

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

SCOTTSDALE INSURANCE CO., )  
as subrogee of THE TIDES )  
CONDOMINIUM ASSOCIATION OF )  
OWNERS, )  
Plaintiff, )

v. )

C.A. No.: N15C-01-187 ALR

)  
SCHELL PROPERTIES, LLC, )  
OCEAN ATLANTIC AGENCY, INC., )  
and SOTHEBY'S INTERNATIONAL )  
REALTY AFFILIATES, LLC, )  
Defendants. )

Submitted: July 31, 2015

Decided: August 5, 2015

*Upon Consideration of Motions for Summary Judgment  
of Defendant Schell Properties, LLC and  
Defendant Sotheby's International Realty Affiliates, LLC*  
**GRANTED**

**MEMORANDUM OPINION**

Michael I. Silverman, Esquire, Silverman, McDonald & Friedman, Wilmington, DE, and Robert A. Stern, Esquire, Clausen Miller, P.C., New York, NY, Attorneys for Plaintiff.

William A. Crawford, Esquire, Franklin & Prokopik, Wilmington, DE, Attorney for Defendant Schell Properties, LLC.

Matthew J. Rifino, Esquire, McCarter & English LLP, Wilmington, DE, and Louis A. Chiafullo, Esquire, McCarter & English LLP, Newark, NJ, Attorneys for Defendant Sotheby's International Realty Affiliates, LLC.

**Rocanelli, J.**

This is a subrogation lawsuit filed by Plaintiff Scottsdale Insurance Company (“Scottsdale”) to recover payments made to its insured The Tides Condominium Association of Owners (“The Tides”) for property damage at a condominium building that was caused by pipes bursting in an individual unit, specifically Unit 6306 owned by Defendant Schell Properties, LLC (“Schell”).

Defendants Schell and Sotheby’s International Realty Affiliates, LLC (“Sotheby”) seek judgment as a matter of law on the grounds that subrogation has been waived by The Tides, consistent with Delaware statute and the controlling legal documents.<sup>1</sup> Furthermore, according to Schell and Sotheby, if The Tides has waived subrogation against the individual unit owners, then Scottsdale as the insurer of The Tides likewise has no right of subrogation.<sup>2</sup>

The Court may grant summary judgment only where the moving party can “show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>3</sup> The moving party bears the initial burden of proof and, once that is met, the burden shifts to the non-moving party to show that a material issue of fact exists.<sup>4</sup> At the motion for summary judgment phase, the Court must view the facts “in the light most favorable to the

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<sup>1</sup> A third defendant is named in the lawsuit, Ocean Atlantic Agency, Inc., but has not appeared.

<sup>2</sup> A subrogee has no greater rights than that of the subrogor. 83 C.J.S. *Subrogation* § 1; *US Airways, Inc. v. McCutchen*, 133 S.Ct. 1537, 1546 n.5 (2013).

<sup>3</sup> Super. Ct. Civ. R. 56.

<sup>4</sup> *Moore v. Sizemore*, 405 A.2d 679, 680–81 (Del. 1979).

non-moving party.”<sup>5</sup> At oral argument on May 19, 2015, the parties were given an opportunity to present all material pertinent to a motion for summary judgment,<sup>6</sup> and the parties submitted additional materials for the Court’s consideration.

The Tides is a common interest community located in Rehoboth Beach, Delaware.<sup>7</sup> All common interest communities created within the state of Delaware are governed by the Delaware Uniform Common Interest Ownership Act (“DUCIOA”), codified in Chapter 81 of Title 25 of the Delaware Code, unless otherwise exempted.<sup>8</sup> The DUCIOA requires common interest communities to maintain property, liability, and fidelity insurance policies,<sup>9</sup> and also requires that “[t]he insurer waive its right to subrogation under the insurance policy against any unit owner or member of the unit owner’s household.”<sup>10</sup> A waiver of subrogation has been enforced in the decisional law. For example, in *St. Paul Fire & Marine Insurance Company v. Elkay Manufacturing Company*,<sup>11</sup> the Delaware Supreme Court upheld a contractual waiver of subrogation.<sup>12</sup>

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<sup>5</sup> *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

<sup>6</sup> See Super. Ct. Civ. R. 12(b) (“If on a [12(b)(6)] motion . . . matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment.”); *Johnson v. Student Funding Grp., LLC*, 2015 WL 351979, at \*1 (Del. Super. Jan. 26, 2015).

<sup>7</sup> 25 Del. C. § 81–103(12) (defining condominium as “a common interest community”).

<sup>8</sup> 25 Del. C. § 81–116.

<sup>9</sup> 25 Del. C. § 81–313(a)(1)–(3).

<sup>10</sup> 25 Del. C. § 81–313(d)(2).

<sup>11</sup> 2003 WL 139775 (Del. Super. Jan. 17, 2003).

<sup>12</sup> *Id.* at \*5–7.

Consistent with the statute, the Council of Unit Owners of The Tides Condominium Association (“Tides Council”) established a Code of Regulations (“Tides Condo Regulations”) outlining the plans of unit ownership, use, and occupancy. Specifically, pursuant to 25 *Del. C.* § 81–313(d)(2), The Tides Condo Regulations contain a waiver of subrogation clause, which provides:

All policies shall contain a waiver of subrogation by the insurer as to any claims against the [Tides] Council, the Unit Owner and/or their respective agents, employees or invitees, and of any defenses based upon co-insurance or invalidity arising from the acts of the insured. Said policies cannot be canceled, invalidated or suspended on account of any conduct of the [Tides] Council, the Unit Owner and/or their respective agents, employees or invitees.<sup>13</sup>

On April 22, 2004, Schell and a principle of The Tides signed The Tides Condo Regulations.

Scottsdale contends that Schell (the unit owner) and Sotheby (the property manager) negligently maintained Unit 6306 by failing to supply the unit with heat or electricity, thereby allowing a water pipe to freeze and burst.<sup>14</sup> Scottsdale paid its insured, The Tides, \$115,915.06 to fix damage caused by the burst water pipe. Despite Delaware law and the controlling legal documents, Scottsdale contends that it has the right of subrogation to recover the money Scottsdale paid to The

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<sup>13</sup> *The Tides Code of Regulations*, Art. VI, § 2(f). Notwithstanding Scottsdale’s concerns that claims against Sotheby cannot be waived under the “household” language of 25 *Del. C.* § 81-313(d)(2), The Tides Condo Regulations provide waiver of “claims against the [Tides] Council, the Unit Owner and/or their respective agents, employees or invitees . . . .”

<sup>14</sup> The role of the third defendant is not clear. Indeed, the Complaint seems to confuse the various legal entities.

Tides for the water damage. On the other hand, Schell and Sotheby contend that they are entitled to judgment as a matter of law because The Tides signed an express waiver of subrogation, as statutorily required, which bars any claims by The Tides against Schell and Sotheby.

Scottsdale has no right of subrogation. Enforcing the waiver of subrogation is consistent with statute, the parties' intentions as expressed in The Tides Condo Regulations, and Delaware decisional law. The Court hereby finds that The Tides waived its right of subrogation against Schell as owner of Unit 6306 and against Sotheby as property manager. Scottsdale is the insurer of The Tides. Scottsdale cannot have right of subrogation greater than those of The Tides. Accordingly, Scottsdale has no right of subrogation against Schell or Sotheby, which are both entitled to judgment as a matter of law.

**NOW, THEREFORE, this 5<sup>th</sup> day of August, 2015, the Motion for Summary Judgment of Defendant Schell Properties, LLC and Defendant Sotheby's International Realty Affiliates, LLC is hereby GRANTED. Judgment is hereby entered in favor of Defendant Schell Properties, LLC and Defendant Sotheby's International Realty Affiliates, LLC, and against Plaintiff Scottsdale Insurance Company as subrogee of The Tides Condominium Association of Owners.**

**IT IS SO ORDERED.**

*Andrea L. Rocanelli*

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**The Honorable Andrea L. Rocanelli**