STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

HASTINGS MUTUAL INSURANCE COMPANY,

Plaintiff,

Case No. 2022-000198-CB

vs.

NIDEC CHS, LLC and NIDEC PRESS & AUTOMATION,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on Plaintiff's Motion for Partial Summary Disposition and Defendants' Motion for Summary Disposition.

I. Background

In this subrogation case, Plaintiff issued an insurance policy to Defendants' landlord, Richard Shafer, d/b/a R. Shafer Builder, LLC ("Shafer"), insuring his business located in the city of Romeo against fire damage and other stated perils. Pursuant to a November 25, 2019 lease agreement (the "Lease"), Shafer leased a portion of his business property (the "Property") to Defendants (collectively, "NIDEC"). Def. Ex. 1. The Lease contains the following pertinent provisions:

> 6. REAL PROPERTY INSURANCE. The Landlord will insure the building for property damage and for the full replacement value at its sole discretion and shall invoice Tenant for the cost of said insurance. The Tenant agrees to pay invoice within thirty (30) days after receiving it.
>
> 13. FIRE. It is understood and agreed that if the premises hereby leased be damaged or destroyed in whole or in part by fire or other casualty during the term thereof, the Landlord will repair and restore the same to good tenantable condition with reasonable dispatch, and that the rent herein provided for shall abate entirely in case the entire premises are untenantable and pro rata for the portion rendered untenantable, in case a part only is untenantable, until the same shall be restored to a tenantable condition; provided, however, that if the Tenant shall fail to adjust his own insurance or to remove his damaged goods, wares, equipment or property

within a reasonable time, and as a result thereof the repairing and restoration is delayed, there shall be no abatement of rental during the period of such resulting delay, and provided further that there shall be no abatement of rental if such fire or other cause damaging or destroying the leased premises shall result from the negligence or willful act of the Tenant, his agents or employees, and provided further that if the Tenant shall use any part of the leased premises for storage during the period of repair a reasonable charge shall be made therefor against the Tenant, and provided further that in case the leased premises, or the building of which they are a part, shall be destroyed to the extent of more than one-half of the value thereof, the Landlord or Tenant, may at their mutual option, terminate this Lease forthwith by a written notice to each other.

14. REPAIRS. The Landlord after receiving written notice from the Tenant and having reasonable opportunity thereafter to obtain the necessary workmen therefor agrees to keep in good order and repair the roof, outer walls, foundation and structural components of the premises, the parking lot, all utility and drainage services (including water, electric, gas, sewer and sanitary service leading up to the building, but not the doors, door frames, window glass, window casings, window frames, windows or any of the appliances or appurtenances of said window casings, window frames and windows, doors or door frames, preventative maintenance of Heating/HVAC units (as required by units' manufacturer) or any attachment thereto or attachment to said building or premises used in connection therewith[1]. Notwithstanding the foregoing, Landlord will not be responsible for any repairs resulting from negligence of Tenant, its agents, employees, or invitees...

16. REPAIRS AND ALTERATIONS. The Tenant further covenants and agrees that, except for Landlord's obligations under this Lease he will, at his own expense, during the continuation of this Lease, keep the said premises and every part thereof in as good repair and at the expiration of the term yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damage by the elements expected...

18. CARE OF PREMISES. The Tenant shall not perform any acts or carry on any practices which may injure the building or be a nuisance or menace to other Tenants in the building and shall keep premises under his control (including adjoining drives, streets, alleys, or yards) clean and free from rubbish, dirt, snow and ice at all time, and it is further agreed that in the event the Tenant shall not comply with these provisions, the Landlord may enter upon said premises and have rubbish, dirt and ashes removed and the side walks cleaned, in which event the Tenant agrees to pay all charges that the Landlord shall pay for hauling rubbish, ashes and dirt, or cleaning walks. Said charges shall be paid to the Landlord by the Tenant as soon as bill is presented to him. Furthermore, the Tenant shall at his own expense promptly comply with all lawful laws, orders,

[1] There is no close parentheses in the Lease.

> regulations or ordinances of all municipal, County and State authorities affecting the premises hereby leased and the cleanliness, safety, occupation and use of same, provided that Tenant shall not be required to make any alterations or improvements to the premises in order to achieve such compliance if such alterations or improvements would be required regardless of Tenant's particular use of the premises, which alterations or improvements shall be Landlord's obligation. *Id.*

Plaintiff claims that during the term of the lease, NIDECs' employees failed to maintain their paint booth and surrounding area in a safe manner by properly storing combustible materials. Plaintiff claims, supported by the affidavit of an expert fire investigator, that the combustible materials ignited, causing a fire and property damage. Pl. Ex. 8. As a result of the property loss, Plaintiff paid Shafer in excess of $25,000. Plaintiff claims that it is entitled to payment from NIDEC for the amount it paid to Shafer for the costs of the repairs.

On January 14, 2022, Plaintiff filed its complaint against NIDEC alleging Count I: negligence and Count II: breach of contract. On April 8, 2022, NIDEC filed a motion for summary disposition pursuant to MCR 2.116(C)(8). On June 5, 2022, the Court entered an Order denying NIDECs' motion for summary disposition without prejudice. On November 14, 2022, NIDEC filed its renewed motion for summary disposition which was granted in part and denied in part by this Court's Order dated February 14, 2023 which dismissed Plaintiff's claims for negligence and breach of the indemnification clause while maintaining Plaintiff's claim of breach of contract.

On March 28, 2023, Plaintiff filed its instant motion for partial summary disposition. On April 24, 2023, NIDEC filed their response in opposition to the motion. On April 27, 2023, Plaintiff filed its reply brief.

On April 6, 2023, NIDEC filed their instant motion for summary disposition. On April 24, 2023, Plaintiff filed its response in opposition to the motion. On April 27, 2023, NIDEC filed its reply brief.

This matter was heard on May 1, 2023 and taken under advisement.

II. Standard of Review

A motion for summary disposition under MCR 2.116(C)(5) reviews whether the party asserting a claim has the legal capacity to sue. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). The issue is resolved on the basis of the pleadings and any documentary evidence submitted by the parties. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). The Court reviews a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A litigant's mere pledge to establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10)." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). "The court rule plainly requires the adverse party to set forth specific facts at the time of the motion showing a genuine issue for trial." *Id.* "Summary disposition under MCR 2.116(C)(10) is appropriately granted if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Greene v AP Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds could differ. *Debano-Griffin v Lake Co*, 493 Mich 167, 175; 828 NW2d 634 (2013).

III. Law & Analysis

I. Plaintiff's Motion for Partial Summary Disposition

Plaintiff avers that there is no genuine issue of material fact that: 1) NIDEC entered into a Lease with Plaintiff's insured, 2) NIDEC breached the Lease, and 3) that breach was the direct, natural, and proximate cause of the damages. In response, NIDEC argues that *W Am Ins Co v Pic Way Shoes of Cent Michigan, Inc*, 110 Mich App 684; 313 NW2d 187 (1981) stands for the proposition that Plaintiff is unable to pursue subrogation from NIDEC because NIDEC and the landlord agreed in the lease that damages would be allocated to the insurer. However, in making this argument, NIDEC omits the distinction raised by Plaintiff in its response to NIDEC's motion – there was no requirement that NIDEC pay the premiums, merely that the landlord had the ability to invoice NIDEC for the premiums, and the landlord's failure to do so removes NIDEC from protection under *Pic Way*. Accordingly, there is no agreement between landlord and NIDEC that the insurance coverage was for the benefit of both parties, and there was no release which prohibits this subrogation action.

A. NIDEC entered into a lease with landlord

It is undisputed that the parties entered into a valid contract.

B. NIDEC breached the lease agreement.

¶ 16 of the Lease required NIDEC, the tenant, to "keep the said premises and every part thereof in as good repair and at the expiration of the term yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damage by the elements excepted."

Plaintiff avers that NIDEC breached this provision because the property was not leased to NIDEC with significant fire damage. In response, NIDEC argues that taking the contract as a

whole prohibits finding in Plaintiff's favor, because the Court must consider ¶¶ 6 and 13 in interpreting ¶¶ 16 and 18. ¶ 13 requires the landlord to repair and restore the premises to good and tenantable condition with reasonable dispatch – there is no requirement that NIDEC make any repairs prior to vacating the premises. This is in line with this Court's holding in the 2/14/23 Opinion. Plaintiff's argument on this issue is without merit.

Plaintiff next cites the provision in ¶ 18 which prohibits the tenant from performing any acts or carrying on any practices which may injure the building.

Plaintiff avers that testimony was taken from NIDEC's corporate representative which clearly indicates that NIDEC breached this provision of the agreement. Pl. Ex. 3 at 17:04-19:16; 23:08-23:11. Indeed, a fire was discovered at the property five months before the date of the subject loss. *Id.* at 48:13-49:05, 50:02-08. In response to that fire, NIDEC's only preventative action was to add six red fireproof buckets to store used rags. *Id.* at 50:09-51:03, 51:05-08. The representative testified in his individual capacity that he could not recall any discussion of these buckets or the proper storage of used rags after the first fire. Pl. Ex. 4 at 98:03-20, 99:02-08. Plaintiff avers that after the fire, photographs show that used rags were not disposed of in the fireproof buckets. Pl. Ex. 5 and Ex. 3 at 37:08, 26:12-19, 39:09-20. The fire investigator concluded that the fire was caused by the ignition of the combustible materials. Pl. Exs. 8, 10, and 12. Plaintiff also points out that NIDEC failed to post any paint hazard information throughout the facility despite information from the supplier that rags and other items soaked with the product may spontaneously catch fire if improperly discarded. Pl. Ex. 6 and Ex. 3 at 46:22-25, 47:13-19.

Plaintiff also avers that NIDEC had a microwave, toaster oven, and refrigerator plugged into a power strip using extension cords near the paint booth where the fire originated, against

NIDEC's policy. Pl. Ex. 7 and Ex. 3 at 59:01-19; 60:10-13, 16-25; 61:03-05. NIDEC had no one at the facility responsible for supervising to ensure items like power strips were not being used against policy and there was no discussion about the hazard posed by such items near flammable liquids and oil- and paint-soaked rags. Pl. Ex. 3 at 63:08-23.

In response to the argument regarding ¶ 18, NIDEC suggests that ¶ 13 is the only paragraph which may be applied to fire damage, and since it makes no reference to liability, liability cannot be imposed. It is important to note that ¶ 18 does not require that the actions taken actually damaged the building; it only requires the tenant to not engage in activities which could injure the building. NIDEC has produced no evidence countering Plaintiff's evidence that it engaged in prohibited activities. Accordingly, NIDEC may be held responsible for breaching the contract. Accordingly, NIDEC was responsible for presenting evidence to create a genuine issue of material fact in light of the evidence presented by Plaintiff. It has failed to do so.

C. NIDEC's breach was the direct, natural, and proximate cause of the damages.

Plaintiff argues that its experts conclude that NIDEC's actions, which were in breach of the contract, caused the fire and resulted in damages, satisfying this third element. Plaintiff asserts that its damages are the direct, natural, and proximate cause of NIDEC's breach of ¶ 18, because NIDEC took no action to prevent the loss which occurred.

In response, NIDEC avers that this is the incorrect standard for a breach of contract claim which requires only a determination that the damages naturally arose from the breach and were within the contemplation of the parties at the time the contract was made. NIDEC has presented no evidence that its actions did not result in damages to Plaintiff and no legal authority to support its position on the proper standard for a breach of contract claim.

Finally, NIDEC suggests that it is entitled to discovery if the Court is inclined to grant Plaintiff's motion, as it declined to pursue discovery on negligence issues based on the 2/14/23 Opinion. However, given that this is not a negligence issue, there is no need to reopen discovery. Further, Plaintiff takes issue with NIDEC's statements regarding discovery being reopened. The Court need not take additional action before granting summary disposition in Plaintiff's favor.

The Court finds that no genuine issues of material fact remain regarding Count II and that summary disposition must be granted in Plaintiff's favor.

II. NIDEC's Motion for Summary Disposition

NIDEC asserts that the Court requested additional clarification related to the breach of contract claim related to the landlord's obligation to provide insurance under the Lease Agreement and whether the second sentence of ¶ 6 of the Lease Agreement requiring NIDEC to pay the costs of the insurance impacts NIDEC's ability to rely on such insurance and whether they have received an invoice and paid the costs. NIDEC avers that claims for unpaid premiums should be dismissed under MCR 2.116(C)(5) because Plaintiff holds no subrogation rights against NIDEC for payment of the premiums. NIDEC argues that the Lease Agreement provides that the Landlord is responsible for insuring the premises and specifically disclaims NIDEC's liabilities paid for by the insurance and there was no intent that the lessee be held accountable and therefore claims should be dismissed under MCR 2.116(C)(10). Plaintiff avers that the issues raised by the Court in the 2/14/23 Opinion boil down to whether NIDEC was an "additional insured" or an implied co-insured under the insurance policy; Plaintiff suggests it was not.

A. NIDEC's liability

On the payment of any loss on behalf of its insured, an insurer is entitled to be subrogated to any right of action that its insured could have maintained against a third party whose negligence or wrongful act caused the loss. 44 Am Jur 2d *Insurance* §1794. The insurer's right to subrogation is ordinarily specified in the liability insurance contract. Even if it is not, the insurer is entitled to equitable subrogation, or subrogation by operation of law, on the payment or satisfaction of the loss. *Lahti v Finnish Mut Fire Ins Co*, 76 Mich App 398, 256 NW2d 610 (1977). The insurer has no greater or lesser rights than its insured and any defense to the subrogation claim that could have been raised against the insured is equally valid against the insurer. *Northern Ins Co of New York v B Elliott, Ltd*, 117 Mich App 308, 323 NW2d 683 (1982).

NIDEC argues that because the Landlord agreed to provide fire insurance benefiting both parties, it is relieved of liability for fire damage occasioned by its own negligence. As support for this, NIDEC cites *W Am Ins Co v Pic Way Shoes of Cent Michigan, Inc*, 110 Mich App 684; 313 NW2d 187 (1981), where the Court held that the lessor's agreement to provide fire insurance for the benefit of both parties relieved lessee of liability for fire damage occasioned by its own negligence. However, NIDEC has not addressed whether the insurance provided for in the instant case was for the benefit of both parties. In response to this argument, Plaintiff points out that the contract does not state that the landlord was providing fire insurance benefiting both parties. However, Plaintiff has provided no support for this claim, merely asserting that the policy language differs between the instant case and *Pic Way*.

Plaintiff also addresses whether NIDEC was considered an additional insured. Plaintiff avers that if NIDEC had been invoiced and paid the insurance premiums as required by the lease,

it would be considered an additional insured and Plaintiff would be barred from seeking recovery. However, there is no evidence that NIDEC ever paid any insurance premiums.

Based on the differentiation between this case and *Pic Way* and the fact that NIDEC was never invoiced for the insurance premiums, there is no basis for this Court to determine that Plaintiff is unable to pursue subrogation from NIDEC.

B. Contract's Intent

NIDEC argues that reading the contract as Plaintiff suggests renders ¶ 6 nugatory – the Landlord would not be required to cover fire damage to the building if NIDEC were responsible for fire damage to the building. NIDEC avers that the parties both understood that the insurance was to benefit both NIDEC and the Landlord and it should be interpreted as such. In response, Plaintiff again raises the issue of the additional insured status, or lack thereof, of NIDEC, confirming that NIDEC is not an additional insured.

There is no basis in the contract for determining that NIDEC cannot be subrogated to Plaintiff.

C. *Laurel Woods*[2]

NIDEC argues that this case is distinguished from *Laurel Woods* not only factually but legally by an unpublished decision[3]. In its prior opinion in this case, this Court focused on the fact that in *Laurel Woods*, the landlord had not expressly agreed to obtain insurance on the building, while the lease at issue in the instant case stated that Shafer would insure the premises. In *Gauthier*, the Court of Appeals distinguished its facts from those of *Laurel Woods*, particularly regarding the landlord's assumption of the obligation to insure the building. The *Gauthier* court determined that holding the tenants responsible for the fire damage would render

[2] *Laurel Woods Apartments v Roumayah*, 274 Mich App 631; 734 NW2d 217 (2007).

the landlord's responsibility to insure the property nugatory and dismissed the breach of contract claim as a result.

In response, Plaintiff differentiates the *Gauthier* case, identifying differing language in the lease including the requirement that the landlord obtain insurance coverage and silence as to whether the tenant would be invoiced for the premiums. In the case at bar, Plaintiff argues that it was within the sole discretion of the landlord to obtain the policy and invoice NIDEC. Plaintiff asserts that further, this Court has already determined that *Laurel Woods* is applicable to the case at bar based on its holding in the 2/14/23 Opinion. However, Plaintiff's arguments are not factually accurate, given that this Court actually determined that the landlord in this case was required to provide insurance on this Property and that *Laurel Woods* was differentiated from the case at bar.

Regardless, not only is this Court not bound to follow *Gauthier*, but one unpublished decision is insufficient to justify granting summary disposition in NIDEC's favor regarding this breach of contract claim.

D. Standing

Finally, NIDEC argues that Plaintiff lacks standing to pursue unpaid insurance premiums on behalf of the landlord because Plaintiff has only alleged that it is subrogated to the rights of the Landlord under the insurance policy and has not sought damages for unpaid insurance premiums on behalf of the landlord and therefore is unable to stand in the landlord's shoes on that issue. In response, Plaintiff avers that it is not seeking recovery of insurance premiums, so this is a non-issue. The Court need not address this issue, as neither party is raising this argument.

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[3] *Gauthier v Elkins*, unpublished per curiam opinion of the Court of Appeals, issued November 13, 2014 (Docket No. 317437).

After analyzing the various arguments raised by NIDEC, this Court finds no basis to grant the requested summary disposition in their favor.

IV. Conclusion

For the reasons set forth above, Plaintiff's motion is GRANTED and Defendants' motion is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Richard L. Caretti

RICHARD L. CARETTI
Circuit Court Judge

Dated: May 26, 2023

cc: Michael R. Marx, Esq.
Thomas J. Cedoz, Esq.

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