

**STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND  
BUSINESS COURT**

**FEDERAL INSURANCE COMPANY,  
Plaintiff,**

v.

**Case No. 16-151117-CB  
Hon. James M. Alexander**

**SULZER METCO, INC,  
Defendant.**

---

**OPINION AND ORDER RE: SUMMARY DISPOSITION**

This matter is before the Court on Defendant's motion for summary disposition. This subrogation action arises out of a fire that damaged Plaintiff's insured's (First Industrial) building. Defendant is a tenant in said building under the terms of a March 22, 2002 Lease.

On January 21, 2013, a propane tank belonging to Defendant exploded and caused a fire. Plaintiff claims that Defendant was negligent in inspecting, servicing or operating its equipment, which led to the explosion and fire. Plaintiff ultimately paid its First Industrial \$208,526.96 on the fire loss. Plaintiff now wishes to recover said amount from Defendant on claims of breach of contract, indemnification, and negligence.

Defendant now moves for summary disposition under MCR 2.116(C)(8) or (C)(10), which respectively test the legal and factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Defendant argues that it is entitled to summary disposition because its Lease with First Industrial contains a valid and enforceable waiver-of-subrogation provision found in Section 10.3 of the Lease. It provides (in full):

Waiver of Subrogation. To the extent permitted by law, and without affecting the coverage provided by insurance required to be maintained hereunder, Landlord and Tenant each waive any right to recover against the other for (a) damages to property, (b) damages to the Premises or any part thereof, or (c) claims arising by reason of the foregoing, to the extent that such damages and claims are insured against or required to be insured against by Landlord or Tenant under this Lease. This provision is intended to waive, fully and for the benefit of each party, any rights and/or claims that might give rise to a right of subrogation by any insurance carrier. The coverage obtained by each party pursuant to this Lease shall include, without limitation, a waiver of subrogation by the carrier which conforms to the provisions of this section.

Waivers (or releases) are enforceable in Michigan, and “it is well settled that the scope of [the same] is governed by the intent of the parties as expressed in the release.” *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000). Just like any other contract, “[i]f the text of the release is unambiguous, the parties’ intentions must be ascertained from the plain, ordinary meaning of the language of the release.” *Id.*

Further, “[u]nder ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

And an insurance policy is construed in the same manner as any other type of contract. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 367; 817 NW2d 504 (2012).

Based on the plain language of the Lease’s “Waiver of Subrogation” provision, Defendant argues that “the clear intent . . . is to prevent insurers from bringing subrogation actions, just like this one, in the event an insurer pays for damages covered by an insurance policy.”

**And the present provision actually declares its intent:** “This provision is intended to waive, fully and for the benefit of each party, **any** rights and/or claims that might give rise to a right of subrogation by **any** insurance carrier.” (emphasis added). This broad language is clear and unambiguous.

Defendant argues that the waiver provision applies because the damage to the building was insured against by First Industrial (as Landlord) under a Plaintiff policy. In support, Defendant cites to the “Waiver of Subrogation” Provision, which provides that “Landlord and Tenant each waive any right to recover against the other for . . . damages to the Premises or any part thereof . . . to the extent that such damages and claims **are insured against or required to be insured against by Landlord or Tenant** under this Lease.” (emphasis added).

In other words, because the Landlord insured the damaged premises under a Plaintiff policy, Defendant claims that the broad subrogation waiver applies.

In response, Plaintiff generally argues that the waiver should not be applied for two reasons. First, Plaintiff claims that there is a failure of a condition precedent. Second, Plaintiff argues that the plain language of the provision prevents its application in this case.

Initially, Plaintiff claims that a clause in the first sentence of Section 10.3 constitutes a condition precedent that precludes the waiver’s application, citing: “To the extent permitted by law, **and without affecting the coverage provided by insurance required to be maintained hereunder**, Landlord and Tenant each waive any right to recover against the other. . . .”

Plaintiff claims that this clause means that the waiver provision is only applicable if Defendant maintains insurance required under the lease. And, Plaintiff argues, Defendant breached the Lease by failing to name Plaintiff as an additional insured on its insurance policy – as required under Section 10.2. As a result, Plaintiff argues that Section 10.3’s subrogation waiver is invalid.

In response, Defendant claims that there are no conditions precedent to invoke the to the “Waiver of Subrogation” provision. In Michigan, “unless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract.” *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006).

And, Defendant argues, “[a]ny alleged failure of [it] to comply with Section 10.2 of the Lease does not affect the validity or enforceability of the waiver of subrogation provision in Section 10.3.” In support, Defendant cites an unpublished Indiana case that concluded that a failure to procure required insurance did not affect the subrogation waiver clause. *Amco Ins Co v Global Group, Inc*, unpublished Opinion of the Indiana Court of Appeals, decided August 22, 2007 (Docket No. 20A03-0701-CV-147).

While the cited case is non-binding, the Indiana Court’s reasoning is sound. But the larger problem is that Plaintiff’s interpretation of a condition precedent twists the cited clause beyond its breaking point.

In context, the clause “and without affecting the coverage provided by insurance required to be maintained hereunder” simply reinforces the notion that an insurer cannot point to the waiver of subrogation provision as a means for denying coverage otherwise afforded under a policy. This is the plain meaning of this clause.

Whether Defendant breached another Lease provision by failing to name Plaintiff as an additional insured is not a condition for application of the subrogation-waiver provision. Had the parties to the Lease so intended, it would have been easy to include the same. But they did not. There is no condition precedent. And Defendant's failure to name Plaintiff as an additional insured does not affect the subrogation-waiver provision.

Plaintiff next argues that First Industrial only agreed to waive recovery against Defendant if its damages were covered by the Defendant policy. Plaintiff argues that this concept comes from the end of the first sentence found in Section 10.3, which provides that the parties waive all claims against each other "to the extent that such damages and claims are insured against or required to be insured against by Landlord or Tenant under this Lease."

Plaintiff argues that this language "clearly shows that First Industrial only intended to waive recovery against [Defendant] for damages resulting from [Defendant's] acts or operations *if* said damages were covered by the [Defendant] policy as required, which of course they were not."

But Plaintiff's interpretation is only possible if you ignore the words "Landlord or" in the quoted sentence. Plaintiff believes the sentence reads that the parties waive all claims "to the extent that such damages and claims are insured against or required to be insured against by ~~Landlord or~~ Tenant under this Lease." The Court will not ignore these words.

It is undisputed that the damage was covered by a Plaintiff-issued, Landlord policy required under the Lease. Plaintiff, in fact, paid the Landlord on said policy. As a result, the subrogation-waiver provision is effective for said damages. This is so because said damages "**are insured against** or required to be insured against **by Landlord** or Tenant **under this Lease**." (emphasis added).

As stated, “it is well settled that the scope of a release is governed by the intent of the parties as expressed in the release.” *Collucci*, 240 Mich App at 658. The parties to the Lease unequivocally announced the intent of Section 10.3: “This provision is intended to waive, fully and for the benefit of each party, **any** rights and/or claims that might give rise to a right of subrogation by **any** insurance carrier.”

This case never should have been filed. It was always barred by the broad language of the subrogation-waiver provision.

For all of the foregoing reasons and viewing all evidence in the light most favorable to Plaintiff, the Court finds that there are no material questions of fact in dispute and Defendant is entitled to judgment as a matter of law. The Court, therefore, GRANTS Defendant’s motion for summary disposition under (C)(10) and DISMISSES Plaintiff’s Complaint in its entirety.

Defendant may file an appropriate motion for costs and attorney fees.

This Order is a Final Order that resolves the last pending claim and closes the case.

**IT IS SO ORDERED.**

July 27, 2016  
Date

/s/ James M. Alexander  
Hon. James M. Alexander, Circuit Court Judge