

<b>Subway Real Estate Corp. v Saleem</b>
2019 NY Slip Op 30874(U)
March 22, 2019
Supreme Court, New York County
Docket Number: 652759/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: <u>HON. MARGARET A. CHAN</u>	PART	IAS MOTION 33EFM
	Justice	
-----X-----	INDEX NO.	652759/2017
SUBWAY REAL ESTATE CORP.,	MOTION DATE	
Plaintiff,	MOTION SEQ. NO.	001
- V -		
MUHAMMAD SALEEM, MUHAMMAD MALIK	DECISION AND ORDER	
Defendants.	-----X-----	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this motion to/for

DISMISS

In this action seeking indemnification and attorneys' fees originating from a disputed settlement agreement, defendant Muhammad Saleem moves in motion sequence 001 to dismiss plaintiff Subway Real Estate Corporation's (SREC) complaint pursuant to CPLR 3211(a)(1) and (7). For its part, SREC cross-moves: (1) for an order pursuant to CPLR 3211(c) notifying the parties that their motions shall be treated as motions for summary judgment; and (2) pursuant to CPLR 3212, to grant SREC summary judgment on its three causes of action and to set this matter down for a hearing to determine the amount of attorneys' fees and expenses SREC is entitled to recover. Defendant Muhammad Malik has yet to appear in this matter. The decision and order is as follows:

#### Allegations

This dispute over the language of a settlement agreement begins in 1997. Plaintiff SREC is in the business of leasing retail locations for the purpose of subletting the spaces to sublessees to operate Subway Sandwich Shops (NYSCEF #1 – Complaint at ¶6). On June 1, 1997, SREC entered into a written lease agreement (1997 Lease) with 397 8<sup>th</sup> Avenue Realty Corp. as landlord for a storefront located at 401 Eighth Avenue, in the city, county, and state of New York (*id.* at ¶7). At some point thereafter, Muhammad Saleem and Muhammad Malik (Defendants) entered into a subleasing agreement for the premises with SREC to operate a Subway Restaurant (*id.* at ¶8). SREC alleges that the sublease required Defendants to perform and observe all the obligations of SREC under the 1997 Lease and to make all rental payments directly to the Landlord as set forth in the 1997 Lease (*id.* at ¶11).

On May 4, 2002, PJA, LLC, the successor-in-interest to 397 8<sup>th</sup> Avenue Realty Corp. and SREC entered into an amendment to the 1997 Lease (*id.* at ¶12). In June 2008, the same parties entered into a revised lease agreement (2008 Lease) (*id.* at ¶13). The 2008 Lease between PJA and SREC stated that the sublessee would pay the landlord directly and that SREC would not receive or hold the rent (*id.* at ¶17). Defendants continued to pay rent to PJA directly as per the terms of the sublease (*id.* at ¶15). At some point, Defendants failed to perform their obligation to pay real estate taxes to the landlord (*id.* at ¶19).

As such, on May 23, 2014, 397 Eighth Avenue LLC, the successor-in-interest to PJA commenced an action against SREC in the Supreme Court, County of New York, under Index No. 651599/2014 to recover unpaid real estate taxes in the sum of \$259,553.13 and for attorneys' fees (*id.* at ¶20). On March 17, 2015, SREC commenced a third-party action against Defendants for indemnification and/or contribution (*id.* at ¶22). During the pendency of these actions, real estate taxes continued to accrue (*id.* at ¶24). Additionally, between July 2015 and November 2015, Defendants failed to pay base rent. Thus, on November 24, 2014, 397 Eighth Avenue LLC commenced a nonpayment proceeding in Civil Court of the City of New York (Index No. L&T 084913/15) to recover unpaid base rent in the amount of \$47,822.44 (*id.* at ¶¶25-26).

On January 12, 2016, 397 Eighth Ave LLC, SREC, and Defendants entered into a Stipulation of Settlement that resolved all litigation (*id.* at 27; NYSCEF #22 – Stipulation of Settlement). As per the Settlement, on January 31, 2016, SREC paid \$165,000.00 to 397 Eighth Avenue LLC to cover the unpaid real estate taxes (Complaint at ¶30; Settlement at ¶1-2). The Settlement also provided that “[SREC] (or Defendants) shall pay \$83,688.27 (the “Rent Arrears Payment”) to [397 Eighth Avenue LLC] simultaneous with the execution of this Stipulation in full satisfaction of all Base Rent and Additional Rent” (Settlement at ¶3). There is no dispute that SREC paid the real estate taxes and that Defendants paid the rent arrears.

The dispute at issue in this current litigation centers around the Stipulation of Settlement, specifically Paragraph 22 which reads: “[Defendants] agree to indemnify and hold [SREC] harmless for any liability damages, claims or judgments arising from this litigation, and shall reimburse [SREC] for any and all costs and expenses incurred, including but not limited to, reasonable attorneys' fees, costs, disbursements, and expenses” (*id.* at ¶22). SREC's first cause of action alleges that, pursuant to Paragraph 22 of the Settlement, Defendants must pay SREC \$165,000.00 that SREC paid to 397 Eighth Avenue LLC to cover the back-owed real estate taxes. SREC's second cause of action claims that Defendants must reimburse SREC for attorneys' fees, costs, and expenses that SREC incurred in the initial action and nonpayment proceeding (Complaint at ¶¶34-39). SREC's third cause of action claims that Defendants must also reimburse SREC for attorneys' fees and expenses incurred in the prosecution of this instant matter (*id.* at ¶¶40-42). Defendant Saleem now moves to dismiss.

### Standard on Motion to Dismiss

Muhammad Saleem (Defendant) moves pursuant to CPLR 3211(a)(1) and (7) to dismiss SREC's complaint pre-answer. In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). In particular, under 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*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

### Defendant Saleem's Motion to Dismiss

Defendant argues that SREC is barred from relying upon an allegedly oral sublease as a mechanism to indemnify SREC for its \$165,000 payment to 397 Eighth Avenue LLC and its attorneys' fees related to the prior litigation as addressed above. Defendant argues that the Stipulation of Settlement's mutual release clause bars this action. The release clause reads as follows:

"this Stipulation shall constitute the parties' accord and satisfaction and mutual release of any and all demands, rights, claims, remedies, actions, causes of actions or liabilities that any party hereto may have against any other party hereto...without limitation, any claims that have arisen, or could be asserted as arising from or relating to [SREC] and/or [Defendant's] occupancy of the Premises and arising under the lease. Specifically excepted from the operation of the foregoing releases are: (i) the obligations... of the parties under this Stipulation; (ii) the rights and remedies of the parties reserved and preserved in this Stipulation." (NYSCEF #22 – Stipulation of Settlement at 11-12, ¶19).

Defendant's motion is therefore valid to a limited extent. While SREC's entire action is not barred, indemnification pursuant to the sublease is barred based on the Stipulation of Settlement. Accordingly, SREC's first and second causes of action are dismissed to the extent they are predicated on the terms of the sublease, such as in Paragraphs 11 and 35 of SREC's complaint (Complaint at ¶¶ 11, 35). As the settlement agreement acts as a release of claims arising from the sublease, this court need not address the curious absence of a written agreement between the parties memorializing the subleasing arrangement and the attendant statute of frauds issues raised by the defendant.

However, the remainder of defendant's motion to dismiss is denied. SREC's complaint is primarily predicated on Paragraph 22 of the Stipulation of Settlement which provides that "[Defendants] agree to indemnify and hold [SREC] harmless for any liability damages, claims or judgments arising from this litigation, and shall reimburse [SREC] for any and all costs and expenses incurred, including but not limited to, reasonable attorneys' fees, costs, disbursements, and expenses" (NYSCEF #22 at ¶22, emphasis supplied to denote the parts that were added). Paragraph 22 contains hand-written edits, which eliminated the language wherein "[Defendants] agree to indemnify and hold [SREC] harmless for any damages, claims or judgments resulting from any breach of this Stipulation, and shall reimburse [SREC] for any and all costs and expenses that it may incur due to any breach of this Stipulation, including but not limited to, reasonable attorneys' fees, costs, disbursements, and expenses" (*id.*, emphasis supplied to denote the parts that were crossed-out).

Viewed in the most favorable light for SREC, this language indicates that Defendants are obligated to reimburse SREC for damages arising from the dispute between 397 Eighth Avenue LLC and SREC. The phrase "this litigation" must refer to the disputes that the Stipulation of Settlement purported to resolve. The language "incurred" also indicates that the drafters of the agreement were attempting to indemnify SREC for attorneys' fees experienced in resolving the 397 Avenue LLC litigation. Further, the hand-written edits changed the meaning of Paragraph 22 from a prospective indemnification to an indemnification of prior activity. All these factors favor SREC's position, and thus, defendant's motion must be denied.

#### SREC's Cross-Motion for Summary Judgment

SREC's request pursuant to CPLR 3211(c) to treat defendant's CPLR 3211(a)(1) motion to dismiss as a motion for summary judgment is denied. CPLR 3211(c) allows a court after "adequate notice to the parties" to treat a motion to dismiss "as a motion for summary judgment" whether or not the issue has been joined. However, this court has not given notice to the parties that it is entertaining the instant motion to dismiss as one for summary judgment and does not do so in this decision.

Nevertheless, SREC argues that an exception to the notice requirement applies here. The First Department has outlined three exceptions to the notice requirement of CPLR 3212(c): "(1) where the action in question involves no issues of fact but only issues of law which are fully appreciated and argued by both sides; (2) where a request for summary judgment pursuant to CPLR 3211(c) is specifically made by both sides; and (3) where both sides deliberately lay bare their proof and make it clear they are charting a summary judgment course" (*Shah v Shah*, 215 AD2d 287, 289 [1st Dept 1995]). The first and second exceptions do not apply because neither party indicated that this matter "involved a purely legal question rather than any issues of fact" and defendant did not request that the motion to dismiss be treated as a motion for summary judgment (*Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

SREC posits that exception three applies, because “both parties have submitted documentary evidence and raised arguments demonstrating that they are deliberately charting a summary judgment course” (NYSCEF #24 – Pl’s Memo of Law in Support and Opposition at 2-3). Defendant strenuously argues that the parties have not charted a course for summary judgment and Saleem claims that he has defenses that have yet to be litigated as this matter is still pre-answer (NYSCEF #25 – Def’s Reply and Opposition at 9). Defendant’s objection to converting its motion to one for summary judgment “is a significant indication that the parties were not charting such a course” (*Wadiak v Pond Management, LLC*, 101 AD3d 474, 475 [1st Dept 2012]). Summary judgment in premature at this juncture.

As an additional matter, Michael Donahue, SREC’s in-house Managing Counsel, submitted an out-of-state affidavit without notarization and a certificate of conformity (NYSCEF #11). A subsequently submitted affidavit corrected these defects (NYSCEF #27). Donahue’s affidavit is accepted nunc pro tunc (*see Matapos Tech. Ltd. v Compania Adina de Comerico Ltda*, 68 AD3d 672, 673 [1st Dept 2009] [“As long as the oath is duly given, authentication of the oathgiver’s authority can be secured later, and given nunc pro tunc effect if necessary. The absence of such a certificate is a mere irregularity, and not a fatal defect”]). However, the acceptance of Mr. Donahue’s affidavit does not alter the judicial calculus here.

Accordingly, it is hereby ORDERED that defendant Muhammad Saleem’s motion to dismiss is granted as it relates to claims predicated on the underlying sublease with SREC; it is further

ORDERED that defendant Muhammad Saleem’s pre-answer motion to dismiss is otherwise denied in its entirety; it is further

ORDERED that plaintiff SREC’s motion to convert defendant’s motion to dismiss into a motion for summary judgment is denied; it is further

ORDERED that defendant Muhammad Saleem shall serve an Answer within 20 days after entry of this Order; and it is further

ORDERED that the parties shall appear in Part 33, 71 Thomas St., New York, NY 10013 on May 8, 2019 at 9:30 AM for a preliminary conference.

This constitutes the decision and order of the court.

3/22/2019  
DATE

CHECK ONE:

CASE DISPOSED  
 GRANTED  
 SETTLE ORDER

DENIED

NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER

OTHER

APPLICATION:

  
MARGARET A. CHAN, J.S.C.