

60 A.D.3d 456

(Cite as: 60 A.D.3d 456, 874 N.Y.S.2d 465)

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Great Am. Ins. Co. of N.Y. v Simplexgrinnell LP
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NY,2009.

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2009 N.Y. Slip Op. 01705

Great American Insurance Company of New York et
al., Appellants
v
Simplexgrinnell LP, Respondent.
Supreme Court, Appellate Division, First Department,
New York

March 10, 2009

CITE TITLE AS: Great Am. Ins. Co. of N.Y. v Simplexgrinnell LP

HEADNOTE

Insurance
Subrogation Rights of Insurer
Waiver of Subrogation

Kingsley Kingsley & Calkins, Hicksville (Kevin T. Murtagh of counsel), for appellants.

Shook, Hardy & Bacon LLP, Kansas City, Mo. (Aristotle N. Rodopoulos, of the bar of the State of Missouri, admitted pro hac vice, of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 8, 2008, which granted defendant's motion pursuant to [CPLR 3211](#) (a) (1) to dismiss the complaint, unanimously affirmed, with costs.

The court properly found that the waiver of subroga-

tion provision in the underlying sprinkler system servicing agreement was neither overreaching nor procedurally or substantively unconscionable (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988]). We reject plaintiffs' contention that the waiver does not bar a claim for gross negligence. As the Court of Appeals has held, "[a] distinction must be drawn between contractual *457 provisions which seek to exempt a party from liability . . . and contractual provisions . . . which in effect simply require one of the parties to the contract to provide insurance for all of the parties" (*Board of Educ., Union Free School Dist. No. 3, Town of Brookhaven v Valden Assoc.*, 46 NY2d 653, 657 [1979]). We discern no public policy basis for limiting freedom of contract (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]) so as to preclude parties from agreeing that a waiver of subrogation bars not only claims of negligence but also claims of gross negligence. Thus, the waiver conclusively established a defense to plaintiff insurer's claim (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]). Moreover, we hold as well that plaintiffs' allegations of tortious conduct fail to allege the necessary violation of a legal duty independent of the contract with defendant (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).**2 We have considered plaintiffs' remaining contentions and find them unavailing. Concur—Tom, J.P., Friedman, Gonzalez, Sweeny and McGuire, JJ.

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