SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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THE TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, AS SUBROGEE OF WESTSIDE RADIOLOGY ASSOCIATES PC,MID-ROCKLAND IMAGING PARTNERS INC.,KEY EQUIPMENT FINANCE, A DIVISION KEY BANK NATIONAL ASSOCIATION,

Plaintiff,

- v -

VEMA GROUP, LLC,1790 BROADWAY ASSOCIATES, LLC,GOODHOPE MANAGEMENT CORP., BROADWAY, IONIAN MANAGEMENT INC.,NORDSTROM, INC.,JONES LANG LASALLE AMERICAS, INC.,LIBERTY CONTRACTING CORP., KETCHAM PUMP COMPANY, INC.,FIRE SAFETY ALARMS, INC, LLC,CONTROLLED COMBUSTION CO., INC.,JOHN DOES 1-3,

Defendant.

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INDEX NO. 161411/2019

MOTION DATE April 4, 2022

MOTION SEQ. NO. 004 005 006 007

DECISION + ORDER ON MOTION

1790 BROADWAY ASSOCIATES, LLC, GOODHOPE MANAGEMENT CORP.

Plaintiff,

-against-

BROADWAY 57TH/58TH RETAIL INVESTOR, LLC, JT MAGEN & COMPANY, INC., LIBERTY CONTRACTING CORP., SAFWAY ATLANTIC, LLC, EXCALIBUR GROUP, LLC, JONES LANG LASALLE, INC., KETCHAM PUMP COMPANY, INC., FIRE SAFETY ALARMS, INC., CONTROLLED COMBUSTION CO., INC., JOHN DOE 1-10, (BEING FICTITIOUS ENTITIES)

Defendant.

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Third-Party
Index No. 596092/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 235, 240, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 297, 298, 299, 300, 301, 302, 303, 304, 310, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 329, 330, 331

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 005) 161, 162, 163, 164, 165, 166, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 236, 241

were read on this motion to/for SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 006) 167, 168, 169, 170, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 237, 238, 239, 242, 314, 315, 316, 332

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 007) 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 295, 296, 305, 306, 307, 308, 309, 311, 312

were read on this motion to/for DISCOVERY .

BACKGROUND

This is a consolidated subrogation action arising out of alleged property damage caused by three water-loss events that occurred between December 30, 2017 and January 7, 2018 at the building located at 1790 Broadway, New York, NY (Building). Travelers Property Casualty Company Of America (Travelers) alleges that it provided business and property loss insurance to Westside Radiology (Westside), a tenant in the Building; as well as Mid-Rockland Imaging Partners Inc. (Mid-Rockland), an entity that leased certain assets of the radiological medical practice operated by Westside; and Key Equipment Finance (Key), an entity that owned and leased certain medical equipment to Mid-Rockland. Travelers generally alleges that defendants' negligence caused/contributed to the water damage and further alleges that Travelers issued insurance payments on behalf of Westside, Mid-Rockland and Key for equipment that was damaged.

PENDING MOTIONS

On October 22, 2021, 1790 Broadway Associates, LLC (1790) and Goodhope Management Corp. (Goodhope) moved for summary judgment and dismissal of the claims asserted against them (Mo Seq 4), and Liberty Contracting Corp (Liberty) cross-moved for summary judgment and dismissal of the claims asserted against them, or alternatively denying the motion for summary judgment with leave to renew after the completion of discovery.

On December 10, 2021, Magen, Nordstrom, Broadway, and JLL moved for summary judgment and dismissal of the claims asserted against them (Mo Seq 5), and Ionian moved for summary judgment and dismissal of the claims asserted against them (Mo Seq 6).

On January 13, 2022, Travelers moved for an order pursuant to CPLR §3214(b) lifting the stay on discovery pending determination of the summary judgment motions (Mo Seq No 7) and on February 18, 2022, 1790 and Goodhope cross-moved to stay further discovery pending the determination of the motions.

On April 4, 2022, the court heard oral argument and reserved decision.

The motions are consolidated herein and granted to the extent set forth below.

ALLEGED FACTS

1790 and Westside entered into a lease agreement, dated April 3, 1992, pursuant to which 1790 leased to Westside portions of the cellar and sub-cellar of the Building (Cellar Lease). 1790 and Westside entered into another lease agreement, dated May 22, 2002, pursuant to which 1790 leased to Westside the entire rentable space of the 9th floor of the Building (9th Floor Lease). Both leases contained waiver of subrogation clauses.

1790, Westside and Mid-Rockland executed an amendment of leases, dated January 25, 2016, pursuant to which, Westside, as assignor, assigned the Cellar Lease and the 9th Floor

Lease to Mid-Rockland, and 1790 leased to Mid-Rockland two additional spaces in the cellar and sub-cellar of the building, as well as two additional spaces on the 7th floor of the Building, for terms commensurate with the Cellar Lease and 9th Floor Lease, respectively. Later an additional amendment was entered leasing the 8th floor to Mid-Rockland for the same period.

Prior to 2017, Westside and Mid-Rockland began operating a medical imaging business at the Building. The Medical Imaging Practice occupied space on the Building's ninth floor, and much of the imaging equipment, including MRI machines and x-ray machines, were in the Building's basement, or cellar.

Most of the relevant events occurred during December of 2017 and January of 2018. At that time, the Building was undergoing restorations at two levels. 1790 and Goodhope are the owner and management company, respectively, of the Building. 1790 had entered a lease with Broadway 57th 58th Retail Investors LLC (Tenant), a subsidiary of Nordstrom, Inc. (Nordstrom). Pursuant to the lease between 1790 and Tenant, Tenant would perform much of the work of fitting out a new space to be within the Building to become a new Nordstrom store. However, certain work was also to be performed by 1790. Further, at the same time, 1790 was performing other restoration work in other parts of the Building that were not associated with the Nordstrom's store.

During cold weather in December 2017 and January 2018, construction was ongoing on both the first and second floors of the Building, and certain areas were left unheated. Water pipes within the unheated spaces were not turned off and drained. Consequently, on three occasions, water pipes froze, burst and leaked water. The water flowed into the Building's basement/cellar, damaging the imaging equipment located there, and damaging drywall, carpet, furniture, other betterments and improvements, and other business personal property.

Water again entered the Building's basement spaces in early July 2018. On that occasion, the Building's management was draining certain risers containing water. The risers were supposed to drain into a sump in the basement, then be pumped into the storm sewer system by sump pumps. However, the sump pumps failed, the sump overflowed, and again the space was flooded.

Travelers pursuant to an insurance policy issued to Radnet, Inc. (Radnet) a parent corporation of Mid-Rockland, made payments: to Mid-Rockland for property damage, damages to the space and lost income; to Westside for lost income; and to Key for damage to equipment leased by Mis-Rockland from Key that Mid-Rockland otherwise would have been liable for.

DISCUSSION

CPLR § 3212(b) generally provides that a motion for summary judgment may be granted where the movant submits papers and proof sufficient to establish that no trial is warranted as a matter of law, and judgment should instead be directed in its favor. CPLR §3212(b). However, as summary judgment is a drastic measure which deprives litigants of their day in court, it should not be granted if any party demonstrates the existence of disputed facts sufficient to require a trial. *Id.*; *Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474 (1979). Summary judgment may be granted only if, when considering the facts in the light most favorable to the non-moving party, the movant has met its burden of demonstrating the absence of any material factual dispute, and the non-movant has "fail[ed] to establish the existence of any material issues of fact which require a trial[.]" *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012). "The moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Id.*

MOTION Seq No 4

Travelers Has Provided Sufficient Evidence to defeat Summary Judgment on the claim that subrogation is barred by the Voluntary Payment Doctrine

At the time of the Water Losses, Travelers insured Radnet under policy number KTJ-CMB-0K65273-6-17 ("Travelers Policy"). Radnet was listed as the "Named Insured" on the Travelers Policy. The Travelers Policy also explicitly stated:

NAMED INSURED

> In addition to the first Named Insured shown in the Declarations, the following are added as Named Insured, as their interest may appear with respect to insurance provided under this policy for the first Named Insured shown in the Declarations:
>
> Any subsidiary company or affiliated company over which the first Named Insured has active management or maintains more than fifty percent (50%) ownership interest provided the first Named Insured notifies the Company within ninety {90) days from the date any such subsidiary or affiliate is acquired or formed by the first Named Insured

It is alleged that Mid-Rockland was a wholly owned subsidiary of Radnet at the time of the Water Losses, and that Westside was an affiliated company over which Radnet had active management. Westside's location at the Building was also listed on the Statement of Values for the Travelers' Policy at the time of the Water Losses. Travelers' property adjuster, Raymond Bongiovonni, determined there was coverage for the losses of both Mid-Rockland Imaging and Westside.

Mid-Rockland was contractually bound by an equipment lease related to an MRI machine and associated computer equipment that it had leased from Key Equipment (hereinafter, the "Equipment Lease"). The Equipment Lease provided that Key (the equipment lessor) retained legal ownership of the leased equipment throughout the duration of the lease. The Equipment Lease explicitly also stated that, "[t]he Lessee is responsible for payment of any costs

required to bring the equipment to the condition and standard required by the Lease, and the Acceptable Return Condition[.]"

For its part, the Travelers Policy stated that insurance coverage was available for fixtures, equipment and business personal property located at the insureds' premises as listed on the Statement of Values, including "Personal Property of Others … used in the Insured's business that is in the care, custody, or control of the Insured or for which the Insured has agreed in writing to insure prior to any loss or damage."

Defendants' argument regarding the volunteer doctrine assumes that Travelers was not legally or contractually required to pay Mid-Rockland, Westside and/or Key Equipment for damages related to the Water Losses according to the terms of the Travelers Policy. This assumption has been sufficiently rebutted by Travelers to warrant denial of summary judgment on this basis. With respect to Mid-Rockland and Westside, the explicit definition of Named Insureds includes any subsidiary company or affiliated company over which Radnet has active management or maintains more than fifty percent (50%) ownership interest.

Travelers has submitted evidence that Mid-Rockland was a wholly owned subsidiary of Radnet, and Westside was a company affiliated with Radnet, which Radnet actively managed. Westside's interests at the Building were also listed on the Statement of Values associated with the Travelers' Policy. Mr. Bongiovanni determined that there was coverage for the losses of both Mid-Rockland and Westside.

Travelers also submits evidence that Mid-Rockland was contractually responsible to pay for any damages to Key's MRI machine and associated equipment that were incurred during the course of the Equipment Lease. The Water Losses occurred, and the equipment was damaged, during that period. As Mid-Rockland was insured by Travelers, and the damages fell within the

scope of the Travelers Policy, Travelers argues it was required to pay for the damages. Travelers has provided sufficient evidence to defeat the motion for summary judgment on this point.

While it is a principle of law that a mere "volunteer" is not entitled to subrogation *Perlmutter v. Timely Toys, Inc.*, 8 App. Div. 2d 834, 190 N. Y. S. 2d 107 (2d Dep't 1959), the inquiry does not end there. The term "volunteer," in the context of subrogation, does not include one who acts to protect his own interests, whether or not he acts under a legal obligation. 73 Am. Jur. 2d § 25. Subrogation "is no longer narrow and technical in its scope, but has been broadened and extended to cover particular facts and circumstances, where it is equitable that a person furnishing money to pay a debt should be substituted for the creditor or in place of the creditor."[1] *Sherman v. Yankee Prods. Corp.*, 201 App. Div. 647, 194 N. Y. S. 705, 706 (2d Dep't 1922).

Among the protected interests which have been held to give rise to a right of subrogation are: an interest in avoiding litigation and settling a fairly disputed obligation, *e.g. American Commercial Lines Inc. v. Valley Line Co.*, 529 F. 2d 921 (8th Cir. 1976); the interest of a mortgagee in the mortgaged property (*see* 73 Am. Jur. 2d Subrogation § 100); the interest of a creditor in maintaining the solvency of a debtor, *e.g. First National City Bank v. United States*, 548 F. 2d 928 (Ct. Cl. 1977); and the interest of the winning party to an arbitration award in obtaining the report of a referee, *Sherman v. Yankee Prods. Corp., supra*.

New York Stock Exch., Inc. v. Sloan, No. 71 CIV. 2912, 1980 WL 1431, at *1 (S.D.N.Y. Aug. 15, 1980).

Defendants argue the facts establishing the payees as named insureds were not pled with specificity in the complaint. However, they are pled sufficiently to set forth a cause of action and there is no legal requirement for pleading with specificity as to such a claim. Defendants further argue that Travelers' opposition papers fail to establish that Radnet had active management over Westside, a fourth-tier subsidiary, that Radnet had direct ownership of Mid-Rockland or timely notified Travelers of is acquisition of Mid-Rockland, or that the Travelers Policy required it to pay Key for damage to its equipment. But Travelers has not moved for summary judgment, they are opposing defendants' motion for summary judgment and in this regard have raised sufficient questions of fact on this point at this stage of the litigation to defeat the motion.

For the same reasons, the following pending motions which seeks summary judgment based on the voluntary payment doctrine are also denied:

Liberty Contracting Corp's cross-motion to Motion Seq. 4, Motion Seq. 5, and Motion Seq No. 6.

Travelers' Claims Are Barred by the Waiver of the Subrogation Clause of the Lease and therefore Dismissed as against 1790 and Goodhope

In New York, an insurance carrier is barred from maintaining a subrogation claim if the applicable insurance policy permits the insured lessee to waive their subrogation rights to the lessor and the relevant lease agreement contains a waiver of subrogation. *See Atlantic Specialty Ins. Co. v 600 Partners Co., L.P.*, 202 N.Y. Misc. LEXIS 10094 (NY Cty. 2020); *Tower Risk Mgt. v Ni Chunp Hu*, 84 A.D. 3d 616 (1st Dep't 2011); *Continental Ins. Co. v. 115-123 West 29th St. Owners Corp.*, 275 A.D. 2d 604 (1st Dep't 2000). Where a party has waived its right to subrogation, its insurer has no subrogation claim for negligence. *Kaf-Kaf, Inc. v. Rodless Decorations*, 80 N.Y. 2d 654 (1997); *Allstate Indem. Co. v Virfra Holdings, LLC*, 124 A.D. 3d 528 (1st Dep't 2015).

In this case, Travelers' subrogation claims against 1790 and Goodhope are barred because 1790's lease agreement with Mid-Rockland contains an enforceable waiver of subrogation clause and the Travelers policy and CNA policy, the insurer for 1790, contain requisite language permitting their insureds to waive their subrogation rights.

U.S. Underwriters Ins. v New Realty Realty, 2012 N.Y. Misc. LEXIS 4896 (2012) is a case on point. In *U.S. Underwriters*, a commercial tenant suffered water damage as a result of a malfunctioning fire suppression system. U.S. Underwriters commenced a subrogation action against the landlord seeking to recoup payments it made to the tenant for its losses. The lease contained a waiver of subrogation clause which stated:

> … to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or anyone claiming through or under each of them by way of subrogation or otherwise. The foregoing release and waiver shall be in force only if both releasors insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance.

The policy issued permitted the tenant to waive its subrogation rights. The Court held that the waiver of subrogation clause contained in the lease agreement between tenant and the building owner was conditioned solely upon there being in each of their insurance policies a clause permitting a waiver of subrogation, and it was undisputed that each policy contained such a clause. Accordingly, the waiver of subrogation clause in the lease barred the action.

Atlantic Specialty Ins. Co. v 600 Partners Co., L.P., 202 N.Y. Misc. LEXIS 10094 (NY Cty. 2020), is also applicable. In *Atlantic Specialty Ins. Co*., the Plaintiff's subrogor was a commercial tenant. The parties agreed in the lease to waive their subrogation rights for "loss, damage or destruction with respect to its property by fire or other casualty." The Court held that the damage was caused due to a water leak fell within the provision, was covered by the policy and, the claim was therefore barred by the waiver.

As in *U.S. Underwriters* and Atlantic, Travelers' subrogation claims are barred. Indeed, the Cellar Lease contains a release and waiver of subrogation rights that is identical to the language in the U.S. Underwriters lease. The relevant language of Paragraph 9 of the Cellar Lease states:

> Notwithstanding the foregoing, each party shall look first to any insurance in its favor before making any claim against the other party for recovery for loss or damage resulting from fire or other casualty, and to the extent that such Insurance is in force and collectible and to the extent permitted by law, Owner and Tenant each hereby releases and waives all right of recovery against the other or anyone claiming through or under each of them by way of subrogation or otherwise. The foregoing release and waiver shall be in force only if both releasors' insurance policies contain a clause providing that such a release or waiver shall not invalidate the insurance.

Additionally, it is well settled that such language waives subrogation as to the landlord's managing agent. The waiver of the right to subrogation extends to the Landlord's managing agent even though the provision in the lease does not explicitly say so.

In *Pilsener Bottling Co. v. Sunset Park Indus. Assocs*., 201 A.D.2d 548 (2d Dep't 1994), the Appellate Division, in affirming summary judgment, held that the subrogation-waiver clause in the contract between the parties was applicable to the employees, agents and/or servants of the parties, that a reading of the entire lease illustrated that the parties intended to include agents or employees within the meaning of the term "landlord", under the subrogation-waiver clause of the lease. *See also, Ins. Co. of N. Am. v. Borsdorff Servs*., 225 A.D.2d 494 (1st Dep't 1996) (*We also note that while SWA was not specifically mentioned in the waiver of subrogation provision of the lease, a reading of the lease, as a whole, demonstrates that it was the intent of the parties to the lease that both the landlord Arnow and the management company, SWA, be protected equally*).

As one court noted:

> Courts have routinely held that when the subrogation waiver does not expressly include the management company, the management company is equally protected by the waiver (*see Global Imports Outlet, Inc. v The Signature Group LLC,* 90 AD3d 401, 402 [1st Dept 2011][Waiver applies to managing agent]; *Foremost Furniture Showroom, Inc. v 830 West Co.*, 73 AD3d 491, 492 [1st Dept 2010] [Waiver applies to managing agent]; *General Acc. Ins. Co. v 80 Maiden Lane*, 252 AD2d 391, 392 [1st Dept 1998]; *Insurance Co. of N. Am. v Borsdorff Servs.* 225 AD2 494, 494 [1st Dept 1996][Reading the lease as a whole demonstrates the intent of the parties to lease that both the landlord and managing company be equally protected by the subrogation waiver]; *Pilsner Bottling Co. v Sunset Park Indus. Assoc*., 201 AD2d 548, 549 [2d Dept 1994] ["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. It appears that the parties anticipated that the parties would operate through employees, agents, or servants"]).

Philadelphia Indem. Ins. Co. v. B & L Mgmt. Co. LLC, 60 Misc. 3d 1207(A)(N.Y. Sup. Ct. 2018)(*see also Foremost Furniture Showroom, Inc*. v 830 W. Co. 73 AD3d 491 (1st Dept., 2010).

As both Mid-Rockland and 1790 waived their rights to subrogation against each other and obtained insurance that allowed them to do so, Travelers is barred from recovery and its claims against 1790 and Goodhope are dismissed in their entirety.

Travelers argues that the clause relied upon by the movants does not apply because it is supplanted by the Rider's insurance procurement and attendant waiver of right of recovery clauses. However, the court does not find that the insurance procurement provision of the Rider creates any conflict or inconsistency. The "Paramount" provision of the Rider only supplants the Lease terms "[i]f and to the extent that any of the provisions of this Rider conflict or are otherwise inconsistent with any of the preceding printed provisions of this lease." The Rider does not conflict and is not inconsistent with the waiver of subrogation clause because it is silent on the issue of subrogation and does not modify Article 9 of the Lease. Indeed, neither Article 9, the subrogation clause, nor the word "subrogation" are referenced in the Rider.

Travelers alternatively argues that the waiver of subrogation clause only bars subrogation as to Mid-Rockland, however the damages paid to Westside were for "business interruption losses" which could only be by virtue of their occupancy of the subject premises pursuant to Mid-Rockland's lease. Similarly, the payment to Key was for equipment leased by Mid-Rockland and owned by Key that Mid-Rockland would have been liable for if not covered by its insurance.

Based on the foregoing the motion to for summary judgment and dismissal of the complaint as to 1790 and Goodhope is granted.

DISCLOSURE

As the court has ruled on the pending summary judgment motions there is no need to grant the relief sought in Motion Seq No 7 as to lifting the stay pending the determination of the

motions, or Goodhope's cross-motion seeking a stay. The parties are further directed to this Court's Part Rules which provide that discovery is never stayed pending summary judgment motions.[i]

CONCLUSION

WHEREFORE it is hereby:

ORDERED that the motions for summary judgment of defendants 1790 Broadway Associates, LLC and Goodhope Management Corp. are granted and the complaint is dismissed against them; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants 1790 Broadway Associates LLC and Goodhope Management Corp. dismissing the claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs.

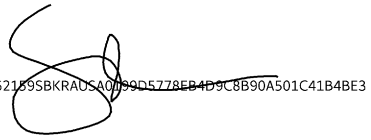
ORDERED that, within 20 days from entry of this order, 1790 Broadway Associates, LLC shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that the parties are to appear for a virtual status conference to schedule remaining discovery on June 21, 2022 at 12 noon; and it is further

ORDERED that this constitutes the decision and order of this court.



4/27/2022
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

[i] On April 20, 2022, this Court issued a decision denying Motion Seq No. 2 as moot because the court mistakenly believed that was what the parties had advised at oral argument. However, after oral argument. the Court requested and was provided with the transcript from oral argument which in fact specifically stated that the issues raised on Motion Seq No 2 remain outstanding and needed to be addressed by the court. Nevertheless given the court's dismissal of the Traveler's claims against 1790 and Goodhope the issues in Mo Seq No. 2 are in fact moot.