
the owner and property manager respectively of the subject
premises, move for summary judgment dismissing the complaint of
plaintiff-subrogee Travelers on the grounds that plaintiff's

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

0ACKP

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

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insurance policy permits the waiver of subrogation which is provided for in the subrogee's lease. It is clear that an enforceable waiver of subrogation in a commercial lease would preclude plaintiff's claim. See Kaf-Kaf, Inc. v Rodless Decorations, Inc., 90 NY2d 654, 657 (1997) ("waiver of subrogation clause contained in the parties' lease precludes the negligence claims of their subrogated insurance carriers").

Plaintiff does not dispute that the lease contains a waiver of subrogation clause and that its policy allowed Interpublic to waive subrogation. Rather plaintiff argues that its waiver lacks mutuality because the movants' policy is silent on waiver. This argument lacks merit. Plaintiff misrelies upon the decision in Continental Insurance Company v. 115-123 West 29th Street Owners Corp. (275 AD2d 604, 605 (1st Dept 2000) where the Court held there was no waiver of subrogation because the "parties fail to identify any language in the policy that actually effects a waiver of subrogation against the landlord, which is the condition for the release of the lessor." As stated by another decision of this court, Continental "relied on by Travelers, is distinguishable because the lease in that case required the insurance policies to contain a waiver of subrogation. The Lease in this case does not require the parties to procure a policy with a clause waiving subrogation. Instead, it permits the parties to waive subrogation so long as it will not invalidate

the insurance." The Travelers Property v A & R Kalimian Realty, L.P., 2007 NY Slip Op 33907(U) (Sup Ct, NY County, Nov 30, 2007).

The Lease in this case states in pertinent part that "Landlord and Tenant shall each secure an appropriate clause in , or an endorsement upon, each fire or extended coverage . . . pursuant to which the respective insurance companies waive subrogation or permit the insured, prior to any loss, to agree with a third party to waive any claim it might have against such third party (and each party hereto hereby agrees and in such instance shall waive any claim it might have had against such third party)" (emphasis added). Section IV, Paragraph 8 of movants' Commercial General Liability Policy states that "If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after the loss to impair them" (emphasis added). Therefore, by the terms of the movants' policy the waiver of subrogation in the lease by defendants' is valid because the CGL policy allows the insured relinquish its claims prior to the loss. See General Acc. Ins. Co. v 80 Maiden Lane Associates, 252 AD2d 391, 392 (1st Dept 1998) ("such language is clearly intended to assure mutuality of obligation. Inasmuch as plaintiff subrogee has already paid the tenant under its policy, which is silent on the issue, and the transfer of rights clause in the managing agent's policy does not preclude the parties'

anti-subrogation agreement, such agreement to allocate the parties' risks is valid and enforceable").

Accordingly, it is

ORDERED that the motion for summary judgment is GRANTED; and it is further

ORDERED that the Clerk is directed to enter judgment DISMISSING this action and all cross-claims as against defendants 23RD STREET PROPERTIES, WILLIAMS REAL ESTATE CO., INC..

This is the decision and order of the court.

Dated: April 6, 2009

ENTER:

~~Debra A. James~~
DEBRA A. JAMES
J.S.C.
J.S.C.

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APR 16 2009
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NEW YORK