

**Bayrock Spring St., LLC v 246 Spring St. (Soho
NYC) Mezz, LLC**

2019 NY Slip Op 30203(U)

January 18, 2019

Supreme Court, New York County

Docket Number: 650921/2015

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 42

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BAYROCK SPRING STREET, LLC and BAYROCK
GROUP, LLC,

Plaintiffs,

-against-

246 SPRING STREET (SOHO NYC) MEZZ, LLC and
246 SPRING STREET (SOHO NY) B, LLC,

Defendants.

Index No. 650921/2015
Motion Seq. No. 003

DECISION/ORDER

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HON. NANCY M. BANNON, J.:

In this action to recover unpaid fees for legal, accounting and tax services, 246 Spring Street (Soho NY) Mezz, LLC (Spring Street Mezz) and 246 Spring Street (Soho NY) B, LLC (Spring Street B) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment to dismiss the first cause of action for breach of contract of Bayrock Spring Street, LLC (Bayrock Spring) and Bayrock Group, LLC (Bayrock Group) and for a judgment granting defendants their first counterclaim for unpaid license fees for office space.

In their cross motion, plaintiffs move, pursuant to CPLR 3212, for summary judgment in their favor, on their fourth cause of action for breach of contract and specific performance in connection with their rights to use certain hotel facilities and services. In addition, plaintiffs seek to dismiss defendants' first and second counterclaims, respectively, for use and occupancy of office and parking space.

For the reasons set forth below, defendants' motion is granted and plaintiffs' cross motion is denied.

I. Background and Procedural History

The Bayrock Group, a real estate and investment firm with a 100% membership interest in Bayrock Spring, was one of the original developers together with non-party Sapir Organization Spring Street LLC (SOSS), which were part of the joint venture, which developed the Trump Soho Hotel Condominium (the project or the property). The joint venturers formed two separate Delaware LLCs, which were the indirect parent of the Bayrock/Sapir Organization, LLC (BSO) charged with developing and running the project.

Until March 3, 2010, Bayrock Spring served as managing member of the joint venture. At such time, Bayrock Spring resigned from its position in favor of SOSS, pursuant to a letter (the resignation agreement) with SOSS, and agreed to continue performing legal, accounting, tax as well as some sales and marketing services for BSO in consideration of receipt of certain payments, rights and benefits through 2011 (NYSCEF Doc. No. 81).

In 2010, SOSS refinanced the struggling project with the help of affiliates of the investment firm CIM Group, respectively, CIM Senior and CIM Mezz (NYSCEF Doc. No. 100 at 3; Complaint at 5 and 6). On December 3, 2010, plaintiffs entered into a consent and waiver agreement with defendants as a result of the restructuring of an outstanding mortgage loan and an outstanding mezzanine loan in the project (NYSCEF Doc. No. 82). Therein, defendants reaffirmed and assumed the obligation to pay plaintiffs in accordance with the resignation agreement. The resignation agreement and the consent and waiver agreement are referred to hereinafter collectively as the agreements. In or about 2014 or 2015, CIM Group acquired the property through the foreclosure process after the sponsors defaulted on the loan.

As relevant here, the agreements include provisions governing the reimbursement of plaintiffs for project-related costs and expenses and grant plaintiffs the use of “Complimentary

Room Nights” along with rights to use food and beverage and spa services as well as other rights and benefits in accordance with the joint venture agreement and other agreements and documents (resignation agreement, ¶ A; consent and waiver agreement, ¶¶ 4 and 10).

In addition, plaintiffs were granted licenses (NYSCEF Doc. No. 91) by BSO, defendants’ predecessor in interest, to occupy certain commercial space (the office space) at the project site (*see* resignation agreement, ¶ G) as well as the right to use parking space (resignation agreement, ¶ A).

This action was commenced on March 24, 2015, and defendants served their answer with counterclaims on May 15, 2015. On June 16, 2016, this court rendered a decision on plaintiffs’ motion sequence number 002, pursuant to CPLR 3211 (a) (7), dismissing defendants’ third counterclaim for contractual indemnification and granting defendants leave to voluntarily discontinue their fourth counterclaim for common-law indemnification without prejudice to asserting it in a related action (NYSCEF Doc. No. 66).

II. Contentions

Defendants argue that plaintiffs’ breach of contract claim should be dismissed on the basis that Section B (3) of the resignation agreement specifically refers to the word “reimbursement” as opposed to “payment.” Defendants contrast the word reimbursement with payment and state that whereas the former references “costs and expenses” actually incurred, the contract refers to the latter as a “lump sum” or “monthly’ until a sum certain was paid off” (defendants’ mem at 10).

Second, defendants contend that to the extent there is any ambiguity regarding the “reimbursement” terminology, plaintiffs’ own conduct over the course of the performance is dispositive. Namely, plaintiffs initially sought and were paid \$75,000, but as actual costs and

expenses reduced, they only sought actual costs incurred and were reimbursed for same.

Defendants point out that, in the four years of performance, nothing was ever indicated on any statement, draw request or otherwise to suggest any other intention.

Third, defendants contend that plaintiffs waived any claim for more than the amounts sought and received. Specifically, plaintiffs, over the course of four years of a clear course of performance, never reserved a right to more than what they were seeking through their draw requests, by letter, or in some other manner.

Finally, defendants argue that the agreements are valid and enforceable contracts that govern and discharge defendants' obligations regarding reimbursement and thus preclude any quantum meruit claim.

Next, defendants argue that they are entitled to a judgment on their first counterclaim for unpaid license payments for office space for the following reasons. First, defendants claim that if they are granted summary judgment dismissing the breach of contract claim, plaintiffs' claim of setoff of license fees against reimbursement for alleged unpaid fees for services rendered disappears.

Second, even in the absence of summary judgment, defendants contend that plaintiffs are not entitled to any set off as different parties are involved. Third, defendants claim that there is no right of setoff unless a party holds a liquidated debt. Fourth, defendants argue that Bayrock Group never claimed a right of setoff in a related action where defendants commenced a holdover proceeding against Bayrock Group for nonpayment of license fees. Therefore, there is no claim for right of set off after the fact.

In opposition, in relation to their first cause of action, plaintiffs argue that they did not waive their right to full payment under the agreements. Plaintiffs contend that their acceptance

of lesser amounts through draw requests does not constitute a waiver, or their intention to relinquish their right to full payment.

Rather, plaintiffs argue that they intended to forbear the full amount until a later date considering the hotel's financial difficulties. Plaintiffs state that SOSS directed the creation of the draw requests and required that it approve all amounts requested. Plaintiffs also aver that their authorized representative, Julius Schwarz (Schwarz), and defendants agreed that "Bayrock" was not waiving its right to demand the full amount at a later time. Plaintiffs argue that forbearance does not constitute waiver.

Furthermore, plaintiffs argue that the agreements contain clear and unequivocal non-waiver clauses, which preclude defendants' waiver argument.

Finally, plaintiffs argue that defendants' foreclosure did not affect plaintiffs' right to payment. Contrary to defendants' contentions, which omit a portion of the governing contract they quote, plaintiffs point out that the resignation agreement provides that the Bayrock payments shall cease if there is a foreclosure, "*provided that* the foreclosure was 'vigorously contested by Sapir member and the Joint Venture in good faith and in appropriate proceedings'" (plaintiffs' mem at 15 [emphasis in original]). Plaintiffs argue that the foregoing condition did not occur.

With regards to their fourth claim for breach of contract and specific performance relating to Bayrock's personnel's rights to use certain hotel facilities and hotel services, plaintiffs argue that the agreements are valid contracts, that plaintiffs performed, and that defendants breached by denying Bayrock personnel the right to use these facilities and services. Plaintiffs seek damages for that breach in an amount to be determined and hereby no longer request

In their cross motion, plaintiffs seek summary judgment dismissal of defendants' first counterclaim for use and occupancy of office space. Plaintiffs argue that defendants asserted a claim for "fair market use and occupancy" in the amount of \$18,700 per month in their answer whereas the governing license agreement shows that they are only entitled to monthly payments of \$2,556.25. In addition, the amount reflected in plaintiffs' invoices is consistent with the aforementioned figure stipulated in the license agreement. Plaintiffs also argue that defendants are improperly attempting to amend their counterclaim by recasting it as one for "unpaid license payments" instead of "fair market use and occupancy" in an effort to succeed on their motion. In any event, plaintiffs argue that in the event the court permits this amendment, any amounts due under the license agreement should be deducted from the amounts due to plaintiffs on their claims for breach of contract.

In addition, plaintiffs also seek summary judgment in their favor on defendants' second counterclaim for use and occupancy of hotel parking spaces. Plaintiffs underscore that defendants do not even attempt to move for summary judgment on this claim. Plaintiffs stress that, as supported by Schwarz's uncontroverted testimony, plaintiffs were given use of the parking spaces at no cost, by a third-party parking garage company; that there was no written or oral agreement requiring plaintiffs to pay for same and that they never received a bill or invoice for same for over five years.

In reply, defendants argue that plaintiffs do not dispute that they are entitled only to be reimbursed for certain "Project related overhead costs and expenses" specifically enumerated in Exhibit A of the resignation agreement; that during the period from 2010-2014, plaintiffs enumerated these expenses in draw requests for the project and that plaintiffs were in fact reimbursed in full for all such expenses requested. Furthermore, plaintiffs never objected during

that four-year period to any such payments or otherwise indicated in writing that they sought or were entitled to more than the amount identified in the draw requests.

Defendants highlight that plaintiffs ignore the plain “reimbursement” language of the contract and their course of conduct and insist instead that they had made an oral agreement with a low-level employee of Sapir such that they not seek the full amount under the resignation agreement, but rather may reserve their right to accrue the difference between that figure and the amount in the draw requests so that they may catch up at an indefinite point in the future.

Defendants argue that plaintiffs’ arguments fail for the following reasons.

First, plaintiffs’ contention that they orally reserved the right to accrue their demands indefinitely is ineffective for the following nine reasons: i) Schwarz does not articulate a clear agreement, but rather refers to a conversation and an understanding with Michael Koltyonuk (Koltyonuk) without identifying his position ii) there is no mention of Sapir or any Sapir principal, nor is there any allegation that Koltyonuk was authorized or in a position to enter into any such agreement; iii) neither is there any follow-up writing or correspondence to confirm any such understanding or modification; iv) in any event, any oral modification would not be enforceable as against Sapir as this would contravene paragraph I (2) of the resignation agreement, which prohibits any modification, waiver or change “except by a writing signed by the party against whom such modification, waiver or change is sought to be enforced” (NYSCEF Doc. No. 81); v) defendants contend that Schwarz admits that Sapir would not allow plaintiffs to seek full reimbursement beyond the amounts set forth in the draw requests and acknowledges that plaintiffs never noted any such arrangement to anyone in writing and instead accepted reimbursement for only the amounts sought without comment or objection; vi) defendants also point out that plaintiffs do not allege any such oral agreement or reservation of rights vis-à-vis

defendants as they allege the conversation was with the Sapir organization; vii) any oral modification would also be ineffective against defendants, pursuant to paragraph 16 of the consent and waiver agreement, which requires any amendment to be in writing; viii) the undisputed documentary evidence, specifically the draw requests annexed to defendants' motion (NYSCEF Doc. Nos. 84 and 85) contradict any assertion that plaintiffs thought that they were entitled to \$49,117.17 until they agreed to reduce that amount in consideration of a right to reserve and accrue any shortfall; and (ix) plaintiffs do not submit any proof in admissible form that they incurred specific expenses in the amount for which they now seek catch-up reimbursement; rather, Schwarz concedes the amount in the draw requests and admits that the reimbursement requests were revised because of employee changes and that at least some of those expenses are no longer applicable.

Next, defendants point out that the only document that is binding on them is the consent and waiver agreement. Defendants argue that the foregoing agreement does not contain a non-waiver clause, rather, paragraph 16 merely requires that amendments be in writing. Similarly, paragraph I (2) of the resignation agreement requires that any modification, waiver or change be in writing. Therefore, both contracts cite language that bars any claim for an oral modification to the reimbursement provisions.

Finally, defendants argue that in March 2014, the reimbursement payments ceased and, since paragraph B (3) of the resignation agreement states that plaintiffs had bargained for the right to cease providing services in that event, they may not thereafter ply services and continue to seek reimbursement of amounts to the foreclosing lender to take advantage of the foreclosure scenario.

Concerning the first counterclaim relating to the use of office space, defendants argue that plaintiffs openly acknowledge in Schwarz's affidavit that they owe at least \$2,556.25 per month for the use of the space and they do not make any effort to even question or dispute the \$80,000 invoiced amount. Defendants dispute plaintiffs' contention that they are attempting to amend anything. Rather, defendants state that plaintiffs admit that \$80,000 are owed.

Defendants argue that plaintiffs are not entitled to any catch-up payments as different parties are involved and there is no right of setoff of an unliquidated amount versus a liquidated amount.

With regards to the fourth cause of action concerning plaintiffs' rights to use certain hotel facilities and services, defendants contend that plaintiffs fail to submit any proof of any element of any such contract claim in admissible form, and that, in particular, there is no proof of a breach. While the resignation agreement merely provides that Bayrock principals Schwarz and Kotler shall "continue to retain" certain room night rights set forth in the original joint venture agreement and certain other "documents and agreements" relating to the project, the consent and waiver agreement does not change that structure, but adds that any such rights shall "relinquish" if and when plaintiffs "cease to maintain any direct or indirect ownership interest in the Project's food and beverage facilities." The defendants maintain that plaintiffs fail to identify or submit any applicable documents of any breach of any specific contract, nor is there proof of any damages. Schwarz does not assert that he or another representative ever asked for the right to use a room and were refused. Furthermore, the defendants contend, even if there was a breach, there are no damages for the loss of a right to use something for free that was never requested.

Next, defendants argue that they did not seek summary judgment on the second counterclaim given its size and relative significance. Defendants contend that there is no dispute that plaintiffs occupied two parking spots from November 2012 through April 2015 without

paying for them. Defendants argue that the nature of the alleged “amendment” of the license agreement, the length of time of use and the value of the benefit were left unresolved by Schwarz’s affidavit and are open issues that may require a trial.

III. Discussion

CPLR 3212 (e) permits partial summary judgment “as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just.” The principle is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion shall be granted if neither party has shown “facts sufficient to require a trial of any issue of fact” (CPLR 3212 [b]). However, “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad*, 64 NY2d at 853; *People v Grasso*, 50 AD 3d 535, 545 [1st Dept 2008]).

A. Defendants’ Motion for Summary Judgment to Dismiss

1. First Cause of Action: Breach of Contract: Reimbursement of Overhead Services

a. Legal Standard

In order to sustain a breach of contract action, plaintiff must establish the existence of a valid agreement, plaintiff’s performance of its obligations thereunder, defendant’s breach of its obligations and resulting damages (*Second Source Funding, LLC v Yellowstone Capital, LLC*,

144 AD3d 445, 445-46 [1st Dept 2016]; *see also Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009], *affd* 14 NY 3d 901 [2010]).

When interpreting its terms, “[a] contract should be ‘read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be interpreted as to give effect to its general purpose’” (*Insurance Corp. of N.Y. v Central Mut. Ins. Co.*, 47 AD3d 469, 471 [1st Dept 2008], quoting *Empire Props. Corp. v Manufacturers Trust Co.*, 288 NY 242, 248 [1942]). Furthermore, provisions of contracts “should be construed to give force and effect . . . and not in a manner so as to render them meaningless” (*Yoi-Lee Realty Corp. v 177th St. Realty Assoc.*, 208 AD2d 185, 190 [1st Dept 1995]).

Where proof of the breach involves the interpretation of language, the issue of whether the contract is ambiguous is a question for the court to resolve as a matter of law (*South Rd. Assoc., LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 278 [2005]).

A contract is considered ambiguous when terms are “susceptible to more than one reasonable interpretation” (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]; *RM Realty Holdings Corp. v Moore*, 64 AD3d 434, 436 [1st Dept 2009], citing *Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

Where the language of the contract is ambiguous, the intent of the parties at the time the contract may be determined by extrinsic evidence to resolve the ambiguity arising from “reasonable interpretations supportive of differing outcomes to the parties’ dispute” (*Hambrecht & Quist Guar. Fin., LLC v El Coronado Holdings, LLC*, 27 AD3d 204, 204 [1st Dept 2006]). Courts may “look to the past practice of the parties to give definition and meaning to language in an agreement” (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 333 [1998]).

Consequently, the meaning of any disputed provisions is a question of fact for the factfinder to determine. Any ambiguity shall be resolved by the factfinder where “determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence” (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169, 172 [1973]).

b. Applicable Contractual Provisions

Both parties rely on the following provisions in the resignation agreement and the consent and waiver agreement to make their case.

Paragraph B (3) of the resignation agreement states in relevant part:

“Bayrock Member shall continue to be reimbursed on the fifteenth of every month beginning on April 15, 2010 and continuing for a minimum of six (6) months and until Bayrock Member receives no less than sixty (60) days' prior written notice from the Sapir Member (the ‘Termination Notice’), reimbursement of its Project related overhead costs and expenses in the amount of \$75,000 per month as set forth on Exhibit A attached hereto. For the avoidance of doubt, Bayrock Member shall be entitled to receive from Lender the monthly Project related overhead costs and expenses reimbursement payment to be paid in the month of March covering the period of February, 2010. Simultaneously with the sending of the Termination Notice, Sapir Member shall pay Bayrock Member the sum of \$60,000 towards reimbursement of severance expenses relating to the termination of Project related employees. Once Bayrock Member ceases to receive reimbursement of its Project related overhead costs and expenses, it shall no longer have any obligation to provide any Project related services, except as specifically provided herein. Notwithstanding any provision herein to the contrary, except for the obligation to make the payments provided for pursuant to this Paragraph B 3, nothing herein shall, or shall be deemed to require Sapir Member, the Property Owner or Bayrock member or any other person or entity to retain or continue the employment of any person(s) or entities currently employed by any of Bayrock Member, BSOR, BSOH, or Property Owner.”

(NYSCEF Doc. No. 81 at 3-4)].

Exhibit A of the resignation agreement is titled “Monthly Project Overhead Reimbursement” and itemizes “Bayrock Project Related Salaries and Overhead Expenses,” including the names and salaries of four Bayrock Group employees, namely Shawn May, Tatiana

Yusupova, Brian Halberg and Raymond Lee; the name and compensation of one independent contractor, Joe Ginex; and seven categories of overhead expenses for a total of \$75,000.

As pointed out by the moving parties, defendants are not a party to the resignation agreement, which was executed by Schwarz for Bayrock Spring and accepted and agreed to on March 3, 2010 by Alex Sapir for SOSS (*see* consent and waiver agreement, schedule C, organizational chart). However, defendants signed the consent and waiver agreement on December 3, 2010 (NYSCEF Doc. No. 82) with plaintiffs, which reaffirms plaintiffs' entitlement to their rights under paragraph B (3) of the resignation agreement as stated below:

"Subject to the terms of the Bayrock Resignation Letter and the Amended and Restated Mezzanine Loan Agreement, dated as of the date hereof, by and between Investor and Mezzanine Borrower, Investor agrees to pay to Bayrock Spring Street (or to permit Mortgage Borrower and/or Mezzanine Borrower to pay to Bayrock Spring Street) the payments described in Section B(3) of the Bayrock Resignation Letter on the terms and conditions set forth therein."

(Consent and waiver agreement, ¶ 10).

c. Interpretation of the Term "Reimbursement"

At the heart of the dispute is the determination of the meaning that may be ascribed to the term "reimbursement" under the agreements.

Defendants argue that plaintiffs were only entitled to the reimbursement of expenses actually incurred whereas plaintiffs argue that they have a right to receive a fixed amount per month without regard to expenses incurred.

In support of their position, defendants submit project-related salaries and overhead expenses statements (project statements) that plaintiffs prepared and that Schwarz initialed, which list the name, position, responsibility and associated remuneration per month of each employee or independent contractor as well as a breakdown of monthly overhead expenses (NYSCEF Doc. No. 83).

Defendants aver in their affirmation in support of the motion that these project statements were submitted by plaintiffs as part of draw requests to the lender for funding. As clarified by defendants, the record shows that the corresponding amount sought in the statements is set forth under the rubric of “Owner’s Rep Fee” or “Category 5.03” covering several line items in the draw requests (NYSCEF Doc. Nos. 84 and 85).

While the amount submitted for reimbursement remains \$75,000 from March 2010 to July 2010, starting August 2010, that figure starts to fluctuate commensurate with the number of persons in plaintiffs’ employ and the bonuses, severance or miscellaneous payments expended as employees depart. Towards the end of 2011, the amount drops to \$23,655 and remains the same until beginning of 2014 (*see* NYSCEF Doc. No. 83; NYSCEF Doc. No. 84 for the period of March 2010 to October 2010 and NYSCEF Doc. No. 85 for the period of November 2010 to February 2014).

Plaintiffs’ own admission confirms the aforementioned conduct and further bolsters defendants’ claims that the parties intended and agreed to define the reimbursement as actual salaries and expenses incurred. Indeed, Maria Simonchyk (Simonchyk), an independent contractor serving as controller with Bayrock Group (defendants’ mem at 7), testified at her examination before trial (EBT or deposition) that draw requests were prepared and submitted based on an “estimated and averaged out” amount of actual expenses and that all other expenses included specifically in draws and separate line items, such as salaries were “actually made and they were actually incurred” (NYSCEF Doc. Nos. 86 at 55).

Additionally, when asked whether “every item of salary and expense reimbursement identified in the various draw requests . . . were paid in full,” Simonchyk admits that they were “actually paid” (*id.* at 54 and 55).

In opposition, plaintiffs submit an affidavit prepared by Schwarz who asserts that the \$75,000 that defendants promised to pay plaintiffs represents an approximation of Bayrock Spring's monthly costs in connection with the project and exhibit A of the resignation agreement explains how that figure was calculated (NYSCEF Doc. No. 100 at 2 and 3). Schwarz avers that this amount was later revised and then readjusted to \$49,117.17 per month based on changes in employees and overhead expenses. It remained \$49,117.17 per month from March 2010 until the end of provision of services by Bayrock Spring to defendants. Schwarz also asserts that the obligations remained the same after SOSS refinanced the project, which reaffirmed Bayrock Spring's right to the payments outlined in paragraph B (3) of the resignation agreement through the paragraph 10 of the consent and waiver agreement. Schwarz avers that Bayrock Spring would prepare, at the request and under the direction of SOSS, a draw request, which is a request for funding for project-related expenses incurred under the loan documents between the parent entity of Bayrock/Sapir Organization, LLC (BSO) and BSO. Schwarz specifies that in addition to amounts Bayrock Spring was entitled to under the resignation agreement and/or the consent and waiver agreement, the draw request included other expenses of the parent entity of BSO and BSO, "such as taxes, legal fees from outside counsel, marketing and sales costs, and miscellaneous expenses" (*id.* at 4).

Schwarz avers that in the beginning, in March 2010, SOSS directed Bayrock Spring to include a draw request in the amount of \$49,117.17 per the agreements, but as of July 2010, SOSS no longer allowed Bayrock Spring to include the full \$49,117.17 to which it was entitled (*id.*, 4 and 5). In support of this assertion, Schwarz relies on "conversations" he had with "representatives from SOSS, including Michael Koltyonuk" (*id.* at 5). The reason given was that the hotel was not doing well financially, and the "understanding was that the amounts advanced under the draw

request under the CIM Loan would be credited towards the amounts owed to Bayrock, and the remainder would accrue” (*id.*). Therefore, Schwarz asserts that between July 2010 and October 2014, at SOSS’s direction, the draw requests were made with amounts lower than those due under the agreements. Furthermore, CIM stopped funding the draw requests in March 2014 (*id.* at 6).

d. Analysis

Here, it is clear from the provisions of the agreements, the documentary evidence and the admission in the record that the parties intended that plaintiffs’ reimbursement correspond to salaries and expenses actually incurred.

Schwarz’s affidavit appears to be self-serving in light of the compelling documentary proof adduced and Simonchyk’s admission contradicting his account, and plaintiffs’ demand letters (NYSCEF Doc. Nos. 88 and 89) do little to challenge the evidence (*compare Alvarez v New York City Hous. Auth.*, 295 AD2d 225, 226-227 [1st Dept 2002]) [holding that a court may “disregard an issue of fact when dismissal of the complaint is predicated on the plaintiff’s admission, which is subsequently contradicted by a self-serving affidavit in opposition to the motion” or “where compelling documentary evidence clearly demonstrates that factual issues raised in opposition to the motion ‘are not genuine, but feigned’”] [citation omitted]; *see also Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [1st Dept 2002] [ruling that the “attempt to generate a factual dispute . . . [was] flatly contradicted by the evidence” and that, moreover, “[g]enerally, a self-serving affidavit offered to contradict deposition testimony does not raise a bona fide question of fact and will be disregarded”).

Admittedly, plaintiffs’ pre-litigation demand letters dated September 12, 2014 (NYSCEF Doc. No. 88) and November 4, 2014 (NYSCEF Doc. No. 89) enclose a schedule, which plaintiffs purport to represent the project related salaries and overhead expenses. However, the

list of employees is static and includes only the names of Tatiana Yusupova and Raymond Lee, who plaintiffs advise were later replaced by Simonchyk and Brian Halberg, who plaintiffs indicate was later replaced by Schwarz. The plaintiffs quote a subtotal of salaries in the amount of \$46,755 and a total of \$2,362.17 reflecting expenses adding up to \$49,117.17 per month from March 2010 through October 2014. The foregoing total corresponding to the amount due under each draw request is not corroborated by the project statements initialed by Schwarz or the draw requests submitted by defendants.

Further challenging Schwarz's interpretation of events is plaintiffs' own controller's testimony. Plaintiffs' allegation that there was a separate oral agreement stipulating that Bayrock Spring shall first include a submission in the amount of \$49,117.17 and then later a lesser amount but reserve the right to accrue the remainder owed it is not only vague, but unsustainable. In any event, plaintiffs fail to expressly refer to the terms of the oral agreement (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995], citing *Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987]; *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994]). Furthermore, any side agreement with an SOSS representative is unpersuasive here as the agreements contain provisions requiring any amendment to be in writing (resignation agreement, ¶ I (2); consent and waiver agreement, ¶ 16).

The parties devote a lot of their argument to the issue of waiver. However, that question is rendered moot by the evidence in the record.

Based on the foregoing, defendants' motion to dismiss plaintiffs' first cause of action for breach of contract is granted.

2. Fourth Cause of Action: Breach of Contract and Specific Performance – Rights to Use Certain Hotel Facilities and Hotel Services

As stated in the contentions section of this decision, plaintiffs withdraw that branch of their complaint seeking specific performance and state, in their cross motion, that they instead request only money damages in connection with this cause of action.

In their complaint, plaintiffs allege that defendants stipulated, pursuant to the agreements, to provide Bayrock personnel rights to use certain hotel facilities and services. However, defendant Spring Street Mezz's notification to plaintiffs by letter dated February 18, 2015 (NYSCEF Doc. No. 106) that it was ending their rights to use complimentary room nights constitutes a breach of said agreements.

In support of their claims, plaintiffs rely on paragraph A of the resignation agreement, which states in pertinent part:

“For the avoidance of doubt, following Bayrock Member's resignation as Managing Member, Bayrock Member and its principals and representatives, including, without limitation, Julius Schwarz and Arie Kotler, shall continue to retain its Complimentary Room Nights, complimentary rights to use of the food and beverage and spa services of the Project, rights pursuant to Section 7.07 of the JV Agreement to take or elect to take space in the Project, and other rights of benefits provided under the Joint Venture Agreement and other documents and agreements as of the date hereof relating to the Project. Specifically, Arie Kotler, Julius Schwarz and their respective designees shall have the right to use up to (at their election) 200 Complimentary Room Nights per year, it being understood and restated herein that Complimentary Room Nights are subject to availability”

(NYSCEF Doc. No. 81 at 2).

Plaintiffs also refer the court to paragraph 4 of the consent and waiver agreement, which purportedly confirms the aforementioned right, and which, according to defendants, describes the condition under which such rights are waived:

“4. Notwithstanding any contrary provision in any other agreement, the Bayrock Entities agree that (a) their use of complimentary room nights in the

Project shall be subject to availability and shall not displace any existing paying customers using the Project, (b) they shall not sell or otherwise obtain a profit by transferring complimentary room nights to third parties, and (c) if at any time the Bayrock Entities cease to maintain any direct or indirect ownership interest in the Project's food and beverage facilities, the Bayrock Entities shall relinquish any entitlement they may have under any document to complimentary food or beverages in any facility in the Project”

(NYSCEF Doc. No. 82 at 3).

The record shows that plaintiffs sent defendants demand letters dated September 12, 2014 and November 4, 2014 seeking payment of outstanding amounts owed under the agreements in connection with services rendered (NYSCEF Doc. Nos. 88 and 89). Defendants responded to plaintiffs by letter dated January 29, 2015 stating in pertinent part that plaintiffs were “reimbursed for all amounts contemporaneously requested” and that:

“In addition, we wish to advise you that Investor intends to end all complimentary use of the hotel rooms, spa and F&B by BSS and other former sponsors of the Property and cease occupancy of the office space leased on Varick Street (collectively, “Fringe Benefits”), so these Fringe Benefits will no longer be available to BSS or other former sponsors of the Property”

(NYSCEF Doc. No. 105 at 2).

According to Schwarz, Spring Street Mezz followed up with a letter dated February 18, 2015 addressed to members of Trump International Hotels Management LLC and “cc’d” to Bayrock Group “seemingly in retaliation for Bayrock’s demand for reimbursement” with the following (NYSCEF Doc. No. 100 at 7):

“In anticipation of the impending transfer of the 100% membership interest in Project Owner to Lender or Lender’s designee, we write to instruct you to end the use of complimentary room nights at the Property (other than Operator Complimentary Room Nights as defined under the Hotel Management Agreement) for numerous reasons, including but not limited to those outlined below”

(NYSCEF Doc. No. 106 at 2).

Defendants claim, however, that their February 18, 2015 letter merely explains to plaintiffs that any rights under the agreements extinguished under the terms of governing contracts, including the Unit Management Agreements and the Hotel Management Agreement referenced in their letter. Defendants highlight that plaintiffs do not contend or submit any evidence supporting the assertion that defendants' position set forth in the letter is incorrect, invalid, or wrongful.

Defendants further argue that plaintiffs do not identify or submit the applicable documents or proof of any actual breach of any specific contract. Nor is there proof of any damages, or that Schwarz asked for the right to use a room and was refused. Finally, defendants argue that there can be no money damages for the loss of a right to use something for free that was never requested.

Based on the foregoing, defendants have raised a genuine issue of fact regarding when plaintiffs' rights extinguished, which cannot be resolved on a motion for summary judgment. Therefore, that branch of plaintiffs' cross motion seeking summary judgment on their fourth cause of action is denied.

B. Defendants' First and Second Counterclaims

1. First Counterclaim – Use and Occupancy – Office Space

On October 13, 2009, BSO granted the Bayrock Group a license to occupy office space at the project site, located at 170 Varick Street, New York, New York for the term of November 1, 2009 to October 31, 2012 for a fee of \$2,556.25 per month (NYSCEF Doc. No. 91). The license agreement was allegedly extended through October 31, 2017 via the execution of an amendment dated November 2014 (NYSCEF Doc. No. 92).

Defendants allege that they acceded control of BSO by exercise of rights under a Pledge Agreement. Defendants contend that the license agreement terminated on October 31, 2012 and appear to contest the validity of the amendment. Defendants further allege that plaintiffs failed to quit the office at the expiration of the license agreement and failed to pay any license payment since November 1, 2012.

Schwarz avers in his affidavit that, at the time of the execution of the license agreement, he served as General Counsel of BSO and executive vice president of the Bayrock Group, and signed the agreement on behalf of both entities, respectively as licensor for the former and as licensee for the latter (NYSCEF Doc. No. 100 at 8).

Schwarz asserts that plaintiffs occupied the office space from November 2009 to September 2015 and that they paid \$2,556.25 until October 2012 and then started “withholding payment because of monies owed to Bayrock under the Resignation agreement and Consent and Waiver” (*id.*). Notwithstanding the foregoing, defendants continued to issue invoices to Bayrock Group through May 2015 (*see* NYSCEF Doc. No. 108).

The court notes that, on May 18, 2015, BSO served a Ten (10-) Day Licensee Notice to Quit and Vacate the Premises on Bayrock Group on May 18, 2015 claiming that the license agreement expired on October 13, 2012 and that Bayrock Group failed to comply with paragraph 19 of said agreement by not surrendering the premises. BSO then commenced a licensee holdover proceeding in the Civil Court of the City of New York against Bayrock Group (*Bayrock/Sapir Organization LLC v Bayrock Group LLC*, Civil Court Index No. 70212/2015). The proceeding was settled by stipulation dated July 9, 2015 providing for Bayrock Group to vacate the premises on or before September 4, 2015 (NYSCEF Doc. No. 45).

At his deposition, Schwarz was shown an invoice dated August 7, 2015 with a license fee rounded down to \$2,500 per month and an aging summary reflecting an amount adding up to \$80,000 as well as another invoice dated August 14, 2015 (NYSCEF Doc. No. 94). When questioned by defendants' counsel as to whether Schwarz ever objected to the amount of license payments set forth in the invoices in an email or on paper to the Trump Soho Hotel, Schwarz admits the following:

"I didn't object to the amount. I objected to the fact that we're not paying for it because there's a lot more owed to us than it was to them.

* * *

"I orally would explain it to Maria and tell her to explain it to Michelle Schneider.¹ And I don't know if there are any e-mails or not"

(*id.* at 164).

Plaintiffs also submit e-mail correspondence accompanied by invoices for "Office Rent" on Trump Soho New York letterhead issued to Bayrock in the amount of \$2,500 per month for the period of March 2015 to May 2015 (NYSCEF Doc. No. 108). In the last e-mail dated May 21, 2015 included as exhibit, a Trump Soho New York Credit Manager writes "[t]he total outstanding balance dating back to October 2012 is \$80,000. Please advise when we may expect payment" (*id.*).

As set forth in the stipulation dated July 9, 2015 between the underlying parties, defendants preserved their "right to claim or counterclaim for unpaid use and occupancy for the Premises under the license agreement and/or at the market rate" (NYSCEF Doc. No. 43, ¶ 3).

Although defendants refer to their first counterclaim in their memorandum of law as one for "unpaid license payments," defendants labeled same in their answer and counterclaims as

¹ According to Schwarz, Michelle Schneider is either CFO for Bayrock Sapir or Trump Soho (NYSCEF Doc. No. 94 at 163).

“Use and Occupancy.” The misnomer that plaintiffs highlight is academic and not prejudicial to the motion.

The record shows that there is no dispute as to the amount of license fees owed in connection with the use of the office space.

Based on the foregoing, that branch of defendants’ motion seeking summary judgment on their first counterclaim is granted, and plaintiffs’ corresponding cross motion to dismiss is denied.

2. Second Counterclaim – Use and Occupancy – Parking Spaces

The resignation agreement provides that one parking space shall be provided to plaintiffs at no cost through October 2012 as follows:

“Sapir Member acknowledges and agrees that Julius Schwarz has the exclusive right to use at no cost one parking space pursuant to Property Owner’s contract with respect to parking for the Project, which is currently with Central Parking. Such parking space shall be available to Bayrock during the term of the License Agreement (as hereinafter defined)”

(NYSCEF Doc. No. 81, ¶ A at 2).

In their second counterclaim, defendants allege that BSO contracted with certain parking garages to provide certain parking and valet services to its hotel guests, including certain parking spaces for use by BSO designees. Specifically, defendants allege that they agreed to permit Bayrock Group and certain of its designated principals to a single parking space during the term of the license agreement, i.e. through October 31, 2012. However, defendants claim that Bayrock Group failed to terminate such usage and continued to use two parking spaces without authority or payment for the period of November 1, 2012 through April 30, 2015 at the rate of \$550 per month each, or a total of \$33,000.

In their cross motion to dismiss, plaintiffs point out that defendants did not attempt to move for summary judgment on this claim, for which Schwarz never received a bill or invoice and which involves an agreement between plaintiffs and a third party.

Plaintiffs' affiant, Schwarz, avers that the parking garage at the hotel was run by a third-party company and that "the agreement between the parking garage company and the Hotel provided that certain parking spaces were provided at no cost to the Hotel and those who worked for it" (NYSCEF Doc. No. 100 at 9). Schwarz also asserts that he used his parking space from November 2009 until about May 2015 at which time "apparently CIM notified the garage to stop letting me and Vicky use the parking spaces" (*id.* at 9).

While there is no dispute that Schwarz and his assistant Vicky Games (Vicky) used and occupied two parking spaces, defendants challenge the motion to dismiss by arguing that there are questions of fact relating to the nature of the alleged amendment to the license agreement (NYSCEF Doc. No. 92), the length of time of use and the value of that benefit.

Based on the foregoing, the court finds that plaintiffs did not sustain their burden as to how they were entitled to use parking space at the project site. Therefore, plaintiffs' cross motion seeking the dismissal of defendants' second counterclaim is denied.

IV. Conclusion

Accordingly, it is

ORDERED that the defendants' motion is granted and they are awarded summary judgment dismissing the first cause of action of the complaint and summary judgment on their first counterclaim, and it is further,

ORDERED that plaintiffs' cross motion is denied in its entirety, and it is further

ORDERED that plaintiffs' cross motion is denied in its entirety, and it is further

ORDERED that the defendants are granted judgment in the amount of \$80,000, together with interest at the statutory rate of 9% per annum from the date of October 1, 2012, until the date of the decision on this motion, and thereafter, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of the action is severed and shall continue as to the second through fourth causes of action of the complaint and as to the second counterclaim; and it is further

ORDERED that counsel are directed to appear for a status conference in Part 42, Room 1127 B at 111 Centre Street, New York, New York, on February 21, 2019, at 11:30 a.m; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: January 18, 2019



Nancy M. Bannon, J. S. C.

HON. NANCY M. BANNON