

**NorGUARD Ins. Co. v Three Eighty Fulton St. Inc.**

2022 NY Slip Op 31014(U)

March 28, 2022

Supreme Court, New York County

Docket Number: Index No. 155788/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. LOUIS L. NOCK PART 38M

*Justice*

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NORGUARD INSURANCE COMPANY A/S/O 256 EAST  
FORDHAM ROAD REALTY LLC.,

Plaintiff,

- v -

THREE EIGHTY FULTON STREET INC.,

Defendant.

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INDEX NO. 155788/2020

MOTION DATE 10/19/2020

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 28

were read on this motion to/for DISMISS

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendants motion to dismiss the complaint pursuant to CPLR 3211 is granted, based upon the following memorandum decision.

**Background**

In this insurance subrogation action, plaintiff NorGUARD Insurance Company (“plaintiff”), as subrogee of nonparty 256 East Fordham Road Realty LLC (“tenant”), asserts three causes of action: breach of contract (first cause of action); negligence (second cause of action); gross negligence (third cause of action). Defendant Three Eighty Fulton Street Inc. (“defendant”) moves to dismiss the complaint based on documentary evidence, another action pending, and for failure to state a cause of action pursuant to CPLR 3211(a)(1), (a)(4), and (a)(7). Alternatively, defendant seeks a stay of this action pursuant to CPLR 2201, in favor of the prior underlying action between tenant and defendant captioned *256 East Fordham Road Realty LLC v Three Eight Fulton St. Inc.*, Index No. 160483/2019, presently pending before this court.

Defendant is the record owner of the building located at 376 Fulton Street, Brooklyn, New York, and licensed the use and occupancy of the first floor and cellar of the building to tenant pursuant to a License Agreement in effect at the time of the property damage giving rise to this action (NYSCEF Doc. No. 5, ¶¶ 6-7). Plaintiff asserts that this agreement is in fact a lease, rather than a license agreement (*id.*). Relevant to the instant motion, the agreement provides that defendant licensed the space to tenant to use as a retail store, and tenant agreed to obtain and maintain comprehensive general liability insurance for personal injury and property damage, and to name defendant as an additional insured under the policy (NYSCEF Doc. No. 7, License Agreement, ¶ 7[d]). Further, tenant and defendant “waive[d] on behalf of their insurers and themselves, as to any casualty which would be covered by fire insurance with extended coverage, all rights of subrogation, recovery, or damages based upon the negligence of the other” (*id.*). Plaintiff issued to tenant an insurance policy as required by the Agreement, including up to \$100,000 in business interruption losses (NYSCEF Doc. No. 5, ¶¶ 23-26; NYSCEF Doc. No. 28, Businessowners Policy). Defendant was named as an additional insured under the policy (NYSCEF Doc. No. 28, Additional Insured – Managers or Lessors of Premises, BP 04 02 01 05 at 1).

On August 22, 2019, there was a water leak at the premises, damaging tenant’s “business and personal property, inventory, fixtures and possessions” (NYSCEF Doc. No. 5, ¶¶ 16-20). Investigation of the leak revealed that the leak came from a pipe “servicing the fire protection sprinkler system on the 4th floor of the building,” caused by a leak in the roof leading to damaged drywall and the failure of the brackets holding the pipe to keep it in place (*id.*, ¶¶ 17-18). Tenant submitted a claim up to the policy limit for its business interruption losses, and

plaintiff paid the full amount of the claim (*id.*, ¶¶ 25-26). Plaintiff now seeks, as tenant's subrogee, to recover the amount it paid to tenant from defendant.

Tenant commenced a direct action against defendant on October 28, 2019, captioned *256 East Fordham Road Realty LLC v Three Eight Fulton St. Inc.*, Index No. 160483/2019, which is presently at the discovery phase of litigation. Plaintiff commenced the instant action by filing a summons and complaint on July 28, 2020 (NYSCEF Doc. No. 1). Defendant appeared and now makes the instant per-answer motion to dismiss.

### Standard of Review

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). “[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

### 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” (*Nationwide Mut. Ins. Co. v U.S. Underwriters Ins. Co.*, 151 AD3d 504, 505 [1st Dept 2017]). “The insurer’s rights against a third party are derivative and limited to the rights the insured would have against that third party” (*id.*). “Therefore, an insurer can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured” (*id.* [internal quotation marks and citations omitted]).

The antisubrogation rule exists as an exception to the doctrine. “Insurers are barred under the antisubrogation rule from seeking subrogation from a named insured or additional insureds” (*Millennium Holdings LLC v Glidden Co.*, 27 NY3d 406, 415 [2016]). Under the antisubrogation rule, “an insurer has no right of subrogation against its own insured for a claim arising from the very risk for which the insured was covered” (*ELRAC, Inc. v Ward*, 96 NY2d 58, 76 [2001] [internal citations and quotation marks omitted]). Put another way, “an insurer may not step into the shoes of its insured to sue a third-party tortfeasor--if that third party also qualifies as an insured under the same policy--for damages arising from the same risk covered by the policy” (*id.*). “The antisubrogation rule, therefore, requires a showing that the party the insurer is seeking to enforce its right of subrogation against is its insured, an additional insured, or a party who is intended to be covered by the insurance policy in some other way” (*Millennium Holdings LLC*, 27 NY3d at 416).

Here, the License Agreement requires, and the policy provides, that defendant is a named insured under the policy (NYSCEF Doc. No. 7, License Agreement, ¶ 7[d]; NYSCEF Doc. No. 28, Additional Insured – Managers or Lessors of Premises, BP 04 02 01 05 at 1). Tenant’s damages from defendant’s alleged negligence and breach of contract are covered under the policy, as evidenced by plaintiff providing coverage for same under the policy. By commencing

an action against defendant, plaintiff is seeking to recover from its own insured for a risk it covered under the policy. As such, this action is barred by the antisubrogation rule (*Millennium Holdings LLC*, 27 NY3d at 416; *ELRAC, Inc.*, 96 NY2d at 76).<sup>1</sup>

Accordingly, it is hereby

ORDERED that the motion of defendant Three Eighty Fulton Street Inc. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant.

This constitutes the decision and order of the court.

ENTER:

*Louis L. Nock*

<u>3/28/2022</u> DATE	<hr/> LOUIS L. NOCK, J.S.C.			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

<sup>1</sup> As this is an independent ground to dismiss the complaint, the court declines to consider whether this action should be dismissed due to another action pending (CPLR 3211[a][4]) or for otherwise failing to state a cause of action (CPLR 3211[a][7]).