

IN THE SIXTEENTH JUDICIAL CIRCUIT, JACKSON COUNTY, MISSOURI
AT KANSAS CITY

[REDACTED])
[REDACTED])
Plaintiff,)
vs.)
[REDACTED])
[REDACTED])
[REDACTED])
Defendants.)

Case No. [REDACTED]

Div. 18

JUDGMENT

On January 9th, 2019, the Court conducted a hearing and heard argument on Plaintiff’s (herein after [REDACTED]) Motion to Extinguish or Determine Alleged Subrogation Rights of Purported Intervenor [REDACTED] and Defendant, [REDACTED] [REDACTED] (herein after [REDACTED]) Response to Plaintiff’s Motion to Extinguish or Determine Alleged Subrogation Rights. At the conclusion of the hearing, the Court gave [REDACTED] and [REDACTED] additional time to supplement their arguments as to the reasonableness of [REDACTED] costs and expenses.

Now on this 18th day of March, 2019, the Court, having considered all arguments and having reviewed all tendered exhibits, **DENIES** [REDACTED] request to extinguish [REDACTED] right to subrogation and hereby determines [REDACTED] subrogation rights for the following reasons:

1. [REDACTED] argues [REDACTED] engaged in bad faith to avoid paying contractual obligations after an explosion at [REDACTED] causing damages.
2. [REDACTED] paid a nominal¹ amount to [REDACTED] and [REDACTED] filed suit for Vexatious Refusal to Pay.

¹ The Court takes no position in the amount initially paid by [REDACTED] but uses “nominal” to denote an amount that gave rise to [REDACTED] filing suit against [REDACTED] for Vexatious Refusal to Pay.

3. [REDACTED] and [REDACTED] eventually settled the Vexatious Refusal to Pay suit and [REDACTED] a paid [REDACTED] an additional sum of money. The exact terms of the settlement are under confidential terms.

4. [REDACTED] has now settled with all Third-Party Defendants. 3 of the 4 Third-Party Defendant's paid [REDACTED] a sum of money as to the diminution of [REDACTED]. The exact terms of the settlements are under confidential terms.

[REDACTED] argues [REDACTED] has unclean hands by initially refusing to pay their claim and thus [REDACTED] has waived its rights to subrogation

[REDACTED] argues it would be manifestly unjust to permit [REDACTED] to subrogate Plaintiff's claims, given that [REDACTED] refused to pay until a Vexatious Refusal to Pay suit was filed. [REDACTED] supports its argument by stating to permit [REDACTED] to subrogate their claims once [REDACTED] has done all of the work, not only rewards [REDACTED] bad faith, but incentivizes [REDACTED] to gamble by refusing to initially pay. This [REDACTED] argues provides no sanction for [REDACTED] breach and goes against public policy.

[REDACTED] argues there's nothing in the record to suggest, imply or support that they have waived their rights to subrogate. [REDACTED] states that while the claims were for Vexatious Refusal to Pay, there was no finding by a court of vexatious refusal to pay or that [REDACTED] had unclean hands in this matter and since there was nothing in the record otherwise, this Court had nothing to go on other than argument of [REDACTED] for such claims. And since the law suit was ultimately settled and neither party admitted any liability, [REDACTED] argues it would be inappropriate to open the record and hold anything against them from that settlement.²

The Court, recognizing there are a myriad of reasons a dispute may have arose between [REDACTED] and [REDACTED] that led to a dispute, will not question how sausage is made but will honor the product of the process.

² This Court recognizes and appreciates that public policy and judicial economy encourages settlement agreements. That being said, this Court gives credence to [REDACTED] assertion that there is no incentive or sanctions (if [REDACTED] were acting in bad faith to allow them to later subrogate [REDACTED] interests. While not specifically in this case, but in general, even where specific findings of bad faith are not made, this Court believes, if warranted, Courts should look to the actions of the parties leading up to litigation as a basis in determining unclean hands and waiver.

The Language of the Settlement of Plaintiff’s Bad Faith Claim Against [REDACTED]
Does Nothing To Revitalize [REDACTED] Subrogation Interest

[REDACTED] next argues that by the time the settlement agreement was reached, [REDACTED] had waived its right to subrogation due to bad faith and that allowing [REDACTED] to now subrogate would subvert the plain language and intent of the settlement agreement by modifying [REDACTED] right to subrogation.

The Court disagrees with [REDACTED] argument two fold. First, [REDACTED] presupposes unclean hands and waiver. As mentioned above, the Court will not peek behind the curtain of the settlement agreement. As such, [REDACTED] has not waived their subrogation rights due to unclean hands, thus no need for revitalization.

Second, contrary to [REDACTED] interpretation, as written, the language of the settlement agreement does not extinguish [REDACTED] subrogation interests. It states:

3. Subrogation and Other Claims/Litigation. The Parties agree that any right to recovery, whether such claims or causes of action arise by way of subrogation arising out of or related to the Explosion, the Claim, the Litigation, the Policy and/or the Settlement Payment (the “subsequent Action”) will be subject to the terms of the “Policy,” or, will be settled by agreement between the Parties or by the Court. [REDACTED] agrees that [REDACTED] has paid/had agreed to pay \$[...] for the Explosion damages under the Policy. The Parties further agree that nothing contained herein shall modify or impair any Parties’ right to recover claims or causes of action arising by way of subrogation or otherwise arising out of or related to the Explosion.

In context, it appears the parties contemplated the possibility of future litigation with regards to subrogation and built in provisions as to how such litigation would be settled; “subject to the terms of the ‘Policy,’ or, will be settled by agreement between the Parties, or by the Court.” The agreement further states “nothing contained herein shall modify or impair any Parties’ right to recover claims or causes of action arising by way of subrogation or otherwise arising out of or related to the Explosion.”

[REDACTED] Subrogation Interests

As set forth above, the Settlement Agreement between [REDACTED] and [REDACTED] did not modify or impair the parties subrogation interests in any way. However, one cannot recover *more* in subrogation than actually paid. *Missouri Public Entity Risk Management Fund v.*

American Casualty Company of Reading, 399 S.W.3d 68, 74 (Mo. App. W.D. 2013).

█ does not dispute that it is required to pay a pro rata share of the costs and expenses

In calculating █ subrogation interests, the Court looks to *Keisker v. Farmer*, 90 S.W.3d 71, 75 (Mo. banc 2002). Under *Keisker*, the maximum subrogation owed to █ is “the extent of [its] payment,” less fees and costs expended by Plaintiff to recover (including attorney’s fees). 90 S.W.3d at 75. As set out in the parties policy (adopted from *Keisker, id.*):

TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

If any person or organization to or for whom we make payment under this Coverage Part has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:

1. Prior to a loss to your Covered Property or Covered Income.
2. After a loss to your Covered Property or Covered Income only if, at time of loss, that party is one of the following:
 - a. Someone insured by this insurance;
 - b. A business firm:
 - (1) Owned or controlled by you; or
 - (2) That owns or controls you; or
 - c. Your tenant.

This will not restrict your insurance.

Thus, █ is entitled to an amount *minus* a *pro rata* share of █ expenses and attorney’s fees.

Since █ has settled with the Third-Party Defendants for an amount in total of █, the Court determines █ subrogation interests to be █. The calculation is as follows:

- $\frac{\text{█}}{\text{█}} = \text{█}$ (pro rata percentage of the lien to the 3rd party actions)

³ The Court goes beyond the █ policy limit for “Consequential Damages.” Amount represents monies paid by █ to █ before the vexatious law suit was filed against █ by █, where the parties eventually settled for █.

- [REDACTED] x [REDACTED] = [REDACTED] (case expenses multiplied by [REDACTED] pro rata %)
- [REDACTED] - [REDACTED] = [REDACTED] (deduct [REDACTED] expenses from subrogation lien)
- [REDACTED] x [REDACTED] = [REDACTED] (further deduct attorney's fees of [REDACTED])
- Remaining balance of [REDACTED] ([REDACTED] subrogation interests)

WHEREFORE, IT IS HEREBY ORDERED that [REDACTED] [REDACTED] subrogation interests have not been extinguished and are entitled to receive such interests.

IT IS FURTHER ORDERED that [REDACTED] shall receive [REDACTED] in subrogation interests.

IT IS FURTHER ORDERED that the contents of this Order shall remain confidential and under seal until further order of the Court.

IT IS SO ORDERED

17-Apr-2019
Date


Kevin D. Harrel