

Lawrence v Super M Constr. Corp.
2022 NY Slip Op 31264(U)
April 18, 2022
Supreme Court, New York County
Docket Number: Index No. 161910/2015
Judge: Sabrina Kraus
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

SUSAN LAWRENCE,

Plaintiff,

- v -

SUPER M CONSTRUCTION CORP., EDWARD WU, and
JOYCE WU

Defendants.

-----X

INDEX NO. 161910/2015

MOTION DATE 4/18/2022

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 104, 105, 106, 107, 108, 109, 110, 111, 112

were read on this motion to/for Summary Judgment.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff commenced this action seeking compensatory and consequential damages sustained to her condominium unit located at 77 Hudson Street, 4th Floor, New York, New York allegedly caused by the negligence of the Edward and Susan Wu (defendants) who reside on the 5th floor of said building.

This action was commenced by the filing of a Summons and Complaint on November 18, 2015, on March 25, 2016, the defendants interposed an Answer denying the material allegations of the Complaint. Super M Construction Corp. has never answered or appeared herein.

Discovery has been completed and on March 18, 2021 plaintiff filed a note of issue.

THE PENDING MOTION

On June 21, 2021, defendants moved for summary judgment and dismissal of the complaint on the basis that the waiver of subrogation provision in the by-laws precludes plaintiff

from maintaining this action. Pursuant to a decision and order dated December 13, 2021, the court (Kelly, J) denied defendants' motion for summary judgment without prejudice to renewal and directed plaintiff to provide defendants with a copy of the applicable UNITED STATES LIABILITY INSURANCE GROUP Policy # HP3550106/ K075796.¹

Defendants now renew their motion for summary judgment and dismissal of the complaint. For the reasons stated below, the motion is denied.

ALLEGED FACTS

Commencing in or about July 2013, the 5th floor condominium unit, owned by defendants was involved in ongoing construction and renovation. On October 11, 2013 at approximately 1A.M., a significant amount of water came through the 4th floor ceiling, causing substantial damage to the 4th floor unit.

Plaintiff claims herein that she sustained water damage as a result of defendants' negligence on October 11, 2013, October 15, 2013, October 31, 2013 and November 1, 2013. Plaintiff is claiming damages for rental income, payments to independent contractors and payments for materials utilized for repairs and restoration.

The By-Laws of the 77 Hudson Street Condominium contain a waiver of subrogation clause which states in part on Page 19, Paragraph 6.2.5 " Unit owners shall not be prohibited from carrying other insurance for their own benefit ... provided that all such policies shall contain waivers of subrogation ...". The condominium by-laws mandate that each unit and all portions of the common elements are required to be kept in "first class condition" by the unit owner responsible for the maintenance of their units. The By-Laws provide that Unit owners possess

¹ While defendants move pursuant to CPLR §2221(e) for renewal, this court declines to refer the motion back to Judge Kelly as Judge Kelly did not make any substantive ruling on the prior motion, nor was there a request by the parties for such a referral at oral argument.

the duty to promptly make or perform, or cause to be made or performed, all necessary maintenance work, repairs and replacements. Pursuant to Article 6.9 of the By-Laws, it is required that in the event maintenance, repairs or replacements (whether structural or non-structural) in or to any unit is necessitated by the negligence, misuse or neglect of any unit owner, the entire cost thereof shall be borne by such unit owner.

In accordance with the By-Laws, Plaintiff procured a policy of insurance from UNITED STATES LIABILITY INSURANCE GROUP (hereinafter, "USLI") with policy limits of \$160,000.00, which allows for the waiver of subrogation claims. According to the Declarations Page of the USLI policy plaintiff had coverage in the amounts of \$100,000 for dwelling, \$25,000 for personal property, \$10,000 for loss of use and \$25,000 for loss assessment. Endorsement #1 effective on 10/24/13 increased the limits for Coverage C (Personal Property) and D (Loss of Use) to \$60,000 each.

Plaintiff received checks issued on June 24, 2014 in the amount of \$10,000 for loss of use coverage and \$35,000.96 for building coverage arising out of the October 11, 2013 incident. According to the Proposed Statement of Loss and the Sworn Statement in Proof of Loss pertaining to October 11, 2013 incident, plaintiff received the full policy limit of \$10,000 for the loss of use claim. Her claim for restoration was diminished by a \$2500 deductible and a depreciation of \$7092.76 and therefore, the total amount paid at that time for building was \$45,000.96.

Defendants allege that plaintiff previously received a \$10,000 advance payment and a total of \$62,093.72 from USLI. Plaintiff's Bill of Particulars details extensive property damage, which includes loss of rental income of \$240,300.00, construction, renovation and repair of the unit totaling \$143,000.00, consultant fees, including architects, designers and appraisers totaling

\$30,000.00, and that the premises was uninhabitable from October 11, 2013 to June 2015.

Plaintiff alleges her total recovery from insurance was \$55,000.00.

Defendants allege that all of the items of damage claimed by plaintiff were insured by her USLI policy, but plaintiff only filed a claim for damages with USLI arising out of the October 11, 2013 incident and did not exhaust the policy limits of her policy.

DISCUSSION

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action ... has no merit" (CPLR §3212 [b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v. New York Univ.* 64 NY2d 851, 853 [1985]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad Supra* at 853 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *Silverman v. Perlbinde*r, 307 AD2d 230 [2003]; *Thomas v. Holzberg*, 300 AD2d 10, 11 [2002)).

Defendants have failed to meet their burden. Defendants' motion fails as a matter of law because this is not a subrogation action, and defendants show no other contractual provisions that would preclude plaintiff's claims against them.

Subrogation is an equitable doctrine which 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, Inc.*, 90 NY2d 654, 660 [1997]; *Winkelmann v. Excelsior Insurance Co.*, 85 NY2d 577, 581 [1995]; *American*

Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc., 307 AD2d 939, 941 [2d Dept 2003]).

Parties to a commercial transaction are free to allocate the risk of liability to third parties through insurance and deployment of a waiver of subrogation clause (*Atlantic Mutual Insurance Company v. Elliana Properties*, 261 AD2d 296, 296 [1st Dept 1999]). "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* at 660; *Atlantic Mutual Insurance Company* at 296). *Kaf-Kaf* holds that a waiver of subrogation claim is applicable to negligence claims.

This action is a not a subrogation action. Defendants fail to cite a single case where a court has held that the waiver of subrogation should be applied against the insured as it is asking the court to do in this case. Nor did defendants point to any language in the By Laws that limits plaintiff's recover to what is provided by her insurance carrier, or that require her to exhaust available insurance prior to suing defendants for damage incurred as a result of defendants' negligence.

Based on the foregoing, the motion is denied.

CONCLUSION

WHEREFORE it is hereby:

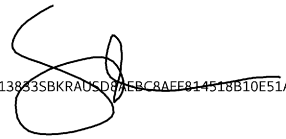
ORDERED that defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff 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 any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

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

202204181138833SBKRAUSD07EBC8AEF814518B10E51AC5C5004B0


4/18/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE