SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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MICHEL ABBOUD,

Plaintiff,

- v -

MADISON KYLE REALTY CORP., VARIETY ENTERTAINMENT GROUP, LLC,

Defendant.

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INDEX NO. 157006/2019

MOTION DATE 11/17/2020, 11/17/2020

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

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VARIETY ENTERTAINMENT GROUP, LLC

Plaintiff,

-against-

NORTHSIDE VENTURES, INC.

Defendant.

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Third-Party
Index No. 595421/2020

The following e-filed documents, listed by NYSCEF document number (Motion 002) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 106, 107, 117, 118, 119, 120

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 108, 109, 110, 111, 112, 113, 114, 115, 116, 121

were read on this motion to/for JUDGMENT - DEFAULT.

Motion sequence numbers 002 and 003 are consolidated herein for disposition and are disposed of in accordance with the following decision and order.

In this action to recover damages for personal injuries, third-party defendant Northside Ventures Inc. d/b/a Faymous Studios (Northside) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the third-party complaint or, in the alternative, to compel arbitration and stay the

action pursuant to CPLR 7503 (a), or for an extension of time to answer the third-party complaint (Mot. Seq. No. 002).

Plaintiff Michel Abboud cross-moves, pursuant to CPLR 1010, to sever the third-party action from the main action (Mot. Seq. No. 002).

Defendants/third-party plaintiffs Madison Kyle Realty Corp. (Madison) and Variety Entertainment Group, LLC (Variety) move, pursuant to CPLR 3215, for leave to enter a default judgment against Northside (Mot. Seq. No. 003).

BACKGROUND

On April 14, 2019, plaintiff allegedly tripped and fell while on stage at a venue known as "the Box" located at 189 Chrystie Street in Manhattan (the Premises). The Premises is owned by Madison. At the time of the incident, non-party189 Chrystie Street Partners, L.P. d/b/a The Box (189 Chrystie) leased the Premises from Madison. Variety is a managing partner of 189 Chrystie. Northside, pursuant to a Special Events Agreement with 189 Chrystie, booked the Premises to put on the event that plaintiff was participating in at the time of the incident (Special Events Agreement, NYSCEF Doc. No. 63). The Special Events Agreement included the following arbitration clause:

> "*Any controversy or claim arising out of or in relation to this Agreement or the validity, construction or performance of this Agreement, or the breach thereof, shall be resolved by arbitration* in accordance with the rules and procedures of the American Arbitration Association under its jurisdiction in New York City, New York. The parties shall mutually agree on a single arbitrator (an attorney or a retired judge). The parties agree hereto that they will abide by and perform any award rendered in any arbitration conducted pursuant hereto. The arbitration shall be held in New York City, New York and any award shall be final, binding and non-appealable"

(*id.* at ¶ L [emphasis added]).

On July 17, 2019, plaintiff commenced this action against Madison and Variety to recover damages for injuries he allegedly sustained as a result of the fall (Summons

and Complaint, NYSCEF Doc. No. 1). On or about June 11, 2020, Madison and Variety filed a third-party action against Northside. The first and second causes of action in the third-party complaint seek common-law indemnification and contribution on the ground that Northside was actively at fault for bringing about plaintiff's injury (Third-Party Summons and Complaint at ¶¶ 28-48, NYSCEF Doc. No. 37). The third cause of action is for contractual defense and indemnification pursuant to the Special Events Agreement (Third-Party Summons and Complaint at ¶ 25, NYSCEF Doc. No. 37). In this regard, Madison and Variety rely on the following clause in the agreement:

> "Separate and apart from any obligation contained herein, [Northside] agrees to indemnify, defend and hold harmless 189 Chrystie . . . *and its partners, investors, shareholders, employees, agents, landlords and representatives* from any and all damages, claims, losses or any liability whatsoever arising from or relating to: (a) [Northside's] breach of any of its obligations as set forth in this Agreement; and (b) any negligent act or omission or intentional misconduct by [Northside] or its employees, representatives, agents, contractors or invitees in connection with the Event"

(Special Events Agreement at ¶ K, NYSCEF Doc. No. 63 [emphasis added]). They also highlight the following language in the agreement:

> "[Northside] shall be solely responsible for any and all damages, claims, losses or any liability whatsoever arising from or relating to any outside material or services [Northside] utilizes at the Venue or any act or omission of [Northside] and its employees, representatives and Invitees"

(Special Events Agreement at ¶ J, NYSCEF Doc. No. 63; Third-Party Summons and Complaint at ¶ 24, NYSCEF Doc. No. 37).

The fourth cause of action is for breach of a provision in the Special Events Agreement purportedly requiring Northside to procure additional insurance coverage for Madison and Variety, which states:

> "[Northside] agrees to maintain insurance to cover its activities in the Premises, which names 189 Chrystie . . . *and its partners, agents, investors, landlords, shareholders, employees, representatives, and contractors as an additional insured* and

> provides minimum coverage of $1 Million Dollars for each occurrence and $2 Million Dollars in aggregate for any and all damages, claims, losses, or any liability whatsoever arising from or relating to [Northside's] Event at the Box"

(Special Events Agreement at ¶ F, NYSCEF Doc. No. 63 [emphasis added]; Third-Party Summons and Complaint at ¶ 26, NYSCEF Doc. No. 37).

Now, in motion sequence number 002, Northside moves, pre-answer, for an order dismissing the third-party complaint[1] or, in the alternative, to compel arbitration and stay the main action, asserting that the Special Events Agreement provides for arbitration of Madison and Variety's third-party claims against it. In motion sequence number 002, plaintiff also cross-moves to sever the third-party action from the main action. In motion sequence number 003, Madison and Variety move to enter a default judgment against Northside.

DISCUSSION

Motion Sequence No. 002

In support of its CPLR 3211 (a) (1) and (7) motion, Northside asserts that the third-party complaint should be dismissed based upon the arbitration clause in the Special Events Agreement. However, "'[a]n agreement to arbitrate is not a defense to an action' and 'may not be the basis for a motion to dismiss'" (*Mozzachio v Schanzer*, 188 AD3d 873 , 876 [2d Dept 2020], quoting *Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y.*, 45 NY2d 735, 738 [1978]; see *Hui v New Clients, Inc.,* 126 AD3d 759, 760 [2d Dept 2015]). "The mere existence of an arbitration clause in the contract [does] not authorize dismissal of the action. Only an 'arbitration and award' would warrant such a dismissal" (*Ogoe v New York Hosp.,* 99 AD2d 968, 969 [1st Dept 1984], quoting CPLR 3211[a] [5]).

Alternatively, Northside moves, pursuant to CPLR 7503 (a), to compel arbitration of the claims made in the third-party action based on the arbitration clause in the Special Events Agreement. Under CPLR 7503 (a), a "party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration." "If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration" (CPLR 7503 [a]).

On a motion to compel arbitration, a court must first "determine whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement" (*Sisters of St. John the Baptist, Providence Rest Convent v Geraghty Constructor*, 67 NY2d 997, 999 [1986]). "Once the courts have performed the initial screening process, determining that the parties have agreed to arbitrate the subject matter in dispute, their role has ended and they may not proceed to decide whether particular claims are tenable" (*Matter of Praetorian Realty Corp. (Presidential Towers Residence),* 40 NY2d 897, 898 [1976]).

Here, in opposition to Northside's motion, Madison and Variety argue that they did not agree to submit their dispute to arbitration inasmuch as they were not signatories to the Special Events Agreement. "[N]otwithstanding the public policy favoring arbitration, nonsignatories are generally not subject to arbitration agreements" (*Matter of Belzberg v Verus Invs. Holdings Inc.,* 21 NY3d 626, 630 [2013] [citation omitted]). However, they may be compelled to arbitrate under certain circumstances (*see generally MAG Portfolio Consult., GMBH v. Merlin Biomed Group LLC*, 268 F3d 58, 61 [2d Cir 2001]). Here, Northside contends that Madison and Variety should be compelled to arbitrate under the "direct benefits theory of estoppel," which applies when a

> "nonsignatory knowingly exploits the benefits of an agreement containing an arbitration clause, and receives benefits flowing directly from the agreement.
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> ***
>
> Where the benefits are merely indirect, a nonsignatory cannot be compelled to arbitrate a claim. A benefit is indirect where the nonsignatory exploits the contractual relation of the parties, but not the agreement itself"

(*Matter of Belzberg*, 21 NY3d at 631 [internal quotation marks and citations omitted]).

In seeking contractual defense and indemnification, as well as damages for breach of the Special Events Agreement, Madison and Variety are seeking direct benefits under the agreement (*see 2004 Parker Family LP v BDO USA LLP*, 67 Misc 3d 1222(A), 2020 NY Slip Op 50614 [U],*4 [Sup Ct, NY County 2020]["plaintiffs (, even though they are non-signatories,) may be compelled to arbitrate because they knowingly exploited the benefits of the Engagement Agreements by asserting claims against the Auditors expressly based on those Agreements"]; *see also McKenna Long & Aldridge, LLP v. Ironshore Specialty Ins. Co.*, 2015 WL 144190, 2015 U.S. Dist. LEXIS 3347, *24-*32 [SD NY 2015]). Their claims for breach of contract and contractual defense and indemnification fall squarely within the broad arbitration clause which covers "[a]ny controversy or claim arising out of or in relation to this Agreement" (Special Events Agreement at ¶ L, NYSCEF Doc. No. 63). Their common-law indemnification and contribution claims also arise out of and/or relate to the Special Events Agreement inasmuch as Madison and Variety allege that plaintiff was participating in the event that is the subject matter of the agreement when the underlying incident occurred (Third-Party Summons and Complaint at ¶¶ 30-32, NYSCEF Doc. No. 37). Therefore, all of their claims against Northside may be submitted to resolution by arbitration.[2]

"[W]here arbitrable and nonarbitrable claims are inextricably interwoven, the proper course is to stay judicial proceedings pending completion of the arbitration, particularly where the determination of issues in arbitration may well dispose of nonarbitrable matters" (*Cohen v*

Ark Asset Holdings, Inc., 268 AD2d 285, 286 [1st Dept 2000]). In this case, the claims in the main action and the third-party action are interrelated. However, a determination of issues in the arbitration will not dispose of, or limit, nonarbitrable matters in the main action inasmuch as plaintiff would not be a party to the arbitration and therefore would not have a full and fair opportunity to participate in those matters. Moreover, Northside's liability for indemnification and contribution in the third-party action is contingent upon a finding that Madison and/or Variety are liable in the main action. As such, staying the main action pending completion of the arbitrable claims is not suitable. Therefore, the third-party action is stayed pending arbitration of the third-party claims, which will follow resolution of the main action (*see* CPLR 1010 ["The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, *or make such other order as may be just*"][emphasis added]; CPLR 7503 [a] ["If the application (to compel arbitration) is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration"]).

Motion Sequence No. 003

Madison and Variety move for leave to enter a default judgment against Northside, arguing that Northside failed to answer the third-party complaint or otherwise timely appear in the third-party action. For the following reasons, the motion is denied.

Pursuant to CPLR 3215 (a), "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." "An applicant for a default judgment against a defendant must submit proof of service of the summons and complaint, proof of the facts constituting the claim, and proof of the defaulting defendant's failure to answer or appear" (*U.S. Bank, N.A. v Razon*, 115 AD3d 739, 740 [2d Dept

2014]; *see* CPLR 3215 [f]). "'In order to successfully oppose . . . a default judgment, a defendant must demonstrate a justifiable excuse for his default and a meritorious defense'" (*New Media Holding Co. LLC v Kagalovsky*, 97 AD3d 463, 465 [1st Dept 2012], quoting *ICBC Broadcast Holdings-NY, Inc. v. Prime Time Adv., Inc.*, 26 AD3d 239, 240 [1st Dept 2006]).

Here, Madison and Variety submit an affidavit of service demonstrating that service was effectuated upon Northside on July 6, 2020, by serving the New York State Secretary of State (Affidavit of Service, NYSCEF Doc. No. 101). Where, as here, service was made on a corporation by delivering the summons "to an official of the state authorized to receive service in [the defendant's] behalf," the defendant must appear "within thirty days after service is complete" (CPLR 320 [a]; *see* CPLR 3012 [c]; BCL 306). "Service of process . . . shall be complete when the secretary of state is so served" (BCL 306 [b] [1]).

In this case, service was complete on July 6, 2020, when the secretary of state was served. Therefore, Northside had to appear by August 5, 2020. Under CPLR 320 (a), a "defendant appears by [1] serving an answer or a notice of appearance, or [2] by making a motion which has the effect of extending the time to answer." Northside has not served an answer or notice of appearance. However, it did make a motion to dismiss the third-party complaint pursuant to CPLR 3211 (a). Such a motion extends a defendant's time to answer the complaint "until ten days after service of notice of entry of the order" (CPLR 3211 [f]) and, as such, constitutes an appearance under CPLR 320 (a).

However, under CPLR 3211 (e), a pre-answer motion to dismiss pursuant to CPLR 3211 (a) "must be made 'before service of the responsive pleading is required' (CPLR 3211[e]), or it is untimely" (*Deutsche Bank Natl. Trust Co. v Hall*, 185 AD3d 1006, 1008 [2d Dept 2020]), and an untimely motion to dismiss "will not operate to relieve a party's default in pleading"

(*Wenz v Smith*, 100 AD2d 585, 586 [2d Dept 1984]). Northside had until August 5, 2020 to appear but did not move to dismiss the third-party complaint until September 16, 2020 (NYSCEF Doc. No. 49). Therefore, Northside did not comply with the time requirement in CPLR 3211 (e).

That said, as Northside points out, on March 20, 2020, Governor Andrew M. Cuomo issued Executive Order (EO) 202.8, entitled "Temporary Suspension and Modification of Laws Relating to the Disaster Emergency," which, as relevant here, states:

> "In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, *any specific time limit for the* commencement, *filing*, or service *of any* legal action, notice, *motion*, or other process or proceeding, *as prescribed by* the procedural laws of the state, including . . . t*he civil practice law and rules* . . . is hereby tolled from the date of this executive order until April 19, 2020"

(available at https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf [emphasis added]). Through a series of subsequent EOs, the Governor thereafter continued this directive (with certain exceptions not relevant here) through November 3, 2020 (*see* EO 202.14 [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.14_final.pdf]; EO 202.28 [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO202.28.pdf]; EO 202.48 [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.48.pdf]; EO 202.55 [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.55.pdf]; EO 202.60 [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.60.pdf]; EO 202.67 [https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202_67.pdf [stating that "[t]he suspension in Executive Order 202.8, as modified and extended in

subsequent Executive Orders, that tolled any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceedings as prescribed by the procedural laws of the state, including but not limited to . . . the civil practice law and rules . . . is hereby continued, as modified by prior executive orders, provided however, for any civil case, such suspension is only effective until November 3, 2020, and after such time limit will no longer be tolled"]).

The court agrees with Northside, that the EOs cited above apply to the procedural time limit set forth in CPLR 3211 (e) for making a pre-answer motion to dismiss the complaint under CPLR 3211 (a). As such, Northside's motion to dismiss is not untimely and therefore had the effect of extending Northside's time to answer. Accordingly, Madison and Variety's motion for leave to enter a default judgment against Northside is denied. It is also noted that staying the third-party action will also stay Northside's time to answer the third-party complaint.

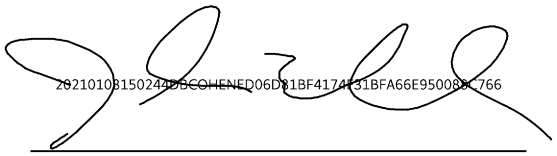
CONCLUSION

In accordance with the foregoing, it is hereby

ORDERED that the motion of third-party defendant Northside Ventures Inc. d/b/a Faymous Studios (Mot. Seq. No. 002) to dismiss the third-party complaint pursuant to CPLR 3211 (a), or in the alternative to compel arbitration of the third-party complaint pursuant to CPLR 7503 (a), is granted to the extent of compelling arbitration of the claims in the third-party action following resolution of the main action, and the third-party action is hereby stayed pending arbitration; and it is further

ORDERED that plaintiff Michel Abboud's cross motion (Mot. Seq. No. 002), pursuant to CPLR 1010, to sever the third-party action is denied; and it is further

ORDERED that the motion of defendants/third-party plaintiffs Madison Kyle Realty Corp. and Variety Entertainment Group, LLC (Mot. Seq. No. 003) for leave to enter a default judgment, pursuant to CPLR 3215, against third-party defendant Northside Ventures Inc. d/b/a Faymous Studios is denied.



1/8/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE