

New Hampshire Ins. Co. v Hi-Life Bar & Grill

2011 NY Slip Op 30826(U)

April 5, 2011

Supreme Court, New York County

Docket Number: 110744/10

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 107441/2010
NEW HAMPSHIRE INSURANCE CO
VS.
HI-LIFE BAR & GRILL
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE 1/18/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
4-5
6

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 *is decided in accordance with the enclosed memorandum decision and order.*

FILED

APR 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/5/11

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X
NEW HAMPSHIRE INSURANCE COMPANY a/s/o
170 WEST 83RD STREET CORP.,

Plaintiff,

-against-

HI-LIFE BAR & GRILL and 83/AMSTERDAM
RESTAURANT CORP. d/b/a HI-LIFE BAR
& GRILL,

Defendants.

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

INDEX NO. 110744/10

DECISION AND ORDER
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This action arises from a fire that occurred on the premises of the Hi-Life Bar & Grill on West 83rd Street. Plaintiff New Hampshire Insurance Company (NHIC) sues as the subrogee of the property owner and landlord, 170 West 83rd Street Corp. (Landlord). Defendant 83/Amsterdam Restaurant Corp. d/b/a Hi-Life Bar & Grill (Restaurant) is the tenant,¹ pursuant to a lease (Notice of Motion, Ex. D). NHIC paid out approximately \$175,000 on account of the loss sustained by Landlord as a result of the July 21, 2007 fire. Restaurant moves for summary judgment dismissing the complaint on the grounds that the subrogation claim is barred under the terms of the lease.

The cause of the fire is disputed. At approximately 9 AM, workers in the Restaurant reported a fire emanating from

¹ There is just one defendant because there is no separate entity called "Hi-Life Bar & Grill"; the tenant under the lease and the operator of the restaurant is 83/Amsterdam Restaurant Corp. (see Aff. of Earl Geer, Notice of Motion, Ex. F).

inside the kitchen wall. Defendant relies upon an uncertified copy of a report from a New York City Fire Department fire marshall (Notice of Motion, Ex. C), which states that the fire originated in the basement when wood inside the wall was ignited by a defective flue pipe; the fire spread to wood studs in the wall up to the first floor kitchen. NHIC relies upon the affidavit of an investigator it hired, who opines that the only heat source present that could have ignited the fire was the restaurant stove, and although it appears the wood studs in the wall was the first fuel to be ignited in the fire, the evidence does not establish what circumstances caused the ignition (Aff. Of Roger C. Iapicco, annexed as Ex. C to Aff. In Opposition of Fern Flomenhaft, Esq.). Plaintiff contends that additional discovery is needed to establish how the fire began.

In sum, the Fire Department report indicates that the fire is Landlord's fault, and NHIC's expert leaves open the possibility that the fire was caused by Restaurant's stove.

Restaurant argues that this difference of opinion on causation is not fatal to its motion, because the lease contains an anti-subrogation clause that covers NHIC's claim. For the purposes of this motion, defendant concedes that the fire could have been its fault.

Paragraph 9 of the lease is titled "Destruction, Fire and Other Casualty". The relevant part of paragraph 9 reads as

follows:

Nothing contained hereinabove shall relieve Tenant from liability that may 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 is permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or any one 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 release or waiver shall not invalidate the insurance . . .

Paragraph 46 to the lease rider states the following:

The Tenant agrees and covenants to indemnify and hold harmless Landlord from and against any and all claims arising during the term of this lease for damages or injuries to goods, wares, merchandise and property and/or for any personal injury or loss of life, in upon or about the demised premises arising out of Tenant's use and not caused by Landlord or by his employees, employees/agents, etc. The Tenant covenants to provide the Landlord, within ten (10) days from the commencement date hereof, and to keep in force during the term hereof, for the benefit of the Landlord and the Tenant, a comprehensive policy of liability insurance protecting the Landlord and Tenant against liability insurance whatsoever [sic] occasioned by accidents on or about the demised premises or any appurtenance thereto. . . .
(Lease and Rider, Flomenhaft Aff., Ex. D)

Restaurant contends that under paragraph 9, the parties

waived subrogation rights, subject to certain conditions that were met in this case. In particular, Landlord's insurance was in force and collectible, and Restaurant's insurance policy in force at the time was consistent with this provision. NHIC argues that the terms of Rider paragraph 46 contradicts the lease paragraph 9, and where there is a conflict between the Rider and the lease, the terms of the Rider prevail (Rider, paragraph 50).

NHIC argues that the waiver of subrogation clause is contradicted by paragraph 46 because the latter provides that Restaurant will indemnify Landlord from all claims arising out of Restaurant's use of the premises. This argument fails because paragraph 46 clearly refers to indemnification in the Landlord's favor from claims made by third parties. Since a subrogation claim is made in the name of the insured party (here, the insured party is the Landlord), it cannot obtain indemnification from its own claim. Paragraph 9 addresses damage claims as between the Landlord and Restaurant only, and does not involve indemnification from third parties, so there is no conflict between the provisions.

A waiver of subrogation provision within a lease precludes the insurer's subrogated negligence claim to recover money it paid to or on behalf of its insured (see *Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654, 661 [1997]). The waiver of subrogation provision in paragraph 9 is enforceable, and

accordingly NHIC's subrogation claim, which is the sole basis for this lawsuit, must be dismissed, even if there is a question of fact as to whether the fire arose from the negligence of the Landlord, the Restaurant, or neither.

NHIC's argument that the motion should be denied because discovery is not complete is misguided. The motion relies upon documentary evidence, i.e., the lease and the insurance policies, the text of which is not disputed, and there is no explanation of any likelihood that further discovery will shed needed light on any material issue. That the true cause of the fire is not established is not a bar to granting Restaurant's motion.

It hereby is

ORDERED that defendant Restaurant's motion for summary judgment is granted, and the complaint is dismissed, and the Clerk is directed to enter judgment accordingly, with costs and disbursements to Restaurant as taxed.

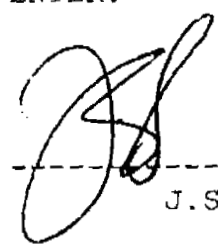
Dated: April 5, 2011

ENTER:

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