

<b>Lexington Ins. Co. v Galleria Condominium</b>
2014 NY Slip Op 30671(U)
March 12, 2014
Sup Ct, New York County
Docket Number: 156326/12
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 11

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LEXINGTON INSURANCE COMPANY, as subrogee of INDEX NO. 156326/12  
ELDAD LLC, ELDAD PRIME, LLC and all other  
named insured under policy number 4271656,

Plaintiff,  
-against-

GALLERIA CONDOMINIUM, BROWN HARRIS  
STEVENS RESIDENTIAL MANAGEMENT, LLC,  
SKY 4, LLC, STREAMLINE WINDOWS, INC. and  
LAWLESS & MANGIONE ARCHITECTS  
ENGINEERS, LLP,

Defendants.

-----X  
JOAN A. MADDEN, J.:

In this subrogation action, defendants Galleria Condominium (“Galleria”) and Brown Harris Stevens Residential Management, LLC (“Brown Harris”) move for an order pursuant to CPLR 3211(a)(7) dismissing all claims asserted against them, or alternatively converting the motion to a motion for summary judgment pursuant to CPLR 3211 and 3212, and granting summary judgment in their favor.<sup>1</sup> Co-defendant Lawless & Mangione Architects Engineers, LLP (“L & M”) cross-moves for the identical relief, dismissing the complaint as against it or alternatively awarding summary judgment in its favor. L & M also cross-moves to dismiss the cross-claims asserted against it, and opposes the motion by co-defendants Galleria and Brown Harris to the extent they seek dismissal of L&M’s cross-claims. Plaintiff Lexington Insurance Company (“Lexington”) opposes the motion and cross-motion, and defendant Sky 4 LLC (“Sky”) opposes only the motion by Galleria and Brown Harris.

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<sup>1</sup>The court declines to consider the request in the alternative by Galleria and Brown Harris for summary judgment on their cross-claims against co-defendants Sky and Streamline, since that request appears only in their reply papers.

The following facts are not disputed unless otherwise noted. The accident underlying this action occurred on June 6, 2012, at a 57-story, mixed-use luxury condominium building known as the Galleria Condominium, located at 115-117 East 57<sup>th</sup> Street in Manhattan. A window in unit 52A, owned by defendant Sky, fell from the 52<sup>nd</sup> floor and landed on the building's eight-story glass atrium, damaging, *inter alia*, the commercial portion of the building, owned by Lexington's insured, Eldad LLC and Eldad Prime LLC (collectively "Eldad"). The lower three and upper 16 floors comprise the commercial portion of the building, and the balance of the upper floors comprise the residential portion of the building. Defendant Brown Harris is the managing agent of the condominium. Defendant Streamline Windows, Inc. was apparently responsible for the installation of the window in Unit 52A, and defendant L & M was the architectural firm that apparently prepared "shop drawings" relating to the installation of the window.

On September 13, 2012, Lexington commenced this action asserting one cause of action for negligence against all defendants. The complaint seeks damages in the sum of \$884,202.21, the amount Lexington alleges it paid its insured as property damages. Defendants Galleria and Brown Harris answered asserting four affirmative defenses, and two cross-claims against co-defendants Sky, Streamline and L&M, for contribution and indemnification. Defendant L&M answered asserting 15 affirmative defenses, and one cross-claim against co-defendants Galleria, Brown Harris, Sky and Streamline, for common law and contractual indemnification, and contribution. Defendant Sky answered asserting six affirmative defenses and one cross-claim against co-defendants Galleria, Brown Harris, Streamline and L&M, for common law indemnification. Defendant Streamline has neither appeared nor answered.

Defendants Galleria and Brown Harris are now moving to dismiss or for summary judgment, arguing that Lexington's negligence claim is without merit based on the waiver of subrogation clause in the condominium by-laws and the Lexington policy. The court agrees.

Section 6.2-7 of the condominium by-laws states that "Unit Owners shall not be prohibited from carrying other insurance for their own benefit, and the Residential Board shall not be prohibited from carrying insurance for the benefit of the Residential Section or Residential Unit Owners, provided that *all such policies policies shall contain waivers of subrogation*, to the extent obtainable . . ." (emphasis added). The Lexington policy contains a subrogation clause which states in relevant part that the "insurer [Lexington] shall not acquire any right of recovery that the *insured has expressly waived prior to a loss*, nor shall such waiver affect the insured's rights under this Policy" (emphasis added). Based on the clear and explicit terms of the foregoing provisions, Eldad expressly agreed to waive any right of subrogation against the condominium and its managing agent, and Lexington, in turn, agreed that it would have no "right of recovery" that Eldad, as the insured "expressly waived prior to a loss."

Contrary to Lexington's assertion, the above-quoted provisions in condominium by-laws and the Lexington policy conclusively establish defendants' waiver of subrogation defense as a matter of law. See 511 West 232<sup>nd</sup> Owners Corp v. Jennifer Realty Co, 98 NY2d 144 (2002); Weil Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc, 10 AD3d 267 (1<sup>st</sup> Dept 2004). While Lexington also argues that dismissal or summary judgment is premature since discovery is outstanding, the absence of discovery does not require denial of defendants' motion, as Lexington fails to show that facts essential to oppose the motion are in defendants' exclusive knowledge, or that discovery might lead to facts relevant to a viable defense. See Woods v. 126

Riverside Drive Corp, 64 AD3d 422, 423 (1<sup>st</sup> Dept 2009), lv app den 14 NY3d 704 (2010);

Duane Morris LLP v. Astor Holdings, Inc, 61 AD3d 418 (1<sup>st</sup> Dept 2009).

Thus, since the waiver of subrogation clause in the by-laws bars Lexington claims against Galleria and Brown Harris, the complaint is dismissed as against them. However, the co-defendants' cross-claims against Galleria and Brown Harris for indemnification and contribution shall stand, since the co-defendants are not parties to and, therefore, are not bound by the waiver of subrogation clause in the condominium by-laws. See Spectra Audio Research, Inc v. Chon, 62 AD3d 561 (1<sup>st</sup> Dept 2009).

For the identical reason, L&M's cross-motion is denied, as it is undisputed that L&M is not a party to the condominium by-laws, and, therefore, derives no benefit from the waiver of subrogation clause in that document. While L&M asserted for the first time at oral argument, that it is a third-party beneficiary of the waiver of subrogation clause in the condominium by-laws, it provided no legal authority to support such conclusion. In any event, the court find that such assertion is not persuasive. See id. Thus, L&M's cross-motion is denied.

Accordingly, it is


ORDERED that the motion by defendants Galleria Condominium and Brown Harris Stevens Residential Management, LLC, is granted only to the extent the complaint is severed and dismissed as against such defendants, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion by defendant Lawless & Mangione Architects Engineers, LLP is denied in its entirety; and it is further

ORDERED that the balance of the action, including the cross-claims asserted against defendants Galleria Condominium and Brown Harris Stevens Residential Management, LLC, shall continue, and all parties are directed to appear for a compliance conference on April 3, 2014 at 9:30 am, in Part 11, Room 351, 60 Centre Street.

DATED: March 12, 2014

ENTER:

  
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**HON. JOAN A. MADDEN**  
J.S.C. J.S.C.