2020 IL App (1st) 192422-U

SIXTH DIVISION
December 24, 2020

No. 1-19-2422

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HARTFORD FIRE INSURANCE COMPANY, a/s/o THE SECOND CITY, THE SECOND CITY, INC., WEST BEND MUTUAL INSURANCE COMPANY a/s/o FLEET FEET SPORTS DEVELOPMENT COMPANY, Plaintiffs, (Hartford Fire Insurance Company, a/s/o The Second City, Plaintiff-Appellee) v. ADOBO LIMITED PARTNERSHIP, an Illinois limited partnership, ACTION FIRE EQUIPMENT, INC., and AVERUS, INC., Defendants, (Averus, Inc., Defendant-Appellant) AVERUS, INC., Third-Party Plaintiff-Appellant, v. OLD TOWN DEVELOPMENT ASSOCIATES,	Appeal from the Circuit Court of Cook County. Nos. 16 L 011363 17 L 001010 Honorable Allen P. Walker, Judge Presiding.

)
Third-Party Defendant-Appellee.)

JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Oden Johnson concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court properly granted summary judgment in favor of third-party defendant-appellee Old Town Development Associates and against third-party plaintiff-appellant Averus, Inc. on a contribution claim because Old Town Development Associates was not liable to the original plaintiffs (Hartford Fire Insurance Company as subrogee of The Second City and West Bend Mutual Insurance as subrogee of Fleet Feet Sports Development Co.) under the Joint Tortfeasor Contribution Act; circuit court did not abuse its discretion when it granted plaintiffs' and Old Town Development Associates' joint motion for good faith finding as to their settlement agreement; affirmed.

¶ 2 Defendant-Third Party Plaintiff, Averus, Inc. (Averus), appeals an order of the circuit court that 1) granted summary judgment to third-party defendant, Old Town Development Associates, LLC (Old Town), on Averus's third-party complaint for contribution against Old Town and 2) granted Old Town and Plaintiffs' Hartford Fire Insurance Company as subrogee of The Second City (Hartford) and West Bend Mutual Insurance as subrogee of Fleet Feet Sports Development Co. (West Bend) Joint Motion for Good Faith Finding.

¶ 3 On appeal, Averus contends that summary judgment on its contribution claim against Old Town was improper because Old Town was subject to liability in tort to plaintiffs under the Joint Tortfeasor Contribution Act (740 ILCS 100/2) (West 2018)). Averus argues that Old Town was liable in tort to plaintiffs because 1) the mutual waiver provisions in the lease agreements between plaintiffs and Old Town that waived all claims against Old Town did not vitiate Old Town's common law duty to plaintiffs to provide reasonably safe premises and 2) the anti-subrogation rule is an affirmative defense that presupposes that Old Town was liable to plaintiffs in tort. Averus further contends that because summary judgment was improper, we should also

reverse the circuit court's order granting plaintiffs' and Old Town's joint motion for good faith finding. Averus argues that the settlement between plaintiffs and Old Town was not made in good faith. We affirm.

¶ 4 I. BACKGROUND

¶ 5 This consolidated case arose from a fire that occurred at an Adobo Grill restaurant located inside a building known as Piper's Alley located at 1618-1620 North Wells Street, in Chicago. Old Town was Adobo Grill's landlord and the owner of the building. The fire caused damage to parts of the building leased by other tenants, including The Second City (Second City), Fleet Feet Sports Development Co. (Fleet Feet), and a Chipotle Mexican Grill, Inc. (Chipotle) restaurant.

¶ 6 In case No. 16 L 11363 (Hartford case), plaintiffs, Hartford and West Bend, filed a complaint based on negligence against defendants Adobo Limited Partnership (Adobo), who owned Adobo Grill, Action Fire Equipment, Inc. (Action Fire), a fire cleaning and maintenance company that inspected and serviced the fire suppression equipment at Adobo Grill, and Averus, a kitchen-hood cleaning company that cleaned Adobo Grill's vent hoods and ductwork. Plaintiffs did not assert any claims against the owner and landlord of the building, Old Town. In case No. 2017 L 1010 (Philadelphia case), plaintiff, Philadelphia Indemnity Insurance Company as subrogee of Old Town (Philadelphia), filed a complaint based on negligence against Averus and Action Fire, alleging similar allegations as plaintiffs alleged in the Hartford case. In the Philadelphia case, Averus also filed a third-party complaint for contribution against Adobo. The court consolidated the Hartford and Philadelphia cases for discovery and trial purposes.[1]

[1] In March 2019, the court granted Adobo's motion for a good faith finding as to a settlement agreement with all the plaintiffs in the Hartford case. In April 2019, the court granted Action Fire's motion for good faith finding as to a settlement agreement with plaintiffs in both cases.

¶ 7 Hartford Case – Plaintiffs' Complaint

¶ 8 Plaintiffs' complaint asserted negligence claims against Adobo, Action Fire, and Averus and alleged as follows. In August 2015, a fire occurred at an Adobo Grill located inside the building owned by Old Town, which caused substantial damage to parts of the building leased by Second City and Fleet Feet. Pursuant to Second City and Fleet Feet's insurance policies with, respectively, Hartford and West Bend, as well as these companies' payment of claims, Hartford was subrogated to the rights of Second City and West Bend was subrogated to the rights of Fleet Feet.[2]

¶ 9 Plaintiffs' complaint alleged negligence claims against Adobo and Action Fire as follows. Adobo failed to timely respond to the fire and negligently 1) trained employees on the proper use of kitchen and fire suppression equipment; 2) cleaned and maintained the kitchen and fire suppression equipment; and 3) used the cooking and fire suppression equipment on the date of the fire. Action Fire negligently installed, serviced, and maintained the wet chemical equipment and handheld fire extinguishers located in Adobo Grill's kitchen and failed to advise Adobo Grill of the problems and defects regarding its wet chemical system and fire extinguishers.

¶ 10 Plaintiffs' complaint alleged a negligence claim against Averus as follows. Averus negligently cleaned the subject ductwork and failed to follow the appliable codes with respect to cleaning and maintaining the ductwork. Averus failed to recommend to Adobo Grill that the ductwork be cleaned more than two times each year and failed to inform Adobo Grill of certain defects in the ductwork, including the lack of proper clearance to combustibles. Averus failed to ensure that Adobo Grill understood the recommendations and warnings contained in its service

[2] In a subrogation action, plaintiffs, the insurers, step into the shoes of their insureds, Second City and Fleet Feet. See *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (2006) ("a subrogee merely succeeds to the legal rights or claims of a subrogor)".

reports and continued to service and clean Averus'ssystem knowing it could not be properly cleaned. Averus negligently certified the safety of the system. As a direct result of Averus's actions, the fire ignited and caused damages to the premises leased by Second City and Fleet Feet.

¶ 11 Third-Party Complaint for Contribution

¶ 12 Averus subsequently filed a third-party complaint for contribution against Old Town under the Joint Tortfeasors Contribution Act (Act) (740 ILCS 100/2 (West 2018)). Averus alleged as follows. Old Town was a direct and proximate cause of the subject fire because it, *inter alia*, failed to ensure the building complied with the applicable safety codes. Old Town was negligent when it permitted commercial kitchen grease ducts that did not have proper clearance to combustibles and were not made with a continuous liquid-tight weld or braze on the external surface of the duct system, which were violations of the Chicago Municipal Code. Old Town failed to advise Adobo Grill, Second City, and Fleet Feet of certain defects in the ductwork, including, *inter alia*, the lack of proper clearance to combustibles and the use of unwelded seams located throughout the ductwork. With respect to remodeling work completed in 1998 on Adobo Grill's hood and ductwork system, Old Town failed to properly examine Adobo's plans and specifications and approved plans that were not in compliance with the applicable codes and standards. Old Town's acts and omissions were a direct and proximate cause of plaintiffs' injuries and, if judgment was entered against Averus, then Averus was entitled to contribution against Old Town under the Act.

¶ 13 Old Town filed a motion to dismiss Averus's third-party complaint for contribution based on section 2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-619 (West 2018)). Averus alleged that under the terms of lease agreements between Old Town and Fleet Feet and Old Town and Second City, Second City and Fleet Feet were required to obtain liability insurance

naming Old Town as an additional insured and that, as an additional insured, Old Town was not liable to plaintiffs, the insurers, in a subrogation action. Old Town also argued that the lease agreements contained mutual waiver of liability provisions that waived Old Town's liability in the event of certain circumstances, including disrepair of equipment and Old Town's failure to keep the building in repair. Old Town argued that, based on the anti-subrogation rule and liability waivers contained in the leases, Old Town was not subject to liability in tort to plaintiffs in the underlying action and that, therefore, Averus could not seek contribution from Old Town under the Act.

¶ 14 In response to Old Town's motion to dismiss the contribution claim, Averus argued that the anti-subrogation rule was inapplicable to Averus and that Old Town's immunity from direct action against plaintiffs did not prevent Averus from asserting a third-party action against Old Town. Following a hearing, the court denied Old Town's motion to dismiss.

¶ 15 Old Town's Affirmative Defense to Averus's Contribution Claim

¶ 16 Old Town subsequently filed its answer to Averus's third-party complaint for contribution and alleged one affirmative defense based on the provisions in the leases it had with Second City and Fleet Feet. Old Town's lease agreements with Second City and Fleet Feet were similar, and Old Town cited certain provisions contained in section 9 of the leases. Section 9.1.1. entitled "Tenant" stated as follows:

> "Tenant, at Tenant's expense, *** shall maintain in force with responsible companies approved by Landlord and in amounts from time to time approved or requested by Landlord: *** (v) fire insurance with extended coverage endorsements including, but not limited to, vandalism and malicious mischief, covering all equipment installed by Tenant in the Premises, all of Tenant's Work and all of Tenant's stock in trade, trade fixtures,

furniture, furnishings and floor coverings in the Premises to the extent of one hundred (100%) of their replacement cost and naming Landlord, Landlord's agents and Landlord's mortagee(s), if any, as additional insureds***"..

Section 9.3 entitled "Mutual Waiver of Right of Recovery" stated:

"Each party hereto hereby waives all claims for recovery from the other party for any loss or damage to any of its property or resulting loss of income or losses under worker's compensation laws or benefits insured under valid and collectible insurance policies to the extent of any proceeds collected under such insurance, subject to the limitation that this waiver shall apply only when it is either permitted by or, by the use of such good faith efforts (including the payment of a reasonable additional premium), could have been so permitted by the applicable policy of insurance. The parties hereto further agree to use good faith efforts to have any and all fire, extended coverage or any and all material damage insurance which may be carried endorsed *** with the following *** subrogation clause: 'This insurance shall not be invalidated should the insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the property described herein.' "

Section 9.4 entitled "Waiver of Landlord's Liability" stated:

"To the extent permitted by law, Landlord and Landlord's agents and employees, including but not limited to, the managing agent(s) for [Piper's Alley] and all employees of said managing agent(s), shall not be liable for, and Tenant waives all claims for, damage to persons or property sustained by Tenant or any person claiming through Tenant resulting from any accident or occurrence in or upon the Premises or the Building or any part of the Property or any adjacent property or any property under the control of the Landlord,

> including, but not limited to, claims for direct and/or consequential damage resulting from: (i) any equipment or appurtenances becoming out of repair; (ii) the Landlord's failure to keep the Building or the Property in repair; (iii) injury done or occasioned by wind, water, or other natural element; (iv) any defect in or failure of plumbing, heating or air conditioning equipment, electrical wiring or installation thereof, gas, water, and steam pipes, stairs, porches, railings, walks, piers, escalators or elevators; *** (xi) any act, omission or negligence of co-tenants or of other persons or occupants of the Building or adjoining buildings, or of owners of adjacent or contiguous property or of Landlord or its agents and employees. Nothing contained in this Section 9.4 shall, however, be deemed or construed as indemnification of Landlord or its agents, servants or employees of their own negligence."

Old Town alleged that based on these lease provisions that required Second City and Fleet Feet to name Old Town as an additional insured and that waived Old Town's liability, any right of subrogation was waived, and Old Town was not subject to liability to plaintiffs and their insureds. Old Town therefore argued that because it was not subject to liability in tort to plaintiffs, it was not liable to Averus in contribution under the Act.

¶ 17 Old Town's Motion for Summary Judgment

¶ 18 In July 2019, Old Town filed a motion for summary judgment against Averus's third-party complaint for contribution in the Hartford case. Old Town attached the leases it had with Second City and Fleet Feet and recited the same provisions it had included in its motion to dismiss and affirmative defense. Old Town argued that, based on the anti-subrogation rule and liability waivers contained in the leases between Old Town and Second City and Fleet Feet, plaintiffs could not recover from and were prevented from pursuing claims against Old Town. Old Town argued

that because plaintiffs could never recover from and pursue claims against Old Town, Old Town was not liable in tort to plaintiffs. Old Town therefore argued that because it was not liable to the underlying plaintiffs, it was not liable to Averus for contribution and the court should enter summary judgment against Averus on its contribution claim.

¶ 19 In response, Averus argued that Old Town's arguments in its motion for summary judgment were identical to the arguments Old Town made in its motion to dismiss, which the court denied. Averus argued that the court had previously decided that the anti-subrogation rule and the liability waivers contained in the leases did not bar Averus's contribution claim against Old Town.

¶ 20 Old Town's and Plaintiffs' Joint Motion for Good Faith Finding

¶ 21 In October 2019, Old Town, Hartford, West Bend, as well as intervenor-petitioners Harleysville, and Chipotle filed a joint motion for good faith finding as to a settlement agreement. The parties attached to the motion the "Full Release of All Claims," which set forth the terms of the agreement. In the motion, the parties asserted that Old Town "negotiated a settlement of its disputed contributory negligence" in consideration of payment by its insurer, Philadelphia, in the amount of $15,000, which was allocated to plaintiffs/petitioners as follows: $10,000 for Hartford, $2,000 for West Bend, $1,000 for Chipotle, and $2,000 for Harleysville. In the motion, the parties argued, *inter alia*, that Old Town was not subject to liability in tort to plaintiffs and that, therefore, Old Town was not liable to Averus for contribution under the Act. The parties asserted that the settlement was made in good faith given Old Town's lack of liability in tort to plaintiffs and in contribution to Averus.

¶ 22 In Averus's objections to the motion for good faith finding, it asserted that following the settlements agreements that plaintiffs entered into with Adobo and Action Fire, the remaining amount in controversy was $21 million. Averus argued that Old Town's $15,000 settlement

compared to its $21 million liability exposure and its $1 million insurance coverage showed the absence of good faith. Averus argued that the relationship between the settling parties was also evidence of bad faith and that the agreement was designed to "wrongfully extinguish Averus's contribution rights against Old Town." Averus further contended that Old Town's liability was clear, asserting that it was the premises owner and it allowed dangerous conditions on the premises, including issues with the ductwork. Averus argued that Old Town's lease with Adobo provided a detailed 13-step procedure that allowed Old Town to inspect Adobo Grill's construction and that Old Town failed to ensure that the Adobo Grill buildout was built in accordance with the plans and specifications.

¶ 23 Averus argued that its expert, Allan Snyder, President of AFC Forensic Consulting, opined that Old Town allowed a dangerous condition on its premises and that Old Town breached its duty to provide a reasonably safe premises. Averus attached a report prepared by Snyder, wherein he concluded that Old Town had a "non-delegable Duty to maintain reasonably safe premises" of the building and that the lease between Old Town and Adobo Grill included "management and control procedures to ensure that the architectural plans and the construction" of Adobo Grill's work was reviewed and approved in writing by Old Town multiple times before Adobo opened for business. Snyder concluded that Old Town "allowed Adobo to open for business with multiple uncorrected fire safety deficiencies."

¶ 24 Averus also attached to its objection a report prepared by plaintiffs' expert, Joseph G. Leane, P.E., C.F.L, a licensed professional engineer. Leane's report stated that his firm was requested to conduct a mechanical engineering investigation of the fire and that he investigated Adobo Grill's kitchen exhaust hood and duct system. Leane examined photographs that were taken by Averus during their cleaning work before the fire and he concluded that the photographs

depicted defective and unsafe conditions of the exhaust duct that created a dangerous fire hazard, including, *inter alia*, inadequate duct access for cleaning, grease filters arranged so that not all exhaust air passed through them, and inadequate clearance to combustible framing seams that were not continuously welded.

¶ 25 Hearing on Old Town's Motion for Summary Judgment and the Joint Motion for Good Faith Finding

¶ 26 In November 2019, the court held a hearing on Old Town's motion for summary judgment and on the joint motion for good faith finding. At the beginning of the hearing, Old Town's counsel requested the court start with the joint motion for good faith finding before the motion for summary judgment. The court responded that it wanted to discuss the motion for summary judgment first. Following argument on the motion for summary judgment, the court granted Old Town's motion. In doing so, it noted that, based on the lease provisions that waived liability and required Old Town to be co-insured on plaintiffs' insurance policies, Old Town was not liable. The court stated that a motion to dismiss based on section 2-619 required a different standard than a motion for summary judgment.

¶ 27 The parties then presented arguments on the joint motion for good faith finding. Old Town's counsel informed the court that when the summary judgment motion was pending, the settling parties reached a settlement agreement. Counsel told the court that the settlement was "not an admission of any liability or fault" and that it was "a means on my end for us to be removed from this case and not spend any further time or expense defending Old Town when, obviously, our position is that Old Town is not liable in tort to the plaintiffs."

¶ 28 Hartford's counsel argued that, based on the lease provisions, Hartford could not recover from Old Town and that "any recovery that the plaintiffs were able to obtain against Old

Town is infinitely better than what we are actually legally allowed to recover based on the application of the waivers of liability and the contract." Counsel further told the court that its "chances of recovery against Old Town were nil; *** after all the discovery has been taken, that there was no chance of recovery against Old Town based on the contractual bars." The court granted the joint motion for good faith finding. In doing so, the court stated as follows:

> "The Court looks at the case in its totality. And given the Court's prior ruling on the motion for summary judgment as to the issue of liability, the Court thinks that there is no bad faith between the settling parties and, therefore, is going to grant the motion for good faith finding, notwithstanding the—I think it's a total of $15,000 settlement versus the insurance proceeds. But again, *** since the Court, *** on the motion for summary judgment, found that—granted the motion for summary judgment based on liability, I think that arises out of the waiver of the leases and the additional insured doctrine. The Court thinks that in light of that, the probability of recovery is not very great; and therefore, the Court does not find the settlement to be in bad faith."

¶ 29 In the court's oral findings, it found that its rulings on the motion for summary judgment and joint motion for good faith finding were final and appealable and, in the court's November 12, 2019, written order, the court stated that the rulings were "final and appealable pursuant to Rule 304(a)." The court subsequently entered a *nunc pro tunc* order, stating that pursuant to the court's November 12, 2019, finding, the court further found "that there is no just reason for delaying either enforcement or appeal or both." The trial court subsequently entered an order placing the case on the "Stay Calendar." This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 Motion for Summary Judgment

¶ 32 On appeal, Averus contends that the circuit court erred in granting Old Town's motion for summary judgment because Old Town was subject to liability in tort to plaintiffs at the time of the fire, which is when liability is determined under the Act, and was therefore liable to Averus for contribution under the Act. Averus asserts that the liability waivers in the leases and anti-subrogation rule may prevent plaintiffs from maintaining a direct action against Old Town but do not affect Averus's statutory right to bring a third-party contribution claim against Old Town. Averus asserts that the lease agreements between plaintiffs and Old Town did not extinguish Old Town's common law duty as a property owner and that the anti-subrogation rule is a judicially created affirmative defense that does not nullify Old Town's liability in tort.

¶ 33 In response, Old Town argues that Averus has no right to contribution against Old Town under the Act. Old Town asserts that because Old Town's lease agreements with Second City and Fleet Feet required Second City and Fleet Feet to name Old Town as an additional insured, plaintiffs may not recover from Old Town in subrogation and, therefore, Old Town is not liable to plaintiffs-insurers in a subrogation action. Old Town also asserts that the liability waivers contained in the leases between Old Town and Second City and Fleet Feet preclude plaintiffs from pursuing claims against Old Town. Old Town asserts that to the extent plaintiffs have waived Old Town's liability, Old Town is not liable in tort to plaintiffs because the waivers eliminate Old Town's tort liability to plaintiffs. Old Town therefore asserts that it is not liable to Averus in contribution under the Act.

¶ 34 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). In determining whether there is a genuine issue of material fact, these materials are

construed strictly against the movant and liberally in favor of the opponent. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. "A genuine issue of material fact exists when the material facts are disputed or when the material facts are undisputed but reasonable persons might draw different inferences from those undisputed facts." *State Farm Mutual Automobile Insurance Co. v. Murphy*, 2019 IL App (2d) 180154, ¶ 21. Summary judgment is a drastic means of disposing of litigation and should only be granted when the right of the moving party is clear and free from doubt. *Mashal*, 2012 IL 112341, ¶ 49. Our review of a court's summary judgment ruling is *de novo*. *Radiant Star Enterprises, L.L.C. v. Metropolis Condominium Association*, 2018 IL App (1st) 171844, ¶ 49.

¶ 35 Under the Joint Tortfeasor Contribution Act (Act) "where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them." 740 ILCS 100/2(a) (West 2018). The Act further states that the right of contribution exists "only in favor of a tortfeasor who has paid more than his pro rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro rata share." 740 ILCS 100/2(b) (West 2018). Further, "[n]o tortfeasor is liable to make contribution beyond his own pro rata share of the common liability." *Id.*

¶ 36 Under the Act, "a party's obligation to make contribution rests on his liability in tort to the injured or deceased party, *i.e.*, the plaintiff in the underlying action." *Vroegh v. J & M Forklift*, 165 Ill. 2d 523, 528-29 (1995). The Act provides "that the basis for a contribution claim is the potential liability of both the person seeking contribution and the person from whom contribution is sought." *McCombs v. Dexter*, 186 Ill. App. 3d 484, 486 (1989). Thus, "some basis for liability to the original plaintiff must exist" and "[i]f a defendant is not a tortfeasor *vis-a-vis* the original plaintiff, it cannot be a joint tortfeasor *vis-a-vis* a codefendant and may not be held liable to that

codefendant for contribution." *Vroegh*, 165 Ill. 2d at 529. Under the Act, "liability in tort has been interpreted to mean 'potential' tort liability, determined at the time of the injury to the initial plaintiff." *Raab v. Frank*, 2019 IL 124641, ¶ 21 (quoting *Doyle v. Rhodes*, 101 Ill. 2d 1, 10-11 (1984)). However, "[p]otential for tort liability exists until a defense is established." *Raab*, 2019 IL 124641, ¶ 21.

¶ 37 Initially, we note that Averus does not dispute that plaintiffs are subrogees of Second City and Fleet Feet and that plaintiffs, as subrogees, step into the shoes of Second City and Fleet Feet. Subrogation "is a creature of chancery and is a method whereby one who has involuntarily paid a debt or claim of another succeeds to the rights of the other with respect to the claim or debt paid." *Chubb Insurance Co. v. DeChambre*, 349 Ill. App. 3d 56, 60 (2004). Subrogation " 'means substitution of one person for another; that is, one person is allowed to stand in the shoes of another and assert that person's rights against the defendant.' " *Trogub v. Robinson*, 366 Ill. App. 3d 838, 842 (2006) (quoting D. Dobbs, Law of Remedies § 4.3(4), at 604 (2d ed.1993)). A subrogee has no greater rights then the subrogor and can enforce only those rights as the subrogor could enforce against the third party. *Reich v. Tharp*, 167 Ill. App. 3d 496, 501 (1987). "Where the insured is required by contract or lease to carry insurance for the benefit of another, the other party may attain the status of a coinsured, and no subrogation may be taken against such a party, in the absence of a design or fraud on the part of the coinsured." *Id*. The purpose of the anti-subrogation rule is to "prevent an insurer from recovering back from its insured that loss or damage the risk of which the insured had passed along to the insurer under the policy." *Chubb Insurance Co.*, 349 Ill. App. 3d at 62. Thus, plaintiffs-insurers, as subrogees, stand in the shoes of Second City and Fleet Feet, but they can enforce only those rights as the subrogor could enforce against the third party.

¶ 38 As previously discussed, under the Act, liability in tort " 'is determined at the time of the injury out of which the right to contribution arises.' " *Doyle*, 101 Ill. 2d at 11 (quoting *Stephens v. McBride*, 97 Ill. 2d 515, 520 (1983)). However, "[p]otential for tort liability exists until a defense is established." *Raab*, 2019 IL 124641, ¶ 21.

¶ 39 Here, after the court denied Old Town's motion to dismiss Averus's third-party complaint for contribution, Old Town filed an answer and an affirmative defense, wherein it asserted that, based on the lease provisions that waived Old Town's liability and that required Second City and Fleet Feet to name Old Town as an additional insured, Old Town was not subject to liability to plaintiffs. Thus, Old Town asserted an affirmative defense that would have defeated plaintiffs' claims against Old Town had they made them. Averus does not dispute that the lease provisions are invalid or unenforceable and acknowledges that the leases would have prevented plaintiffs from maintaining a successful action against Old Town, as it states, "the contracts merely prevented Plaintiffs from successfully suing Old Town for its alleged negligence." Accordingly, Old Town's potential for tort liability under the Contribution Act was extinguished when its defense based on the lease provisions was established. As previously discussed, under the Act, "a party's obligation to make contribution rests on his liability in tort to the injured or deceased party, *i.e.*, the plaintiff in the underlying action" and "some basis for liability to the original plaintiff must exist." *Vroegh*, 165 Ill. 2d at 528-29. Thus, because Old Town was not liable to the original plaintiffs based on the lease provisions in which the parties waived recovery and liability and required plaintiffs to name Old Town as an additional insured in their insurance policies, it was not liable to Averus in contribution under the Act. The court therefore properly granted summary judgment in favor of Old Town on Averus's contribution claim.

¶ 40 To support Averus's argument that it had a valid contribution claim against Old Town, it cites *Doyle v. Rhodes*, 101 Ill. 2d 1 (1984) and *Scott & Fetzer Co. v. Montgomery Ward & Co.*, 112 Ill. 2d 378 (1986). We find these cases distinguishable.

¶ 41 In *Doyle*, the plaintiff sued the defendant, driver of a vehicle, for injuries he received when he was struck by the vehicle while working on a highway for a highway contractor. *Doyle*, 101 Ill. 2d at 4. The defendant driver filed a third-party complaint for contribution against the highway contractor, the plaintiff's employer. *Id.* at 4-5. The circuit court granted the employer's motion to dismiss the contribution claim. *Id.* at 5. On appeal, the employer argued that, under the Worker's Compensation Act, it was not liable to the plaintiff, the employee, in tort and was therefore not subject to a contribution claim under the Contribution Act. *Id.* at 6. The supreme court reversed, concluding that under the Act "the employer's immunity from a suit in tort by its employee as plaintiff is not a bar to a claim for contribution against it by a defendant held liable to such a plaintiff." *Id.* at 14. In doing so, it found that the Worker's Compensation Act, "provides employers with a defense against any action that may be asserted against them in tort, but that defense is an affirmative one whose elements-the employment relationship and the nexus between the employment and the injury-must be established by the employer, and which is waived if not asserted by him in the trial court." *Id.* at 10. The court further stated that, "[a]t the time of an injury for which an employer's negligence is partly responsible, the employer is in fact 'subject to liability in tort' to his employee, although that liability can be defeated depending on the response he chooses to make to his employee's claim in the event the employee decides to sue in tort." *Id.* at 10–11.

¶ 42 Unlike *Doyle*, where the circuit court dismissed the third-party complaint for contribution following a motion to dismiss, here, the circuit court denied Old Town's motion to

dismiss the contribution claim, after which Old Town answered and asserted its affirmative defense based on the lease provisions that waived Old Town's liability and that required Second City and Fleet Feet to name it as an additional insured. The court then granted Old Town's motion for summary judgment based on the lease provisions. Thus, when Old Town asserted the lease provisions as an affirmative defense, its liability in tort to plaintiffs was defeated. As previously discussed, Averus does not argue that the lease provisions are invalid or unenforceable or that plaintiffs could have maintained a successful action against Old Town, as it asserts that "the contract merely prevented Plaintiffs from successfully suing Old Town for its alleged negligence" and that Old Town was liable to Averus under the Act for its pro rata share of liability "even though Plaintiffs were contractually barred from suing Old Town themselves."

¶ 43 In *Scott & Fetzer Co.*, plaintiffs-tenants filed a complaint against another tenant, Montgomery Ward & Company, Inc (Wards), after a fire occurred in the warehouse in which Wards occupied. *Scott & Fetzer Co.*, 112 Ill. 2d at 382-83. The tenants also filed a complaint against Burns Electric Security Services, Inc. (Burns), a company that had installed and maintained fire-warning systems in the portion of the building where the fire occurred. *Id.* at 382. Wards filed a third-party complaint for contribution against Burns. *Id.* at 385. On appeal, Burns argued that it was not liable in tort to the plaintiffs-adjacent tenants because it did not owe them a legal duty and that, therefore, it was not liable to Wards in contribution. *Id.* at 388, 394. Burns also argued that an exculpatory clause contained in Burns and Wards contract precluded the contribution claim. *Id.* at 394-95. The supreme court concluded that the plaintiffs had sufficiently stated a cause of action in tort against Burns and that, therefore, Burns was subject to liability in tort under the Act. *Id.* at 395. The court also concluded that the exculpatory provision in the contract between defendants Burns and Wards did not prevent Wards' contribution action. *Id.*

¶ 44 Unlike *Scott & Fetzer Co.,* where the supreme court found that the third-party defendant Burns was subject to liability in tort under the Act because plaintiffs sufficiently stated a cause of action against Burns, here, plaintiffs did not submit any claims against Old Town such that the original plaintiffs had a valid cause of action against Old Town. Rather, Old Town asserted an affirmative defense based on the lease provisions that waived Old Town's liability and required plaintiffs to name Old Town as an additional insured in their insurance policies. Thus, unlike Burns who was liable to the original plaintiffs, here, Old Town asserted a defense that defeated its liability to the original plaintiffs. Accordingly, because *Doyle* and *Scott & Fetzer Co*., are distinguishable, we are unpersuaded by Averus's reliance on them.

¶ 45 Motion for Good Faith Finding

¶ 46 Averus next contends that because we should reverse the circuit court's order granting summary judgment in favor of Old Town, we should also reverse the court's order granting Old Town and plaintiffs' joint motion for good faith finding as to the $15,000 settlement agreement. Averus claims that had the court denied Old Town's motion for summary judgment, a jury could have found that Old Town's negligence caused damages far in excess of the $15,000 settlement amount. Averus argues that the settling parties' settlement was negligible considering Old Town had significant liability and that the settlement was 1.5% of Old Town's $1 million insurance coverage policy. Averus asserts that the gap between the $21 million in remaining damages that plaintiffs sought and the $15,000 settlement amount, which was .07% of the remaining damages, demonstrates a lack of good faith. Averus argues that the settling parties' motivation for settling was to force Averus to settle for more than its equitable share of fault because, after the settlement,

Averus was the only remaining defendant and would be forced to settle with the entire amount of its $6 million insurance policy instead of risk being subject to $21 million in damages.[3]

¶ 47 The Act "clearly contemplates, and encourages, settlement by fewer than all tortfeasors who may be responsible for a single injury." *Ellis v. E.W. Bliss & Co.*, 173 Ill. App. 3d 779, 782 (1988). Section 2(c) of the Act states as follows:

> "When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater." 740 ILCS 100/2(c) (West 2018).

¶ 48 The Act promotes two important policies: the policy favoring settlement and the policy favoring the equitable apportionment of damages among tortfeasors. *Johnson v. United Airlines*, 203 Ill. 2d 121, 133, (2003). The Act " 'promotes settlement by providing that a defendant who enters a good-faith settlement with the plaintiff is discharged from any contribution liability to a nonsettling defendant.' " *Antonicelli v. Rodriguez*, 2018 IL 121943, ¶ 13 (quoting *BHI Corp. v. Litgen Concrete Cutting & Coring Co.*, 214 Ill. 2d 356, 365 (2005)). The "good faith" requirement is the only requirement the Act places on the right to settle and "it is the good-faith nature of a settlement that extinguishes the contribution liability of the settling tortfeasor." *Johnson*, 203 Ill. 2d at 128. The Act does not define the term "good faith" and there is no "precise formula" for determining what constitutes "good faith" under the Act. *Id.* at 134.

[3] In Hartford and Second City's brief, they state that Averus had $11,000,000 in primary and excess liability insurance.

¶ 49 The initial burden of showing good faith is on the settling parties. *Antonicelli*, 2018 IL 121943, ¶ 24. However, "this burden is met simply by showing that the settlement is legally valid." *Ross v. Illinois Central Railroad Co.*, 2019 IL App (1st) 181579, ¶ 26. " 'Where there is a resolution of a claim by virtue of a settlement, and the terms of the settlement are made known to the court, there has been a preliminary showing of good faith which creates a presumption of validity.' " *Palacios v. Mlot*, 2013 IL App (1st) 121416, ¶ 19 (quoting *Jessee v. Amoco Oil Co.*, 230 Ill. App. 3d 337, 346 (1992)). "If a settling party demonstrates that the settlement is supported by consideration, the settlement 'is considered *prima facie* in good faith.' " *Palacious*, 2013 IL App (1st) 121416, ¶ 20 (quoting *McDermott v. Metropolitan Sanitary District*, 240 Ill. App. 3d 1, 44 (1992)).

¶ 50 After the settling parties meet the preliminary showing, the nonsettling parties must prove the absence of good faith by a preponderance of the evidence. *Antonicelli*, 2018 IL 121943, ¶ 24. The settling parties can show the absence of good faith by demonstrating that the settlement conflicted with the terms or was inconsistent with the policies underlying the Act or that the settling parties engaged in wrongful conduct, collusion, or fraud. *Johnson*, 203 Ill. 2d at 134. Factors showing absence of good faith may also include "whether the settlement amount was reasonable and fair, whether the parties had a close personal relationship, whether the plaintiff sued the settling party, or whether information about the settlement agreement was concealed." *Palacios*, 2013 IL App (1st) 121416, ¶ 22. No single factor is determinative. *Id.*

¶ 51 It is within the circuit court's discretion based upon the totality of the circumstances to determine whether a settlement satisfies the good faith requirement under the Act. *Antonicelli*, 2018 IL 121943, ¶ 23. The "totality-of-the-circumstances" analysis "encourages the peaceful settlement of claims while protecting against wrongful conduct or unfair dealing." *Palacios*, 2013

IL App (1st) 121416, ¶ 22. We review a trial court's determination on good faith under the abuse of discretion standard. *Id.* ¶ 18. We give due deference to the circuit court's familiarity with and observation of the proceedings that occurred before the settling parties executed the settlement agreement. *Id.*

¶ 52 Applying these principals above, we conclude that the trial court did not abuse its discretion when it granted plaintiffs' and Old Town's joint motion for good faith finding. The settling parties attached to their motion a "Full Release of All Claims" that set forth the terms of the settlement agreement, including that in consideration of a $15,000 payment from Old Town's insurer, Philadelphia, to the plaintiffs-intervenors (Hartford, Second City, West Bend, Harleysville, and Chipotle), the plaintiffs-intervenors released Old Town from any and all claims. The Release also stated that it "constitutes the entire agreement and understanding" of the parties. Thus, the settling parties made a preliminary showing of good faith because the terms of the settlement were made known to the court and the settlement was supported by consideration. However, Averus has failed to meet its burden by showing the absence of good faith by the preponderance of the evidence. There is no evidence in the record demonstrating that the settling parties engaged in wrongful conduct, collusion, or fraud.

¶ 53 Averus claims that the gap between the $15,000 settlement and $21 million in remaining damages shows a lack of good faith. However, the amount of a settlement, alone, does not require a finding of bad faith. *Johnson*, 203 Ill. 2d at 137. Rather, "the amount of a settlement must be viewed in relation to the probability of recovery, the defenses raised, and the settling party's potential legal liability." *Id*.

¶ 54 Here, plaintiffs did not file any claims against Old Town and at the hearing on the motion for good faith finding, Hartford's counsel acknowledged that plaintiffs could not recover

from Old Town based on the lease provisions. Hartford's counsel told the court that "any recovery that the plaintiffs were able to obtain against Old Town is infinitely better than what we are actually legally allowed to recover based on the application of the waivers of liability and the contract" and its "chances of recovery against Old Town were nil; *** after all the discovery has been taken, that there was no chance of recovery against Old Town based on the contractual bars." See *Johnson*, 203 Ill. 2d at 137-38 (concluding that the nominal settlement agreement between the plaintiffs and the third-party defendant did not indicate that the settlement was made in bad faith, noting that, at the time of the settlement the plaintiffs recognized that the third-party defendant had a viable defense against tort claims, that the plaintiff never sued the third-party defendant, and that the plaintiffs' counsel told the court that the decision not to sue was formed after extensive research indicated that a suit had little likelihood of success). Further, Old Town asserted in its affirmative defense to Averus's contribution claim that based on the lease provisions, it was not liable to plaintiffs. Averus does not dispute that the lease provisions were valid and enforceable or that the provisions would have precluded plaintiffs from successfully recovering from Old Town. Accordingly, under these circumstances, and viewing the amount of the settlement in relation to the probability of recovery, the defenses raised, and the settling party's potential legal liability, we are unpersuaded by Averus's argument that the disparity between the settlement amount and remaining damages shows lack of good faith.

¶ 55 Averus also asserts that the landlord-tenant relationship between Second City and Old Town also demonstrates lack of good faith. We disagree. Second City and Old Town have a commercial landlord-tenant relationship. However, there is no evidence showing that Second City and Old Town had a type of relationship such as a close family relationship or friendship that would demonstrate collusion, wrongful conduct, or that they engaged in bad faith. See *Palacios*,

2013 IL App (1st) 121416, ¶¶ 25, 38 (where the plaintiff and the third-party defendant were co-workers and occasionally shared a ride to work, the court found there was no evidence of collusion or wrongful conduct in the parties' settlement agreement, noting that there was no evidence of close family or friend relationship).

¶ 56 Accordingly, from our review of the record, we cannot find that the settling parties' settlement agreement was made in bad faith or that the circuit court's decision granting the joint motion for good faith finding was arbitrary, fanciful, or unreasonable. The circuit court therefore did not abuse its distraction when it granted the settling parties' joint motion for good faith finding.

¶ 57 III. CONCLUSION

¶ 58 The circuit court properly granted Old Town's motion for summary judgment against Averus's contribution claim. The circuit court did not abuse its discretion when it granted the settling parties joint motion for good faith finding. For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 59 Affirmed.