IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

American Automobile Insurance, as subrogee of John and Penny Freund and National Surety Corporation, as subrogee of Alvin Umans, Plaintiffs, v. Harold O. Schulz Co., Inc., Defendant.	)	No. 13 L 1901 consolidated with
Great Northern Insurance Company a/s/o Ana Tannebaum, Plaintiffs, v. Harold O. Schulz Company, Inc., Defendant.	)	No. 13 L 5015

MEMORANDUM OPINION AND ORDER

Contracts are to be interpreted according to their terms, and only parties and expressly intended third-party beneficiaries may enforce them. If, however, contracts are ambiguous, extrinsic evidence may be used to interpret them. The defendant seeks to dismiss the plaintiffs' complaints by enforcing against them covenant-not-to-sue provisions in agreements executed by the plaintiffs' subrogors and their condominium association. Since the provisions' plain language does not apply to the defendant and it is neither a party nor a third-party beneficiary to the agreements, the motions to dismiss must be denied. Additionally, the defendant seeks to dismiss the complaints based on what are currently ambiguous contract terms, making dismissal inappropriate.

Facts

Penny and John Freund hired Harold O. Schulz Company to remodel their condominium at 132 East Delaware Place in Chicago. On May 6, 2010, Schulz allegedly broke or damaged a sprinkler head. Water that leaked from

the sprinkler damaged the Freunds' condominium and those owned by Ana Tennebaum and Alvin Umans.

American Automobile Insurance, National Surety Corporation, and Great Northern Insurance Company reimbursed the Freunds, Umans, and Tennebaum respectively for their injuries and became subrogated to their rights of recovery. The three insurers eventually filed lawsuits against Schulz. Between the two complaints, the subrogees raise causes of action for negligence, breach of contract, and breach of warranty.

Schulz filed motions to dismiss the complaints. 735 ILCS 5/2-619(a)(9). Schulz attaches as an exhibit to its motions a condominium declaration executed by the Freunds, Umans, and Tennebaum. Section 5.08(i) of the declaration expressly provides that:

> Each Unit Owner hereby waives and releases any and all claims which he may have against any other Unit Owner, the Association, its officers, members of the Board, Declarant, Developer, the Manager and managing agent of the Property, if any, and their respective employees and agents, for any damage to the Common Elements, the Units, or to any personal property located in the Unit or Common Elements caused by fire or other casualty to the extent that such damage is covered by fire or other form of casualty insurance or would be covered by insurance for which such Unit Owner is responsible pursuant to Section 5.08(g).

Schulz argues that the declaration is binding on the Freunds, Umans, and Tennebaum and, as affirmative matter, defeats their subrogees' causes of action, justifying dismissal of their complaints.

Schulz argues more specifically that the Freunds waived their right to subrogation when they signed an agreement with Schulz. That agreement, also attached as an exhibit, incorporated American Institute of Architects document A201-2007, which contains the following language in section 11.3.7:

> The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, . . . for damages caused by fire or other perils to the extent covered by property insurance obtained pursuant to this § 11.3 or other property insurance applicable to the Work . . . .

According to Schulz, this provision specifically bars the Freunds from seeking recovery against it.

Analysis

This dispute centers on two sets of contracts and a third independent contract. The first are insurance agreements executed by the plaintiff insurance companies and their insureds. The parties do not appear to dispute that those agreements give the insurers the right of subrogation to seek compensation for claims paid by the insurers to their insureds for property damage allegedly caused by Schulz. The second are condominium declarations executed by the unit-owner subrogors and 132 East Delaware Place Condominium Association. Schulz argues that the declarations' covenant-not-to-sue provisions bar the plaintiff-subrogee insurers from suing Schulz and, therefore, justifies its motions to dismiss. The third contract is between the Freunds and Schulz in which the Freunds waive their rights of subrogation.

Schulz's reliance on the condo declarations and the Freund-Schulz agreement means that Schulz is seeking to dismiss the complaints based on affirmative matter that defeats the plaintiffs' claims. 735 ILCS 5/2-619(a)(9); *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 485 (1994). A court considering a section 2-619 motion is to construe the pleadings and supporting documents in a light most favorable to the nonmoving party. *Czarobski v. Lata*, 227 Ill. 2d 364, 369 (2008). All well-pleaded facts contained in the complaint and all inferences reasonably drawn from them are to be considered true. *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008). A court is not to accept as true those conclusions unsupported by facts. *Pooh-Bah Enterps., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009).

The resolution of this dispute is based on interrelated principles of Illinois contract law. First, if an enforceable contract creates a right of subrogation, the contract's terms are controlling. *See American Family Mut. Ins. Co. v. Northern Heritage Builders, L.L.C.*, 404 Ill. App. 3d 584, 588 (1st Dist. 2010), *citing Benge v. State Farm Mut. Auto. Ins. Co.*, 297 Ill. App 3d 1062, 1071 (1st Dist. 1998). Second, the parties to a contract intend that its terms apply only to them and not to third parties. *Barney v. Unity Paving, Inc.*, 266 Ill. App. 3d 13, 19 (1st Dist. 1994). Third, only a party to a contract or those in privity may sue to enforce its terms. *Gold v. Ziff Commns. Co.*, 322 Ill. App. 3d 32, 45-46 (1st Dist. 2001), *citing Bescor, Inc. v. Chicago Title & Trust Co.*, 113 Ill. App. 3d 65, 69 (1st Dist. 1983). Fourth, contracts are to be interpreted as a whole, and unambiguous terms are to be given their plain and ordinary meaning. *See Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. Fifth, if contract language is susceptible to more than

one meaning, it is ambiguous, and a court may consider extrinsic evidence to determine the parties intent. *Gallagher v. Lennart*, 226 Ill. 2d 208, 233 (2007).

Schulz's first theory in support of its motion to dismiss is the covenant-not-to-sue provisions in the condo declarations trump the rights of National Surety and Great Northern as subrogees of Umans and Tannebaum, respectively, to sue under their insurance contracts. Schulz rests this argument on section 5.08(i) of the condo declarations providing that:

> Each unit owner hereby waives and releases any and all claims which he may have against any other Unit Owner, *the Association, its officers, members of the Board, Declarant, Developer, the manager and managing agent of the Property, if any,* and their respective employees and agents, for any damage to the Common Elements, the Units or to any personal property located in the Unit or Common Elements cause by fire or other casualty to the extent that such damage is covered by fire or other form of casualty insurance or would be covered by insurance for which such Unit Owner is responsible pursuant to section 5.08(g).

For the reasons presented below, a plain reading of this section does not provide a legal or factual basis supporting Schulz's motion.

First, Schulz's quotation of the section in its motion ellipses the italicized phrase the court included above. This omission is either a negligent oversight or a purposeful misreading of the section. Without the italicized phrase, the section would appear to prohibit a unit owner from suing a second unit owner for property damage caused by the negligence of the second unit owner or that unit owner's employees and agents. But that is not what the section provides. The phrase "respective employees and agents" is nonsensical when applied to unit owners because they are restricted to "non-transient dwelling," *see* § 7.01(a), which would prohibit them from running businesses out of their condo units complete with employees or agents. Rather, the phrase "employees and agents" makes sense only if it is applied to the immediately preceding phrase, "the manager and managing *agent* of the Property, if any. . . ." (Emphasis added.) It would be expected that a building manager or its managing agent would have employees or agents; indeed, the phrase provides as much.

A second reason is more straightforward – the condo declarations do not prohibit an insurance carrier as a unit owner's subrogee from suing any of the entities listed in section 5.08(i). Quite simply, the section makes no

mention of insurance carriers and subrogees. This court will not read "subrogees" into section 5.08(i) since the parties could have included that word but purposefully omitted it.

Third, "employees" and "agents" as used in section 5.08(i) cannot be construed to include insurance carriers acting as subrogees. Since the rather poorly drafted declaration does not define "employee" or "agent," reference to the common law is permitted. "An independent contractor undertakes to produce a certain result but is not controlled as to the method in which he obtains that result." *Lang v. Silva*, 306 Ill. App. 3d 960, 972 (1st Dist. 1999), *citing Spivey v. Brown*, 150 Ill. App. 3d 139, 143 (3d Dist. 1986). While there is no rule used to determine whether a person is an agent, employee, or independent contractor, *see Davis v. Industrial Comm'n*, 261 Ill. App. 3d 849, 852, (4th Dist. 1994), factors to be considered are: (1) the right to control the manner in which the work is performed; (2) the right to discharge; (3) the method of payment; (4) whether taxes are deducted from the payment; (5) the skill level required to perform the work; and (6) the furnishing of the necessary tools, materials, or equipment. *Lang*, 306 Ill. App. 3d at 972. No single factor is determinative, but the right to control the manner in which the work is performed is considered predominant. *Id.* Whether a person is an agent, employee, an independent contractor is generally a question of fact, *id.*, yet a court may make that determination as a matter of law if the relationship is so clear as to be indisputable. *Id.* at 973.

In this instance, this court need not analyze any of the factors. All reasonable inferences favor the non-moving party, and Schulz has failed to allege any facts with which this court could determine that Schulz was an employee or agent. Without those facts, this court is compelled to presume that Schulz was not an employee or agent.

Fourth, Schulz's argument must be wrong because accepting it would punish innocent property owners' insurance carriers at the expense of negligent tortfeasors. In other words, if Schulz were correct, no contractor would ever purchase insurance since insurance carriers for innocent property owners, *i.e.*, those not in privity with the contractor, would always be responsible for paying claims for damages inflicted by third-party contractors. In Schulz's world, property-damage insurance would dramatically increase in cost while Schulz would get a free ride. This version of risk allocation is simply unacceptable.

Schulz's second theory supporting his motion to dismiss is that the Freunds are barred from suing Schulz because their bilateral agreement waived American Automobile's subrogation right. This argument may have merit based on what at first glance may be similar cases. *See e.g.*,

Intergovernmental Risk Mgmt. v. O'Donnell, Wicklund, Pigozzi & Peterson Architects, Inc., 295 Ill. App. 3d 784 (1st Dist. 1998). For a variety of reasons, however, it is too soon to tell. First, it is unclear whether the American Automobile policy gave the Freunds the right to waive their insurer's subrogation right. Second, the subrogation waiver in the Freund-Schulz agreement applies "to the extent covered by property insurance obtained pursuant to this paragraph 11.3.7 [of American Institute of Architects' document A201-2007] or other property insurance applicable to the Work . . . ." Apparently Schulz supplied the AIA document to the Freunds. Based on American Automobile's response, however, it appears that Schulz supplied the Freunds with various other documents. How any of those documents affect the subrogation waiver, if at all, is unclear. Third, it is also unclear what constituted "the Work," as that phrase is used in paragraph 11.3.7 and as it applies to the Freunds' renovation project. Fourth, no facts yet exist to indicate that the Freunds purchased property insurance specifically for the renovation project or whether their existing insurance policy covered all of the damages caused by Schulz's acts or omissions. Absent those facts, this court cannot decide whether the section 11.3.7 subrogation waiver or any other document has any relevance to this dispute. Consequently,

IT IS ORDERED THAT:

1. Schulz's motions to dismiss are denied with prejudice; and
2. Schulz is given until January 23, 2014 to file its answers.

Dated: 3 January 2014

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

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