

Granite State Ins. Co. v Buts, Inc.

2023 NY Slip Op 32242(U)

June 29, 2023

Supreme Court, New York County

Docket Number: Index No. 153584/2018

Judge: Verna L. Saunders

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This opinion is uncorrected and not selected for official publication.

the lease, now and forever, subject, however, to Tenant's obligations under Section 2 above."

Under Section 2 of the termination agreement, tenant forfeited its security deposit under the lease in the amount of \$9,963.55, plus any interest to landlord, "provided [t]enant shall install, at its cost and expense, not later than February 15, 2018, 12 dryers at the [l]eased [p]remises."

Defendant asserts that ¶ 5 of the termination of the lease reflects that the parties intended that the agreement would apply to all parties, their successors and/or assigns. Additionally, defendants argue that the insurance policy issued to PDK specifically allows the landlord to waive any recovery so long as it is memorialized in writing. Similarly, the policy issued by the Hartford Insurance Company to defendant also allows its insured to waive recovery in writing before a loss without voiding the coverage.

Defendant submits, *inter alia*, the affidavit of Thomas Ellis, an officer of defendant, who claims that the parties agreed that "in consideration given by [defendant], in the form of forfeiture of the security deposit along with the purchase and installation of certain dryers that would remain on the property, both parties agreed to waive, release and discharge each other, with prejudice, from any and all claims or causes of action, of whatsoever nature, that may exist against the other." Ellis maintains that the termination agreement applies to the claims asserted in this action and, thus, must be dismissed. (NYSCEF Doc. No. 17, *Ellis' affidavit*).

In opposition, plaintiff contends that there is ample evidence that defendant and/or its insurance carrier, the Hartford, knew or had reason to know of plaintiff's subrogation claim, prior to the date the lease termination agreement was signed on April 17, 2018, and, thus, cannot defeat plaintiff's subrogation rights by a release executed by its insured. To this point, plaintiff relies on the affidavit of its adjuster, James Krasnozon, who affirms, in relevant part, that he mailed subrogation claim letters to defendant and defendant's insurance carrier on August 8, 2017, and November 1, 2017, prior to the date of the lease termination agreement (NYSCEF Doc. Nos. 22, *Krasnozon letter*; 23, *subrogation claim letters*). Krasnozon further avers that, according to a report issued by Bill Russo of York Risk Services, who was retained to investigate the claim, defendant and the insureds retained the same public adjuster, Michael Oland of Affiliated Adjustment Group, for their claims. Russo indicates that he communicated with Oland and defendant's insurance carrier, Hartford, to discuss liability of the fire (NYSCEF Doc. No. 24, *York Risk Services Report*). Plaintiff maintains that, insofar as Ellis never states that he was unaware of plaintiff's subrogation claim prior to the lease termination agreement, which is a necessary element of the motion, the motion must be denied. Moreover, according to the plaintiff, the motion should also be denied as premature pursuant to CPLR 3212(f) because defendant has not yet been deposed and a representative would have exclusive knowledge of whether defendant knew or had reason to know of plaintiff's subrogation rights. Plaintiff further claims that, since the agreement was not signed by PDK, it cannot be enforced as against said party.

In reply, defendant argues, *inter alia*, that the termination agreement clearly demonstrates that it was the intent of the parties to extinguish all rights and claims against the other upon the

forfeiture of the premises by the defendant. To the extent plaintiff contends that it did not expressly agree to waive or release claims, defendant argues that plaintiff's own policy allows its policyholder to waive any recovery so long as the waiver is in writing and involves its tenant.

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . a defense is founded upon documentary evidence; or . . . the cause of action may not be maintained because of . . . release . . .; or the pleading fails to state a cause of action." (CPLR 3211[a][1], [5], [7].)

"Subrogation is an equitable doctrine that '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'" (*Indemnity Ins. Co. of N. Am. v St. Paul Mercury Ins. Co.*, 74 AD3d 21, 26 [1st Dept 2010], quoting *Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997].) Generally, "[w]hen an insured executes a general release in favor of a tortfeasor without reserving the rights of his insurer, the insured impairs the insurer's right of subrogation and thereby relieves the insurer of any further liability under the policy." (*Ziegler v Raskin*, 100 AD2d 814, 815-816 [1st Dept 1984], citing *Aetna Cas. & Sur. Co. v Schulman*, 70 AD2d 792, *lv dend.* 48 NY2d 608). Also, "[o]nce an insurer has paid a claim and the tortfeasor knows or should have known that a right to subrogation exists, the wrongdoer and the insured cannot agree to terminate the insurer's claim without its consent and such an agreement cannot be asserted as a defense to the insurer's cause of action." (*Fasso v Doerr*, 12 NY3d 80, 88 [2009]; see *Ocean Acc. & Guar. Corp. v Hooker Electrochemical Co.*, 240 NY 37, 46 [1925]; see generally *Connecticut Fire Ins. Co. v Erie Ry. Co.*, 73 NY 399, 402-403 [1878]; cf. *Weinberg v Transamerica Ins. Co.*, 62 NY2d 379, 384, 384 n 4 [1984].)

Under plaintiff's policy, titled "Transfers of Rights and Recovery against Others to Us", it states:

"[i]f 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 shall do everything necessary to secure our rights and shall do nothing after loss to impair them. *But you may waive your rights against another party in writing:*

1. Prior to a loss to your Covered Property.
2. *After a loss to your Covered Property only if, at time of loss, that party is one of the following:*
 - a. Someone insured by this insurance:
 - b. A business firm:
 - i. Owned or controlled by you; or
 - ii. That owns or controls you; or
 - c. *Your tenant.*" (Emphasis added)

Here, notwithstanding the law governing subrogation, applying the "the well-established principles governing the interpretation of insurance contracts, which provide that the

unambiguous provisions of an insurance policy, as with any written contract, must be afforded their plain and ordinary meaning” (*Broad St., LLC v Gulf Ins. Co.*, 37 AD3d 126, 130 [1st Dept 2016]; accord *Damon G. Douglas Co. v Mt. Hawley Ins. Co.*, 193 AD3d 610 [1st Dept 2021]), this court finds that there is a colorable argument that, pursuant to plaintiff’s insurance policy, the insured may waive its rights against its tenant if said waiver is memorialized in writing — an argument plaintiff fails to address in its opposition papers. That said, this court is nevertheless constrained, at this juncture, to deny the motion because, although plaintiff commenced this action as subrogee for both PDK Development Corp and New Hyde Park Stores, Inc., only Hyde Park Stores, Inc. signed the release that defendant relies upon to argue dismissal of plaintiff’s claims. Given defendant’s failure to explain how said release extends to PDK Development, it is hereby

ORDERED that defendant’s motion is denied in its entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for defendant shall serve a copy of this decision and order, with notice of entry, upon defendant; and it is further

ORDERED that the parties shall appear for a remote conference on September 20, 2023, details which shall be provided no later than September 18, 2023.

This constitutes the decision and order of this court.

June 29, 2023



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE