

<b>Insurance Co. of Greater N.Y. v Rasmussen</b>
2015 NY Slip Op 31381(U)
July 22, 2015
Supreme Court, New York County
Docket Number: 157284/2012
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY - PART 29**

-----X  
**Insurance Company of Greater New York  
as subrogee of WP Owners Corporation**

**Plaintiff**

**DECISION AND ORDER**

**-against-**

**INDEX NO.: 157284/2012**

**David Rasmussen and Michelle Rasmussen**

**Defendant**  
-----X

Upon the foregoing papers, the Defendants

Procedural History

Underlying Complaint and Allegations

The underlying action arises from a fire that occurred on January 6, 2012 in apartment 4A located at 75-24 Bell Boulevard, Oakland Gardens, New York. Said location is a cooperative property owned by the WP Owners Corporation ("WPO"). At the time of the fire, the Defendants were tenants in apartment 4A and the Plaintiff Insurance Company of Greater New York ("ICGNY") insured the building for property damage. The Plaintiff alleges in sum and substance in the bill of particulars that the fire started due to the Defendants' negligence in failing to properly care and supervise their minor daughter. Specifically, that the Defendants left their minor daughter unsupervised in the apartment while failing to secure flammable materials from her access. The Plaintiff, as the subrogee of the WPO, seeks to recover from the Defendants \$105,943.69, the full sum of the WPO's claim for the fire damage, which the Plaintiff paid to WPO after a \$5,000.00 deductible.

The Defendants now move for summary judgment dismissing the Plaintiff's action, and the Plaintiff opposes.

On July 21, 2015, the parties appeared for oral argument before the Court on the instant motion for summary judgment.

## Parties' Contentions

The Defendants' motion for summary judgment argues two points in sum and substance: that there is no issue of fact as to the Defendants' lack of negligence in the underlying action and that WPO could not transfer its rights to Plaintiffs to pursue the underlying action against the Defendants, since WPO waived any rights of recovery from the Defendant for property damage pursuant to the Proprietary Lease.

The Defendants argue that the subject fire was started by a malfunctioning television set in the apartment, and that there is no basis for the Plaintiff's allegation that the fire was caused by the Defendants' child playing with matches while the Defendants were not at home. The Defendants further argue that they are being sued in their individual capacity only and not in their capacity as the guardians of a child, that the child is not a party to the lawsuit and that the statute of limitations to bring the child into the action through her parents has expired. The Defendants further argue that even assuming arguendo that the fire was started by the Defendants' child playing with matches, the Plaintiff has failed to submit any evidence to establish a basis for their claim against the Defendants for negligent supervision. Specifically, the Defendants argue that the Plaintiff had failed to submit any proof that the Defendants either entrusted their child with a dangerous instrumentality or knew of the child's proclivity to play with matches and/or light things on fire. In the absence of said showing, the Defendants argue that they are not ipso facto responsible for the conduct of their child.

The Defendants further argue that pursuant to the Proprietary Lease between WPO and the Defendants, when read together with the insurance policy between WPO and the Plaintiff, WPO waived its right to recover against the Defendants for damage to the subject property. The Defendants refer to paragraph 4(d) of the Proprietary Lease which states that WPO would use its best efforts to obtain a provision in all insurance policies carried by it "waiving the right of subrogation against the lessee and, to the extent that any loss or damage is covered by the lessor by any insurance policies which contain such waiver of subrogation, the lessor releases the releasee from any liability with respect to such loss or damage." The Defendants also refer to paragraph 11 of the Proprietary Lease wherein the tenants agree to indemnify the landlord "for all damage and expense", with the exception that said paragraph "shall not apply to any loss or damage when lessor is covered by insurance which provides for waiver of subrogation against the lessee." The Defendants refer to the insurance policy between WPO and the Plaintiff, which indicates in the "commercial property conditions" provision that the insured can "waive [its] rights against another party in writing: 1. Prior to a loss to your covered property or covered income." The Defendants argue in sum and substance that since the insurance policy between WPO and the Plaintiff included a provision allowing WPO to waive its rights of recovery, WPO waived said rights as to the Defendants pursuant to paragraphs 4(d) and 11 of the Proprietary Lease. As such, the Defendants argue that WPO waived its right to recover from the Defendants for any damages covered by the insurance policy, and WPO could not thereafter transfer said rights to the Plaintiff as subrogee.

At oral argument on the motion, the Defendants reiterated their argument that there is no basis of proof to support the Plaintiff's claim that the fire was caused by the Defendants' child playing with matches, any other flammable materials, and/or any other instrument or instrumentalities. The Defendants further reiterated their argument that the language of the Proprietary Lease clearly indicates that WPO waived its rights of recovery against the Defendants for any damaged covered by the insurance policy.

In opposition to the motion, the Plaintiff argues that there is an issue of fact as to whether or not the underlying fire was caused by the Defendants' negligent supervision of their child. The Plaintiff attaches with their opposition papers the deposition transcript taken of the Defendant Michelle Rasmussen, which the Plaintiff argues is sufficient to create an issue of fact as to whether the fire and subsequent property damage resulted from the Defendants' negligent supervision of their child. The Plaintiff specifically refers to Ms. Rasmussen's testimony that her child's behavior on occasions prior to the subject incident included screaming, yelling, kicking, hitting and throwing things. The Plaintiff also refers to Ms. Rasmussen's testimony that her child was in special education due to behavioral issues and that Ms. and Mr. Rasmussen were gone from the apartment for approximately 40 minutes when the incident occurred. The Plaintiff also refers to Ms. Rasmussen's testimony that she was arrested in connection with the subject incident for leaving her child alone and unsupervised in the apartment. The Plaintiff attaches with the opposition papers a copy of the New York City Fire Incident Report, Fire Marshal Report, which indicates that the cause of the fire was "Child Playing w/Matches/Lighter".

On the issue of the Proprietary Lease, the Plaintiff argues that the Appellate Division First Department has already determined that language such as that used in insurance policy between the Plaintiff and WPO does not constitute a waiver of subrogation rights. The Plaintiff refers to the case of Continental Insurance Company, etc. vs 115-123 West 29<sup>th</sup> Street Owners Corp. (275 A.D.2d 604 (NY App Div 1st Dept 2000)) and argues that said case stands for the principle that the Proprietary Lease's waiver of subrogation does not apply. The Plaintiff argues that the insurance policy between the Plaintiff and WPO did not include a waiver of subrogation against WPO, but rather the insurance policy simply authorized WPO to waive WPO's rights against another party in writing prior to a loss.

At oral argument on the motion, the Plaintiff clarified its argument that there was an issue of fact as to the cause of the fire. The Plaintiff argued before the Court that given that the Defendants' nine-year-old child had prior behavioral issues, the mere fact that the Defendants left their child in the apartment unsupervised constituted negligent supervision and created an issue of fact as to whether or not the child caused the fire. Further, the Plaintiff argued for the first time at oral argument that the fire was started by the Defendant's child inserting either matches or some other object into the television located in the apartment. Said specific argument was not included in the Plaintiff's opposition to the Defendants' motion for summary judgment.

Further, although the Plaintiff did not argue that the language of paragraph 4(d) of the Proprietary Lease was in any way unclear, the Plaintiff reiterated its position that the language of the insurance policy between the Plaintiff and WPO did not constitute a waiver of subrogation rights pursuant to the Appellate Court's decision in Continental Insurance Company, etc. vs 115-123 West 29<sup>th</sup> Street Owners Corp. (275 A.D.2d 604 (NY App Div 1st Dept 2000)). The Plaintiff did not address any of other language of paragraph 4(d) of the Proprietary Lease. In particular, the Plaintiff did not address the provision of paragraph 4(d) that required that WPO "use its best efforts to obtain a provision in all insurance policies carried by it waiving the right of subrogation against the lessee".

### Analysis

#### Summary Judgment Standard

It is well settled that the proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)).

"Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact' and then only if, upon the moving party's meeting of this burden, the non-moving party fails 'to establish the existence of material issues of fact which require a trial of the action'" (Vega v Restani Constr. Corp., 18 N.Y.3d 499, 503 (NY 2012) citing Alvarez v. Prospect Hosp., 68 NY2d 320 (NY 1986)). "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." (Ostrov v. Rozbruch, 91 AD3d 147, 152 (NY App Div 1st Dept 2012) citing Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (NY 1985); Alvarez v Prospect Hosp., 68 NY2d 320 (NY 1986)). The proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her

favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Smalls v. AJI Indus., Inc., 10 NY3d 733, 735 (NY 2008)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)).

In deciding a motion for summary judgment, the Court's function is to identify material triable issues of fact, not to make credibility determinations or findings of fact. Issue-finding, rather than issue-determination is the key to the procedure (See Vega v. Restani Constr. Corp., 18 NY3d 499, 505 (NY 2012); Farias v. Simon, 122 AD3d 466 (NY App Div 1st Dept 2014)). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (See Negri v. Stop & Shop, Inc., 65 NY2d 625 (NY 1985)). If there is any doubt as to the existence of a triable issue, then the motion for summary judgment should be denied (See Grossman v. Amalgamated Hous. Corp., 298 AD2d 224, 226 (NY App Div 1st Dept 2002) citing Rotuba Extruders, Inc. v. Ceppos, 46 NY2d 223 (NY 1978); Stone v. Goodson, 8 NY2d 8 (NY1960)).

"On the other hand, to defeat a motion for summary judgment the opposing party must 'show facts sufficient to require a trial of any issue of fact'. Normally if the opponent is to succeed in defeating a summary judgment motion he, too, must make his showing by producing evidentiary proof in admissible form. The rule with respect to defeating a motion for summary judgment, however, is more flexible, for the opposing party, as contrasted with the movant, may be permitted to demonstrate. We [The Court of Appeals of New York] have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY 1980) citing CPLR §3212(b); Phillips v. Joseph Kantor & Co., 31 NY2d 307 (NY 1972); Indig v. Finkelstein, 23 NY2d 728 (NY 1968); Alvord v Swift & Muller Constr. Co., 46 NY2d 276 (NY 1978); Fried v Bower & Gardner, 46 NY2d 765 (NY 1978); Platzman v American Totalisator Co., 45 NY2d 910 (NY 1978); Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285 (NY 1973)).

Defendants have met their prima facie burden to establish that the Plaintiff cannot sustain an action against them for negligence

"[I]t is well-established law that a parent owes a duty to third parties to shield them from an infant child's improvident use of a dangerous instrument, at least, if not especially, when the parent is aware of and capable of controlling its use... Parents are permitted to delegate to their children the decision to participate in dangerous activities, but they are not absolved from liability for harm incurred by third parties when the parents as adults unreasonably, with respect to such third parties, permit their children to use dangerous instruments." (Nolechek v. Gesuale, 46 NY2d 332, 338-339 (NY 1978)).

This principle of parental responsibility/negligence for the tort of a child is best stated in section 2:269 of the New York Pattern Jury Instructions which read as follows:

PJI 2:260 Liability for the Conduct of Another—Family Relationship—Liability of Parent for Tort of Child—Negligence in Permitting Use of Instrumentality

A parent is not responsible for the acts of (his, her) child, but is responsible for the failure to use reasonable care in entrusting to or leaving in the possession of the child an instrument which, in view of the nature of the instrument, the age, intelligence, and disposition of the child and (his, her) prior experience with such an instrument, constitutes an unreasonable risk of harm to others. Reasonable care means that degree of care which a reasonably prudent parent would use under the same circumstances.

The language of PJI 2:260 is based upon a review of Nolechek v Gesuale (46 NY2d 332 (NY 1978); Marks v Thompson, 18 AD2d 731 (NY App Div 3d Dept 1962), aff'd, 13 NY2d 1029 (NY 1963); Ansbro v Noviello, 202 AD2d 211 (NY App Div 1st Dept 1994); Len v Cohoes, 144 AD2d 187 (NY App Div 3d Dept 1988); Costa v Hicks, 98 AD2d 137 (NY App Div 2nd Dept 1983); Gordon v Harris, 86 AD2d 948 (NY App Div 3rd Dept 1982); Bucholtz v Grimmer, 50 AD2d 1062 (NY App Div 4th Dept 1975); Lichtenthal v Gawoski, 44 AD2d 771 (NY App Div 4th Dept 1974); Restatement, Second, Torts, §§ 308, 316; Prosser and Keeton, Torts (5th Ed) § 123; 46 NYJur2d, Domestic Relations § 534; 79 NYJur2d, Negligence § 75; and Warren's Negligence, Vol 2C-Part 2, Parent and Child § 80.01 (3) (4th Ed. 1990).

Under the Holodook rule, "[a] parent's negligent failure to supervise a child is generally held not to constitute a tort actionable by the child" (LaTorre v Genesee Management, Inc., 90 NY2d 576, 579, (NY 1997) citing Holodook v Spencer, 36 NY2d 35, 51 (NY 1974)). The Holodook rule also bars actions by third parties against parents for the tortious acts of their children when predicated simply upon general claims of negligent supervision (Nolechek v Gesuale, 46 NY2d 332, 340 (NY 1978) ["Negligent supervision of children, in general, creates no direct unreasonable hazard to third parties."]). This "sound rule" however, is accompanied by "sound exceptions," which include "the duty owed by parents to third parties to control their use of dangerous instruments to avoid harm to third parties" (Id at 339, 341). This exception is a "very specific and narrow complement to the Holodook principle" (LaTorre v Genesee Management, 90 NY2d 576, 581 (NY 1997)), and "is limited to circumstances where a parent's

conduct creates a particularized danger to third persons that is plainly foreseeable (Rios v Smith, 95 NY2d 647, 652 (NY 2001)). “[I]t is ‘unreasonable to burden parents and guardians ... by exposing them to rebound liability, flowing from a child's or adult's natural deficits or personal qualities’ based merely on ‘general allegations’. In order to establish the basis for liability, a plaintiff must prove the ‘extraordinariness or patent foreseeability of the particular situation’” (Rios v. Smith, 95 N.Y.2d 647, 652 (NY 2001) citing LaTorre v Genesee Management, 90 NY2d 576, 581 (NY 1997)) “[P]arental liability for negligent entrustment is limited to circumstances where a parent's conduct creates a particularized danger to third persons that is plainly foreseeable” (Rios v. Smith, 95 N.Y.2d 647, 652 (NY 2001)). Further negligent supervision of children entrusted with dangerous instruments can portend foreseeable injury to third parties, while negligent supervision of children without such instruments generally do not (Wayne Coop. Ins. Co. v Hawthorne, 2012 NY Slip Op 30328(U) (NY Sup Ct Wayne Cnty 2012)).

The Defendants argue that they are entitled to summary judgment as a matter of law as the evidence is completely devoid of any proof that the Defendants entrusted their child with a dangerous instrumentality or were aware of their child's dangerous propensities.

In support of the instant motion for summary judgment, the Defendants attach with their moving papers affidavits by both David and Michelle Rasmussen, wherein they both attest in sum and substance that the underlying fire was started by a television set in their apartment. They further attest that no matches were kept in the room where the television was located and that all matches was secured in an elevated position in the kitchen. They further attest that they are unaware of their child ever using matches prior to the fire or at the time of the fire.

Upon a review of the submitted papers, the Court finds that the Defendants have sustained their prima facie burden for summary judgment. Specifically, upon a review of the Plaintiff's complaint and verified bill of particulars, it is clear that the Plaintiff's action against the Defendants hinges upon the Plaintiff's claim that the Defendants were negligent in their care and supervision of their minor child. The Plaintiff claims in sum and substance that the fire was caused by the Defendants' child playing with flammable materials while unsupervised in the apartment and that the Defendants are liable for the child's conduct. However, neither the complaint nor the verified bill of particulars includes any factual allegations in support of said claim. As such, the Court finds that the Defendants have met their prima facie burden for summary judgment.

The Plaintiffs have failed to establish based upon nonhearsay evidence that there is an issue of fact as to whether or not the fire was caused by the Defendants' alleged negligent supervision of their child

The Plaintiff's argument in opposition to the motion for summary judgment centers upon the Plaintiff's claim that the fire was caused by the Defendants' nine-year-old child playing with matches. Said claim appears to be based entirely upon the "New York City Fire Incident Report, Fire Marshal Report" that the Plaintiff attaches with their opposition papers, which indicates that the cause of the fire was "Child Playing w/Matches/Lighter". However, upon examination of the "New York City Fire Incident Report, Fire Marshal Report", the Court finds that said conclusion as to the cause of the fire is based entirely upon hearsay. Although a Fire Department report is generally admissible under the business records exception to the hearsay rule, a court may properly preclude a fire marshal from testifying as to the cause and origin of a fire, where said conclusions were reached entirely upon hearsay information rather than an independent investigation of physical evidence (See Zohar v. 1014 Sixth Ave. Realty Corp., 24 A.D.3d 125, 126 (NY App Div 1st Dept 2005)). There is nothing within the Fire Incident Report to indicate that the assigned investigator concluded that the fire was caused by a "Child Playing w/Matches/Lighter" based upon an independent investigation of the physical evidence. The Fire Incident Report described multiple interviews that the assigned investigator had with the Defendants and several other individuals, none of whom made any statements to suggest that the fire was started by a child playing with matches or a lighter.

The assigned investigator did indicate that he conducted a physical examination of the fire scene on 1/6/2012 and again on 1/25/2011 [sic 2012], but his observations in no way support the Plaintiff's allegation that the fire was caused by the Defendants' child playing with matches or a lighter.<sup>1</sup> The Court recognizes that the assigned investigator does indicate that he "observed matches and lighters in the kitchen of the subject premises". Although said direct observation would not be considered hearsay, it is insufficient by itself to create an issue of fact as to whether or not the fire was caused by the Defendants' child playing with flammable materials. The mere fact that there were matches and lighters in the kitchen of the apartment is insufficient to create an issue of fact as to whether or not the fire was caused by the Defendants' child playing with matches or a lighter.

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<sup>1</sup> In point of fact, the investigator's observations as described in the Incident Report strongly support the Defendants' position that the fire was caused by a malfunctioning television set. Specifically, the investigator observed "heavy charring" in the wood cabinet that contained the television, and that the television was heavily fire damaged with no electrical cord remaining.

The Plaintiff further attempts to support its argument that the Defendants' child caused the fire by referring to Ms. Rasmussen's deposition testimony as to her child's prior behavioral issues and specific "defiance" to her parents. The Plaintiff argues in sum and substance that the child's prior behavioral issues, taken together with the child's "defiant" behavior on the date of the fire and the fact that there were matches present in apartment is sufficient to create an issue of fact as to whether or not the child caused the fire by playing with matches. The implication being that Ms. Rasmussen's testimony as to her child's prior behavioral issues is sufficient to establish that the child showed a "propensity" to likely play with matches and/or lighters. However, there is nothing from Ms. Rasmussen's deposition to connect her child's behavior with causing the fire and/or suggest that her child had a "propensity" to play with flammable materials (See generally LaTorre v. Genesee Mgmt., 90 N.Y.2d 576 (NY 1997)). Ms. Rasmussen did testify that her child had behavioral issues and was receiving special education. She also testified that her child had defiance issues including screaming, yelling and hitting. However, said deposition testimony is insufficient to support the Plaintiff's specific allegation that the Defendants' child caused the fire by playing with flammable materials. Even taken together with the fact that there were matches in the kitchen of the apartment, the fact that the Defendants' child may have had behavioral issues is insufficient to create an issue of fact as to whether or not the child caused the fire by playing with matches.

The Plaintiff also refers to Ms. Rasmussen's testimony that she was arrested and charged with Endangering the Welfare of a Child in connection with the underlying incident. Ms. Rasmussen testified in sum and substance that she was originally charged with a felony that was reduced to a misdemeanor and ultimately dismissed pursuant to an adjournment in contemplation of dismissal upon her completion of a parenting course (See CPL §170.55). However, the fact that Ms. Rasmussen was charged Endangering the Welfare of a Child in connection with the incident does not imply that the Defendants' child caused the fire by playing with matches. The elements of a charge of Penal Law § 260.10 - Endangering the welfare of a child can be met based upon the underlying incident without any implications as to the actual cause of the fire.

Finally, the Court finds that the mere fact that the Defendants left their nine-year-old child unsupervised in the apartment prior to the fire is insufficient to create an issue of fact as to whether or not the child caused the fire and/or that the Defendants are liable for their child's alleged actions based upon a theory of negligent supervision. As previously stated, there is no nonhearsay proof to support the Plaintiff's claim that Defendants' child actually caused the fire. The Court notes that at oral argument, the Plaintiff's attorney argued for the first time that the fire was started by the Defendant's child inserting objects into the television in the apartment. Plaintiff's attorney also referred for the first time to an expert report that he claims creates a basis for said argument. However, no such expert report was included with the Plaintiff's opposition to the Defendants' motion for summary judgment. The Plaintiff's claim that the Defendants' child caused the fire is pure speculation based upon Ms. Rasmussen's testimony that her child had prior behavioral issues, her testimony that her child showed "defiant"

behavior on the date of the fire and that she left her child unsupervised in the apartment prior to the fire. In order for a third-party claim against a parent or guardian to withstand the force of Holodook, negligence must be alleged and pleaded with some reasonable specificity, beyond mere generalities. The extraordinariness or patent foreseeability of the particular situation are factors to be considered in determining whether a claim may be allowed to stand that would drive the entire family into a conflicted litigation experience. (LaTorre v. Genesee Mgmt., 90 N.Y.2d 576, 584 (NY 1997)). Plaintiff's argument that the Defendants' child may have started the fire is based upon "generalities" as to the child's behavior (e.g. Ms. Rasmussen's testimony that her child had prior behavioral problems and that her child was "defiant" on the date of the fire). In the absence of some nonhearsay proof specifically linking the child's actions with the cause of the fire, said "generalities" as to the child's behavior are insufficient to support the Plaintiff's claim against the Defendants based upon a theory of negligent supervision.

As previously stated, the Plaintiff's opposition to summary judgment hinges upon its argument that the Defendants' were negligent in leaving their child unsupervised with access to matches (or some other similarly flammable objects) and that the Defendants' child started a fire by playing with matches. However, the Plaintiff has failed to submit sufficient nonhearsay evidence to establish that there is an issue of fact as to whether or not the Defendants' child actually caused the fire. Specifically, the only basis for the Plaintiff's argument on this point is the "New York City Fire Incident Report, Fire Marshal Report", which indicates that the cause of the fire was "Child Playing w/Matches/Lighter". However, upon examination of said report, the Court finds that said conclusion as to the cause of fire was not based upon the assigned investigator's observations of the physical evidence. Further, in the absence of some additional proof that the fire was actually caused by matches and/or a lighter, the assigned investigator's observation that there were matches and lighters in the kitchen of the apartment is insufficient to create an issue of fact as to the cause of the fire.

Accordingly, the Defendants' motion for summary judgment is granted on the basis that that there is no proof in admissible form to support the Plaintiff's allegations that the underlying fire was caused by the Defendants' child playing with flammable materials while unsupervised in the apartment. Similarly, there is no proof that the Defendants entrusted their child with a dangerous instrumentality (matches, lighters, etc.), were unaware of their child's dangerous propensities, that the Defendants' child possesses any such propensities, or that the Defendants were otherwise liable for the fire based upon a theory of negligent supervision of their child.

Read together, the terms of the Proprietary Lease between WPO and the Defendants and the terms of insurance policy between WPO and the plaintiff constituted a written waiver of WPO's right to recover against the Defendants for damage to the subject property. As such, the Plaintiff's do not have a right to pursue the underlying subrogation action against the Defendants.

"Subrogation, an equitable doctrine, allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse. While parties to an agreement may waive their insurer's right of subrogation, 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, 90 NY2d 654, 660 (NY 1997) citing Pennsylvania General Ins. Co. v. Austin Powder Co., 68 NY2d 465 (NY 1986); S.S.D.W. Co. v. Brisk Waterproofing Co., 76 N.Y.2d 228 (NY 1990). Further, it is well settled that when the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement and will enforce the writing according to its terms (Continental Ins. Co. v. 115-123 West 29th St. Owners Corp., 275 AD2d 604, 605 (NY App Div 1st Dept 2000) citing W.W.W. Assocs. v. Giancontieri, 77 NY2d 157 (NY 1990); Quest Equities Corp. v. Benson, 193 AD2d 508 (NY App Div 1st Dept 1993)).

Upon review of the Proprietary Lease and the sections of the insurance policy that the Defendants attach with their motion papers, this Court finds that the Defendants have established prima facie that WPO waived its rights to recover against the Defendants for damage to the subject property covered under the insurance policy. Paragraph 4(d) of the Proprietary Lease entitled "Waiver of Subrogation" reads in relevant part as follows:

"Lessor agrees to use its best efforts to obtain a provision in all insurance policies carried by it waiving the right of subrogation against the lessee; and to the extent that any loss or damage is covered by the Lessor by any insurance policies which contain such waiver of subrogation, the Lessor releases the lessee from any liability with respect to such loss or damage."

The text of Paragraph 4(d) of the Proprietary Lease specifically requires that WPO will use its "best efforts" to obtain insurance policies that include a waiver of subrogation. Further, if said insurance policies include a waiver of subrogation, WPO releases the Defendants from any liability with respect to any loss or damage covered by the insurance policy. Said paragraph clearly reflects an understanding between WPO and the Defendants that WPO was to obtain an insurance policy that would include a waiver of subrogation, thereby releasing the Defendants from any liability with respect to loss or damage covered by insurance. In point of fact, the provision specifically requires that WPO will "use its best efforts" to obtain an insurance policy that includes a waiver of subrogation for the purpose of releasing the Defendants from any liability with respect to loss or damage covered by insurance. The parties (WPO and the Defendants) understanding that WPO was to obtain an insurance policy that included a waiver of subrogation is confirmed by paragraph 11 of the Proprietary Lease entitled "Indemnification". This paragraph states in relevant part that "The Lessee agrees to

save the Lessor harmless from all liability, loss, damage....” but also specifically indicates that “[t]his paragraph shall not apply to any loss or damage when the Lessor is covered by insurance which provides for a waiver of subrogation against the Lessee.” As such, it is clear from the language of the Proprietary Lease between WPO and the Defendants that WPO would use its “best efforts” to obtain an insurance policy that included a waiver of subrogation, for the purpose of releasing the Defendants from any liability with respect to any loss or damage covered by the insurance policy.

Section I entitled “Transfer of Rights of Recover Against Others to Us” of the Commercial Property Conditions in the insurance policy between the Plaintiff and WPO reads as follows:

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. prior to a loss to your Covered Property.

Upon a plain reading, this section of the insurance policy gives WPO the option to waive its rights of recovery against the Defendants in writing prior to a loss. Given the language in Paragraph 4(d) in the Proprietary Lease between WPO and the Defendants, in particular that the WPO would use its “best efforts” to obtain an insurance policy that included a waiver of subrogation thereby releasing the Defendants from any liability with respect to any loss or damage covered by the insurance policy, this Court finds that paragraph 4(d) of the Proprietary Lease constitutes a written waiver of rights as described in the insurance policy between WPO and the Plaintiffs.

WPO and the Defendants entered into the Proprietary Lease prior to the fire and paragraph 4(d) of the Proprietary Lease indicates that WPO was waiving its rights to recover against the Defendants for damages covered by the insurance policy. As such, the Court finds that said paragraph constitutes a written waiver by WPO of its rights to recover against the Defendants for any damage covered in the insurance policy. Therefore, said waiver falls squarely within the language of the “Transfer of Rights of Recover Against Others to Us” section of the insurance policy between WPO and the Plaintiffs, which specifically allowed WPO to waive its rights of recovery against another party prior to a loss.

In opposition to summary judgment, the Plaintiff refers to the Appellate Division, First Department's decision Continental Ins. Co. v. 115-123 West 29th St. Owners Corp. (275 AD2d 604 (2001)) in support of its argument that the waiver of subrogation clause in the Proprietary Lease did not apply in the instant action. However, the Appellate Court's ruling in Continental Ins. Co. v. 115-123 West 29th St. Owners Corp. did not address a Proprietary Lease that included the specific language that is before this Court. The Appellate Court had before it a proprietary lease that included a waiver of subrogation clause that read as follows:

"In the event that Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect to such loss or damage."

(Continental Ins. Co. v. 115-123 West 29th St. Owners Corp., 275 A.D.2d 604, 605 (NY App Div 1st Dept 2000))

The Appellate Court found said waiver of subrogation clause was not triggered by the lessee's insurance policy since said insurance policy did not contain a waiver of subrogation against the landlord. "Rather, the insurance policy simply authorizes the insured to 'waive your rights against another in writing ... [p]rior to a loss.'" (Continental Ins. Co. v. 115-123 West 29th St. Owners Corp., 275 A.D.2d 604, 605 (NY App Div 1st Dept 2000)).

Although the insurance policy in the instant action includes language similar to the insurance policy examined by the Appellate Court, it is the language of the Proprietary Lease that distinguishes the instant action from Continental Ins. Co. v. 115-123 West 29th St. Owners Corp. Specifically, the Proprietary Lease before this Court specifically required that WPO would go to its "best efforts" to obtain an insurance policy that included a waiver of subrogation, for the purpose releasing the Defendants from any liability with respect to any loss or damage covered by the insurance policy. Said language reflected the clear intent on the part of WPO to obtain an insurance policy that would allow for WPO to release the Defendants from any liability with respect to any loss or damage covered by the insurance policy (See Greater New York Mut. Ins. Co. v Nasarre, 2009 NY Slip Op 31420(U) (NY Sup Ct Ny Cnty 2009) [finding that the "best efforts" clause in a lease obligated a landlord to use its "best efforts" to obtain an insurance policy that included a waiver of subrogation and the Defendant was entitled to summary judgment where the insurance subrogee failed to submit evidence that the landlord made any effort to obtain a waiver.].

"[W]here a clause is unambiguous, contract language and terms are to be given their plain and ordinary meaning." (45 Broadway Owner LLC v NYSA-ILA Pension Trust Fund, 107 A.D.3d 629, 631 (NY App Div 1st Dept 2013) citing Greenfield v. Philles Records, 98 NY2d 562 (NY 2002)). Although the insurance policy between the Plaintiff and WPO did not include a provision that "automatically" waived WPO's subrogation rights, it did specifically include a mechanism by which WPO could waive its rights against another party in writing prior to a loss. Paragraph 4(d) of the Propriety Lease clearly reflects WPO's intent to release the Defendants from any liability with respect to any loss or damage covered by the insurance policy. Further, WPO and the Defendants entered into the written Proprietary prior to the fire. Therefore Paragraph 4(d) of the Propriety Lease meets all of the requirements of the "Transfer of Rights of Recover Against Others to Us" section of the insurance policy allowing WPO to waive its rights to recovery against another party.

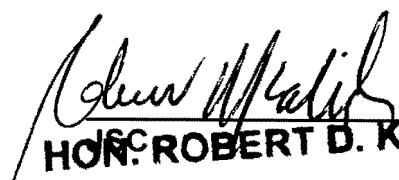
As such, the Court finds that WPO waived its right to recover against the Defendants pursuant to paragraph 4(d) of the Propriety Lease, which constituted a written waiver of rights as required by the Transfer of Rights of Recover Against Others to Us" section of the insurance policy between WPO and the Plaintiff. Therefore, WPO could not transfer to the Plaintiff any rights of recovery against the Defendants as to any damage covered by the insurance policy.

#### Conclusion

Accordingly and for the reasons so stated in the instant decision, it is hereby ORDERED that the Defendants' motion for summary judgment is hereby granted and the Plaintiff's underlying action is hereby dismissed.

The foregoing constitutes the Judgment and decision of the Court.

**Dated: July 22, 2015**

  
**HON. ROBERT D. KALISH**  
J.S.C.