

**Metro E. 99 St. LLC v Parcare Community Health  
Network, Inc.**

2025 NY Slip Op 30689(U)

February 27, 2025

Supreme Court, New York County

Docket Number: Index No. 655282/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. LYLE E. FRANK **PART** **11M**

*Justice*

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METRO EAST 99 STREET LLC

Plaintiff,

- v -

PARCARE COMMUNITY HEALTH NETWORK, INC.,

Defendant.

-----X

**INDEX NO.** 655282/2023

**MOTION DATE** 05/10/2024

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

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

Upon the foregoing documents, plaintiff’s motion is denied, and defendant’s cross-motion is denied.

**Background**

Metro East 99 Street LLC (“Plaintiff”) owns a building that in March of 2020, it leased part of the ground floor to Parcure Community Health Network, Inc. (“Defendant”). The agreement (the “Lease”) was for ten years, and relevant provisions included a statement that the obligations under the lease were subject to Defendant obtaining the consent and approval of the New York State Department of Health to operate as an extension site under Article 28 of the New York Public Health Law. Operation of the site as an Article 28 extension site was the only permitted use for the site, despite the necessity of conducting certain improvements to the space before approval could be granted. Defendant was also to use all reasonable efforts in obtaining this approval. This provision was specifically negotiated by Defendant.

In November of 2019, Defendant began the process of applying for approval from the DOH. Approval for operation as an extension site required extensive improvements to the building, which Defendant performed. In early 2020, during the COVID-19 pandemic, Defendant was temporarily approved under an emergency provision to operate as an extension site. The DOH approval of the request explicitly stated that it was only granting temporary approval, and that the normal approval process would still need to be conducted. In April of 2020 Defendant moved into the premises and began to staff a team, with operations under the temporary approval commencing in July of 2020. While on the premises, and at Plaintiff's urging, Defendant began paying rent.

In late December of 2020, the New York Attorney General's Office began what Defendant characterizes as an "unfounded investigation" into the distribution of COVID vaccines at the site. As a result of this investigation, the DOH decided to hold the application for permanent approval pending the NYAG investigation. This investigation was terminated without criminal prosecution in January of 2023, but the DOH was still unwilling to proceed with Defendant's application. As a result of all this, and the termination of the emergency temporary approval in May of 2023, Defendant alleges that it was no longer able to operate on the premises and make rent payments. After more attempts to have DOH process the application, Defendant withdrew the application and surrendered the premises to Plaintiff on September 30, 2023, citing the regulatory approval provision in the Lease. In October of 2023, Plaintiff brought the underlying suit against Defendant, seeking unpaid rent and future rent, as well as attorneys' fees.

### **Standard of Review**

Under CPLR § 3212, a party may move for summary judgment and the motion "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be

established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR § 3212(b). Once the movant makes a showing of a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opponent to “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448 (2016). The facts must be viewed in the light most favorable to the non-moving party, but conclusory statements are insufficient to defeat summary judgment. *Id.*

### **Discussion**

Plaintiff has brought the present motion seeking summary judgment in its favor. Defendant opposes the motion and has cross-moved for partial summary judgment, dismissing the second cause of action and granting leave to amend the answer. For the reasons that follow, both the motion and the cross-motion are denied.

#### **Summary Judgment on the First Cause of Action is Denied as There are Material Issues of Fact**

Plaintiff is seeking summary judgment on the first cause of action for unpaid and future rent. Defendant opposes on the grounds that obtaining permanent Article 28 extension site approval from DOH was an unfulfilled condition precedent, thus excusing their performance under the Lease. The first issue presented regarding the regulatory approval provision is whether a temporary, emergency approval for a unique pandemic situation satisfies the condition precedent. When an agreement contains an express condition precedent, as the Lease here does, there can be no “mitigating standard of materiality or substantiality applicable to the non-occurrence of that event.” *Oppenheimer & Co. v. Oppenheim*, 86 N.Y.2d 685, 692 (1995). The Lease clearly states that it is required that “all Regulatory Approvals are obtained”, and the word ‘all’ would reasonably include the final approval necessary in order to operate normally as an

Article 28 extension site. It is not disputed that Defendant never got such approval. Therefore, the emergency temporary approval did not, in and of itself, satisfy the express condition precedent.

The issue then becomes whether, as Plaintiff argues, Defendant waived the condition precedent by moving into the premises and accepting the emergency approval, as well as if Defendant failed to exercise reasonable efforts in attempting to obtain the permanent approval as required by the Lease. Given the affidavits and evidence submitted by Defendant regarding their efforts to obtain the approval and the reasons given why their application was unsuccessful, there are clear material issues of fact surrounding whether their efforts were reasonable or not. Plaintiff also argues that Defendant waived the condition precedent by paying rent for the months it was in possession of the premises. Defendant counters by saying that they never waived the condition precedent, that Plaintiff was fully informed as to the temporary and unique nature of the emergency approval, and that pursuant to the terms of the Lease any waiver of the condition precedent would need to be in writing and signed by both parties.

A waiver is “the intentional relinquishment of a known right with full knowledge of the facts upon which the existence of the right depends [and it] is a question of fact.” *Amrep Corp. v. American Home Assurance Co.*, 81 A.D.2d 325, 329 (1st Dept. 1981). There are multiple questions of fact here on whether Defendant knowingly and intentionally waived their right to the protections of the regulatory approval condition precedent in the Lease. As such, summary judgment in favor of Plaintiff would be inappropriate.

*Summary Judgment is Denied on the Second Cause of Action as to Both Parties*

Defendant has cross-moved for partial summary judgment dismissing the second cause of action for attorneys’ fees. Plaintiff relies on an indemnification provision in the Lease for their

claim, arguing that the provision requires Defendant to reimburse Plaintiff for any action they take to enforce the Lease. The relevant language reads as follows: “Lessee shall indemnify and hold Lessor harmless from and against all liabilities [...] including reasonable attorneys’ fees imposed upon or incurred by or asserted against Lessor or the Project by reason of [...] any failure on the part of the Lessee to comply with or perform any of the terms, covenants or conditions of the Lease.” The provision ends by stating that “in the case of any suit, action or proceeding brought against Lessor or filed against the Project [...] by reason of any such occurrence, Lessee shall upon Lessor’s request [...] resist and defend such suit.”

In New York, an indemnification provision must contain “unmistakably clear intent to indemnify each other for attorney’s fees in an action between them on the contract” in order to be enforceable. *Sage Sys., Inc. v. Liss*, 39 N.Y.3d 27, 29 (2022). Furthermore, for an indemnification provision to cover claims between the parties in addition to indemnification for third-party claims, “its language must unequivocally reflect that intent” and when none of the potential grounds for a claim listed are “exclusively or unequivocally referable to claims between the parties themselves”, such a provision cannot be interpreted in such a manner. *Gotham Partners, L.P. v. High Riv. Ltd. Partnership*, 76 A.D.3d 203, 206 (1st Dept. 2010). Contrary to Plaintiff’s argument, the indemnification provision does not need to explicitly state that it only applies to third party claims in order to bar claim reimbursement between the parties. The case law is clear that an indemnification provision that grants one party attorneys’ fees for claims brought between the two parties to the agreement must unequivocally state that it authorizes such claims or be worded in such a way that third-party claims are completely excluded.

In a recent case examining a similarly worded indemnification clause, the First Department held that an indemnification provision covering claims arising from breaches of

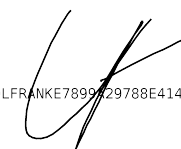
obligations under a contract must exclusively refer to claims between the parties to the contract and could not encompass third-party claims arising out of a party’s breach of contract. *Shah v. 20 E. 64th St., LLC*, 198 A.D.3d 23, 42 (1st Dept. 2021). Under this precedent, summary judgment in favor of Defendant on the second cause of action must be denied. But since, as stated above, there are material issues of fact regarding whether or not Defendant breached the Lease, summary judgment on the second cause of action in favor of Plaintiff must also be denied.

Defendant’s Cross-Motion to Amend the Answer is Granted

Defendant has cross-moved to amend their answer, and Plaintiff opposes on both procedural and substantive grounds. Turning first to the procedural, the proposed amended answer provided by Defendant is not red lined. Under CPLR § 3025, “[a]ny motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.” Here, the proposed amended answer does not indicate anywhere what changes or additions were made. Therefore, the cross-motion to amend is properly denied without prejudice. Accordingly, it is hereby

ADJUDGED that plaintiff’s motion for summary judgment is denied; and it is further

ADJUDGED that defendant’s cross-motion for summary judgment on the second cause of action and to amend the answer is denied.

  
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LYLE E. FRANK, J.S.C.

2/27/2025  
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| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED              | <input checked="" type="checkbox"/> DENIED | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION | <input type="checkbox"/> OTHER     |
| APPLICATION:          | <input type="checkbox"/> GRANTED                    |  | <input type="checkbox"/> GRANTED IN PART                  |                                    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> SETTLE ORDER               |  | <input type="checkbox"/> SUBMIT ORDER                     |                                    |
|                       | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN |  | <input type="checkbox"/> FIDUCIARY APPOINTMENT            | <input type="checkbox"/> REFERENCE |