

**SUPREME COURT OF THE STATE OF NEW YORK
 NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES
Justice

PART 59

**GREAT AMERICAN INSURANCE COMPANY OF NEW YORK
 INC.,**

INDEX NO. 653172/2014

Plaintiff,

MOTION DATE _____

- v -

MOTION SEQ. NO. 001

DAVID REIS,

JUDGMENT

Defendant.

The following e-filed documents, listed by NYSCEF document number 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 were read on this application to/for _____.

Upon the foregoing documents, it is

ORDERED that the defendant's cross motion for summary judgment is denied and the plaintiff's motion for summary judgment on the complaint is granted, and the Clerk is directed to enter judgment in favor of plaintiff and against defendant in the sum of \$ 77,442.50 , with interest at the rate of 9 % per annum from the date of December 10, 2010 , until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk.

Both parties agree that the Nicholas Yacht Yard bailment agreement (Bailment Agreement) between them provided, in pertinent part:

"4. Licensee [defendant] agrees to have his boat completely insured, including liability, collision, and fire and extended coverage. Each insurer shall waive subrogation. Each Licensee will be held responsible for damage he causes to other boats in the Marina or to

the structure or facilities thereof whether caused by negligence or not. Nichols assumes no responsibility for the safety of any boat at the Marina and shall not be responsible for loss or damage to person or property due to wind, waves, theft, collision, chafing, vandalism, fire, or any other cause, unless due to the negligence of the Marina or its employees acting in the performance of their duties. ***

34. Licensee shall adhere to all environmental laws and shall keep the lands and waters of the marina clean and free from human and animal waste, oil and fuel spills and other toxic products identified by Federal, State and local governments.”

Attached to plaintiff’s supporting papers is a report dated January 10, 2011, signed and certified by a Marine Surveyor, which states as to Cause of Loss: “Cause of loss is a broken sight glass tube from what appears to be vibrations. The poor design of the fuel system did contribute to the loss.” Also, attached to plaintiff’s moving papers is a report dated February 15, 2011, signed and certified by another Marine Surveyor, who found, inter alia,

“It appears that a design flaw in the fuel tank sight gage [sic] caused the oil to leak out of SCENIC ROUTE’s fuel tank. The sight gage [sic] is composed of a clear plastic tube with a sender unit suspended within the tube. It appears that the sender unit was able to move like a pendulum within the tube as the boat responded to sea conditions. The movement appears to have etched a groove in the plastic tube and that the tube eventually fractured resulting in the fuel leak***Damage as described above considered being the result of a fuel leak originating within the third-party yacht SCENIC ROUTE. The leak occurred due to a flaw in the design of a fuel tank sight gage [sic]. The tank’s fuel leaked into the boat’s bilges and was pumped overboard by the boat’s automatic bilge pumps resulting in contamination”.

In his cross motion, defendant comes forward with no evidence that rebuts plaintiff’s prima facie expert opinion evidence as to the cause of the fuel tank leak from defendant’s boat, i.e., a poorly designed fuel sight gauge. Furthermore, this court disagrees with defendant that the waiver of subrogation operates to bar plaintiff’s claim. As the Appellate Division, First Department, stated, after review of the subrogation waiver language in the agreement before it in Viacom Intern, Inc., v Midtown Realty Co., (193 AD2d 45, 53-54 [1st Dept. 1993])

“As St. Paul [Fire & Marine Ins. Co v Protection Mutual Inc Co., 644 F Sup 38] recognized with respect to this particular clause, the waiver is limited to subrogation claims premised on tort liability. *** By its express terms, paragraph 44 relates to third-

party claims against [landlord] arising out of [tenant's] possession, use or control of the demised premises, not to the claims of the parties, inter se. Thus, since the waiver of subrogation clause does not bar the claim, the defendant insurers should be permitted to assert a cross-claim in subrogation based on [the landlord's] breach of its contractual obligation to repair the damaged leasehold improvements.”

So too here, the waiver of subrogation clause at bar pertains to actions by third parties against either party for damages to their vessels or the structures or facilities of such vessels. In failing to maintain or service the fuel sight gauge of his boat that caused the fuel tank leak on the lands of the Marina, defendant breached paragraph 34 of the Bailment Agreement, and plaintiff insurer is entitled to recover in this action for subrogation with respect to such breach.

7/27/2017
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	