Madison Hospitality Mgt. LLC v Acacia Network Hous., Inc.
2023 NY Slip Op 33263(U)
September 20, 2023
Supreme Court, New York County
Docket Number: Index No. 656639/2020
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **42**

Justice

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MADISON HOSPITALITY MANAGEMENT LLC, MAVE HOTEL INVESTORS LLC,

Plaintiffs,

- v -

ACACIA NETWORK HOUSING, INC.,

Defendant.

----------X

INDEX NO. 656639/2020

MOTION DATE 10/27/2022, 11/15/2022, 10/27/2022

MOTION SEQ. NO. 009 010 011

DECISION + ORDER ON MOTION

ACACIA NETWORK HOUSING, INC.,

Third-Party Plaintiff,

-against-

CITY OF NEW YORK, CITY OF NEW YORK DEPARTMENT OF HOMELESS SERVICES, CITY OF NEW YORK HUMAN RESOURCES ADMINISTRATION,

Third-Party Defendants.

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Third-Party
Index No. 595806/2021

The following e-filed documents, listed by NYSCEF document number (Motion 009) 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 353, 356, 380, 381, 383

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 355, 369, 370, 371, 372, 373, 374, 375, 376, 377, 382, 384

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 354, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 379, 385

were read on this motion to/for JUDGMENT - SUMMARY.

I. INTRODUCTION

In this action seeking, *inter alia*, damages upon causes of action sounding in breach of contract, the court, by order dated July 16, 2021, granted summary judgment to plaintiff MAve Hotel Investors, LLC ("Investors") as to its first cause of action for breach of contract, dismissed the third, eleventh, and twelfth causes of action (MOT SEQ 003), and denied Investors' separate motion for summary judgment on the fourth, seventh, eighth, and ninth causes of action as an improper successive summary judgment motion (the "Prior Decision") (MOT SEQ 004). Now, the defendant, Acacia Network Housing, Inc. ("Acacia"), moves pursuant to CPLR 3212 for summary judgment dismissing Investors' remaining causes of action (MOT SEQ 009); Investors oppose Acacia's motion and separately move a second time for summary judgment pursuant to CPLR 3212(e) as to its fourth, seventh, eighth, and ninth causes of action (MOT SEQ 010), which motion is in turn opposed by Acacia; and the third-party defendants, City of New York (the "City"), New York City Department of Homeless Services ("DHS"), and New York City Human Resources Administration/Department of Social Services ("HRA/DSS") (collectively, the "City Defendants") move pursuant to CPLR 3212 for summary judgment dismissing Acacia's third-party complaint (MOT SEQ 011), which motion Acacia also opposes.

Acacia's motion is granted in part, to the extent discussed herein. Investors' motion is denied, and the City Defendants' motion is also denied.

II. BACKGROUND

Except as set forth below, the parties are referred to the Prior Decision for a recitation of the relevant facts.

Investors is the owner of The MAve Hotel (the "Hotel"), a boutique hotel located at 62 Madison Avenue in the Flatiron District of Manhattan. Plaintiff Madison Hospitality Management, LLC ("Madison Hospitality") manages the Hotel. Acacia is a not-for-profit corporation that contracts with DHS to provide temporary emergency shelter to individuals and families experiencing homelessness.

On October 23, 2017, Madison Hospitality, as agent and manager for Investors, entered into a Memorandum of Understanding (MOU) with Acacia whereby the Hotel would provide hotel rooms "for the stated purpose of operating a supervised temporary housing assistance program" for DHS clients. The MOU provides, *inter alia*, that the Hotel would "provide Acacia Network Housing Inc. with 74 [] confirmed hotel room reservations [beginning on January 1, 2018] at a rate of $199.00 per day per room[.]" The MOU affords Acacia the option to terminate the agreement upon 90 days' written notice to the Hotel, and similarly provides Investors the option to terminate the agreement upon 30 days' written notice to Acacia.

Paragraph 9 of the MOU provides, *inter alia*, that "[t]he Hotel will . . . be responsible for all maintenance and repairs" to its rooms and common areas. Pursuant to paragraph 11(e) of the MOU, Acacia agreed to reimburse the cost to repair "any extraordinary damages caused by [the] willful misconduct or negligence" of its clients, while the Hotel agreed "to hold [Acacia] harmless for any damage caused by normal wear and tear." The MOU, at paragraph 13, also contains an indemnity provision, which states, as relevant here, that Acacia agrees to indemnify the Hotel for "any and all costs, expenses, claims and liabilities, including (without limitation) attorneys' fees and costs, arising out of the occupancy . . . by [Acacia] or its agents, contractors, employees, or clients[.]"

As discussed in the Prior Decision, on August 28, 2020, DHS (in lieu of Acacia) provided written notice to plaintiffs of its intent to terminate the MOU, effective October 30, 2020, and it is undisputed that Acacia and its clients thereafter vacated the Hotel as of October 31, 2020.

On December 1, 2020, the plaintiffs filed a complaint seeking declaratory relief and payment for room fees and the cost of repairs for damages allegedly caused to the property by Acacia's clients. The plaintiffs also seek indemnification for: (1) continuing lost revenues from the date that Acacia vacated the Hotel, at the rate of $199 per day per room, claiming that the property damage allegedly caused by Acacia's clients rendered the Hotel unusable, and that Investors lack the funds to make the necessary repairs[1]; and (2) $2,000,000 in additional security that Investors was required to maintain for its mortgage loan, claiming that the property damage allegedly caused by Acacia's clients, and the cost of repairs for such damage, reduced the appraised value of the Hotel, triggering the additional security requirement in Investors' loan agreement. Acacia filed an answer with counterclaims on December 31, 2020.

On July 16, 2021, the court issued the Prior Decision, which granted Investors' motion for summary judgment as to its first cause of action for breach of contract; granted Acacia's motion to dismiss the complaint to the extent of dismissing the third, eleventh, and twelfth causes of action; and denied Investors' separate motion for summary judgment on its fourth, seventh, eighth, and ninth causes of action as an improper successive summary judgment motion.

On September 2, 2021, Acacia filed a third-party complaint against the City Defendants alleging that the City is liable for any amounts Acacia owes to Investors based on its clients' occupancy of the Hotel, and seeking a judgment against the City Defendants for any damages

[1] The plaintiffs contend that, as of the filing of their second successive summary judgment motion on October 31, 2022, they were owed $9,853,032 in lost revenue, with an additional $14,726 accruing every day.

that the court determines Acacia owes to Investors. The City Defendants filed an answer to the third-party complaint on November 5, 2021. These motions then ensued.

III. DISCUSSION

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra.

1. Acacia's Motion

Acacia moves for summary judgment dismissing Investors' remaining causes of action, numbered here as in the complaint, for: (2) breach of contract under MOU paragraph 11(e) for failure to reimburse the cost of repairs for property damage allegedly caused by Acacia's clients; (4) declaratory judgment for indemnification of continuing lost revenues purportedly resulting from the alleged property damage rendering the Hotel unusable; (5) negligence for the alleged property damage; (6) vicarious liability for the alleged property damage; (7) indemnification for the cost of repairs for the alleged property damage; (8) account stated for invoices seeking reimbursement for the cost of repairs for the alleged property damage; (9) indemnification for the additional security maintained by Investors for its mortgage loan, purportedly because of the

alleged property damage; (10) indemnification for attorneys' fees and costs; (13) imposition of a constructive trust; and (14) punitive damages.

In its opposition papers, Investors expressly states that it does not oppose Acacia's motion with respect to its thirteenth and fourteenth causes of action. Accordingly, Acacia's motion is granted as to the thirteenth and fourteenth causes of action, and those claims are hereby dismissed.

Acacia's motion is denied insofar as it seeks summary judgment dismissing the second, fifth, sixth, and eighth causes of action. These causes of action all seek to recover payment for the cost of repairs for the property damage allegedly caused by Acacia's clients. As such, liability on these claims is governed by MOU paragraph 11(e), pursuant to which Acacia agreed to reimburse the cost to repair "extraordinary damages caused by [the] willful misconduct or negligence" of its clients, while Investors agreed "to hold [Acacia] harmless for any damage caused by normal wear and tear."

Acacia principally argues that these claims should be dismissed because the alleged damage to the Hotel resulted from normal wear and tear. To demonstrate this, it relies on the report of an engineer, Dennis Morrissey, P.E., which was submitted by Investors' insurance carrier in a related federal action wherein Investors seek insurance coverage for the same alleged property damage claimed herein. Investors insist that Morrissey's report, which concludes that the property damage at issue was "the result of normally expected wear and tear," is inadmissible and should be disregarded because it is unsworn and not authenticated by an affidavit from Morrissey. Acacia responds that, even assuming the report as submitted is not properly

authenticated, the court may take judicial notice of the report's filing in the parallel federal action, together with Morrissey's Declaration therein authenticating the report.[2]

The court, however, need not resolve the dispute regarding the admissibility of Morrissey's report because, even assuming, *arguendo*, that the report is admissible and establishes, *prima facie*, that the alleged damages resulted from normal wear and tear, the evidence submitted by Investors is sufficient to raise a triable issue of fact. Specifically, Investors point to pictures taken by its property manager Sol Chakalo that depict the Hotel's damaged rooms. While many of the images include tears or scratches that a fact-finder reasonably *could* conclude qualify as normal wear-and-tear, the court cannot weigh competing evidence at the summary judgment stage, and cannot rule out the possibility that a reasonable fact-finder, viewing the claimed damage, might disagree with Morrissey's report and conclude that at least some of it consists of greater damage than that caused by ordinary use.

Accordingly, Acacia's motion is denied insofar as it seeks summary judgment dismissing the second, fifth, sixth, and eighth causes of action.

The motion is likewise denied with respect to the tenth cause of action, which seeks to recover attorneys' fees under the MOU's indemnity provision. The court has already determined in the Prior Decision that the MOU's indemnity provision expressly provides for payment of attorneys' fees upon, *inter alia*, breach of the agreement. Given that at least some of Investors causes of action will survive summary judgment, including its second cause of action for breach of contract, the claim for attorneys' fees likewise survives.

[2] Indeed, the court notes that the District Court in the related federal action expressly rejected a challenge to the admissibility of Morrissey's report and concluded that the report constituted admissible *prima facie* evidence that the alleged property damage at the Hotel resulted from normal wear and tear. Mave Hotel Invs. LLC v. Certain Underwriters at Lloyd's London, No. 21-CV-08743 (JSR), 2023 WL 2871345, at *6 (S.D.N.Y. Apr. 10, 2023).

However, Acacia's motion is granted insofar as it seeks summary judgment dismissing Investors' seventh cause of action, which seeks indemnification for the cost of repairs for the property damage alleged. Investors' argument that Acacia should be held liable for the Hotel's repair costs under the indemnity provision set forth in MOU paragraph 13, rather than the damages provision found in paragraph 11 of the agreement, is contrary to well-established principles of contract interpretation. It is fundamental that "courts should read a contract as a harmonious and integrated whole to determine and give effect to its purpose and intent." Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, Nat'l Ass'n v Nomura Credit & Cap., Inc., 30 NY3d 572, 581 (2017) (internal quotation marks omitted). "In that regard, a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect." Id. (internal quotation marks omitted).

While the MOU's indemnity provision states that Acacia must indemnify Investors for "any and all costs" arising out of its clients' occupancy of the Hotel, the contract, read as an integrated whole, makes plain that the indemnity provision is less broad than this language would at first suggest. In particular, the indemnity provision was clearly not intended to encompass repair costs for property damage given that the MOU in paragraph 11(e) expressly addresses reimbursement for such repairs and requires *Investors to hold Acacia harmless* for property damage caused by normal wear and tear. Similarly, Investors' expansive interpretation of the indemnity provision would improperly render the MOU's damages clause "meaningless" and "without force or effect." That is because, under Investors' preferred interpretation, the indemnity provision would require Acacia to indemnify Investors for the cost of repairing property damage arising from its clients' occupancy of the Hotel regardless of whether it resulted

from normal wear and tear or constituted "extraordinary damages caused by willful misconduct or negligence[.]"

Accordingly, because the court finds that the relevant repair costs are not within the scope of the MOU's indemnity provision but are instead separately and expressly provided for in the contract's damages clause, Acacia is entitled to judgment as a matter of law dismissing the seventh cause of action.

Acacia's motion is likewise granted with respect to the fourth and ninth causes of action. The fourth cause of action seeks indemnification for continuing lost revenues from the date that Acacia vacated the Hotel, at the rate of $199 per day per room. Investors contend that it is entitled to such indemnification under paragraph 13 of the MOU because the property damage allegedly caused by Acacia's clients purportedly rendered the Hotel unusable, *and Investors lack the funds to make the necessary repairs*. In effect, Investors is attempting to use the MOU's indemnity provision to shift the risk of its own inaction and/or insolvency onto Acacia. This is beyond any reasonable interpretation of the indemnity provision's scope.

The Hotel's lost revenues derive from Investors' inability (or possibly refusal) to pay the cost of repairing its property. The fact that the damage to be repaired may have originated from the occupancy of the Hotel by Acacia's clients is irrelevant. It is undisputed that Investors bears responsibility for undertaking the repair and maintenance of the Hotel. The MOU's damages provision entitles Investors to reimbursement from Acacia for the costs of such repairs under certain circumstances, but nowhere in the MOU is there any indication that the parties intended that Acacia essentially insure Investors against the risks arising from its own inability or refusal to perform its repair obligations in the first instance. Simply put, it is Investors' responsibility to repair its property. It could have done so as soon as Acacia vacated the Hotel, or even before

then, thereby avoiding the lost revenues it now seeks to recover. Moreover, had it completed the necessary repairs, it could have then, if appropriate, sought reimbursement from Acacia for its repair costs under the MOU's damages clause. Investors cannot, however, neglect its repair obligations and then seek to shift the risk of this neglect onto Acacia under the MOU's indemnity provision. In effect, Investors is arguing that the indemnity provision allows it to sit on its hands, make no effort to maintain and repair its property, and collect room fees from Acacia in perpetuity, even after the MOU was terminated. This is plainly well beyond any reasonable interpretation of what the parties intended.

The ninth cause of action is similarly subject to dismissal because it too attempts to stretch the MOU's indemnity provision beyond its reasonable scope in order to shift onto Acacia the risk of Investors' underinvestment in the Hotel. The ninth cause of action seeks indemnification under MOU paragraph 13 for $2,000,000 in additional security that Investors was required to maintain on the mortgage loan that it used to finance its purchase of the Hotel. Investors claim that the property damage allegedly caused by Acacia's clients, and the cost of repairs for such damage, reduced the appraised value of the Hotel, as reflected in three appraisals dated October 16, 2017, October 2, 2018, and October 4, 2019, thereby triggering the additional security requirement in Investors' loan agreement. However, Investors is again seeking to recover damages caused by its own inaction. Investors could have simply maintained the Hotel in good repair and sought reimbursement from Acacia for its repair costs, as appropriate, under the MOU's damages provision. Having failed to do so, it cannot now shift onto Acacia the collateral costs, imposed under a contract to which Acacia is not a party, of its decision to neglect the upkeep of its property.

Moreover, review of the appraisals upon which Investors rely reveals the disingenuousness of its claim. The first appraisal, dated October 16, 2017, predates the execution of the MOU. As such, that appraisal's low valuation of the Hotel cannot possibly have anything to do with Acacia. The subsequent two appraisals similarly base their low valuation of the Hotel on the same factors identified in the 2017 appraisal, and do not identify any new factors relating specifically to Acacia's occupancy. It is thus clear that the low valuations reflected in the appraisals derive from factors that predate and are largely unrelated to Acacia's occupancy of the Hotel.

Indeed, upon review it becomes clear that Investors misrepresents the substance of the appraisals. Investors claim that the appraisals' low valuations were based on the damage done to the Hotel by Acacia's clients, which would necessitate expensive repairs to be undertaken by any purchaser of the property. However, the appraisals themselves do not say this. To the extent that the appraisals touch on the occupancy of the Hotel by Acacia's clients, it is principally to note Investors' decision to operate the Hotel as a shelter for homeless families with children, rather than operating the property as a commercial hotel consistent with its highest and best use. And while the appraisals do discuss the need for expensive repairs, the discussion does not relate to repairing the property damage allegedly caused by Acacia's clients. Rather, the appraisals cite the need for capital investments to upgrade the property to better meet market standards for commercial hotels, such as "restoration of the lobby, repairs to operating equipment including upgrades to the hotel's technology and lock systems, and improvements to the guestroom furniture and finishes." In short, the appraisals' low valuation of the Hotel did not stem from the property damage allegedly caused by Acacia's clients, but stemmed instead from Investors' underinvestment in, and failure to adequately maintain, the property, as well as its decision to

operate the Hotel as housing for the homeless, a decision that Investors could have undone at any time by exercising its option to terminate the MOU. Thus, even if the MOU's indemnity provision could be read as broadly as Investors suggest—which it cannot be—it would still not encompass the additional security costs that Investors seek to recover because, as shown by the appraisals that form the basis for Investors' claim, those costs do not "arise" from Acacia's clients' occupancy of the Hotel.

Accordingly, Acacia's motion for summary judgment dismissing Investors' remaining causes of action (MOT SEQ 009) is granted to the extent of dismissing the fourth, seventh, ninth, thirteenth, and fourteenth causes of action, and is otherwise denied.

2. Investors' Motion

Investors' motion for summary judgment on its fourth, seventh, eighth, and ninth causes of action (MOT SEQ 010) is denied. For the reasons discussed above, Acacia is entitled to summary judgment dismissing the fourth, seventh, and ninth causes of action, and there exists an issue of fact precluding summary judgment in favor of either party as to the eighth cause of action.

Moreover, the court finds that MOT SEQ 010 is an improper successive summary judgment motion. This is Investors' second successive summary judgment motion with respect to these claims. Approximately two months after filing its motion for summary judgment as to its first cause of action for breach of contract, Investors moved again pursuant to CPLR 3212(e) for summary judgment as to its fourth, seventh, eighth, and ninth causes of action (MOT SEQ 004). The court, in the Prior Decision, denied MOT SEQ 004 as an improper successive summary judgment motion. So too here.

It is well settled that "[s]uccessive motions for summary judgment should not be entertained without a showing of newly discovered evidence or other sufficient justification." Jones v 636 Holding Corp., 73 AD3d 409, 409 (1st Dept. 2010); see Landis v 383 Realty Corp., 175 AD3d 1207 (1st Dept. 2019). To justify a successive summary judgment motion, purportedly "new" evidence must have been "unavailable to [the movant] before the prior motion[.]" Lorne v 50 Madison Ave LLC, 198 AD3d 483, 483 (1st Dept. 2021); see Landis v 383 Realty Corp., supra; Maggio v 24 West 57 APF, LLC, 134 AD3d 621, 625-26 (1st Dept. 2015). An intervening appellate decision in the same case may also constitute "sufficient justification" for a successive summary judgment motion if the decision clarifies or changes the controlling law. See Amill v Lawrence Ruben Co., 117 AD3d 433, 433–34 (1st Dept. 2014).

It has also been held that a court may entertain a successive summary judgment motion that is '"substantively valid"' and '"will further the ends of justice and eliminate an unnecessary burden on the resources of the courts."' Wells Fargo Bank, N.A., v Osias, 205 AD3d 979, 982 (2nd Dept. 2022), quoting Aurora Loan Servs., LLC v Yogev, 194 AD3d 996, 997 (2nd Dept. 2021). That is, entertaining the motion would '"enhance[] judicial efficiency."' MTGLQ Investors, LP v Collado, 183 AD3d 414, 414 (1st Dept. 2020), quoting Landmark Capital Invs., Inc. v Li-Shan Wang, 94 AD3d 418, 419 (1st Dept. 2012). However, this is a "narrow exception to the successive summary judgment rule." Wells Fargo Bank, N.A, v Osias, supra at 981 (internal quotation marks omitted). '"Successive motions for the same relief burden the courts and contribute to the delay and cost of litigation. A party seeking summary judgment should anticipate having to lay bare its proof and should not expect that it will readily be granted a second or third chance."' Id. at 982, quoting Deutsche Bank Natl. Trust Co. v Elshiekh, 179 AD3d 1017, 1020 (2nd Dept. 2020).

Investors fails to demonstrate, or even allege, a sufficient justification for entertaining a successive summary judgment motion. In fact, the moving papers submitted on the present motion are nearly identical, verbatim, to those previously submitted in support of MOT SEQ 004. And, remarkably, the present motion papers do not mention, let alone address, the standard for consideration of a successive summary judgment motion, or even that the court has already denied Investors' prior motion for the same relief as an improper successive summary judgment motion.

The only evidence in support of the present motion not also submitted in support of the prior motion is the deposition testimony, taken after the Prior Decision was issued, of Acacia witnesses Alfredo Matthews and Stephaniee Bennett. In Vinar v Litman, 110 AD3d 867, 867-68 (2nd Dept. 2013), it was held that deposition testimony elicited after the denial of a first summary judgment motion cannot be considered "new" evidence to establish facts that could have been established at the time of the initial motion through alternative evidentiary means. Here, Investors relies on Matthews' and Bennett's deposition transcripts to argue that Acacia cannot rely on the damages clause of the MOU because Acacia itself failed to comply with certain procedural aspects of the provision concerning the steps to be taken in connection with the documentation and submission of claims for reimbursement of repair costs. However, Investors could have made the same argument at the time of its initial summary judgment motion based on alternative evidentiary means, and in fact did so in its reply memorandum in support of MOT SEQ 004.

Moreover, even if this testimony could be considered "new" evidence, it does not resolve the question of fact regarding whether the property damage at issue was caused by normal wear and tear or constitutes "extraordinary damages caused by [the] willful misconduct or negligence"

of Acacia's clients. At most, the testimony could support Investors' argument that Acacia, having allegedly failed to comply with the procedural requirements of the MOU's damages clause, cannot evade its reimbursement obligation thereunder by pointing to Investors' own purported failure to comply with these same procedural requirements. The testimony does not, however, establish that Investors is entitled to reimbursement in the first instance because the damages at issue were "extraordinary" and "caused by [the] willful misconduct or negligence" of Acacia's clients.

Accordingly, Investors motion for summary judgment on its fourth, seventh, eighth, and ninth causes of action (MOT SEQ 010) is denied.

3. The City Defendants' Motion

The City Defendants' motion for summary judgment dismissing Acacia's third-party complaint is denied.[3] The City Defendants are correct that, as the court already determined in the Prior Decision, they can have no direct liability to Investors under the MOU because they are not parties to that agreement. The City Defendants are also correct that, because they owe no duty directly to Investors, and because Acacia's separate contract with the City (the "Contract") only provides for one-way indemnification in favor of the City, Acacia cannot maintain its claims against the City Defendants based on theories of express or implied indemnification. However, neither of these arguments address the crux of Acacia's claims against the City Defendants, which is that Acacia entered into the MOU with Investors at the City's direction, in order to fulfill its obligations to the City under the Contract, and that any damages it is found to owe to Investors under the MOU are reimbursable expenses under the terms of the Contract.

[3] The third-party complaint asserted three causes of action. The second cause of action sought to hold the City Defendants liable for amounts owed in connection with Investors' first cause of action for unpaid rent. However, on September 15, 2022, the parties stipulated to the withdrawal of Investors' first cause of action, together with all other claims pertaining to it. Accordingly, only the first and third claims in the third-party complaint remain.

Under the Contract, which was executed on June 23, 2017, Acacia agreed to operate an Emergency Hotel Bed Program, whereby it would provide housing in commercial hotel rooms for eligible homeless families served by DHS. Acacia was to provide these services in accordance with the Contract's Budget, which set the maximum annual amount that Acacia could be reimbursed for its services, and which included line-item cost estimates for, *inter alia*, damages to hotel units, replacement of furniture, and miscellaneous repairs. Pursuant to Appendix B, Section 15.04 of the Contract, entitled "Payment," and as explained in the affidavit of Vincent Pullo, the Chief Contracting Officer for HRA/DSS and DHS, dated October 27, 2022 and submitted by the City Defendants in support of their motion, Acacia was to be paid by DHS "based upon the monthly submissions of invoices" detailing the amounts Acacia had expended and the payments due to it. The City would then review these invoices and pay Acacia for the approved amounts.

Based on the above, and given that there is no dispute that Acacia entered the MOU with Investors in accordance with its obligations under the Contract, the court finds that the City Defendants have not demonstrated, *prima facie*, that Acacia is not entitled to reimbursement under the Contract for any repair costs that it may ultimately be found liable to pay to Investors under the terms of the MOU. The Contract's Budget expressly accounted for reimbursement of repair costs, at least up to a certain amount, and Acacia no doubt would have invoiced the City for the repair costs at issue had it determined, in the first instance, that they were reimbursable under the terms of the MOU (which were themselves largely, if not entirely, dictated by the City). Therefore, while Acacia may not ultimately prevail on the two remaining causes of action in its third-party complaint, they are not subject to dismissal at this juncture.

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of defendant Acacia Network Housing, Inc. for summary judgment pursuant to CPLR 3212 dismissing plaintiffs' remaining causes of action (MOT SEQ 009) is granted to the extent that the fourth, seventh, ninth, thirteenth, and fourteenth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the motion of plaintiff MAve Hotel Investors, LLC pursuant to CPLR 3212 for partial summary judgment in its favor on its fourth, seventh, eighth, and ninth causes of action (MOT SEQ 010) is denied; and it is further

ORDERED that the motion of third-party defendants City of New York, New York City Department of Homeless Services, and New York City Human Resources Administration/Department of Social Services for summary judgment pursuant to CPLR 3212 dismissing the third-party complaint (MOT SEQ 011) is denied; and it is further

ORDERED that the parties shall appear for a settlement conference with the court at 10:00 AM on December 1, 2023.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/20/2023
DATE

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