

Allstate Indem. Co. v Virfra Holdings LLC
2014 NY Slip Op 30623(U)
March 12, 2014
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

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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: October 9, 2013
Motion Sequence: 002

DECISION AND ORDER

For Plaintiff:
Feldman & Feldman LLP
By Leonard B. Feldman, Esq.
811 West Jericho Turnpike, Ste 201W
Smithtown, New York 11787
631-979-1200

For Defendant Virfra Holdings LLC:
Cinotti & Stone LLP
By Scott Stone, Esq.
11 Broadway, Ste 368
New York, New York 10004
212-825-0489

For Defendant Evans Relocation:
no appearance on this motion

Papers considered in review of this motion to reargue:

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.:

Plaintiff moves pursuant to CPLR 2221 to renew and reargue the Court's decision and order, dated July 3, 2013, dismissing the complaint as against defendant Virfra Holdings, LLC on the ground of the waiver of subrogation clause required by the condominium's by-laws to be present in all insurance policies carried by condominium unit owners. Plaintiff argues that the

Court overlooked and misapprehended binding legal authority, citing *Duane Reade v Reva Holding Corp.* (30 AD3d 229 [1st Dept 2006]), *Liberty Mutual Ins. Co. v Perfect Knowledge, Inc.* (299 AD2d 524 [2nd Dept 2005]) and *Am. Motorist Ins. Co. v Morris Goldman Real Estate Corp.* (277 F Supp 2d 304, 308 [SDNY 2003]). Plaintiff argues that Virfra's failure to comply with the by-laws, by not obtaining requisite insurance coverage, relieves its subrogees from the requirement of maintaining an insurance policy with a waiver of subrogation clause and effectively rescinds *nunc pro tunc* the waiver of subrogation clause contained in plaintiff's policy.

Specifically, plaintiff relies on the risk allocation principle enunciated in the cited precedent as follows:

Waiver of subrogation provisions exist as part and parcel of a risk allocation agreement whereby liability is shifted to the insurance carriers of the parties to the agreement. Such an agreement is necessarily premised on the procurement of insurance by the parties. . . Without the procurement of insurance, the shifting envisioned under the agreement could not take place, and the agreement was frustrated.

(*Liberty Mutual Ins. Co.*, 299 AD2d at 526 [citation omitted]).

This principle, together with the case law plaintiff cites, developed in the context of commercial leasehold agreements and cannot be applied in the setting of a condominium association. A leasehold agreement concerns only the signatories, so that one party's failure to comply with the agreement may excuse

compliance by all other parties. The same cannot be said of adherence to the by-laws of a residential condominium association.

The relationship between condominium owners, as well as between owners and the association itself, is governed by the relevant by-laws. One condo owner's failure to abide by the by-laws does not relieve the remaining owners of compliance. Otherwise, a condominium arrangement would be unfeasible. Thus, pursuant to Downtown Condominium's by-laws, it is a duly elected board of directors, not individual unit owners, that has legal authority to enforce provisions thereof.

(By-Laws §§2.4(A) (xviii) and 2.6(A); cf. *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 539 [1990]).

By-Law §5.4(E) includes a mandate for members to obtain insurance and a requirement that all procured insurance policies contain a waiver of subrogation. While plaintiff's subrogor fully complied with this provision,¹ defendant Virfra Holdings LLC ("Virfra") failed to procure requisite coverage. Nonetheless, Virfra's non-compliance with By-Law §5.4(E) does not render plaintiff's waiver of subrogation clause null and void, as its

¹Due to plaintiff's omission of a copy of its policy from the moving papers in the previous motion, the Court mistakenly asserted in its original ruling that plaintiff's policy did not contain a waiver of subrogation. In fact, a waiver of subrogation is contained in Paragraph 10 on page 17 of the policy. Plaintiff presents a copy of its insurance policy in support of the second branch of its motion seeking renewal. Because the Court accepts the copy of the insurance policy on the branch of the motion to reargue, the remainder of the motion to renew is deemed moot.

own compliance with the by-laws is independent of the actions of other unit owners. (Cf. *Agostinelli v Stein*, 17 AD3d 982, 984 [4th Dept], *lv dismissed* 5 NY3d 824 [2005]). The sole means of rectifying Virfra's non-compliance with the by-laws is petitioning the board of directors to take action.

In accordance with the foregoing, it is hereby


ORDERED that plaintiff's motion to reargue pursuant to CPLR 2221 is granted, and on reargument, the Court adheres to its prior ruling; and it is further

ORDERED that plaintiff's motion to renew is denied as moot.

This constitutes the decision and order of the Court.

Date: 3/12/14

ENTER:


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