SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

----------X

CORBETT AND DULLEA REALTY, LLC,

Plaintiff,

- v -

MUSS DEVELOPMENT, LLC, 1459 THIRD AVENUE LLC, and 1459 3RD RE ASSOCIATES,

Defendants.

----------X

INDEX NO. 655369/2017

MOTION DATE 03/17/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

MUSS DEVELOPMENT, LLC and 1459 THIRD AVENUE LLC, 1459 3RD RE ASSOCIATES,

Third -Party Plaintiffs,

-against-

VCPRE LLC and Y7 MANAGEMENT, LLC

Third-Party Defendants.

----------X

Third-Party
Index No. 595990/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 57

were read on this motion to/for DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss third-party complaint is denied; and it is further

ORDERED that counsel are directed to submit to 59nyef@nycourts.gov and to file with NYSCEF a proposed discovery status conference order or a counter proposed status conference order on or before October 23, 2020.

DECISION

In this action, first-party plaintiff Corbett and Dullea Realty LLC (Corbett), a real estate broker, brings suit against defendants/third-party plaintiffs Muss Development, LLC (Muss), 1459 Third Avenue, LLC (1459 Third), and 1459 3rd RE Associates (1459 3rd RE) for breach of implied contract and unjust enrichment. Corbett alleges that it was the procuring cause of a lease entered into between defendants 1459 Third and 1459 3rd RE, as landlord and owner, and third-party defendant Y7 Management, LLC (Y7), as tenant, and is thus entitled to a brokerage commission.

After Corbett filed its action, defendants/third-party plaintiffs then commenced a third-party action against third-party defendants Y7 and VCPRE LLC (VCPRE), its real estate broker, for indemnification.

VCPRE now moves, pursuant to CPLR 3211 (a) (7), for an order dismissing the third-party action as against it (NYSCEF Doc No. 40).

As set forth below, the motion to dismiss shall be denied.

Background

Accepting the allegations set forth in both the amended complaint (NYSCEF Doc No. 7) and the third-party complaint (NYSCEF Doc No. 42) as true (Leon v Martinez, 84 NY2d 83, 87 [1994]), the following facts emerge.

1459 Third and 1459 3rd RE, through Muss, their agent, rented the 4th and 5th Floors in the building known as 1459 Third Avenue, New York, New York 10028 (the subject premises) to Y7, pursuant to a written lease (the Lease [NYSCEF Doc No. 53]), dated May 11, 2016, between 1459 Third Avenue and 1459 3rd RE, as landlord, and Y7 as tenant, for a term which commenced on August 1, 2016, and is set to expire on July 31, 2026 (third-party complaint, ¶ 10). VCPRE was the broker for the Lease and represented that it was the sole and only broker for the Lease (id., ¶ 11).

Paragraph 75 of the rider to the Lease states:

> "The Tenant represents and warrants that it has dealt with no broker of any kind other than [VCPRE] and agrees to indemnify and hold the Landlord harmless from any claims of any broker, including all costs reasonably incurred in defending the same which may arise by reason of Tenant having dealt with any broker in connection with this lease. Landlord agrees to pay to VCPRE LLC a commission in connection with this lease pursuant to a separately negotiated agreement"

(Lease, ¶ 75).

Prior to the execution of the Lease, VCPRE executed a separate brokerage agreement, dated April 28, 2016 (the Brokerage Agreement [NYSCEF Doc No. 54]), regarding the brokerage fee to be paid to VCPRE for the leasing of the subject premises to Y7 (third-party complaint, ¶ 13). Paragraph 3 of the Brokerage Agreement provides:

> "The undersigned broker warrants and represents that the undersigned, to the best of its knowledge, is the sole broker in any wise instrumental in consummating the Lease *and the prior negotiations*

> *thereto*, and agrees to hold Owner harmless and indemnify Owner from and against any and all damages, liabilities, costs, and expenses (including attorneys' fees) arising out of or in connection with any claims by any other broker(s), such indemnification to be limited to the extent of commissions received by Broker under this Agreement"

(Brokerage Agreement, ¶ 3 [italics added as emphasis).

Y7 took possession of the subject premises pursuant to the terms of the Lease, and 1459 Third and 1459 3rd RE paid the agreed-upon commission to VCPRE (third-party complaint, ¶ 13).

Thereafter, Corbett commenced the first-party action, seeking to recover a brokerage commission that Corbett claims it is owed from defendants/third-party plaintiffs in connection with the leasing of the subject premises to Y7. In the amended complaint, Corbett alleges that it was the "procuring cause" of Y7 renting the subject premises from defendants/third-party plaintiffs, because it identified the subject building for Y7, identified the 4th and the 5th Floors in the subject building as the location to rent after touring the subject building with Y7, discussed the usage of the space with defendants/third-party plaintiffs, negotiated rent and other leasehold terms with defendants/third-party plaintiffs, and provided them with information regarding the prospective tenant's financial status.

Specifically, Corbett alleges that, in or around May of 2015, Y7 contacted it about finding New York locations for a yoga studio,

in particular a location on the Upper East Side of Manhattan (amended complaint, ¶ 6). Corbett further alleges it identified the subject building and arranged with Muss for Y7 to tour the building for available spaces (id., ¶ 7). According to Corbett, Y7 expressed a desire to rent the 4th and 5th Floors of the subject building (id., ¶ 8). Corbett submitted an offer to Muss for Y7 to rent the subject premises, which purportedly included a provision for the landlord to pay a full brokerage commission. This offer was rejected. Corbett then submitted a higher offer on July 13, 2015, which also purportedly included the provision that the landlord was to pay a full brokerage commission (id., ¶ 9). Muss rejected this second offer, purportedly on the grounds that it wanted a "more conventional" tenant, that it was worried about the noise that might be created by Y7, and that it was concerned about a tenant leasing two floors (id., ¶ 10).

Corbett was later informed by a letter from Y7's counsel that it toured the subject premises again in January of 2016, six months after touring them with Corbett, and entered into the Lease for the subject premises in May of 2016 (id., ¶ 11). Corbett alleges that defendants/third-party plaintiffs have failed to pay any brokerage commission to it, and that it is owed a full commission in the amount of $100,641.00 as a result it being the "procuring cause" of Y7 entering into the Lease for the subject premises (id., ¶ 13).

Defendants/third-party plaintiffs deny that they entered into any agreement with Corbett for brokerage services for the subject premises, and never retained it to provide any services. They further deny that they owe Corbett a brokerage fee.

Defendants/third-party plaintiffs contend that, even if Corbett were entitled to a brokerage commission for the leasing of the subject premises to Y7, pursuant to the terms of paragraph 75 of the Lease and paragraph 3 of the Brokerage Agreement, VCPRE and Y7 represented that VCPRE was the only broker involved in the leasing of the subject premises to Y7, and that VCPRE and Y7 would hold defendants/third-party plaintiffs harmless and indemnify them from and against any and all damages, liabilities, costs, and expenses (including attorneys' fees) arising out of or in connection with any claims by any other broker. They contend that, accordingly, pursuant to the Lease and the Brokerage Agreement between the parties, Y7 and VCPRE are liable for any brokerage fee claims made by Corbett, together with the reasonable value of the legal fees, costs and expenses incurred by defendants/third-party plaintiffs in defending the Corbett action.

After the complaint was initiated by Corbett, defendants/third-party plaintiffs then served a third-party complaint against VCPRE and Y7. Both VCPRE and Y7 failed to answer the complaint, and defendants/third-party plaintiffs moved for a default judgment. Defendants/third-party plaintiffs agreed to

vacate the default judgment, and VCPRE then made the instant motion.

Discussion

It is firmly established that, on a motion to dismiss a complaint pursuant to CPLR 3211(a) (7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Landon v Kroll Lab. Specialists, Inc., 22 NY3d 1, 5-6 [2013]; Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314, 326 [2002]; Leon, supra, 84 NY2d at 87). The sole inquiry is whether a cognizable legal theory is contained in the pleading, not whether there is evidentiary support or whether the claimant can ultimately succeed on the merits (African Diaspora Maritime Corp. v Golden Gate Yacht Club, 109 AD3d 204, 211 [1st Dept 2013]; Philips S. Beach, LLC v ZC Specialty Ins. Co., 55 AD3d 493, 497 [1st Dept 2008]). If the four corners of the complaint provide potentially meritorious claims, the motion to dismiss should be denied (see 511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152 [2002]). "'However imperfectly, informally, or even illogically the facts may be stated, a complaint, attacked for insufficiency, must be deemed to allege whatever can be implied from its statements by fair and reasonable intendment'" (Feinberg v Bache

Halsey Stuart, Inc., 61 AD2d 135, 138 [1st Dept 1978] [citation omitted]).

Construing the third-party amended complaint in the generous matter to which it is entitled, this court concludes that the third-party complaint contains sufficient allegations to withstand dismissal.

On this motion, the main issue before this court is whether the indemnification agreement entered into by VCPRE is binding and valid. In support of its motion to dismiss, VCPRE contends that "[u]nder the indemnity clause, it is clear that the clause does not cover the facts of this case, where there are claims by a broker, unaffiliated with VCPRE, who had dealings with Third-Party Plaintiffs ten months prior to VCPRE becoming involved" (affirmation of David S. Schwartz, Esq. [NYSCEF Doc No. 41], ¶ 26). VCPRE further contends that "[n]othing in the indemnity provision between VCPRE and Third-Party Plaintiffs states that VCPRE will indemnify Third-Party Plaintiffs for conduct solely caused by Third-Party Plaintiffs and which took place well before any conduct whatsoever was undertaken by VCPRE" (id., ¶ 27). The court rejects these arguments.

"'It is well settled that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (Sullivan v Harnisch, 96 AD3d 667, 667 [1st Dept 2012] [citation omitted]; Greenfield v

Philles Records, 98 NY2d 562, 569 [2002] ["a written agreement . . . must be enforced according to the plain meaning of its terms"]; see e.g. Hogeland v Sibley, Lindsay & Curr Co., 42 NY2d 153, 159 [1977] [where lease or other contract is negotiated between two sophisticated business entities, it suffices that agreement between parties connotes an intention to indemnify which can be clearly implied from language and purpose of entire agreement]). "Construction of an unambiguous contract is a matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms" (Beal Sav. Bank v Sommer, 8 NY3d 318, 324 [2007]). In interpreting a contract, courts "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed" (Kass v Kass, 91 NY2d 554, 566 [1997] [internal quotation marks and citation omitted]). "Particular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought" (id. [internal quotation marks and citation omitted]; see also W.W.W. Assoc., Inc. v Giancontieri, 77 NY2d 157, 163 [1990] [when the parties dispute the meaning of a particular contract clause, the task of the court is to determine whether such clauses are ambiguous when "read in the context of the entire agreement"]).

This court finds that, under these principles of contract construction, the indemnification provision is valid, as the express language of that provision demonstrates that it was clearly contemplated by the parties that if a claim was made with respect to prior negotiations, VCPRE agreed to indemnify defendants/third-party plaintiffs.

VCPRE acknowledges that it entered into the Brokerage Agreement with defendants/third-party plaintiffs. The Brokerage Agreement specifically provides that VCPRE "warrants and represents" that it is the "sole broker in . . . consummating the Lease and the prior negotiations thereto," and agrees to hold the Owner harmless and indemnify it from any damages or liabilities arising out of any claims "by any other broker(s)." Thus, contrary to VCPRE's allegations, it is clear from the unambiguous language of the indemnification provision that the indemnification extends to any prior negotiations with respect to the leasing of the subject premises to Y7, and that thus, if Corbett is successful in the main action, VCPRE would be liable for Corbett's brokerage fees (see e.g. Julien J. Studley, Inc. v Coach, Inc., 3 AD3d 358, 360 [1st Dept 2004] [recognizing identical indemnification provision as valid: "the lease entered into between Coach and the landlords expressly indemnifies the landlords against claims for brokerage commissions made by any broker claiming to represent Coach"]; see also Gilligan v CJS Bldrs., 178 AD3d 566, 567 [1st

Dept 2019] [third-party plaintiff "established its entitlement to full contractual indemnification from (third-party defendant) pursuant to the express terms of its indemnification agreement"]; Sanchez v 404 Park Partners, LP, 168 AD3d 491, 493 [1st Dept 2019] [same]).

In its reply affirmation (NYSCEF Doc No. 48), VCPRE contends, for the first time, that third-party plaintiffs "fail[] to state a claim that VCPRE should indemnify Third-Party Plaintiffs because Third-Party Plaintiffs never alleged that VCPRE's Agent had authority to bind VCPRE to the 2016 Indemnification Clause" (reply affirmation, ¶ 23). VCPRE argues that, as a principal, it cannot be held liable for the unauthorized act of its agent (id., ¶ 14, citing Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co., 55 AD3d 1108, 1110 [3rd Dept 2008]). VCPRE further argues that, in the third-party complaint, defendants/third-party plaintiffs "did not allege at all that they made any inquiry of VCPRE as to the scope of VCPRE's Agent's authority to bind VCPRE to the 2016 Indemnification Clause" (id., ¶ 18), and "did not allege at all that VCPRE indicated in any way, by words or conduct, that its Agent had apparent or actual authority to bind VCPRE to the 2016 Indemnification Clause" (id., ¶ 20).

However, "the function of a reply affidavit is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support

of the motion" (Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992]; see also Eujoy Realty Corp. v Van Wagner Communications, LLC, 22 NY3d 413, 422-423 [2013] ["it does not 'avail (the moving party) to shift to (the nonmoving party), by way of reply affidavit, the burden to demonstrate a material issue of fact at a time when (the nonmoving party) has neither the obligation nor the opportunity to respond absent express leave of court'"] [citation omitted]).

Therefore, VCPRE has waived this argument because it raised it for the first time on reply, and this court may not consider the merits of its new argument (Center for Independence of the Disabled v Metropolitan Transp. Auth., 184 AD3d 197, 209 [1st Dept 2020]; 416 W 25th St. Lender LLC v 416 W. 25th St. Assoc., LLC, 182 AD3d 432, 433 [1st Dept 2020]; 47 E. 34th St. (NY), L.P. v Bridgestreet Corporate Hous., LLC, 180 AD3d 525, 526 [1st Dept 2020]; Dookhie v Woo, 180 AD3d 459, 464-65 [1st Dept 2020]; Residential Bd. of Mgrs. of Platinum v 46th St. Dev., LLC, 154 AD3d 422, 423 [1st Dept 2017]).

In any event, even if the court were to consider VCPRE's new argument, its attorney's reply affirmation contains only vague conclusory allegations, and is uninformed by personal knowledge. As such, it is insufficient to support the motion to dismiss (see Manhattan Film v Entertainment Guars., 156 AD2d 152, 153 [1st Dept 1989]).

Accordingly, the motion to dismiss shall be denied (see Breed Abbott & Morgan v Hulko, 139 AD 2d 71, 73 [1st Dept 1988], affd 74 NY2d 686 [1989] [denying motion to dismiss, because "(a)pplying the normal rules of construction of a contract, it would appear indisputably clear that the broad provisions of the indemnification agreement included the right of Breed, Abbott to recover the legal expenses incurred in defending a lawsuit by one of the parties to the contract that resulted in a determination that Breed, Abbott had acted appropriately in accordance with its contractual responsibilities"]).

The court has considered movants' remaining arguments and finds them to be unpersuasive.

9/17/2020
DATE

DEBRA A. JAMES, 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