

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-LAW DIVISION**

JUL-5
PI 3-20

GREAT LAKES REINSURANCE (UK) PLC,)
as subrogee of SRI Monroe Street Venture, LLC and)
CERTAIN UNDERWRITERS AT LLOYD’S, as subrogee)
of SRI Monroe Street Venture, LLC,)

Plaintiffs,)

Judge Kathy M. Flanagan

v.)

Case No.: 2010 L 007165

CROWN ENERGY SERVICES, INC., d/b/a)
Able Engineering Services,)

Defendant.)

Courtroom: 2210

LEXINGTON INSURANCE COMPANY,)
as subrogee of SRI Monroe Street Venture, LLC,)

Intervenor-Plaintiff,)

v.)

CROWN ENERGY SERVICES, INC. d/b/a)
Able Engineering Services,)

Defendant.)

735 ILCS 5/2-615 MOTION OF CROWN ENERGY SERVICES, INC. D/B/A ABLE ENGINEERING SERVICES TO DISMISS FOURTH AMENDED SUBROGATION COMPLAINT AT LAW

Defendant, CROWN ENERGY SERVICES, INC. d/b/a Able Engineering Services (hereafter ‘CROWN’) moves pursuant to 735 ILCS 5/2-615 to dismiss Plaintiffs’, GREAT LAKES REINSURANCE (UK) PLC, as subrogee of SRI Monroe Street Venture, LLC, and CERTAIN UNDERWRITERS AT LLOYD’S, as subrogee of SRI Monroe Street Venture, LLC (hereafter ‘GREAT LAKES/ LLOYDS’), Fourth Amended Subrogation Complaint against Defendant, CROWN, for the following reasons:

1. Following the entry of this court’s November 28, 2011 Memorandum Opinion, the insurance subrogees GREAT LAKES/LLOYDS allege on December 15, 2011 they took an insurance claim reassignment

from Fund Six, which allows GREAT LAKES/ LLOYDS to sue CROWN for breach of the Engineering Services Agreement (hereafter 'AGREEMENT') between SRI and CROWN.

2. By way of background, on **March 28, 2007** at 11:46 a.m., an electrical fire allegedly started within a Baltimore Aircoil Company HVAC (BAC) cooling tower 4 (CT4) by an energized north basin heater underneath CT4. The HVAC system is located on the roof of 500 West Monroe Street in Chicago, Illinois (hereafter '500 West Monroe'). The fire allegedly damaged cooling tower 3 (CT3) and CT4, model no. 32692C, installed in 1991 as original equipment at 500 West Monroe. Plaintiffs are insurance companies that provided property damage coverage for 500 West Monroe, including CT3 and CT4. Plaintiffs allege CROWN was to maintain CT3 and CT4 in accordance with an engineering services agreement between SRI Monroe Street Venture, LLC, a Delaware limited liability company c/o Shorenstein, L.P. (hereafter 'SRI') and CROWN. Plaintiffs allege CROWN was responsible for the damage to CT3 and CT4 at 500 West Monroe and now sue CROWN for breach of the services contract, totaling \$238,389.74.

3. On **June 18, 2010**, MUNICH RE, as subrogee of SRI Monroe Street Venture, LLC and CERTAIN UNDERWRITERS OF LLOYDS OF UK (hereafter 'MUNICH RE/LLOYDS') filed its \$238,389.72 property damage Subrogation Complaint.

4. On **September 23, 2010**, CROWN presented its first motion to dismiss the Subrogation Complaint of MUNICH RE/LLOYDS. MUNICH RE/LLOYDS withdrew the Complaint.

5. On **October 23, 2010**, MUNICH RE/LLOYDS filed its amended complaint.

6. On **October 27, 2010**, CROWN filed a 735 ILCS 5/2-619.1 motion to dismiss MUNICH RE/LLOYDS' Amended Subrogation Complaint.

7. On **January 31, 2011**, this court granted CROWN's motion to dismiss the MUNICH RE/LLOYDS' Amended Subrogation Complaint and the Intervening Subrogation Complaint, ordering the filing of Amended Subrogation Pleadings by **February 21, 2011**.

8. On **February 18, 2011**, MUNICH RE/LLOYDS filed their Second Amended Complaint. Changing parties, the Second Amended Complaint read MUNICH RE/LLOYDS, subscribing to cover note

PP0600339, as subrogee of SRI Monroe Street Venture, LLC; Certain Underwriters of MUNICH RE/LLOYDS of London, UK subscribing to cover note PP0600341, as subrogee of SRI Monroe Street Venture, LLC and the third subrogation plaintiff, Certain Underwriters of MUNICH RE/LLOYDS of London, UK subscribing to cover note PP0600335, as subrogee of SRI Monroe Street Venture, LLC.

9. After briefs were submitted, on **June 10, 2011**, the Second Amended Complaint was dismissed pursuant to 735 ILCS 5/2-615.

10. On **June 30, 2011**, an emergency motion for reconsideration, clarification, and extension for filing of amended pleadings was presented. On **July 25, 2011**, the emergency motion was denied. MUNICH RE/LLOYDS was given until **August 15, 2011** to file the Third Amended Complaint.

11. On **August 15, 2011**, MUNICH RE/LLOYDS filed their Third Amended Complaint.

12. On **August 29, 2011**, CROWN filed a 735 ILCS 5/2-615 Motion to Dismiss Third Amended Complaint.

13. After briefs were submitted, on **November 28, 2011**, the Third Amended Complaint was dismissed pursuant to 735 ILCS 5/2-615 and Plaintiffs were given until **December 19, 2011** to file their Fourth Amended Complaint.

14. On **December 19, 2011**, subrogation plaintiffs filed their Fourth Amended Subrogation one count complaint for breach of contract. Changing parties again, the Fourth Amended Complaint now names GREAT LAKES REINSURANCE (UK) PLC, as subrogee of SRI Monroe Street Venture, LLC, (hereafter, 'GREAT LAKES') and CERTAIN UNDERWRITERS AT LLOYD'S, as subrogee of SRI Monroe Street Venture, LLC (hereafter 'LLOYDS') as Plaintiffs. At ¶45, subrogors allege the terms of the insurance policy allow the companies to be subrogated to claims to the extent of such payment. (See Fourth Amended Complaint, ¶¶ 45-46). Subrogors then allege, prior to the **August 31, 2009** dissolution of SRI, "an assignment occurred whereby Fund Six acquired all the rights and obligations" of SRI through a "Undertaking Regarding Dissolution and Liquidation of SRI Monroe Street Venture, LLC" agreement (hereafter, 'DISSOLUTION UNDERTAKING'). (See Fourth Amended Complaint, ¶48; Exhibit '1', DISSOLUTION UNDERTAKING). Subrogors further allege through

SUBROGATION RECEIPTS "Fund Six assigned and transferred to GREAT LAKES/LLOYDS all claims and causes of action SRI had. (See Fourth Amended Complaint, ¶¶49, 50).

15. Subrogors supply the **December 12, 2011** Ronnie E. Ragoff Affidavit to say he knows SRI's intent and that it was in the **August 31, 2009** DISSOLUTION UNDERTAKING where SRI's assigned "rights and obligations" to Fund Six. The untitled **December 16, 2011** GREAT LAKES SUBROGATION RECEIPT says *on July 25, 2007, Fund Six was the assignee of SRI*. The RECEIPT further states on **December 16, 2011**, Fund Six transferred all claims to GREAT LAKES. (See Exhibit '6', GREAT LAKES SUBROGATION RECEIPT). The untitled **December 16, 2011** LLOYDS SUBROGATION RECEIPT states *on July 25, 2007, Fund Six was the assignee of SRI*. This RECEIPT further states, on **December 16, 2011**, Fund Six transferred all claims to LLOYDS. (See Exhibit '7', LLOYDS SUBROGATION RECEIPT).

II
OWNERSHIP OF 500 WEST MONROE STREET AND THE SHORENSTEIN
REALTY SERVICES, L.P. ENGINEERING SERVICES AGREEMENT

1. On **November 1, 2005**, Shorenstein Realty Services, L.P., on behalf of the OWNER: SRI signed the Shorenstein Realty Services, L.P. AGREEMENT with CONTRACTOR: CROWN, the terms of which ran from **November 1, 2005** to **October 31, 2007**. (See Exhibit '4', AGREEMENT). The AGREEMENT is between the owner, SRI, and the contractor, ABLE. (See Exhibit '4', AGREEMENT , pg. 20).

2. The Trustee's Deed confirms on **March 28, 2007**, 500 West Monroe was owned by SRI. (See Exhibit 'A', **January 29, 2002** Trustee's Deed). On **July 11, 2007**, by Special Warranty Deed, SRI sold 500 West Monroe to Broadway 500 West Monroe Fee, LLC, a Delaware limited liability company. (See Fourth Amended Complaint, ¶20; Exhibit 'B', **July 11, 2007** Special Warranty Deed). *§14.1.1 of the AGREEMENT allowed SRI to assign the AGREEMENT only to the successor owner, then Broadway 500 West Monroe Fee, LLC, and not Fund Six.* (See Exhibit '4', AGREEMENT, §14.1).

3. Further, §14.6 of the AGREEMENT says the AGREEMENT shall not be deemed to confer any rights to any person or entity other than the parties hereto. (See Exhibit '4', AGREEMENT, §14.6).

III

PURSUANT TO 735 ILCS 5/2-615(a) GREAT LAKES/LLOYDS' FOURTH AMENDED SUBROGATION COMPLAINT IS INSUFFICIENT AS A MATTER OF LAW TO ESTABLISH BREACH OF CONTRACT

1. To plead breach of contract, plaintiffs must allege an offer and acceptance, consideration, definite and certain terms of the contract, plaintiffs' performance of all required contingent conditions, defendant's breach of the terms of the contract, and damages resulting from the breach. *Browning v. Eckland Consultants, Inc.*, 2004 WL 2687961 (1st Dist. 2004); S.C.R. 133(c); (See also: *Akinyemi v. JP Morgan Chase Bank, N.A.*, 391 Ill.App.3d 334, 908 N.E.2d 163 (1st Dist. 2009)). GREAT LAKES/LLOYDS do not plead facts sufficient to establish the elements for a cause of action for a breach of contract. Similarly, GREAT LAKES/LLOYDS do not plead sufficient facts establishing their standing to enforce the AGREEMENT, to which they cannot establish an assignment of the AGREEMENT by SRI to Fund Six. *Browning*, 2004 WL 2687961 (1st Dist. 2004).

2. Inadequate facts are alleged SRI assigned the AGREEMENT, or any causes of action SRI had against ABLE for breach of contract to anyone prior to the **July 11, 2007** sale of the 500 West Monroe to Broadway 500 West Monroe Fee, LLC and prior to the **August 31, 2009** dissolution of SRI. (See Fourth Amended Complaint, ¶¶45-50; Exhibit '1', DISSOLUTION UNDERTAKING).

3. The Fourth Amended Subrogation Complaint for breach of the AGREEMENT is based on unverified circumstances that on an undisclosed date, SRI assigned unspecified "rights to enforce claims" for breach of contract against third-parties to Fund Six (See Fourth Amended Complaint, ¶48). The Fourth Amended Complaint asserts "prior to the [**August, 2009**] dissolution of SRI, and assignment occurred whereby Fund Six acquired "all the rights and obligations" of SRI pursuant to a DISSOLUTION UNDERTAKING. (See Fourth Amended Complaint, ¶48). *The subrogors do not and cannot attach any written assignment by SRI of the AGREEMENT to Fund Six because 500 West Monroe was sold to Broadway 500 West Monroe Fee, LLC in July, 2007.* (See Fourth Amended Complaint, ¶20; Exhibit 'B', **July 11, 2007** Special Warranty Deed). Nothing, either in the DISSOLUTION UNDERTAKING, ASSIGNMENT OF CLAIMS, or SUBROGATION RECEIPTS shows SRI assigned the AGREEMENT to Fund Six. Knowing full well, 500 West Monroe was sold on **July 11, 2007**, the complaint makes

no factual reference the AGREEMENT was assigned by SRI to Fund Six; no factual reference SRI assigned any remedy under the AGREEMENT of any type against CROWN/ABLE to Fund Six; and no verified factual reference SRI intended to assign the AGREEMENT to Fund Six.

4. In violation of S.C.R. 191 and 735 ILCS 5/2-1103 GREAT LAKES/LLOYDS offers the **December 16, 2012** Ronnie E. Ragoff Affidavit to 'conclude' the 'intent' of the **August 31, 2009** SRI DISSOLUTION UNDERTAKING was to allow Fund Six to acquire SRI's rights and obligations. (See Exhibit '5', Affidavit of Ronnie E. Ragoff). The alleged SRI assignment to Fund Six must be based on the SRI assignment agreement, not parol testimony contained in an affidavit construing the **August 31, 2009** DISSOLUTION UNDERTAKING. (See Exhibit '1', DISSOLUTION UNDERTAKING; Exhibit '5', Affidavit of Ronnie E. Ragoff). In order to use Ronnie E. Ragoff Affidavit, the subrogors must plead the original SRI assignment is ambiguous and/or the DISSOLUTION UNDERTAKING is ambiguous and susceptible to more than one 'reasonable construction'. There is no such showing. The Ronnie E. Ragoff Affidavit is used to show the "intent" of SRI and Fund Six without any showing any written assignment is ambiguous. Additionally, The Ronnie E. Ragoff statements do no show he reviewed the complete DISSOLUTION UNDERTAKING, which would include the Delaware LLC Agreement. The Ronnie E. Ragoff Affidavit cannot be considered and cannot be used in place of any alleged original assignment by SRI to Fund Six. *Owens v. McDermott, Will & Emery*, 316 Ill App. 3d 340, 736 N.E.2d 145, 155, 249 Ill. Dec 303 (1st Dist. 1990).

5. Consistent with 735 ILCS 5/2-606, subrogees' claim is based on the "acquirement of SRI's rights and obligations" from SRI by Fund Six. The written SRI assignment of the AGREEMENT to Fund Six is not specifically discussed, nor attached to the Fourth Amended Complaint. Without the SRI assignment (if it exists), the subrogees cannot factually establish what, if anything, was assigned by SRI to Fund Six. The subrogees have failed to factually allege and verify the date SRI assigned the AGREEMENT to Fund Six, who on behalf of SRI signed it, the consideration paid, sufficient information to identify what interest was assigned, and competent evidence SRI intended to assign the AGREEMENT to Fund Six. No facts are alleged identifying the existence of the original SRI assignment or why the assignment is not attached to the Complaint. In addition to the underlying AGREEMENT,

the SRI assignment showing ownership of the claim by GREAT LAKES/LLOYDS is a document on which the action is founded. See 735 ILCS 5/2-606. If the SRI assignment is not attached to the Fourth Amended Complaint, the Complaint must be dismissed. *Candice Co., Inc. v. Ricketts*, 281 Ill. App. 3d 359, 666 N.E.2d 722, 735 (1st Dist. 1996). [Contract and assignment must be attached to complaint or complaint is subject to dismissal.] *Candice*, 666 N.E.2d at 725.

6. GREAT LAKES and LLOYDS then offers unverified SUBROGATION RECEIPTS to say Fund Six was assignee of SRI on **July 25, 2007**, not **August 31, 2009**. (See Exhibit '6', GREAT LAKES SUBROGATION RECEIPT; Exhibit '7', LLOYDS SUBROGATION RECEIPT). Here, neither GREAT LAKES nor LLOYDS signed the AGREEMENT with CROWN. Missing from the Fourth Amended Complaint are factual allegations that SRI assigned the AGREEMENT to Fund Six before SRI sold of 500 West Monroe to Broadway 500 West Monroe Fee, LLC. Instead, GREAT LAKES/LLOYDS base their breach of contract claim on an argument that SRI assigned SRI's rights to sue "third parties" to Fund Six.

7. Under 735 ILCS 5/2-403 (a), GREAT LAKES/LLOYDS, as the alleged assignee of the AGREEMENT from SRI, are required to verify under oath when they became the bona fide owner of the SRI claim for breach of the AGREEMENT against CROWN. The Ronnie E. Ragoff Affidavit, DISSOLUTION UNDERTAKING, ASSIGNMENT OF CLAIMS and SUBROGATION RECEIPTS are not substitutes for assignees' verification under oath explaining how and when GREAT LAKES/LLOYDS became the assignee of SRI's claim.

8. GREAT LAKES/LLOYDS also fails to provide a verified pleading establishing when they became the subrogee of SRI's breach of contract action against CROWN. Specifically, 735 ILCS 5/2-403(c) says:

Any action hereafter brought by virtue of the subrogation provision of any contract or by virtue of subrogation by operation of law shall be brought either in the name or for the use of the subrogee; and the subrogee shall in his or her pleading on oath, or by his or her affidavit if pleading is not required, allege that he or she is the actual bona fide subrogee and set forth how and when he or she became subrogee.

Other than alleging the right of subrogation, the Fourth Amended Complaint makes no factual showing how the right to subrogate on the insured's contract inures to GREAT LAKES/LLOYDS benefit.

IV
PLAINTIFFS' FOURTH AMENDED COMPLAINT SHOULD BE DISMISSED PURSUANT TO 735 ILCS 5/2-615 BECAUSE GREAT LAKES/LLOYDS HAVE FAILED TO FACTUALLY ESTABLISH A VALID ASSIGNMENT.

1. On August 31, 2009, after the July 11, 2007 sale of 500 West Monroe, SRI was dissolved. (See Fourth Amended Complaint, ¶21; Exhibit '1', DISSOLUTION UNDERTAKING). Plaintiffs claim that upon dissolution of SRI, and pursuant to the DISSOLUTION UNDERTAKING, Fund Six assumed the rights and obligation of SRI, including rights to subrogate on the AGREEMENT. (See Fourth Amended Complaint, ¶22, 48; Exhibit '1', DISSOLUTION UNDERTAKING). However, nowhere in the DISSOLUTION UNDERTAKING does it state SRI assigned any rights to subrogate on the AGREEMENT between SRI and CROWN. The DISSOLUTION UNDERTAKING is based on a Delaware LLC Agreement, not provided. Further, nothing in the Fourth Amended Complaint, exhibit 2, shows Fund Six was the subrogee insured.

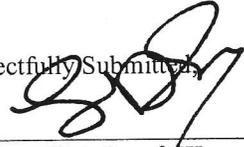
2. Subrogors cannot establish an assignment of the AGREEMENT by SRI to Fund Six. An assignment is a transfer of some identifiable property claim or right from the assignor (SRI) to assignee (Fund Six). Assignments are void unless the assignor has the thing he intends to assign. *Litwin v. Timbercrest Estates, Inc.*, 37 Ill. App. 3d 956, 347 N.E.2d 378 (1st Dist. 1976). None of the complaint allegations factually establish the AGREEMENT is the subject of any assignment. (See Fourth Amended Complaint, ¶¶ 45-49). Here, there is no recitation to consideration, no reference to the AGREEMENT, no reference to assignment of causes for breach of the AGREEMENT, no reference to CROWN, and no reference that it was SRI's intent to allow Fund Six to obtain breach of contractual claims against CROWN. *Browning v. Eckland Consultants, Inc.*, 2004 WL 2687961 (1st Dist. 2004). No factual averment is made establishing any potential claim for breach of the AGREEMENT between SRI and CROWN was assigned to Fund Six. *Browning v. Eckland Consultants, Inc.*, 2004 WL 2687961 (1st Dist. 2004).

3. Plaintiffs further argue the assignment of rights to subrogate on the AGREEMENT between SRI and ABLE was pursuant to the "intent" of the parties and the DISSOLUTION UNDERTAKING. (See Fourth Amended Complaint, ¶48; Exhibit '1', DISSOLUTION UNDERTAKING; Exhibit '5', Affidavit of Ronnie E. Ragoff). If the language of the DISSOLUTION UNDERTAKING is clear and unambiguous, the intent of the parties must be determined solely from the language of the DISSOLUTION UNDERTAKING itself, which should be given

its plain and ordinary meaning, and the DISSOLUTION UNDERTAKING should be enforced as written. No extrinsic evidence can be used to show that parties intended something else. *Owens v. McDermott, Will & Emery*, 316 Ill App. 3d 340, 736 N.E.2d 145, 249 Ill. Dec 303 (1st Dist. 1990). Here, the language of the DISSOLUTION UNDERTAKING is clear and unambiguous. No assignment by SRI to Fund Six has been offered. The DISSOLUTION UNDERTAKING is not signed by SRI. No reference whatsoever is made of an assignment of the AGREEMENT, or causes of action for breach of the AGREEMENT. (See Exhibit '1', DISSOLUTION UNDERTAKING, ¶¶5-7).

WHEREFORE, pursuant to 735 ILCS 5/2-615, CROWN respectfully requests dismissal of the Fourth Amended Complaint with prejudice and to allow no further complaint amendments.

Respectfully Submitted,

By: 

Lowell D. Snorf, III
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d/b/a Able Engineering Services

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