2017 IL App (3d) 160658-U

Order filed November 13, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

FOREMOST INSURANCE COMPANY GRAND RAPIDS, MICHIGAN a/s/o GLOBAL REAL ESTATE SOLUTIONS, LLC,	)	Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois.
Plaintiff-Appellant,	)	
v.	)	Appeal No. 3-16-0658 Circuit No. 16-L-20
JEREMY McKINNEY,	)	
Defendant-Appellee.	)	The Honorable Robert C. Marsaglia, Judge, presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err when it dismissed a subrogation action after finding that a lease agreement did not clearly indicate that the parties intended the tenants to be responsible for fire damage.

¶ 2 The plaintiff, Foremost Insurance Company, brought a subrogation action against the defendant, Jeremy McKinney, who had leased certain real estate from Foremost Insurance's insured, Global Real Estate Solutions, LLC. Foremost Insurance sought to recover from

McKinney the payment it had made to Global Real Estate for fire damage caused to the leased premises. The circuit court granted McKinney's motion to dismiss after finding that the lease agreement did not clearly indicate that the parties intended the tenants to be responsible for fire damage. On appeal, Foremost Insurance argues that the court erred when it granted McKinney's motion to dismiss. We affirm.

¶ 3 FACTS

¶ 4 Foremost Insurance filed a subrogation action against McKinney on April 28, 2016. The complaint alleged that Foremost Insurance insured Global Real Estate, who leased certain real estate to McKinney and his wife. On February 8, 2015, McKinney's son had been riding a mini bike, which he refueled and parked inside the garage. He leaned the mini bike against the wall because it did not have a kick stand. Subsequently, McKinney smelled gasoline. He went into the garage to investigate and found the mini bike laying on its side. Gasoline had spilled from the mini bike's tank. When McKinney picked up the mini bike, the gasoline ignited. The ensuing fire caused damage to the garage and the "property's attic space." The complaint alleged that the fire was caused by McKinney's negligence and that he was liable to Foremost Insurance for the $131,311.49 it paid to Global Real Estate for the fire damage.

¶ 5 McKinney filed a motion to dismiss pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2014)). The motion alleged that tenants are not responsible for fire damage to the leased premises unless the lease clearly indicates the parties so intended. McKinney alleged that the lease he and his wife signed did not indicate that intent.

¶ 6 The only provision in the lease agreement that specifically addressed fire damage was ¶ 10, which stated:

> "Owner/Agent shall not be liable for any loss of property by fire, theft, breakage, burglary, or otherwise, nor for any accidental damage to persons or property in or about the leased premises resulting from electrical failure, water overflow, rain, windstorm, snow, freezing, etc. which may cause issue of flow into or from any part of said premises or improvements, including pipes, gas lines, sprinklers, or electrical connections. Resident/Tenant hereby agrees to purchase needed insurance or to provide self-insurance in adequate amounts to offset any risk."

¶ 7 The circuit court held a hearing on McKinney's motion to dismiss on September 19, 2016. The court issued its written decision on October 20, 2016, granting McKinney's motion. The court found that ¶ 10 of the lease agreement was the key provision and that it distinguished "property" from "leased premises" and "dwelling" such that the lease did not clearly indicate that the parties intended the tenants to be responsible for fire damage. Foremost Insurance appealed.

¶ 8 ANALYSIS

¶ 9 On appeal, Foremost Insurance argues that the circuit court erred when it granted McKinney's motion to dismiss. Foremost Insurance argues that the lease clearly indicated that the parties intended the tenants to be responsible for fire damage.

¶ 10 A motion to dismiss brought pursuant to section 2-615 of the Code challenges the legal sufficiency of a complaint by claiming it is facially defective. 735 ILCS 5/2-615 (West 2014); *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 19. The court must accept all well-pled facts, and reasonable inferences from those facts, as true. *Beacham v. Walker*, 231 Ill. 2d 51, 58 (2008). "It is well understood that the critical inquiry is whether the allegations of the complaint, when

construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted." *Blumenthal*, 2016 IL 118781, ¶ 19. We review a circuit court's decision on a section 2-615 motion to dismiss *de novo*. *Id.*

¶ 11 It is important to remember that this case involves a subrogation claim. As explained by the supreme court:

> "The doctrine of subrogation is a creature of chancery. It is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim or debt so paid. [Citation.] The right of subrogation is an equitable right and remedy which rests on the principle that substantial justice should be attained by placing ultimate responsibility for the loss upon the one against whom in good conscience it ought to fall. [Citation.] Subrogation is allowed to prevent injustice and unjust enrichment but will not be allowed where it would be inequitable to do so. [Citation.] There is no general rule which can be laid down to determine whether a right of subrogation exists since this right depends upon the equities of each particular case. [Citation.]
>
> One who asserts a right of subrogation must step into the shoes of, or be substituted for, the one whose claim or debt he has paid and can only enforce those rights which the latter could enforce. [Citation.] Consequently, in the case at bar, the insurance company may assert a right of subrogation against the tenant for

> the fire damage if: (1) the landlord could maintain a cause of action against the tenant and (2) it would be equitable to allow the insurance company to enforce a right of subrogation against the tenant." *Dix Mutual Insurance Co. v. LaFramboise*, 149 Ill. 2d 314, 319 (1992).

¶ 12 In *Dix Mutual Insurance*, a landlord and tenant signed a very brief and simple lease agreement. *Id.* at 317-18. The only provision of the agreement that addressed risk assumed by the landlord and tenant stated that "[t]he Tenant will assume their own risk for their personal property and Landlord, J.S. Ludwig, will not be responsible for fire, wind, or water damage." *Id.* at 318. While the tenant was stripping paint, with the landlord's permission, from the exterior of the house, the house suffered fire damage. *Id.* The landlord recovered $40,579 from the insurance company for the loss, and the insurance company in turn filed a subrogation claim against the tenant. *Id.*

¶ 13 The *Dix Mutual Insurance* court stated that "[a]lthough a tenant is generally liable for fire damage caused to the leased premises by his negligence, if the parties intended to exculpate the tenant from negligently caused fire damage, their intent will be enforced." *Id.* at 319. After noting that an express provision exculpating the tenant from liability for fire damage was not an absolute necessity, the court emphasized that the proper approach was to examine the lease as a whole. *Id.* at 320.

¶ 14 The supreme court found it significant that the parties did in fact consider potential fire damage, as evidenced by the sole risk-assuming provision, but the parties only addressed fire damage to the tenant's personal property in that provision. *Id.* at 322. The court held that in so doing, the parties to the lease "intended for each to be responsible for his own property." *Id.*

¶ 15 The supreme court found further support for its conclusion in the fact that the landlord had insured the leased premises from fire damage. *Id.* The court further noted, *inter alia,* that: (1) companies insuring against fire damage expect to pay for negligent fires and they take that expectation into consideration when calculating their rates (*id.* (quoting *Stein v. Yarnall-Todd Chevrolet, Inc.*, 41 Ill. 2d 32, 38 (1968)); and (2) customarily, fire insurance policies insure against both accidentally and negligently caused fires (*id.* (quoting *Cerny-Pickas & Co. v. C.R. Jahn Co.*, 7 Ill. 2d 393, 398 (1955))). Accordingly, the court concluded that "the parties intended that the tenant was not to be liable for any fire damage to the premises and that the landlord would look solely to the insurance as compensation for any fire damage to the premises." *Id.*

¶ 16 As a whole, the lease agreement in this case was a one-year agreement for McKinney, his wife, and their two children to live in the leased premises in exchange for a monthly rent. The lease agreement contained several standard-type provisions intended to protect the integrity of the leased premises for residential rental purposes, such as reporting any defects prior to move-in and leaving the premises in move-in condition at the end of the lease. The parties specifically addressed the assumption of risk from fire damage in ¶ 10, which stated:

> "Owner/Agent shall not be liable for any loss of property by fire, theft, breakage, burglary, or otherwise, nor for any accidental damage to persons or property in or about the leased premises resulting from electrical failure, water overflow, rain, windstorm, snow, freezing, etc. which may cause issue of flow into or from any part of said premises or improvements, including pipes, gas lines, sprinklers, or electrical connections. Resident/Tenant hereby

agrees to purchase needed insurance or to provide self-insurance in adequate amounts to offset any risk."

¶ 17 Initially, we address Foremost Insurance's claim that "property" in ¶ 10 means more than just personal property. In support of that claim, Foremost Insurance emphasizes that the lease agreement does not define the terms "property," "premises," or "dwelling," and it points to other provisions in the lease agreement which allegedly use the terms interchangeably. For example, the opening paragraph of the lease agreement uses "property" to refer to the leased premises: "Resident/Tenant, in consideration of Owner/Agent permitting him/her to occupy the above property ***." In sum, Foremost Insurance claims that "Paragraph 10 absolves the Owner/Agent from Liability for any loss of property arising from fire, theft, breakage, burglary, or otherwise."

¶ 18 Foremost Insurance's attempt to cast doubt on the meaning of "property" in ¶ 10 is unpersuasive. We do not dispute that the lease agreement inartfully uses the term "property" inconsistently throughout the document. However, there is nothing ambiguous about the manner in which "property" is used in ¶ 10. "Property" is readily distinguishable from "leased premises" such that "property" clearly refers only to personal belongings within the "leased premises." Moreover, even if an ambiguity existed, it is well settled that ambiguities in a contract's terms are to be resolved against the drafter. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 479 (1998). For these reasons, ¶ 10 does not expressly place the responsibility on the tenants for fire damage to the leased premises.

¶ 19 Further, the instant situation resembles the one in *Dix Mutual Insurance* in several important ways. The lease agreement shows that parties clearly did consider the possibility of fire. In ¶ 10, the parties expressly addressed fire damage, but only to the tenants' personal property, and placed liability for protecting that property with the tenants. However, that

paragraph did not address liability for the leased premises if damaged by fire, and like the risk-assuming provision in *Dix Mutual Insurance*, thereby indicated that the parties intended for each to be responsible only for what they owned. *Id*. Coupled with the fact that the landlord in this case, Global Real Estate, carried fire insurance for the leased premises (as evidenced by the payment it received from Foremost Insurance for the loss), we hold that the circumstances of this case compel the same conclusion as in *Dix Mutual Insurance*. *Id.*

¶ 20 In sum, the parties to the lease agreement clearly contemplated fire damage and, because they intended for each to be responsible only for what they owned, they intended to exculpate the tenants from liability for any fire damage to the leased premises. We hold that a subrogation claim is therefore unavailable to Foremost Insurance in this case and that the circuit court did not err when it granted McKinney's motion to dismiss.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Grundy County is affirmed.

¶ 23 Affirmed.