SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON **PART** 37

Justice

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SASHA MUNIAK,

Plaintiff,

- V -

KH 48 LLC,

Defendant.

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INDEX NO. 656859/2019

MOTION DATE 05/13/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61

were read on this motion to DISMISS.

Upon the foregoing documents, and for the reasons stated hereinbelow, defendant's motion to dismiss is denied and plaintiff's cross-motion for summary judgment on the issue of liability only is granted.

BACKGROUND

Prior to the events here in issue, plaintiff, Sasha Muniak ("Muniak"), was the principal of a restaurant company called "Mangia Services, Inc." and of its related entities (collectively, "Mangia"). In or about 1989, Mangia signed a lease (the "Lease") for the basement and first two floors of the commercial building located at 16 East 48th Street, New York, NY (the "Building") and began operating a restaurant in the space (the "Subject Premises"). Muniak guaranteed Mangia's obligations under the lease. NYSCEF Doc. No. 18. Defendant, KH 48 LLC ("KH 48"), purchased the Building in or about 1998 and so became Mangia's landlord.

Non-party Meygrand Associates ("Meygrand") owned the building at 18 East 48th Street ("the Meygrand Building"), which, not surprisingly, adjoins the Building. In or about 2003, Meygrand, as grantor, KH 48, as grantee, Mangia, as tenant, and Muniak, as guarantor, signed an "Easement Agreement" (the "Easement Agreement"). NYSCEF Doc. No. 16.

The Easement Agreement created a rear fire escape from the second floor of the Subject Premises through the Meygrand Building and out into the street (the "Easement"). It also provided, in part, as follows: "Mangia shall pay, on behalf of [KH 48, $1,000] per month … from the Commencement Date and so long as this easement shall remain in force and effect, whether or not Mangia shall be a tenant of the restaurant . . . until this easement is terminated." NYSCEF Doc. No. 16. The Easement Agreement could not be amended or terminated without the prior written consent of the New York City Department of Buildings ("DOB"). The Easement Agreement also provided that "Mangia shall have the right (i) to seek

the permission of the [DOB] for the right to terminate the easement, and (ii) if so obtained, to terminate this Easement Agreement and the easement granted hereunder." Id.

As an inducement for Meygrand to grant the Easement, Muniak signed a guarantee providing, in part, as follows: "Muniak acknowledges that Mangia's obligations pursuant to the Easement Agreement shall remain in force and effect notwithstanding Mangia's vacatur of the [Subject Premises] should the Easement Agreement not have been terminated." Id.

In or about May 2008, Mangia net-leased all of the Building from KH 48 (the "Net Lease") and continued to operate the Mangia restaurant. NYSCEF Doc. No. 17. The Net Lease acknowledged and confirmed the Easement Agreement. Muniak personally guaranteed the Net Lease, which has an attorney's fees provision in favor of KH 48. Id.

Prior to August 2012, Mangia monthly paid Meygrand the $1,000 easement fee. On August 31, 2012, Mangia vacated the Subject Premises while the Easement Agreement was still in effect. KH 48 paid the monthly fee from December 2012 through November 2013 but then stopped and has not paid since.

Meanwhile, in or about February 2013, KH 48 sued Muniak, as guarantor of the lease and the Easement Agreement, for Mangia's alleged rent arrears and for the Easement fees owed to Meygrand (the "KH 48 Action"). KH48 LLC v Sasha Muniak, Sup Ct, NY County, Index No. 151606/2013. In May 2015, Meygrand also sued Muniak pursuant to his guarantee of the Easement Agreement (the "Meygrand Action"). Meygrand Associates, LLC v Services Mangia, Inc. and Sasha Muniak, Sup Ct, NY County, Index No. 651636/2015.

On July 13, 2017, the KH 48 Action settled pursuant to a Stipulation of Settlement (the "Stipulation of Settlement"). NYSCEF Doc. No. 21. As here relevant, Muniak agreed to pay KH 48 $10,000 a month for 29 months (apparently for unpaid rent). Paragraph 6 of the Stipulation of Settlement reads, in part, as follows: "[KH 48] agrees to promptly execute any and all forms [etc.] requested by [Muniak] in connection with [Muniak's] efforts to terminate the [Easement] and to … cooperate in good faith with [Muniak's] efforts to terminate the [Easement]." Muniak claims that he paid $170,000 of the $290,000 due under the Stipulation of Settlement before stopping payments when it became clear that KH 48 had breached Paragraph 6 thereof. NYSCEF Doc. No. 2 ¶ 8. KH 48 apparently disputes this amount.

In June 2018, Mangia and Muniak commenced a third-party action in the Meygrand Action against KH 48, asserting causes of action for indemnification (essentially that KH 48, not Mangia, should be paying the Easement fee) and unjust enrichment (essentially that KH 48 was benefitting from the Easement). KH 48 moved to dismiss. In a Decision and Order dated November 4, 2019, Justice Deborah Kaplan dismissed the third-party action. NYSCEF Doc. No. 25. Justice Kaplan held that the indemnification cause of action was subject to dismissal "because Plaintiff seeks recovery from Mangia and Muniak not vicariously, but rather for their [own] alleged wrongdoing, to wit, breach of the easement agreement and guaranty." She held that the unjust enrichment cause of action was subject to dismissal because, simply put "[u]nder the easement agreement, Mangia was required to pay the monthly fee to Plaintiff." The Meygrand Action remains active.

In the KH 48 Action, Muniak moved to enjoin KH 48 from entering a judgment pursuant to the Stipulation of Settlement, and KH 48 cross-moved to enter a judgment pursuant to the Stipulation of Settlement. In a one-sentence, handwritten Decision and Order, dated November 19, 2019, enjoining KH 48 from entering a judgment pursuant to the Stipulation of Settlement, this Court stated that KH 48 "has failed to comply with [Para.] 6 [of the Stipulation of Settlement] by renting out the subject premises w/ an easement." NYSCEF Doc. No. 37.

Also on November 19, 2019, Muniak commenced the instant complaint asserting a single cause of action, for breach of contract, and seeking, essentially, a declaration that Muniak does not owe any money under the Stipulation of Settlement; the return of the $170,000 he claims he paid thereunder; and to be held harmless from any claims by Meygrand against Muniak. NYSCEF Doc. No. 2.

However, in a Decision and Order entered October 13, 2020, the Appellate Division, First Department unanimously reversed this Court's November 19, 2019, Decision and Order, holding that injunctive relief should not have been granted because Muniak failed to demonstrate irreparable injury, and remanding for a decision on the cross-motion for judgment on the Stipulation of Settlement. NYSCEF Doc. No. 68.

Meanwhile, since Muniak vacated the Building, KH 48 has continued to rent out Subject Premises, apparently to a succession of restaurants, perhaps most recently to a "Wolf & Lamb Steakhouse." Muniak claims that the Easement allows KH 48 to charge its tenants more rent. Understandably, Muniak wants to stop paying the Easement fee, and, accordingly, he claims that he is attempting to cancel the Easement. KH 48 claims that Muniak has failed to make reasonable efforts to terminate the Easement. NYSCEF Doc. No. 5 ¶ 142.

KH 48 now moves to dismiss the instant complaint, pursuant to CPLR 3211(a)(1) (documentary evidence); 3211(a)(4) (prior action pending); and 3211(a)(5) (res judicata). NYSCEF Doc. No. 10. Muniak now cross-moves for summary judgment on the issue of liability. NYSCEF Doc. No. 30.

DISCUSSION

Res Judicata

"Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties on the same cause of action… Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." Parker v Blauvelt Volunteer Fire Co., 93 NY2d 343, 347 (1999) (internal quotations and citations omitted).

Here, the Meygrand Action was commenced in 2015, two years prior to the Stipulation of Settlement. In it, Meygrand sued Mangia and Muniak for failing to pay the Easement fee. In that matter's third-party action, Justice Kaplan dismissed Muniak's indemnification and unjust enrichment claims on narrow, technical legal grounds. Crucially, she did not mention, much less discuss, much less rule on, the issue presented here, to wit, whether KH 48 violated the Stipulation of Settlement (executed two years later), relieving Muniak's obligations thereunder.

The Easement

Defendant notes that "Nowhere in Muniak's complaint is there an indication that KH 48 failed to execute any and all forms, documents, affidavits, certifications, and applications requested by the defendant, defendant's attorney or defendant's expediter in connection with the defendant's efforts to terminate the [Easement]." NYSCEF Doc. No. 11. However, Muniak is relying on the provision that requires KH 48 to "cooperate in good faith with [Muniak's] efforts to terminate the [Easement]."

Defendant is correct that this Court's preliminary determination that Muniak had "failed to comply with [Para.] 6 [of the Stipulation of Settlement] by renting out the subject premises w/ an easement" is not a final, binding determination. See J.A. Preston Corp. v. Fabrication Enters. Inc., 68 N.Y2d 397, 402 (1986) ("The granting or refusal of a temporary injunction does not constitute the law of the case or an adjudication on the merits"); Wellbilt Equipment Corp v. Redeye Grill L.P., 308 A.D.2d 411 (1st Dept 2003).

However, Muniak is entitled to a finding that, as a matter of law, KH 48 violated the Stipulation of Settlement by not only failing to "cooperate in good faith with [Muniak's] efforts to terminate the [Easement]," but, to the contrary, by making termination impossible; the current tenant requires the Easement. In an email dated November 22, 2016, the DOB stated that:

> if [KH 48] wants to cancel the easement based on the construction of [a] new stair, the termination is not possible due to the requirement that the building have two remote means of egress from each floor. The new stair on the second floor is within a couple feet of the other exit. The easement route provided the second 'remote' exit.

NYSCEF Doc. No. 39.

According to one of plaintiff's experts, the only three ways to vacate the Easement are by:

> (i) substituting a new easement, or (ii) constructing an alternative second means of egress removing the need for the easement, or (iii) amending the certificate of occupancy to change the use of the premises so that a second route of egress is no longer required … [All three options are] within the control of [KH 48] and its tenant.

NYSCEF Doc. No. 41.

Yet another of plaintiff's experts wrote that "[KH 48] and its tenant were unwilling to take these actions[,] so the easement stays in place." NYSCEF Doc. No. 47. As argued by Muniak, KH 48 "signed off on documents after the date of the Settlement Agreement that he knew would perpetuate the easement and make it impossible for me to terminate it!" NYSCEF Doc. No. 35 ¶ 14.

Indeed, a month after signing the Stipulation of Settlement, KH 48 filed an "Alteration Type 2" application with the DOB, which continued the existing use, egress and occupancy of the premises. NYSCEF Doc. No. 45. By allowing the new tenant to occupy the premises and by signing off on the Alteration Type 2 applications, KH 48 fixed the Easement in place indefinitely.

In sum, the Easement cannot be terminated under the existing DOB rules and regulations because the current tenant of the space continues to use the Easement as a second means of egress.

Understandably, KH 48 makes much of the fact that Muniak's obligation to pay the Easement fee was "unconditional," etc. However, this generic, boiler-plate language must defer to the specific, detailed obligation of KH 48 to cooperate with, not hinder or prevent, Muniak's attempts to terminate the Easement.

Elementary Fairness

Muniak agreed that his obligations under the Easement Agreement would continue even if he vacated the Subject Premises. However, he bargained for and obtained KH 48's obligation to help him terminate the Easement, and thus his payment obligation thereunder. KH 48 has done the exact opposite.

The current situation is that Muniak is paying for a right that does not benefit him; and KH 48 is not paying for a right that does benefit it. Unless this Court intervenes, this grossly unfair situation could continue indefinitely, perhaps perpetually.

The Stipulation of Settlement

Defendant argues that

> A review of the [S]tipulation [of Settlement] shows its primary purpose was for plaintiff to satisfy his multi-million-dollar exposure with a drastically discounted [apparently 95%] payoff amount, and remedies were agreed upon in the event he defaulted on his repayment obligation. On the other hand, no remedy for an alleged default was provided for in paragraph 6 upon which this new action is based. As the "default" alleged by defendant does not go to the heart of the contract, plaintiff's claim that defendant materially breached it is baseless.

NYSCEF Doc. No. 50.

However, a party that breaches a contract relieves the other party from performing under the contract, whether or not the contract supplies a remedy for that breach. As Muniak argues, the law supplies the remedy. "When a party has breached a contract, that breach may excuse the non-breaching party from further performance if the breach is 'material.'" New Windsor Volunteer Ambulance Corps, Inc. v Meyers, 442 F3d 101, 117 (2d Cir 2006). Paragraph 6 of the Stipulation of Settlement states, in part, "As a material inducement to the defendant entering into this Stipulation of Settlement . . . ." To quote Muniak's counsel, "Of course it was material; it says so!" NYSCEF Doc. No. 54 ¶8).

As Muniak points out, a stipulation of settlement completely replaces the obligations that may have existed prior thereto; it supersedes the litigation it disposes.

The Final Analysis

In the final analysis, contracts, and judicial opinions, should not be construed so as to create an absurd result, such as a never-ending obligation to pay a fee without any benefit therefrom.

Muniak's dismissed third-party claims arose out of the Easement. His claims here arise out of the Stipulation of Settlement.

CONCLUSION

Thus, the motion of defendant, KH 48 LLC, is hereby denied and the cross-motion of plaintiff, Sasha Muniak, for summary judgment on the issue of liability only is granted. However, before directing the Clerk to enter such a judgment, and before conducting a hearing into the issue of damages, this Court will preside over a settlement conference (which the parties have been discussing for quite some time). Surely, counsel accomplished enough to draft the excellent papers submitted on the instant motion will be able to resolve a case arising in the distant past, that involves only money, that will be expensive to continue, and that has been only partially resolved by a Decision and Order subject to a possible, probably inevitable, appeal. The Court will contact counsel forthwith to arrange such a conference.

6/8/2023
DATE

ARTHUR F. ENGORON, 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