AXA Art Ins. Corp. v Christie's Fine Art Stor. Servs., Inc.
2016 NY Slip Op 30148(U)
January 21, 2016
Supreme Court, New York County
Docket Number: 652862/13
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

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AXA ART INSURANCE CORPORATION, as subrogee of JEPHTA DRACHMAN and JORAM PIATIGORSKY, as TRUSTEES of the JACQUELINE PIATIGORSKY REVOCABLE TRUST AND THE JACQUELINE PIATIGORSKY REVOCABLE TRUST; AND AXA ART INSURANCE CORPORATION, INDIVIDUALLY,

Plaintiffs,

- against -

CHRISTIE'S FINE ART STORAGE SERVICES, INC.,

Defendant.

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DECISION and ORDER

Index No. 652862/13
Motion Seq. No. 001

SCARPULLA, J.:

Christie's Fine Art Storage Services, Inc. ("CFASS") moves, pursuant to CPLR 3211 (a) (1), (a) (3), and (a) (7), for dismissal of the amended complaint.

The following allegations are taken from the amended complaint. AXA Art Insurance Corporation ("AXA"), an insurer of fine art, issued an insurance policy to the Jacqueline Piatigorsky Revocable Trust ("Trust") for loss or damage to its art collection, effective from January 15, 2012, through January 15, 2013. In addition to its well-known auction house, defendant CFASS is engaged in the business of storing works of fine art.

After the death of Jacqueline Piatigorsky in 2012, her art collection ("Collection") was transferred to the Trust. Thereafter, the Trust sought a suitable storage facility for the Collection, identifying CFASS as a potential resource. Before the Trust agreed to store the Collection with CFASS, CFASS allegedly made representations to the Trust that once the Collection arrived at its storage facility, the intake process would take no more than

one or two days, and the Collection would then be moved into a secure storage unit. The Trust entrusted the Collection to CFASS for storage pursuant to a "Managed Unit Storage Agreement," dated September 5, 2012 ("Storage Agreement").

On October 11, 2012, the Collection was transported to CFASS's storage warehouse, located in the Red Hook neighborhood in Brooklyn, New York ("Warehouse"). The Warehouse is in what was then designated by the New York City Office of Emergency Management as an evacuation flood Zone A. Zone A faced the highest risk of flooding, because it was a low-lying coastal area that could experience a storm surge when a hurricane of any category made landfall near the City.

On October 18, 2012, the Collection arrived at the Warehouse, and was placed in the staging area on the ground floor, where incoming artwork is inspected, condition reports are prepared, and the intake process is completed. The Collection remained for more than a week, fully exposed to the impact of the soon-to-arrive "Sandy" that was upgraded from a tropical storm to a hurricane on October 24, 2012, as it approached Jamaica. As Sandy passed through the Caribbean on its way to the United States, weather forecasters predicted that there was a significant chance that Sandy would strike the City, and by October 25, 2012, it was being likened to the "Perfect Storm" of 1991.

On October 26, 2012, Mayor Bloomberg announced that parts of the City, particularly in Zone A, were most at risk of flooding, because Sandy was going to make landfall during high tide. That same day, Governor Cuomo declared a State of Emergency in New York. On October 27, 2012, the "Hurricane Center" and "National

Weather Service" predicted levels of storm surges in the tri-state area as high as 11 feet, and national weather forecasters repeatedly warned that maximum precautionary measures needed to be taken. The next morning, Mayor Bloomberg ordered residents of Zone A to evacuate.

Plaintiffs allege that CFASS took virtually no steps to protect the art, failing to even elevate the Collection and other art from the ground floor to higher floors. As the storm approached, rather than bring in auxiliary workers to help protect the art, CFASS fired the operations manager of the Warehouse, and left emergency measures in the hands of an inexperienced skeleton crew. Rather than warn its clients that it lacked the resources to adequately prepare for the storm, on October 26, 2012, CFASS sent an email to clients, including AXA, entitled "CFASS's Hurricane Preparations." The email stated:

> "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
>
> For further information on how you and your family can prepare for the storm, visit the Office of Emergency Management website."

In reality, Plaintiffs allege, CFASS took no extra precautions; had inadequate staff on-site; and failed to raise the art to a safe level. When Sandy struck Brooklyn on October 29, 2012, the Collection remained in the same location as when it first arrived, and Sandy's storm surge cascaded into the staging area of the Warehouse, inundating the Collection. Thereafter, rather than inform its clients of the damage so that restoration efforts could immediately be taken, on October 30, 2012, CFASS sent an email to its clients falsely stating that "CFASS staff has inspected our facility today and I can confirm that your property is safe and has experienced no damage." On November 1, 2012, CFASS's chairman contacted the attorney for the Trust to inform him that the Collection had suffered some water damage as a result of flooding.

The complaint asserts four causes of action for gross negligence, negligent misrepresentation, breach of bailment, and breach of contract. In the first cause of action for gross negligence, AXA alleges that CFASS failed to keep the Collection in a reasonably safe condition, and caused damage to the Collection through gross negligence, careless, and reckless acts or omissions. After the Collection was inundated by the storm surge, CFASS falsely advised all of its clients, including AXA, that none of the property stored in the Warehouse was damaged; told AXA and the Trust that the Collection was not significantly damaged; and CFASS failed to make reasonable efforts to mitigate the

damage caused to the Collection, which resulted in the Collection suffering greater damage.

The second cause of action for negligent misrepresentation alleges that CFASS had a special relationship with AXA and the Trust that imposed a duty on CFASS to provide accurate information. When CFASS made the above-stated representations, it had no reasonable ground for believing that such representations were true. AXA and the Trust reasonably relied on CFASS information, and took no efforts to secure the safety of the Collection, because CFASS falsely or incorrectly claimed that it was taking all such necessary precautions and actions.

The third cause of action, for breach of bailment, alleges that CFASS breached its duty of care to the Trust to maintain the Collection in a reasonably safe condition. In the fourth cause of action, Plaintiffs allege that CFASS materially breached the Storage Agreement, and that the Storage Agreement is therefore null and void. In the complaint, AXA seeks to recover at least $1.5 million in damages, as well as punitive damages, interest, costs, and attorney's fees.

In support of its motion, CFASS argues that the complaint must be dismissed because: (1) none of the causes of action are validly stated; (2) the alleged loss was due to an act of God; (3) the Trust agreed to procure insurance and waive subrogation against CFASS for any loss or damage to the Collection as contained in a binding loss damage liability waiver ("LDL waiver") provision; and (4) the Trust agreed that CFASS' liability would be limited to $100,000 for any loss or damage to the Collection

In opposition, Plaintiffs argue that: (1) the terms of the Storage Agreement and the LDL waiver are unenforceable, because CFASS materially breached those agreements; (2) the LDL waiver is void as against public policy, and does not bar the third cause of action for breach of bailment; (3) because the LDL waiver is void as against public policy, the waiver of subrogation provision, incorporated therein, is unenforceable; (4) any purported limitation on liability is a flawed defense to AXA's subrogated gross negligence claim; and (5) CFASS failed to demonstrate that an act of God was the sole proximate cause of the damage alleged in the complaint.

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 trustees of the Trust 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, the Trust expressly agreed to obtain insurance coverage "against All Risks of physical loss or damage" to the artworks, and the Trust accordingly released CFASS from "all liability for physical loss or damage to my Goods." The Trust 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's care, custody, and control.[1] Upon examining the

[1] Furthermore, the Trust 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;

LDL waiver, I find that it constitutes a waiver of subrogation that bars Plaintiffs' complaint for gross negligence, negligent misrepresentation, breach of bailment, and breach of contract. *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).

Plaintiff 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 v. ADT Sec. Servs., Inc.*, 18 N.Y.3d 675, 684 (2012). As parties to a commercial transaction, CFASS and the Trust 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]

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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 the Trust or of any limitations upon that insurance.

[2] AXA claims that the Trust did not obtain a waiver of subrogation in its insurance policy prior to Hurricane Sandy, and thus AXA should not be prevented from asserting a subrogation action against CFASS. However, by signing the LDL waiver, the Trust released CFASS from any liability for physical loss to the artworks, and AXA 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).

Lastly, Plaintiffs argue that the waiver of subrogation is unenforceable because CFASS materially breached the Storage Agreement by leaving the artworks in the intake area and never properly placing them in secure storage. 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 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).

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 AXA Art Insurance Corporation, as subrogee of, Jeptha Drachman and Joram Piatigorsky, as Trustees of the Jacqueline Piatigorsky Revocable Trust and the Jacqueline Piatigorsky Revocable Trust, and AXA Art Insurance Corporation is granted, and the complaint is dismissed; 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 : 1/21/16

SALIANN SCARPULLA, JSC