Be unambiguous about exemptions

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Does the waiver of subrogation and release of liability paragraph in a commercial lease completely protect the landlord from liability? The Virginia Supreme Court took up this issue in a decision of the court earlier this year.

In Landmark HHH LLC v. Gi Hwa Park, the court considered whether a landlord was liable to a tenant for failure to repair the roof of the leased premises and whether the provisions of the lease, which required the tenant to maintain property insurance, barred the tenant from seeking damages from the landlord for breach of contract.

The facts of this case are straightforward. The tenant leased space from the landlord for a clothing shop. The roof leaked, and the tenant complained to the landlord on a number of occasions. Ultimately, the landlord elected to replace the roof. Following the replacement of the roof, the tenant continued to experience leaks in the leased premises. After an extremely heavy rain, the ceiling above leased premises collapsed and the tenant suffered substantial damage to the inventory of clothing.

The Virginia Supreme Court focused on three provisions of the lease. The first required the tenant to obtain property insurance covering its inventory. The second required the landlord to endeavor to keep the roof in good repair and to make necessary repairs after the landlord had knowledge of the need for repairs. The third was a “waiver of subrogation” paragraph in which landlord and tenant released each other from any liability under the lease, by way of subrogation or otherwise, for loss to property caused by any perils insured under policies of insurance covering such property, but only to the extent of the insurance proceeds payable under such policies.

The facts of the case indicate, without setting forth details, that the tenant did, in fact, receive some insurance proceeds with respect to the damaged inventory. Notwithstanding the receipt of such insurance proceeds, the tenant filed suit against the landlord to recover damages arising from the defective roof.

In its defense, the landlord asserted that it was not liable for breach of contract for failure to maintain the roof. The landlord contended that the tenant had not given the landlord adequate notice of the problems with the new roof. Consequently, the landlord could not be liable to the tenant for breach of contract. The Virginia Supreme Court rejected this argument and held that the landlord “bore the sole responsibility to assure that the new roof would be ‘in good repair’ as required by the lease terms.” The court would not permit the landlord to shield itself from responsibility for providing a serviceable roof on the basis that the tenant did not give the landlord adequate notice.

The court also rejected the landlord’s defense that the “waiver of subrogation” paragraph indicated the intent of the parties to release each other from liability for any loss or damage to property. The court rejected the argument that the “waiver of subrogation” provision protected the landlord from any suit for breach of contract. The court ruled that the qualifying language “(but only to the extent of the insurance proceeds payable under such policies)” did not constitute an absolute waiver of the right of the tenant to sue the landlord for damages, even if it did limit the right of the tenant to recover damages from the landlord. The court explained that the “plain language” of this section only prohibited the tenant from obtaining a double recovery on any loss incurred.

The court held the landlord, as the drafter of the lease, was responsible for including plain language if it desired to exempt itself from all liability for losses arising from the defective roof. The court refused to

insert or to read into the lease a term that could have been expressly included by the landlord, but which provision the landlord failed to include. Returning to a theme that the court has emphasized in recent years, the court stated that it must construe a contract as written and will not add or imply terms in a contract that the parties themselves did not include.

The lessons to be learned from this case are clear. First, if the intent of the landlord is to exempt itself from liability under a lease, the language setting forth the exemption must be stated in plain, unambiguous language. Second, if the intent of the landlord is that the parties should rely on insurance proceeds to cover losses, any release from liability or waiver of subrogation paragraph must be carefully written to achieve that objective. Inclusion in a lease of limiting language such as "(but only to the extent of the insurance proceeds payable under such policies)," will require, at a minimum, that the parties verify the types and amounts of insurance actually carried from which insurance proceeds may be payable.

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