

Philadelphia Indem. Ins. Co. v Jemstone Group LLC
2022 NY Slip Op 31062(U)
March 1, 2022
Supreme Court, New York County
Docket Number: Index No. 159608/2020
Judge: Sabrina Kraus
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

PHILADELPHIA INDEMNITY INSURANCE COMPANY

Plaintiff,

- v -

THE JEMSTONE GROUP LLC,

Defendant.

-----X

INDEX NO. 159608/2020

MOTION DATE 02/15/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59

were read on this motion to/for JUDGMENT - SUMMARY

BACKGROUND

Plaintiff is the insurance carrier for Good Shepard Services, who is a tenant at the premises 7 West Burnside Avenue, Bronx, New York (Subject Premises). The action, based in subrogation, seeks to recover \$618,627.00 paid to their insured, Good Shepard Services (Tenant), for property damage sustained as a result of water damage that occurred in the Subject Premises on November 18, 2019, when a fire sprinkler head discharged in Room 321 within the demised premises.

Defendant is the property management company for the premises 7 West Burnside Avenue, Bronx, New York, and was serving in that position on November 18, 2019. Joseph Jemel, is a managing member in 7 W Burnside LLC (Landlord), the owner of 7 West Burnside Avenue, Bronx, New York, and the principal of The Jemstone Group LLC.

Tenant is in possession pursuant to a lease between Tenant and Landlord's predecessor in interest Burnside Realty Corp.. An amendment to said lease was entered into between Landlord and Tenant on or about August 17, 2017.

Paragraph 9 of the lease addresses the obligations of the parties in the event the subject premises are damaged by fire or other casualty and provides for waiver of subrogation. It states in pertinent part:

Notwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such insurance is in force and collectible and to the extent permitted by law, Landlord and Tenant each hereby releases and waives all right of recovery against the other or anyone claiming through or under each of them by way of subrogation or otherwise. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance and be provided that such a policy can be obtained without additional premiums.

PENDING MOTION

On August 23, 2021, defendant moved for summary judgment. On February 15, 2022, this court heard oral argument and reserved decision. For the reasons stated below, the motion is granted, and the action is dismissed.

DISCUSSION

“ [T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’ ” (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and “should not be granted where there is any doubt as to the existence of a triable issue” of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]; accord *Color by Pergament v Pergament*, 241 AD2d 418, 420 [1st Dept 1997] [“(s)ummary judgment is an exercise in issue-finding, not issue-determination, and may not be granted when material and triable issues of fact are presented”]).

The issue before the court is whether the waiver of the right to subrogation extends to the Landlord’s managing agent even though the provision in the lease does not say so.

In *Pilsener Bottling Co. v. Sunset Park Indus. Assocs.*, 201 A.D.2d 548 (2d Dep’t 1994), the Appellate Division, in affirming summary judgment, held that the subrogation-waiver clause in the contract between the parties was applicable to the employees, agents and/or servants of the parties, that a reading of the entire lease illustrated that the parties intended to include agents or employees within the meaning of the term “landlord”, under the subrogation-waiver clause of the lease. *See also, Ins. Co. of N. Am. v. Borsdorff Servs.*, 225 A.D.2d 494 (1st Dep’t 1996) (*We also note that while SWA was not specifically mentioned in the waiver of subrogation provision of the lease, a reading of the lease, as a whole, demonstrates that it was the intent of the parties to the lease that both the landlord Arnow and the management company, SWA, be protected equally*).

As one court noted:

Courts have routinely held that when the subrogation waiver does not expressly include the management company, the management company is equally protected by the waiver

(see *Global Imports Outlet, Inc. v The Signature Group LLC*, 90 AD3d 401, 402 [1st Dept 2011][Waiver applies to managing agent]; *Foremost Furniture Showroom, Inc. v 830 West Co.*, 73 AD3d 491, 492 [1st Dept 2010] [Waiver applies to managing agent]; *General Acc. Ins. Co. v 80 Maiden Lane*, 252 AD2d 391, 392 [1st Dept 1998]; *Insurance Co. of N. Am. v Borsdorff Servs.* 225 AD2 494, 494 [1st Dept 1996][Reading the lease as a whole demonstrates the intent of the parties to lease that both the landlord and managing company be equally protected by the subrogation waiver]; *Pilsner Bottling Co. v Sunset Park Indus. Assoc.*, 201 AD2d 548, 549 [2d Dept 1994] [“A reading of the entire lease illustrates that the parties intended to include agents or employees within the meaning of the term 'Landlord', under the subrogation-waiver clause of the lease. It appears that the parties anticipated that the parties would operate through employees, agents, or servants”]).

Philadelphia Indem. Ins. Co. v. B & L Mgmt. Co. LLC, 60 Misc. 3d 1207(A)(N.Y. Sup. Ct.

2018)(see also *Foremost Furniture Showroom, Inc. v 830 W. Co.* 73 AD3d 491 (1st Dept., 2010).

Many of the leases discussed in these cases are, like the lease in the case at bar a standard form lease with the identical provisions and language. Language in this lease has been taken as evidence that a managing agent should also be included in the waiver of subrogation rights.

Plaintiff also argues that the subrogation provision does not apply to (landlord’s) property manager ... since the provision refers only to “Owner” and “Tenant.” However, the lease’s provision regarding property loss and damage (paragraph 8), as well as the provision which confers a right of entry to the leased space to make repairs (paragraph 13) is expressly applicable to “Owner” and its “agents.” Therefore, a reading of the lease, as a whole, demonstrates that where issues involving the condition of the leased property or damages thereto are concerned, it was the intent of the parties that (the managing agent) be deemed of equal status to the “Owner,” and the lease must be interpreted to afford equal protection under the subrogation clause to (the managing agent) (see *Insurance Co. of North America v Borsdorff Services, Inc.*, 225 AD2d 494 [1996]; *Pilsener Bottling Co. v Sunset Park Indus. Assocs.*, 201 AD2d 548 [1994]).

Additionally, courts have taken note of the fact that a lease that provides that the Landlord’s address is c/o of the managing agent and notices should be sent to the managing agent as the First Amendment of Lease provides in the case at bar, is further evidence that a managing agent was intended to be covered by the waiver of subrogation clause (see eg *Philadelphia Indem. Ins. Co. v. B & L Mgmt. Co. LLC supra*).

The court does not find plaintiff’s attempts to distinguish this case from the cases discussed to be convincing. Neither does the court find, as argued by plaintiff, that the issue of whether the parties intended to have the managing agent covered by this provision a question of fact which must be determined at trial. It is, as set forth above, a question of fairly well-established law and contract interpretation.

Based on the foregoing, the motion is granted, and the action is dismissed.

WHEREFORE it is hereby

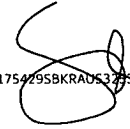
ORDERED that the motion of defendant The Jemstone Group LLC for summary judgment is granted; and it is further

ORDERED that the action is dismissed, and the clerk shall enter judgment accordingly; and it is further

ORDERED that, within 20 days from entry of this order, defendant shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that this constitutes the decision and order of this court.


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3/1/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	
<input type="checkbox"/>	SETTLE ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: