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Appeals Court of Massachusetts.

MERRIMACK MUTUAL FIRE INSURANCE COMPANY [1]

v.

Ellen GIUNTA. [2]

19-P-1525

Entered: October 28, 2020

By the Court (Meade, Sullivan & Sacks, JJ. [3])

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

***1** A fire damaged a building in which the defendant, Ellen Giunta (tenant), had leased space to operate her business. The landlord's insurer, Merrimack Mutual Fire Insurance Company, reimbursed the landlord for the damages and then filed a Superior Court action, as the landlord's subrogee, seeking to recover from the tenant based on her or her employees' alleged negligence in causing the fire. A judge allowed the tenant's motion for summary judgment on the theory that, under the terms of the lease, "the parties intended that the [tenant] would be relieved of liability for damage caused by [her] negligence." Seaco Ins. Co. v. Barbosa, 435 Mass. 772, 779 (2002) (Barbosa). The insurer appealed. We affirm.

1. Authenticity of lease. We are unpersuaded by the insurer's contention that the judge erred in considering the copy of the lease submitted by the tenant. The tenant's motion for summary judgment was accompanied by a statement of material facts (SMF) that she asserted as undisputed, together with the insurer's responses thereto, pursuant to Superior Court Rule 9A(b)(5)(i), (iii)(A). Paragraph 2 of the SMF asserted that "[t]here is a lease of [the subject premises] between [the landlord and the tenant] covering the dates of the fire, on or about April 8, 2015, as alleged in the [c]omplaint ('[l]ease'). ([e]xhibit 2)." Attached to the SMF as exhibit 2 was a document purporting to be a commercial lease agreement for the subject premises, signed by the landlord and the tenant. The insurer's response to paragraph 2 was: "Merrimack Mutual disputes that it was a party to the [l]ease, and that the [l]ease was in effect at the time of the fire as alleged in the complaint, on or about April 8, 2015. See [e]xhibit 2, [b]asic [t]erms."

The insurer's response did not dispute the authenticity of exhibit 2 as a copy of the lease. The insurer's summary judgment opposition, however, argued that exhibit 2 had not been properly authenticated by affidavit or otherwise. At the motion hearing, the insurer's counsel [4] asserted, among other things, that the lease was not properly before the court. The judge responded, "That's a technicality, though." Counsel replied, "Well, it's a technicality but there's no evidence that this is genuinely the lease. It's a copy of a piece of paper that we had in our file." The tenant's counsel stated, "Judge, they produced it. [5] Secondly, we subpoena[ed] the landlord directly. And he submitted it." The judge replied, "All right. Do you have issues with that?" The tenant's counsel said he did not; the insurer's counsel did not respond. The hearing continued with a discussion of the merits of the tenant's motion, which the judge later allowed in a ten-page written decision.

On appeal, the insurer renews its argument that the lease was not authenticated and should not have been considered. We

see no error. Superior Court Rule 9A(b)(5)(i) requires that when a party moves for summary judgment, each statement in the party's SMF be supported by "references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents." The nonmoving party may respond by asserting, among other things, that "a fact is not supported by the materials cited by the moving party, [if] the responding party has a good faith basis for contesting it." Rule 9A(b)(5)(iii)(A)(b). But, "[f]or purposes of summary judgment, each fact set forth in the moving party's statement of facts is deemed to have been admitted unless properly controverted in the manner forth in this [p]aragraph." Rule 9A(b)(5)(iii)(A).

***2** Here, even if the insurer had a good-faith basis for disputing the authenticity of the lease described in and attached to the tenant's SMF, the insurer did not do so in its response to the SMF. Accordingly, the insurer is deemed to have admitted the lease's authenticity. See Godfrey v. Globe Newspaper Co., 457 Mass. 113, 121 ((2010). "If the statement of undisputed facts is to have any meaning, the motion judge must be able to rely on it." Id. Rule 9A(b)(5) "is an 'antiferreting' " rule, designed to relieve a judge of the need to look elsewhere in the record and motion papers to determine what facts are disputed. Id., quoting Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 46 n.18 (2005). Here, the judge did not err in considering the lease attached to the SMF.

2. Expiration of lease. The insurer also argues that the lease, by its own terms, had expired at the time of the fire and thus, no matter what its terms, could not have relieved the tenant of liability for damage caused by her negligence. Again, we are not persuaded. The fire occurred on or about April 8, 2015; paragraph 1(f) of the lease stated that its term ended on March 31, 2015; and paragraph 9 of the lease stated that its term ended on March 31, 2016. Assuming arguendo that paragraph 1(f) governed -- meaning that the lease had terminated eight days before the fire -- the lease nevertheless contained two holdover provisions, paragraphs 10 and 29. Paragraph 10 would govern if the landlord had consented in writing to the tenant remaining in possession; otherwise, paragraph 29 would govern.

Because there was no evidence in the summary judgment record that the landlord had given such consent, paragraph 29 apparently governed, creating a month-to-month tenancy at twice the base rent but "subject always to all of the other provisions of this [l]ease insofar as the same are applicable to a month-to-month tenancy." Even if the judge erred in concluding that paragraph 10 governed, (which would have created a month-to-month tenancy "subject to all the terms and conditions of this [l]ease"), the insurer points to no lease provisions relied on by the judge that would be inapplicable if paragraph 29 governed. Thus any error in concluding that paragraph 10 governed was harmless. We proceed to review the lease provisions examined by the judge.

3. Effect of lease provisions. As the judge recognized, whether the tenant could be liable to the insurer depended on whether, under the terms of lease, "the parties intended that the [tenant] would be relieved of liability for damage caused by [her] negligence."[6] Barbosa, 435 Mass. at 779. Under Barbosa, a judge is to "look to the terms of the lease and other evidence to ascertain the intent of the parties. See Lexington Ins. Co. v. All Regions Chem. Labs, Inc., [419 Mass. 712 (1995)]; Lumber Mut. Ins. Co. v. Zoltek Corp., [419 Mass. 704 (1995)]." Barbosa, supra.

Lexington Ins. Co. involved a commercial lease provision known as a "yield-up" clause, which required the tenant to deliver the premises at the expiration of the tenancy "in the same condition and repair as the same were in at the commencement of the term ... damage by fire or other casualty ... only excepted." Lexington Ins. Co., 419 Mass. at 713. Lumber Mut. Ins. Co. involved a similar yield-up clause, as well as a clause requiring the tenant to pay a portion of the landlord's hazard insurance premium. See Lumber Mut. Ins. Co., 419 Mass. at 706-707. In Barbosa, the court recognized that the type of yield-up clause at issue in both earlier cases was by itself sufficient to show "the agreement of the parties that the tenant would not be liable for fire damage negligently caused by the tenant."[7] Barbosa, 435 Mass. at 779. "[T]his language constituted an agreement that the landlord and tenant were coinsureds, thus defeating the insurer's subrogation claim."[8] Id.

***3** Here, paragraph 82 of the lease contained a yield-up clause, similar to those in Lexington Ins. Co. and Lumber Mut. Ins. Co., requiring the tenant upon expiration of the tenancy to surrender the premises in the same

condition as they were in at the beginning of the lease, "reasonable wear and tear, damage by fire [and specified other causes] excepted." And paragraph 66 of the lease contained a "maintain-and-keep" provision, requiring the tenant to "maintain and keep the [p]remises, reasonable wear and tear, damage by fire [and specified other causes] excepted." See Lumber Mut. Ins. Co., 419 Mass. at 706-707 (concluding that such provision indicated intent to make tenant coinsured of landlord, precluding landlord's insurer from recovering on subrogation theory for tenant's negligence). Relying on these two provisions, the judge here concluded that the parties to the lease did not intend the tenant to be liable for fire damage caused by her negligence.

The insurer argued that other provisions indicated a contrary intent. For example, paragraph 38 of the lease required the tenant to maintain comprehensive general liability insurance against claims for property damage or loss arising out of the use or occupation of the premises. The judge concluded that this generally-worded provision did not refer to fire insurance and was insufficient to overcome the more specific provision in paragraph 43, which required the landlord to maintain "extended fire and extended coverage insurance on the [b]uilding." The lease's yield-up and maintain-and-keep clauses, which excepted fire damage as discussed supra, were additional specific indications of the parties' intent regarding fire damage that limited the reach of the general language of paragraph 38. [9]

The insurer also relied on paragraph 44, under which the landlord agreed, if the tenant so requested, to ask its insurers to waive their rights of subrogation as against the tenant. The insurer argued that this language indicated that "the parties considered subrogation." [10] The judge did not address paragraph 44 in his decision. But, to the extent the insurer means to suggest that paragraph 44 was an acknowledgment that the landlord's insurers actually had rights of subrogation in the first place, we do not agree that such an acknowledgment necessarily applied to the landlord's fire insurance. Paragraph 43 of the lease required the landlord to maintain multiple types of insurance, including "extended fire and extended coverage insurance on the [b]uilding," boiler and machinery insurance, and comprehensive general liability insurance against claims for bodily injury and property damage. Paragraph 44's general language suggested that insurers providing at least some of the types of insurance required by paragraph 43 had subrogation rights as against the tenant. But, in light of the lease's yield-up and maintain-and-keep clauses with their specific exceptions for fire damage, paragraph 44's general language was insufficient to constitute an acknowledgment that the landlord's fire insurer had subrogation rights. [11]

***4** On appeal, the insurer cites a variety of additional lease provisions in support of its argument that the parties to the lease did not intend to relieve the tenant of liability for fire damage caused by her negligence. These include paragraph 39(b) (tenant's insurance coverage was "primary ... with respect to any policies carried by the [l]andlord and ... any coverage carried by the [l]andlord will be excess coverage"), paragraph 62 (limiting landlord's fire damage repair obligations to damage not caused by tenant's negligence), and paragraph 74 (landlord's obligation to pay for repairs excluded repairs necessitated by tenant's negligence). The insurer made none of these arguments to the judge, however. Accordingly, they are waived, and we do not consider them. See Albert v. Municipal Ct. of Boston, 388 Mass. 491, 493-494 (1983).

Finally, the insurer argues that, considering all of the provisions cited above, the lease was ambiguous, requiring a trial to determine the parties' intent. See Barbosa, 435 Mass. at 779 (where lease's terms are ambiguous, uncertain, or equivocal in meaning, intent of parties is question of fact to be determined at trial). As the judge expressly recognized, however, the insurer made no such argument below. Thus, that argument is also waived. [12] See Albert, 388 Mass. at 493-494.

Judgment affirmed.

All Citations

Slip Copy, 2020 WL 6297452 (Table)

Footnotes

1 As subrogee of Prospect Landlord, LLC and Demetrios Sklivas.

2 Doing business as Bliss Massage Studio.

3 The panelists are listed in order of seniority.

4 The insurer is represented by different counsel on appeal.

5 The lease attached to the SMF bore Bates-stamped numbers such as are commonly used in responding to discovery requests.

6 Contrary to the insurer's argument on appeal, the judge did not shift the burden to the insurer to establish that the parties intended to hold the tenant liable for damages caused by her negligence. Rather, the judge quoted and applied the Barbosa standard, which requires proof of intent to relieve the tenant of such liability. See Barbosa, 435 Mass. at 779.

7 We do not agree with the insurer's argument here that Barbosa casts doubt on the approach used in Lexington Ins. Co. and Lumber Mut. Ins. Co. To the contrary, Barbosa cites those two cases as examples of the proper approach: "look[ing] to the terms of the lease and other evidence to ascertain the intent of the parties." Barbosa, 435 Mass. at 779.

8 "It is well established that 'an insurer cannot recover by means of subrogation against its own insured.' " Peterson v. Silva, 428 Mass. 751, 752 (1999), quoting Safeco Ins. Co. v. Capri, 101 Nev. 429, 431 (1985). Peterson, which involved a lease of residential property, held that "absent an express provision in a lease establishing a tenant's liability for loss from a negligently started fire, the landlord's insurance is deemed held for the mutual benefit of both parties." Peterson, supra at 753. The Barbosa court referred to Peterson as having adopted "the doctrine of 'implied co-insureds,' " 435 Mass. at 776, but declined to extend that doctrine from the residential lease context to the commercial lease context. Id. at 777-779. Barbosa instead concluded that, in the latter context, the question is whether the lease and other evidence affirmatively evince an intent to relieve the tenant of liability for fire damage cause by its negligence. Id. at 779.

9 The landlord also made a passing reference to a lease provision requiring that the insurance the tenant was required to obtain would provide for a waiver of the insurer's rights of subrogation as against the landlord. But this language would be directly relevant only if the tenant were required to obtain fire insurance, which the judge correctly concluded was not the parties' intent.

10 The tenant's SMF and summary judgment motion did not assert that she had ever requested such a waiver.

11 The insurer also argued that lease paragraph 52, setting forth the tenant's obligations to indemnify the landlord for certain losses, recognized the tenant's liability for its own negligence. The judge rejected this argument in a footnote, citing Peterson, 428 Mass. at 754, and the insurer does not press the argument on appeal.

12 The tenant has moved to strike two deposition transcripts included in the insurer's record appendix on the ground that they were not part of the record before the motion judge, and the insurer has moved to expand the record to include those materials. We allow the tenant's motion and deny the insurer's motion. See Mass. R. A. P. 8 (a), as appearing in 481 Mass. 1116 (2019). Had we considered the materials, they would not have altered the result that we reach.