SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 57

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UNITRIN AUTO AND HOME INSURANCE COMPANY, as subrogee of JEFFREY KLEIN and CARA KLEIN

Plaintiffs,

–against- Index No. 157680/2013

RUDIN MANAGEMENT COMPANY, INC., RUDIN MANAGEMENT COMPANY, INC., as agents for 215 EAST 68TH STREET, L.P., 215 EAST 68th STREET, L.P., and 215 EAST 68th STREET, LLC,

Defendants,

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PETER H. MOULTON, J.:

BACKGROUND

This is a subrogation action arising out of an alleged burglary that occurred at 215 East 68th Street in Manhattan, a property owned and operated by the defendants. Plaintiff's complaint alleges that the burglary occurred between August 22 and September 1, 2008 while plaintiff's subrogors, Jeffrey Klein and Cara Klein ("Kleins"), were on vacation. The Kleins sustained a loss of jewelry

scheduled under their policy with plaintiff in the amount of $25,602.68, and an additional loss of $1,000.00 for unscheduled jewelry under the policy. Plaintiff, as the Kleins insurer, tendered a payment of $26,602.68 to cover them for their cumulative loss. Plaintiff states that it subsequently sent a letter to defendants notifying them of a lien interest on October 29, 2008. The Kleins then asserted a claim against the defendants for uninsured jewelry stolen from their apartment that was not covered by plaintiff. The defendants liability carrier, OneBeacon Insurance Company, subsequently paid the Kleins $32,607.50 "for items stolen from their apartment that were not covered by UNITRIN." In consideration of that payment, the Kleins sent to the defendants what the defendants perceived to be a General Release dated July 1, 2009. That release, signed by the Kleins, identifies RUDIN MANAGEMENT CO., INC., 215 E. 68th STREET, L.P. and 215 E. 68th STREET, LLC as RELEASEES with respect to any and all actions or claims "that RELEASORS ever had, now have or thereafter can, shall or may have against RELEASEES concerning the burglary of personal property from RELEASORS' apartment, from the beginning of the world to the day of the date of this release." Nevertheless, plaintiff states that it has subrogation rights against defendants because defendants settled the Kleins' uninsured loss claim despite having knowledge of plaintiff's lien interest. In rebuttal, defendants state that the General Release executed by the Kleins precludes plaintiff, as a matter of law, from maintaining this subrogation action.

Consequently, defendants move pursuant to CPLR § 3211 for an order dismissing plaintiff's complaint on the grounds that the General Release prevents this subrogation action. Plaintiff opposes the motion, asserting that defendants were aware of plaintiff's lien interest prior to the execution of the General Release.

DISCUSSION

In deciding a motion to dismiss a complaint for failure to state a cause of action, "the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (see Velez v. Captain Luna's Mar., 74 AD3d 1191, 1192 [2d Dept. 2010] quoting Breytman v. Olinville Realty, LLC, 54 AD3d 703, 703-704 [2d Dept. 2008]). As such, defendants must show that plaintiff's cause of action has no merit (id.). In order to do so, defendants must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact. If a pleading, from its four corners, contains factual allegations that taken together manifest any cause of action cognizable at law, a motion for dismissal will fail (see Foley v. D'Agostino, 21 AD2d 60, 64-65 [1st Dept. 1964]). Plaintiff, as the non-movant, is entitled to the benefit of every favorable inference that may be drawn from the pleadings, affidavits, and competing contentions of the parties (see Morris v. Morris, 306 AD2d 449, 451 [2d Dept. 2003]).

As a legal principle, subrogation "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" (see Duane Reade v. Reva Holding Corp., 30 AD3d 229, 232 [1st Dept. 2006] [quoting Kaf-Kaf, Inc. v. Rodless Decorations, 90 NY2d 654, 660 [1997]). The Court of Appeals has consistently held that an insurer's rights as an equitable subrogee against a third party are derivative and are limited to such rights as the insured "would have against such third party for its default or wrongdoing" (see Federal Ins. Co. v. Arthur Andersen & Co., 75 NY2d 366, 372 [1990]). A general release can prejudice the rights of an insurance subrogee by "extinguishing the

right of subrogration" (see Weinberg v. Transamerica Ins., Co., 62 NY2d 379, 384 [1984]). However, a party cannot extinguish another's right to subrogation where that party has knowledge about the other's right to subrogation (see Aetna Cas. & Sur. Co. v. Bekins Van Lines Co., 67 NY2d 901, 903 [1986]).

Here, plaintiff's complaint asserts a cognizable claim for subrogation. Paragraphs 67-70 of plaintiff's complaint state as follows:

> The KLEINS were deprived of the essential security it contracted for with DEFENDANTS, including DEFENDANTS' security guarantees. THE KLEINS sustained property damage due to the theft of their property caused by the DEFENDANTS' actions. Pursuant to terms and conditions of the KLEINS' policy with UNITRIN, the KLEINS called upon UNITRIN to pay for the damage caused by the theft of their property. UNITRIN paid $26,692.68 for the damage proximately caused by DEFENDANTS' breach of contract. UNITRIN is entitled by its contractual subrogation rights to recover $26,692.68 from the DEFENDANTS, the total damages caused by the DEFENDANTS' breach of contract.

Affording plaintiff, a non-movant here, every favorable inference that can be drawn from the pleadings, plaintiff's pleadings assert a cognizable claim for subrogation rights as a matter of law. Defendants do not challenge the draftsmanship of plaintiff's pleadings, but instead submit that the General Release dated July 1, 2009 prevents plaintiff from asserting any subrogation rights against them. To rebut defendants' claims, plaintiff asserts that the General Release the Kleins provided to the defendants was submitted after defendants had already learned of plaintiff's subrogation rights. In support of its claims, plaintiff submits a letter dated October 29, 2008, addressed to the Rudin Management Company Residential Management that states as follows: "This is to put you on notice of our intent to pursue a subrogation claim under the terms of our policy for the theft of our insured's

property." Given that the letter predates the July 1, 2009 General Release, it does appear to have put the defendants on notice as to plaintiff's potential subrogation rights (see Aetna Cas. & Sur. Co., 67 NY2d at 903). Plaintiff also submits the affidavit of Darlene Grevelding, the subrogation specialist who sent the October 29, 2008 letter, in further support of its opposition to defendants' motion.

In response, defendants submit no information stating that they did not receive the October 29, 2008 letter sent by Ms. Grevelding. Instead, defendants' primary opposition to the letter stems from the notion that Ms. Grevelding's signature on the October 29, 2008 letter appears to differ from her signature on her affidavit dated April 2, 2014. Defendants' challenges to Ms. Grevelding's credibility are insufficient to substantiate a lack of notice of plaintiff's subrogation rights. A determination by this court that defendants had no actual notice would rely entirely on an assessment of Ms. Grevelding's credibility at the expense of evidence adduced in favor of the non-movant. Such a credibility determination is improper on a motion to dismiss (see Gonzalez v. Gonzalez, 262 AD2d 281, 282 [2d Dept. 1999]). As such, viewing the evidence adduced in a light most favorable to plaintiff and accepting that evidence as true, the court finds that plaintiff has established a viable cause of action for its subrogation rights.[1]

Accordingly, it is hereby

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[1]Additionally, despite the fact that defendants motion appears to move for dismissal on statute of limitations grounds (CPLR § 3211(a)(5)), defendant's appear to have moved on such grounds in error. On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (see Rakusin v. Miano, 84 AD3d 1051, 1052 [2d Dept. 2008]). Here, defendants submit no factual allegations in support of an application to dismiss plaintiff's complaint on statute of limitations grounds. The court therefore finds no merit in defendants' motion on that ground.

ORDERED that defendants' motion, pursuant to CPLR § 3211, dismissing plaintiff's complaint is denied.

Dated: January 28, 2015

Enter:

J.S.C.

HON. PETER H. MOULTON