NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7

PHILADELHIA INDEMNITY INSURANCE COMPANY
As subrogee of JEVO NY INC.,

Plaintiff,

-against-

24 WEST 57 APF, LLC and APF PROPERTIES, LLC,

Defendants.

Index No.: 152615/2013
DECISION/ORDER
Motion Seq. No. 002

Recitation as required by CPLR 2219 (a), of the papers considered in reviewing the motion of defendants 24 West 57 APF, LLC (24 West) and APF Properties, LLC (APF) for summary judgment dismissing the complaint of plaintiff Philadelphia Indemnity Insurance Company, as subrogee of Jevo NY Inc. (Jevo).

Papers	**Numbered**
Defendants' Notice of Motion and Affirmation in Support	1
Plaintiff's Affirmation in Opposition	2
Defendants' Reply Affirmation	3

Rosner Nocera & Ragone, LLP., New York (Eliot L. Greenberg of counsel), for plaintiff.
Eustace, Marquez, Epstein, Prezioso & Yapchanyk, New York (Timothy S. Carr of counsel), for defendants.

Gerald Lebovits, J.

In this subrogation action, plaintiff seeks recovery for property damage and business interruption losses, totaling $164,395.06, resulting from a leak in a building owned by 24 West at 24 West 57th Street, New York, New York (the Building). APF is the property manager of the Building. Jevo, plaintiff's subrogor, was a tenant of the Building pursuant to a lease.

Plaintiff alleges that the source of the water that caused the leak was a water tower located on the roof of the Building (complaint, ¶ 5). Plaintiff further alleges that the property damage and subsequent business interruption loss occurred as a result of defendants' negligence and failure to properly maintain and/or install the piping and other plumbing fixtures or components in the water tower (*id.*, ¶¶ 9-10, 14-15). Plaintiff asserts that, as a result, Jevo was forced to expend approximately $24,464.06 to repair the premises after the loss, and, in addition, was forced to close for approximately three weeks while repairs were performed, amounting to $139,931.00 in business interruption losses (opposition affirmation of Eliot L Greenberg, ¶¶ 11-12). Plaintiff, Jevo's insurer, alleges that, as a result of the leak, it paid various sums to or on behalf of Jevo, which it now seeks to recover from defendants (complaint, ¶¶ 11, 16).

A lease (the Lease) exists between 24 West and Jevo for the rentable portion of the 8th floor of the Building (*see* affirmation of Timothy S. Carr, exhibit B). Article 43 of the Lease, entitled "Insurance," contains a waiver of subrogation clause:

> "Landlord and Tenant shall each endeavor to secure an appropriate clause in, or an endorsement upon, each fire or extended coverage policy obtained by it and covering the Building, the Premises or the personal property, fixtures and equipment located therein or thereon, ***pursuant to which the respective insurance companies waive subrogation*** or permit the insured, prior to any loss, to agree with a third party to waive any claim it might have against said third party. The waiver of subrogation or permission for waiver of any claim hereinbefore referred to shall extend to the agents of each party and its employees, and in the case of Tenant, shall also extend to all other persons and entities occupying or using the Premises in accordance with the terms of this Lease"

(Lease, § 43.05 [emphasis added]).

Both parties acted according to the provisions of Article 43 by obtaining effective insurance policies that contained waiver of subrogation clauses. The Business Owners Common Policy Conditions form of the policy issued by plaintiff to Jevo contains the following provision, entitled "Transfer of Rights of Recovery Against Others to Us:

> "If any person or organization to or for whom we make a payment under this policy has rights to recover damages from another, those rights are transferred to us to the extent of our payment. That person or organization must do everything necessary to secure our rights and must do nothing after loss to impair them. But you may waive your rights against another party in writing:
>
> a. Prior to a loss to your Covered Property
> b. After a loss to your Covered Property only if, at time of loss, that party is one of the following:
>
> 1. Someone insured by this insurance;
> 2. A business firm:
> (a) Owned or controlled by you; or
> (b) That owns or controls you; or
> 3. Your tenant"

(*see* Carr aff, exhibit C).

Defendants obtained an insurance policy from Chubb. The General Liability Conditions of the Chubb insurance policy contains the following provision, entitled "Transfer or Waiver of Rights of Recovery against Others":

> "We will waive the right of recovery we would otherwise have had against another person or organization, for loss to which this insurance applies, provided

the insured has waived their rights of recovery against such person or organization in a contract or agreement that is executed before such loss"

(*see id.*, exhibit D).

These provisions satisfy the requirement of Article 43 of the Lease to "endeavor to secure an appropriate clause in, or an endorsement upon, each fire or extended coverage policy obtained by it and covering the Building, the Premises or the personal property, fixtures and equipment located therein or thereon, pursuant to which the respective insurance companies waive subrogation."

Defendants contend that, therefore, the claims set forth in the complaint are barred by the waiver of subrogation. This court agrees, and, as more fully set forth below, defendants' motion for summary judgment dismissing the complaint is granted.

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *accord Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]; *accord Color by Pergament v Pergament*, 241 AD2d 418, 420 [1st Dept 1997] ["(s)ummary judgment is an exercise in issue-finding, not issue-determination, and may not be granted when material and triable issues of fact are presented"]).

Subrogation is an "equitable doctrine" that "allows an insurer to stand in the shoes of its insured and seek indemnification from third-parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse" (*Kaf-Kaf, Inc. v Rodless Decorations*, 90 NY2d 654, 660 [1997]; *accord North Star Rein. Corp. v Continental Ins. Co.*, 82 NY2d 281, 294 [1993]). However, an insurer's right to subrogation is not absolute and may be waived (*State Farm Ins. Co. v J.P. Spano Constr., Inc.*, 55 AD3d 824, 825 [2d Dept 2008] ["[P]arties to an agreement may waive their insurer's right of subrogation"]). Thus, "New York courts have consistently held that a waiver of subrogation provision contained in a lease negotiated between two sophisticated parties in an arm's length transaction is valid and enforceable provided the intention of the parties is clearly and unequivocally expressed" (*Viacom Intl., Inc. v Midtown Realty Co.*, 193 AD2d 45, 53 [1st Dept 1993]). While parties to an agreement may waive their insurer's right of

subrogation, waiver of subrogation clauses, which reflect the parties' allocation of the risk of liability between themselves to third parties through the device of insurance, are to be strictly construed, and cannot be enforced beyond the scope of the specific context in which they appear (*State Farm*, 55 AD3d at 825).

When a party has waived its right to subrogation, such a clause will preclude negligence claims of subrogated insurance carriers who have paid their insureds (*Kaf-Kaf*, 90 NY2d at 661; *see also Seneca Ins. Co. v City of New York*, 35 AD3d 248, 249 [1st Dept 2006]).

A review of the Lease clearly establishes the intent of the parties to waive subrogation claims such as the one here. The Lease contained a waiver of subrogation clause, conditioned solely upon there being in each party's insurance policy a clause permitting a waiver of subrogation. It is undisputed that each policy contained such a clause. The policy of insurance issued by plaintiff to Jevo specifically "acknowledged the right of the insured to waive the insurer's subrogation rights" (*Kaf-Kaf*, 90 NY2d at 661). Accordingly, the waiver of subrogation clause in the Lease bars this action (*Tower Risk Mgt. v Ni Chunp Hu*, 84 AD3d 616, 616 [1st Dept 2011] [upholding the validity of a waiver of subrogation clause conditioned solely on the defendant's procurement of a policy that contained a waiver of subrogation clause]).

Seneca is directly on point. In that case, the landlord and the tenant entered into a lease which absolved the landlord from all liabilities. While the lease was in effect, the sprinkler system malfunctioned in the building. Seneca, as the insurer, paid the tenant's damage claim, and then commenced a subrogation action against the landlord of the property. This claim, however, was rejected and ultimately dismissed because Seneca, as subrogee, stood in the shoes of the tenant, and could not avoid the covenants of the lease waiving rights to subrogation (*Seneca*, 35 AD3d at 249). Likewise, here, plaintiff, who is standing in the shoes of Jevo, is bound by the waiver of subrogation clause in the Lease.

Thus, in light of the broad waiver of subrogation requirement contained in the Lease, and the provisions in the insurance policies that permit the insureds to waive their subrogation rights prior to a loss, there was a valid waiver of subrogation that precludes the claims set forth in the complaint. Accordingly, 24 West and APF are entitled to summary judgment dismissing the complaint (*see Allstate Indem. Co. v Virfra Holdings, LLC*, 124 AD3d 528, 528 [1st Dept 2015] [finding that waiver of subrogation clause precluded action, as "[t]he nature of the loss that occurred herein was of the exact nature contemplated by the waiver of subrogation provision"]; *Payson v 50 Sutton Place S. Owners, Inc.*, 107 AD3d 506, 506 [1st Dept 2013] [same]; *see also American Motorist Ins. Co. v Morris Goldman Real Estate Corp.*, 277 F Supp 2d 304, 308 [SD NY 2003] [holding that, because subrogor sought relief first from its insurers and was fully compensated, the insurers were prohibited under the waiver of subrogation provisions from bringing negligence claims against the defendant]).

In opposition to the motion, plaintiff argues that defendants' motion for summary judgment must be denied, as genuine issues of material fact exist about whether the waiver of subrogation clause is enforceable against the complaint. This court finds, however, that all of plaintiff's arguments lack merit.

First, plaintiff contends that the waiver of subrogation clause contained in the Lease is unenforceable pursuant to GOL § 5-321, which provides that agreements exempting lessors from liability for damages for their own negligence are void as a matter of public policy. However, contrary to plaintiff's argument, courts have consistently held that waiver of subrogation provisions do not violate GOL § 5-321 (*Great N. Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 419 [2006]), because "[r]ather than exempting the parties from liability in violation of [GOL § 5-321] . . . [they] merely reflect their allocation of the risk of liability, as between themselves, to third parties through the device of insurance" (*Viacom*, 193 AD2d at 53); *accord Admiral Indem. Co. v 505 Columbus LLC*, 44 Misc 3d 1218 [A], 2014 NY Slip Op 51182 [U], *3 [Sup Ct, NY County 2014] [holding that waiver of subrogation clause did not violate GOL § 5-321]).

Plaintiff next argues that "the portions of the Lease defendants rely on in support of their instant motion for summary judgment are vague and ambiguous . . . rendering the Defendants in breach of contract of the terms of the Lease" (Greenberg affirmation, ¶ 31). In support of this argument, plaintiff contends that Articles 10, 11 and 21 of the Lease create an ambiguity as to who is expected to perform repairs in the event of damage.

But defendants rely only on the waiver of subrogation provision in support of their motion for summary judgment, and never refer to Articles 10, 11 or 21. Accordingly, it is completely irrelevant whether these provisions are ambiguous. Moreover, even if these articles were ambiguous, they do not affect the validity of the waiver of subrogation clause, which plaintiff concedes is unambiguous.

Plaintiff further contends that "genuine issues of material fact exist as to whether the alleged waiver of subrogation clause is enforceable against" its "second cause of action for breach of contract . . . as defendants' actions, both prior to and after the subject loss, were in contravention of the responsibilities dictated within the Lease" (*id.*, ¶¶ 4, 24). Plaintiff characterizes its second cause of action as follows: "defendant breached its contractual obligations to Jevo for the failure to maintain the building and take appropriate actions to prevent the instant loss" (*id.*, ¶ 54).

The court rejects this argument, as plaintiff does not assert a cause of action for breach of contract in its complaint or bill of particulars. The complaint clearly alleges two causes of action for negligence (*see* complaint, ¶ 9 [alleging in first cause of action that "24 West was negligent, reckless and/or otherwise failed to use due care during the course of its maintenance, service and repair of the Building"]; *id.*, ¶ 14 [alleging in second cause of action that "APF was negligent, reckless and/or otherwise failed to use due care during the course of its maintenance, service and repair of the Building"]). Likewise, in its verified bill of particulars, plaintiff alleges only that defendants "did negligently or recklessly maintain and/or install the plumbing system in the affected property, and the plumbing system thereby malfunctioned, causing damage to the subrogee's premises" (*see* Carr reply affirmation, exhibit A). "[T]he broad applicability of the waiver of subrogation clause contained in the [Lease clearly] precludes the[se] negligence claims" (*Kaf-Kaf*, 90 NY2d at 661).

Plaintiff also argues that the waiver of subrogation clause does not apply to their business interruption losses. Plaintiff contends that, under New York law, "a waiver of subrogation clause

does not preclude a suit to recover losses for which [a tenant] has not purchased and was not required by the lease to purchase, insurance coverage" (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 232 [1st Dept 2006]). Plaintiff argues that because defendants did not require Jevo to obtain and maintain insurance coverage for business interruption losses, it can seek to recover the amount of its business interruption losses.

The court rejects this argument, as plaintiff waived its ability to assert a claim for business interruption losses when it executed the Lease: "Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned" (*Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). According to Article 21 of the Lease, entitled "Landlord's Liability," the parties agreed that defendants would not be liable for any loss or damage to plaintiff's property, any person, or plaintiff's business:

> "Landlord shall not be liable to Tenant or anyone else, for any loss or damage to person, property or business; nor shall Landlord be liable for any latent defect in the Premises of the Building"

(Lease, Article 21). Accordingly, plaintiff's business interruption claim is barred (*see Periphery Loungewear, Inc. v Kantron Roofing Corp.*, 190 AD2d 457, 461 [1st Dept 1993] [holding that, regardless of the applicability of the "waiver of subrogation clause to a claim of a loss for business interruption, plaintiff's business interruption claim is nonetheless barred by virtue of Article 4 of the Lease, which excludes 'liability on the part of Owner by reason of . . . injury to business arising from Owner, Tenant or others making or failing to make any repairs'"]). The court notes, that, in any event, plaintiff did obtain insurance coverage which covered its alleged business interruption claim.

Finally, plaintiff argues that summary judgment is premature, as no discovery has occurred. The court rejects this argument. Summary judgment is entirely appropriate as the waiver of subrogation clause contained in the Lease completely bars plaintiff's claim for damages. Conducting further discovery will not change that fact (*see Citibank, N.A. v Villano*, 140 AD3d 553, 553 [1st Dept 2016] [granting pre-discovery summary judgment motion]).

The court has considered the parties' remaining arguments, and finds them to be without merit.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: September 7, 2017

J.S.C.

HON. GERALD LEBOVITS
J.S.C.