TRAUB LIEBERMAN

NEWS & EVENTS

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Traub Lieberman Attorneys Stephen D. Straus and Andrew N. Adler Win Dismissal of Insurer's Suit Due to Waiver of Subrogation Rights

Related Attorneys: Stephen D. Straus

Traub Lieberman Straus & Shrewsberry LLP attorneys Stephen D. Straus and Andrew N. Adler recently obtained a pre-answer motion to dismiss a seven-figure insurance subrogation action. Plaintiff Merrimack Mutual Fire Insurance Company ("Merrimack") sued as subrogee of a condominium association, alleging that the defendants, who owned a unit in the condominium, negligently and in breach of the condominium's By-Laws caused a fire to break out, which damaged common areas of the building.

Merrimack had issued a Business Owner's Insurance Policy to the condominium association. Notably, the Policy contained the following clause: "We [i.e., Merrimack] waive our rights to recover payment from any unit-owner of the condominium that is shown in the [Policy] Declarations." A 2008 case in the relevant jurisdiction ("2008 Decision") construed identical language to foreclose litigation by the subrogated insurer against any unit owner for reimbursement of money the insurer paid out to remediate common-area property damage.

In its main substantive argument in opposition to defendants' motion, Merrimack contended that, according to the condominium's By-Laws, defendants must have obtained waivers of subrogation in their own insurance policies (protecting solely their own assets) in order to enforce the waiver in Merrimack's policy. In other words, Merrimack suggested that defendants breached a provision of the By-Laws and thus could not ask the Court to impose consequences due to a similar breach by Merrimack.

Defendants, per Traub Lieberman, countered this argument in several ways. Initially, although the 2008 Decision refers to the waiver language in the condominium's governing documents in that matter, that reference serves as non-precedential *dicta*, since the Court predicated its holding upon the express and unambiguous clause in the insurance policy itself, and not upon any other writings.

Secondly, according to a 2016 Decision of the presiding judge in the *Merrimack*case, whether or not the defendants purchased separate insurance policies to protect themselves does not save the condominium's carrier from its own subrogation waiver. Notably, the By-Laws in the 2016 case and in the *Merrimack* suit did not require unit owners to obtain their own insurance. Rather, if such owners chose to purchase personal insurance, those policies were supposed to contain subrogation waivers. In this regard, the difference between the 2016 case and the *Merrimack*action is that, in the former instance, the unit owners did not even buy insurance, whereas in the latter, defendants bought insurance without robust waivers. In the *Merrimack* case, defendants maintained that the unit owners need not have procured any personal insurance at all for the condominium's insurer's coverage duties to attach. It follows that the specific contents of the unit owners' policies are, as 2016 Decision declares, "irrelevant."

Defendants' position was bolstered by their third argument, which relies on language in the By-Laws expressly stating that "the liability of the carriers issuing insurance procured by the Board of Managers shall not be affected or diminished by reason of any Unit Owner's other insurance." This clause signifies that the condominium and its owners intended Merrimack to remain liable for coverage regardless of the contents of the defendants' own insurance policies.

Defendants also distinguished various cases cited in Merrimack's opposition papers and repelled some procedural arguments. Defendants requested that the entire complaint be dismissed, including claims relating to the Policy's deductible. The Court agreed, citing its 2016 Decision and awarding costs to defendants.

Merrimack Mut. Fire Ins. Co. as subrogee of Warren St. Condo. v. Isaacs, Index No. 158947/2017 (N.Y. Sup. Ct. N.Y. County).