SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42M

----------X

INTERSTATE INDEMNITY COMPANY,

Plaintiff,

- v -

EAST 77 OWNERS CO., LLC,

Defendant.

INDEX NO.	650794/2022
MOTION DATE	04/08/2024
MOTION SEQ. NO.	005 & 006

DECISION & ORDER ON MOTION

----------X

APPEARANCES:

Bruno, Gerbino, Soriano & Aitken, LLP, Hasbrouck Heights, New Jersey (Alfred C. Polidore, Esq., of counsel) for Plaintiff.

Segal McCambridge Singer & Mahoney, Ltd, New York, New York (Jeffrey Michael Marchese, Esq., of counsel) for Defendant.

HON. EMILY MORALES-MINERVA:

In this action for, among other things, breach of a settlement agreement and release involving damage to real property, plaintiff INTERSTATE INDEMNITY COMPANY (Indemnity Company) moves, by motion (seq. no. 005), for an order, pursuant to CPLR § 3212,[1] granting it summary judgment against defendant

[1] CPLR § 3212 provides: "Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made, such date being no earlier than thirty days after the filing of the note of issue. If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown."

EAST 77 OWNERS CO., LLC (Owners Co.), and awarding it damages in the sum of $120,000.00 together with interest accruing 45 days after October 06, 2016, and in the sum of $165,221.14 with interest accruing 45 days after January 15, 2021. Owners Co. appears and opposes the motion.

In addition to opposing Indemnity Company's motion, Owners Co. moves, by motion (seq. no. 006), pursuant to CPLR § 3212, for an order granting it summary judgment, against Indemnity Company, and dismissing the complaint. In support of this application, Owners Co. also asserts lack of standing, waiver and estoppel. Indemnity Company appears and opposes Owners Co.'s motion.

For the reasons set forth below, the Court denies both motions (seq. nos. 005 & 006) in their entirety.

BACKGROUND

In or around 2009, an incident occurred which caused damage to the real property of defendant EAST 77 OWNERS CO., LLC, ("OWNERS CO."). Consequently, plaintiff INTERSTATE INDEMNITY COMPANY ("Indemnity Company"), Owner Co.'s insurance company and subrogee, and Owners Co. commenced four actions to recover damages. These actions were against, among others, non-party S.T.A. Parking Corporation ("S.T.A. Parking Corp.") and non-

party Golden Vale Construction Corp. ("G.V.C. Corp.") (see generally Interstate Indemnity Company v East 77 Owners Co., LLC, 224 AD3d 456 [1st Dept 2024] [setting forth some of the factual background in this action]).2

Thereafter, in or around April 2011, Indemnity Company and Owners Co. entered into a settlement agreement and release whereby Indemnity Company acquired the right to recover from proceeds of "any settlement of or judgments that [Owners Co.] actually recovered from the defendants or" insurers of the defendants in the actions from damages to Owners Co.'s property (NYSCEF Doc. No. 112, Settlement Agreement). The agreement identified these actions as including "the Litigation."

About a year later, on April 19, 2012, Owners Co. entered a partial settlement agreement with defendants in "the Litigation": non-parties S.T.A. Parking Corp., King Shah Group, Inc. (King Shah), Certified Testing Laboratories, Inc. (CTL), and Richard J. Zaloum (Zaloum). This settlement resolved "the Litigation" only against non-party King Shah, CTL, and Zaloum for a sum of $1,400,000.00 (see NYSCEF Doc. No. 148, Litigation Settlement Agreement). In exchange for said sum, Owners Co.

---

2 The actions are as follows: (1) East 77 Owners Co., LLC v King Shah Group, Inc. et al., Index No. 603340/07, (2) East 77 Owners Co., LLC v Richard J. Zaloum, P.C., Index No. 114895/07, (3) East 77 Owners Co., LLC v Richard J. Zaloum, Index No. 600105/08, and (4) Indemnity Company, as subrogee of East 77 Owners Co., LLC v King Shah Group, Inc, et al, Index No. 114015/07 (collectively "the Litigation").

formally released, and discontinued "the Litigation" against said non-parties.

However, "the Litigation" between Owners Co. and S.T.A. Parking Corp, continued. Then, on May 25, 2012, Owners Co. and S.T.A. Parking Corp, negotiated a separate agreement, known as an assignment agreement. This agreement self describes as "solely [] between" Owners Co. and S.T.A. Parking Corp, and as a "companion" to "the Litigation" settlement (see NYSCEF Doc. No. 115, Assignment Agreement).3

In this assignment arrangement, Owners Co. and S.T.A. Parking Corp, agreed for the Court to both determine liability of S.T.A. Parking Corp, and to hold an inquest on damages against S.T.A. Parking Corp. Therein, Owners Co. and S.T.A. Parking Corp, also agreed on an indirect method for Owners Co. to recover for the damages to its real property. Namely, Owners Co. acquired a right to a portion of any monies S.T.A. Parking Corp, recovers from the proceeds of (1) any of S.T.A. Parking Corp.'s settlements, (2) any judgments obtained against S.T.A. Parking Corp., (3) any settlements or judgments of S.T.A.'s insurer, and (4) any settlements or judgments against

[3] The Assignment Agreement provides: "This Agreement, entered into on this 24th day of May 2012, is a companion to the Settlement Agreement entered into in the Underlying Actions (as defined herein), and is meant to provide additional terms solely as between East 77 Owners Co., L.L.C. ('E77') and STA Parking Corp. ('STA', as further defined herein) (E77 and STA, collectively, the 'Parties') that supplement the terms of the Settlement Agreement."

any non-settling party or any insurer to a non-settling party involved in "the Litigation." These included settlements or judgments against non-party Lancer Insurance Company (Lancer), non-parties Federal Insurance Company (Federal), Golden Vale Construction Corp. (Golden Vale), Axis Specialty Insurance Company (Axis), and General Star Indemnity Company (General Star).

Further, the assignment agreement allotted the portion of such recoveries between Owners Co. and non-party S.T.A. Parking Corp, as follows: 40% to Owners Co., 20% to S.T.A. Parking Corp., 20% to Owners Co.'s counsel as named therein, and 20% to S.T.A. Parking Corp.'s counsel. The assignment also provided that S.T.A. Parking Corp, continue pending claims against its insurers, any non-settling party to "the Litigation," and any insurer to such non-settling party. These claims included, but were not limited to, a pending inquest on damages against non-party Golden Vale, who defaulted in "the Litigation."

Following the assignment agreement, on November 7, 2013, Owners Co. obtained a judgment against S.T.A. Parking Corp, in the sum of $3,417,051.19. Also, in November 2013, non-party S.T.A. Parking Corp, obtained a $3,848,596.62 judgment against Golden Vale on the indemnification claims it asserted as a third-party in "the Litigation."

Non-party Axis Specialty Insurance Company ("Axis Insurance Company") -- Golden Vale's insurance company -- then paid S.T.A. Parking Corp. $1,000,000.00, on October 6, 2016. Later, in January 2021, S.T.A. Parking Corp, paid Owners Co. $1,376,842.96, pursuant to the assignment agreement.

Having surprisingly learned about both Owner Co.'s assignment agreement with S.T.A. Parking Corp, and Owner Co.'s recoveries, on November 02, 2021, Indemnity Company sent Owners Co. a claim letter, seeking payment, pursuant to their settlement agreement. However, Owner Co. did not issue any payment to Indemnity Company.

Consequently, Indemnity Company filed the instant action, alleging that Owners Co. breached their settlement agreement, as Owners Co failed to pay Indemnity Company their agreed upon share of Owner Co.'s recoveries. As to damages, Indemnity Company seeks to recover: (1) 12% of the $1,000,000.00 Axis Insurance Company paid to S.T.A. Parking Corp., as such sum constituted proceeds of insurance for non-party Golden Vale in "the Litigation" (first cause of action), and (2) 12% of the $1,376,842.96 S.T.A. Parking Corp, paid to Owners Co. (second cause of action). Additionally, Indemnity Company seeks an accounting from Owners Co., setting forth each settlement or judgment Owners Co. collected in connection with "the Litigation" (third cause of action).

Owners Co. filed a pre-answer motion (sequence no. 001) to dismiss Indemnity Company's complaint entirely or, in the alternative, to disqualify the entire law firm of Bruno, Gerbino, Soriano & Aitken, LLP, including counsel Alfred C. Polidore, Esq., from representing Indemnity Company in this action (see NYSCEF Doc. No. 004-005, Notice of Motion and Affirmation in Support). Notably, Owners Company did not raise standing as a ground for dismissal in its pre-answer motion.

The Court (N. Bannon, J.S.C.) granted the pre-answer motion, in part, to the extent of dismissing the third cause of action for an accounting, and otherwise denied the motion entirely (see NYSCEF Doc. No. 24, Decision and Order, N. Bannon J.S.C.).

Owner's Co. appealed said decision and order, only to the extent that the Court (N. Bannon, J.S.C.), denied Owners Co.'s motion to dismiss the first and second causes of action.[4] Upon review, Appellate Division, First Department, affirmed Justice

[4] Regarding Owners Co.'s motion, in the alternative, the Court (N. Bannon, J.S.C.), expressly rejected Owners Co.'s argument that the law firm Bruno Gerbino Soriano & Akin, LLP and counsel of record Alfred C. Polidore, Esq. should be disqualified. The Court reasoned that Owners Co. presented no facts in support of the proposition that Bruno Gerbino Soriano & Akin, LLP and counsel of record Alfred C. Polidore, Esq.'s representation of Indemnity Company, as Owners Co.'s subrogee, created an attorney-client relationship between said counsel and Owners Co. The Court further reasoned that Owners Co., identified no authority for its proposition that an attorney-client relationship is automatically formed between counsel for a subrogee and a subrogor. Therefore, the Court denied Owners Co.'s motion to disqualify the firm and counsel Alfred C. Polidore, Esq., from representing Indemnity Company in this action.

Bannon's decision and order in its entirety (see Interstate Indem. Co. v E. 77 Owners Co., LLC, 224 AD3d 456 [1st Dept 2024]).

Thereafter, Owners Co. filed an answer, asserting various affirmative defenses, including that Indemnity Company lacked standing. The parties engaged in discovery and motion practice surrounding discovery.

Now, Indemnity Company moves, by motion (seq. no. 005), for an order, pursuant to CPLR § 3212, granting it summary judgment against Owners Co., and awarding it damages in the sum of $120,000.00 together with interest accruing 45 days after October 06, 2016, and in the sum of $165,221.14 with interest accruing 45 days after January 15, 2021. Owners Co. opposes the motion, arguing that Indemnity Company lacks standing to bring the action, that Indemnity Company waived its rights under the parties' settlement agreement, and that Indemnity Company should be equitably estopped from asserting its rights under the subject agreement.

Further, by motion (seq. no. 006), Owners Co. also moves, pursuant to CPLR § 3212, for an order granting it summary judgment, against Interstate Company, dismissing the complaint. In support of this application, Owners Co. contends that (1) Interstate lacks standing to bring this action, that (2) Interstate waived its rights under the parties' settlement

agreement, and that (3) Interstate should be estopped from enforcing its rights under the settlement.

Indemnity opposes the motion for an order of summary judgment, appearing to argue that the motion is unsupported by a requisite affidavit, and that a typo in the papers mistakenly referring to Indemnity as "Interstate Insurance Company" does not vitiate its standing. In any event, Indemnity argues that Owners Co. waived its standing argument. As to Owners Co.'s estoppel argument, Indemnity counters that Owners Co. has not set forth any evidence in admissible form to establish that Indemnity engaged in any affirmative act upon which Owners Co. relied to its detriment.

ANALYSIS

Standing

The court first addresses the preliminary issue of standing. At any time before service of the responsive pleading is required, a party may move, pursuant to CPLR § 3211 (a), for an order dismissing the causes of against it (see CPLR § 3211 [e]). However, an objection or defense based upon standing, pursuant to subdivision (3) of CPRL § 3211 (a), is "waived unless raised either by [pre-answer] motion [to dismiss] or in the

responsive pleading" (CPLR § 3211 (e); see also CPLR § 3211 (a) (3) [setting forth grounds for dismissal if "the party asserting the cause of action has no legal capacity to sue"]; Wells Fargo Bank Minn, v. Mastropaolo, 42 AD3d 239, 241-242 [2nd Dept 2007] [holding: "for purposes of the waiver rule set forth in CPLR § 3211 (e), standing and capacity to sue are sufficiently related that they should be afforded identical treatment"]).

Here, Owners Co. filed its initial pleading, a pre-answer motion, failing to raise standing as a ground for dismissal. Therefore, the defense is waived (see Estates NY Real Estate Servs, LLC v City of New York, 184 AD3d 56, 61 n. 2 [holding: "To the extent defendants argue that plaintiff lacks standing . . . they waived the argument by failing to raise it in their pre-answer motion to dismiss"]). Therefore, the court will not consider standing as a basis for an order of summary judgment in this action.

Summary Judgment

Next, the court addresses the merits of Indemnity Company's motion (seq. no. 005) and Owners Co.'s motion (seq. no. 006) for summary judgment.

"On a motion for summary judgment, the moving party must 'make a prima facie showing of entitlement to judgment as a

matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (Nomura Asset Capital Corp, v Cadwalader, Wickersham & Taft LLP, 26 NY3d 40, 49 [2015], citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; CPLR § 3212[b]). Included in such evidence "shall be" a supporting "affidavit" of a person "having knowledge of the facts" (CPLR § 3212 [b]; see also Saunders v J.P.Z. Realty, LLC, 175 AD3d 1163, 1164 [1st Dept 2019], citing GTF Mktg. v Colonial Aluminum Sales, 66 NY2d 965, 967 [1985]).

"A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden" (Saunders, 175 AD3d at 1164, citing Vermette v Kenworth Truck Co., 68 NY2d 714 [1986]). Indeed, it is well-settled that even the affirmation of an attorney shall be without evidentiary value where it is conclusory or based on no personal knowledge (*see* Vermette, 68 NY2d at 714 [providing that the affidavit of an attorney was "patently insufficient" to meet the burden of summary judgment where it merely alleged that admissible proof existed, but failed to tender such proof]); see also Roche v Hearst Corp., 53 NY2d 767, 769 [1981] [holding that, as plaintiff relied solely upon the affirmation of his attorney, who was without personal knowledge of the facts, plaintiff failed to supply the

evidentiary showing necessary to establish an issue a fact for trial]; Zuckerman v City of New York, 49 NY2d 557, 563 [1980]).

Where a movant for summary judgment meets it requisite burden, the non-moving party then has the burden "'to establish the existence of [factual issues] which require a trial of the action'" (id., citing Vega v Restani Constr. Corp., 18 NY3d 499, 503 [2012], quoting Alvarez, 68 NY2d at 324).

The court must view the facts in the light most favorable to the non-movant, giving such the benefit of all reasonable inferences (De Lourdes Torres v Jones, 26 NY3d 742 [2016]). "Summary judgment is inappropriate in any case where there are material issues of fact in dispute or where more than one conclusion may be drawn from the established facts" (Friends of Thayer Lake LLC v Brown, 27 NY3d 1029, 1043 [2016], citing Kriz y Schum, 75 NY2d 25, 33-34 [1989]; see also Ortiz v Varsity Holdings, LLC, 18 NY3d 335, 339 [2011]). "[C]ompeting evidence must be weighed and [a factfinder must assess] the credibility of the witnesses" (Friends of Thayer Lake LLC at 1044, citing Adirondack League Club v Sierra Club, 92 NY2d 591, 600 [1998]).

Applying these principles here, the court finds that both Indemnity Company and Owners Co. fail to support their motions with an affidavit of a party with personal knowledge. In support of motion (seq. no. 005), Interstate Company submits the supporting affidavit of Alfred C. Polidore, Esq., which affirms

"I am fully familiar with the facts and circumstances surrounding this matter from my review and personal handling of the file maintained in our office" (NYSCEF Doc. No. 138, Affirmation of Alfred C. Polidore, Esq. dated March 29, 2024, at 1 [emphasis added]). Similarly, the other affirmation Indemnity Company submits in support of its application provides that the affiant, who is a third-party administrator to Indemnity Company, "is fully and personally familiar with the facts and circumstances surrounding this action" (NYSCEF Doc. No. 139, Affidavit of Steve Lobaccaro, third-party administrator, dated March 29, 2024). "An affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden" (Saunders, 175 AD3d at 1164, citing Vermette, 68 NY2d at 714).

Similarly, as Interstate Company argues in opposition to Owners Co.'s motion (seq. no. 006), Owners Co. fails to provide the court with a supporting affidavit based on personal knowledge of the affiant. The affirmation of counsel Jeffrey M. Marchese, Esq., presenting legal arguments, does not meet said requisite (see NYSCEF Doc. No. 159, Affirmation in Support of Jeffrey M. Marchese, Esq., dated April 08, 2024). Further, in the remaining affidavit in support of Owners Co.'s motion, counsel for Owners Co. affirms only: "This Affidavit is based on

my personal knowledge" (NYSCEF Doc. No. 158, Affidavit in Support of Robert H. Friedman, Esq., at p 1, 11).

In any event, the affirmation of Robert H. Friedman, Esq. appears to be supporting to no avail the argument that the complaint should be dismissed on the ground of waiver as a matter of law. The only authority cited in the affirmation in support for such waiver is MTGLQ Invs., LP v Walker (2022 NY Mise LEXIS 18806 [Sup Ct, Queens County 2022]) and Allstate Fin-Corp. v Dundee Mills (800 F2d 1073 [11 Cir 1986]).

However, MTGLQ Invs. is factually distinguishable and, among other things, applies the general rule: "Waiver of a contractual right occurs when the non-breaching party manifests a clear intention to relinquish the right" (2022 NY Mise LEXIS 18806, *11, quoting Parlux Fragrances, LLC v. S. Carter Enterprises, LLC, 204 AD3d 72, 87 [1st Dept 2022]). As the governing First Department stated in Parlux: such "[a] waiver will not be lightly presumed, and the issue of whether a party waived a particular contractual right is generally for the jury" (204 AD3d at 87 [citation omitted]; see also Fundamental Portfolio Advisors, Inc., 7 NY3d 96, 104 [2006] [providing: "Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment 'may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage.'

However, waiver 'should not be lightly presumed' and must be based on 'a clear manifestation of intent' to relinquish a contractual protection" (citations omitted)]).

As to Owners Co.'s reliance on the 1986 case, Allstate Fin-Corp. v Dundee Mills, said action involved the application of Georgia law (see 800 F2d at 1075 [providing, among other things: "Under Georgia law, waiver is a matter of intent: the evidence must so clearly indicate an intent to relinquish a known right as to exclude any other reasonable information"]). Although it is noteworthy, that, even in Georgia, "waiver is generally a jury question" (id.).

Finally, to the extent that Owners Co. relies on the affidavit of counsel to establish estoppel as a matter of law, this argument is also unavailing as a ground for summary judgment.

> "Estoppel 'is imposed by law in the interest of fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought and who, in justifiable reliance upon the opposing party's words or conduct, has been misled into acting upon the belief that such enforcement would not be sought'"

(Fundamental Portfolio Advisors, Inc, v. Tocqueville Asset Mgmt., L.P., 7 NY3d 96, 106-107 [2006], citing Nassau Trust Co. v Montrose Concrete Prods. Corp., 56 NY2d 175, 184 [1982] and White v La Due & Fitch, Inc., 303 NY 122, 128 [1951]).

Here, factual issues exist both as to whether estoppel is needed to prevent injustice, as well as to whether Indemnity misled Owners Co. into believing that it would not seek to enforce their agreement.

Accordingly, it is

ORDERED that plaintiff INTERSTATE INDEMNITY COMPANY'S motion (seq. no. 005) is DENIED in its entirety; it is further

ORDERED that defendant EAST 77 OWNWES CO., LLC's motion (sequence no. 006) is DENIED in its entirety; and it is further

ORDERED that this case is scheduled for a virtual status conference in Part 42M, on April 28, 2025 at 12:30 P.M.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Emily Morales-Minerva

2/13/2025
DATE

EMILY MORALES-MINERVA, J.S.C.

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