NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------X
TAMM CONSULTING, PRO SE and EINAR TAMM, PRO SE,

Plaintiffs,

- against -

Index No. **300124/2018E**

THE CINCINNATI INSURANCE COMPANY, TURNER FORENSICS, TURNER ENGINEERING, P.C., DANIEL D. TURNER, TROY MCCLURE, JOHN DOES, JOHN DOE COMPANIES, JOHN DOE INSURANCE COMPANIES,

Hon. **FIDEL E. GOMEZ**
Justice

JOHN DOES, JOHN DOE COMPANIES, AND JOHN DOE INSURANCE COMPANIES ARE PEOPLE AND COMPANIES WHOSE NAMES ARE UNKNOWN AND WHO MADE EVALUATIONS, DECISIONS, AND PAYMENT OR NON-PAYMENT DECISIONS, INCLUDING BUT NOT LIMITED TO CLAIMS, DAMAGE, LIABILITY, SUBROGATION, AND/OR REINSURANCE,

Defendants.
----------X

The following papers numbered 1 to 3, read on this motion, noticed on 4/14/2022, and duly submitted as no. 5 on the Motion Calendar of 7/25/2022.

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Defendant The Cincinnati Insurance Company's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: 9/27/22

Hon. **FIDEL E. GOMEZ, A.J.S.C.**

1. CHECK ONE..... ☐ CASE DISPOSED X NON-FINAL DISPOSITION

2. MOTION IS..... ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT
☐ NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

TAMM CONSULTING, PRO SE and EINAR TAMM, PRO SE,

Plaintiffs,

DECISION AND ORDER

- against -

Index No. **300124/2018E**

THE CINCINNATI INSURANCE COMPANY, TURNER FORENSICS, TURNER ENGINEERING, P.C., DANIEL D. TURNER, TROY MCCLURE, JOHN DOES, JOHN DOE COMPANIES, JOHN DOE INSURANCE COMPANIES,

JOHN DOES, JOHN DOE COMPANIES, AND JOHN DOE INSURANCE COMPANIES ARE PEOPLE AND COMPANIES WHOSE NAMES ARE UNKNOWN AND WHO MADE EVALUATIONS, DECISIONS, AND PAYMENT OR NON-PAYMENT DECISIONS, INCLUDING BUT NOT LIMITED TO CLAIMS, DAMAGE, LIABILITY, SUBROGATION, AND/OR REINSURANCE,

Defendants.

----------X

Defendant The Cincinnati Insurance Company ("Defendant") moves for summary judgment dismissing count 10 of the complaint. Plaintiffs Tamm Consulting and Einar Tamm ("Plaintiffs") oppose.

For the reasons which follow, Defendant's motion is denied.

BACKGROUND:

The relevant facts are discussed at length in the Decision and Order of this Court on Plaintiffs' motion to renew and reargue (Mot. Seq. No. 6) issued simultaneously with this Decision and Order.

Count 10 of the Plaintiffs' complaint alleges a cause of action for breach of contract. Plaintiffs allege that Defendant failed to pay in accordance with the parties' release dated July 7, 2017 (the "Release").

On March 25, 2022, Defendant filed the instant motion for summary judgment. On July 25, 2022, the motion was marked fully submitted.

DISCUSSION:

Defendant moves for summary judgment dismissing count 10 of the complaint, arguing that it did not breach the Release, as it made full payment in accordance with the Release as of July 7, 2017. Defendant also argues that Plaintiffs admit receiving the full settlement amount from Defendant (Compl., ¶ 156; Defendant's Exhibit 1).

In support of its motion, Defendant submitted, *inter alia*, an affirmation by counsel; an affidavit by Mark Flynn, a Claims Specialist for Defendant; copies of checks Defendant issued to Plaintiffs; and a copy of the Release.

Mr. Flynn asserts that on July 30, 2015, Plaintiffs presented a claim to Defendant for water damage to their business personal property which occurred on July 22, 2015 ("Claim #1") (Affidavit of Mark Flynn, ¶ 3). He asserts that from March 14, 2016, through July 7, 2017, Defendant paid Plaintiffs $236,877.99 on Claim #1. He asserts that Defendant paid an additional $40,000.00 on Claim #1 (Affidavit of Mark Flynn, ¶ 4-16). He asserts that on July 7, 2017, the parties executed the Release for $276,877.99 for Claim #1 (Affidavit of Mark Flynn, ¶ 17). He asserts that Defendant has paid the entire amount due under the Release (Affidavit of Mark Flynn, ¶ 18).

CPLR § 3212(b) provides, in relevant part, that:

> A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. . . . 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. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

The proponent of a motion for summary judgment carries the initial burden of tendering sufficient admissible evidence to demonstrate the absence of a material issue of fact as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez* at 324). Once movant meets his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence, generally also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman* at 562).

The essential elements in an action for breach of contract "are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach" (*Dee v Rakower*, 112 AD3d 204, 209 [2d Dept 2013]; *Elisa Dreier Reporting Corp. v. Global Naps Networks, Inc.*, 84 AD3d 122, 127 [2d Dept 2011]; *Brualdi v IBERIA Lineas Aeraes de España, S.A.*, 79 AD3d 959, 960 [2d Dept 2010]; *JP Morgan Chase v. J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

"It is well settled that a contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]; *Bailey v Fish & Neave*, 8 NY3d 523, 528 [2007]).

"[R]ules of construction of contracts require, whenever possible, that an agreement should be given a 'fair and reasonable interpretation'" (*Farrell Lines, Inc. v City of New York*, 30 NY2d 76, 83 [1972]). "[A] contract should not be interpreted in such a way as would leave one of its provisions substantially without force" (*Albanese v Consolidated Rail Corp.*, 245 AD2d 475, 476 [2d Dept 1997]). A court "'may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Bailey*, 8 NY3d 523 at 528).

"Whether a contract is ambiguous is a question of law and extrinsic evidence may not be considered unless the document itself is ambiguous" (*Bailey*, 8 NY3d 523 at 528). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing. Extrinsic or parol evidence is admissible only if a court finds an ambiguity in the contract; such evidence is not admissible to create an

ambiguity in a written agreement which is complete and clear and unambiguous upon its face" (*Donohue v Cuomo*, 38 NY3d 1, 12-13 [2022] [internal quotation marks omitted]). Moreover, "[a] contract's silence on an issue does not create an ambiguity which opens the door to the admissibility of extrinsic evidence to determine the intent of the parties" (*id.* at 13). "Ambiguity in a contract arises when the contract, read as a whole, fails to disclose its purpose and the parties' intent, or when specific language is susceptible of two reasonable interpretations" (*id.*).

"A release is a contract whose interpretation is governed by contract law principles. Where the language of the release is clear, effect must be given to the intent of the parties as indicated by the language employed" (*Around The Clock Delicatessen, Inc. v Larkin*, 232 AD2d 514, 515 [2d Dept 1996]).

The Release states in the first paragraph that: "the Undersigned . . . for the sole consideration of . . . ($$276,877.99) to the undersigned in hand paid, receipt whereof is hereby acknowledged . . ." (Defendant's Exhibit 2). However, in the second paragraph, the Release also states that: "if the undersigned or his/her representative does not receive payment within 30 days of the receipt of a signed and dated release by MARK FLYNN, The undersigned shall be entitled to receive interest at a rate of ten percent (10%) per annum beginning the 31st Day after this release is received by MARK FLYNN." (Defendant's Exhibit 2). These two clauses appear to be in conflict with one another, as the former indicates that the settlement amount has been paid, but the latter belies it by contemplating a situation in which the settlement amount has not yet been paid. As such, there is an ambiguity as to whether the settlement amount was paid on the date the Release was executed or is to be paid in the future. Defendant has not demonstrated how this conflict could be resolved or reconciled as to give both clauses effect (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127, 133-134 [1st Dept 2017] ["conflicting contract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect"]; *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 987 [1st Dept 2009]).

Since there is an ambiguity in the Release on this issue, the Court may consider evidence outside of the Release. Defendant submitted with its exhibits a check in the amount of $12,341.88 dated March 22, 2018. This check was issued after the date of the execution of the Release. It is unclear why a check would have been issued to Plaintiffs if the settlement amount had already been paid in full as of the date of execution of the Release. As such, Defendant has failed to establish its prima facie entitlement to summary judgment.

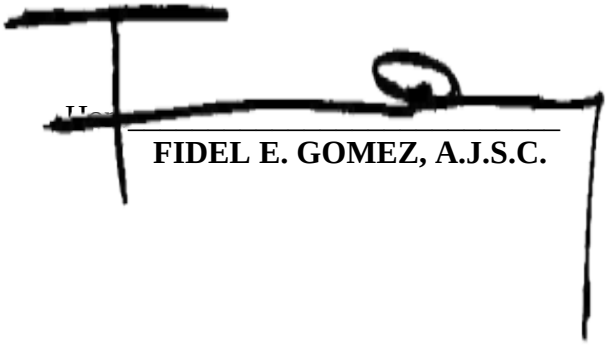
Accordingly, Defendant's motion for summary judgment is denied. In light of the foregoing, Plaintiffs' opposition need not be considered.

It is hereby

ORDERED that Defendant serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated: 9/27/22



FIDEL E. GOMEZ, A.J.S.C.