The Sounds of Silence: Pennsylvania's Sutton Rule

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In *Westminster Am. Ins. Co. a/s/o Androulla M. Toffalli v. Bond*, No. 538 EDA 2023, 2023 Pa. Super. LEXIS 626, 2023 PA Super 272, the Superior Court of Pennsylvania (Appellate Court) recently discussed the impact of silence on the Sutton Rule with respect to the landlord, Androulla M. Toffalli (Landlord), securing insurance. After holding that the tenant, Amy S. Bond (Bond) t/a Blondie's Salon – who leased both commercial and residential space in the building pursuant to written leases – was not an implied "co-insured" on Landlord's insurance policy, the Appellate Court reversed the decision of the trial court.

In this case, Bond rented the ground floor of a property located in Monroe County pursuant to a written commercial lease (Commercial Lease) and operated Blondie's salon out of the leased location. In addition, Bond rented and lived in a second-floor apartment pursuant to a residential lease (Residential Lease). Both leases required the tenants (Tenants) to obtain insurance for personal items. The leases, however, did not require Landlord to obtain fire insurance for the property.

Sometime prior to May 10, 2020, Bond began using and remodeling attic space in the building even though neither she nor her business rented the space. As part of her remodeling, Bond removed the door between the attic space and her apartment and used various electrical power sources. She also burned candles and smoked in the attic. On May 10, 2020, a fire broke out in the building and, ultimately, Landlord's insurer filed a subrogation action against Tenants. Tenants filed a motion for summary judgment, arguing that the claims of Westminster American Insurance Company (Insurer) failed as a matter of law because Tenants were "co-insureds" under the leases. In particular, Tenants argued that since the leases did not require Tenants to purchase fire insurance for the premises, they had a reasonable expectation that they were implied "co-insureds" under Landlord's fire insurance policy. The trail court granted Tenants' motion and Insurer appealed.

Although a majority of the panel did not directly discuss the Sutton Rule, the Appellate Court previously address the Sutton Rule in *Joella v. Cole*, 2019 PA Super 313, 221 A.3d 674 (2019) to resolve the question of whether a landlord's insurer can file a subrogation against a tenant when the tenant's negligence causes damage to the landlord's property. As noted in *Joella*, courts take three approaches to the issue. The first, a pro-subrogation approach, states that absent an express provision in a lease to the contrary, a landlord's insurer can maintain a suit against the tenant. The second approach, an anti-subrogation approach known as the Sutton Rule - first adopted in *Sutton v. Jondahl*, 532 P.2d 478 (Oak. Civ. App. 1975) - states that unless the lease expressly requires a tenant to procure fire insurance, the tenant is an implied co-insured on the landlord's policy. Under the third approach, adopted in Pennsylvania, a case-by-case approach, the court looks at the parties' reasonable expectations as expressed in the lease.

In this case, it was undisputed that Tenants were not named or additional insureds under Landlord's fire insurance policy. Although recognizing that, in some cases, courts permit a legal fiction for purposes of subrogation claims – finding that the tenant is an implied "co-insured" on the landlord's policy – the Appellate Court noted that, in this case, the leases were silent on Landlord's obligation to obtain fire insurance on the property. Thus, the Appellate Court held that the trial court erred when it rewrote the leases to add a provision that the landlord was obligated to obtain fire insurance on the property. Without rewriting the leases, Tenants could not reasonably expect that they were implied co-insureds on Landlord's insurance policy. Accordingly, the Appellate Court[1] reversed the trial court's decision and allowed the subrogation claim to move forward.

The decision reiterates that, in Pennsylvania, the answer to the question of whether a subrogating insurer can pursue a tenant will depend on the reasonable expectations of the parties as expressed in the lease. Where a lease is silent on a landlord's obligation to procure fire insurance, neither a tenant, nor a subrogation professional analyzing a lease, should rewrite the terms of the lease to determine the tenant's reasonable expectations.

[1] The concurring justice felt compelled by current case law to agree with the majority's conclusion but wrote separately to voice concerns over Pennsylvania's current approach to analyzing whether a subrogating insurer can pursue subrogation against a tenant.