Dongbu Ins. Co., Ltd. v Maria Alvarado 1066-1074, LLC
2017 NY Slip Op 32344(U)
October 31, 2017
Supreme Court, Kings County
Docket Number: 503712/15
Judge: Bernard J. Graham
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: Part 36

Index No. 503712/15
Motion Calendar No.
Motion Sequence No.

DONGBU INSURANCE CO., LTD as subrogee of ROSE PHARMACY, INC.,

Plaintiff(s),

-against-

MARIA ALVARADO 1066-1074, LLC, MARIA ALVARADO, STEVEN ALVARADO and ANATOLIO ALVARADO,

Defendant(s).

DECISION / ORDER

Present:
Hon. Judge Bernard J. Graham
Supreme Court Justice

Recitation, as required by CPLR 2219(a), of the papers considered on the review of this motion to: grant defendants' motion for summary judgment and dismiss plaintiff's complaint.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed.....	1-2
Order to Show cause and Affidavits Annexed.....	
Answering Affidavits	3
Replying Affidavits.....	4
Exhibits.....	
Other:...(memo).....	5,6

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Defendants, Maria Alvarado, Anatolio Alvarado, and Maria Alvarado 1066-1074 LLC ("Alvarado"), have moved for an Order, awarding summary judgment and a dismissal of the complaint of the plaintiff, Dongbu Insurance Co., Ltd., ("Dongbu Insurance") as subrogee of Rose Pharmacy, Inc., ("Rose Pharmacy") pursuant to CPLR § 3212, based upon the terms of a lease agreement, as well as the contention that the defendants were not negligent, as they neither created

nor had prior notice of a condition which may have caused a fire. In opposing the motion, plaintiff maintains that there are several material issues of fact that merit the denial of defendants' motion for summary judgment, including, but not limited to the fact that the provisions of the lease are unclear as to which party is responsible for insuring and maintaining the common areas of the premises; the defendants/owners may have breached their duty of care; and the subrogation clause contained in the Rider to the lease agreement should not be enforced and bar plaintiff from proceeding with its action if it did not satisfy the mutuality requirements between the landlord and the tenant.

Background:

The within motion to dismiss by the defendants arises from the claim made by plaintiff/subrogee (the insurance carrier for the tenant Rose Pharmacy) to subrogate the rights of its insured against the defendant, following the payment of a claim to their insured, Rose Pharmacy, who sustained a loss at the premises known as 1074 Liberty Avenue, Brooklyn, New York ("subject premises"). Said premises is a one and a half-story commercial building which is sub-divided into five commercial spaces, one of which was occupied by Rose Pharmacy. The subject property was acquired by defendants, Alvarado, in May, 2001. On or about December 1, 2001, Alvarado, as the landlord, entered into a lease agreement with Rose Pharmacy (tenant), for the premises designated as 1074 C Liberty Avenue for a term of twenty years.

On or about August 6, 2013, a fire occurred in a utility hallway in said building which hallway was allegedly accessible to each of the five commercial tenants and was situated in the center of the building. The report of NEFCO, who conducted a fire investigation on or about August 16, 2013, offered the conclusion that the fire originated at the base of a water heater located within the utility hallway of the building, where a box of combustible materials was

allegedly being stored (see report annexed as Exhibit "A" to the plaintiff's affirmation in opposition to defendant's Notice of Motion). It is alleged that combustible materials had been in the hallway for an extended period of time prior to the fire and that fire resulted when the heat generated by a water heater ignited these materials.

Pursuant to the policy of insurance between the plaintiff and Rose Pharmacy that was in effect at the time of the incident, the latter submitted a claim for its damages in the amount of $191,653.00, which sum was paid by the plaintiff to Rose Pharmacy. The plaintiff then made a demand that the defendants and their insurance carrier reimburse the plaintiff for the amount that was paid to Rose Pharmacy. When said monies were not paid, Dongbu Insurance, as the plaintiff/subrogee, commenced this subrogation action, on about March 31, 2015, by the filing of summons and complaint upon the defendants, in which it seeks the sum of $191,653.00. Issue was joined on behalf of defendants, Alvarado, on or about April 24, 2015, with the service of a verified answer which contained a cross-claim. A Demand for a Verified Bill of Particulars dated April 21, 2015, was made upon the attorney for the plaintiff. A Demand for a Supplemental Notice for Discovery and Inspection dated May 23, 2016, was also made upon the attorney for the plaintiff, pursuant to a Compliance Conference Order dated May 18, 2016. The plaintiff filed a Note of Issue on or about November 11, 2016.

Defendants' contentions:

In moving to dismiss the within action of the plaintiff/subrogee, defendants have proffered several arguments as to why the relief sought herein should be granted. Defendants maintain that the plaintiff is barred and precluded as a matter of law from maintaining this subrogation action since Rose Pharmacy, the tenant/subrogor, had waived its rights to subrogation as against the defendants, pursuant to the terms of the lease agreement dated December 1, 2011. Paragraph #18

of the Rider to the lease provides that all policies of insurance obtained by the tenant "shall expressly waive any right of subrogation on the part of the insurer against the landlord".

With regard to the subrogation clause, defendants maintain that it is permissible for parties to a contract to freely waive their respective right to subrogation provided that the waiver satisfies the mutuality requirements imposed by the lease agreement (see General Accident Ins. Co. v. 80 Maiden Lane Assocs., 252 AD2d 391, 675 NYS2d 85 [1st Dept. 1998]). Defendants assert that a waiver of subrogation clause in the lease agreement which was negotiated by two sophisticated parties, is valid and enforceable to provide the intended waiver of recovery rights (see Viacom Intern., v. Midtown Realty Co., 193 AD2d 45, 602 NYS2d 326 [1st Dept. 1993]). It is further contended that the waiver of subrogation provision is not violative of either GOL § 5-321 nor any other public policy provision in the State (see Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v. Vaiden Assoc., Inc. 46 NY2d 653, 416 NYS2d 202 [1979]). Defendants maintain that the inclusion of the waiver of subrogation clause between Rose Pharmacy and the defendants is clear and unambiguous and broad enough to cover the type of loss allegedly sustained herein and should be enforced.

Defendants assert that in the event that this Court determines that it will not enforce the subrogation waiver, then based upon the exculpatory clause (paragraph #21) in the lease agreement, the relief sought herein by the defendants should be granted. That clause provides that the "landlord shall not be responsible for any loss or damage to any of tenant's property by virtue of tenant's use and storage of tenant's property or materials in the premises caused by theft, fire, casualty, water damage, smoke damage or otherwise." Since the tenant's loss occurred as a result of a fire and the tenant sustained both water and smoke damage, the defendants/owners would not be responsible for these damages.

The defendants further maintain that they did not cause, create or had notice of an alleged

defective condition at the premises. In order to set forth a prima facie case of negligence against the defendants, the plaintiff would be required to show that the defendants created the condition which caused the incident or that the defendants had actual or constructive notice of the incident. Defendants maintain that the plaintiff will be unable to establish that the defendants had prior notice of the condition in the hallway, and in the event that said condition did exist, they would have been entitled to a reasonable time period within which to resolve the condition.

Defendants acknowledge that public policy in this State would not allow a party (defendants) to insulate themselves from damages which was caused by grossly negligent conduct, but they maintain that here was no evidence that the conduct of the defendants rose to the level of gross negligence.

Plaintiff's contention:

In opposing defendants' motion for summary judgment and a dismissal of plaintiff's action, plaintiff maintains that there are several grounds upon which this Court could find that there is a triable issue of fact with respect to plaintiff's claim for subrogation.

Initially, the plaintiff contends that the origin of the fire was in the common area of the premises which area was intended for use by all of the tenants at the premises, was outside of the area that was leased by Rose Pharmacy, and was an area that the defendants had access to. The plaintiff asserts that the owner of the premises has a duty to use ordinary care to keep this common area in a reasonably safe condition and having failed to do so might result in the defendant/owner being responsible for this incident.

Plaintiff maintains that the contention of the defendants that plaintiff is barred from bringing this action as a result of the subrogation waiver provision in the lease is misplaced. Plaintiff asserts that a waiver of subrogation is unenforceable if there is not a mutual requirement

for both the landlord and the tenant to obtain insurance (see A to Z Applique Die Cutting Inc. v. 319 McKibbin Street Corp., 232 AD2d 512, 649 NYS2d 26 [2nd Dept. 1996]). It is contended that this subrogation clause only requires a waiver of subrogation in favor of the landlord and not the tenant and a unilateral waiver provision is not enforceable in New York. Plaintiff asserts that this waiver of subrogation provision would fail the mutuality test under GOL § 5-321, and is thus, unenforceable.

Plaintiff further rejects the argument of the defendants that the provisions of the lease that requires the tenant to procure insurance, and to hold the landlord harmless for any losses, would bar their complaint. Plaintiff maintains that courts have held that a hold harmless provision is invalid and unenforceable when such a provision attempts to allocate the risk of loss to an insurer for the negligence of the lessor and exempts the lessor from liability as a result of its own acts of negligence (see Graphic Arts Supply, Inc. v. Raynor, 91 AD2d 827, 458 NYS2d 115 4th Dept. 1982]). Plaintiff contends that the defendants had a duty to maintain the common areas in a safe condition for all tenants, which includes the area where the fire originated, and the landlord cannot circumvent GOL § 5-321 merely by inserting into the lease a requirement that the tenant obtain insurance.

Plaintiff asserts that the fire originated at the base of a water heater, an area that is subject to defendants' control and there is no evidence offered by the defendants that the water heater is within the leased premises of the tenant, Rose Pharmacy, or that the combustible material was owned or placed near the water heater by the latter.

Finally, plaintiff contends that there is a genuine issue of material fact as to whether the defendants had constructive notice of the unsafe condition in the area of the water heater, and the failure of the defendants to discover the unsafe storage that was situated close to the water heater was negligence in and of itself, and sufficient reason to deny the motion for summary judgment.

Discussion:

This Court has reviewed the submissions of counsel for the respective parties, and considered the arguments presented herein, as well as the applicable law in making this determination with respect to the motion by the defendants to dismiss plaintiff's complaint which seeks to indemnify the plaintiff for the insurance payments made to Rose Pharmacy.

At issue before this Court, is whether the defendants were negligent by their failure to notice the condition (storage materials situated near the water heater in a common area of the premises) which condition may have been identified upon reasonable inspection, or if they had or should have had notice of the condition, did they fail to properly correct or resolve it. Other issues that have been presented before this Court are whether the waiver of subrogation clause contained in Paragraph # 18 of the Rider precludes the claims of a subrogated insurance carrier and whether the exculpatory clause in the lease agreement would further act as a bar to plaintiff's claim.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to a judgment as a matter of law, tendering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact. (Alvarez v. Prospect Hosp., 68NY2d 320, 324, 508 NYS2d 923 [1986]). Summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue (see Kwong On Bank, Ltd. v. Monrose Knitwear Corp., 74 AD2d 768, 425 NYS2d 572 [2nd Dept. 1980]. The evidence will be construed in a light most favorable to the party opposing the motion (see Benincasa v. Garrubbo, 141 AD2d 636, 529 NYS2d 797 [2nd Dept. 1988]).

In support of the motion for summary judgment, the defendants rely upon the lease and the Rider dated December 1, 2001, as well as the affidavit of Anatolio Alvarado. The defendants maintain that the terms of the lease are clear and unequivocal that it was the responsibility of the

tenant to maintain insurance at the premises and that it was understood and agreed that the tenant waived any right of its insurer to bring a claim for subrogation against the landlord/owner. Additionally, the Rider to the lease provided that "landlord shall not be responsible for any loss or damage to any of tenant's property by virtue of tenant's use and storage of tenant's property or materials in the demised premises caused by theft, fire, casualty, water damage, smoke damage," and since the tenant's loss occurred as a result of a fire, the tenant would not have a claim against the landlord for its loss. The supporting affidavit of Anatolio Alvarado states that he visits the premises to collect rent from the tenants, the dates of which vary, that he did not see any garbage or debris in the hallway prior to the fire, that neither he nor his wife caused the condition at the premises, and he did not receive any complaints from Rose Pharmacy prior to the incident as to the condition of the utility hallway. Based upon the foregoing, defendants maintain that the subrogation action commenced by Dongbu Insurance Co. should be dismissed.

The Court's consideration of the issues begins with an analysis of the rights and duties of the parties and the lease that was in effect. The lease between Rose Pharmacy and the defendants provides for the tenant to lease the space known as 1074 C Liberty Avenue. There is no specific description in the lease as to the space that Rose Pharmacy leased, only that it is known as 1074 C. The lease is also silent as to whether the tenant had access to the common areas, was able to use that area for storage, and what was the role and duties of the landlord and tenant with respect to that common area space.

Here, the defendant/owner was admittedly an out-of-possession landlord and in that capacity has certain duties, especially with respect to common areas that they have access to. An out-of-possession landlord may be liable for failing to repair a dangerous condition, of which it had notice, if the landlord assumes a duty to make repairs and reserves the right to enter to inspect to make such repairs (see Litwack v. Plaza Realty Investors, Inc., 11 NY3d 820, 869 NYS2d 388

[2008]. "An out of possession landlord's duty to repair a dangerous condition on leased premises is imposed by statute or regulation, by contract, or by a course of conduct" (Mercer v. Hellas Glass Works Corp., 87 AD3d 987, 988, 930 NYS2d 18 [2011]).

Control of the premises may be established by proof of the landlord's promise, either written or otherwise to keep certain premises in good repair, a statute imposing liability, or a course of conduct demonstrating that the landlord has assumed responsibility to maintain a particular portion of the premises (see Martin v. I Bldg Co., Inc., 126 AD3d 861, 6 NYS3d 105 2nd Dept. 2015]). It has been held that either lease provisions or course of conduct may evidence requisite control (Winby v. Kustas, 7 AD3d 615, 775 NYS2d 906 [2nd Dept. 2004]; Gelardo v. Asthma Realty, 137 AD2d 787, 788, 525 NYS2d 334 [2nd Dept. 1988]).

As to the tenant's duties, a tenant in possession of real property has a common law duty to maintain the demised premises in a reasonably safe condition, independent of any obligations that might be imposed by the terms of a lease with the landlord (see Williams v. Esor Realty Co., 117 AD3d 480, 985 NYS2d 505 [2014]; Sarisohn v. 341 Commack Rd., Inc., 89 AD3d 1007, 1009, 934 NYS2d 202 [2011]).

This Court also considered whether the defendant/owner was in any way negligent with respect to this incident. It is well settled that to establish a prima facie case of negligence, the plaintiff must demonstrate (1) that the defendant owed a duty of reasonable care; (2) there was a breach of that duty and (3) a resulting injury was proximately caused by that breach (Darby v. Compagnie National Air France, 96 NY2d 343, 728 NYS2d 731 [2001]).

Here, defendants claim that they neither had actual or constructive notice of the condition. As the proponent of summary judgment, defendants were obligated to demonstrate that they lacked actual or constructive notice of the precipitating condition or that it did not create the condition (see Gordon v. American Museum of Natural History, 67 NY2d 836, 501 NYS2d 646

[1986]). "A person is chargeable with constructive notice of any fact which would have been disclosed by a reasonably diligent inquiry if circumstances are such as to indicate to a person of reasonable prudence and caution the necessity of making inquiry to ascertain the true facts and he or she avoids such inquiry" (Majer v. Schmidt, 169 AD2d 502, 503, 564 NYS2d 722 [2nd Dept. 1991]). With respect to issue of constructive notice, the defendants stated that they visited the premises to collect rents and were never advised of any complaints regarding debris in the common area of the premises. However, there is no testimony or evidence provided as to when the area was last inspected prior to the incident or what it looked like upon that inspection (see Baines v. G & D Ventures, Inc., 64 AD3d 528, 883 NYS2d 256 [2nd Dept. 2009]). The fact that the defendants stated that they did not receive complaints as to debris in the hallway and visited the premises to collect rents, may not in and of itself absolve the defendants of their duty to inspect and maintain that common area.

Paragraph #27 of the Rider provides that Rose Pharmacy was contractually obligated to repair and maintain the heating system. However, maintenance of the heating system may not include the same duty of ensuring that there were no materials or storage in a common hallway in the vicinity of the water heater. At this stage of the proceedings, it is not known which tenant, if any, had stored these materials in the hallway, and was it the responsibility of the owner or another tenant to inspect and maintain that area. The Rose Pharmacy lease appears to be silent as to that matter.

This Court has also considered the language in paragraph #21 of the Lease Rider which provides in part that the "landlord shall not be responsible for any loss or damage to any of tenant's property by virtue of tenant's use and storage of tenant's property or materials in the demised premise caused by theft, fire, casualty, water damage, smoke damage or otherwise". There are two issues that arise as a result of this clause. Pursuant to General Obligations Law

(G.O.L.) § 5-321, a lease provision which purports to exempt a lessor from liability for its own acts of negligence is void and unenforceable (see Rego v. 55 Leone Lane, LLC, 56 AD3d 748, 749, 871 NYS2d 169 [2nd Dept. 2008]); Gross v. Sweet, 49 NY2d 102; Radius v. Newhouse, 213 AD2d 614, 624 NYS2d 27 [2nd Dept. 1995]). Additionally, a lease provision which purports to hold an owner harmless for injury to property because it attempts to relieve the owner of their responsibility as a result of their negligence is likewise unenforceable (see Breakaway Farm, Ltd., v. Ward, 15 AD3d 517, 789 NYS2d. 730 [2nd Dept. 2005]); A to Z Applique Die Cutting Inc. v. 319 McKibbin Street Corp., 232 AD2d at 513. In addition, there is a question as to what was being referred to as the "demised premises", which interpretation could have an effect upon the rights of the parties. The fire report indicates that the fire occurred in a common area (hallway), and as a result one may conclude it did not occur in space 1074 C which Rose Pharmacy leased. Once again, there is no indication in the lease as to whether the tenant had the right to store its property or materials in what would be deemed to be the common area, and if it did, was that clause referring to space C or another area of the building, and what role, if any, did Rose Pharmacy have with respect to inspecting and maintaining the common area.

In cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language. (4 Williston, Contracts, § 621; 10 NY Jur., Contracts, § 223; 67 Wall Street Company v. Franklin National Bank, 37 NY2d 245, 371 NYS2d 915 [1975]); Leighton's Inc. v. Century Circuit, Inc., 95 AD2d 681, 463 NYS2d 790 [1st Dept. 1983]). A motion for summary judgment should be denied if critical contractual language raises a question as to the real intent of the parties (S & S Media v. Vango Media, 84 AD2d 356, 360 [1st Dept. 1982]).

Here, while the defendants maintain that they come to the subject premises to pick up rent on various dates, they did not observe debris in the hallway nor did they receive complaints from

any of the tenants regarding debris (see affidavit of Anatolio Alvarado annexed as Exhibit "F" to the Notice of Motion), the Court finds that the statement is not determinative of their duty and responsibility to their commercial tenants. The evidence submitted by the defendants was insufficient to establish, prima facie, as a matter of law, that the defendant/landlord properly inspected and maintained those areas of the building that may have been reserved and intended for the common use of the tenants.

In addressing the issue of subrogation, it is an equitable doctrine which allows an insurer to stand in the shoes of its insured and seek indemnification from third parties.

"Waiver of subrogation provisions, which reflect the parties allocation of the risk of liability between themselves to third parties through the device of insurance, are generally valid and enforceable". Such an agreement is "necessarily premised on the procurement of insurance by the parties" (Liberty Mut. Ins. Co. v. Perfect Knowledge, 299 AD2d 524, 526, 752 NYS2d 677 [2nd Dept. 2002]); Footlocker, Inc. v. KK&J, LLC, 69 AD3d 481, 894 NYS2d 380 [1st Dept. 2010]). A waiver of subrogation provisions contained in a lease negotiated between two sophisticated parties in an arm's length transaction is valid and enforceable provided the intention of the parties is clearly and unequivocally expressed (see Hogeland v. Sibley, Lindsay & Curr Co., 42 NY2d 153 397 NYS2d 602 [1977]); Extaza of 34th St. v. City Stores Co., 62 NY2d 919, 479 NYS2d 5 [1984]); Viacom Intl', Inc. v. Midtown Realty Co., & Phoenix Assurance Co. of NY, 193 AD2d at 53). However, a landlord may not circumvent General Obligations Law § 5-321, "simply by placing the burden to procure insurance on the tenant" (Graphic Arts Supply v. Raynor, 91 AD2d 827, 828, 458 NYS2d 115 [1982); Breakaway Farm, Ltd v. Ward, 15 AD3d 517, 789 NYS2d 730 [2nd Dept. 2005]). Here, based upon the Court's consideration of the documents submitted, it is not entirely clear that the parties had a full understanding as to what was being insured and what rights were being waived.

The plaintiffs have raised an issue of fact with respect to the obligation of the defendants to insure a portion of the premises that they may have controlled and which Rose Pharmacy did not. The defendants have offered no evidence that the water heater was situated within the portion of the premises that Rose Pharmacy had leased, or that the combustible material that caught fire was either owned or placed there by Rose Pharmacy or that Rose Pharmacy had any duties and obligations with respect to maintaining the common areas. In addition, a question is raised whether the subrogation clause should be enforced if the mutual requirement has not been met.

Conclusion:

The motion by defendants, Maria Alvarado, Anatolio Alvarado and Maria Alvarado 1066-1074 LLC for an Order awarding summary judgment and a dismissal of the complaint of the plaintiff, Dongbu Insurance Co., Ltd., as subrogee of Rose Pharmacy, Inc., pursuant to CPLR § 3212, is denied.

This shall constitute the decision and order of this Court.

Dated: October 31, 2017

Brooklyn, New York

ENTER

Hon. Bernard J. Graham, Justice
Supreme Court, Kings County