STATE OF NEW HAMPSHIRE
SUPREME COURT

2019-0620

DANIEL RO
Plaintiff/Appellee

v.

FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGGE OF TRUSTEES OF DARTMOUTH COLLEGE
Defendant/Appellant

AND

SEBASTIAN LIM
Plaintiff/Appellee

v.

FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGGE OF TRUSTEES OF DARTMOUTH COLLEGE
Defendant/Appellant

MANDATORY APPEAL FROM ORDER OF THE MERRIMACK COUNTY SUPERIOR COURT PURSUANT TO SUPREME COURT RULE 7

SURREPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLEE DANIEL RO

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FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGEE
OF TRUSTEES OF DARTMOUTH COLLEGE

PLAINTIFF DANIEL RO'S SUR-REPLY BRIEF PURSUANT TO
LEAVE GRANTED BY SUPREME COURT ORDER DATED JUNE 11, 2020

NOW COMES the plaintiff, Daniel Ro, by his attorneys, Getman, Schulthess, Steere & Poulin, P.A., and respectfully submits this sur reply in response to Factory Mutual Insurance Company, as subrogee of Trustees of Dartmouth College, ("Factory Mutual") reply brief.

ARGUMENT

I. THE APPLICABILITY OF THE ANTI-SUBROGATION SUTTON DOCTRINE AS ADOPTED BY THIS COURT IN CRETE IS PREMISED ON THE ALLOCATION OF INSURANCE RESPONSIBILITIES AND NOT MERE ALLOCATION OF LIABILITY

Factory Mutual's position that the Dartmouth College student policies allocate liability for fire damage to students and therefore overcome the presumption that the students are co-insureds under the college's fire insurance

policy ignores the fundamental principle on which the Sutton doctrine is based. The Sutton doctrine originated from the notion that "basic equity and fundamental justice upon which the equitable doctrine of subrogation is established requires that when fire insurance is provided for a dwelling it protects the insurable interests of all joint owners including the possessory interests of a tenant absent an express agreement by the latter to the contrary." Sutton v. Jondahl, 1975 OK CIV APP 2, 532 P.2d 478, 482 (Okla. Ct. App. 1975). The *Sutton* Court ruled that the insurance company affording coverage for fire damage "should not be allowed to shift a fire loss to an occupying tenant *even if the latter negligently caused it*." Id.

Significantly, in *Crete*, this Court was persuaded by the reasoning behind the *Sutton* decision and adopted an "identical rule." Cambridge Mutual Fire Ins. Co. v. Crete, 150 N.H. 673, 675, 846 A.2d 521 (2004). In *Crete* this Court found that a lease provision which allocated liability to the tenant for negligently caused damage was not sufficient to overcome the presumption that the tenant was a co-insured under his landlord's policy. The lease did not "explicitly state that the tenant is *not* considered a coinsured of the landlord under any fire insurance policy obtained by the landlord" nor did it "explicitly require the tenant to obtain his or her own fire insurance for the leased premises." Id. at 676. The Court did not rule that it would have reached a contrary decision if the lease had specifically mentioned fire damage while still omitting any reference to allocation of insurance coverage obligations. Such a ruling would not have been consistent with the *Sutton* holding and would have undermined the entire insurance-based rationale behind the anti-subrogation doctrine.

Thus, the presumption that a tenant is a co-insured under the landlord's policy can be negated only by an express agreement that the tenant is not a co-insured under the landlord's policy and must instead procure his or her own insurance coverage for damage to the landlord's property. Mere allocation of liability in a lease agreement is not sufficient.

Likewise, college policies stating only that residential students may be subject to a variety of possible sanctions, one of which could include being held responsible for damages they cause to the dormitories, are not sufficient to negate the co-insured status of the students under the college's insurance policy. This is particularly so where, as in this case, the college's student policies not only fail to expressly inform the students that they are not co-insureds and must instead procure their own policies to cover such damages, but also affirmatively convey the understanding that students need only insure their own personal property since there is no coverage for that property under the college's policy. Conversely, the average student would logically assume that the college has procured coverage for damage to its own property.

Factory Mutual does not cite to a single student policy that expressly addresses insurance coverage obligations in a manner that would inform students that they should procure insurance policies with multi-million dollar limits to insure against fire damage to college-owned property in the unlikely event of a catastrophic loss such as occurred in this case. The fact that Dartmouth College has not altered its policies in this regard over the nearly four years that have passed since the unfortunate incident at issue strongly suggests the recognition that it would be both unrealistic and economically impractical to require several thousand students to procure such policies.

The cases cited by Factory Mutual for the proposition that subrogation should be permitted when "equitable factors …support placing liability upon the responsible party" do not in fact support its position that subrogation should be permitted under the facts of this case.

For example, in DiLullo v. Joseph, 259 Conn. 847, 792 A.2d 819 (2002), a case which fully supports Ro's position, the landlord's insurer sought subrogation from the tenant for amounts it had paid for fire damage to an apartment caused by the tenant's negligence. Id. at 820. The Connecticut Supreme Court affirmed summary judgment in favor of the tenant based on the Sutton doctrine which it

found to be "sound as a matter of subrogation law and policy." Id. at 822. The Court found that there was no agreement in the lease that the tenant would insure against damage caused by fire or other casualty and ruled that absent an express agreement to the contrary, the tenant was an implied co-insured under the landlord's insurance policy so that the insurance company could not bring an action for subrogation against the tenant. Id. at 821. The Court recognized that "subrogation, as an equitable doctrine, invokes matters of policy and fairness", but found that those considerations supported adopting a default rule making the tenant an implied co-insured in the absence of an express agreement to the contrary. Id. at 853. In so ruling, the Court emphasized that barring subrogation complied with the public policy of preventing economic waste which, in a multi-unit building, would be compounded by the number of tenants. Id. at 822-823.

In Wasko v. Manella, 269 Conn. 527, 849 A.2d 777 (2004), the Court held that an insurer could subrogate against a social houseguest who negligently caused a fire. The Court determined that most social guests would fully expect to be held liable for their negligent conduct in another person's home. Id. at 790. Furthermore, unlike tenants, social guests have not signed a contract or paid rent, so do not have the same expectations regarding insurance coverage for the property as do tenants. Id. The Court concluded that the equitable concerns that preclude subrogation in the context of landlord and tenant simply are not present in the context of houseguest and host. A college student like Ro, on the other hand, is analogous to a tenant because the student signs a contract and pays a room fee and, therefore, can reasonably have the same expectations regarding co-insured status as does a tenant.

In Hartford Fire Ins. Co. v. Warner, 91 Conn. App. 685, 881 A.2d 1065 (2005), the tenant's houseguest caused fire damage to the landlord's residential duplex. The Court found that in the case of a duplex, unlike a multi-unit complex, the public policy against economic waste was not reasonably implicated. Id. at 1069. For purposes of assessing applicability of the Sutton doctrine, a college

dormitory such as Morton Hall is the equivalent of a multi-unit apartment complex and implicates the same concerns with respect to economic waste, unlike a duplex or single-family home.

Thus, even if the Connecticut decisions cited in Factory Mutual's Reply Brief had any relevance in New Hampshire – and they do not – those cases do not lend any support to Factory Mutual's position.

In Tri-Par Investments, LLC v. Sousa, 268 Neb. 119, 680 N.W.2d 190 (2004), another case cited by Factory Mutual which only supports Ro's position, the Court held that absent an express agreement to the contrary in a lease, a tenant and landlord were implied co-insureds under the landlord's fire insurance policy, and the landlord's liability insurer was precluded from bringing a subrogation action against the negligent tenant. Id. at 199. Although the lease required the tenant to repair all damages done to the premises or pay for the same, keep the building free from danger of fire, and return the property in as good condition as it was received, there was no express provision in the lease that provided for a right of subrogation on behalf of the insurer. Id. Therefore, for subrogation purposes, the tenant and landlord were implied co-insureds and the insurer could not maintain the subrogation action on behalf of the landlord against the tenant. Id. at 199-200.

In Cascade Trailer Court v. Beeson, 50 Wash. App. 678, 749 P.2d 761 (1988), the Court found that the lessees were implied co-insureds under the lessor's fire insurance policy, thus defeating the insurer's right of subrogation against them. The court held that the fact that the lease provided that the lessees would not negligently destroy the premises did not indicate that the parties intended to limit the benefit of the insurance to the lessor. Id. at 766. Adopting a "reasonable expectations" rationale, the Court held that the lessor was presumed to carry its insurance for the lessees' benefit because the lease did not contain an express provision to the contrary. Id.

Finally, as explained in Ro's principal Brief, the New York appellate court's decision in Phoenix Ins. Co. v. Stamell, 21 A.D.3d 118 (N.Y. App. Div. 2005) is entirely irrelevant because New York has rejected the anti-subrogation presumption in favor of a rule requiring clear and unequivocal language exempting tenants from the consequences of their own negligence. Id. at 778-779.

Thus, the cases which Factory Mutual has cited without any accompanying analysis in fact support Ro's position and not the position espoused by Factory Mutual.

Notably, if Dartmouth College intended for its student policies to eliminate the students' presumed co-insured status under its fire insurance policy and permit subrogation by its insurer, it had twelve years between the date this Court issued its decision in *Crete* and the date of the fire at issue in this case within which to clarify its policies. It did not do so and has not altered its policies since the Morton Hall fire. While Factory Mutual would like this Court to broadly interpret the student policies in a manner that permits subrogation, those policies simply do not contain the requisite insurance allocation provisions required in order to eliminate the students' co-insured status, inform students of the need to procure insurance coverage for the dormitories and allow subrogation. Therefore, this Court should apply the Sutton anti-subrogation rule it adopted in *Crete*, and affirm the trial court's decision: (1) granting summary judgment in favor of Ro and Lim; and (2) denying Factory Mutual's cross motion for summary judgment.

CERTIFICATION

I hereby certify that the Sur-Reply Brief of Plaintiff/Appellee Daniel Ro complies with the 3,000 word limit set forth in Supreme Court Rule 16(11).

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Sur-Reply Brief of Plaintiff/Appellee will be served electronically on the following counsel of record:

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