

**Travelers Indemnity Co. of Connecticut v Hi-Re-Li
Conditioning Corp.**

2014 NY Slip Op 33486(U)

April 22, 2014

Supreme Court, New York County

Docket Number: 117752/09

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.



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

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

TRAVELERS INDEMNITY COMPANY OF CONNECTICUT
a/s/o ERE LLP,

Plaintiff,

- v -

INDEX NO. 117752/09
MOTION DATE 03-12-2014
MOTION SEQ. NO. 003
MOTION CAL. NO. _____

HI-RE-LI CONDITIONING CORP.,

Defendant.

HI-RE-LI CONDITIONING CORP.,

Third-Party Plaintiff,

- v -

THIRD-PARTY INDEX NO. 590041/2011

RECEIVED
APR 28 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

440 REALTY ASSOCIATES LLC and
SMITH AFFILIATES MANAGEMENT CORP.,

Third-Party Defendants.

440 REALTY ASSOCIATES LLC and
SMITH AFFILIATES MANAGEMENT CORP., d/b/a
SAMCO PROPERTIES,

Fourth-Party Plaintiffs,

- v -

FOURTH-PARTY INDEX NO. 590343/2011

FILED

APR 28 2014

ERE LLP,

Fourth-Party Defendant.

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 8 were read on this motion to/for Dismiss pursuant to CPLR §3211 [a],[7]:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED

1 - 4

5 - 6, 7 - 8

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that ERE, LLP's motion pursuant to CPLR §3211[a][7], to dismiss the Fourth-Party Plaintiff's complaint with prejudice, is granted.

Travelers Indemnity Company of Connecticut (hereinafter referred to as "Travelers"), brought this subrogation action on behalf of, and arising out of damage to

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

property owned by its insured ERE, LLP, resulting from a January 18, 2009, sprinkler pipe bursting in the computer server room causing 15,000 gallons of water to drain from water tanks into the fifth floor of 440 Park Avenue South, New York, New York. The complaint alleges that Hi-Re-Li Conditioning Corp.'s (hereinafter referred to as "Hi-Re-Li"), an HVAC contractor, was negligent in the installation and maintenance of an air conditioning and split unit installed in a window, in ERE, LLP's server room resulting in a freeze-up of the sprinkler causing it to burst and the resulting property damage.

Hi-Re-Li commenced a third-party action for common law indemnification and contribution against 440 Realty Associates LLC (hereinafter referred to as "440 Realty") and Smith Affiliates Management Corp. (hereinafter referred to as "Smith"), the building owner and manager respectively alleging any liability is based on their affirmative acts of negligence. 440 Realty and Smith asserted counter-claims for contribution and common-law indemnification against Hi-Re-Li. 440 Realty and Smith also commenced a fourth-party action against ERE, LLP, the fifth floor tenant, asserting claims for negligence, breach of contract, violations of law, strict liability, contractual indemnification and common law indemnification and contribution. Hi-Re-Li asserted cross-claims against ERE, LLP for indemnification and contribution in the fourth-party action based on ERE LLP's negligent acts or omissions. ERE, LLP then asserted counterclaims against Hi-Re-Li for negligence, indemnification and contribution in the fourth party action.

ERE, LLP seeks to dismiss the fourth party action contending that the complaint fails to state a cause of action because the fourth-party action is barred by the anti-subrogation rule. ERE, LLP contends that Travelers has undertaken the defense of 440 Realty which is listed as an insured on the policy as required pursuant to the lease agreement (Mot. Exh. I). ERE, LLP argues that 440 Realty as an insured under the same policy (Mot. Exh. F), is precluded under the anti-subrogation rule from maintaining the Fourth-Party action.

An insurer in a subrogation action, "stands in the shoes of its insured" and seeks indemnification for wrongdoing that caused a loss to the insured by third-parties, which the insurer must reimburse and arises by operation of law upon payment to the insured (North Star Reinsurance Corp. v. Continental Ins. Co., 82 N.Y. 2d 281, 624 N.E. 2d 647, 604 N.Y.S. 2d 510 [1993]). An insurer cannot seek reimbursement from its own insured for a claim arising out of the same risk for which insurance was obtained and provided. "Public policy requires this exception to the general rule to prevent the insurer from passing the loss to its own insured and to guard against the potential for conflict of interest that may affect the insurer's incentive to provide a vigorous defense for its insured" (Penn. Gen. Ins. Co. v. Austin Powder, Co., 68 N.Y. 2d 465, 502 N.E. 2d 982, 510 N.Y.S. 2d 67 [1986]).

440 Realty argues that it has stated proper causes of action in the Fourth-Party action for indemnification derived from the \$300,000.00 that is not included in the Travelers policy, which makes dismissal premature unless and until a determination is rendered concerning negligence and placing a value on the claim.

Contracts which waive subrogation against any claim each party's insurer might acquire are valid and enforceable, based on the scope and context utilized in the agreement (*Kaf-Kaf, Inc. v. Rodless Decorations, Inc.*, 90 N.Y. 2d 687 N.E. 2d 1330, 665 N.Y.S. 2d 47 [1997]). Waiver of subrogation clauses are valid and enforceable in the context of a landlord and tenant relationship, where each party is responsible for procuring insurance to cover its own risks and it is not used as a means of avoiding liability (*Insurance Co. of N. Am. v. Borsdorff Servs.*, 225 A.d. 2d 494, 639 N.Y.S. 2d 816 [N.Y.A.D. 1st Dept., 1996]).

Pursuant to the lease (Mot. Exh. I), at paragraph 9, titled "Destruction, Fire and other Casualty," which states in relevant part,

"Owner and Tenant hereby releases and waives all right of recovery... against the other or anyone claiming through or under each of them by way of subrogation or otherwise. The release and waiver herein referred to shall be deemed to include any loss or damage to the demised premises and/or any personal property, equipment, trade fixtures, goods and merchandise located therein. The foregoing release and waiver shall be in force only if both releasor's insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance."

Both 440 Realty's policy with Greater New York and ERE LLP's policy with Travelers permit waiver provisions made in writing prior to the loss, and state in relevant part,

"Prior to a loss to your Covered Property or Covered Income....
This will not restrict your insurance."

The Fourth-Party action seeks indemnification from ERE, LLP, even though Travelers provides coverage to 440 Realty. The lease has a valid waiver of subrogation provision. Dismissal pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence will not be presumed to be true and are susceptible to dismissal (*Dragon Head LLC v. Elkman*, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [N.Y.A.D. 1st Dept., 2013]). 440 Realty's Fourth Party Complaint does not state a potentially meritorious causes of action because the indemnification sought is barred by both the anti-subrogation rule and the waiver of subrogation provisions in the lease.

Accordingly, it is ORDERED that ERE, LLP's motion pursuant to CPLR §3211[a][7], to dismiss the Fourth-Party Plaintiff's Complaint with prejudice, is granted, and it is further,

ORDERED that the Fourth-Party Complaint against ERE LLP, is severed and dismissed with prejudice, and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly.

ENTER :

MANUEL J. MENDEZ
J.S.C.



MANUEL J. MENDEZ
J.S.C.

Dated: April 22, 2014

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED

APR 28 2014

COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 117752/2009
TRAVELERS INDEMNITY
vs.
HI-RE-LI CONDITIONING
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

FILED
APR 28 2014
COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE