

<b>Allstate Indem. Co. v Virfra Holdings LLC</b>
2013 NY Slip Op 33924(U)
July 3, 2013
Supreme Court, New York County
Docket Number: 155762/2012
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 63

-----X  
ALLSTATE INDEMNITY COMPANY as subrogee of  
COREY WECLER, CARA OTTILIO-COOPER and  
SHERRI FRIED,

Plaintiffs,

-against-

VIRFRA HOLDINGS LLC and EVANS RELOCATION,  
INC. d/b/a EVANS REAL ESTATE,

Defendants.  
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Index No.:155762/2012  
Subm. Date: April 24, 2012  
Motion Sequence: 001

DECISION AND ORDER

**For Plaintiff:**

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**For Defendant Virfra Holdings LLC:**

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**For Defendant Evans Relocation:**

no appearance on this motion

**Papers considered in review of this motion for summary judgment in lieu of complaint:**

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Affirmation in Opposition.....	<u>2</u>
Affirmation in Reply.....	<u>3</u>

**ELLEN COIN, J.:**

In this subrogation action, defendant Virfra Holdings LLC (Virfra Holdings) moves pursuant to CPLR 3211 (a) (1) and (7) to dismiss the complaint as against it or, in the alternative, to consolidate the instant action with a separate, but related, action pending in this part under index No. 152820/12, entitled *Corey Wecler and Dora Wecler v Virfra Holdings LLC* (the Wecler Action).

The following facts are taken from the parties' pleadings and documentary evidence, and are undisputed unless otherwise indicated. On or about January 17, 2012, a leak and/or flood (water event) occurred in a condominium building located at 15 Broad Street in lower Manhattan, known

as the Downtown Condominium. The cause of the water event was an HVAC pipe that allegedly ✓ froze and burst because one or more windows in condominium Unit 1502 (“the Unit”) <sup>was</sup> left open for an extended period of time during winter months. The water event caused significant damage to other units in the Downtown Condominium, including those owned by Allstate’s insureds Corey Wecler (Wecler), Cara Ottilio-Cooper (Ottilio-Cooper) and Sherri Fried (Fried).

Virfra Holdings allegedly purchased the Unit as a real estate investment and leases it out to third parties. Defendant Evans Relocation, Inc. d/b/a Evans Real Estate (Evans) was the managing agent of the Unit for a period of time immediately prior to the water event of January 17, 2012. Allstate’s insureds Wecler, Ottilio-Cooper and Fried made claims to Allstate for payment based on property damages they sustained due to the water event. Allstate paid the following amounts upon the claims: to Wecler the sum of \$29,866.47, less a \$500 deductible; to Ottilio-Cooper the sum of \$2,887.31, less a \$500 deductible; and to Fried the sum of \$2,257.17, less a \$500 deductible. Allstate, as subrogee, commenced this action to recover from Virfra Holdings and Evans the amounts it paid on the claims.

Central to this motion is a waiver of subrogation clause, contained in the Downtown Condominium by-laws. Virfra Holdings contends that as with all condominium purchases, Wecler, Ottilio-Cooper and Fried purchased their units subject to the declaration and by-laws of the condominium association. The specific language in each of their deeds provides, in relevant part, that each, as grantee, takes: “TOGETHER with, and subject to, the rights, obligations, easements, restrictions and other provisions set forth in the Declaration and the By-Laws of the Condominium . . . .” The Downtown Condominium by-laws contain the following waiver of subrogation clause:

Unit Owners are required to carry other insurance, at their expense, insuring the contents of their Units and their respective Limited Residential Common Elements and liability insurance with respect to acts occurring therein. All such policies shall contain waivers of subrogation and provide that the liability of the carriers issuing the insurance maintained by the Condominium Board shall not be affected or diminished by reason of any such additional insurance carried by any Unit Owner.

(By -Laws §5.4(E)). Virfra Holdings contends that ownership in the Downtown Condominium obligates owners to obtain insurance for their units containing waivers of subrogation, and Allstate, as a subrogee, is bound by these requirements and may not maintain this action.

Allstate argues that the clause does not preclude this subrogation action because Virfra Holdings cannot prove that it procured the appropriate insurance. In support of its position, Allstate relies on the propositions that “a waiver of subrogation clause, by which the parties to a contract prospectively waive any claim each one’s insurer might otherwise acquire against the other party by way of subrogation, is necessarily premised on the procurement of insurance by the parties” (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 232 [1<sup>st</sup> Dept 2006] [internal quotation marks and citation omitted]), and “a waiver of subrogation clause cannot be enforced beyond the scope of the specific context in which it appears.” (*Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654, 660 [1997]). Allstate argues that in order for Virfra Holdings to be a beneficiary of the waiver of subrogation clause, it must prove that it was insured at the time of the loss, and because Virfra Holdings cannot make this showing, it is not entitled to a dismissal of the complaint.

For the following reasons, Virfra Holdings’s motion for a dismissal of the complaint is granted, and the motion for consolidation is denied as moot.

## Discussion

It is well settled that in determining a pre-answer motion to dismiss, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Where the allegations contained in a complaint are “flatly contradicted by documentary evidence,” they “are not entitled to such consideration” (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1<sup>st</sup> Dept 1991], *lv denied* 80 NY2d 788 [1992])[citations and internal quotation marks omitted]). Here the documentary evidence, consisting of the declaration by-laws, conclusively establishes a defense to Allstate’s subrogation claims as a matter of law. (CPLR §3211 (a)(1)).

Contrary to the contention of Allstate, the failure of the condominium unit owner from which the water event emanated to acquire the appropriate insurance coverage does not render the waiver of subrogation clause void. (*Federal Ins. Co. v James*, 2011 NY Slip Op 31939(U) [Sup Ct, NY County 2011]). As noted, unit owners purchase their units subject to the condominium’s declaration and by-laws which, “are, in essence, an agreement among all of the individual unit owners which set forth the respective rights and obligations of unit owners” (*Agostinelli v Stein*, 17 AD3d 982, 984 [4<sup>th</sup> Dept][internal quotation marks and citation omitted], *lv dismissed* 5 NY3d 824 [2005]). As a condition of unit ownership, purchasers agree to subordinate individual ownership rights “to the promotion of the common good.” (*See Murphy v State of New York*, 14 AD3d 127, 134 [2<sup>nd</sup> Dept 2004]).

The terms of the Downtown Condominium’s by-laws require the condominium board to carry insurance to cover the building and the individual unit owners to carry insurance to cover their

personal property. The by-laws also specifically state that the policies procured by the board and by the unit owners “shall contain waivers of subrogation.” (By-Laws §§ 5.4 [A] [i] and 5.4 [E]). The rationale for these requirements in the context of condominium ownership was explained by the court in *Schiller v Community Tech.* (78 AD2d 762, 763 [4<sup>th</sup> Dept 1980]):

“The idea behind using both types of insurance is to provide coverage for the [condominium] project as a whole, as well as for the individual unit owners. Of course, the use of various individual policies increases the risk that subrogation rights will be asserted by one of the insurers against a unit owner because the physical proximity and interdependence of the units makes it likely that damage from fire will extend beyond any one unit (1 Rohan & Reskin, *Condominium Law and Practice*, § 11.05[3]). Obviously subrogation in this situation is undesirable because it jeopardizes the collective resources. Viewing the condominium as a whole, there would be in effect be no insurance if subrogation were permitted, since the loss would ultimately fall on the careless unit owner. Thus, the particular insurance needs of condominium owners suggest that the required waivers were designed to operate only with respect to subrogation claims brought against other condominium unit owners.”

New York courts have also recognized that water damage, much like fire damage, often extends beyond an individual condominium unit, and based on the same rationale, courts have upheld waivers of subrogation against insurers attempting to pursue subrogation claims against the condominium unit owners responsible for water damage sustained by their insureds. (*See Agostinelli*, 17 AD3d at 985; *Federal Ins. Co.*, 2011 NY Slip Op 31939(U) at 10).

As the subrogee, Allstate stands in the shoes of its insureds, who, by virtue of the by-laws, relinquished any right they might otherwise have had to recover damages from the owner of Unit 1502, as the party allegedly responsible for the loss, irrespective of whether Virfra Holdings procured the appropriate insurance. Moreover, by virtue of the by-laws, Allstate is also barred from maintaining a subrogation action where its own insureds are in breach of a condominium’s by-laws requiring them to obtain insurance policies containing waivers of subrogation. (*See Agostinelli*, 17

AD3d at 984; *Admiral Indem. Co. v Delins*, 2012 NY Slip Op 30708(U) [Sup Ct, NY County 2012];  
*Greater New York Mut. Ins. Co. v Nasarre*, 2009 NY Slip Op 31420(U) [Sup Ct, NY County 2009]).

The purpose of the requirement that both the condominium board and the unit owners obtain coverage with waivers of subrogation provisions is to prevent litigation between unit owners and litigation between unit owners and the condominium board. To permit Allstate to pursue this action against Virfra Holdings would frustrate this objective.

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendant Virfra Holdings LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant ; and it is further

ORDERED that the balance of the motion is otherwise denied; and it is further

ORDERED that the action is severed and continued against the remaining defendant.

Dated: July 3, 2013

ENTER:



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Ellen M. Coin, A.J.S.C.