

**National Grid Ins. USA Ltd. v Forest City Jay St.
Assoc., L.P.**

2022 NY Slip Op 30826(U)

March 7, 2022

Supreme Court, Kings County

Docket Number: Index No. 506554/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of March 2022.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

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NATIONAL GRID INSURANCE USA LTD.
as subrogee of NATIONAL GRID USA and
NATIONAL GRID USA

INDEX NO. 506554/2020

Plaintiff,

-against-

DECISION AND ORDER

Motion Sequence #1

FOREST CITY JAY STREET ASSOCIATES, L.P.,
FOREST CITY JAY STREET ASSOCIATES, LLC,
FOREST CITY RATNER COMPANIES, LLC and
FIRST NEW YORK PARTNERS
MANAGEMENT, LLC,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed	20-30,
Opposing Affidavits (Affirmations).....	33-36,
Reply Affidavits (Affirmations)	37

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After a review of the papers and oral argument, the Court finds as follows:

Defendants, Forest City Jay Street Associates, L.P., Forest City Jay Street Associates, LLC, Forest City Ratner Companies, LLC and First New York Partners Management, LLC (collectively, the “Defendants” or “Forest City”), move (Motion Sequence #1) for an order dismissing Plaintiffs’, National Grid Insurance USA, Ltd. (“National Grid Insurance”) as subrogee of National Grid USA and National

Grid USA (“National Grid”) (collectively the “Plaintiffs”), amended complaint pursuant to CPLR 3211(a)1. The subject action relates to Plaintiffs’ claim for water damage to property that purportedly occurred on April 7, 2017 (the “Occurrence”). More specifically, National Grid Insurance seeks the sum of \$384,076.00 it paid to National Grid pursuant to its insurance policy agreement with National Grid to cover repair and replacement costs after the Occurrence (the “Policy”). National Grid seeks the sum of \$10,000.00 it incurred due to the Occurrence and contends that this sum was not covered under the policy with National Grid Insurance. Plaintiffs state that this sum was the deductible amount under the Policy.

This proceeding relates to a lease agreement by and between non-party Forest City Jay Street Associates (“FCA”) as Landlord and non-party the Brooklyn Union Gas Company as Tenant dated September 15, 1988. The lease concerns office space consisting of various floors, at the premises located at the then and therein described parcel “being a part of Tax Block 147 on the Tax Map of the City of New York, County of Kings, and currently bounded in part by Jay Street, Myrtle Avenue and Lawrence Street, as more particularly described on Exhibit A annexed hereto (the “Land”) (hereinafter the “Demised Premises”)” (the “Lease”).¹

Defendants contend that National Grid, as tenant at the Demised Premises, obtained from National Grid Insurance the Policy “for the losses incurred in the flooding incident.” Defendants argue that fault for the Occurrence is not material in that:

- a) National Grid waived its right of recovery against the Defendants;

¹ A review of the apparently 142 page Lease reflects that it was the understanding of the parties that non-party, the City of New York, would, upon its acquisition of the Land, execute a ground lease to FCA as Lessee and that FCA would sublease its interest as lessee/sub-lessor under the ground lease to non-party, New York City Industrial Development Agency (“IDA”) as sub-lessee, and that upon the execution of that sublease with IDA, IDA would then enter into a sub-sublease agreement with IDA as sub-lessor and FCA as sub-sublessee. This arrangement apparently relates to FCA’s intent to improve the Land, “and certain adjacent parcels” with “a complex” to be known as the “MetroTech Complex.” As such, Forest City Jay Street Associates as Landlord, as referenced in the Lease, would be, if the other interim documents and transactions referenced had occurred, the sub-sub-lessor and the Brooklyn Union Gas Company the sub-sub-lessee of the Demised Premises which is part of the Land under the Lease. (NYSCEF Doc. 35). The Court notes that no other lease agreements, as apparently contemplated by the Lease, have been proffered.

- b) National Grid waived National Grid Insurance's right of subrogation against the Defendants; and
- c) National Grid Insurance, expressly agreed to National Grid's waiver of subrogation pursuant to the terms of the Policy.

Defendants contend that both the Lease and Policy constitute documentary evidence upon which the motion is based. The Defendants do not specifically explain why the parties to the Lease are not the parties in this action. The Defendants seek to explain the evolution of the Forest City entities and contend that "National Grid eventually assumed the aforementioned lease agreement from Brooklyn Union Gas, as evidenced by the fact that National Grid was occupying the leasehold premises on April 7, 2017. Thus, National Grid was the tenant at the Subject Premise on April 7, 2017." Other than these statements, there have been no amendatory agreements or other documents (for example, an assignment and assumption agreement) proffered reflecting the relationship of the parties in this action to the parties in the Lease. The Defendants have not indicated whether there are provisions in the Lease that serve to address these issues. The Court will not search the record in order to make this determination. Notwithstanding, the Plaintiffs have not disputed the contentions of the Defendants as to the evolution of the Forest City entities and its role as Landlord, and have not denied that National Grid is a tenant, under the Lease. Accordingly, the parties have conceded that the Lease terms serve to govern the rights and obligations of the parties.

The Plaintiffs, in opposition, contend that the Defendants' interpretation of the Lease "would render other applicable sections meaningless..." Although the Plaintiffs concede that the Lease "...provides for a limited waiver of subrogation...", they contend that "...the plain language otherwise provides a right of recovery to the plaintiff and places conditions on the waiver of subrogation...", which conditions, they argue, have not been met.

CPLR 3211(a)(1)

A motion to dismiss pursuant to CPLR 3211(a)(1) will be granted only if the “documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.” *Fontanetta v. Doe*, 73 A.D.3d 78, 83–84, 898 N.Y.S.2d 569, 573 [2nd Dept, 2010], quoting *Fortis Fin. Servs., LLC v. Fimat Futures USA, Inc.*, 290 A.D.2d 383, 737 N.Y.S.2d 40 [2nd Dept, 2002]. “[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are ‘essentially undeniable,’ would qualify as ‘documentary evidence’ in the proper case.” *Gawrych v. Astoria Fed. Sav. & Loan*, 148 A.D.3d 681, 682, 48 N.Y.S.3d 450, 453 [2nd Dept, 2017]; quoting *Fontanetta v. Doe*, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569, 576 [2nd Dept, 2010]. As stated above, the parties do not dispute that the Lease and related Policy are the operative documents in relation to the issues before the court. As such, they clearly constitute documentary evidence and relate to the issues before the court, to wit: 1) whether there is a waiver of subrogation contained in the Lease, 2) whether such waiver is applicable under the circumstances of this action, and 3) whether the insurer has consented to such waiver.

Defendants direct the Court to the following Lease provision (Article 11.08(b)&(c)):

(b) Tenant agrees that, if obtainable, it will include in its fire and business interruption insurance policies appropriate clauses pursuant to which the insurance company or companies (i) waive the right of subrogation against Landlord and/or any tenant of space in the Building with respect to losses payable under such policy or policies (if such waiver is unobtainable, such policy shall name Landlord as an additional insured as its interest may appear) and/or (ii) agree that such policy or policies shall not be invalidated should the insured waive in writing prior to a loss any or all right of recovery against any party for losses covered by such policy or policies. But should any additional premium be exacted for any such clause or clauses, Tenant shall be released from the obligation hereby imposed unless Landlord or the other tenants shall pay such additional premium.

(c) Provided that Landlord’s right of full recovery under its policy or policies aforesaid is not adversely affected or prejudiced thereby, Landlord hereby waives any and all right of recovery which it might otherwise have against Tenant, its servants, agents and employees, for loss or damage occurring to the Building and the

fixtures, appurtenances and equipment therein and for loss of rental income, to the extent the same is covered by Landlord's insurance, notwithstanding that such loss or damage may result from the negligence or fault of Tenant, its servants, agents or employees. Provided that Tenant's right of full recovery under its aforesaid policy or policies is not adversely affected or prejudiced thereby, Tenant hereby waives any and all right of recovery which it might otherwise have against Landlord, its servants, agents and employees, and against every other tenant in the Building who shall have executed a similar waiver as set forth in this Section ii.08(c) for loss or damage to, Tenant's leasehold improvements and furniture, furnishings, fixtures and other property removable by Tenant under the provisions hereof and for business interruption and loss of use, notwithstanding that such loss, damage or interruption may result from the negligence or fault of Landlord, its servants, agents or employees, or such other tenant and the servants, agents or employees thereof.

Defendants further direct the court to certain Insurance Policy provisions that they contend support their position that National Grid Insurance acknowledged a waiver of its subrogation rights. The relevant Policy provision reads as follows (National Grid Insurance Policy pages 9-10):

C. SUBROGATION AND WAIVERS OF SUBROGATION

i. The Company shall, upon payment of any loss, damage, claim, cost or expense under this Policy, be subrogated to all the Insured's rights of recovery against any person, organisation or entity who may be legally or contractually liable for such loss, damage, claim, cost or expense paid by the Company.

iv. The Company agrees that the Insured, or any other party acting on behalf of the Insured, may hold harmless or release from liability or assume the liability of any person, organisation or entity (and any contractor or sub-contractor thereof) who is working for or with the Insured or with whom or for whom the Insured is working under specific contract or agreement or where otherwise required under any contract or agreement customary or necessary to the conduct of the Insured's business or under governmental or other statutory regulations, provided:

- a. the said hold harmless agreement is concluded or the said release from or assumption of liability is granted prior to the date of the Occurrence; and**
- b. the loss, damage, claim, cost or expense subject to the said hold harmless agreement, release from or assumption of liability arises out of or in connection with such work, contract or agreement.**

The Company agrees to waive its rights of subrogation against any such person, organisation or entity mentioned in this paragraph iv. and/or their insurers.

Defendants contend that the parties were free to contract and that the terms of the Lease and Policy are clear and unambiguous. As such, they argue that a plain reading of the above provisions must result in dismissal of Plaintiffs' action.

Plaintiffs disagree. Plaintiffs argue that Defendants' interpretation of the above provisions would render the following Lease provision meaningless (Lease Article 11.03):

Landlord or its agents shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain or snow or leaks from any part of the Building, or from the pipes, appliances or plumbing works or from the roof, street or subsurface or from any other place or by dampness or by any other cause of whatsoever nature, unless any of the foregoing shall be caused by or due to the negligence or willful misconduct of Landlord, its agents, servants, employees or contractors.

Plaintiffs also contend that in any event, the provision in the Lease that Defendants focus upon applies only to fire and business interruption insurance. Plaintiffs argue that the damages claimed in this action relate to water damage due to flooding. Therefore, Plaintiffs contend, even assuming a subrogation waiver does exist, it does not relate to this claim.

The insurer's right of subrogation, long recognized as a matter of equity, has traditionally been applied to claims against third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse (see, e.g., *Ocean Acc. & Guar. Corp. v Hooker Electrochemical Co.*, 240 NY 37, 47; 16 Couch, *Cyclopedia of Insurance Law* § 61:133, at 310 [Anderson 2d ed]; see also, *Wager v Providence Ins. Co.*, 150 U.S. 99; *Home Ins. Co. v Pinski Bros.*, 160 Mont 219, 500 P2d 945, 949). A third party, by definition, is one to whom the insurer owes no duty under the insurance policy through which its loss was incurred (16 Couch, *op. cit.*, at 310; see, *Home Ins. Co. v Pinski Bros.*, *supra*, p 949).

Pennsylvania General Ins. Co. v. Austin Powder Co., 68 N.Y.2d 465, 471, 510 N.Y.S.2d 67, 70 [1986].

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, 687 NE2d 1330, 665 NYS2d 47 [1997]; see *Dillion v Parade Mgt. Corp.*, 268 AD2d 554, 555, 702 NYS2d 368 [2000]). '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 at 660, citing *S.S.D.W. Co. v Brisk Waterproofing Co.*, 76 NY2d 228, 556 NE2d 1097, 557 NYS2d 290 [1990]).

Gulf Ins. Co. v. Quality Bldg. Contr., Inc., 58 A.D.3d 595, 871 N.Y.S.2d 366 [2d Dept. 2009].

Upon a reading of the relevant provisions of both the Lease and the Policy, it is clear that there was an enforceable waiver of subrogation that addressed the insurance proceeds paid for the damage incurred as a result of the Occurrence, and the conditions of the waiver were met. As to the Lease, the language provides that if obtainable, National Grid would obtain a policy or policies of insurance that contained a waiver of subrogation. The Policy contained that waiver, applicable under certain conditions. As such, the waiver was obtainable. National Grid agreed to waive a right of recovery against the Defendants in the Lease. The Policy permitted National Grid to do so provided that the waiver of recovery (hold harmless, release of liability) was established prior to the Occurrence and the loss related to the nature of the agreement of the parties. Both conditions were met. The Lease contains the waiver of subrogation language and is dated September 15, 1988 (more than 28 years prior to the Occurrence). Additionally, the damage related to the Demised Premises. As such, in accordance with Policy terms, National Grid Insurance waived its right of subrogation.

Plaintiffs' contention that Lease Article 11.03, whereby the Landlord accepted liability to the extent "caused by or due to the negligence or willful misconduct of the Landlord, its agents, servants, employee or contractors", conflicts with Lease Article 11.08(b)&(c) provisions, is without merit.

The Court in *Kaf-Kaf Inc. v. Rodless Decorations*, addressing similar language, held that:

The provisions of paragraph 8, wherein Rodless [Landlord] agrees to be responsible for damages to Kaf-Kaf's [Tenant] personal property caused by any negligent act of Rodless, are not inconsistent with the waiver of subrogation clause in paragraph 9 (e). Although Kaf-Kaf could have invoked paragraph 8 to collect any portion of its damages not covered by insurance, here the insurance policy covered all of Kaf-Kaf's damages, and the insurer's action in subrogation was barred by the waiver provision in paragraph 9. The broad applicability of the waiver of subrogation clause contained in the parties' lease precludes the negligence claims of both parties' subrogated insurance carriers.

Kaf-Kaf, Inc. v. Rodless Decorations, 90 N.Y.2d 654, 661, 665 N.Y.S.2d 47, 50 [1997]; *see also Empire Bias Binding Co. v. Andros Realty Corp.*, 210 AD2d 198, 619 NYS2d 745 [2d Dept. 1994].

The Court also finds that Plaintiffs' contention that the Occurrence, which related to water damage purportedly caused by flooding, had no relation to the waiver of subrogation language in the Lease at Article 11.08(b)&(c), because the provision refers to tenant's "fire and business interruption insurance policies", is also without merit. The provision also references "loss payable" under such policy or policies. There is one policy, and the Policy relates to coverage for both business interruption and property damage generally (Policy Section 6, Page 2). Further, the tenant's waiver of recovery in Lease provision 11.08(c) related to "loss or damage to, tenants' leasehold, improvements, and furniture, furnishing, fixtures and other property... and loss of use..." This language is comprehensive and is not limited by a reference to a fire and business interruption policy. There is no indication from a reading of the provision that water damage would not be included. The breadth of the recovery waiver in the Lease is controlling and determines the scope of the subrogation waiver under the Policy.

Accordingly, Plaintiff National Grid Insurance USA LTD's action is severed and dismissed. However, the action by National Grid USA shall continue. The Policy did not cover the deductible amount of \$10,000.00 that National Grid USA seeks. To the extent it can establish liability on the part of the Defendants, National Grid USA can seek damages against the Landlord pursuant to Lease Paragraph 11.03. That issue has not been resolved. *See American Scientific Lighting Corp. v. Hamilton Plaza Associates et al.*, 144 AD3d 614, 50 NYS3d 485 [2d Dept. 2016].

The caption shall be amended and now read as follows:

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NATIONAL GRID USA
Plaintiff,

INDEX NO.: 506554/2020

-against-

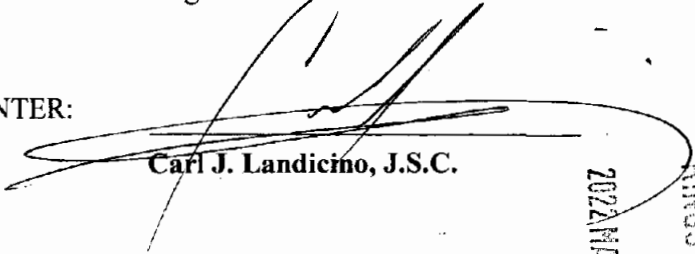
FOREST CITY JAY STREET ASSOCIATES,
L.P., FOREST CITY JAY STREET ASSOCIATES,
LLC, FOREST CITY RATNER COMPANIES,
LLC and FIRST NEW YORK PARTNERS
MANAGEMENT, LLC,
Defendants.

-----X

Accordingly, Defendants' motion to dismiss (Motion Sequence # 1) is granted solely to the extent that the action relating to claims by National Grid Insurance USA LTD as against all Defendants is severed and dismissed.

The foregoing constitutes the Decision, Order and Judgment of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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