SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. GERALD LEBOVITS** **PART** **07**

Justice

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MELISSA MILLER,

Plaintiff,

- v -

MARQUIS RENTALS LLC, MARQUIS NEW YORK LLC D/B/A STAY MARQUIS, and MANESH PATEL,

Defendants.

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INDEX NO. 653379/2022

MOTION DATE 08/15/2023, 08/15/2023, 08/15/2023

MOTION SEQ. NO. 002 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 43, 44, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75

were read on this motion to VACATE DEFAULT.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 102

were read on this motion for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 96, 97, 98, 99, 100, 101

were read on this motion for DEFAULT JUDGMENT.

Stein Farkas & Schwartz LLP, New York, NY (Danielle Siegal of counsel), for plaintiff.
Gilbert de Dios, Esq., New York, NY, for defendant Manesh Patel.
Seyfarth Shaw LLP, New York, NY (Sarah Fedner of counsel), for defendants Marquis Rentals LLC and Marquis New York LLC.

Gerald Lebovits, J.:

These motions arise out of a dispute over rental of a property in the Hamptons in the summer of 2022. Plaintiff, Melissa Miller, rented a property owned by defendant Manesh Patel, through defendants Marquis Rentals LLC and Marquis New York, LLC (collectively, Marquis). Marquis operates as a full-service rental company that posts listings for rental properties on its website. Patel and Marquis signed a contract under which Marquis posted a listing for Patel's property on its website. Miller saw the listing on Marquis's website, and entered agreements with Patel and with Marquis to book the property for June and July 2022.

Miller alleges that there were various issues with the property, including its plumbing, electricity, appliances, and HVAC system. (NYSCEF No. 1 at 4-5.) Miller claims she immediately notified Patel and Marquis about the issues. (*Id.* at 6.) Miller also claims she later

learned that Patel and Marquis lacked the required permits to rent the property to her. (*Id.*) In September 2022, Miller brought this action against Patel and Marquis, asserting contract and fraud claims, and also a claim that defendants violated Southampton Town Code § 270. Defendants did not timely appear and respond to the complaint.

In November 2022, Miller moved for default judgment against all defendants. (NYSCEF No. 5.) She later withdrew the motion as against Marquis. (NYSCEF No. 13.) In February 2023, this court denied the motion as against Patel, holding that Miller had not established the facts constituting her claim against Patel. (NYSCEF No. 17.) The next day, Patel answered, counterclaimed against Miller, and cross-claimed against Marquis.

Patel now moves to vacate his default and to compel Miller to accept his answer (mot seq 002). Marquis moves to dismiss Miller's claims against it and Patel's cross-claim against it (mot seq 003). Miller renews her default-judgment motion against Patel (mot seq 004).[1]

Motion sequences 002, 003, and 004 are consolidated here for disposition. Patel's motion is granted. Marquis's motion is granted in part and denied in part. Miller's motion is denied.

DISCUSSION

I. Patel's Motion to Compel Acceptance of His Answer (Mot Seq 002)

Patel moves under CPLR 3012 (d) to compel Miller and Marquis to accept his untimely answer. A court considering a CPLR 3012 (d) application must take into account "the length of the delay, the excuse offered, the extent to which the delay was willful, the possibility of prejudice to adverse parties, and the potential merits of any defense." (*Emigrant Bank v Rosabianca*, 156 AD3d 468, 472-473 [1st Dept 2017].)

Patel was served using the "nail-and-mail" method under CPLR 308 (4). (*See* NYSCEF No. 2 [affidavit of service].) The affidavit of service was filed on September 28, 2022. (*Id.*) Patel had 40 days from September 28, or November 7, 2022, to appear and respond. (*See* CPLR 308 [4]; CPLR 320 [a].) Patel did not answer until February 3, 2023, 86 days late. The Appellate Division, First Department, has held in this context that a delay of that length is "relatively short." (*Nason v Fisher*, 309 AD2d 526, 526 [1st Dept 2003].)

Patel's excuse for his delay is that he did not promptly receive Miller's initiating papers because he does not live at the Southampton property at which service was affixed. Patel represents that he lives in Manhattan, rents out the Southampton property in the summer, and only visits it occasionally. (NYSCEF No. 29.) Patel also represents that he did not visit the property from September 2022 through January 2023, in particular, due to travel to California to care for his father after a stroke. Further, Patel states that once he learned in January 2023 of the complaint against him, he promptly contacted Miller's attorney to negotiate about the action.

[1] Miller's affirmation in opposition for mot seq 002 (NYSCEF No. 60) is the same as her affirmation in support for the renewed default-judgment motion, mot seq 004. (NYSCEF No. 46.)

(*Id.*) And, as noted above, the record reflects that Patel filed his answer at the beginning of February.

Miller has not shown that any prejudice would result, whether from delay or otherwise, if this court were to compel her to accept Patel's untimely answer. Indeed, this court already denied Miller's first default-judgment motion. (*See* NYSCEF No. 17.)

Patel also raises potentially meritorious defenses. (*See* NYSCEF No. 24 at 8-10.) Patel asserts that he is not in breach of the rental agreement with Miller because he provided her with suitable accommodations that matched what she saw during her inspection of the property and required, at most, only minor repairs. (*Id.* at 8-9.) Patel also claims that Miller did not end the rental early although she had the option to do so, and that Miller agreed that any complaint by her would be addressed to Marquis, not him. (*Id.*) Finally, Patel also asserts that even if he violated Southampton Code § 270 (as Miller argues), that would not excuse Miller from her obligation to make payments under the rental agreement. (*Id.* at 10.)

Taking into account the CPLR 3012 (d) factors, Patel's motion is granted.

II. Marquis's Motion to Dismiss Miller's Complaint and Patel's Cross-Claims (Motion Seq 003)

A. The Branch of Marquis's Motion Seeking Dismissal of Miller's Complaint

Marquis moves under CPLR 3211 (a) (1) and (a) (7) to dismiss all causes of action asserted by Miller against it because of the release Miller signed in the booking agreement. (NYSCEF No. 37 at 8.) A CPLR 3211 (a) (1) "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (*Leon v Martinez*, 84 NY2d 83, 88 [1994].)

At issue is whether Miller released Marquis from "any and all claims" against it by signing the booking agreement. The booking agreement contains at least three clauses limiting Marquis's liability. (*See* NYSCEF No. 40 at 6.) The first of those clauses provides that Marquis may not be held "liable for any indirect, incidental, consequential, special or exemplary damages, or for any damages for death, personal or bodily injury, emotional distress, or damage to property, arising out of or in connection with any visitor's occupancy of the property," before, during, or after the occupancy period. (NYSCEF No. 40 at 6.) The second clause provides that Marquis and its affiliates may not be held "liable or responsible in any way for the actions or faults of" the member or guest. (*Id.*) The third clause provides that "[b]oth Guest and Member waive and release any and all Claims" against Marquis "arising in connection with Marquis's . . . performance of its obligations" under the booking agreement. (*Id.*)

A release is interpreted using contract-law principles. (*Around the Clock Delicatessen v Larkin*, 232 AD2d 514, 515 [2d Dept 1996].) If a signed release "is clear and unambiguous and knowingly and voluntarily entered into," it is "binding on the parties unless cause exists to invalidate it on one of the recognized bases for setting aside written agreements, including

illegality, fraud, mutual mistake, duress or coercion." (*Nelson v Lattner Enters. of N.Y.*, 108 AD3d 970, 972 [3d Dept 2013].)

Here, the language—particularly that of the third clause—is not ambiguous. Nor does Miller allege it is. (*See* NYSCEF No. 79 at 9-10.) The release's scope is not limited to a particular type of claim or set of circumstances. Nor does Miller allege that any illegality, fraud, mutual mistake, duress or coercion induced her to sign the release. At most, Miller alleges that she was required to sign the booking agreement to book the property (NYSCEF No. 80 at 3). But that does not rise to the level of duress. (*See Fruchthandler v Green*, 233 AD2d 214, 214 [1st Dept 1996] [describing circumstances that would constitute duress].) In any event, by accepting the benefits of the contract, Miller essentially ratified the release.[2] (*Id.* at 215.)

Given the binding effect of Miller's release of her claims against Marquis, the motion to dismiss her complaint as against Marquis is granted.

B. The Branch of Marquis's Motion Seeking Dismissal of Patel's Cross-Claims

In his proposed answer, Patel asserts a cross-claim against Marquis for contribution should Patel be held liable to Miller, and for damages for breach of contract. (NYSCEF No. 39 at 14.) Marquis contends first that the cross-claim is not properly before this court, because that Patel did not seek leave of this court to file it, instead moving to compel only *Miller* to accept his answer, not also Marquis. (NYSCEF No. 37 at 6.) This court is not persuaded by that contention.

Marquis's argument presumes that the same timeliness requirements govern answers and cross-claims. But these two types of pleadings are governed by different CPLR provisions—CPLR 3012 (answers) and CPLR 3019 (cross-claims). CPLR 3012 imposes a filing deadline. CPLR 3019 does not. Indeed, CPLR 3019 does not affirmatively require a defendant to raise a cross-claim within the answer, as opposed to in a freestanding document; nor to serve the cross-claim on an appearing defendant in the same manner as a summons. Given the CPLR's distinctions between answers and cross-claims, this court sees no basis to conclude that a defendant who must seek leave to serve and file an untimely answer must also do the same with a *cross-claim*. Nor does Marquis provide precedent supporting that conclusion.

In the alternative, Marquis contends that the cross-claims must be dismissed on their merits under CPLR 3211 (a) (1) and (7). (NYSCEF No. 37 at 1.) This contention fares better.

i. Contribution

Patel brings a cross-claim for contribution from Marquis in the event that Patel is held liable to Miller. But a claim for contribution is only proper in tort actions. (*Livingston v Klein*, 256 AD2d 1214, 1214 [4th Dept 1998].) Here, Patel's cross-claim is not tort-related, and the

[2] Miller also requests that the motion be dismissed because Miller needs discovery to determine all the parties' obligations under the booking and promotion agreements. (NYSCEF No. 79 at 12-13.) Given the straightforward nature of the booking agreement, further discovery is unwarranted. (*See* NYSCEF No. 102 at 7.)

underlying action is for breach of contract.[3] The branch of Marquis's motion seeking to dismiss the contribution cross-claim is granted.

ii. Breach of Promotion Agreement

Patel also brings a cross-claim for Marquis's alleged breach of the promotion agreement. (NYSCEF No. 39 at 16-17.) Marquis contends that this claim is barred by limitation-of-liability provisions in the promotion and booking agreements. This court agrees that the promotion agreement bars Patel's breach-of-contract cross-claim against Marquis.

The promotion agreement contains an extended limitation-of-liability clause. The clause provides in its first sentence that "[t]o the maximum extent permitted by law, in no event shall" Marquis or its agents or affiliates "be liable for *any* delays, accidents, damages, injuries or losses suffered by or with respect to member [Patel], the guest [Miller] (or guest's invitees)." NYSCEF No. 41 at 7 [emphasis added; block capitalization omitted].) This broadly phrased provision forecloses Patel's claim that Marquis should be held liable for losses that he suffered "with respect to" Miller due to Marquis's alleged breaches of contract.

Patel argues, though, that the sweeping language of the first sentence of the limitation-of-liability clause should be understood as implicitly narrowed by the *second* sentence: "Marquis is not responsible or liable for managing or maintaining the property (other than as agreed to in writing." (*Id.* [block capitalization omitted].) That is, Patel claims, because Marquis stated in the written promotion agreement that Marquis would provide him various guest-related services, its alleged breach of that commitment comes within the "as agreed to in writing" exception to the agreement's limitation of liability. (*See* NYSCEF No. 76 at 5.) But the promotion agreement does not state in writing that Marquis may be held "liable for managing or maintaining the property" (NYSCEF No. 41 at 7)—quite the reverse. Nor, in any event, does Patel explain why it would be appropriate to read the first and second sentences of the limitation-of-liability clause as contradicting one another, and to decline as a result to give full effect to the language of the first sentence.[4] (*See Northern Star Textile, Corp. v Micro Office Solutions 4 LLC*, 214 AD3d 426, 427 [1st Dept 2023] ["Contracts must be interpreted in their entirety and read them to give effect to all their provisions as a whole rather than focus on isolated words or cherry-picked provisions."].)

Alternatively, Patel contends that Marquis cannot enforce the limitation-of-liability clause against him given Marquis's (alleged) breach of its obligations under the promotion

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[3] Patel's claim for contribution would also be subject to dismissal in any event, given this court's conclusion above that the Marquis defendants are not liable to Miller. (*See supra* Section II.A.)

[4] This court is not persuaded by Marquis's additional argument that it cannot be held liable to Patel because of a provision in the promotion agreement requiring *Patel* to indemnify *Marquis*. The language of the indemnity provision does not make it "'unmistakably clear'" that the parties intended for Patel to indemnify Marquis in an action between them—as distinct from an action brought by third parties against Marquis arising from Patel's conduct. (*Needham & Co., LLC v UpHealth Holdings, Inc.*, 212 AD3d 561, 562 [1st Dept 2023], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 492 [1989].)

agreement. (NYSCEF No. 76 at 6.) But Patel supplies no authority for this proposition. He relies on the First Department's 1918 decision in *Pilar v Armour*. There, the Court held that an action to collect payments owed under a settlement was not barred by a release provision in the settlement agreement itself. (*See* 169 NYS 246, 247-248 [1st Dept 1918].) In other words, *Pilar* stands for the proposition that a contractual release will not bar a claim for specific performance of the counterparty's obligations under that contract. That proposition is quite different from holding that a limitation-of-liability provision in a contract will not bar a claim for damages sounding in *breach* of contract—the scenario presented by Patel's cross-claim here. And the First Department has made clear, for example in the construction context, that a party asserting a breach-of-contract claim can avoid a contractual limitation-of-liability clause only in limited circumstances. (*See e.g. Advanced Automatic Sprinkler Co., Inc. v Seaboard Sur. Co.*, 139 AD3d 424, 425 [1st Dept 2016] [holding that plaintiff's allegations of delays by the prime contractor did not meet the "heavy burden" required to avoid enforcement of a contractual "no damages for delay clause"].) Patel has not shown that this case presents circumstances of that kind.

The branch of Marquis's motion seeking to dismiss Patel's breach-of-contract cross-claim is granted.

iii. Patel's Request for Leave to Amend

Patel requests that if the court grants Marquis's motion to dismiss, the court should give him leave to correct any deficiency in his pleadings. But Patel does not identify how he would strengthen his complaint, or remedy potential deficiencies in the complaint, if granted the opportunity—let alone provide a proposed amended pleading. Plaintiff thus has not satisfied the requirements of CPLR 3025 (b), governing requests for leave to amend.

III. Miller's Renewed Motion for Default Judgment (Motion seq 004)

Given this court's conclusion that Miller must accept Patel's answer, discussed above, Miller's renewed default-judgment motion is denied.

Accordingly, it is

ORDERED that Patel's motion to compel Miller to accept his untimely answer and counterclaim (mot seq 002) is granted; and it is further

ORDERED that Miller's renewed motion for default judgment against Patel (mot seq 004) is denied; and it is further

ORDERED that the branch of Marquis's motion seeking dismissal of Patel's cross-claims against it (mot seq 003) is granted; and it is further

ORDERED that the branch of Marquis's motion seeking dismissal of Miller's complaint against it (mot seq 003) is granted, and the complaint is dismissed as against Marquis, with costs and disbursements as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the balance of the claims in the action are severed and shall continue; and it is further

ORDERED that Marquis serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

11/1/2023
DATE

HON. GERALD LEBOVITS
J.S.C.

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