No. 2—10—0199
Order filed March 10, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

LEXINGTON INSURANCE GROUP, as Subrogee of Penobscot Management,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellant,	)	
v.	)	No. 09—L—0866
NORTHSTAR AEROSPACE, INC.,	)	Honorable Paul Noland,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court's dismissal of plaintiff's complaint was proper because the lease as a whole did not evince "beyond question" an intent that defendant would liable for negligently caused fire damage. We affirmed the trial court's judgment.

After a fire caused damage to an apartment building owned by Penobscot Management (Penobscot), plaintiff, Lexington Insurance Group, as subrogee of Penobscot, brought a lawsuit against defendant, Northstar Aerospace, Inc., seeking to recover for damages caused by the fire. The trial court dismissed plaintiff's lawsuit pursuant to section 2—619.1 of the Code of Civil Procedure

(the Code) (735 ILCS 5/2—619.1 West 2008)), and plaintiff now appeals. The only issue raised on appeal is whether the trial court erred when it granted defendant's motion. We affirm.

The relevant facts are not in dispute. This matter arises out of a fire on May 29, 2008, at the Brittany Springs Apartments in Naperville, which are owned and operated by Penobscot. Following an investigation by the Naperville fire department, it was determined that the fire originated at apartment number 207 as a result of abandoned or discarded smoking materials. Prior to the fire, Penobscot entered into a lease agreement with defendant to be used by defendant as corporate housing for one of its employees. The lease identified Brittany Springs Apartments as the "Lessor" and defendant as the "Lessee." The lease further specified that Mary Strutzenberg and her two children "will reside at the apartment" and that as the resident, Strutzenberg agreed to report any change in occupancy to Penobscot.

With respect to insurance, the lease provided:

> "29. INSURANCE: Lessor is not an insurer of Lessee's property. Lessee shall carry sufficient insurance to insure all of Lessee's property located on Lessor's property. Each resident is advised to maintain a policy of renter's insurance protecting his/her household goods and personal property and to protect Lessor's property in the event of damage due to negligence or misconduct of Resident."

An agent of defendant signed his initials at the bottom of this paragraph. In addition, the addendum to the lease provided:

> "Insurance: Resident understands that general insurance policies covering apartment buildings do not insure resident's personal belongings against fire, theft and damages of any

> sort (including damages caused by building defects). It [is the] resident's responsibility to contact an insurance company regarding renters insurance."

As a result of the damages caused by the fire, Penobscot made a claim to plaintiff, its insurer, which in turn, paid Penobscot.

On July 13, 2009, plaintiff, as subrogee of Penobscot, filed a three-count complaint against defendant. Count I alleged that "Penobscot sustained catastrophic fire damage to the Brittany Springs Apartments, resulting in [plaintiff] suffering property damage in the sum of $391,403.13" and requested a judgment against defendant in that amount. Count II alleged gross negligence and sought similar relief. Count III alleged breach of contract, alleging that defendant breached its contract with Penobscot when its occupants "improperly and carelessly" discarded smoking materials in the apartment. Count III similarly sought $391,403.13 in damages.

On November 12, 2009, the trial court granted defendant's motion to vacate a technical default and for leave to file a responsive pleading. Defendant filed a motion to dismiss pursuant to section 2—619.1 of the Code. Defendant's motion argued that it was entitled to a dismissal of all three counts pursuant to section 2—615 of the Code (735 ILCS 5/2—615 (West 2008)) based upon our supreme court's decision in *Dix Mutual Insurance Co. v. LaFromboise*, 149 Ill. 2d 314 (1992), and its progeny, which hold that a tenant is the coinsured of the landlord for purposes of the landlord's property by virtue of the tenant's rent payments to the landlord. Defendant also argued that dismissal of count II was appropriate pursuant to section 2—615 because it failed to allege a sufficient basis for gross negligence. Further, defendant argued that dismissal was appropriate pursuant to section 2—619 of the Code (735 ILCS 5/2—619 (West 2008)). Specifically, defendant argued that the lease document provided an independent basis to demonstrate that Penobscot was

responsible for procuring insurance for fire damage to the property and the lease, as drafted by Penobscot, failed to expressly provide that defendant would be liable for fire damage caused by its alleged negligence, as required under Illinois law. On January 27, 2010, after entertaining oral arguments, the trial court granted defendant's motion. Plaintiff timely appealed.

On appeal, the only issue raised by plaintiff is whether the trial court erred in granting defendant's section 2—619.1 motion to dismiss. According to plaintiff, the operative lease language provided that defendant was "advised to maintain" renter's insurance to protect her household goods and Penobscot's property, which represents an express agreement of the parties that defendant be liable for fire damage caused by its negligence. Plaintiff further argues that defendant's obligation to procure insurance for the benefit of Penobscot was clearly spelled out in the lease agreement because the lease specifically provided that if Penobscot suffered damage as a result of defendant's negligence, defendant's insurance would control, whereas Penobscot's insurance would only control if it suffered fire damage by something other than defendant's negligence. Finally, plaintiff argues that the trial court erred in granting defendant's motion to dismiss because the motion was premature because, at the time defendant's motion was filed, defendant had yet to file its responsive pleading or "engage in any of the necessary discovery to indicate and/or develop the intent of the parties under the lease."

Section 2—619.1 of the Code provides that a motion with respect to pleadings pursuant to sections 2—615 and 2—619 of the Code may be filed together as a single motion. 735 ILCS 5/2—619.1 (West 2008). A motion to dismiss pursuant to section 2—615 of the Code tests the legal sufficiency of the complaint, whereas a motion pursuant to section 2—619 admits the legal sufficiency of the complaint but asserts an affirmative defense which defeats the claim. *Solaia*

Technology LLC v. Specialty Publishing Co., 221 Ill. 2d 558, 578-79 (2006). Our review under either section is *de novo*. *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 12 (2005).

Under Illinois law, a lease is an agreement subject to the law of contracts, and leases should be construed as a whole to ascertain the intent of the parties. *The Housing Authority of Champaign County v. Lyles*, 395 Ill. App. 3d 1036, 1039 (2009). If the lease terms are unambiguous, the lease should be enforced as written and courts are not permitted to rewrite the lease to provide a better bargain to one of the parties. *Owens v. McDermott, Will & Emery*, 316 Ill. App. 3d 340, 439 (2000). If, however, an uncertainty arises concerning the meaning of the terms of a lease, the lease should be construed in the lessee's favor and against the lessor. *Clarendon America Insurance Co. v. Prime Group Realty Services, Inc.*, 389 Ill. App. 3d 724, 729 (2009).

Illinois courts have previously addressed the issue of whether a tenant is liable for negligently causing fire damage to a leased property. In *Towne Realty, Inc. v. Shaffer*, 331 Ill. App. 3d 531 (2002), the plaintiffs alleged that the defendant negligently caused fire damage to a leased premises and sought $671,463.95 in damages. *Id.* at 534. The parties' lease contained various provisions regarding damage to the property and insurance. Specifically, the lease provided that the defendant keep the apartment in "good repair and be responsible for any damages to the premises" caused by normal wear and tear; not use the premises in a manner which would increase the plaintiffs' damage and liability insurance; and the defendant would not hold the plaintiffs liable for any damage to personal property, including fire damage. *Id.* at. 533-34. The defendant subsequently filed a motion to dismiss pursuant to sections 2—615 and 2—619 of the Code, arguing in part that when the parties entered into the lease, they contemplated that the plaintiffs and their insurer would bear the risk of

loss due to fire damage. The trial court agreed with the defendant and granted the motion to dismiss *Id.*

On appeal, the reviewing court affirmed the trial court's determination. The court in *Towne Realty* discussed previous supreme court decisions (*id.* at 536-40 (citing *Cerny-Pickas & Co. v. C.R. Jahn Co.*, 7 Ill. 2d 393 (1955); *Stein v. Yarnall-Todd Chevorlet, Inc.*, 41 Ill. 2d 32 (1968); *Dix Mutual Insurance Co v. LaFramboise*, 149 Ill. 2d 314 (1992))), and concluded that the "the key factor in determining whether the parties intended to exculpate the tenant from liability for negligently caused fire damage to the leased premises is the allocation of insurance burdens as evidenced by the lease." *Towne Realty,* 331 Ill. App. 3d at 540. According to the court, when the lease provisions indicate, either expressly or implicitly, that the lessor will obtain insurance against the risk of fire damage to the building, the tenant is normally not liable for negligently causing such damage unless the parties' contrary intent is clear. *Id.* Therefore, the defendant could not be liable for negligently caused fire damage unless the parties' intent, as evidenced by the lease provisions, is "beyond question." *Id.* The court reasoned that, pursuant to supreme court precedent, absent a clear intent of the parties to render the tenant liable for such damage, the tenant is essentially a coinsured under the lessor's insurance policy by virtue of paying rent. *Id.* The court in *Towne Realty* then held that the defendant was not liable for negligently caused fire damage because "the lease as a whole does not evince the parties' intent that, during the course of his three-month lease, [the defendant] would be liable for negligently caused fire damage" to the building. *Id.* at 542.

We find *Towne Realty* to be persuasive to the matter presently before us. Initially, we note the relevant portion of paragraph 29 of the lease specified that "[e]ach resident" was advised to maintain renter's insurance to protect Penobscot's property in the event of damage due to a resident's

negligence. Here, although defendant was the lessee, the lease also specified that Strutzenberg and her children, who are not parties in this case, would occupy the apartment as residents.

Moreover, the plain and unambiguous lease provisions do not evince "beyond question" that the parties intended that defendant would be liable for negligent fire damage to the building. We recognize that paragraph 29 of the lease provided that "each resident is advised" to maintain renter's insurance protecting her or his personal belongings and the owner's property in the event of damage due to negligence. This provision, however, refers only to negligently caused damage in a general manner, and does not specifically reference damage caused by fire. See *Towne Reality*, 331 Ill. App. 3d at 541-42 (noting that lease language of a general nature, which provided that the tenant would be responsible for any damage to the premises but made no specific reference to fire damage, was insufficient to demonstrate a clear intent that the tenant would be liable for fire damage). In addition, the second sentence in paragraph 29 placed an express obligation on defendant to procure renter's insurance to protect her personal property. However, the next sentence merely advised each resident–and not defendant specifically–to obtain renter's insurance to protect the property of Penobscot. If the parties wanted to obligate defendant to procure renter's insurance to protect personal property and also Penobscot's property, they could have expressly provided such a requirement in the lease. Our conclusion that the parties could have provided an express agreement regarding fire damage is further supported by defendant's initialing next to paragraph 29 of the lease, indicating that paragraph's provisions represented the parties' intent.

Similarly, a reading of the addendum implicitly indicates that the parties intended that Penobscot would obtain insurance to protect against fire damage. The addendum stated that general insurance covering the building does not cover residents' belongings, and further reminded defendant

that management does not insure a resident's personal belongings against fire, including damage caused by defects in the building. The court in *Town Realty* found that similar language demonstrated that the parties contemplated the plaintiffs would maintain insurance against fire. We agree with the court's conclusion and find it applicable to the lease language here. See *Towne Realty*, 331 Ill. App. 3d at 541 (citing *Stein v. Yarnall-Todd Chevorlet, Inc.*, 41 Ill. 2d 32, 37 (1968)).

Finally, our determination that the lease did not evince a clear intent of the parties that defendant would be liable for fire damage is consistent with the well-established maxim that the provisions of the lease will be construed against the drafter and that a court will not impose new responsibility upon a tenant unless the lease clearly indicates that the tenant clearly intended to assume such a responsibility. *Towne Realty*, 331 Ill. App. 3d at 542 (citing *Windsor at Seven Oaks v. Kelly*, 113 Ill. App. 3d 978, 980-81 (1983) ("Where a landlord has drafted the lease, a court will not impose a responsibility upon the tenant unless the circumstances and the contract clearly indicate that the tenant intended to assume such a responsibility.")). We also reject plaintiff's argument that defendant's motion was untimely. The trial court's November 12, 2009, order clearly permitted defendant to file a responsive pleading, which it proceeded to do pursuant to section 2—619.1 of the Code.

In sum, had the parties intended for defendant to be liable for negligently caused fire damage, the parties could have expressly stated that intent in the lease. Instead, the lease merely advised each resident to obtain renter's insurance to protect their property and Penobscot's property in the event of damage due to a tenant's negligence, and that Penobscot's insurance does not cover defendant's personal property. Pursuant to the lease, defendant was not residing in the apartment. Further, the lease did not expressly require defendant to obtain insurance for negligently caused fire damage, for

which due to the unique nature of fire damage, Illinois courts shift responsibility from lessor to tenant. Accordingly, the lease as a whole did not evince "beyond question" an intent that defendant would liable for negligently caused fire damage, and dismissal pursuant to section 2—619.1 of the Code was warranted.

For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

Affirmed.