SCANNED ON 7/31/2007

[* 1]

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

PRESENT: HON. MICHAEL D. STALLMAN PART 7

Index Number : 100111/2004

FEDERAL INS. CO.

VS

LCOR INC.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/8/07

MOTION SEQ. NO. _____

MOTION CAL. NO. 32

The following papers, numbered 1 to 4 were read on this motion to/for SJ

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits A-F	1-2
Answering Affidavits — Exhibits A-F	3
Replying Affidavits	4

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion "is determined in accordance with the annexed memorandum decision and order."

FILED
JUL 31 2007
COUNTY CLERK'S OFFICE
NEW YORK

HON. MICHAEL D. STALLMAN

Dated: 7/24/07

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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FEDERAL INSURANCE CO.
a/s/o PROGENICS PHARMACEUTICALS, INC.,

Plaintiff,

- against -

LCOR INCORPORATED, CROMPTON CORPORATION, EASTVIEW HOLDINGS, LLC, LANDMARK HOLDINGS, LLC, KEREN MANAGEMENT LIMITED PARTNERSHIP AND KEREN LIMITED PARTNERSHIP,

Defendants.

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Index No. 100111/04

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this action brought by Federal Insurance Co. (Federal), as subrogee of Progenics Pharmaceuticals (Progenics), to recover for damages to Progenics's property allegedly caused by a defective HVAC system, defendants LCOR Incorporated (LCOR), Eastview Holdings, LLC (Eastview), Landmark Holdings, LLC (Landmark), Keren Management Limited Partnership and Keren Limited Partnership (together, Keren) (all the above parties together, movants), move for summary judgment dismissing the complaint as to the movants.

Progenics, a pharmaceutical company, leased space as a subtenant in a building located at 777 Old Saw Mill River Road, Tarrytown, New York (the premises). Progenics stored pharmaceutical products on the premises. On January 7, 2001, the HVAC system on the premises allegedly malfunctioned, causing excessive heat which, allegedly, caused considerable damage to Progenics's property. Progenics was reimbursed for the loss by its insurer, Federal, in the sum of $1,750,000, making Federal Progenics's subrogee in this action against those parties which were allegedly responsible for the ownership and/or maintenance of the HVAC system.

Federal brings this action against Eastview, Landmark and Keren, as owners of the building.

See Complaint, ¶ 12. Federal also brings the action against these parties, plus defendant Crompton Corporation (Crompton) and LCOR, as parties which allegedly operated, managed and/or controlled the premises. *Id.* at 13.

Movants claim that at the time of the loss, the premises was owned by Eastview, and that it was managed by LCOR. Keren was the owner of the premises prior to the loss, which had leased the premises to a party identified as Witco Corporation, formerly known as Crompton. The premises then went through a series of assignments, from Keren to Landmark to Eastview. Progenics was Crompton's subtenant, and its sublease incorporated by reference the prime lease between Eastview and Crompton (Prime Lease).

Movants seek dismissal as to Keren and Landmark because they were not the owners or managers of the premises at the time of the loss. Movants seek dismissal of the action as against Eastview and LCOR pursuant to a waiver of the insurer's right of subrogation, which was a requirement of the Prime Lease.

In its memorandum in opposition to the motion, Federal concedes that the action should be dismissed as to Landmark and Keren, as they had no ownership or management obligations at the time of the loss. Federal, while not specifically stating that the action should be dismissed as to Eastview, concedes that "under certain circumstances, waivers of subrogation are valid and enforceable under New York law" (Federal's Memorandum of Law, at 3), referring to the cases sited by movants, *Kaf-Kaf, Inc. v Rodless Decorations, Inc.* (90 NY2d 654 [1997]), *Extaza of 34th Street v City Stores Co., Inc.* (62 NY2d 919 [1984]), and *Viacom International Inc. v Midtown Realty Co.* (193 AD2d 45 [1st Dept 1993]). These cases stand for the proposition 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 International Inc. v Midtown Realty Co,* 193 AD2d at 53; *see also Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d at 660 ("parties to an agreement may waive their insurer's right of subrogation"). Therefore, since there is no dispute that there was a waiver of subrogation clause in the Prime Lease, Federal cannot pursue Eastview, and the action is dismissed as to Eastview.

As a result of the foregoing concessions, Federal directs its remaining arguments against LCOR. Federal notes that the Prime Lease defines "landlord" solely as the owner of the premises, and does not include agents of the landlord, such as LCOR. As such, Federal maintains that, because LCOR is not the owner of the premises, LCOR cannot claim the benefit of the waiver of subrogation clause.

"'The 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 eliminate any material issues of fact.'" *Kesselman v Lever House Restaurant*, 29 AD3d 302, 303 (1st Dept 2006), quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Upon the presentation of a prima facie case by the movant, the burden then shifts to the motion's opponent to raise a triable issue of fact. *Kesselman,* at 303-304.

On the present motion, movants fail to make a prima facie case that LCOR may rely on the Prime Lease's waiver of subrogation clause. LCOR argues that the Prime Lease evinces an intent that LCOR be covered by the waiver of subrogation clause, citing to *Insurance Company of North America v Borsdorff Services, Inc.* (225 AD2d 494 [1st Dept 1996]) and *Pilsener Bottling Company, Inc. v Sunset Park Industrial Associates* (201 AD2d 548 [2d Dept 1994]).

Each of these two cases stand for the proposition that, if "it was the intent of the parties to the lease that both the landlord [] and the management company [] be protected equally" by a subrogation clause in a lease, they both are covered even if not "specifically mentioned." *Insurance Company of North America v Borsdorff Services, Inc.*, 225 AD2d at 494.

Pilsener Bottling Company, Inc. v Sunset Park Industrial Associates (201 AD2d 548, *supra*) is more specific. It states that a waiver of subrogation clause will be applicable to the "employees, agents and/or servants of the parties" if "[a] reading of the entire lease illustrates that the parties intended to include agents or employees within the meaning of the term 'Landlord,' under the subrogation-waiver clause of the lease." *Id.* at 549.

In its reply papers, and for the first time, LCOR claims to be Eastview's "assign." Movants' Reply Memo. of Law, at 3. It then refers the Court to a clause in the sublease which states that "[t]his sublease shall inure to the benefit of and shall be binding upon the parties hereto and their respective successors and **assigns**, as same are permitted hereunder [emphasis in original]." Federal's Memo. of Law, Ex. 6, Sublease at 15, Paragraph 25.6.

LCOR does not say what it is an assignee to. It offers no proof of an assignment of anything. It does not explain how the above two cases would apply to it as an assignee. If LCOR is mistaking "agent" for "assign," it still cannot rely on the rule in *Insurance Company of North America v Borsdorff Services, Inc.* (225 AD2d 494, *supra*) or *Pilsener Bottling Company, Inc. v Sunset Park Industrial Associates* (201 AD2d 548, *supra*), as it has not shown that there is any language in the Prime Lease or sublease which would establish an intent to include Eastview's managing agent within the waiver of subrogation clause. LCOR has failed to establish a prima facie right to summary judgment based on the language of the leases, or on any principle of law. Rather, it

appears clear, as a matter of law, that plaintiff has properly asserted a subrogation claim against LCOR which must proceed to trial.

Moreover, the Court notes that LCOR's argument concerning some manner of assignment is not properly raised, having arisen for the first time in its reply papers. See *GJF Construction Corp. v Cosmopolitan Decorating Co., Inc.*, 35 AD3d 535 (2d Dept 2006)(facts or arguments offered for the first time in reply papers will not be considered by the court). Federal has had no opportunity to delve into any argument concerning an assignment, and has never been directed to the lease language upon which LCOR relies.

Accordingly, it is

ORDERED that defendants LCOR Incorporated, Eastview Holdings, LLC, Landmark Holdings, LLC, Keren Management Limited Partnership and Keren Limited Partnership's motion for summary judgment dismissing the complaint is granted only as to the parties Eastview Holdings, LLC, Landmark Holdings, LLC, Keren Management Limited Partnership and Keren Limited Partnership, and not as to LCOR Incorporated; and it is further

ORDERED that the action is severed and dismissed as to the above mentioned parties; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue.

This order constitutes the decision of the Court.

Dated: July 24, 2007
New York, New York

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN