Broadway SKY, LLC v 53rd St. Holdings, LLC
2019 NY Slip Op 30907(U)
April 4, 2019
Supreme Court, New York County
Docket Number: 654594/2012
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

BROADWAY SKY, LLC,
Plaintiff,

– against –

53RD STREET HOLDINGS, LLC, CITY OUTDOOR, INC. and CLARK A. CUMMINS,
Defendants.

53RD STREET HOLDINGS, LLC and CLARK A. CUMMINS,
Third-Party Plaintiffs,

– against –

OOS INVESTMENTS, LLC,
Third-Party Defendant.

CITY OUTDOOR, INC.,
Second Third-Party Plaintiff,

– against –

OOS INVESTMENTS, LLC, 53RD STREET HOLDINGS, LLC, and CLARK A. CUMMINS,
Second Third-Party Defendants.

Index No.: 654594/2012

DECISION/ORDER

This action arises out of defendants' alleged failure to pay license fees. Plaintiff Broadway SKY, LLC (Broadway SKY), the owner of a building located at 1691-95 Broadway, New York, New York (the Building), initially entered into license agreements with defendant/second third-party plaintiff City Outdoor, Inc. (City Outdoor). With the consent of Broadway SKY, City Outdoor assigned its rights under these agreements to second third-party defendant OOS Investments, LLC (OOS), which then assigned the rights to defendant/second third-party defendant 53rd Street Holdings, LLC (53rd St. Holdings). City Outdoor and 53rd St.

Holdings retained joint and several liability for the performance of the license agreements, including the payment of fees. Defendant/second third-party defendant Clark Cummins personally guaranteed the performance and obligations of 53rd St. Holdings under the License Agreements.

In the main action, Broadway SKY moves, pursuant to CPLR 3212, for summary judgment against City Outdoor. City Outdoor cross-moves for summary judgment dismissing the complaint. In the alternative, City Outdoor's cross-motion seeks an order, pursuant to CPLR 3212 (f), denying Broadway SKY's motion and granting "a continuance" to allow City Outdoor to engage in discovery "essential" to enable defendant to oppose plaintiff's motion.

In the second third-party action, 53rd St. Holdings and Cummins move for an order dismissing the amended second third-party complaint, pursuant to CPLR 3211 (a) (1) and (7). OOS separately moves for an order dismissing this complaint, pursuant to CPLR 3211 (a) (1) and (7). City Outdoor cross-moves against each second third-party defendant for the following relief: an order, pursuant to CPLR 2004 and 2005, extending its "time within which to have filed and served the Second Third-Party Summons and Complaint to the date it was filed"; an order, pursuant to 22 NYCRR § 202.21 (d), allowing the second third-party complaint to stand and the action to proceed despite the filing of the Note of Issue, and permitting City Outdoor to take discovery from the other parties to the action; an order, pursuant to CPLR 3211 (d), denying defendants' motions to dismiss or for a continuance to engage in discovery; and an order permitting City Outdoor the opportunity to re-plead to correct defects in the amended second third-party complaint.[1] By separate motion, OOS seeks to seal an exhibit in support of its motion to dismiss.

[1] The memoranda of law on Broadway SKY's motion are referred to as Broadway SKY Memo. In Supp., City Outdoor Memo. In Opp. To Broadway SKY Motion, and Broadway SKY Reply. The memoranda of law on 53rd

Background

The following facts are undisputed. By two license agreements, each made as of February 12, 2008 (the License Agreements), Broadway SKY granted City Outdoor licenses to affix "Sign Structures" to the surface of the roof and exterior perimeter walls (facade), respectively, of the Building. ("License Agreement for Exterior Signage (Facade)", § 2.01 [Aff. of Shmuel Bar-Or In Supp. of Broadway SKY Motion (Bar-Or Aff.), Ex. 7] [Facade Agreement]; "License Agreement for Exterior Signage (Roof)", § 2.01 [Bar-Or Aff., Ex. 3] [Roof Agreement].)

By means of five separate agreements, each made and entered into on July 1, 2010, City Outdoor, with the consent of Broadway SKY, assigned its rights and certain obligations under the License Agreements. The first two agreements assigned City Outdoor's "right, title and interest" under the License Agreements to OOS. ("Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Facade)", Second Whereas Clause, § "FIRST" [A] [Bar-Or Aff., Ex. 4] [Facade Assignment No. 1]; "Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Roof)", Second Whereas Clause, § "FIRST" [A] [Bar-Or Aff., Ex. 4] [Roof Assignment No. 1] [collectively, Assignment No. 1 or Assignment No. 1 Agreements].) OOS agreed to "assume and be responsible for any liability or obligation with respect to the License Agreement arising after the Closing," and to indemnify City Outdoor for "any and all Damages asserted against, . . . or incurred or suffered by the Seller [City Outdoor], directly or indirectly, as a result of or arising from . . . (iii) Any liability arising in connection

St. Holdings' and Cummins' motion are referred to as 53rd St. Holdings Memo. In Supp., City Outdoor Memo. In Opp. To 53rd St. Holdings Motion, and 53rd St. Holdings Reply. The memoranda of law on OOS' motion are referred to as OOS Memo. In Supp., City Outdoor Memo. In Opp. To OOS Motion, and OOS Reply.

with the License Agreement after the Closing . . . ." (Facade Assignment No. 1, §§ "First" [E], "Third" [B]; Roof Assignment No. 1, §§ "First" [E], "Third" [B].)

The second two agreements assigned OOS' "right, title and interest" under the License Agreements to 53rd St. Holdings. ("Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Facade)", Second Whereas Clause, § "FIRST" [A] [Bar-Or Aff., Ex. 4] [Facade Assignment No. 2]; "Agreement of Assignment and Assumption of License Agreement for Exterior Signage (Roof)", Second Whereas Clause, § "FIRST" [A] [Bar-Or Aff., Ex. 4] [Roof Assignment No. 2] [collectively, Assignment No. 2 or Assignment No. 2 Agreements].) 53rd St. Holdings agreed to assume liabilities and indemnification obligations identical to those that OOS had agreed to assume in Assignment No. 1. (Facade Assignment No. 2, §§ "First" [E], "Third" [B]; Roof Assignment No. 2, §§ "First" [E], "Third" [B].)

In the fifth agreement between Broadway SKY, City Outdoor, OOS, and 53rd St. Holdings, Broadway SKY consented to the Assignments. This agreement provided that Broadway SKY, as Licensor, "consent[ed] to (a) the Assignor's [City Outdoor's] assignment unto the Immediate Assignee [OOS] of all of the Assignor's right, title and interest in, to and under" the License Agreements and to "(b) the Immediate Assignee's assignment unto the Remote Assignee [53rd St. Holdings] of all the Immediate Assignee's right, title and interest in, to and under" the License Agreements. ("Consent to Sequential Assignment and Assumption of License Agreements for Exterior Signage", §§ 1-2 [Bar-Or Aff., Ex 5] [Consent Agreement].)

Under the Consent Agreement, OOS and 53rd St. Holdings "each acknowledge[d], represent[ed], and agree[d] that . . . it ha[d] examined the Building and the License Area . . . , and agree[d] to accept same in their condition and state of repair existing as of the date [of the

Consent Agreement], i.e., 'AS IS', including, but not limited to, patent and latent defects of every kind and nature, structural and nonstructural. . . ." (Id., § 16 [a].)

The Consent Agreement contained the following covenant:

> "The Assignor [City Outdoor] and Remote Assignee [53rd St. Holdings], each for itself, hereby covenants and agrees that the Assignor and Remote Assignee shall be each jointly and severally liable for the observance and performance of each and every one of the terms, covenants and conditions of the [License Agreements] on the licensee's part to be performed, including, without limitation, the payment of Minimum Fixed License Fees, Additional License Fees and other charges under the [License Agreements]. . . ."

(Id., §§ 5-6.)

The Consent Agreement also contained the following indemnification provision:

> "Assignor [City Outdoor] and Assignee [53rd St. Holdings] shall be jointly and severally liable to defend, indemnify and hold Licensor [Broadway SKY] harmless from and against any and [sic] claims, damage, loss, liability, costs and expenses, including, without limitation, reasonable attorneys' fees, which Licensor shall suffer or incur in connection with or arising out of the Assignment, this Agreement or the transactions contemplated thereby."

(Id., § 12.)

Four additional agreements are relevant this transaction. Two of these agreements, also made as of July 1, 2010, were entered into between 53rd St. Holdings and Broadway SKY and amended certain provisions of the License Agreements, including the provisions involving fees due to Broadway SKY. ("First Amendment to License Agreement for Exterior Signage (Facade)" [Bar-Or Aff., Ex. 8] [Facade Agreement Amendment]; "First Amendment to License Agreement for Exterior Signage (Roof)" [Bar-Or Aff., Ex. 6] [Roof Agreement Amendment] [collectively, Amendments to the License Agreements].)

Finally, in two identical agreements, Cummins guaranteed performance of each of the License Agreements as amended by the Amendments to the License Agreements. ("Personal Guaranty of License Agreement[ ] For Exterior Signage (Facade)", sworn to on July 1, 2010, § 1 [Aff. of Daniel Heyman (City Outdoor's Atty.) In Opp. To 53rd St. Holdings & Cummins Motion, dated Aug. 23, 2017, Ex. A] [Aug. 23, 2017 Heyman Aff.] [Facade Guaranty]; "Personal Guaranty of License Agreement[ ] For Exterior Signage (Roof)", sworn to on July 1, 2010, § 1 [Aug. 23, 2017 Heyman Aff., Ex. A] [Roof Guaranty] [collectively, the Guaranty Agreements].)

Broadway SKY commenced this action on December 31, 2012 against 53rd St. Holdings, Cummins, and City Outdoor for failing to pay licensing fees and "Late Charges" due under the terms of the License Agreements. (Compl., ¶¶ 18-20.)

By two notices of default, dated May 2, 2014 and addressed to 53rd St. Holdings, to the attention of Cummins, Broadway SKY alleged that 53rd St. Holdings was "in default in the performance of its obligations arising under the License Agreement[s]" for failing to pay Minimum Fixed License Fees. (Bar-Or Aff., Ex. 9.) By two notices of termination, dated May 15, 2014, Broadway SKY "elected to" terminate the License Agreements, effective as of May 19, 2014. (Id.)

In an agreement made as of September 1, 2016, Broadway SKY, 53rd St. Holdings, and Cummins settled all claims against each other. ("Settlement Agreement & Mutual Release" [Aff. of Jay Katz (53rd St. Holdings' & Cummins' Atty.) In Reply To 53rd St. Holdings Motion (Katz Aff. In Reply), Ex. Z] [Settlement Agreement].) The Settlement Agreement provided for termination of both the License and Guaranty Agreements, stating that these Agreements:

> "shall be of no further force or effect whatsoever, provided however, neither such termination nor anything contained in this

> Settlement Agreement shall be deemed to release or waive of [sic] any claims, rights or remedies which Broadway SKY may have thereunder, at law, or in equity, by reason of any breach thereof against any party or parties, other than as against 53rd Street Holdings or Cummins as set forth in Paragraph 4 of this Agreement, all of which shall be preserved. Without limiting the generality of the foregoing, no third parties are intended to nor shall benefit from this Settlement Agreement or any provisions herein contained."

(Id., ¶ 2.) On September 27, 2016, the parties to the Settlement Agreement discontinued the action with prejudice only "as against each other." (Stipulation of Discontinuance [NYSCEF Doc. No. 119].) Broadway SKY filed a note of issue on September 30, 2016. (NYSCEF Doc. No. 120.) On November 28, 2016, Broadway SKY filed this summary judgment motion. (NYSCEF Doc. No. 121.) On January 13, 2017, City Outdoor filed a second third-party complaint against OOS, 53rd St. Holdings, and Cummins for indemnification and contribution. (NYSCEF Doc. No. 134.)

DISCUSSION

Broadway SKY's Motion & City Outdoor's Cross-Motion for Summary Judgment

The court first considers the motion of Broadway SKY and the cross-motion of City Outdoor for summary judgment or expedited discovery. 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 New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 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, subd [b])." (Zuckerman, 49 NY2d at 562.)

Broadway SKY moves for summary judgment against City Outdoor without identifying the specific causes of action on which it seeks relief. (Broadway SKY Notice of Motion [NYSCEF Doc. No. 121]; Broadway SKY Memo. In Supp., at 11-12.) In its brief in support of the motion, Broadway SKY claims that it is entitled to recover for breach of contract and, in particular, for pre and post termination fees due under the License Agreements.[2] (Broadway SKY Memo. In Supp., at 4, 11-12.)

In opposition and in support of its own motion for summary judgment, City Outdoor argues, as a threshold matter, that Broadway SKY is not entitled to summary judgment on its claims because, under claim preclusion doctrines, the Settlement Agreement and Stipulation of Discontinuance between Broadway SKY, 53rd St. Holdings, and Cummins bar Broadway SKY's claims against it. (City Outdoor Memo. In Opp. To Broadway SKY Motion, at 9-14.)

[2] Broadway SKY refers to the amended complaint in its submissions on its motion for summary judgment, but summarizes the causes of action from the original complaint. (See Bar-Or Aff., ¶ 3, Ex. 1; Broadway SKY Memo. In Supp., at 2.) There is, however, overlap between the causes of action in the original and amended complaints. In both, there are breach of contract causes of action for unpaid license fees (Compl., ¶¶ 7-27, 50-70; Amended Compl., ¶¶ 7-27, 55-75), and causes of action against defendant Cummins under the Guaranty Agreements (Compl., ¶¶ 32-37, 75-80; Amended Compl., ¶¶ 48-54, 96-102). In the original complaint, there is a cause of action for specific performance (Compl., ¶¶ 38-46), whereas in the amended complaint, brought after the purported termination by Broadway SKY of the License Agreements, there is a cause of action for post termination fees (Amended Compl., ¶¶ 43-47, 91-95). The differences in the two pleadings do not affect the disposition of the summary judgment motions as the breach of contract claims in both the original and amended complaint require consideration of the same legal issues.

In any event, the court rejects City Outdoor's argument that the amended complaint is not operative because the parties did not stipulate to allow Broadway SKY to file the amendment or because Broadway SKY did not move to amend the complaint pursuant to CPLR 3025 (b). (See Aff. of Daniel Heyman, dated March 13, 2017, ¶ 12.) Any objection to the amended complaint was waived because City Outdoor failed to reject it until the present motion was made. (See Nassau County v Incorporated Vil. of Roslyn, 182 AD2d 678, 679 [2d Dept 1992], lv dismissed 80 NY2d 972 ["Although the [plaintiff] served its first amended complaint and second amended complaint without leave from the Supreme Court, and beyond any time period within which an amendment could have been made as of right, the defendants waived any objection to those pleadings on that basis by failing to reject them"] [internal citation omitted]; accord Nardi v Hirsh, 250 AD2d 361, 364 [1st Dept 1998]; Patrick M. Connors, 2016 Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3025:9; see also Jordan v Altagracia Aviles, 289 AD2d 532, 533 [2d Dept 2001] [holding that plaintiff "waived her right to dispute [the] propriety" of the amended answer that was served without leave of court and "well beyond the period within which an amended pleading may be served as of right," because plaintiff "never rejected the pleading" until defendant moved for summary judgment dismissing the complaint].)

It is well settled that "[u]nder res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action." (Parker v Blauvelt Volunteer Fire Co., Inc., 93 NY2d 343, 347 [1999]; see Eshaghian v Eshaghian, 2019 NY Slip Op 01524, * 1 [1st Dept Mar. 5, 2019].) While res judicata may be based on a stipulation of settlement, the settlement must encompass the claims asserted in the prior action. (See generally Ember v Denizard, 160 AD3d 537, 538 [1st Dept 2018] [holding that res judicata did not bar plaintiff's claims where the settlement agreement and stipulation of discontinuance in two prior actions did not encompass the claims asserted in the later action]; compare Fifty CPW Tenant Corp. v Epstein, 16 AD3d 292, 294 [1st Dept 2005] [holding that res judicata barred plaintiff's action where the stipulation discontinuing the prior action "did not contain any reservation of the right to pursue related claims or limitation of the claims disposed of to those actually asserted in that proceeding. . . ."].)

Here, the settlement was made in the same action and between different parties. In any event, the Stipulation of Discontinuance applied "only" to the claims against 53rd St. Holdings and Cummins. Moreover, the Settlement Agreement, to which City Outdoor was not a party, expressly reserved Broadway SKY's rights against City Outdoor. The res judicata doctrine is accordingly inapplicable.

Broadway SKY is also not barred by collateral estopped from maintaining its claims against City Outdoor because the doctrine of collateral estoppel "is inapplicable if an issue has not been fully litigated, e.g., if there has been a stipulation." (Angel v The Bank of Tokyo-Mitsubishi, Ltd., 39 AD3d 368, 371 [1st Dept 2007], citing Kaufman v Eli Lilly & Co., 65 NY2d 449, 456-457 [1985]; accord Americorp Fin., L.L.C. v Venkany, Inc., 102 AD3d 516, 516 [1st Dept 2013] [settlement agreement in prior action between defendant and non-party did not

preclude defendant's claim].) Finally, law of the case is inapplicable as no issue in this action has been "judicially determined." (See generally Martin v City of Cohoes, 37 NY2d 162, 165 [1975], rearg denied 37 NY2d 817; Delgado v City of New York, 144 AD3d 46, 51-52 [1st Dept 2016]; Carmona v Mathisson, 92 AD3d 492, 492-493 [1st Dept 2012].)

City Outdoor also argues that it has "suretyship status" under the Consent Agreement and that the Settlement Agreement discharged its obligations because Broadway SKY "destroyed" City Outdoor's subrogation rights against 53rd St. Holdings and Cummins. (City Outdoor's Memo. In Opp. To Broadway SKY Motion, at 15-17; Letter of Daniel Heyman, dated Oct. 19, 2017 [NYCSEF Doc. No. 263] [Oct. 19, 2017 Letter].) As discussed further below (infra at 20-22), the court holds that City Outdoor is a surety, is secondarily liable for the obligations under the License and Consent Agreements, and is not discharged from its obligations under these Agreements.

Paragraph 2 of the Settlement Agreement provides in full:

> "Termination of Agreements. Upon execution of this Settlement Agreement and Mutual Release, the Parties acknowledge and agree that both the Façade License Agreement, Roof License Agreement, Façade Agreement Guaranty, and Roof Agreement Guaranty shall all be deemed to be unconditionally and irrevocably terminated, and shall be of no further force or effect whatsoever; provided however, neither such termination nor anything contained in this Settlement Agreement shall be deemed to release or waive of [sic] any claims, rights or remedies which Broadway SKY may have thereunder, at law, or in equity, by reason of any breach thereof against any party or parties, other than as against 53rd Street Holdings or Cummins as set forth in Paragraph 4 of this Agreement, all of which shall be preserved. Without limiting the generality of the foregoing, no third parties are intended to nor shall benefit from this Settlement Agreement or any provisions herein contained."

Paragraph 4 of the Settlement Agreement further provides:

> ". . . Broadway SKY hereby releases and discharges 53rd Street Holdings and Clark A. Cummins . . . from all actions, . . . claims and demands whatsoever, in law[,] admiralty or equity, which against 53rd Street Holdings and/or Cummins, Broadway SKY ever had, now has or hereafter can, shall or may have in any manner whatsoever arising out of or related to the Façade License Agreement, the Roof License Agreement, Consent, Façade Agreement Guaranty, or Roof Agreement Guaranty, or any of them. . . ."

City Outdoor argues that the Settlement Agreement released 53rd St. Holdings and Cummins from all claims arising out of the License Agreements, the Consent Agreement, and the Guaranty Agreements. (Oct. 19, 2017 Letter, at 2.) According to City Outdoor, Broadway SKY therefore released all of its claims not only against 53rd St. Holdings and Cummins, but also against City Outdoor, because "the obligation of a surety is only coextensive with that of its principal." (Id. [quotation marks in original].)

This argument ignores Broadway SKY's reservation of rights in paragraph 2 of the Settlement Agreement. Paragraph 2 provides that nothing in the Agreement shall release or waive Broadway SKY's claims against any party "other than as against 53rd St. Holdings or Cummins as set forth in Paragraph 4 of this Agreement, all of which shall be preserved." This paragraph also provides that "no third parties are intended to nor shall benefit from this Settlement Agreement. . . ." The fact that paragraph 2 of the Settlement Agreement does not specifically mention the Consent Agreement does not undermine the conclusion that Broadway SKY unequivocally reserved its rights against City Outdoor. In construing the Settlement Agreement, the court must "give full meaning and effect to the material provisions. A reading of the contract should not render any portion meaningless. Further, 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 so interpreted as to give effect to its general purpose." (Beal Sav. Bank v Sommer, 8 NY3d 318,

324-25 [2007] [internal quotation marks and citations omitted]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157, 162 [1990] [reading the contract "as a whole to determine its purpose and intent"]; National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969] [holding that "[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency"].) Applying these precepts, the court holds that the clear intent of the Settlement Agreement and of paragraphs 2 and 4, read together, is not to release but to preserve Broadway SKY's claims against City Outdoor.

Broadway SKY's release of 53rd St. Holdings in the Settlement Agreement does not destroy City Outdoor's subrogation rights. Under New York law, the general rule is that a creditor's release of a principal debtor acts to discharge parties who are only secondarily liable such as guarantors or sureties. (See Jones v Gelles, 125 AD2d 794, 795 [3d Dept 1986]; Compagnie Financiere de CIC et de l'Union Europeenne v Merrill Lynch, Pierce, Fenner & Smith Inc., 188 F3d 31, 34 [2d Cir. 1999] [Sotomayor, J.] [applying New York Law and citing Jones v Gelles].) A release will not, however, discharge a surety's obligation, where the debtor agrees to a reservation of rights when the creditor releases its obligations. In that instance, the courts reason that the "release" is merely a covenant not to sue, which leaves unimpaired the surety's rights against the principal obligor. (See Jones v Gelles, 167 AD2d 636, 637 [3d Dept 1990], lv denied 77 NY2d 806 [1991] [upholding finding that indemnity agreement did not unambiguously show on its face plaintiff-creditor's intention not to relinquish her claim against defendant surety; "nor [did] it contain an express reservation, which would entitle it to be regarded as a covenant not to sue, of her right to seek reimbursement" from defendant]; Compagnie Financiere, 188 F3d at 37 [explaining that, "under New York law, 'a release with reservations is regarded as a personal covenant not to sue the debtor, which leaves unimpaired

the creditor's rights against the surety and the surety's rights against the debtor,'" citing 63 NY Jur 2d Guaranty & Suretyship, § 258 (1987)]; United Natural Foods, Inc. v Burgess, 488 F Supp 2d 384, 391, 393 [SD NY 2007] [explaining that, under New York law, "where a debtor agrees to a reservation of rights when a creditor releases its obligations, the 'release' will be regarded only as a covenant not to sue and will not impair the subrogated rights of the guarantor against the debtor"]; 63 NY Jur 2d, Guaranty and Suretyship, § 253 [2d ed, 2019 update] ["[T]he release of a principal debtor without the surety's consent does not discharge the surety if the creditor reserves its rights against the surety"].) Here, the release of 53rd St. Holdings in the Settlement Agreement is merely a covenant not to sue 53rd St. Holdings. As 53rd St. Holdings agreed to an express reservation of rights against City Outdoor, City Outdoor's rights of subrogation were not destroyed.

The court further rejects City Outdoor's argument that the Amendments to the License Agreements discharged its obligations as surety under the License and Consent Agreements because these Amendments altered City Outdoor's obligations without its consent. (See City Outdoor Memo. In Opp. To Broadway SKY, at 17-18.) It is well settled that "[u]nder general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation. Suretyship is a contractual relation and thus the rule is stated that the creditor and the principal debtor may not alter the surety's undertaking to cover a different obligation without the surety's consent." (Bier Pension Plan Trust v Estate of Schneierson, 74 NY2d 312, 315 [1989]; accord Mount Vernon City School Dist. v Nova Cas. Co., 19 NY3d 28, 35-36 [2012].) A surety may, however, consent in advance to a modification of its obligations. (See White Rose Food v Saleh, 99 NY2d 589, 591-592 [2003] [finding that a guarantor had consented to a modification agreement which reduced the weekly payments due on a note when the original note specifically

stated that the maker and guarantors agreed that the time for payment may be extended or that the note could be renewed].)

Under the Consent Agreement, Broadway SKY, as licensor, consents to City Outdoor's assignment to OOS and then OOS' assignment to 53rd St. Holdings of the License Agreements, which are defined as the License Agreements, "dated February 12, 2008 (as may have been, and may hereafter be, amended . . .)." (Consent Agreement, Second Whereas Clause.) Further, the Consent Agreement conditions the Licensor's (i.e., Broadway SKY's) consent to the assignments "upon . . . the exchange by and between Licensor and Assignor [City Outdoor], simultaneously with the execution" of the Consent Agreement, of the Amendments to the License Agreements, annexed to the Consent Agreement, executed by the Assignees. (Id., §§ 3 [a] [iii].) City Outdoor does not dispute that the Amendments were executed on July 1, 2010, the date as of which the Assignments and Consent Agreement were also made. It is thus clear from the face of the Consent Agreement that City Outdoor knew of, facilitated, and consented to the Amendments to the License Agreements.

Alternatively, City Outdoor claims that, even if it is a co-obligor and not a surety, Broadway SKY's claims are barred under General Obligations Law (GOL) § 15-105. (City Outdoor Memo. In Opp. To Broadway SKY Motion, at 2-3; City Outdoor Memo. In Opp. To Broadway SKY Motion, at 18-19.) GOL § 15-105 (1)[3] provides:

[3] The court rejects Broadway SKY's argument that, because "Defendants' [sic] Answer never raised General Obligations Law 15-105 (or any other section) as a defense, . . . the defense is waived as a matter of law." (Broadway SKY Reply, at 9.) A motion for summary judgment will be considered on unpleaded grounds where the opposing party has an opportunity to present its argument in opposition and there is no surprise or prejudice. (Bautista v Archdiocese of New York, 164 AD3d 450, 451 [1st Dept 2018]; see Rogoff v San Juan Racing Assn., Inc., 54 NY2d 883, 885 [1981] [granting summary judgment based on the Statute of Frauds, a defense not pleaded in defendants' answer, because "this defense was the principal ground relied on by defendants in support of their motion and . . . it was fully opposed by plaintiff. . . ."].) Broadway SKY executed the Settlement Agreement and filed the Stipulation of Discontinuance nearly four years after City Outdoor filed its answer. Broadway SKY had the opportunity to present its opposition to City Outdoor's GOL § 15-105 defense in its Reply and at oral argument. (See 10/26/17 Tr., at 8, 20.) As Broadway SKY does not claim prejudice or surprise, City Outdoor may raise the defense. As discussed above, however, the court finds that GOL § 15-105 does not bar Broadway SKY's claim.

> "If an obligee releasing or discharging an obligor without express reservation of rights against a co-obligor, then knows or has reason to know that the obligor released or discharged did not pay so much of the claim as he was bound by his contract or relation with that co-obligor to pay, the obligee's claim against that co-obligor shall be satisfied to the amount which the obligee knew or had reason to know that the released or discharged obligor was bound to such co-obligor to pay."

City Outdoor contends that this statute bars Broadway SKY's claims because 53rd St. Holdings had primary liability to Broadway SKY and Broadway SKY knew that 53rd St. Holdings would be responsible for 100 percent of any license fees owed to Broadway SKY, but did not expressly reserve its rights against City Outdoor. (Oct. 19, 2017 Letter, at 2-3.)

This contention is without merit. GOL § 15-105 is inapplicable under these circumstances in which, as held above (supra at 10-11), Broadway SKY released its claims against 53rd St. Holdings and Cummins, but expressly reserved its rights against any other party. Conversely, GOL § 15-104 expressly provides, in the case of co-obligors, that "the obligee's release or discharge of one or more of several obligors, or of one or more of joint, or of joint and severable obligors shall not discharge co-obligors, against whom the obligee in writing and as part of the same transaction as the release or discharge, expressly reserves his rights. . . ."].) City Outdoor thus was not discharged of its obligations under the License and Consent Agreements, even if it was a co-obligor.[4]

[4] GOL Article 15 applies by its terms to co-obligors. Although City Outdoor relies on GOL Article 15 only in connection with its alternative claim that it is discharged from liability even if it is a co-obligor, it is noteworthy that substantial authority has applied this Article to sureties and guarantors. (See Stasyszyn v Sutton E. Assocs., 213 AD2d 337, 338-339 [1st Dept 1995], lv dismissed in part and denied in part 86 NY2d 869; Lewis & Greer, P.C. v Sinrod, 49 AD3d 822, 822 [2d Dept 2008]; Jones v Gelles, 167 AD2d at 637; but see 801 South Fulton Ave. Corp. v Radin, 138 AD2d 561, 562 [2d Dept 1988].)

For all of the above reasons, the court holds that City Outdoor has not been discharged of its obligations to Broadway SKY under the Consent and License Agreements, as modified by the Amendments. City Outdoor's motion for summary judgment will therefore be denied.

Broadway SKY's motion for summary judgment will, however, also be denied. In moving for summary judgment, Broadway SKY relies on section 16 of the Consent Agreement, quoted above (supra at 4-5), under which OOS and 53rd St. Holdings agree, as of July 1, 2010, the date of the Consent Agreement, to accept the Building in "as is" condition. (Broadway SKY Memo. In Supp., at 5.) City Outdoor counters that, shortly after the execution of the Consent Agreement, the Department of the Buildings placed a violation on the Building, that scaffolding was erected in November or December 2010 and remained on the Building through July 2011, and that scaffolding was again erected in 2012. (City Outdoor Memo. In Opp. to Broadway SKY Motion, at 7; Heyman Aff., ¶ 28.) City Outdoor claims that the scaffolding prevented 53rd St. Holdings from erecting signs in accordance with the Agreements. (Heyman Aff., ¶ 28.) Broadway SKY does not dispute that scaffolding remained in place during these time periods, but claims that City Outdoor fails to explain how the scaffolding interfered with 53rd St. Holdings' placement of signage on the Building. (Broadway SKY Reply, at 5-6.)

This argument ignores that City Outdoor produces evidence that, at the oral argument of Broadway SKY's prior motion to dismiss, Broadway SKY's prior counsel not only conceded that the scaffolding was in place on the above dates, but also acknowledged that 53rd St. Holdings "would not have been able to install a sign during that period. . . ." (1/30/14 Tr., at 6-7, 10.) Assuming, without deciding, that the Agreements permit City Outdoor to maintain a claim for a set off—an issue which the parties have not fully addressed on this record—this evidence is

sufficient to raise a triable issue of fact as to whether Broadway SKY is entitled to license fees, at least for the period in which the scaffolding was in place.[5]

Finally, City Outdoor requests expedited discovery in the event the court does not grant it summary judgment. (City Outdoor Memo. In Opp. to Broadway SKY Motion, at 20.) City Outdoor fails to demonstrate entitlement to this relief. Although City Outdoor claims that there has been no discovery to date (id.), the lack of discovery is the result of its own decision not to take discovery that this court repeatedly ordered. City Outdoor appeared at the preliminary conference and all but one of the subsequent discovery conferences.[6] From the outset, as stated in a December 16, 2014 compliance conference order, the parties gave the pendency of settlement discussions as a reason for their failure to meet discovery deadlines. (NYSCEF Doc. No. 108.) In a proposed October 22, 2015 compliance conference order, the parties had not yet even served responses to plaintiff's "Notice of D&I," and proposed further extensions. The court declined to approve these extensions or to order further discovery, but provided that "[t]he parties may stipulate to the above deadlines if the settlement fails." (NYSCEF Doc. No. 112.) The court also stated that it would reconsider its decision not to order further discovery, "on a showing of diligence in conducting discovery." (Id.) On the next compliance conference date, March 29, 2016, the parties still had not conducted discovery and again represented to the court that they had been settling. (NYSCEF Doc No. 115.) Broadway SKY, 53rd St. Holdings, and

[5] Broadway SKY relies on the "as is" clause in the Consent and License Agreements to support its contention that City Outdoor has no defense to the amounts for license fees claimed due. (Broadway SKY Memo. In Supp., at 5.) In its reply, however, Broadway SKY contends that it is entitled to summary judgment, but acknowledges that City Outdoor "might be entitled to a brief hearing on its offset." (Broadway SKY Reply, at 6.) In discussing the set off issue, neither party addresses the impact of section 4.01 of the License Agreements and of the Amendments, in which the Licensee agrees to pay the Licensor licensing fees "without any deduction or set-off whatsoever. . . ."

[6] A preliminary conference was held on May 6, 2014. Subsequent compliance conferences were held before the court on December 16, 2014, May 21, 2015, October 22, 2015, and March 29, 2016. City Outdoor appeared at each of these conferences except the March 29, 2016 conference.

Cummins appeared at this conference, but City Outdoor did not. The order provided: "[T]he court declines to order further discovery. See 10/22/15 order. If the action is not resolved, the [plaintiff] shall file a note of issue by 9/1/16. The parties may stipulate between themselves to any needed discovery but the note of issue shall be filed by 9/1/16." (Id.) By letter dated September 1, 2016, the court was advised that Broadway SKY had settled with 53rd St. Holdings and Cummins, and requested an extension of time to file the note of issue. (NYSCEF Doc. No. 118.) In an endorsement on this letter, the court stated: "Discovery is complete in that the [court] has declined to order further discovery due to the parties' failure to proceed with discovery. The time to file the Note of Issue is extended to 9/30/16 final." (Id.) City Outdoor did not respond to this letter or request any further discovery prior to serving the instant motion.

Given its wholesale failure to take discovery during pre-trial proceedings, City Outdoor has forfeited its rights to discovery in this action. City Outdoor's recent retention of new counsel is not a basis for re-opening discovery. Nor, as discussed below (infra at 29-30), is discovery warranted based on Broadway SKY's settlement of its claims with 53rd St. Holdings and Cummins.[7]

53rd St. Holdings' & Cummins', & OOS' Motions to Dismiss

The court turns to 53rd St. Holdings' and Cummins' motion, and OOS' separate motion, to dismiss City Outdoor's amended second third-party complaint, and to City Outdoor's cross-motions for an order allowing the second third-party action to proceed and permitting City Outdoor to take discovery.

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as

[7] This decision will not preclude Broadway SKY and City Outdoor from agreeing between themselves to conduct discovery before the action is reached for trial.

alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88.)

53rd St. Holdings' & Cummins' Motion

As against 53rd St. Holdings, the amended second third-party complaint pleads a second cause of action for indemnification (Amended Second Third-Party Compl., ¶¶ 46-51), a third cause of action for indemnification based on City Outdoor's status as surety (id., ¶¶ 52-59), and a fourth cause of action for contribution based on the allegation that City Outdoor and 53rd St. Holdings are co-obligors (id., ¶¶ 60-62). As against Cummins, the amended second third-party complaint pleads a fifth cause of action for contribution based on City Outdoor's and Cummins' alleged status as co-sureties (id., ¶¶ 63-67), and a sixth cause of action for indemnification based on City Outdoor's allegation that it is a third-party beneficiary of the Guaranty Agreements (id., ¶¶ 68-71). The second third-party complaint also pleads a seventh cause of action for unjust enrichment against both 53rd St. Holdings and Cummins (id., ¶¶ 72-78).

53rd St. Holdings and Cummins argue that the second, third, and fourth causes of action should be dismissed because none of the agreements provides City Outdoor with a right of indemnification or contribution against 53rd St. Holdings. (53rd St. Holdings Memo. In Supp., at 17-21.) They argue that, in contrast, City Outdoor has a contractual indemnification claim against OOS under the Assignment No. 1 Agreements, and therefore has an "adequate remedy at law." (53rd St. Holdings Memo. In Supp., at 1-2, 18; 53rd St. Holdings Reply, at 9-11.) They further dispute City Outdoor's claim that it has surety status and may maintain an equitable indemnification claim against 53rd St. Holdings. (53rd St. Holdings Memo. In Supp., at 19-20; 53rd St. Holdings Reply, at 15-20.) In opposition, City Outdoor argues that, under the Agreements, City Outdoor is a surety, whereas 53rd St. Holdings is a principal obligor, and that City Outdoor therefore has rights of indemnification, contribution, and subrogation against 53rd St. Holdings. (City Outdoor Memo. In Opp. To 53rd St. Holding Motion, at 8-14.)

The unambiguous terms of the Agreements at issue in this transaction, considered as a whole, demonstrate that City Outdoor is a surety and 53rd St. Holdings is the primary obligor. As the Court of Appeals has explained:

> "A suretyship arrangement is, at its core, the confluence of three distinct, yet interrelated, obligations. These obligations are embodied in the tripartite relationship of principal obligor and obligee; obligee and secondary obligor; and secondary obligor and principal obligor. When a secondary obligor is bound to pay for the debt or answer for the default of the principal obligor to the obligee, the secondary obligor is said to have suretyship status. In other words, in transactions giving rise to suretyship status, the secondary obligor is answerable to the obligee in some way with respect to a duty, the cost of which, as between the principal obligor and the secondary obligor, ought to be borne by the principal obligor."

(Chemical Bank v Meltzer, 93 NY2d 296, 302 [1999], citing Restatement [Third] of Suretyship & Guaranty § 1, comment b [other internal citation omitted].) A suretyship arrangement "does

not depend upon the use of technical words but upon a clear intent that one party as surety [is bound] to the second party as creditor to pay a debt contracted by a third party, either immediately upon default of the third party or after attempts to effect collection from the third party have failed." (General Phoenix Corp. v Cabot, 300 NY 87, 92 [1949], accord Chemical Bank, 93 NY2d at 302.) The court must therefore "look to the substance of the entire transaction, rather than its form." (Chemical Bank, 93 NY2d at 302, citing Restatement [Third] of Suretyship & Guaranty § 1 [3] [a].)

Considering the substance of the entire transaction and the express terms of the Agreements, the court holds that the cost of any duty to Broadway SKY "ought to be borne" by 53rd St. Holdings.[8] Pursuant to the Assignment Agreements, as consented to by Broadway SKY under the Consent Agreement, City Outdoor assigned its "right, title and interest" in the License Agreements to OOS, which in turn assigned its "right, title and interest" to 53rd St. Holdings. (See supra at 3-5, quoting Assignment and Consent Agreements.) The Consent Agreement provides that 53rd St. Holdings "shall . . . satisfy any and all requirements under the Façade License Agreement and the Roof License Agreement, as amended by the First Amendment to License Agreement For Exterior Signage (Façade) and First Amendment to License Agreement for Exterior Signage (Roof), respectively. . . ." (Consent Agreement, § 8.) Moreover, the Amendments to the License Agreements require 53rd St. Holdings as Licensee to "completely install and erect" the Sign Structures "within the period of one hundred eighty (180) days

[8] The court rejects 53rd St. Holdings' attempt to distinguish Chemical Bank v Meltzer (93 NY2d 296, supra) on the ground, among others, that the defendant in that case was a guarantor of an unconditional lease payment. (53rd St. Holdings Reply, at 17-18.) Whether an undertaking by a surety is conditional or unconditional affects the surety's obligations, but not its status as a surety. (See National Union Fire Ins. Co. of Pittsburgh, Pa. v Cooper, 1990 WL 55690, * 7 [SD NY, Nos. 85-Civ-8750 to 85-Civ-8754 (LLS), 1990] [finding that an insurer that guaranteed payment of certain promissory notes was a surety, but holding that questions of fact remained as to, among other things, "the type of suretyship the parties entered"—i.e., conditional or unconditional].)

immediately following the date" of the Amendments. (Facade Agreement Amendment, § 4; Roof Agreement Amendment, § 4.)

As City Outdoor persuasively argues, City Outdoor "no longer possessed any rights or privileges with respect to the building . . . and therefore no longer had access to the building nor any ability to erect any billboards or hang signs, as required by the license agreements, nor sell advertising for it. . . ." (City Outdoor Memo. In Opp. to 53rd St. Holdings Motion, at 12.) 53rd St. Holdings does not point to any provision in any of the Agreements under which City Outdoor retained the right to affix signage or otherwise to perform the nonfinancial obligations of the Licensee. City Outdoor's obligations therefore do not arise unless 53rd St. Holdings is in default of its obligations.

In support of their claim that City Outdoor is not a surety, 53rd St. Holdings and Cummins cite the fact that City Outdoor received consideration for the assignments and was relieved of its obligations to perform under the License Agreements. (53rd St. Holdings Reply, at 15-16.) The consideration, or benefit, that City Outdoor received for the assignment does not, however, alter its status as surety and secondary obligor. (See Restatement [Third] of Suretyship & Guaranty § 2, Illustration 2 ["S Corporation sells all of its assets to P, who pays $1,000,000 and agrees to assume all of S Corporation's liabilities. With respect to each liability of S Corporation, P is the principal obligor and S Corporation is the secondary obligor"].) Moreover, 53rd St. Holdings assumed the obligations under the License Agreements but also received an assignment of the right to perform, and to profit from, the assignment of the Agreements. 53rd St. Holdings accordingly "reaped the lion's share of the benefits" from the transaction. (See Chemical Bank, 93 NY2d at 303.) In addition, as noted above, City Outdoor was required to pay the debt only if 53rd St. Holdings defaulted after the assignment. (See id.)

Contrary to 53rd St. Holdings' and Cummins' further contention, City Outdoor's status as a surety is not precluded by the provisions of the Consent Agreement, which state that City Outdoor and 53rd St. Holdings "shall be each jointly and severally liable" for performance of the License Agreements. (Consent Agreement, §§ 5-6.) These provisions must be read in light of the entire transaction, by which all of City Outdoor's right, title, and interest in the License Agreements was ultimately assigned to 53rd St. Holdings and which imposed upon 53rd St. Holdings the right and obligation to affix signage upon the Building and to perform other nonfinancial obligations. (See provisions of Agreements, discussed supra at 21.)

The imposition of joint and several liability is not inconsistent with City Outdoor's status as a surety. On the contrary, it is well settled that, notwithstanding that a party "jointly and severally" agrees to guarantee the debt of another, it is a surety where, as here, the party is a "secondary obligor [] bound to pay for the debt or answer for the default of the principal obligor to the obligee. . . ." (See Chemical Bank, 93 NY2d at 300, 302.)

As a surety, City Outdoor is entitled to maintain its claim for indemnification against 53rd St. Holdings. (See Lori-Kay Golf, Inc. v Lassner, 61 NY2d 722, 723 [1984] ["As a general rule a surety is equitably entitled to full indemnity against the consequences of a principal obligor's default"]; accord United Rentals (N. Am.), Inc. v Iron Age Tool Corp., 150 AD3d 1304, 1306 [2d Dept 2017]; Glen Banks, New York Contract Law § 25:35 [2d ed 28A West's NY Prac Series 2018 update].)

53rd St. Holdings and Cummins also mistakenly contend that City Outdoor is not entitled to indemnification because none of the Agreements by which the transaction was effected contains any provision that expressly affords City Outdoor a right of indemnification. (53rd St. Holdings Reply, at 9, 11.) A separate or additional written contract between the parties was not

necessary to enable City Outdoor to recover from 53rd St. Holdings. (See DeForge v Karwoski, 87 AD3d 1323, 1324 [4th Dept 2011]; Frontier Ins. Co. v Lubiam USA, Inc., 1998 WL 265016, * 2 [SD NY, No. 97-Civ-3480 (DC), 1998] ["A surety is, as a general rule, equitably entitled to full indemnity against the consequences of a principal obligor's default. . . . In the absence of an express indemnification agreement, . . . the surety's indemnification right is implied"] [internal quotation marks and citations omitted]; see also Barr v Raffe, 97 AD2d 696, 696 [1st Dept 1983].)

53rd St. Holdings' and Cummins' contention that City Outdoor has a remedy at law against OOS and therefore cannot maintain a claim against 53rd St. Holdings and Cummins is unsupported by any legal authority and is contradicted by the principles governing suretyship discussed above. The court has considered the remaining arguments of 53rd St. Holdings and Cummins and finds them unavailing.

The court therefore holds that the third cause of action states a claim for indemnification. The second cause of action for indemnification will be dismissed as duplicative. The fourth cause of action for contribution will be dismissed based on this court's holding that City Outdoor is a surety, not a co-obligor.

As to City Outdoor's amended second third-party complaint against Cummins, 53rd St. Holdings and Cummins argue that the fifth, sixth, and seventh causes of action should be dismissed. They seek dismissal of the fifth cause of action for contribution on the ground that "[t]here is no cause of action for common law or implied 'contribution' in contract actions as a matter of law." (53rd St. Holdings Memo. In Supp., at 21.) They further argue that because Cummins' Guaranty Agreements were made exclusively in favor of Broadway SKY, no other party may assert a claim against Cummins. (Id., at 21-22.) City Outdoor responds that Cummins

is a co-surety and that City Outdoor is therefore entitled to contribution from Cummins in either "one-half of any sum" due to Broadway Sky or "the whole thing" as an "accommodation maker." (City Outdoor Memo. In Opp. To 53rd St. Holdings, at 15-17.)

The court holds that the fifth cause of action states a claim for contribution. A surety that pays more than its proportionate share of a common liability is entitled to contribution from any co-sureties. (See First Natl. Bank of Highland v Koriba, Inc., 89 AD2d 713, 713 [3d Dept 1982] [finding that defendant paid the underlying debt as a surety and that co-defendant guarantor "may be liable for contribution as a cosurety"]; Falb v Frankel, 73 AD2d 930, 930-931 [2d Dept 1980] [holding that a surety was not entitled to contribution from a co-surety where the surety made a partial payment that did not exceed his pro rata share of the common liability]; see also Leo v Levi, 304 AD2d 621, 622-623 [2d Dept 2003]; Glen Banks, New York Contract Law, § 25:22 [2d ed 28A West's NY Prac Series 2017 update].)

A co-suretyship arises "when two or more sureties stand in the same relation to a principal. . . ." (See Wells v Miller, 66 NY 255, 258 [1876]; see generally Green Bus Lines, Inc. v Consolidated Mut. Ins. Co., 74 AD2d 136, 147-148 [2d Dept 1980], lv denied 52 NY2d 701 ["The sine qua non of contribution is the existence of a common burden, obligation or liability. . . . The most frequent application of the doctrine is found in the case of cosureties. . . ."] [internal citations omitted].) A co-suretyship may exist regardless of whether the obligations are set forth in different agreements or guarantee payment of different amounts so long as "the obligations were for the same debt or duty, and were not other and distinct transactions, and where it [does] not appear that one was intended to be secondary or collateral to the other." (Armitage v Pulver, 37 NY 494, 498-499 [1868]; 63 NY Jur 2d Guaranty and Suretyship § 481 ["The cosurety relation may exist whether all are bound upon a single

instrument, such as a bond, or by different instruments, provided they are cosureties for the same principal and the same obligation, and it is immaterial whether the sureties are liable severally or jointly"].)

Cummins' obligations arise from the Guaranty Agreements, while City Outdoor's obligations arise from the Consent Agreement. City Outdoor's and Cummins' obligations, however, both arise from the assignment of the License Agreements to which Broadway SKY consented. City Outdoor's second third-party complaint therefore adequately pleads a claim for contribution based on the allegation that "City Outdoor and Cummins are co-sureties." (Amended Second Third-Party Compl., ¶ 66.)

On this motion, the court cannot and need not determine whether and to what extent City Outdoor is entitled to contribution. In contending that it is an "accommodation maker," and therefore may recover "as much as 100%" of any sum that Broadway SKY may recover from City Outdoor, City Outdoor relies on cases that cite Article 3 of the Uniform Commercial Code. (See City Outdoor Memo. In Opp. To 53rd St. Holdings Motion, at 16-17, citing e.g. CDS Capital, LLC v Young, 27 AD3d 509, 512 [2d Dept 2006]; Florio v Cross, 194 AD2d 136, 138 [3d Dept 1993].) By its terms, Article 3 applies to "commercial paper—that is to say, to drafts, checks, certificates of deposit and notes. . . ." (UCC § 3-103, official comment 1.) City Outdoor makes no showing on this record that the UCC applies to the agreements in this action.

Moreover, the parties do not address the separate issue of whether City Outdoor and Cummins, as between themselves, are co-sureties or successive sureties—i.e., a surety for a surety. (See 63 NY Jur 2d Guaranty & Suretyship, § 481 [explaining that "the right of contribution does not attach where the sureties are successive sureties who, as between themselves, are primarily and secondarily liable. . . ."]; see generally Wells, 66 NY at 258-260.)

The sixth cause of action against Cummins pleads a claim for indemnification based on the allegation that City Outdoor is a third-party beneficiary of Cummins' Guaranty Agreements. (Amended Second Third-Party Compl., ¶¶ 68-71.) City Outdoor does not contest dismissal of this cause of action. Nor could it do so, as its allegation that it is a third-party beneficiary of the Guaranty Agreements is wholly conclusory and City Outdoor fails to plead any facts from which a reasonable inference could be drawn that the Guaranty Agreements were intended for its benefit. (See generally Mendel v Henry Phipps Plaza W., Inc., 6 NY3d 783, 786 [2006].)

The seventh cause of action for unjust enrichment against 53rd St. Holdings and Cummins will be dismissed as there is a written contract that governs the transaction. (See generally Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987].)

Finally, 53rd St. Holdings and Cummins contend that the second third-party complaint should be dismissed in its entirety because it was filed over two years after the date for impleader had passed and beyond the twenty days afforded a party by 22 NYCRR § 202.21 (e) to vacate a note of issue on the ground that an action is not trial-ready. (53rd St. Holdings Memo. In Supp., at 14-17.) While 53rd St. Holdings and Cummins do not argue that the statute of limitations has passed, they argue that City Outdoor's claims are barred by the doctrine of laches based on City Outdoor's lack of participation in the litigation. (Id., at 16-17.) In opposition, City Outdoor argues that "none of the parties to this litigation diligently moved this litigation forward." (City Outdoor Memo. In Opp. To 53rd St. Holdings, at 5.) Further, City Outdoor contends that its former counsel was "intentionally misled" to believe that 53rd St. Holdings, Cummins, and Broadway SKY were "working toward a global settlement" (id., at 6), and that under the circumstances presented, City Outdoor is entitled to post-note of issue discovery within the

meaning of 22 NYCRR § 202.21 (d). (Id., at 5-6.) In the alternative, City Outdoor requests that the court sever rather than dismiss the amended second third-party complaint. (Id., at 7-8.)

The court holds that the amended second third-party complaint should stand, but that City Outdoor, 53rd St. Holdings, and Cummins should be denied further discovery on the causes of action against 53rd St. Holdings and Cummins.[9] As the Court of Appeals has emphasized, "[t]he failure to comply with deadlines . . . impairs the efficient functioning of the courts and the adjudication of claims. . . ." (Gibbs v St. Barnabas Hosp., 16 NY3d 74, 81 [2010].) Here, however, the litigation was delayed by 53rd St. Holdings' and Cummins' own protracted settlement negotiations with Broadway SKY. As discussed above (supra at 6-7), these parties reached a settlement on September 1, 2016 and Broadway SKY filed its summary judgment motion against City Outdoor on November 28, 2016. A month and a half later, on January 13, 2017, City Outdoor filed its second third-party complaint. Significantly, 53rd St. Holdings and Cummins do not make any showing of prejudice as a result of City Outdoor's delay in filing the second third-party complaint. (See Range v The Trustees of Columbia Univ. in the City of N.Y., 150 AD3d 515, 516 [1st Dept 2017].) Given Broadway SKY's complete failure to prosecute the main action during its lengthy settlement negotiations with 53rd St. Holdings and Cummins, this court does not find that City Outdoor's delay in commencing the third-party action was "knowing[] and deliberate[]." (Compare Skolnick v Max Connor, LLC, 89 AD3d 443, 444 [1st Dept 2011].)[10]

[9] As discussed further below, discovery will be permitted, on an expedited basis, in connection with the cause of action against OOS.

[10] The settling parties can hardly be heard to claim surprise that City Outdoor filed its third-party complaint shortly after the settlement was announced, as the settlement did not involve any payment to Broadway SKY by 53rd St. Holdings and Cummins and left the entire financial burden of the transaction on City Outdoor.

Under these circumstances, the third-party claim is not barred by the failure to meet the deadline for impleader or vacatur of the note of issue. Nor, given the absence of prejudice, is the action barred by the doctrine of laches. (See generally Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 816 [2003], cert denied 540 US 1017; accord Matter of Linker, 23 AD3d 186, 189 [1st Dept 2005].)

In declining to sever or dismiss the second third-party action, the court further finds that "the issues of law and fact involved in the main and second third-party actions are intertwined. . . ." (Range, 150 AD3d at 516.) City Outdoor will be liable to Broadway SKY in the main action to the extent that 53rd St. Holdings breached the assigned License Agreements by failing to affix signage and pay fees. In the third-party action, there will be issues as to the parties' liability as between or among themselves for any damages to Broadway SKY. It is likely that some or all of the same witnesses will be required in both actions. A single trial will therefore best serve the interests of judicial economy. (See id.; Marbilla, LLC v 143/145 Lexington LLC, 116 AD3d 544, 544 [1st Dept 2014]; Erbach Fin. Corp. v Royal Bank of Canada, 203 AD2d 80, 80 [1st Dept 1994].)

The court declines to permit City Outdoor, 53rd St. Holdings, or Cummins to conduct further discovery as between themselves.[11] As discussed above (supra at 17-18), these parties failed to take discovery over the protracted period during which Broadway SKY, 53rd St. Holdings, and Cummins engaged in settlement negotiations. City Outdoor unpersuasively argues that it failed to take discovery because it was "lulled into inactivity by the representations of the other parties that they were settling the action." (City Outdoor's Memo. In Opp. To 53rd

[11] While the court declines to order further discovery between City Outdoor, 53rd St. Holdings, and Cummins, this decision will not preclude those parties from agreeing between themselves to conduct discovery before the action is reached for trial.

St. Holdings Motion, at 2-3.) In an affirmation in support of City Outdoor's cross-motion, its former counsel states that because "no demand" was made during settlement negotiations for City Outdoor's participation in the negotiations, she "was led to believe that plaintiff and co-defendants were negotiating a global settlement." (Aff. of Yolanda Zawisny In Supp. Of City Outdoor's Cross-Motion, ¶ 13.) Nowhere does she state that she made a demand to participate on behalf of City Outdoor or that she took steps to keep herself apprised of the status of the negotiations. Moreover, there is evidence in the record that City Outdoor was in fact informed that 53rd St. Holdings, Cummins, and Broadway SKY were negotiating a settlement only as between themselves. In an email dated February 23, 2016, 53rd St. Holdings' and Cummins' counsel informed City Outdoor's counsel that "the plaintiff and 53rd Street and Cummins defendants will be attempting to follow through on the settlement of the claims between those parties. . . ." (Email from Jay Katz to Mark Zawisny [City Outdoor's Atty.], dated Feb. 23, 2016 [Katz Aff. In Reply, Ex. V].) Subsequently, in a September 1, 2016 letter, discussed above (supra at 18), Broadway SKY informed the court that Broadway SKY and the "Active Defendants"—i.e. 53rd St. Holdings and Cummins—had reached a settlement in principle, and requested an extension of time to file the note of issue. City Outdoor did not respond to this letter.

Even if City Outdoor could reasonably argue that it delayed discovery in reliance on the expectation of a global settlement, all of the circumstances relating to the settlement occurred prior to the filing of the note of issue. They therefore do not qualify as "unusual or unanticipated

circumstances" that would support a request for post-note discovery pursuant to 22 NYCRR § 202.21 (d).[12]

City Outdoor requests leave to replead to correct any "facial defects" in the amended second third-party complaint. (City Outdoor's Memo. In Opp. To 53rd St. Holdings Motion, at 24.) This branch of its motion will be denied, as City Outdoor does not identify any defects that it seeks to correct and does not submit a proposed amended complaint.

OOS' Motion

The third-party complaint pleads a sole cause of action against OOS for indemnification. OOS moves to dismiss this claim as barred by laches. (OOS Memo. In Supp., at 5-9.) Like 53rd St. Holdings and Cummins, OOS does not argue that City Outdoor's claims are barred by the statute of limitations.

An action for breach of an indemnification contract is an action at law, which is not subject to the equitable defense of laches. (Republic Ins. Co. v Real Dev. Co., 161 AD2d 189, 189-190 [1st Dept 1990]; Matter of Liquidation of Am. Druggists' Ins. Co. [v Kenny], 15 AD3d 268, 268 [1st Dept 2005], lv dismissed 5 NY3d 746; see generally McDermott v City of New York, 50 NY2d 211, 216-217, 217 n 2 [1980], rearg denied 50 NY2d 1059 [explaining that the right to indemnity "springs from a contract, express or implied . . . , but also noting that "implied indemnification finds its roots in the principles of equity"].) Here, the claim for indemnification arises from written contracts between City Outdoor and OOS. (See Facade Assignment No. 1, §§ "First" [E], "Third" [B]; Roof Assignment No. 1, §§ "First" [E], "Third" [B].) The defense of laches is therefore unavailable.

[12] The court notes that, although Broadway SKY submits opposition to any further discovery against it by City Outdoor as a result of its filing of the third-party action, Broadway SKY does not claim that the third-party action should be severed. (See Pl.'s Aff. In Limited Opp. To The Cross-Motion of City Outdoor [NYSCEF Doc No 221].)

As OOS was not a party to the main action, discovery on the third-party claim against OOS will be permitted, provided that it is conducted on an expedited basis. As held above (supra at 28), in light of its own delay in prosecuting the main action, Broadway SKY cannot claim prejudice as a result of the delay occasioned by the prosecution of the third-party action. OOS will also be granted leave to assert any affirmative defenses or cross-claims.

OOS' Motion to Seal

OOS moves for an order sealing an Equity Agreement, dated November 15, 2016, between City Outdoor, OOS, and a nonparty in connection with a separate transaction. (Aff. of James Neumann [President of OOS] In Supp. of OOS' Motion To Dismiss, Ex. 7.) The requested redactions, set forth in a letter dated December 11, 2017 (NYSCEF Doc. Nos. 269-270), relate to proprietary financial information concerning the transaction. Good cause exists, pursuant to 22 NYCRR § 216.1 (a), for the requested redactions based on the parties' interest in confidentiality and the potential competitive harm to its business.

ORDER

It is hereby ORDERED that the motion (Motion Seq. No. 005) of plaintiff Broadway SKY, LLC for summary judgment is denied, and the cross-motion of defendant City Outdoor, Inc. (City Outdoor) for summary judgment and for expedited discovery is denied; and it is further

ORDERED that the motion (Motion Seq. No. 006) of second third-party defendants 53rd Street Holdings, LLC (53rd St. Holdings) and Clark A. Cummins (Cummins) to dismiss is granted to the extent of dismissing the second cause of action for indemnification, the fourth for contribution, the sixth for indemnification, and the seventh for unjust enrichment; and it is further

ORDERED that the cross-motion of City Outdoor is granted solely to the extent that the amended second third-party complaint against 53rd St. Holdings and Cummins shall stand and continue, but only as to the third cause of action for indemnification against 53rd St. Holdings and the fifth cause of action for contribution against Cummins; and it is further

ORDERED that second third-party defendants 53rd St. Holdings and Cummins shall serve an answer to the amended second third-party complaint within 20 days after the date of entry of this order; and it is further

ORDERED that the motion (Motion Seq. No. 007) of second third-party defendant OOS Investments, LLC (OOS) to dismiss is denied; and it is further

ORDERED that the cross-motion of City Outdoor is granted solely to the extent that the second third-party claim for indemnification against OOS shall stand and continue, and that discovery on this claim shall be conducted on an expedited basis; and it is further

ORDERED that second third-party defendant OOS shall serve an answer to the amended second third-party complaint within 20 days after the date of entry of this order; and it is further

ORDERED that the parties shall appear in Part 60 (Room 248, 60 Centre Street, New York, New York) for a preliminary conference on the OOS discovery on April 25, 2019 at 2:30 p.m.; and it is further

ORDERED that OOS' motion (Motion Seq. No. 008) to seal an Equity Agreement, dated November 15, 2016 (Aff. of James Neumann, Ex. 7), is granted to the extent of authorizing the redactions set forth in the redacted version annexed to a December 11, 2017 letter to the court (NYSCEF Doc. No. 269-270); and it is further

ORDERED that OOS shall file an unredacted version of the Equity Agreement. Provided that: Upon service of a copy of this order upon the Clerk of the Court, the Clerk shall seal the Equity Agreement (the sealed document); and it is further

ORDERED that, until further order of the court, the Clerk of the Court shall deny access to the sealed document to anyone other than the staff of the Clerk or the court, counsel of record for any part to this case, and any party; and it is further

ORDERED that this order may not be used to seal or redact the sealed document if offered at trial.

This constitutes the decision and order of the court.

Dated: New York, New York
April 4, 2019

MARCY FRIEDMAN, J.S.C.