

<b>Gabay v Esplanade Venture Partnership</b>
2019 NY Slip Op 31297(U)
May 7, 2019
Supreme Court, New York County
Docket Number: 650948/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

JACK GABAY, GOLDEN GOOSE REALTY GROUP LLC, HERSHEL FELDMAN, Plaintiffs, - v - ESPLANADE VENTURE PARTNERSHIP, DAVID SCHARF, JOSEPH SCHARF, ALEXANDER SCHARF, SUSAN DIAMOND, Defendants. INDEX NO. 650948/2017 MOTION DATE 05/02/2018 MOTION SEQ. NO. 001 002 003 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 68, 91, 92, 138, 177, 178, 179 were read on this motion to/for

JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 002) 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 69, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 180, 181, 182, 183, 184, 189, 190, 191, 192, 193, 194, 197, 198, 199, 200, 201 were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 003) 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 185, 186, 187, 188, 195, 202, 203, 204 were read on this motion to/for

SUMMARY JUDGMENT(BEFORE JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 139, 140, 141, 142, 143, 144, 145, 146, 147, 176, 196, 205 were read on this motion to/for

SUMMARY JUDGMENT(BEFORE JOINDER)

Upon the foregoing documents, it is decided as follows:

In this action for breach of contract, third-party defendants 305 West End Holding LLC (305 Holding) and 305 West End Property LLC (305 Property) (collectively, 305 Entities), move in Motion Sequence (MS) 001 for summary dismissal pursuant to CPLR 3212 of the third-party complaint of third-party plaintiff, Esplanade Venture Partnership (EVP), and for summary judgment on their counterclaim against EVP for attorneys' fees.

In MS 002, the 305 Entities move pursuant to CPLR 3212 for summary dismissal of the complaint of plaintiffs Golden Goose Realty Group LLC, Jack Gabay and Hershel Feldman (collectively, Plaintiffs). Plaintiffs cross-move pursuant to CPLR 3212 for summary judgment on their complaint, or in the alternative, compelling EVP and the 305 Entities to comply with discovery.

In MS 003, defendants EVP, David Scharf, Joseph Scharf, Alexander Scharf and Susan Scarf Diamond (collectively, EVP defendants) move pursuant to CPLR 3212 for summary dismissal of plaintiffs' complaint. Plaintiffs cross-move pursuant to CPLR 3212 for summary judgment on the complaint, or in the alternative, compelling EVP defendants and the 305 Entities to comply with discovery.

In motion sequence 004, EVP moves pursuant to CPLR 3212 for summary judgment on its third-party complaint for indemnification.

Motion sequences 001, 002, 003, and 004 are consolidated for joint disposition.

### **Factual Background**

Plaintiff Golden Goose Realty Group LLC is a licensed real estate broker within the State of New York. Plaintiff Jack Gabay is the sole member of Golden Goose. Plaintiff Hershel Feldman is a licensed real estate broker licensed to transact business as a real estate broker within the State of New York.

EVP owned the property and building located at 305 West End Avenue (the Property) in the city, county, and state of New York. At the relevant time, the Property was occupied as senior housing and was known as "The Esplanade."<sup>1</sup> In March 2016, plaintiffs became aware that EVP was interested in selling the property. In April 2016, Gabay and Feldman met with defendant Joseph Scharf, wherein they agreed that plaintiffs would find a purchaser for the property in exchange for a brokerage commission.<sup>2</sup>

In April 2016, Gabay notified Jan Burman of The Engel Burman Group, LLC (Burman Group), a real estate developer, of the Property being offered for sale, and Jan Burman indicated an interest in purchasing the Property. Plaintiffs thereafter informed EVP of the Burman Group's interest.

Plaintiffs introduced EVP to the Burman Group and performed services plaintiffs allege to be in accordance with their brokerage agreement. For instance

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<sup>1</sup> The property has been renamed "305 West End Assisted Living," and is branded as a luxury senior care facility.

<sup>2</sup> Plaintiffs allege that the brokerage agreement consisted of a brokerage commission in the amount of 0.75% of the gross sales price of the property (NYSCEF # 1, ¶¶15-16). In its answer, EVP denies the existence of an agreement (NYSCEF # 5, ¶15), but later admits to the existence of a brokerage agreement in an affirmation (NYSCEF # 91, ¶9). However, the amount of the brokerage commission which plaintiffs were entitled to is disputed.

plaintiffs served as a communicator between the two parties; arranged, scheduled and participated in multiple walkthroughs of the Property with the Burman Group; scheduled and participated in meetings between EVP and Jan Burman; directly participated in the exchange of due diligence documents and information for, and between EVP and the Burman Group; and participated in negotiations between the parties including the exchange of several written offers and counter-offers and contract drafts for sale of the Property (NYSCEF # 1, ¶ 20 a-f).

Between May and July 2016, plaintiffs claim that it exchanged multiple offers by the Burman Group to EVP to purchase the property (*id.*, ¶21). On July 11, 2016, a meeting was held with EVP, the Burman Group, their respective attorneys, and plaintiffs. Plaintiffs claim that the purpose of the meeting was to sign the contract of sale between EVP and the Burman Group, but that EVP abruptly left the meeting without entering into an agreement for the sale of the Property (*id.*, ¶23).

Plaintiffs later learned that on July 12, 2016, EVP signed a Contract of Sale to sell the Property to 305 West End Holding LLC and that Northwind had wired \$7 million for the down-payment (*id.*, ¶ 33; NYSCEF # 111). 305 Holding was an entity of The Northwind Group (Northwind), a real estate development company controlled by Ran Eliasaf. Apparently, EVP was separately negotiating the sale of the Property with the Burman Group through Plaintiffs, and Northwind through its broker, Meridian (NYSCEF # 109 – Eliasaf aff, ¶ 8).

After signing the contract, Eliasaf had second thoughts about doing condo-conversion he had planned for the Property and opted for the senior assisted living plan (*id.*, ¶ 20). Eliasaf reached out to the Burman Group for the purpose of entering into a joint venture to manage a senior assisted living facility at the Property. According to Eliasaf, in order for the Property to operate as a senior living facility in New York, it required a licensed operator, which the Burman Group was. But Eliasaf learned that the Burman Group did not manage properties it did not own (*id.*, ¶¶ 23-24. On September 9, 2016, Northwind and Burman agreed to form an entity called 305 Property for this joint venture (NYSCEF # 19, ¶10).

On October 7, 2016, 305 Holding assigned the contract of sale to 305 Property, and on December 5, 2016, the parties closed on the Property. The Bargain and Sale Deed for the Property dated December 5, 2016, lists 305 West End Property, LLC as the buyer.

Plaintiffs now allege that they were the procuring cause of the sale of the Property, and that EVP breached the brokerage agreement for failing to pay the brokerage commission in the amount \$1,087,500, or 0.75% of the gross sale price of the Property. Plaintiffs also claim that they are entitled to relief under the theories of unjust enrichment and *quantum meruit*.

In turn, EVP filed the third-party complaint against the 305 Entities, wherein EVP claims that it is entitled to contractual indemnification, including attorneys' fees for its defense in the main and third-party actions. The 305 Entities filed a counterclaim for contractual indemnification for attorneys' fees for defending EVP's third-party claims.

## Discussion

### *Summary Judgment*

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "regardless of the sufficiency of the opposing papers" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

### *Procuring Cause*

The 305 Entities argue that plaintiffs were not the "procuring cause" of the transaction between 305 Property and EVP, and thus EVP has no liability for a broker's commission, and hence, the third-party complaint against the 305 Entities must also be dismissed. In opposition, plaintiffs argue that it performed a number of brokerage services that demonstrate its efforts were the procuring cause of the Burman Group to purchase the Property.

A broker is only entitled to a broker's commission where the broker is the "procuring cause" of the transaction. That is, a broker must demonstrate a "direct and proximate link" between his or her efforts and the deal ultimately consummated (*Rosenhaus Real Estate, LLC v S.A.C. Capital Mgmt., Inc.*, 121 AD3d 409, 409 [1st Dept 2014]; see also *SPRE Realty, Ltd. v Dienst*, 119 AD3d 93, 99 [1st Dept 2014]). It is not enough that the broker created "amicable atmosphere" or "amicable frame of mind" to demonstrate that the broker was the procuring cause of a transaction (*SPRE Realty*, 119 AD3d at 98; see *Rosenhaus*, 121 AD3d 409).

In a case factually similar to the facts herein, the Appellate Division, First Department affirmed the dismissal of plaintiff-broker's claim for a broker's commission on the grounds that the broker was not the procuring cause of the sale (*RMB Properties, LLC v Am. Realty Capital III, LLC*, 55 Misc. 3d 1202[A] [Sup Ct N.Y. County 2016], *aff'd sub nom. RMB Properties v. Am. Realty Capital III, LLC*, 148 A.D.3d 585 [1st Dept 2017]). In *RMB*, the broker introduced the seller to a prospective buyer, ARC, and performed some brokerage services. ARC thereafter submitted a letter of intent, which was rejected by the seller. Instead, the seller

signed a letter of intent with another buyer, Thor. However, the deal began to fall apart when Thor realized that it could suffer adverse tax consequences in acquiring the property based on how the deal was structured. Thereafter, the seller, ARC and Thor negotiated a deal wherein Thor would assign its rights as buyer to ARC.

In holding that the broker was not the direct and proximate cause of the consummated deal, the court noted that the deal the broker began working on was terminated when the seller rejected ARC's letter of intent and that the broker did not play a role in the negotiations between Thor and ARC or the ultimate agreements that were reached (*id.*, \*5-6). The court further held there was no evidence of bad faith on behalf of ARC to defeat an agreement with the seller.

Here, plaintiffs were not the procuring cause of the transaction at issue. Plaintiffs' efforts to secure a deal failed, and the relationship between EVP and Burman Group was terminated when EVP signed the Contract of Sale with 305 Holding, the other entity competing to purchase the Property. Plaintiffs did not introduce EVP to 305 Holding and did not play any part in crafting the agreement for 305 Holding to purchase the Property. Further, plaintiffs were not involved with procuring the Burman Group to become a joint venture partner in 305 Property or the creation of 305 Property, and did not have a hand negotiating the assignment of the Contract of Sale from 305 Holding to 305 Property.

Moreover, the proposed contract for sale by plaintiffs and the consummated agreement are fundamentally different. For instance, the proposed contract between the Burman Group and EVP required a \$1 million down payment, with \$6 million to follow if the contract became non-cancellable after the completion of the 45-day due diligence period, whereas the consummated agreement required a \$7 million down payment upfront, did not require a due-diligence period, and was firm (NYSCEF # 66 at 15-16).

Plaintiffs' opposition fails to show that it was the procuring cause of the sale of the Property to 305 Property or that their services were terminated in bad faith. Plaintiffs' argument that the brokerage services they provided to EVP induced the Burman Group to ultimately purchase the Property is without merit. At most, plaintiffs' efforts resulted in creating an amicable atmosphere between EVP and the Burman Group, which is insufficient to demonstrate that plaintiffs were the procuring cause of the ultimate deal (*RMB Properties*, 55 Misc. 3d 1202[A] at \*5).

Plaintiffs suggest that Northwind planned to partner with the Burman Group before the sale to 305 Holding. However, plaintiffs fail to cite to any evidence supporting its contention and the excerpt of Eliasaf's affidavit they do cite to simply states that 305 Holding would require a joint venture partner to operate the Property and to possibly obtain financing (NYSCEF # 39, ¶20).

Plaintiffs also argue that EVP was aware prior to the closing that the Burman Group was going to have an ownership and controlling interest in 305 Property. Clearly, EVP would have been aware that Burman was going to have an ownership and controlling interest in 305 Property since it agreed to execute the “First Amendment to Contract of Sale,” wherein EVP and 305 Holding agreed to the assignment of the contract “by [305 Holding] to [305 Property], which is owned and controlled by [305 Holding] and [Engel Burman]” (NYSCEF # 57, ¶3).

Plaintiffs assert that Northwind only learned of the Burman Group because of plaintiffs’ introduction of the Burman Group to EVP. Plaintiffs cite to Eliasaf’s affidavit wherein Eliasaf states that he first learned of the Burman Group when Alexander Scharf pressed him to sign the contract of sale for the Property because EVP was also negotiating with the Burman Group (NYSCEF # 114 at 25). It would appear that plaintiffs claim credit for Northwind’s signing of the contract of sale with EVP because of the competing pressure placed by the Burman Group. As Gabay avers, “there can be no doubt, that we, the Plaintiffs, proximately caused the sale of the Property to [305 Property] . . . .” (NYSCEF # 115, ¶ 19).

To say that plaintiffs’ introduction of the Burman Group to EVP was the procuring cause of the sale of the Property to Northwind which later entered into a joint venture with the Burman Group strains the definition of an introduction. Eliasaf stated that at the meeting when he heard the name “Bristol” mentioned, he later looked online and found that “Bristol” was a brand of luxury senior citizen assisted living facilities that was owned by the Burman Group (NYSCEF # 115, ¶ 20 quoting Eliasaf’s aff). In any event, even if credit were given to plaintiffs for the introduction, introducing the parties alone is insufficient to establish entitlement to a brokerage commission resulting from the sale of the property (*see Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564, 565 [1st Dept 2013]).

Plaintiffs’ argument that an issue of fact exists as to whether the Burman Group and Northwind acted in bad faith by colluding with each other prior to the July 12, 2016 sale is also without merit. Plaintiffs contend that the affidavits of Jan Burman and Steve Krieger, another principal of the Burman Group, falsely claim that the first time they became aware of Northwind was when Eliasaf contacted them on July 8, 2016, when in fact, Gabay sent them a group text message a month earlier on June 8, 2016, informing Burman and Krieger of Northwind’s bid on the property. In their reply affidavits, Burman and Krieger clarify that they forgot about receiving the group text message, which was sent sixteen months prior to the date of their initial affidavits (NYSCEF #s 189, ¶¶3-5; 191, ¶¶3-5). Importantly, they both affirm that the first time they had any communication with Eliasaf, or anyone at Northwind, about the Property was on July 8, 2016 (*id.*).

Finally, plaintiffs argue that the 305 Entities' motion for summary judgment (MS 002) should be denied because it is premature since defendants failed to provide requested discovery, including the outstanding depositions of Eliasaf, Burman, and Krieger. This court disagrees; the 305 Entities' motion for summary dismissal of the complaint (motion sequence 002) is not premature.

To defeat a motion for summary judgment due to incomplete discovery, there must be "some evidentiary basis . . . offered to suggest that discovery may lead to relevant evidence" (*DaSilva v Hah Engineers, Architects & Land Surveyors, P.C.*, 125 AD3d 480, 482 [1st Dept 2015]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Davila v New York City Transit Auth.*, 66 AD3d 952, 953 [1st Dept 2009], quoting *Lopez v WS Distribution, Inc.*, 34 AD3d 759, 760 [2d Dept 2006]).

While plaintiffs claim that the 305 Entities failed to respond to their discovery demands, their contention that further discovery will "undoubtedly support Plaintiffs' claims in this case" is insufficient to warrant the denial of the 305 Entities' motion. Plaintiffs have offered no indication that further discovery will produce relevant evidence. Their hope that further discovery in this case will lead to relevant evidence is without basis. Plaintiffs' argument that Burman and Krieger's affidavit misstating the date in which they were first informed of the existence of Northwind is not a sufficient evidentiary basis to deny the 305 Entities' motion and require further discovery.

#### *Quantum Meruit and Unjust Enrichment*

The 305 Entities argue that the *quantum meruit* and unjust enrichment claims against EVP should also be dismissed since EVP and plaintiffs entered into brokers' agreement.

Dismissal of a claim for *quantum meruit* and/or unjust enrichment is warranted where there is a valid and enforceable agreement governing the same subject matter (*Douglas Elliman, LLC v E. Coast Realtors, Inc.*, 149 AD3d 544 [1st Dept 2017], citing *Rosenhaus*, 121 AD3d at 409; *Parker Realty Grp., Inc. v Petigny*, 14 NY3d 864, 866 [2010]; *Orenstein v Brum*, 27 AD3d 352, 353 [1st Dept 2006]).

Here, the brokerage agreement entered into between plaintiffs and EVP preclude plaintiffs' claims pursuant to *quantum meruit* and unjust enrichment. While plaintiffs correctly assert that EVP denied the existence of an agreement in its answer, defendant David Scharf affirms the existence of such a brokerage agreement. David Scharf indicates that "[i]n April 2016 . . . plaintiffs and [defendant Joseph Scharf] agreed that if Plaintiffs procured a buyer of the [property] for EVP and, as result, the buyer closed, it would pay them a



commission” (NYSCEF # 91, ¶9). Thus, no issue of fact exists as to the existence of a brokerage agreement. Moreover, plaintiffs do not dispute that brokerage agreement covers the subject matter of plaintiffs claim, i.e. the brokerage commission which they allege they are entitled to. Further, plaintiffs’ claim for unjust enrichment is also dismissed because their efforts to procure a deal between EVP and the Burman Group were unsuccessful (*see Retail Advisors, Inc. v SLG 625 Lessee LLC*, 138 AD3d 425, 425 [1st Dept 2016]).

Accordingly, the branch of the 305 Entities’ motion to dismiss the complaint against EVP is granted.

### *Indemnification*

The 305 Entities argue that they are entitled to dismissal of EVP’s claim for indemnification since liability for the broker’s commission remains solely with EVP. The 305 Entities contend that they did not breach the provision contained in the Contract of Sale addressing brokers’ fees and that it was EVP’s responsibility to pay a broker’s fee under the agreement it had with plaintiffs, and that the 305 Entities did not do anything to procure a brokerage fee.

Since plaintiffs’ claims against EVP are dismissed, liability under the indemnification clause only consists of attorneys’ fees and costs. The court notes that the parties argue that there are two bases for indemnification for attorneys’ fees within the Contract of Sale: paragraphs 16 and 50.

The indemnification provision contained in paragraph 16, entitled “Brokers” states the following, in relevant part:

“Each party hereby agrees to indemnify, defend, and hold the other harmless from and against any and all claims, losses, liabilities, costs and expenses (including attorneys’ fees and disbursements) resulting from (a) any breach of the foregoing representation of the indemnifying party; and (b) any claim that may be made by any other broker, or any other person claiming a commission, fee or other compensation by reason of this transaction, if the same shall arise by, through or on account of any alleged act of the indemnifying party. The provisions of this Section 16 shall survive the Closing, or if the closing does not occur, the termination of this Agreement.”

(NYSCEF # 33, ¶16).

“A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous” (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]).

At the outset, there is not a meaningful distinction between the triggering sentence within the indemnification clause requiring that a broker's claim "arise by, through or on account of" an act of the indemnifying party and the commonly used "arising out of." The Court of Appeals has interpreted "[t]he phrase 'arising out of' . . . to 'mean originating from, incident to, or having connection with' " (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]).

In essence, plaintiffs' claim asserts that it is owed a brokerage commission because the Burman Group, through its affiliate 305 Property, ended up owning the Property. Thus, Plaintiffs' claim arose out of the 305 Entities' assignment of the contract of sale from 305 Holding to 305 Property.

As discussed above, Eliasaf, the controlling manager of Northwind, reached out to Burman to bring them in as a joint-partnership in 305 Property. Eliasaf sought out the Burman Group, in part, because it was a licensed senior living facility operator, and he needed an operator for the premises (NYSCEF # 62, ¶¶20-23). But for Northwind's reaching out to the Burman Group to bring them in as a joint partner in 305 Property and then assigning the contract of sale between EVP and 305 Holding to 305 Property, plaintiffs would not have a basis to bring their claims. While EVP consented to amend the Contract of Sale to permit the assignment, it was the assignment itself that triggered the indemnification provision in paragraph 16.

Further, paragraph 16 states that the indemnifier is to be liable for *any claim* arising from its action, even though plaintiffs' claim arises from the brokers agreement between EVP and plaintiffs, to which the 305 Entities were not a party.

Paragraph 50 of the Contract of Sale states:

"Attorneys' Fees. Each party shall pay its own legal fees incidental to the negotiation, execution, and delivery of this Agreement and the consummation of the transactions contemplated hereby. In connection with any litigation arising out of this Agreement, the prevailing party shall be entitled to recover reasonable attorneys' fees and disbursements for services rendered in connection with such litigation, including appellate proceedings and post judgment proceedings."

Since EVP, and not the 305 Entities, are the prevailing parties in the third-party action, the 305 Entities are not entitled to indemnification pursuant to paragraph 50 of the contract of sale, and their claim for indemnification is dismissed. Accordingly, EVP is entitled to indemnification for attorneys' fees from the 305 Entities pursuant to paragraphs 16 and 50 of the Contract of Sale.

### Conclusion

Accordingly, it is hereby

ORDERED that the 305 Entities' motion pursuant to CPLR 3212 for summary dismissal of the complaint of plaintiffs (MS 002) is granted, and the complaint is dismissed as against defendants, EVP, David Scharf, Joseph Scharf, Alexander Scharf and Susan Scarf Diamond; it is further

ORDERED that Plaintiffs' cross-motion (MS 002) pursuant to CPLR 3212 for summary judgment on their complaint, or in the alternative, compelling EVP and the 305 Entities to comply with discovery is denied; it is further

ORDERED that the 305 Entities' motion pursuant to CPLR 3212 for summary dismissal of the third-party complaint of EVP is moot, and the branch of their motion for summary judgment on their counterclaim against EVP for attorney's fees (MS 001) is denied; it is further

ORDERED that defendants EVP, David Scharf, Joseph Scharf, Alexander Scharf and Susan Scarf Diamond's motion pursuant to CPLR 3212 for summary dismissal of plaintiffs' complaint is moot (MS 003), and plaintiffs cross-motion pursuant to CPLR 3212 for summary judgment on the complaint, or in the alternative, compelling EVP and the 305 Entities to comply with discovery, is denied; it is further

ORDERED that EVP's motion pursuant to CPLR 3212 for summary judgment on its third-party complaint for indemnification is granted to the extent that the 305 Entities shall pay defendants reasonable attorneys' fees and costs (MS 004), is granted; it is further

ORDERED and ADJUDGED that the Clerk of the court shall enter judgment as written; it is further

ORDERED that the portion of EVP's motion seeking attorneys' fees is severed and referred to a special referee to hear and determine the amount of reasonable attorneys' fees owed to EVP; it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/suptmanh](http://www.nycourts.gov/suptmanh) at the "References" link), shall assign this matter

at the initial appearance to an available JHO/Special Referee to hear and report as specified above; it is further

ORDERED that counsel for Plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186), or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that counsel for EVP shall serve a copy of this order, along with notice entry, on all parties within fifteen (15) days of entry.

This constitutes the Decision and Order of the court.



5/07/2019  
DATE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE