THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0620

DANIEL RO
v.
FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGEE
OF TRUSTEES OF DARTMOUTH COLLEGE;

AND

SEBASTIAN LIM,
v.
FACTORY MUTUAL INSURANCE COMPANY, AS SUBROGEE
OF TRUSTEES OF DARTMOUTH COLLEGE.

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

SURREPLY OF PLAINTIFF-APPELLEE SEBASTIAN LIM

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Appellant's argue that Dartmouth College's Student Handbook properly allocated liability for the Morton Hall fire to the Plaintiffs, and that any other finding would create a new requirement of "strict construction" in order to negate the application of the anti-subrogation rule. See Appellant's Reply Brief at 4. As to be discussed below, however, Dartmouth's Handbook and policies fail to constitute an express agreement that would require student-tenants to purchase their own fire insurance policies on the dormitory building or which explicitly states that the student-tenants are not coinsured under the applicable fire insurance policy as required under the *Sutton* Doctrine. Therefore, the Merrimack Superior Court Order must be affirmed.

I. DARTMOUTH COLLEGE'S STUDENT HANDBOOK AND POLICIES DO NOT CONSTITUTE AN EXPRESS AGREEMENT THAT NEGATES THE PRESUMPTION THAT A STUDENT-TENANT IS A COINSURED OF THE LANDLORD FOR PURPOSES OF ANY FIRE INSURANCE COVERAGE ON THE LEASED PREMISES.

"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." Cambridge Mut. Fire Ins. Co. v. Crete, 150 N.H. 673, 675 (2004) (emphasis added) (citing Sutton v. Jondahl, 532 P.2d 478, 482 (Okla. Ct. App. 1975)). "The company affording such coverage should not be allowed to shift a fire loss to an occupying tenant even if the latter negligently

caused it." Sutton, 532 P.2d at 482 (citing New Hampshire Ins. Co. V. Ballard Wade, Inc. 17 Utah 2d 86 (1965); and noting that a parallel effect was reached in Hardwere Mut. Ins. Co. V. Dunwoody, 194 F.2d 666 (9th Cir. 1952)). Because no such agreement existed, Factory Mutual should, therefore, be precluded from asserting subrogation rights against the student-tenants. "For to conclude otherwise is to shift the insurable risk assumed by the insurance company from it to the tenant – a party occupying a substantially different position from that of a fire-causing third party not in privity with the insured landlord." Sutton, 532 P.2d at 482.

Appellant's argument stems from a misconstrued reading of Crete, one which allows for subrogation against a tenant when the landlord/tenant agreement merely, "address[es] the specific issue of the tenant's liability for fire damages caused by the tenant's negligence." See Appellant's Reply at 4-5. Appellant states, "the numerous student policies, when violated, clearly place liability for resulting damage." See Appellant's Reply p. 7. However, Appellant misses the mark. The *Sutton* Doctrine is not a doctrine based upon a mere shifting of liability to another party; the *Sutton* Doctrine is a doctrine based upon the allocation of insurance. This allocation of which party will procure fire insurance on the building is the crux of the Sutton doctrine. As stated in *Sutton*:

> The landlords of course could have held out for an agreement that the tenant would furnish fire insurance on the premises. But they did not. They elected to themselves purchase the coverage. To suggest the fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of urban apartment and single-family dwelling renting. Prospective tenants ordinarily rely upon the owner of the dwelling to provide fire protection for the realty (as

> distinguished from personal property) absent an express agreement otherwise. Certainly it would not likely occur to a reasonably prudent tenant that the premises were without fire insurance protection or if there was such protection it did not inure to his benefit and that he would need to take out another fire policy to protect himself from any loss during his occupancy.

Sutton, 532 P.2d at 482. Again, the premise of the *Sutton* Doctrine stems from the allocation of insurance, not a mere shifting of liability for damages caused by fire as Appellant argues. In the instant case, there simply was no express agreement placing the responsibility of procuring fire insurance on the students. Indeed, the antithesis existed – Dartmouth's Risk Policy explicitly allocated the burden of obtaining fire insurance regarding any dormitory structures to Dartmouth, while the students were allocated the burden to obtain insurance on their own personal property. See Appellant's App. Vol. IV at 46.

As discussed more thoroughly in Appellees' briefs, the Dartmouth Risk Policy plainly states that Dartmouth College, not the student-tenants, will obtain fire insurance covering against losses incurred to College-owned property, including the Morton Hall dormitory building. See Appellant's App. Vol. IV at 46. Dartmouth's Risk Policy excludes insurance coverage for any damage to student-tenant's personal property. See Id. Dartmouth's own policies recommend only that the dormitory resident students obtain insurance for their own personal property. See Id. This allocation of the burden of obtaining fire insurance on the building itself is the exact opposite of what the Crete court requires to defeat the presumption of co-insurance.

In order to defeat the presumption that the dormitory resident is a co-insured, there must exist an explicit agreement to the contrary. Dartmouth

College and the Appellant, being in the position to dictate residential terms to student-tenants, could have added an express statement into the Student Handbook – one without ambiguity – explicitly requiring the student-tenants to purchase their own fire insurance policy to protect themselves from any loss during their occupancy or explicitly stating that the students are not coinsured under any fire insurance policy obtained by the College. See Sutton, 532 P.2d at 482; see also Crete, 150 N.H. at 676. Instead, Appellant wishes this Court to review piecemeal verbiage culled from numerous policies and despite the fact that none of the language cited by the Appellant addresses the crux of whether the tenant is responsible for purchasing fire insurance on the building, to somehow read into the policies that Dartmouth had actually intended to place the responsibility of obtaining fire insurance on the students despite explicitly stating the opposite.

The Appellant argues that the Handbook is a contract between the parties and certain policies make it clear that the Appellee could be responsible for damage resulting from violating the rules. While generally true, none of those policies in any way negate Mr. Lim's status as a coinsured under the Dartmouth fire insurance policy in the manner required under Crete. For brevity's sake, the Appellant fails to point to even a single instance across the myriad of cobbled together policies to show an, "express provision allocating liability to the tenant for fire damages to the leased premises." See Crete, 150 N.H. at 677. As the Superior Court Order noted, the Open Flame in Residence Halls Policy, "is the only document in the Handbook that specifically mentions liability for fire damage." See Appellant's Addendum at 61, Merrimack County Superior Court Order. Even that language does not explicitly assign liability to the student for damage caused by fire, but only

states that a student "may" be found liable. See Id. Even when viewed with various other policies within the Student Handbook, does not create an express allocation of liability as required by Crete. Simply, Dartmouth could have required the students to obtain and to carry insurance for the entire dormitory. Dartmouth College and the Appellant did not do that.

Here, the allocation of insurance is explicit – Dartmouth will insure against fires, while the students are responsible for their own property. Indeed, nowhere does the Handbook or any other policy hint at, let alone explicitly state, otherwise. This allocation of insurance is what the *Sutton* Doctrine is based upon. To suggest that fire insurance does not extend to the insurable interest of an occupying tenant is to ignore the realities of dormitory or student-apartment renting. Because there is no explicit agreement expressly stating that students are required to purchase their own fire insurance or expressly stating that the students are not coinsured under the Dartmouth policy, the Merrimack Superior Court Order must be affirmed.

The Appellant also argues that, "the purpose of subrogation is to place the responsibility where it ultimately should rest by compelling payment by the one who in good conscience ought to pay for it." See Appellant's Reply Brief at 8 (internal quotations and citations omitted). However, the *Sutton Doctrine*, as an exception to ordinary subrogation principles, takes a different approach to the balance of equities. The equitable doctrine as set forth in Sutton and as adopted by this Court in Crete, is that fundamental justice requires that when fire insurance is provided, it protects all owners and tenants, absent an express agreement to the contrary.

As an equitable doctrine, the *Sutton Doctrine* is, essentially, an economic risk allocation between the landlord and the tenant, or here – between the

college and the dormitory resident. As a matter of equity, it makes sense because the dormitory resident believes the dormitory building is going to be insured by the owner. Here, Dartmouth went beyond even that and explicitly told the students that it was providing fire insurance for the building. As the owner, Dartmouth College is in the best position to assess the risk of loss due to fire and assess the amount of insurance required to cover for such a loss. Dartmouth can then adjust the amount it charges students to live in its buildings the cost of purchasing insurance. In contrast, the dormitory student is not in the position to assess any of these risks. In essence, the balance of equities under the *Sutton Doctrine* is not about which party will be responsible for a loss due to fire but is about which party will purchase fire insurance to cover such a loss.

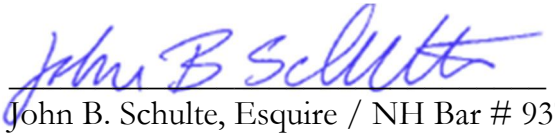
CONCLUSION

In conclusion, Plaintiff-Appellee, Sebastian Lim, respectfully requests that the New Hampshire Supreme Court AFFIRM the Merrimack Superior Court order.

Respectfully Submitted,
SEBASTIAN LIM

By and through their attorneys,
LAW OFFICES OF JOHN B. SCHULTE

Date: June 22, 2020



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CERTIFICATION OF SERVICE

I hereby certify that two copies of the foregoing document have been sent to Matthew R. Passeri, Esquire and Debbie Lorusso Makris, Esquire via first class mail.

John B. Schulte, Esquire

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