

**Starnet Ins. Co. v Christie's Fine Art Stor. Servs.,
Inc.**

2016 NY Slip Op 30147(U)

January 21, 2016

Supreme Court, New York County

Docket Number: 159899/2013

Judge: Saliann Scarpulla

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

----- X

STARNET INSURANCE COMPANY
as subrogee and assignee of LEROY NEIMAN
FOUNDATION, INC., LEROY NEIMAN, INC.,
and THE ESTATE OF LEROY NEIMAN

DECISION and ORDER

Index No. 159899/2013
Motion Seq. No. 001

Plaintiffs,

- against -

CHRISTIE'S FINE ART STORAGE SERVICES, INC.,

Defendant.

----- X

SCARPULLA, J.:

Christie's Fine Art Storage Services Inc. ("CFASS") moves, pursuant to CPLR 3211 (a)(1), (3), and (7), for dismissal of the complaint. Plaintiffs StarNet Insurance Company (StarNet) as subrogee for Leroy Neiman Foundation, Inc., Leroy Neiman, Inc., and The Estate of LeRoy Neiman (collectively, "Neiman"), cross-move for partial summary judgment: (1) on the issue of liability, (2) dismissing CFASS' defenses concerning any purported limitation or exculpation of liability for the damages alleged in the complaint, and (3) dismissing any purported waiver of subrogation.

Background

The following allegations are taken from the complaint. Plaintiffs include LeRoy Neiman Foundation, Inc. and LeRoy Neiman, Inc., both New York not-for-profit corporations, and The Estate of LeRoy Neiman, and StarNet, as subrogee and assignee of

Neiman. Defendant CFASS represented itself to be the “world’s premier storage provider for fine art, antiques and collectibles.”

CFASS offered its clients a variety of storage options “[f]rom self-managed units, to units overseen by our accomplished staff, to our vault where a variety of property is kept for multiple clients - clients have several distinctive choices. Regardless of selection, all clients receive the same exceptional service that has been Christie’s hallmark since 1766.” CFASS represented that its “Fine Art Storage Services team is a group of carefully hand-picked experts. CFASS staff receive the same training as Christie’s team and understand the unique handling requirements of any property from paintings and sculpture to furniture and fashion.”

CFASS owned and managed a fine art storage facility “within a gated, high security compound” located at 100 Imlay Street, Brooklyn, New York, which is located in the Red Hook section of Brooklyn adjacent to the East River (“Warehouse”). The Warehouse was located in a high risk flood zone along the waterfront in Red Hook. The neighborhood of Red Hook is in an area known as Zone A, a low-lying coastal area with the highest risk of flooding during a storm related surge.

Neiman was the owner of numerous fine works of art by the artist Leroy Neiman (“Artwork”). In reliance upon CFASS’s representations that the Artwork would be stored in a secure unit on the Warehouse’s second floor, on September 17, 2012, Neiman entered into a Managed Unit Storage Agreement with CFASS (Storage Agreement) for storage of the Artwork in Unit 2B-09 of the Warehouse. The Artwork was delivered to

the Warehouse on September 20, 2012 (277 pieces) and again on October 4, 2012 (199 pieces). Neiman paid \$6,286.50 for storage of the Artwork in Unit 2B-09 for the period, October 17, 2012 to November 16, 2012. The 277 pieces of Artwork remained unsecured on the first floor of the Warehouse for more than 39 days, were never placed into Unit 2B-09, a secure, storage unit on the Warehouse's second floor, and were commingled with other artwork on the ground floor. The 199 pieces of Artwork (the second shipment to the Warehouse) remained on the first floor of the Warehouse for more than 25 days, were never placed into Unit 2B-09.

Hurricane Sandy began as a low pressure system, south of Kingston Jamaica, and on October 22, 2012, the "National Hurricane Center" named the system "Tropical Storm Sandy." During the next several days, there were reports that a massive storm would be hitting New York City on or about October 29, 2012, with high winds and tides, severe storm surges, and widespread coastal flooding.

On October 26, 2012, Mayor Bloomberg warned residents that the "Coastal Storm Plan designates as 'Zone A' the low-lying coastal areas of our city most at risk for flooding and other damage," which includes the Red Hook area of Brooklyn, where the Warehouse is located. On October 26, 2012, Governor Cuomo declared a statewide state of emergency. When it became evident that a major storm would be imminently hitting the City, on October 26, 2012 CFASS represented to Neiman in an email with the reference "CFASS's Hurricane Preparations" as follows:

CFASS Fine Art Storage Services provides non-stop, best-in-class environmental controls and security for your property every day. And when significant inclement weather approaches, rest assured we take extra precautions. These precautions may include, but are not limited, to the following as necessary:

- Temporary and permanent generators properly filled
- Extra security staff on-site
- All property on the first floor on the West side of the building checked to ensure all items are raised off the floor
- Roof of the facility checked for loose materials
- Absorbent socks placed along the base of all exterior doors
- All property in managed storage raised so that they are off the ground
- Empty rooms on upper floors have been identified and can house property if property movement is required
- All security personnel updated on the emergency procedures

Notwithstanding the foregoing, CFASS never moved or otherwise elevated the Artwork from the first floor to Unit 2B-09 on the Warehouse's second floor, relocated or elevated the Artwork to any other space, or otherwise took any precautions to protect the Artwork. On October 29, 2012 the Artwork sustained severe damage from flooding.

The complaint contains seven causes of action for gross negligence, breach of bailment, negligence, rescission, negligent misrepresentation, fraudulent misrepresentation, and breach of fiduciary duty. Specifically, Plaintiffs allege that CFASS acted with gross negligence, or negligence with respect to its care, custody, and storage of the Artwork; CFASS breached an express or implied bailment by failing to return the Artwork without damage; the Storage Agreement is void and rescinded based on CFASS' material misrepresentations concerning how it would protect the Artwork; CFASS negligently or fraudulently represented that the Artwork was safely stored in unit

2B-09 on the Warehouse's second floor; and CFASS breached its fiduciary duty to Neiman by making material misrepresentations concerning how the Artwork would be stored and protected.

Plaintiffs seeks to recover \$10,125,506 in damages, plus interest from October 29, 2012, punitive damages, attorney's fees, and rescission of the Storage Agreement. Pursuant to an insurance policy, StarNet partially reimbursed Neiman for its losses, and thereby became subrogated to the extent of its payment (\$8,348,660) and Neiman assigned the uninsured portion of the loss (\$1,776,846) to Starnet.

CFASS moves to dismiss the complaint on the grounds that: (1) the alleged loss was due to an act of God; (2) Neiman agreed to procure insurance and waive subrogation against CFASS for any loss of or damage to the property, and (3) Neiman agreed that CFASS' liability would be limited to \$100,000 for any loss or damage to the Property. CFASS further argues that the complaint fails to state a cause of action.

In opposition, Plaintiffs argue that: (1) CFASS is a warehouse, as defined in U.C.C. § 7-102 (13), not a self-storage facility; (2) CFASS failed to appropriately limit its liability pursuant to U.C.C. § 7-204; (3) CFASS' attempt to exonerate itself from liability violates U.C.C. § 7-204; (4) CFASS' material breach of the Storage Agreement negates any purported effort to exculpate itself or waive subrogation; (5) Neiman may recover the uninsured portion of its loss; (6) CFASS' act of God defense fails; and (7) the causes of action in the complaint are adequately stated.

The parties submit copies of the Storage Agreement and the LDL waiver. The Storage Agreement states, at paragraph 7(c), that in the event that CFASS does not accept liability as described in paragraph 7(a), “the Goods will remain at the Depositor’s risk at all times, and Depositor will sign a loss/damage waiver letter in the form attached hereto.” It further states that “[e]ven if, despite the terms of this clause, CFASS is found to be liable for any loss of, or damage to, the Goods, that liability shall not exceed \$100,000 or the market value of the Goods, if lower.”

The LDL waiver signed by the president of the LeRoy Neiman Foundation, Inc. states “we are responsible for arranging insurance cover for the property (“Goods”) I/we deposit to Christie’s Fine Art Storage Service Inc. (“CFASS”). I/we understand that this insurance coverage needs to be against All Risks of physical loss or damage.” It further states “I/We agree that CFASS will not be responsible for, and I hereby release CFASS, its officers, directors, employees, agents and contractors, from and against all liability for physical loss of or damage to my Goods. I also agree to notify my insurance carrier/company of this agreement and arrange for them to waive any rights of subrogation against CFASS . . . with respect to any loss of or damage to the Property while it remains in CFASS care, custody and control.”

Discussion

“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.” *Kaf-Kaf, Inc. v. Rodless Decorations*, 90

NY2d 654, 660 (1997). “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.” *Id.* “Waiver of subrogation provisions reflect the parties’ allocation of the risk of liability whereby liability is shifted to the insurance carriers of the parties to the agreement.” *Travelers Indem. Co. v. AA Kitchen Cabinet & Stone Supply, Inc.*, 106 A.D.3d 812, 813 (2d Dep’t 2013) (internal quotation marks and citation omitted). “[A] waiver of subrogation is ‘viewed as a device by which the parties merely allocate the risk of liability between themselves to third parties through insurance.’” *H & M Hennes & Mauritz LP v. Skanska USA Bldg., Inc.*, 617 F. Supp. 2d 152, 159 (E.D.N.Y. 2008) (quoting *Interested Underwriters at Lloyds v. Ducor’s, Inc.*, 103 A.D.2d 76, 77 (1st Dep’t 1984), *aff’d* 65 N.Y.2d 647 (1985)).

The circumstances presented in this subrogation action are similar to an action previously before me, *XL Specialty Ins. Co. v. Christie’s Fine Art Storage Servs. Inc.*, Index No. 159926/2013 (Sup. Ct. New York County). In that action, the plaintiff XL Specialty Ins. Co. (“XL Specialty”), subrogee to Chowaiki & Co., Fine Art Ltd. (“Chowaiki”), a fine art gallery, sought to recover losses arising from artworks damaged at CFASS’ warehouse during Hurricane Sandy.

In my decision on CFASS’ motion to dismiss XL Specialty’s complaint, I first determined that: (1) a bailor-bailee relationship existed between CFASS and Chowaiki under U.C.C. Article 7, not a lessor-lessee relationship under Lien Law § 182; and (2) that although a warehouse may limit its liability for negligence under U.C.C. § 7-204(2),

the limitation of liability provision in the storage agreement between Chowaiki and CFASS was unenforceable. However, I ultimately granted CFASS' motion to dismiss the complaint based on the existence of a waiver of subrogation contained in the loss damage waiver signed by Chowaiki.

The LDL waiver at issue here is identical to the loss damage waiver in *XL Specialty*. In the LDL waiver, Neiman expressly agreed to obtain insurance coverage “against All Risks of physical loss or damage” to the Artwork, and Neiman accordingly released CFASS from “all liability for physical loss or damage to my Goods.” Neiman further agreed to notify its insurer regarding the LDL waiver, and arrange for its insurer to waive any rights of subrogation against CFASS regarding any loss or damage to the property while it remained in CFASS' care, custody, and control.¹ Upon my examination of the LDL waiver, I find that it constitutes a broad waiver of subrogation that bars Plaintiffs' complaint. *Footlocker, Inc. v. KK&J, LLC*, 69 A.D.3d 481, 482 (1st Dep't 2010) (noting that a “waiver of subrogation may bar a claim for gross negligence”); *Great Am. Ins. Co. of N.Y. v. Simplexgrinnell LP*, 60 A.D.3d 456, 457 (1st Dep't 2009). Moreover, Plaintiffs fail to allege any tortious conduct independent of the Storage Agreement that would give rise to separate liability in tort. *Abacus Fed. Sav. Bank v.*

¹ Furthermore, Neiman acknowledged in the Storage Agreement that the property would remain at its risk at all times; that CFASS would not be liable for any physical loss of, or damage to, the property; and that it had the responsibility to effect and maintain adequate insurance regarding the stored property. The parties further agreed that CFASS would have no knowledge of any insurance affected by Neiman or of any limitations upon that insurance.

ADT Sec. Servs., Inc., 18 N.Y.3d 675, 684 (2012); *Great American Ins. Co. of New York*, 60 A.D.3d at 457.

Plaintiffs contends that the waiver of subrogation is void because it permits CFASS to excuse itself from all liability in violation of U.C.C. 7-204. However, it is well-settled that a waiver of subrogation is not a contractual provision which seeks “to exempt a party from liability” but instead simply requires “one of the parties to the contract to provide insurance for all the parties.” *Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v. Valden Assoc.*, 46 N.Y.2d 653, 657 (1979); *Abacus Fed. Sav. Bank*, 18 N.Y.3d at 684. As parties to a commercial transaction, CFASS and Neiman were “free to allocate the risk of liability to third parties through insurance and deployment of a waiver of subrogation clause.” *Gap, Inc. v. Red Apple Companies, Inc.*, 282 A.D.2d 119, 124 (1st Dep’t 2001).²

Plaintiffs argue that the waiver of subrogation is unenforceable because CFASS materially breached the Storage Agreement by failing to properly store the Artwork on the second floor. However, a waiver of subrogation is enforceable in spite of any contract breaches where – as alleged here – the breached provisions are independent from those provisions relating to the allocation of risk between the parties. *Encompass Ins. Co. of*

² Neiman argues that its insurance policy did not waive subrogation against CFASS. By signing the LDL waiver, Neiman released CFASS from any liability for physical loss to the Artwork, and Starnet may not assert such released claims as subrogee. Moreover, it is well-settled that “an insured’s breach of an agreement to obtain a waiver of subrogation in an insurance policy prevents its insurer from maintaining a subrogation action.” *Greater New York Mut. Ins. Co. v. Nassare*, 2009 WL 1915699 (Sup. Ct. N.Y. Cnty. 2009); *Agostinelli v. Stein*, 17 A.D.3d 982, 984 (4th Dep’t 2005).

Am. v. English, 2013 WL 796309 (S.D.N.Y. 2013); *Indian Harbor Ins. Co. v. Dorit Baxter Skin Care, Inc.*, 430 F. Supp. 2d 183, 193 (S.D.N.Y. 2006); *St. Paul Fire & Marine Ins. Co. v Universal Bldrs. Supply*, 409 F. 3d 73, 83-85 (2d Cir. 2005) (finding that the waiver-of-subrogation clause is enforceable because it is not dependent on the alleged breaches).³

In the fourth cause of action, Plaintiffs seek rescission of the Storage Agreement based on CFASS' fraudulent misrepresentations that it would properly store the Artwork on the second floor, and that it would take extra precautions to protect the Artwork during Hurricane Sandy. These allegations fail to state a claim for rescission based on fraud. Contrary to Plaintiffs' assertion, the Storage Agreement, an integrated contract, did not contain any provision requiring CFASS to store the Artwork on the second floor. Further, Plaintiffs fail to allege that CFASS made a knowing misrepresentation of fact at the time they entered into the Storage Agreement; they only allege that CFASS made a misrepresentation of fact after the contract was signed. *Sokolow, Dunaud, Mercaider & Carreras LLP v. Lacher*, 299 A.D.2d 64, 70 (1st Dep't 2002). Lastly, Plaintiffs do not state a claim for rescission because they fail to allege that the status quo may be

³ Plaintiffs argue that, because Neiman was only partially compensated for damage to the Artwork, Neiman may recover the \$1,776,846 loss not covered by insurance. As noted above, however, Neiman undertook the responsibility to maintain adequate insurance regarding the stored property and released CFASS from any liability for physical loss to the Artwork. In addition, the parties further agreed that CFASS would have no knowledge of any insurance affected by Neiman or any limitations upon that insurance.

substantially restored upon rescission of the contract. *Alper v. Seavey*, 9 A.D.3d 263, 264 (1st Dep't 2004).

For the above stated reasons, I grant CFASS' motion to dismiss the complaint based on the waiver of subrogation defense. In light of my decision to dismiss the complaint, Plaintiffs' cross-motion for partial summary judgment on the issue of liability, dismissing CFASS' defenses concerning any purported limitation or exculpation of liability for the damages alleged in the complaint, and dismissing any purported waiver of subrogation is denied.

In accordance with the foregoing, it is

ORDERED that the motion by defendant Christie's Fine Art Storage Services, Inc. to dismiss the complaint by plaintiffs Starnet Insurance Company as subrogee and assignee of Leroy Neiman Foundation Inc., Leroy Neiman, Inc., and the Estate of Leroy Neiman is granted, and the complaint is dismissed; and it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATE: 1/29/16


SALIANN SCARPULLA, JSC