Technology Ins. Co. v Congregation Ateres Shmiel D'Saylish
2022 NY Slip Op 34837(U)
July 27, 2022
Supreme Court, Kings County
Docket Number: Index No. 521561/2018
Judge: Devin P. Cohen

Supreme Court of the State of New York
County of Kings

Index Number 521561/2018
Seq. 002

Part 91

DECISION/ORDER

TECHNOLOGY INSURANCE COMPANY, as subrogee of THE 810 BEDFORD AVENUE CONDOMINIUM and 810 AVENUE OWNER LLC, subrogors,

Plaintiff,

against

CONGREGATION ATERES SHMIEL D'SAYLISH,

Defendants.

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

Papers Numbered	
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	2
Replying Affidavits	
Exhibits	Var.
Other	

Upon the foregoing papers, defendant Congregation Ateres Shmiel D'Saylish ("the Congregation")'s motion for summary judgment (seq. 002) is decided as follows:

Background Facts

This action arises out of a fire that allegedly occurred at the subject premises on October 27, 2015. The instant action is for subrogation by the insurance carrier, Technology Insurance Company ("Technology"), which paid $172,175.51 to its insured, 810 Bedford Avenue Condominium and 810 Avenue Owner LLC, following an assessment of the damage caused by the fire (John Zamillo, representative of Technology, EBT at 23).

The facts of this matter are largely undisputed. 810 Bedford Avenue is a mixed-use condominium with five floors and a finished basement. There are twelve apartments and one synagogue condominium. The Congregation was the owner of the lower level and the banquet hall.

The instant motion for summary judgment is not predicated upon any evidence of liability for the underlying fire. Rather, the Congregation contends that Technology cannot

maintain its action as a subrogee in light of both the condominium by-laws and the terms of Technology's own insurance policy. The condominium by-laws read as follows:

> **Section 5.4. Insurance**
>
> (A) If the same shall be obtainable, the Condominium Board shall obtain, and shall maintain in full force and effect, fire insurance policies with all risk extended coverage, vandalism and malicious mischief endorsements, ensuring the Building (including all Units and the bathroom and kitchen fixtures installed therein on the date of recording the Declaration and all service machinery contained therein, but not including appliances or any furniture, furnishings, decorations, belongings, or other personal property supplied or installed by Unit Owners or the tenants of Unit Owners) and covering the interest of the Condominium, the Condominium Board, all of the Unit Owners and all Permitted Mortgagees, as their interests may appear. Each of the said policies shall contain:
>
> (i) waivers of (a) subrogation, (b) any defense based upon Co-insurance or other insurance, (c) invalidity arising out of any acts of the insured, and (d) pro-rata reduction of liability
>
> * * *
>
> (E) Unit Owners shall not be prohibited from carrying other insurance for their own benefit, provided that all such policies shall contain waivers of subrogation and further provided that the liability of the carriers issuing the insurance maintained by the Condominium Board shall not be affected or diminished by reason of any such, additional insurance carried by any Unit Owner.

The Condominium Board purchased an insurance policy from Technology. In the relevant subsections, that agreement states:

> **K. Transfer Of Rights Of Recovery Against Others To Us**
>
> 1. Applicable to Businessowners Property Coverage:
>
> If any person or organization to or for whom we make payment under this policy has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing [in a set of enumerated circumstances].
>
> [As amended by the rider] 2. Applicable to Businessowners Liability Coverage:

> If the insured has rights to recover all or part of any payment we have made under this policy, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them. However, if the insured has waived those rights to recover through a written contract or if "your work" was commenced under a letter of intent or work order, subject to a subsequent reduction to writing with customers whose customary contracts require a waiver, we waive any rights of recovery we may have under this policy

Analysis

Subrogation is an equitable doctrine that allows an insurer to "stand in the shoes of its insured to seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*North Star Reins. Corp. v. Continental Ins. Co.,* 82 NY2d 281, 294 [1993]). Parties may waive their insurer's right of subrogation with waiver-of-subrogation clauses, which "reflect the parties' allocation of the risk of liability between themselves to third parties through the device of insurance" (*Liberty Mut. Ins. Co. v. Perfect Knowledge,* 299 AD2d 524, 526 [2002]).

In support of its motion for summary judgment the Congregation points to the condominium board's by-laws, which require that any insurance policy purchased by the Condominium Board include a waiver of subrogation. The Congregation mistakenly reads the condominium by-laws as affirmatively waiving subrogation, when in reality the text of the by-laws only directs the board to waive subrogation. In addition, the insurance policies presented to the court do not waive subrogation; they merely allow waiver of subrogation rights (*see e.g. Commerce & Indus. Ins. Co. v Admon Realty, Inc.*, 168 AD2d 321, 323 [1st Dept 1990]).[1] The permission to waive is not equivalent with waiver. Here, it appears that the Condominium Board had both the duty under the condominium by-laws and the power under the insurance policies to

[1] The parties dispute whether paragraph K1 or K2 applies in this context; however, both paragraphs allow the insured to waive subrogation without affirmatively waiving subrogation. Therefore, I do not need to decide which paragraph applies for the purpose of this motion, as the outcome is the same in either case.

waive subrogation rights—however, in reality, the Board did not fulfill its obligation to waive those subrogation rights (*see e.g. Ins. Corp. of New York v Cohoes Realty Assoc., L.P.*, 50 AD3d 1228, 1230–31 [3d Dept 2008]).

Although Technology retained the power to carry out a subrogation action pursuant to the relationships between the parties, there may yet be equitable and public policy reasons why such an action cannot proceed. "An otherwise valid contractual provision may be rendered unenforceable where the public policy in favor of freedom of contract is overridden by another weighty and countervailing public policy" (*New Brunswick Theological Seminary v Van Dyke*, 184 AD3d 176, 177 [2d Dept 2020]). Here, given the relationships of the parties involved, this action may be precluded by the antisubrogation doctrine. If the rights of the Board are subrogated by Technology because the Board abrogated its duty to include a waiver of subrogation in its policy agreement, the Congregation has a putative cause of action against the Board for breaching the by-laws. As required by the by-laws, the Condominium Board purchased the insurance policy from Technology "[to cover] the interest of . . . all of the Unit Owners . . . as their interests may appear," and that includes the Congregation. Then, if Technology succeeded in its action against the Congregation, and the Congregation were to prevail on its action for indemnification against the Board, the result would be that the insurer (Technology) would be seeking to recover from its insured (the Board), albeit indirectly. That outcome would violate the prevailing rule that "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" (*Pennsylvania Gen. Ins. Co. v Austin Powder Co.*,68 NY2d 465, 468 [1986]; *see e.g. Agostinelli v Stein*, 17 AD3d 982, 986–987 [4th Dept 2005, Lawton, J. concurring]). Here, one of the major public policy goals for which anti-subrogation jurisprudence has been developed is implicated:

the "enforcement of the rule . . . to prohibit an insurer from passing its loss to its own insured" (*Jefferson Ins. Co. of New York v Travelers Indem. Co.*, 92 NY2d 363, 373 [1998]). In the instant action, there is a reasonable expectation that such a result will obtain.

Conclusion

Accordingly, the defendant's motion for summary judgment (seq. 002) is granted. The plaintiff's complaint is dismissed.

This constitutes the decision and order of the court.

July 27, 2022
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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