IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

FIREMEN'S INSURANCE COMPANY OF WASHINGTON, D.C., as subrogee of Birch Pointe Condominium Association	)	CIVIL ACTION NUMBER
	)	07C-06-287-JOH
Plaintiff	)	
v.	)	
FIRE-FREE CHIMNEY SWEEPS, INC.	)	
Defendant	)	
v.	)	
RICK RATEL	)	
Third-Party Defendant	)	
STATE FARM MUTUAL FIRE AND CASUALTY INSURANCE COMPANY, as subrogee of Joanna Herlihy,	)	CIVIL ACTION NUMBER
	)	08C-01-144-JEB
Plaintiff	)	
v.	)	
FIRE-FREE CHIMNEY SWEEPS, INC.	)	
Defendant	)	
RICK BRYANT, et al.,	)	CIVIL ACTION NUMBER
Plaintiff	)	08C-01-156-MMJ
v.	)	
FIRE-FREE CHIMNEY SWEEPS, INC.	)	
Defendant	)	

NATIONWIDE INSURANCE COMPANY as subrogee of Judith Jester	)	CIVIL ACTION NUMBER
	)	08C-01-132-MJB
Plaintiff	)	
v.	)	
FIRE-FREE CHIMNEY SWEEPS, INC.	)	
	)	
Defendant	)	

Submitted: September 30, 2009
Decided: January 5, 2010

MEMORANDUM OPINION

Upon Motion of Third-Party Defendant
Rick Ratel for Summary Judgment - ***DENIED***

Appearances:

Joseph Bellew, Esquire, of Cozen O'Connor, Wilmington, Delaware, and Paul R. Bartolacci, Esquire, of Cozen O'Connor, Philadelphia, Pennsylvania, attorneys for plaintiff Firemen's Insurance Company of Washington, D.C.

Louis J. Rizzo, Esquire, of Reger Rizzo Kavulich & Darnall, LLP, Wilmington, Delaware, attorney for defendant and third-party plaintiff Fire-Free Chimney Sweeps, Inc.

Robert J. Leoni, Esquire, of Shelsby & Leoni, Stanton, Delaware, attorney for third-party defendant Ricky Ratel

HERLIHY, Judge

A large fire broke out in the Birch Point Condominium Complex on January 17, 2006. Experts agree that the fire started in or near the fireplace of third party defendant, Rick Ratel, and that the primary cause of the fire was aftermarket (brand incompatible) doors he installed on his fireplace. By virtue of an anti-subrogation agreement between Ratel and the Birch Pointe Condominium Association ("BPCA") he is immune from any suit it could bring or that its subrogee and insurer, Firemen's Insurance Company ("Firemen's") could bring. This agreement could also possibly bar suits other unit owners could bring. Firemen's has, instead, sued Fire-Free Chimney Sweep, Inc. ("Fire-Free") for allegedly providing an insufficient chimney and fireplace inspection in 2004.[1] Fire-Free in turn, has filed a third party complaint seeking contribution from Ratel for his negligence, if any.

Ratel moves for summary judgment against Fire-Free's third party complaint. He claims the anti-subrogation agreement bars Firemen's from suing him. His argument is based on the theory that if the primary plaintiff could not bring a suit against him, all other suits should be barred. The Court does not find an appropriate basis in law for such a conclusion and his motion is DENIED.

Factual Background

On January 17, 2006 a large fire in the Birch Pointe Condominium complex caused

[1] Fire-Free moved for summary judgment on Firemen's action. The Court has dealt with that motion in a separate opinion of the same date.

over one million dollars in property damage to Ratel's unit and others. The fire was ignited when the area surrounding Ratel's fireplace overheated and caught fire. This, experts for all parties agree, was caused when the aftermarket doors installed by Ratel did not properly exhaust heat. Ratel had purchased "aftermarket" doors manufactured by a different manufacturer from that whose fireplace and chimney systems were installed in all the Birch Pointe condominiums. Firemen's paid a claim made by the BPCA and then exercised its right of subrogation and sued Fire-Free. Firemen's was barred from filing suit against Ratel due to an anti-subrogation agreement contained in the Birch Pointe Condominium Association Enabling Declaration Establishing a Plan for Birch Pointe Condominium and Code of Regulations ("Declaration"). After Firemen's filed its initial suit, other subrogees and unit owners filed negligence actions against Fire-Free. Those cases were consolidated into this one. Fire-Free, when answering Firemen's complaint, filed a third party complaint against Ratel.

It alleges that Ratel is liable for contribution if it is determined to be liable. It asserts that Ratel installed aftermarket doors that were not suitable for the fireplace to which he attached them, and the firebox had a crack that allowed smoke and heat to escape. Further, Fire-Free alleges that Ratel burned a log and failed to ensure that it was extinguished when he left his unit.

Section 9(d) of the Declaration requires BPCA to purchase liability insurance. It also contains the following restriction:

> (e) All such policies shall contain a waiver of subrogation by the Insurer as to any and all claims against the [BPCA], the Association of Owners, the owner of any condominium unit and/or their respective agents, employees or tenants, and any defenses based upon existence of other Insurance or upon invalidity arising from the acts or omissions of the Insured.[2]

The insurance purchased by BPCA was for the benefit of all the unit owners, "(a) The named insured under any such policies shall be the Association of owners of Birch Pointe, for the use and benefit of the individual owners of the condominium units."[3] The Declaration may also bar other unit owners from filing suit against each other:

> 9(e) Liability for Negligence. Except to the extent that valid and collectible liability insurance exists covering the person sought to be held liable, no unit owner or occupant, and no member, agent or employee of the Council shall be liable to each other or to anyone else for any condition of the common elements which he has not actively and intentionally caused, unless such condition is the result of gross negligence or willful conduct.[4]

Parties' Contentions

Ratel argues that the anti-subrogation agreement between him and the BPCA bars Fire-Free's third party suit. The agreement prevents Firemen's from suing him as he is an insured party under the policy between BPCA and Firemen's. Ratel argues that this

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[2] Ratel's Mot. for Summ. J. at Ex. A, p. 15.

[3] *Id*. at 13.

[4] *Id*. at 16-17. The Declaration is a prime example of poor draftsmanship. It has, to all intents and purposes, two section 9(e) and further follows no logical or lawyer - like organization in its structure.

agreement, in turn, prevents Fire-Free, which is allegedly liable for negligence to Firemen's, from suing him.

Fire-Free and Firemen's oppose this position. They claim that Uniform Contribution Among Tortfeasors Act permits such suits. Fire-Free argues that Ratel is attempting to use a contractual defense against a party that is a stranger to the contract between BPCA and the unit owners.

Discussion

The Uniform Contribution Among Torfeasors Act[5] allows a defendant to pursue a third party claim for contribution. Section 6302 states, "The right of contribution exists among joint tort-feasors."[6] It defines joint tortfeasors as, "2 or more persons jointly or severally liable in tort for the same injury to person or property whether or not judgment has been recovered against all or some of them."[7]

In *Great American Assurance Co. v. Fisher Controls International, Inc.*,[8] this Court addressed the question of whether a defendant can bring a third party complaint against an insured in a subrogation action where the plaintiff would otherwise be barred from suit by an anti-subrogation agreement. The facts of that case are similar to the case at bar. In it,

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[5] 10 *Del. C.* §§ 6301-6308.

[6] 10 *Del. C.* § 6302.

[7] 10 *Del. C.* § 6301.

[8] 2003 WL 21901094 (Del. Super. Aug. 4, 2003).

Great American issued a builder's risk policy to a construction company. After a fire and explosion caused damages that Great American paid pursuant to the insurance agreement, it sought to exercise its subrogation rights and sued various parties it claimed were responsible for damages. One of those defendants, Connectiv, was also insured by the Great American policy and could not be sued according to an anti-subrogation agreement in effect. It was eventually dismissed as a defendant by Great American. The two remaining defendants then filed suit against Connectiv for indemnification. Connectiv presented the same argument that Ratel now advances.

The Court analyzed *New Amsterdam Casualty Company v. Holmes*[9] which focused on the definition of joint tortfeasor as it appears in § 6301. *New Amsterdam* held, "[T]he district court's question should have been not whether the defendants were jointly and severally liable to the plaintiff insurer, but whether they had jointly injured [the subrogor] in whose shoes the plaintiff stood."[10]

The Court uses the same injury analysis to determine that Ratel is to remain in this case. He allegedly contributed to the fire by negligently installing aftermarket doors and left his fireplace burning unattended. Those actions, if true, could serve as the basis for liability on his part. A question of fact remains if he caused the injury and as such this

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[9] 435 F.2d 1232 (1st Cir. 1970).

[10] *Id.* at 1234-35 (as cited in *Great American*, 2003 WL 21901094, at *4).

Court cannot conclude as a matter of law that he is not a joint tortfeasor. If he is a joint tortfeasor then Fire-Free has the right to seek contribution.

The Court acknowledges Ratel's argument that *Great American* may be distinguishable to some degree. *Great American* relied upon the principle that a subrogee cannot assert rights superior than those of the subrogors.[11] If a potential defendant, however, cannot be sued because of an anti-subrogation agreement, the subrogee then has a right to collect a greater *pro rata* share from fewer defendants than if the suit were brought directly by the subrogor because a direct claim would have a greater number of defendants. Ratel argues that none of the unit owners would have had the right to sue him. This contention means Firemen's, as the unit owner's subrogee, would not have the ability to pursue a right superior to its subrogor, BPCA.

On the other hand, there are several issues regarding applicability involving 9(e)'s "Liability for Negligence."[12] First, the language seems to confine its prohibition to common property, not individual unit owner property. Second, its language refers to "gross negligence" or "willful conduct" in relation to the "common elements." On this kind of motion and this record, this Court cannot properly decide these issues. In addition Ratel has offered no affidavits that indicate what level of collectible liability insurance exists or what degree of damage occurred at common elements as opposed to areas owned

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[11] *Great American*, 2003 WL 21901094, at *5.

[12] See supra p. 3. The "second" 9(e).

by individual unit owners. Even if § 9(e) bars other unit owners from suing Ratel, the rights of the subrogee being equal to the subrogor is not the exclusive reason to deny summary judgment.

Section 6602 gives a defendant the right to contribution against joint tortfeasors absent statutorily created exceptions. There is a question of what percentage, if any, of liability is legally attributable to Ratel. It would be an injustice to prevent Fire-Free from potentially offsetting its liability under these circumstances. Fire-Free is a stranger to the contract upon which Ratel relies. Such a contract should not be permitted to restrict statutory rights that Fire-Free did not consent to give up.

Consistent with this Court's decision in *Great American*, the Court holds that Fire-Free's claim is not barred by the anti-subrogation agreement.

Conclusion

For the reasons stated herein, third-party defendant's, Rick Ratel's, motion for summary judgment is DENIED.

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J.