SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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SCAROLA, RICHARD J.J.

Plaintiff,

- v -

MALONE, DANIEL C.

Defendant.

INDEX NO. 652186/2017

MOTION DATE 06/30/2023, 09/13/2023

MOTION SEQ. NO. 009 010

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 009) 101, 102, 103, 104, 105, 106, 107, 109, 120, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 139, 140

were read on this motion to/for AMEND CAPTION/PLEADINGS.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 132, 133, 134, 135, 138, 141, 142, 143, 144, 145, 146, 147, 148

were read on this motion to/for ENFORCE/EXEC JUDGMENT OR ORDER.

This special proceeding arises out of an arbitrated dispute between the parties, who were former law partners. Presently before the court are (1) respondent Daniel Malone's motion for leave to file a supplemental verified answer to assert counterclaims (MS 009); and (2) petitioner Richard Scarola's motion for an order enforcing the arbitration award that has been confirmed and entered into judgment (MS 010). Both motions are opposed.

Background

Scarola and Malone were former law partners who had numerous disputes arising from their unsuccessful partnership. As required by their partnership agreement dated February 1, 2012 (Partnership Agreement), Scarola and Malone arbitrated their disputes under the auspices of the American Arbitration Association, before mediator/arbitrator Michael J. Oberman, Esq. (Arbitrator) (NYSCEF #'s 2-6). The arbitration lasted three years, from March 2014 to May 2017 (NYSCEF # 33, ¶ 3). The Arbitrator issued five separate written interim and final determinations, culminating in a final award dated May 8, 2017, which incorporated by reference the determinations in the Interim Award dated April 28, 2015, the Second Interim Award dated July 13, 2016, the Third Interim Award dated October 26, 2016, and the Partial Final Award dated February 6, 2017 (together, the Award) (NYSCEF #'s 2-6, 13).

The part of the Award at issue here concerns a long-term commercial lease for office space on the 41st Floor of 1700 Broadway, New York, New York (the Lease; NYSCEF # 141, ¶ 3). The Lease had a term of more than ten years and annual rent close to $1 million (NYSCEF # 133, ¶ 3). Scarola and Malone shared a security deposit exceeding $850,000, and they each personally guaranteed the Lease with obligations of approximately $10 million (NYSCEF # 133, ¶ 3; NYSCEF # 141, ¶ 26). The Lease permitted Scarola and Malone to sublease up to 60% of the leased space to third parties but required them to operate a law firm occupying at least 40% of the leased space (NYSCEF # 3 at 32). Given this requirement, the Arbitrator found that even after Malone's departure from his prior law firm with Scarola, "the vitality of the Law Firm is [still] of continued importance to both Partners" to not default under the Lease (*id.* at 32, 36-38). As such, in the First Interim Award, the Arbitrator decided that if Scarola could continue operating a successor law firm occupying 40% of the leased space so as to prevent a default under the Lease, Malone should bear some of the costs Scarola incurred, in an amount to be determined at stage two of the arbitration (*id.* at 41, ¶ 7).

In the Second Interim Award, the Arbitrator allocated to Malone a portion of the operating expenses associated with the Lease and the rent shortfall—the amount of rent the parties owed under the Lease less the parties' subleasing revenue (NYSCEF # 4 at 20-24). Specifically, the Arbitrator (1) allocated 30% of the rent shortfall and operating costs to Malone and the remaining 70% to Scarola, (2) estimated the annual rent shortfall to be $303,096 and the annual operating costs to be $147,585, and then (3) ordered that Malone pay Scarola $7,577.40 for monthly rent shortfall and $3,689.63 for monthly operating costs (*id.* at 20-24, 36-37). Such payments applied to January through December 2016 as is and applied to January 2017 through the duration of the Lease with annual inflation adjustment of 2% for rent shortfall and 1% for operating costs (*id.* at 36-37).

In April 2017, Scarola commenced this special proceeding to confirm the Award (NYSCEF # 1). As an exhibit to his reply affidavit, Scarola provided a proposed bill that specified the amounts of monthly payments Malone owed him, calculated per the Award's terms (NYSCEF # 16). Hon. Eileen Bransten, by Order and Decision dated August 16, 2017, confirmed the Award but noted "everything in [Scarola's] reply affidavit, any of [Scarola's] conclusions, . . . any of [Scarola's] figures, they are not part of my decision today. I confirm only the Arbitrator's award" (NYSCEF # 18 at 7).

The parties complied with the Award until November 2021 when Malone stopped making monthly payments for his share of the rent shortfall and operating expenses associated with the Lease (NYSCEF # 133, ¶¶ 6-7). Malone argued that his payment obligations were conditioned on Scarola paying 70% of the rent shortfall and operating expenses, and Scarola did not pay his share of 70%, thus relieving Malone from the obligations to pay his 30% share (NYSCEF # 141, ¶¶ 20, 24). Malone contended that Scarola had received substantial rent abatement for the period from April 2020 to August 2022 because of the Covid-19 pandemic (the

Abatement), as evidenced in a Lease & Settlement Agreement dated October 30, 2020 (*id.* ¶¶ 25, 27-33; NYSCEF # 85).

In response to Malone's non-payment, Scarola moved for entry of judgment on the Award in December 2021 (MS 002), and after the motion was denied without prejudice to renewal, Scarola moved again in August 2022 (MS 003) (NYSCEF #'s 21-34). By Order dated December 20, 2022, this court granted MS 003 and entered judgment on the Award (NYSCEF # 73 – Order; NYSCEF # 97 – Judgment). In entering the Judgment, this court did "not reach whether [Malone] is required to pay his 30 % share for the period at issue" as "prior to entry of judgment it would be premature for the court to render a determination as to the intent and meaning of the Award" (NYSCEF # 73 at 4). The court made clear that "the entry of judgment is without prejudice to the parties seeking further relief from the court, including regarding the meaning and application of the Award" (*id.*).

In April 2023, the court referred this special proceeding to the Commercial Division Alternative Dispute Resolution program for mediation (NYSCEF # 100). The mediation fell through. In June 2023, Malone moved for leave to file supplemental verified answer (NYSCEF # 105 – MS 009) and in October 2023, Scarola moved for an order enforcing the Judgment (NYSCEF # 138 – MS 010). At issue in both MS 009 and MS 010 is Malone's position that he was freed from payment liabilities for the period of November 2021 to August 2022 because of the Abatement. This Decision and Order addresses MS 009 and MS 010 below.

Discussion

Malone's Motion to Amend (MS 009)

In MS 009, Malone seeks to file a supplemental answer to allege that his payment obligations are conditional on (1) Scarola paying 70% of the rent shortfall and operating costs (the 70/30 Condition) and (2) there being no default or early termination of the Lease (NYSCEF # 103, ¶¶ 35-37). Malone asserts that the Abatement not only justifies his failure to pay for the period of November 2021 through August 2022 but in fact causes him to have overpaid Scarola from April 2020 to October 2021 (*id.* ¶¶ 97-101). Malone therefore seeks an award of repayment in the amount of $230,812.09 by adding (i) a counterclaim for a declaratory judgment that he has no obligation to pay during November 2021 to August 2022, and his previous payments have resulted in an overpayment (*id.* at 26-28), (ii) a second counterclaim for unjust enrichment (*id.* at 28-29), and (iii) a third counterclaim for money had and received (*id.* at 29-31).

In opposition, Scarola contends that Malone's motion to amend, after entry of the Judgment, should be denied as untimely (NYSCEF # 131 at 8-9, 15-16). Scarola further argues that Malone's attempt to change or undo the Award by this motion to amend is futile because first, the Award has specified that mediation or arbitration is the only mechanism for adjusting the parties' payment obligations (NYSCEF # 4 at 30-31; NYSCEF # 131 at 7-14); and second, even if the court were to overturn the Award, it lacks evidence to re-assess or re-allocate the rent shortfall and operating

costs, therefore cannot re-determine the parties' payment obligations (NYSCEF # 131 at 7-14).

Malone counters that there is no delay on his part that warrants denial of his motion to amend (NYSCEF # 139 at 4-7); and that the dispute on the 70/30 Condition arises from the Award, not the Partnership Agreement, thus is not subject to the arbitration clause of the Partnership Agreement (*id.* at 7-9). Malone adds that Scarola fails to show that Malone's proposed amendments regarding the 70/30 Condition are "palpably insufficient or clearly devoid of merit" (*id.* at 9-12).

Leave to amend a pleading should be "freely given" (CPLR 3025 [b]) as a matter of discretion in the absence of prejudice or surprise (*Cafe Lughnasa Inc. v A & R Kalimian LLC*, 176 AD3d 523 [1st Dept 2019]). However, leave will be denied where the proposed amendment lacks merit or would serve no purpose other than to "needlessly complicate and/or delay discovery and trial" (*id.*). The decision to grant or deny leave to amend is committed to the sound discretion of the IAS court (*Valerie Reuling v Consol. Edison Co. of New York, Inc.*, 138 AD3d 439, 440 [1st Dept 2016]). "Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]).

Here, Malone's motion for leave to amend is denied for it would needlessly complicate the present case, where the disputes have been extensively and granularly litigated in an arbitration that spanned over three years, resulting in the Award that has been confirmed in 2017 and entered into Judgment in 2022 (*see Phoenix Life Ins. Co. v Irwin Levinson Ins. Tr. II*, 70 AD3d 476, 477 [1st Dept 2010] [affirming denial of leave where the proposed amendment would "further delay and unnecessarily complicate the case"]). Contrary to Malone's position,[1] the only pending controversy regarding the asserted 70/30 Condition does not warrant reopening this special proceeding at this final stage and amending Scarola's petition and Malone's answer filed more than six years ago (*see B.B.C.F.D., S.A. v Bank Julius Baer & Co. Ltd.*, 62 AD3d 425, 425 [1st Dept 2009] [denying leave because the proposed amendment would "effectively resurrect[] . . . cases that, after many years of litigation, are close to being resolved"]).

Additionally, leave should be denied for Malone's unexplained delay in moving to amend: Malone has been aware of the Abatement since October 2021 (NYSCEF # 102, ¶ 13); and yet delayed without explanation for almost two years before filing the instant motion in June 2023 (*see Heller*, 303 AD2d at 24 ["[w]here there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay," failure to do so warrants denial of leave]; *see also B.B.C.F.D., S.A.*, 62 AD3d at 425 [denying leave to amend as the movant delayed seeking leave for three years after having known the

[1] As discussed below, in opposing MS 010, Malone posits that to resolve the current dispute, Scarola should amend his petition to seek a declaratory judgment in his favor, like what Malone did in MS 009 (NYSCEF # 143 at 8-11).

underlying facts]). In any event, as discussed below in MS 010, Malone's position that he was automatically relieved from any payment obligations because of the 70/30 Condition and the Abatement lacks merit. Therefore, Malone's motion for leave to file a supplemental answer (MS 009) is denied.

Scarola's Motion for Execution of Judgment (MS 010)

In MS 010, Scarola moves for an order executing the Judgment, directing Malone to turn over $124,087.78 plus interest, and "to the extent necessary, interpreting the Award to require that payment to [Scarola] by . . . Malone" (NYSCEF # 138 at 1). Scarola asserts that Malone's payment obligations do not hinge on the 70/30 allocation, which is only "used as a building block . . . to determine the fixed, non-variable amounts Malone would pay" (*id.* at 13-16, 20-22). Scarola reiterates that arbitration is the only avenue for Malone to revisit or adjust his payment obligations under the Award (*id.* at 17-20). Scarola adds that even if Malone's payment obligation was subject to the 70/30 Condition, this condition applies to rent shortfall, not gross rent (*id.* at 10-14). According to Scarola, during the pandemic, he paid "a larger, not smaller, rent shortfall" because many subleasees had left (*id.* at 11-12). In other words, the Abatement of gross rent has been offset by lost subleasing revenue (*id.*).[2]

Malone, in response, argues that the Award clearly subjects his payment obligations to the 70/30 Condition (NYSCEF # 143 at 11-13), and therefore a failure of such condition automatically relieves him from payment obligations, without having to revisit or adjust the Award through a mediation (*id.* at 15-18). In one single sentence, Malone conclusorily claims that his argument focuses not on gross rent but on "net payment" (*id.* at 14). Then Malone posits that MS 010 has various procedural defects and that the Judgment cannot be enforced under CPLR Article 52 because it does not specify a money amount (*id.* at 5-8). Malone also claims that Scarola's request for interpretation of the Award fails to give proper notice to Malone; and instead of making the instant motion, Scarola should have moved to amend his petition to seek a declaratory judgment for the rights he asserts (*id.* at 8-11). Finally, Malone cross moves for an order "conditioning [either] party's use of CPLR Article 52 on" the entry of a money judgment (*id.* at 1, 9-11).

In reply, Scarola disputes Malone's procedural arguments and contends that "[n]o proceeding beyond this motion is required for the Court to enforce or construe the Award and end this case" (NYSCEF # 147 at 2-6). Scarola points out that despite acknowledging that the expenses subject to the 70/30 allocation are rent shortfall and operating expenses, not gross rent, Malone still rests his argument on the Abatement of gross rent and produces no evidence that Scarola failed to pay 70% of the rent shortfall and operating expenses (*id.* at 6-8, 10-11). Further, Scarola argues the Award should not be interpreted as giving Malone "a self-executing right

[2] Malone incorrectly claims that this argument—that Scarola has paid his share of the rent shortfall and operating expenses—was raised for the first time on reply and requests leave to file a sur-reply on this issue (NYSCEF # 148). Malone's request is denied as this is not a new issue raised on reply.

to audit" the rent shortfall and operating expenses every month (*id.* at 8). Scarola avers that in practice, the Award requires Scarola to pay all the rent shortfall and operating expenses to avoid default under the Lease, and in return, Malone is liable for paying Scarola a fixed monthly sum (*id.* at 9, 11-13).

"Where a dispute exists as to the meaning of an arbitration award that has been confirmed in a judgment, it becomes the Court's function to determine and declare the meaning and intent of the arbitrator" (*Pine St. Assoc., L.P. v Southridge Partners, L.P.*, 107 AD3d 95, 100 [1st Dept 2013]). To that end, a court may review the text of the arbitrator's award in conjunction with the arbitrator's findings (*id.*) And in so doing, "a court should adopt the most reasonable meaning of the text by avoiding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result" (*id.*).

Here, Scarola and Malone dispute the meaning of the Award, specifically, the alleged 70/30 Condition (NYSCEF #'s 3, 4). The court now determines the meaning of the Award and the intent of the Arbitrator by reviewing the Award's text and the Arbitrator's findings.

In the First Interim Award, the Arbitrator finds Malone liable for some costs associated with the Lease, in an amount to be determined at stage two of the arbitration, if Scarola prevents a default under the Lease (NYSCEF # 3 at 41, ¶ 7). In the Second Interim Award, the Arbitrator concludes that Malone is liable for some of the rent shortfall and operating costs, as determined by an equitable mechanism that can be "expressed as either a formula or as specific dollar amounts—or a combination of both" (NYSCEF # 4 at 18-19). The Arbitrator further finds such equitable mechanism to be a 70/30 allocation between Scarola and Malone (*id.* at 21). Next, the Arbitrator calculates the estimated amounts of rent shortfall and operating expenses (*id.* at 22-24). Upon the parties' agreement, the Arbitrator set these amounts fixed (with inflation adjustments) for the duration of the Lease term, provided that upon good cause shown and based on materially changed circumstances either party may seek adjustment of their payment obligations through arbitration or mediation (*id.* at 28-31 ["the parties agreed that the cost of operating the Space could be set now and (with some adjustment) for the duration of the Lease term"]). Finally, the Arbitrator applies the 70/30 allocation to the set amounts of rent shortfall and operating expenses, directing Malone to pay Scarola $7,577.40 for monthly rent shortfall and $3,689.63 for monthly operating expenses, for past months of January through July of 2016 and then-future months from August 2016 to the end of the Lease, August 2022 (*id.* at 36-37, ¶¶ 8-10).

Critically, when deciding the Award, the Arbitrator intends to (i) help the parties avoid a default under the Lease, thus minimizing the parties' potential liabilities respecting the security deposit and guarantees (*id.* at 15, 21); and (ii) resolve all pending issues regarding the Lease so the parties have certainty as to their respective liabilities for the remaining Lease term (*id.* at 28-29).

Considering the above, the most reasonable meaning of the Award is for Malone to pay Scarola fixed monthly sums and for Scarola to ensure there is no default under the Lease (NYSCEF # 3 at 41, ¶ 7; NYSCEF # 4 at 36-37, ¶¶ 8-10). The Arbitrator starts the analysis of this very issue by finding Malone liable for a portion of the rent shortfall and operating expenses if Scarola prevents a default under the Lease (NYSCEF # 3 at 41, ¶ 7; NYSCEF # 4 at 18) and ends the analysis by ordering Malone to pay Scarola $7,577.40 for monthly rent shortfall and $3,689.63 for monthly operating expenses (NYSCEF # 4 at 36-37). While the Arbitrator makes a 70/30 allocation between Scarola and Malone as an interim step to arrive at the amounts that Malone owes, in conclusion, the Arbitrator's order mandates payments of fixed sums, as opposed to payments of fixed percentages (*compare id.* ¶¶ 8-10 *with id.* ¶ 4). Tellingly, the Arbitrator applies the fixed-amount payment obligations retroactively to January through July 2016, rather than allocating to Malone 30% of the actual amounts of rent shortfall and operating costs during that period (*id.* at ¶ 8).

Malone's argument regarding the 70/30 Condition rests heavily, if not solely, on a sentence in the Award—"Mr. Malone's 30% payment obligation is conditioned on Mr. Scarola paying his allocated 70% share of these expenses" (*id.* at 21). However, this sentence should not be read in a vacuum. Viewing the Award as a whole, the Arbitrator never calculates fixed amounts of the rent shortfall and operating expenses for Scarola to pay corresponding to his 70% share, instead, the Arbitrator charges Scarola to prevent a default under the Lease, which in practice means Scarola needs to pay the rent shortfall and operating expenses in full before collecting a portion from Malone (NYSCEF # 3 at 41, ¶ 7; NYSCEF # 4 at 21, 24).

To interpret the Award as requiring Malone to pay 30% of the actual expenses would render the Arbitrator's calculation of Malone's monthly payment amounts superfluous. Had the Arbitrator intended to apply a 70/30 allocation based on actual expenses, he would not need to calculate the exact amounts of Malone's share of rent shortfall ($7,577.40) and operating expenses ($3,689.63) and could have simply set a fixed percentage of 30% (*compare id.* ¶¶ 8-10 [directing Malone to pay Scarola $7,577.40 and $3,689.63 each month] *with id.* ¶ 4 [directing Scarola to establish a credit in favor of Malone "in the amount of 50% of disbursements or expenses paid by the Law Firm in 2012-14").

Further, if the Award conditioned Malone's monthly payments on Scarola paying precisely 70% of the rent shortfall and operating expenses, it would lead to an absurd result that permits Malone to conduct monthly audits on the rent shortfall and operating expenses, and based on the audit results, exercise a self-executing right to cease making payments if Scarola's payment falls short of his 70% share. Such recurring audit practice has no basis in the Award, and would expose the parties to greater possibilities of defaulting under the Lease if Malone holds off payments based on the audits or if the parties dispute the audit results. This runs afoul of the Auditor's intent to provide the parties with certainty and minimize the parties' potential liabilities of defaulting under the Lease. In fact, up

until November 2021, the parties' actual practice has been for Scarola to pay the rent shortfall and operating expenses in full and for Malone to send Scarola fixed monthly payments (NYSCEF # 133, ¶¶ 6, 9). The record shows no audits of the actual amounts of rent shortfall or operating expenses conducted to determine whether Malone and Scarola each paid exactly 30% and 70% of the actual expenses.

Therefore, Malone's payment obligations under the Award are fixed monthly sums, rather than a fixed 30% of the actual expenses incurred. As such, the Abatement does not excuse Malone from paying the set amounts covering rent shortfall and operating expenses during the period of November 2021 through August 2022, nor is Malone entitled to repayment from Scarola. Since the Award does not permit Malone to unilaterally cease making payments for rent shortfall and operating expenses based on the asserted 70/30 Condition, if Malone seeks relief from the payment obligations, the Award requires that he do so via another arbitration or mediation proceeding (NYSCEF # 4 at 30-31).

Malone's procedural arguments are similarly unavailing. First, the dispute over the asserted 70/30 Condition has been on-going for years: the record shows that Malone became aware of the Abatement in October 2021 and the parties have been disputing the alleged 70/30 Condition since then (NYSCEF #'s 82, 83). Malone cannot now claim that he has no notice of this issue. Further, Malone's position that the only procedurally proper way to resolve the current controversy is for parties to amend their pleadings to seek declaratory judgment is untenable. "Once the award is confirmed into a judgment, all of the enforcement of judgment remedies become available for it." (David D. Siegel, New York Practice, Confirmation of Award § 601 [6th ed]). To the extent that the Judgment does not specify a monetary amount and calls for further interpretation of the Award, the court has addressed such issues in this Decision and Order. And as discussed above in MS 009, amending the pleadings nine years after the arbitration took place and six years after the original pleadings were filed would resurrect this disposed proceeding at its post-judgment stage is untenable. Likewise, Malone's cross motion for an order conditioning both parties' use of CPLR Article 52 on the entry of a money judgment is denied to avoid further complicating this special proceeding.

Conclusion

In view of the above, it is hereby

ORDERED that respondent Daniel Malone's motion for leave to file a supplemental verified answer (MS 009) is denied; and it is further

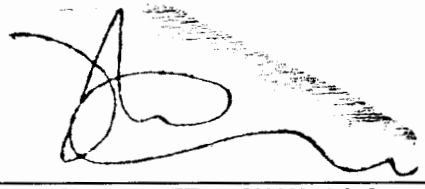
ORDERED that petitioner Richard Scarola's motion to enforce the judgment confirming the arbitration award (MS 010) is granted, and respondent's cross motion for an order conditioning party's use of CPLR Article 52 on the entry of a money judgment is denied; and it is further

ORDERED that respondent turn over to petitioner money in the amount of $124,087.78, plus interest totaling $16,477.95 through September 13, 2023, and

with interest from that date at the daily rate of $30.60 (CPLR 5004), as set by the Second Interim Award by the Arbitrator (NYSCEF # 4 at 12); and it is further

ORDERED that counsel for petitioner shall serve a copy of this order with notice of entry upon all parties within ten (10) days of entry.

This constitutes the Decision and Order of the Court.



10/30/2023
DATE

MARGARET A. CHAN, J.S.C.

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