

**Philadelphia Indem. Ins. Co. v GFP Real Estate, LLC**

2023 NY Slip Op 33578(U)

September 26, 2023

Supreme Court, New York County

Docket Number: Index No. 152995/2021

Judge: Leslie A. Stroth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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. LESLIE A. STROTH PART 12**

*Justice*

-----X  
PHILADELPHIA INDEMNITY INSURANCE COMPANY,  
Plaintiff,  
INDEX NO. 152995/2021  
MOTION DATE 05/16/2023  
MOTION SEQ. NO. 002

- v -

GFP REAL ESTATE, LLC., CROWN PLUMBING, INC., THE  
RELIABLE AUTOMATIC SPRINKLER CO., INC., ABC  
CORPORATIONS 1-10, JOHN DOES 1-10

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X  
The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 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, 60,  
62, 63, 64, 65, 66, 67, 68

were read on this motion to/for AMEND CAPTION/PLEADINGS

The instant motion arises out of a subrogation action to recover for property damages allegedly incurred by the AIDS Service Center of Lower Manhattan (ASC or subrogor), subrogor of plaintiff Philadelphia Indemnity Insurance Company (plaintiff), as a result of a sprinkler malfunction.

Plaintiff moves pursuant to CPLR 3025 (b) for leave to serve a proposed supplemental summons and complaint against two new parties, 34th Street Commercial Properties and 41 West 34<sup>th</sup> Street, LLC, as well as two causes of action for negligence and breach of lease. Plaintiff also seeks to amend the complaint to add a cause of action for breach of lease as against existing defendant GFP Real Estate, LLC (GFP Real Estate or GFP).

GFP Real Estate opposes the motion and cross-moves to dismiss the complaint pursuant to CPLR 3211 (a) (1) and (7).

## I. Alleged Facts

ASC leased the third and fourth floors of 41-45 West 34th Street a/k/a 62-64 West 35th Street, New York, New York 10001 (the subject premises) to use as a commercial space pursuant to a lease agreement dated May 7, 2014 (the lease). *See* NYSCEF doc. no. 31. The lease lists proposed additional defendant 34th Street Commercial Properties, LLC (34<sup>th</sup> Street Properties) as the lessor and includes provisions of the waiver of the right to subrogation.

On June 19, 2020, a sprinkler allegedly discharged on the 6th floor of the subject premises causing damage to the floors below, including the third and fourth floors which are leased by ASC. As a result of the sprinkler discharge, ASC sustained severe damage to its commercial space which amounted to over \$420,000.00. Plaintiff reimbursed ASC for such damage pursuant to its insurance policy. Plaintiff commenced this action on March 26, 2021 to recover the reimbursement costs.

## II. Plaintiff's Motion to Amend the Complaint

CPLR § 3025 (b) provides,

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Leave to amend a caption should be freely granted in the absence of prejudice or surprise unless the proposed amendment is palpably insufficient or patently devoid of merit. *See MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). The First Department, Appellate Division has held that, “[the] plaintiff need not establish the merit of its proposed new allegations...but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” *Id.* at 500 (citations omitted). “The burden of establishing prejudice is on the party opposing the amendment.” *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 (2014) (citations omitted).

Courts are given "...considerable latitude in exercising their discretion, which may be upset by us only for abuse as a matter of law." *Matter of Von Bulow*, 63 NY2d 221 (1984).

Plaintiff asserts that in the course of discovery it was revealed that 34<sup>th</sup> Street Properties leased the premises to ASC pursuant the lease. Plaintiff further contends that a deed filed with the Office of the City Register of the City of New York on August 19, 2004 shows that the subject premises is owned by 41 West 34<sup>th</sup> Street, LLC (41 West 34<sup>th</sup> Street).<sup>1</sup> As a result, plaintiff seeks to assert causes of action against proposed additional defendants 34<sup>th</sup> Street Properties and 41 West 34<sup>th</sup> Street for negligence and breach of lease.<sup>2</sup>

Similarly, plaintiff recognized through discovery that defendant GFP Real Estate, the managing agent of the subject premises, may have breached its duties and obligations under the lease and, as such, may be liable for the losses incurred by ASC. Specifically, the lease provides that all responsibilities pertaining to the sprinkler system of each space lies with the tenants. Prior to the loss, the 6<sup>th</sup> floor of the subject premises was vacant and in the exclusive custody and/or control of GFP Real Estate, 34<sup>th</sup> Street Properties, or 41 West 34<sup>th</sup> Street. Therefore, plaintiff seeks to amend its complaint to include a cause of action for breach of lease against GFP Real Estate.

In opposition, GFP Real Estate asserts that ASC waived its insurer's right to subrogation pursuant to the lease, and plaintiff approved such waiver via its insurance policy with ASC. As such, GFP Real Estate argues that plaintiff's proposed claims against it and 34<sup>th</sup> Street Properties

---

<sup>1</sup> GFP Real Estate posits that, while the Lease refers to 34<sup>th</sup> Street Properties using the term "Owner," 34<sup>th</sup> Street Commercial Properties was itself a lessee of the subject premises that in turn subleased part of the premises to AIDS Service.

<sup>2</sup> GFP Real Estate does not oppose plaintiff's proposed amendment concerning 41 West 34th St LLC. Therefore, plaintiff's motion is granted with respect to the proposed amendments against 41 West 34th St LLC, without opposition.

are untenable, rendering the proposed amendments devoid of merit. GFP refers to paragraph 9 of the lease, entitled "Destruction, Fire and other Casualty" provides that:

[E]ach 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. *Owner and Tenant each hereby releases and waives all right of recovery with respect to subparagraphs (b), (d) and (e) above, 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. (Emphasis added).

Additionally, section 51 of the rider to the lease, entitled "Waiver of Subrogation" states:

Each party hereby releases the other party... from all liability, *whether for negligence or otherwise*, in connection with loss covered by any fire and/or extended coverage insurance policies...but only to the extent that such loss is collected under set fire and/or extended coverage insurance policies. Such release is also conditioned upon including the policy or policies of a provision whereby any such release shall not adversely affect said policies or prejudice any right of the releasor to recover thereunder. (Emphasis added).

Both paragraph 9 and section 51 of the rider to the lease condition the waiver of subrogation upon the existence of language in the parties' insurance policies that such a waiver will not invalidate or adversely affect the policies.

GFP Real Estate maintains that the relevant insurance policies include the requisite language that the ASC<sup>3</sup> and 34<sup>th</sup> Street Properties<sup>4</sup> may waive the right of recovery without any

---

<sup>3</sup> The Insurance policy between plaintiff and ASC states:

If any person or organization to or for whom we make payment under this Coverage Part 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: ... prior to a loss to your Covered Property or Covered Income. *This will not restrict your insurance.* NYSCEF do. no. 44 (emphasis added).

<sup>4</sup> The insurance policy between 34<sup>th</sup> Street Properties and its insurer Zurich American Insurance Company states:

If the insured waives its right to recover payments for injury or damage from another person or organization in a written contract executed prior to a loss, *we waive any right of recovery we may have against such person or organization because of any payment we have made under this Coverage Part ...* This waiver of rights shall not be construed to be a waiver with respect to any other operations in which the insured has no contractual interest. NYSCEF doc. no. 46 (emphasis added).

adverse effects. As such, GFP Real Estate maintains that plaintiff's proposed additional claims against it and 34th Street Properties have been waived, the amendments are palpably insufficient and would be futile considering that plaintiff's subrogation rights have been waived, and therefore, plaintiff's motion to amend must be denied with respect to those claims.

In reply, plaintiff asserts that there is no question as to whether 41 West 34<sup>th</sup> Street and 34<sup>th</sup> Street Properties are real parties in interest and that complete relief cannot be granted until they are added as defendants to the instant action. *See* CPLR 1001. Plaintiff maintains that no prejudice or surprise would result from allowing the proposed amendments, which should be granted liberally.

### III. GFP Real Estate's Cross-Motion to Dismiss

For the same reasons asserted above, GFP Real Estate cross-moves to dismiss plaintiff's claims pursuant to CPLR 3211 (a) (1), on the basis of documentary evidence, and CPLR 3211 (a) (7), for failure to state a claim.<sup>5</sup>

Pursuant to CPLR 3211 (a) (1) "a party may move for judgment dismissing one or more causes of action asserted against him on the ground that...a defense is founded on documentary evidence." A motion made pursuant to CPLR 3211 (a) (1) may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. *See Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 (2002).

A party may also move to dismiss a claim on the ground that the pleading fails to state a cause of action. CPLR 3211 (a) (7). Upon such a motion, the Court must accept the facts alleged as true and determine simply whether plaintiff's facts fit within any cognizable legal theory. *See*

---

<sup>5</sup> Given the significant overlap between the parties' arguments on both motions, the Court first addresses the arguments on each motion and then consolidates the analysis for disposition.

CPLR 3026; *Morone v Morone*, 50 NY2d 481 (1980). The complaint shall be liberally construed, and the allegations are given the benefit of every possible favorable inference. See *Leon v Martinez*, 84 NY2d 83, 87 (1994).

GFP Real Estate maintains that ASC waived plaintiff's right to commence a subrogation action pursuant to the lease, and, as such, the complaint must be dismissed upon the defense of documentary evidence. GFP Real Estate contends that the language of the lease and relevant insurance policies are unambiguous and clearly preclude plaintiff's claims.

In opposition, plaintiff argues that neither paragraph 9 of the lease nor section 51 of the rider to the lease constitute an enforceable waiver of subrogation in this case. At the outset, plaintiff asserts that paragraph 9 is inapplicable here, where damage is caused by the negligence of the owner and cites to *Cont. Ins. Co. v Faron Engraving Co., Inc.*, 179 AD2d 360, 361 (1st Dept 1992) ("it is plain that the waiver of subrogation did not apply to this action involving damage to the authorized tenant's property caused by negligence of the owner."). Rather, plaintiff contends that paragraph 8 of the lease is the controlling provision. Paragraph 8, entitled "Tenant's Liability Insurance Property Loss, Damage, Indemnity," provides that the owner shall not be liable for damage to the tenant's property unless caused by the owner's negligence. Thus, plaintiff maintains that GFP Real Estate's reliance on paragraph 9 of the lease is misplaced. As this action sounds in negligence, plaintiff contends that the owner of the subject premises may be held liable for the damages allegedly incurred pursuant to paragraph 8 and that its claims against GFP Real Estate must survive.

#### IV. Analysis

Here, section 51 of the rider to the lease, which is explicitly entitled "Waiver to Subrogation," unambiguously releases the parties to the lease from all liability, "whether from

negligence of otherwise.” See NYSCEF doc. no. 31. The only condition imposed by such waiver is that the parties’ insurance policies include language that such a waiver will not invalidate or adversely affect the policies, as is the case here. Although paragraphs 8 and 9 seemingly create an exception to such waiver where damage results from the owner’s negligence, section 51 of the rider expressly controverts the existence of such an exception.

Moreover, paragraph 8 and 9 are contained in the standard form of loft lease, while the rider contains specific provisions negotiated by the parties. As it is the case that, “[w]here general and special provisions appear, special provisions control,” section 51 of the rider controls here. *Waldman v New Phone Dimensions, Inc.*, 109 AD2d 702, 704 (1st Dept 1985), citing *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 45 (1956). Therefore, the Court finds that ASC waived any right to subrogation on behalf of plaintiff, even in the event of owner’s negligence. Further, “New York courts have consistently held that a waiver of subrogation provision contained in a lease negotiated between two sophisticated parties in an arm’s length transaction is valid and enforceable provided the intention of the parties is clearly and unequivocally expressed.” *Viacom Intl., Inc. v Midtown Realty Co.*, 193 AD2d 45, 53 (1st Dept 1993).

The lease provides that ASC unambiguously waived any right for plaintiff, as its insurer, to pursue a subrogation action against GFP and 34<sup>th</sup> Street Properties, notwithstanding whether the damage results from their negligence. It is undisputed that Philadelphia Indemnity covered the subject water intrusion loss and now seeks subrogation pursuant to that coverage. Therefore, the lease conclusively establishes a complete defense to plaintiff’s claim for negligence against GFP, as agent of the lessor. Accordingly, GFP’s motion to dismiss is granted, and plaintiff’s first cause of action as against GFP is dismissed.<sup>6</sup>

---

<sup>6</sup> The Court notes that the dismissal does not extend to any cross-claims asserted.

The same rationale herein applies to plaintiff's motion to amend the complaint. Plaintiff's proposed claims against GFP and 34<sup>th</sup> Street Properties are untenable as a matter of law given ASC's waiver of subrogation. Such claims are so devoid of merit as to warrant denial of plaintiff's motion. However, the motion is granted with respect to the claims against new proposed defendant 41 West 34<sup>th</sup> Street, the owner of the property, as it is not a party to the lease, and GFP does not oppose such relief.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to assert the proposed third and fourth causes of action against 41 West 34<sup>th</sup> Street, LLC, and the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and amended complaint, in the form annexed to the motion papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties 34<sup>th</sup> Street Commercial Properties and 41 West 34<sup>th</sup> Street, LLC in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the cross-motion of defendant GFP Real Estate, LLC 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; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the amendment and the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the action shall bear the following caption:

PHILADELPHIA INDEMNITY INSURANCE COMPANY  
as subrogee of AIDS SERVICE CENTER OF LOWER  
MANHATTAN, INC.

Plaintiff,

-against-

41 WEST 34TH STREET, LLC., CROWN PLUMBING,  
INC., THE RELIABLE AUTOMATIC SPRINKLER  
CO., INC., ABC CORPORATIONS 1-10 and JOHN DOES 1-10,

Defendants.

And it is further

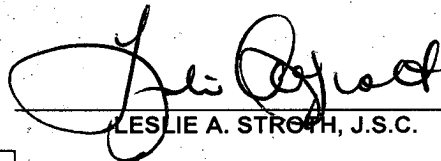
ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein;

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office 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).

The foregoing constitutes the decision and order of the Court.

9/26/2023

DATE



LESLIE A. STROTH, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: