SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – IAS PART 3

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SCHON FAMILY FOUNDATION and
HENRY SCHON,

Plaintiffs,

-against-

BRINKLEY CAPITAL LIMITED; MULTIFORMAS SOLUCOES GRAFICAS INTEGRADAS; and EMANUEL WOLFF

Defendants.

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Index No.: 653664/2015
Motion Date: 9/21/2018
Motion Sequence 002

BRANSTEN, J.

This action comes before the Court on Plaintiffs' motion for summary judgment pursuant to CPLR 3212 on their sole claim for breach of contract. Defendants oppose the motion. For the reasons set forth below, Plaintiffs' motion for summary judgment is granted.

I. BACKGROUND

This breach of contract action arises from a settlement agreement in a previous action bearing the same caption, Index Number 652005/2014 (the "Previous Action"). (Plaintiffs' Rule 19-a Statement of Facts ("Pl. 19-a") ¶ 1.) Plaintiffs Henry Schon and Schon Family Foundation (the "Foundation") commenced the Previous Action against Defendants Brinkley Capital Limited ("Brinkley"), Multiformas Solucoes Graficas Integradas ("Multiformas"), and Emanuel Wolff for their failure to make payments under the following loans: (1) Henry Schon made two loans to Brinkley in the aggregate

amount of $1.5 million (the "Henry Loan"), which were guaranteed by Emanuel Wolff and Multiformas; and (2) the Foundation made two loans to Brinkley in the aggregate amount of $1.6 million (the "Foundation Loan"), which were guaranteed by Mr. Wolff and Multiformas. (*Id.* ¶ 1.)

A. The Parties Settle the Previous Action

On or about November 26, 2014, the parties executed the "Interim Settlement Agreement" to settle the Prior Action (the "Settlement Agreement"). (Pl. 19-a ¶ 2.) At the time the Settlement Agreement was executed, Defendants' outstanding obligations under the Henry Loan totaled $403,744, with interest accruing from September 25, 2008, and the Foundation Loan totaled $972,000, with interest accruing from July 1, 2009. (*Id.* ¶ 3.) Defendants acknowledged and reaffirmed their obligation to pay Plaintiffs the aggregate of the Henry Loan and Foundation Loan, totaling $1,365,744 (together the "Schon Loan Amount"). (Schon Affid. Ex. A ¶ 1.)

In the Settlement Agreement, Plaintiffs acknowledged that Defendants made a payment of $10,000 for October 2014. (*Id.* ¶ 4.) Paragraph Four of the Settlement Agreement provided Defendants were required to make two payments of $10,000 to the Foundation on November 15, 2014 and December 15, 2014, that would be applied to the balance of the Foundation Loan. Subsequently, starting January 10, 2015, Defendants were required to pay monthly payments of $3,000 to Henry Schon and $10,000 to the

Foundation for 24 months through December 2016. (*Id.* ¶ 4.) Defendants were also required to make a one-time payment of $76,000 to the Foundation before April 30, 2015. (*Id.*) Thus, Paragraph Four provided a payment schedule for an aggregate total of $418,000 of the Schon Loan Amount.

Pursuant to Section 5 of the Settlement Agreement, Defendants were to pay the balance of the Schon Loan Amount, in the principal amount of $947,744, according to a payment plan to be negotiated by Mr. Schon and Mr. Wolff sometime before December 31, 2016. (*Id.* ¶ 5.)

The Settlement Agreement further provided that if Defendants failed to make any of the payments, Plaintiffs would serve a Notice to Cure demanding payment within five business days. (*Id.* ¶ 6.) If Defendants failed to cure within five days, then Defendants would be in default without any further right to cure. (*Id.*) In the event of default, Plaintiffs were permitted to commence an action to recover the outstanding amount of the Schon Loan, less any payments made by Defendants. (*Id.* ¶ 7.) In addition, if Plaintiffs proved successful in the prosecution of the action to enforce the Settlement Agreement or if the second action was settled, Section Seven provided Defendants agreed to pay Plaintiffs' reasonable attorneys' fees incurred by Plaintiffs in enforcing the Settlement Agreement. (*Id.*)

B. Defendants Fail to Make Required Payments

Defendants made payments through April 2015, but then stopped making the required $3,000 payment to Henry Schon and the $10,000 payment to the Foundation beginning in May 2015. (Pl. 19-a ¶¶ 8-9.) Defendants also failed to make the $76,000 payment to the Foundation before April 30, 2015. (*Id.* ¶ 9.) In total, Defendants made payments of $12,000 to Henry Schon and $86,000 to the Foundation. (*Id.* ¶ 10.)

Defendants aver that in the summer of 2015, Henry Schon and Emanuel Wolff entered into an oral forbearance agreement, pursuant to which Mr. Schon agreed not to take any action with respect to any alleged defaults under the Settlement Agreement until the parties had a chance to meet in January 2016. (Defendants' Rule 19-a ("Def. 19-a") ¶ 7.) On September 21, 2015, Plaintiffs served upon Defendants a Notice to Cure the stated default within five business days, which Defendants failed to cure. (Pl. 19-a ¶ 14.)

Plaintiffs commenced this action by filing a motion for summary judgment in lieu of complaint on November 4, 2015. By Decision and Order dated March 15, 2016, this Court denied Plaintiffs' motion and deemed Plaintiffs' moving papers the Complaint pursuant to CPLR 3213. (NYSCEF No. 21.) Defendants filed an Answer with Counterclaims on March 28, 2016. (NYSCEF No. 23.)

II. ANALYSIS

Plaintiffs seek an order granting summary judgment on their breach of contract claim, dismissing Defendants' counterclaims, and awarding Plaintiffs costs and attorneys' fees.

A. Legal Standard

The standards for summary judgment are well-settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." CPLR 3212(b); *Zuckerman v. City of N.Y.*, 49 N.Y.2d 557, 562 (1980). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once such proof has been offered, to defeat summary judgment "the opposing party must show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman*, 49 N.Y.2d at 562. When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007).

B. Plaintiffs' Claim for Breach of the Settlement Agreement

Plaintiffs argue Defendants breached the Settlement Agreement by failing to make monthly payments and the one-time payment to the Foundation pursuant to Paragraph Four of the Settlement Agreement. Under New York law, the elements of a cause of action for breach of contract are (1) the parties entered into a valid agreement, (2) performance by plaintiff, (3) defendant's failure to perform, and (4) resulting damage. *See VisionChina Media Inc. v. S'holder Representative Servs., LLC*, 109 A.D.3d 49, 58 (1st Dep't 2013).

Defendants argue the Settlement Agreement merely provided for preliminary payments. In addition, Defendants argue the payments were contingent on the parties' obligation to negotiate in good faith until January 31, 2017 with respect to a revised payment plan for the balance owed. Contrary to Defendants' argument, the Settlement Agreement does not contain any indication that Defendants' obligation to pay the $418,000 under Paragraph Four was conditioned upon the execution of a final payment plan for the outstanding balance of the Schon Loan pursuant to Paragraph Five. Moreover, the fact that the Settlement Agreement is titled "Interim Settlement Agreement" does not remove Defendants obligation to make timely payments pursuant to Paragraph Four. Instead, the term "interim" indicates that Paragraph Four provided for partial payment of the full sum due to Plaintiffs and anticipated the parties would reach an agreement as to the remaining $947,744 owed, as provided in Paragraph Five.

"[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Marin v. Constitution Realty, LLC*, 28 N.Y.3d 666, 673 (2017). The plain language of Section 4 of the Settlement Agreement clearly imposes an obligation on Defendants to make monthly payments to Plaintiffs in addition to the one-time payment to the Foundation. This obligation is also reiterated in Paragraph Seven of the Settlement Agreement, which defines an event of default as any failure to make any payment set forth in the Settlement Agreement. Therefore, the Settlement Agreement clearly creates an obligation for Defendants to make payments to Plaintiffs.

It is undisputed that Defendants failed to make the required monthly payments in May 2015 and failed to remit the onetime payment of $76,000 to the Foundation before April 30, 2015. (Pl. 19-a ¶ 9.) Pursuant to the Settlement Agreement, in the event Defendants failed to make any payments, Plaintiffs were required to send Defendants a demand to cure within five business days. (Schon Affid. Ex. A ¶ 6.) Then, if Defendants failed to cure, Defendants would be in default without any further right to cure and Plaintiffs had the right to commence an action to enforce the Settlement Agreement. (*Id.* ¶ 7.) Plaintiffs sent the Notice of Default on September 21, 2015. (Pl. 19-a ¶ 14.) It is undisputed that Defendants failed to cure on or before September 28, 2015. (*Id.* ¶ 15.) Therefore, Plaintiffs have established that Defendants breached the Settlement Agreement.

C. The Alleged Oral Forbearance Agreement

Defendants argue there was no breach because Henry Schon modified the Settlement Agreement by entering into an oral forbearance agreement with Emanuel Wolff in the summer of 2015. Pursuant to the purported oral forbearance agreement, Mr. Schon allegedly agreed to forbear on any action relating to the Schon Loan amount until January, 2016.

General Obligations Law § 15–301(1) provides "[a] written agreement . . .which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought . . . ."

"[I]f the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls." *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 343 (1977). Here, the Settlement Agreement provides the agreement "may not be modified, altered or amended in any way, except by a writing executed by each of the parties affected by such modification, alteration or amendment." (Schon Affid. Ex. A ¶ 10.)

However, General Obligations Law § 15-301(1) only prohibits executory oral modification of written contracts. Once executed, the oral modification may be proved. *See Rose*, 42 N.Y.2d at 34. Where there is only partial performance of the oral modification sought to be enforced, a party claiming oral modification can only prevail

upon proof that there was an oral modification and that the performance occurred in a manner that was unequivocally referable to that oral modification. *See id.* Here, the performance of the purported forbearance agreement was not completed because Plaintiffs served the Notice to Cure in September 2015 and brought this action to enforce the Settlement Agreement in November 2015. Thus, the Court must determine whether Defendants raise an issue of fact regarding the existence and partial performance of the purported oral forbearance agreement.

"To establish the existence of an enforceable agreement, a party must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound." *Kasowitz, Benson, Torres & Friedman, LLP v. Reade*, 98 A.D.3d 403, 404 (1st Dep't 2012), *aff'd*, 20 N.Y.3d 1082 (2013). The Court notes there is a dispute as to whether Mr. Schon ever agreed to forbear from taking action on Defendants' default under the Settlement Agreement. Mr. Wolff attests that Mr. Schon agreed not to take any action and agreed to meet with Mr. Wolff in January 2016 to work out a resolution. (Wolff Affid. ¶ 10.) On the other hand, Mr. Schon attests that he never agreed to forbear in July 2015, yet he unilaterally decided not to take action until after Rosh Hashana. (Schon Affid. ¶ 16.) Nevertheless, the Court finds this issue of fact insufficient to deny summary judgment, as Defendants fail to raise an issue of fact regarding the consideration for the forbearance agreement.

It is well settled that "valuable consideration may consist of some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other." *Holt v. Feigenbaum*, 52 N.Y.2d 291, 299 (1981). Here, Defendants fail to allege or provide evidence that Mr. Schon received any consideration for his purported promise not to take action regarding the defaults under the Settlement Agreement. As noted above, Defendants were obligated to make payments to Plaintiffs pursuant to Paragraph Four. Yet, at the time Mr. Schon allegedly agreed to forbear, Defendants had already missed the required monthly payments since May 2015 and failed to make the one-time payment due to the Foundation in April 2015. Without an allegation or evidence regarding the consideration received for Mr. Schon's promise, Defendants cannot raise a material issue of fact regarding the existence of the alleged oral forbearance agreement. Therefore, Defendants fail to raise a triable issue of fact regarding the purported modification.

Furthermore, while not addressed in the parties' briefs, there is an additional exception to the writing requirement pursuant to Section 15-301 of the General Obligations Law. "Once a party to a written agreement has induced another's significant and substantial reliance upon an oral modification, the first party may be estopped from invoking the statute to bar proof of that oral modification." *Rose v. Spa Realty Assocs.*, 42 N.Y.2d 338, 344 (1977). Nevertheless, the Court finds this exception does not apply, as Defendants fail to demonstrate any significant or substantial reliance upon Mr.

Schon's alleged promise to forbear on any action relating to the default. Defendants fail to allege or provide any evidence of a change in their course of conduct in reliance on the promise. Therefore, Defendants fail to raise an issue of fact regarding the estoppel exception to General Obligations Law § 15-301.

For the foregoing reasons, Plaintiffs provide evidence entitling them to summary judgment on their breach of contract claim and Defendants fail to raise a material issue of fact requiring trial.

D. Interest

Defendants also argue the total amount to be paid under the Settlement Agreement did not include interest except in the event of default. However, the Settlement Agreement defines the amount of the Henry Loan as $403,744 "together with interest accruing from September 25, 2008" and the Foundation Loan as $962,000 "together with interest accruing from July 1, 2009." (Schon Affid. Ex. A at 2.) Therefore, the Settlement Agreement included the interest on the Henry Loan accruing from September 25, 2008 and interest on the Foundation Loan accruing from July 1, 2009 to the date of the execution of the Settlement Agreement.

E. Defendants' Counterclaims and Affirmative Defenses

Defendants assert counterclaims for fraudulent inducement, breach of contract, and unjust enrichment. Defendants further assert affirmative defenses of estoppel, waiver, and failure of a condition precedent. Plaintiffs move to dismiss Defendants' counterclaims and affirmative defenses.

1. Fraudulent Inducement

Defendants first counterclaim is for rescission of the Settlement Agreement, based on the allegation that Defendants were fraudulently induced into entering the Settlement Agreement. Defendants allege Henry Schon assured Emanuel Wolff that he would continue to negotiate with Mr. Wolff regarding a revised payout schedule after the agreement was executed.

The Settlement Agreement contains two broad merger and integration clauses. Paragraph Twelve provides,

> No party hereto is relying upon any representation, understanding, undertaking, or agreement not set forth in this Agreement, and each party expressly disclaims any reliance on any such representation, understanding, undertaking, or agreement. Provided, however, that both parties acknowledge and agree that that they are obligated to negotiate in good faith with respect to entering into a payment plan as provided for in Paragraph 5 hereof.

(Schon Affid. Ex. A ¶ 12.) In addition, Paragraph Fifteen provides, "All prior understandings and agreements among the parties concerning the subject matter of this agreement are merged in this Agreement."

Here, the integration clause explicitly references representations that the parties are "obligated to negotiate in good faith with respect to entering into a payment plan as provided for in Paragraph 5 hereof." (Schon Affid. Ex. A ¶ 12.) Parol evidence of a representation may not be introduced where the instrument contains a specific disclaimer of reliance on the representation alleged. *See Marine Midland Bank, N.A. v. CES/Compu-Tech, Inc.*, 147 A.D.2d 396, 396 (1st Dep't 1989) (finding disclaimer in assignment and note was sufficiently specific to foreclose fraudulent inducement defense). Thus, as a matter of law, Defendants are precluded from raising a claim for fraudulent inducement by virtue of the integration clause and merger clauses. *See Gen. Bank v. Mark II Imports, Inc.*, 293 A.D.2d 328, 328 (1st Dep't 2002) (holding guarantors' claim for fraudulent inducement claim fails as a matter of law due to integration clause).

Defendants also argue that the waiver provision in the Settlement Agreement is unenforceable based on the fraudulent inducement claim. Paragraph Seven of the Settlement Agreement provides "Defendants waive all defenses and counterclaims except for the defense of payments made by Defendants." (Schon Affid. Ex. A ¶ 7.) The Court of Appeals has held where a party asserts a claim for rescission based on fraud, the parol evidence rule has no application. *See Sabo v. Delman*, 3 N.Y.2d 155, 161 (1957)

(holding evidence of allegedly fraudulent oral misrepresentation may be introduced to rescind a contract on the ground of fraud). However, as noted above, Defendants claim for rescission and fraudulent inducement fails as a matter of law. A waiver of defenses and counterclaims may be enforced and is not against public policy. *Chem. Bank N.Y. Trust Co. v. Batter*, 31 A.D.2d 802, 802 (1st Dep't 1969). Thus, Defendants are precluded from raising affirmative defenses and counterclaims in this action.

2. Breach of the Settlement Agreement

Defendants' second counterclaim is for breach of the settlement agreement based on Plaintiffs' failure to negotiate in good faith. This claim is identical to Defendants' eighth affirmative defense for failure of a condition precedent, and thus both claims will be analyzed together. Plaintiffs argue the counterclaim and defense fail for two reasons. First, the claim is belied by Mr. Wolff's statement that the parties continued to negotiate after the execution of the Settlement Agreement. Second, Plaintiffs argue Defendants breached the Settlement Agreement and discharged Plaintiffs from their obligation to continue negotiating.

The record is clear that the parties continued to negotiate after the Settlement Agreement was executed. In fact, in late 2014, the parties agreed to a monthly payment amount of $10,000 after the Paragraph Four payments concluded in December 2016. (Wolff Affid. ¶ 20.) While there was never an agreement reached as to the specific

details of the repayment plan, *i.e.* the term of payments or whether interest would be included, there were discussions pursuant to Paragraph Five. Moreover, the parties were in communication regarding the Settlement Agreement until September 2015. (Wolff Affid. ¶ 23.) Nevertheless, Defendants argue that Plaintiffs breached the Settlement Agreement by refusing to negotiate after September 2015.

It is well settled that "[a] non-breaching party will be discharged from the further performance of its obligations under a contract when the breach [by the other party] is so substantial that it defeats the object of the parties in making the contract" and that such a material breach is one "that goes to the root of the contract." *Viacom Outdoor, Inc. v. Wixon Jewelers, Inc.*, 25 Misc.3d 1230(A), at *3 (Sup. Ct. N.Y. Cnty. 2009), *aff'd in part, vacated in part on other grounds*, 82 A.D.3d 604 (1st Dep't 2011). The Court has already found that Defendants fail to raise a material issue of fact regarding the purported forbearance agreement and Defendants were in breach of Paragraph Four of the Settlement Agreement as of September 28, 2015. Thus, Defendants discharged Plaintiffs' obligation to negotiate in good faith pursuant to Paragraph Five. Accordingly, Defendants counterclaim for breach of the Settlement Agreement and affirmative defense for failure of a condition precedent must fail.

3. The Remaining Counterclaims and Defenses

Finally, Defendants' defenses and counterclaims should be dismissed for the same reasons Plaintiffs' motion was granted. Defendants were obligated to make the monthly payments to Plaintiffs pursuant to the Settlement Agreement. Thus, the fourth affirmative defense of unjust enrichment must fail because Plaintiffs were not unjustly enriched by the payment of $98,000 under the terms of the Settlement Agreement. In addition, Defendants failed to raise a triable issue of fact regarding the existence of the forbearance agreement. Therefore, the third counterclaim for breach of the forbearance agreement must fail, along with the fifth affirmative defense for unclean hands, the sixth affirmative defense for estoppel, and seventh affirmative defense for waiver.

For the reasons stated above, Defendants' counterclaims and affirmative defenses are dismissed.

F. Attorneys' Fees

Plaintiffs also request an award of attorneys' fees incurred in pursuing this action. Generally, a prevailing party may not collect attorneys' fees and disbursements from another party unless an award is authorized by an agreement between the parties, statute, or court rule. *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5 (1986). Paragraph Seven of the Settlement Agreement provides "[i]n the event Plaintiffs are successful in the prosecution of Plaintiffs' Second Action or if the Second Action is settled by the parties,

Defendants, jointly and severally, agree to pay Plaintiffs' reasonable attorney's fees incurred in enforcing this Agreement as a result of Defendants' default." (Schon Affid. Ex. A ¶ 7.) As noted above, Plaintiffs are entitled to summary judgment on their breach of contract claim. Therefore, Plaintiffs are entitled to attorneys' fees, as provided in the Settlement Agreement.

Reasonable attorneys' fees are to be determined by the Court. *See Mfr. Hanover Trust Co. v. Green*, 95 A.D.2d 737, 738 (1st Dep't 1983). Therefore, the matter is referred to a referee for a hearing on that issue. *See DDS Partners, LLC v. Celenza*, 6 A.D.3d 347, 349 (1st Dep't 2004).

III. CONCLUSION

ACCORDINGLY, it is hereby

ORDERED, Plaintiffs' motion for summary judgment on their breach of contract claim is GRANTED; it is further

ORDERED Defendants' counterclaims and affirmative defenses are dismissed; it is further

ADJUDGED and DECLARED that Plaintiff Henry Schon is entitled to judgment against Defendants, jointly and severally, in the sum of $391,744, with accrued interest thereon at the statutory rate of 9% per annum from September 25, 2008 to November 26, 2014; it is further

ADJUDGED and DECLARED that Plaintiff Schon Family Foundation is entitled to judgment against Defendants, jointly and severally, in the sum of $876,000, with accrued interest at the statutory rate of 9% per annum from July 1, 2009 to November 26, 2014; it is further

ADJUDGED and DECLARED Plaintiffs are entitled to recover Plaintiffs' costs and expenses, including reasonable attorneys' fees, incurred by Plaintiffs in bringing this action;

WHEREAS the court having on its own motion determined to consider the appointment of a referee to determine as follows, and it appearing to the court that a

reference to determine on consent is proper and appropriate pursuant to CPLR 4317(a), it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issues of fact, which are hereby submitted to the JHO/Special Referee to determine the amount of costs and reasonable attorneys' fees Plaintiffs incurred in bringing this action; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for Plaintiffs shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for

the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part.

This constitutes the decision and order of the Court.

Dated: New York, New York
November 27, 2018

ENTER:

HON. EILEEN BRANSTEN
J.S.C.