

Nova Cas. Co. v De Hua Jiang
2015 NY Slip Op 31436(U)
July 8, 2015
Supreme Court, Kings County
Docket Number: 501134/13
Judge: Johnny Lee Baynes
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At a Special Term Part 68 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof, at 360 Adams St, Brooklyn, New York, on the 8th day of July, 2015

PRESENT:

HON. JOHNNY L. BAYNES

Justice

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Index No. 501134/13

NOVA CASUALTY COMPANY, as subrogee of
XIN MEI LIN and LING HUI HUANG,

Plaintiff,

DECISION AND ORDER

-against-

DE HUA JIANG, Individually and t/d/b/a
OK DISCOUNTS STORE INC., a/k/a
TERRY OU INTERNATIONAL, INC.,

Defendants.

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Defendants, De Hua Jiang, Individually and t/d/b/a OK Discount Store, Inc. a/k/a Terry Ou International, Inc., (hereinafter "Defendants") move by Notice of Motion dated January 28, 2015, for an Order pursuant to CPLR § 3212 granting Summary Judgment in favor of Defendants, dismissing the Complaint of Nova Casualty Company, as subrogee of Xin Mei Lin and Ling Hui Huang, (hereinafter "Plaintiff").

Plaintiff's subrogors, Xin Mei Lin and Ling Hui Huang (hereinafter "Subrogors") are owners of a three-story building located at 4915 7th Avenue, Brooklyn, New York. Defendants leased the first floor and basement of the building pursuant to a written lease. A fire occurred on

the premises on September 6, 2011. As a result of the fire, plaintiff paid insurance proceeds of \$332,986.29 to its subrogors.

Paragraph 9 of the lease between the parties governs what occurs in regard to the leased premises in the event of a fire or casualty. Paragraph 9 (e) provides in pertinent part:

Nothing contained (in the lease) shall relieve Tenant from liability that may exist as a result of damage from fire or other casualty. Notwithstanding the foregoing, including Owner's obligation to restore under subparagraph (b) above, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such insurance is in force and collectible, and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery with respect to subparagraphs (b) (d) and (e) above, against the other or any one 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 to any personal property, equipment, trade fixtures, goods and merchandise located therein.** The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance. If, and to the extent that such waiver can be obtained only by payment of additional premiums, then the party benefitting from the waiver shall pay such premium within 10 days after written demand or shall be deemed to have agreed that the party obtaining insurance coverage shall be free of any further obligation under the provisions hereof with respect to waiver of subrogation. Tenant acknowledges that Owner will not carry insurance Tenant's furniture and/or furnishings or any fixtures or equipment, improvements or appurtenances removable by Tenant, and agrees that Owner will not be obligated to repair any damage thereto or replace the same. (f) Tenant hereby waives the provisions of Section 227 of the Real Property Law and agrees that the provisions of this article shall govern and control in lieu thereof. (Emphasis added).

Defendants seek Summary Judgment dismissing the Complaint in accordance with the waiver of subrogation clause set forth above. Plaintiff seeks subrogation as to that part of the claim paid to its subrogors, the owners of the demised premises, for other than damage to the

“demised premises”. This view contradicts the plain reading of the waiver of subrogation section of the lease between the parties. The waiver specifically says it applies to “any loss or damage to the demised premises and/or to any personal property, equipment, trade fixtures, goods and merchandise located therein. There is no limitation to this waiver of subrogation contained in the clear language of the section. The only limitation to subrogation is that the parties respective insurance policies cannot be invalidated by the waiver of subrogation. The insurance documents submitted to the Court contain no such invalidation and confirm the validity of the policies, inclusive of the subrogation waiver.

Summary judgment is warranted when there are no factual disputes to be resolved by the trier of fact. *Mallard Construction Corp v County Fed Savings*, 32 NY2d 285 [1973], issues to be resolved are strictly issues of law, *Long Island RR Co v Northport Industrial Corp.*, 42 NY2d 455 [1977], or when the uncontroverted facts can only be determined in one fashion as a matter of law. *Alvord and Swift v Stewart and Miller Constr. Co., Inc.*, 46 NY2d 276 [1978].

Once this showing is made, the burden shifts to the party opposing the motion for Summary Judgment. *See, Sisko v The New York Hospital*, 647 NYS2d 191 [1st Dept 1996]. In considering a motion for summary judgment, the Court must view all facts in a light most favorable to the non-moving party. *See, Zuckerman v City of New York*, 49 NY2d 557 [1980]. Plaintiff contends that the subrogation clause is “conspicuously devoid of any mention of the ‘demised premises’”. The plain language of the subrogation clause does, in fact refer to “loss or damage to the demised premises”. Any other reading is counter to that plain language of the agreement between the parties. The subrogation clause bars the instant action and is directly on point with the *Kaf-Kaf v Rodless Decorations*, 90 NY2d 654 [1997].

WHEREFORE, it is hereby

ORDERED AND ADJUDGED that Defendant's Motion for Summary Judgment for an Order pursuant to CPLR § 3212 granting Summary Judgment in favor of Defendants, dismissing the Complaint of Nova Casualty Company, as subrogee of Xin Mei Lin and Ling Hui Huang is granted in all respects and the Clerk of Court is hereby directed to enter dismissal of the Complaint and all Claims contained therein with prejudice.

The foregoing constitutes the Decision and Order of this Court.

ENTER


JOHNNY L. BAYNES, JSC


FILED
SUNBURG COUNTY CLERK
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