2626 BWAY LLC v Broadway Metro Assoc., L.P.
2009 NY Slip Op 33002(U)
December 15, 2009
Supreme Court, New York County
Docket Number: 602937/08
Judge: Eileen Bransten
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SCANNED ON 12/22/2009

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

PRESENT: Bransten PART 3m

HON. EILEEN BRANSTEN *Justice*

2626 Bway LLC

INDEX NO. 602937/08

MOTION DATE 8/19/09

MOTION SEQ. NO. 002

- v -

MOTION CAL. NO. ______

Broadway Metro Associates

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 22 2009
NEW YORK COUNTY CLERK'S OFFICE

RECEIVED
DEC 16 2009
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: 12-15-09

HON. EILEEN BRANSTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3
---------------------------------------X

2626 BWAY LLC,

Plaintiff,

-*against*-

Index No.: 602937/08
Mtn. Date: 8/19/09
Mtn. Seq. No.: 002

BROADWAY METRO ASSOCIATES, L.P.,

Defendant.

---------------------------------------X
PRESENT: Hon. Eileen Bransten, J.:

In this dispute, plaintiff 2626 BWAY LLC ("2626") moves to dismiss defendant Broadway Metro Associates, L.P.'s ("Broadway Metro") counterclaim seeking attorneys' fees, based on the indemnification provision in a lease. If granted, 2626 further seeks to discontinue the present action as moot.[1]

FILED
DEC 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

BACKGROUND

Broadway Metro is the owner of premises located at 2624-2626 Broadway, Manhattan, New York (the "Premises"). 2626 is a commercial tenant of the premises pursuant to a lease dated September 6, 2006 (the "Lease") (Notice of Motion, Ex. B).

[1]There is another action pending before this Court, involving these same parties, albeit seeking other relief based on other facts. *See 2626 BWAY LLC v Broadway Metropolitan Associates, L.P.*, Index No. 106287/09.

On August 6, 2008, Broadway Metro served a Notice to Cure on 2626 (*id.*, Ex C), maintaining that 2626 had violated Article 13 of the Lease by failing to obtain appropriate insurance, as set forth therein. Under Article 19.1.4 of the Lease, Broadway Metro could declare an event of default, including 2626's failure to "comply with or perform any . . . covenant of condition hereof" which continued for more than 30 days. Under the Lease, should 2626 fail to correct the default, Broadway Metro had the right to terminate the Lease by giving three days' notice, in writing. Lease, Article 19.2.

Plaintiff claims to have cured the default in October 2008. However, Broadway Metro refused to accept the alleged cure. Upon Broadway Metro's refusal, 2626 commenced an action for a *Yellowstone* injunction[2] before this Court. 2626 voluntarily withdrew the motion on November 2, 2008. Notice of Motion, Ex G.

Following the withdrawal of 2626's motion, Broadway Metro served a Notice of Default upon 2626, based on 2626's failure to comply with the Notice to Cure. 2626 brought a second action for a *Yellowstone* injunction, which was denied by this Court, based on the fact that, although 2626 had obtained insurance, it did not appear to comport with the type of insurance required under the provisions of the Lease. *Id.*, Ex I. As a result, 2626 failed to establish a likelihood of success on the merits. *Id.*, Ex K.

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[2]*First National Stores, Inc. v Yellowstone Shopping Center, Inc.*, 21 NY2d 630 (1968).

Broadway Metro then sent 2626 a Notice of Termination of the Lease. Broadway Metro followed up the Notice of Termination with a holdover action in the Civil Court, New York County, based on the Notice to Cure, Notice of Default and Notice of Termination ("Civil Court Action"). Petition, Ex L.

2626 responded with a motion to dismiss for lack of personal jurisdiction, which was granted by the Civil Court, and the proceeding was dismissed on the basis of defective service. Civil Court Decision and Order, Ex A.

Based on the proposition that the dismissal of the Civil Court action vitiates the Notice of Termination, 2626 seeks to discontinue the present action as moot, since 2626 no longer faces termination of the Lease. Also, as a consequence, 2626 would have this Court dismiss Broadway Metro's counterclaim for attorneys' fees and costs, sought under the terms of the Lease.

In the alternative, 2626 argues that the Lease does not even contain a provision entitling Broadway Metro to attorneys' fees, since, allegedly, the provision upon which Broadway Metro relies only applies to actions by third parties brought against Broadway Metro. Broadway Metro counters that the dismissal of the Civil Court action did not void its Notice to Cure, which is still in effect, and is still not cured. It further contends that the provision requiring indemnification does indeed provide that 2626 pay Broadway Metro attorneys' fees in the event of 2626's failure to comply with any provision of the Lease.

DISCUSSION

2626 is correct in claiming that Broadway Metro cannot rely herein on the Notice to Cure as a predicate notice for any further landlord-tenant proceeding. Once an action is brought upon a predicate notice, and is subsequently dismissed, no further action or proceeding may commence upon the same notice. *See Kaycee West 113th Street Corp. v Diakoff*, 160 AD2d 573 (1st Dept 1990); *NRP LLC II v El Gallo Meat Market, Inc.*, 2003 WL 22469745, 2003 NY Slip Op 51355(U) (App Term, 1st Dept 2003). "That notice, served in the context of the prior Civil Court matter, cannot serve as the predicate for this later action. Since the Civil Court action was dismissed, the [notice] upon which it was predicated cannot be revived to support a new action." *Kaycee West 113th Street Corp.*, 160 AD2d at 573. It is irrelevant that the proceeding was not dismissed on the merits. *See NRP LLC II*, 2003 NY Slip Op 51355(U).

Further, this Court does not accept Broadway Metro's argument that the only predicate notice which has been extinguished, if any, was its final Notice of Termination, not the Notice to Cure. The Notice to Cure, no matter how unusual (as Broadway Metro claims it to be), was still a predicate notice in the Civil Court Action. Broadway Metro must serve new "predicate notices" (*NRP LLC II*, 2003 Slip Op 51355[U], at *1), including a new Notice to Cure. In consequence, 2626 has no need of the present action, which will be discontinued as moot. This decision is made without prejudice to Broadway Metro to serve

a new Notice to Cure, if desired. However, as noted in *Kaycee West 113th Street Corp.* (160 AD2d 573), any such action must be brought in the Civil Court.

As 2626's motion is essentially one to dismiss Broadway Metro's counterclaim, the law as pertains to dismissals under CPLR 3211 (a) applies.

> "On a motion to dismiss pursuant to CPLR 3211, we must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 (2001); *see Leon v Martinez*, 84 NY2d 83 (1994).

A motion brought pursuant to CPLR 3211 (a) (1) "may be granted where 'documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.'" *Held v Kaufman*, 91 NY2d 425, 430-31 (1998), quoting *Leon*, 84 NY2d at 88; *Foster v Kovner*, 44 AD3d 23, 28 (1st Dept 2007) ("[t]he documentary evidence must resolve all factual issues and dispose of the plaintiff's claim as a matter of law").

"Where the contract . . . is unambiguous, 'its interpretation is a matter of law and effect must be given to the intent of the parties as reflected by the express language of the agreement.'" *National Granite Title Insurance Agency, Inc. v Cadlerock Properties Joint Venture, L.P.*, 5 AD3d 361, 362 (2d Dept 2004), quoting *Riley v South Somers Development Corp.*, 222 AD2d 113, 117 (2d Dept 1996). "Contracts which are clear and unambiguous

[* 7]

should be enforced according to their plain meaning." *Cellular Telephone Co. v 210 East 86th Street Corp.*, 44 AD3d 77, 83 (1st Dept 2007).

The Lease, after listing a string of occurrences for which 2626 shall be liable to third parties such as "liabilities, obligations, claims, damages, fines, penalties, interest, causes of action, costs and expenses, including but not limited to reasonable attorneys' fees," continues, in section 14.1, so as to provide for indemnification for:

> "any failure on the part of the Tenant promptly and fully to comply with or perform any of the terms of, covenants or conditions of this Lease; or performance of any labor or services or the furnishing of any materials or other property in respect of the Demised Premises or any other part thereof by reason of any such occurrence, Tenant, upon Landlord's request and at Tenant's expense, shall resist and defend such suit, action or proceeding, or cause same to be resisted and defended by counsel designated by Tenant and approved by Landlord."

In *Hooper Associates, Ltd. v AGS Computers* (74 NY2d 487, 491 [1989]), the Court of Appeals stated that:

> "[w]ords in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might "seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view" (*Robertson v Ongley Elec.*, 46 NY 20, 23). This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed."

See also Weissman v Sinorm Deli, Inc., 88 NY2d 437 (1996); *Lipshultz v K & G Industries, Inc.*, 294 AD2d 338 (2d Dept 2002); *Wisniewski v Kings Plaza Shopping Center of Flatbush Avenue, Inc.*, 279 AD2d 570 (2d Dept 2001).

The Court in *Hooper*, recognizing that "attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule" (*Hooper,* 74 NY2d at 491, citing *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1 [1986]), was concerned with determining whether an indemnification clause was "limited to attorney's fees incurred by plaintiff in actions involving third parties or also includes those incurred in prosecuting a suit against defendant for claims under the contract" (*id.* at 491), the very issue before this Court.

The indemnification clause in *Hooper* called for the defendant to hold harmless the plaintiff from, among other things, breaches of warranty by defendant, "[t]he performance of any service to be performed hereunder," infringement of patent rights, the installation of certain systems, and mechanic's liens. *Id.* at 490. Despite the language therein, isolated from the rest of the clause, which might appear to indemnify the plaintiff for attorneys' fees arising from a suit against defendant by plaintiff, the Court in *Hooper* held that none of the language employed "*clearly permitt*[*ed*]" such damages (*id.* at 492 [emphasis added]); that the clause was "typical of those which contemplate reimbursement when the indemnitee is required to pay damages on a third-party claim," and that none of the claims delineated "are *exclusively*

or *unequivocally referable* to claims between the parties themselves or support an inference that defendant promised to indemnify plaintiff for counsel fees in an action on the contract." *Id.* (emphasis added).

The indemnification clause in the present case is even more broadly applicable to third-party actions than the one in *Hooper*. A reading of the clause does not evidence any contractual intent that the clause be "exclusive" or "unequivocally referable" to an action between the contracting parties, as opposed to an action involving third parties. The "particular occasion" and "particular object" of the indemnification clause (*id.* at 491), requires a finding that such indemnification was not intended. As such, this court finds that the indemnification clause herein does not entitle Broadway Metro to collect attorneys' fees arising from its various litigations against 2626 based on the Lease. As such, Broadway Metro's counterclaim for attorneys' fees must be dismissed.

Plaintiff is entitled to an order granting its motion both to dismiss the counterclaim, and to dismiss its own action as moot. This decision is without prejudice to Broadway Metro's commencement of an action in Civil Court, based on any predicate notices required under the Lease.

[* 10]

Accordingly, it is

ORDERED that the motion brought by 2626 BWAY LLC to discontinue the complaint as moot, and to dismiss defendant Broadway Metro Associates, L.P.'s counterclaim, is granted, and the action and counterclaim are dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

FILED
DEC 22 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York

December 15, 2009

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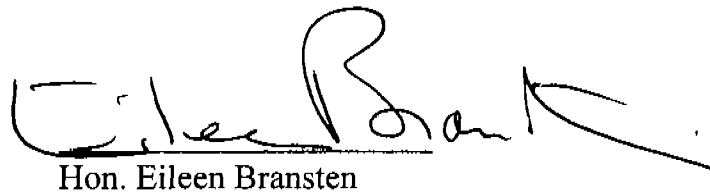

Hon. Eileen Bransten