Supreme Court, New York.
New York County
NEW YORK SKYLINE, INC., Plaintiff,
v.
EMPIRE STATE BUILDING COMPANY L.L.C., and Empire State Realty Observatory TRS, LLC, Defendants.
No. 651148/2013.
February 25, 2014.

Decision and Order

Motion Seq. No.: 001

O. PETER SHERWOOD, J.:

OVERVIEW

This is an action, *inter alia*, for a declaratory judgment declaring that: (1) plaintiff, **New York Skyline, Inc.** ("Skyline" or "Plaintiff"), is not in default of its obligations under the Lease by issuing a Press Release, dated March 12, 2013, announcing its "Empire State Building + NY SKYRIDE combo ticket Spring Sale" (the "Press Release"), without the prior approval of defendants Empire State Building Company LLC ("ESBC") and Empire State Realty Observatory TRS, LLC ("ESRO" and together with ESBC, "ESB") and (2) ESB's failure to approve an advertisement containing the information in the Press Release would be unreasonable. Plaintiff seeks to enjoin ESB from serving Skyline with a Notice of Default or Notice to Cure respecting the publication of marketing information such as that contained in the Press Release without obtaining ESB's approval beforehand.

BACKGROUND

Since 1994, Skyline has owned and operated an attraction in the Empire State Building (the "Building") involving a simulated helicopter ride over New York City (the "Attraction") (Amended Complaint ["AC"] ¶ 1). The Building is owned by non-party Empire State Land Associates, LLC. Non-party Empire State Building Associates, LLC is the master lessee of the Building and subleases the Building to defendant ESBC (AC ¶ 13; *see In re New York Skyline, Inc.*, 2013 WL 4478949 *1 [Bankr. S.D.N.Y. August 20, 2013]). Defendant ESRO, successor to Empire State Building, Inc., operates the observation decks located on the 86th and 102nd floors of the Building (the "Observatory") (*id.*; AC ¶ 15).

Skyline operates the Attraction on the second floor of the Building pursuant to a commercial lease agreement with ESBC as lessor and Skyline as lessee dated February 26, 1993 (the "Original Lease") (Nissim Aff. Exhibit "B"). The Original Lease has been amended and modified by agreements dated October 28, 1993 (*id.* Exhibit "C"), February 8,

1994 (*id.* Exhibit "D"), March 1996 (*id.* Exhibit "E"), December 30, 1999 (*id* Exhibit "F"), May 27, 2005 (the "May 2005 Amendment") (*id.* Exhibit "G") and March 6, 2012 (*id.* Exhibit "I"). Unless otherwise stated, references herein to the Lease include the amendments.

ESBC and ESRO, jointly as licensors, and Skyline, as licensee, are also parties to a License Agreement, dated February 26, 1993 (the "Original License") (*id.* Exhibit "J"), which has been amended and modified by agreements dated March 1996 (*id.* Exhibit "K"), and December 30, 1999 (*id.* Exhibit "L") and by the May 2005 Amendment (*id.* Exhibit "G").

The Press Release was issued by Skyline on or about March 12, 2013 and is titled "NY SKYRIDE & Empire State Building 'Spring Forward' Discount Tickets". It advertises their "Empire State Building + NY SKYRIDE combo tickets Spring Sale" (AC ¶ 7, Exhibit "A"; Nissim Aff. Exhibit "M"). The Press Release informs potential customers that: "[i]n addition to the discounted ticket prices, there is a 'Fast Track' offering to the Empire State Building Observatory, which saves visitors up to 75% of the Observatory waiting time when the COMBO NY SKYRIDE + Empire State Building ticket is booked." The Press Release contains a disclaimer that states: "NY SKYRIDE is an independent business and is not affiliated with the owner of the Empire State Building nor the Observatory atop the Empire State Building." *(Id.)*.

In response to the issuance of the Press Release, ESB's counsel sent a "cease and desist" letter to Skyline, dated March 25, 2013, demanding that Skyline "immediately cease and desist from using the name of the Empire State Building or ESB in connection with its business, advertising, promotion, publicity or for any other purpose, without first obtaining the prior written consent of ESB" (AC ¶ 8, Exhibit "C"; Nissim Aff. Exhibit "N"). ESB's counsel asserted that the Press Release was an express violation of the Lease, specifically, Article 44 (E) of the Original Lease. That provision reads, in its entirety, as follows:

E. *Advertising. Etc.* Tenant will not publicize, display or distribute any advertising material, signs or notices of any kind and will not publicize or advertise its business at the Building, except upon prior written approval of Landlord of each item of such display advertising and/or publicity. Approval if granted may be revoked at any time thereafter by Landlord and such approval may be withheld or revoked with or without cause. *Tenant will not use the name of Landlord or of the Empire State Building in any manner in connection with its business, advertising, promotion or for any other purpose without the prior written consent of Landlord, which consent shall not be unreasonably withheld for first class dignified advertisements which will not detract from or impair the dignity, image or reputation of the Empire State Building.* Letter heads, envelopes and other written material to be used in connection with its business at the Building may state that Tenant's address is the Empire State Building, New York, New York, [emphasis supplied].

(AC Exhibit "D"; Nissim Aff. Exhibit "A"). The letter concluded that: "[I]f you fail to confirm in writing that you will comply with this material obligation of the Lease (*see* Article 44 K) and/or if you breach this provision again, ESB will have no choice but to seek appropriate legal relief pursuant to the lease, license, and the law" (Nissim Aff. Exhibit "N").

In response, Skyline commenced this action. In its Amended Complaint, Skyline contends that:

ESB is asserting an overly broad interpretation of the Lease in an effort to damage Skyline's marketing activities with the aim of limiting its revenues and destroying Skyline's business. Skyline has the right to accurately advertise what it

sells. Skyline has the right to advise potential customers that a combination ticket will permit them to experience the Observatory and Skyride, and that both attractions are located at the Empire State Building. It has a right to inform its customers what they are purchasing when they buy a Skyline combination ticket. Nothing in the Lease or License gives ESB the right to preview Skyline's advertising activities about Skyline combination tickets (*id.* ¶ 9).

Skyline further contends that numerous tour operators and ticket sellers in New York City engage in virtually identical marketing and promoting of the ESB Observatory experience with no objection from ESB (*id.* ¶ 10). It avers that it has consistently promoted the Observatory experience as part of its marketing of a Skyline combination ticket and that ESB never objected or demanded that Skyline obtain ESB's pre-approval of its marketing materials (*id.* ¶ 22).

ESB maintains that Article 44 (E) of the Original Lease expressly restricts Skyline's ability to use ESB's protected trade name in its promotion of the Attraction without ESB's prior written consent and that Skyline's issuance of the Press Release without ESB's prior written consent constitutes a default under Article 44 (E) of the Lease. ESB also notes that, contrary to Skyline's contention, it is not claiming that Skyline cannot advertise a combination ticket, but only that if Skyline chooses to use ESB's protected tradename in its advertising in any manner other than to inform potential customers of the location of the premises, it must first obtain ESB's permission. ESB further claims that by suggesting in the Press Release that ESB is selling discounted tickets to the Building and Observatory, Skyline is engaging in false and misleading advertising, the type of harm the Lease provision is intended to prevent.

ESB also disputes Skyline's claim that it has advertised "for years" the right to experience both the Attraction and the Observatory by buying a combination ticket without objection, stating that Skyline failed to substantiate this claim by producing any prior marketing material in which ESB's protected trade name was used in the same manner as in the Press Release. ESB contends that, in any event, the no waiver provision of the Lease precludes Skyline from advancing such argument as its failure to enforce a default under a provision of the Lease, does not constitute a waiver as any subsequent defaults.

MOTION

Before the court is ESB's motion to dismiss the complaint, which motion the court is treating as a motion for summary judgment (*see* CPLR 3211 [c]). Defendants assert that the documentary evidence -- namely the Original Lease between the parties together with subsequent modifications and the Press Release -- conclusively demonstrate that Skyline's cause of action for declaratory relief is without merit and fails to state a cause of action against ESB. ESB also seeks a declaration that Skyline breached the Lease by using ESB's protected trade name in the Press Release or, alternatively, for an order, pursuant to CPLR § 3024 (b), striking certain prejudicial and irrelevant allegations contained in the complaint.[FN1]

> FN1. Defendants' motion to dismiss, by Notice of Motion, dated May 17, 2013, was asserted against the original complaint. Thereafter, plaintiff served and filed an Amended Complaint (NYSCEF Doc. No. 29). In correspondence with the Court, plaintiff sought permission to file opposition papers to defendants' motion to dismiss in the event the court did not deem defendants' motion mooted as a consequence of plaintiff filing an amended complaint (NYSCEF Doc. No. 50). Although defendants objected to plaintiff's application, the court accepted filing of the opposition papers. On August 28, 2013, the court granted defendants an oppor-

tunity to submit a reply brief (NYSCEF Doc. No. 58). Thereafter, pursuant of CPLR 3211(c), the court converted the motion to dismiss into a motion for summary judgment. The motion for summary judgment shall be applied to the amended complaint.

Skyline opposes the motion, claiming that (1) ESB's position concerning its Press Release is simply the latest effort by ESB to drive Skyline from the premises and destroy its business; (2) the Press Release is similar to press releases Skyline issued previously with no objection by ESB; (3) Skyline's right to sell an Observatory ticket is controlled by the License Agreement, not by the Lease, and such License does not require ESB's prior approval of its marketing materials; and (4) Section 44 (B)(1) of the Lease, upon which defendants rely, does not cover the Press Release.

In reply, defendants assert that Plaintiff's position that only the License and not the Lease applies to the to the Press Release, is expressly contradicted by concessions made by Plaintiff in a case before the Bankruptcy Court. Defendants direct the court's attention to a decision of the Bankruptcy Court where it is stated that
Skyline conceded at the May 13, 2010 oral argument that the May 2005 Agreement and the Existing Lease and License were a single indivisible agreement for purposes of assumption under 11 U.S.C. § 365.

(In re ***New York Skyline, Inc.***, 432 B.R. 66, 76 [Bankr. S.D.N.Y. 2010] [Nissim Aff. In Support, Exhibit "P"]). Thus, under the doctrines of *res judicata* and collateral estoppel, Skyline is bound by this determination. Defendants also point out that the Lease and the License contain cross default provisions by which a default under the Lease essentially suspends the License to sell tickets to either the Attraction or the Observatory until the default under the Lease is cured. Defendants contend further that Plaintiff's interpretation of Article 44 (E) of the Lease as limiting its obligation to obtain ESB's consent before it can lawfully use its name, is tortured and should be rejected. Further, ESB has not waived its right to enforce Article 44 (E) as the Lease contains a "no waiver" clause and there is no evidence that ESB was aware of Skyline's prior advertisements that purportedly contained the same language as the Press Release.

A. Plaintiff's Opposition to Motion for Summary Judgment

At the time the court converted the motion to dismiss into a motion for summary judgment, the court gave leave to the parties to submit additional briefs addressed to the converted motion *(see* CPLR 3211[c]). Plaintiff opposes the motion for summary judgment essentially on the same basis as it opposed defendants' motion to dismiss the complaint, claiming that the provision in Article 44 (E) of the Lease upon which defendants rely to require prior approval of the advertising is contrary to the long history between the parties in which ESB agreed to a form of marketing Skyline's attraction that allowed Skyline to describe the benefits associated with ESB's Observatory. Indeed, Skyline argues that the Second License Agreement between the parties controls and permits Skyline to sell a combination ticket and engage in marketing which touts the Skyline attraction and lauds the attributes of the Observatory. Indeed, Skyline claims that ESB and Skyline agreed on a basic advertising strategy, frequently met and exchanged ideas for marketing both attractions, shared the cost of promoting both the Skyline Attraction and the ESB Observatory at marketing conventions, and often shared promotional booths at national marketing functions. Skyline claims that the marketing style that ESB long approved has not changed. It adds that ESB did not seek to review Skyline's marketing materials that typically describe the benefits of visiting both the Attraction and the Observatory.

B. ESB's Reply

ESB responds that Article 44 (E) of the Lease requires Skyline to obtain ESB's prior written consent to any of its promotions, publicity, or advertising which use the name of ESB or the Empire State Building ("Building"). ESB dismisses claim that the parties' history controls, arguing that the parties' purported prior course of conduct cannot vary the terms of an unambiguous agreement. In fact, ESB emphasizes that the Lease itself is clear that prior promotional activities do not constitute a waiver of ESB's rights under the Lease. ESB maintains that neither the Second License Agreement nor any joint promotional or marketing campaign evidences a blanket form of marketing the Attraction that would permit Skyline unilaterally to use ESB's trade name or market the Observatory without ESB's prior consent

DISCUSSION

Breach of the Lease Agreement

A claim for breach of contract requires: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages flowing from defendant's breach (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

It is undisputed that the Lease is a contract and, therefore, subject to general principals of contract interpretation. "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent ... and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' .... Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67; *see W. W. W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). A contract is ambiguous if it is "reasonably susceptible of more than one interpretation" (*Chimart Assocs. v Paul*, 66 NY2d 570, 573 [1986]). Ambiguity is determined by looking at the four corners of the document, not to outside sources (*see Kass v Kass*, 91 NY2d 554, 566 [1998]). In interpreting the contract, Courts should give meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]). In this regard, "clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations" (*Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

As the Court of Appeals has declared, the rule requiring that a written agreement be enforced according to its terms has special importance in transactions involving real property:

We have ... emphasized this rule's special import 'in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arms length.

(*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], quoting *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]).

The parties to the Lease are sophisticated businesspeople who entered into arms-length transactions in negotiating the Original Lease, the License and modifications to each. The intention of the parties may be gathered from the four corners of the Lease and should be enforced according to its terms. Contrary to Plaintiffs' arguments, the language of Section 44 (E) is susceptible to only one reasonable interpretation, namely, that Skyline, while being authorized to sell combination tickets to its Attraction and the Observatory, is not permitted to use ESB's protected trade name in "its business, advertising, promotion or for any other purpose without the prior written consent of Landlord, which consent shall not be unreasonably withheld for first class dignified advertisements which will not detract from or impair the dignity, image or reputation of the Empire State Building"

(Original Lease, Article 44 [E]).

As ESB observes, Skyline's arguments focus on whether it was entitled to issue combination tickets for the Attraction and the Observatory. That matter is not at issue here. Instead, the issue is whether Skyline may use the Building in its advertising absent the written consent of ESB. While the record before the court shows the exceedingly contentious relationship between the parties, that does not impair the right of ESB to enforce the provisions of the Lease. Unless ESB's prior written consent is sought and unreasonably withheld, the court cannot compel ESB to accommodate Skyline's promotional efforts.

There are other reasons that require dismissal of the amended complaint. Skyline cannot change its position from that asserted in the Bankruptcy action, namely, that the Lease and the License are essentially one indivisible agreement. Moreover, since the Original Lease and the License were executed simultaneously and relate to the same subject matter, they may be considered (and the court so finds) as contemporaneous writings and should be read together as one (*see Abed v John Thomas Financial, Inc.*, 107 AD3d 578 [1st Dept. 2013], quoting *PETRA CRE CDO 2007-1, Ltd. v Morgans Group LLC*, 84 AD3d 614 [1st Dept 2011]). Thus, the fact that the License does not repeat the language in Article 44 (E) of the Lease does not compel any other conclusion than that under the plain language of the Lease, Skyline was required to obtain ESB's prior written consent to use ESB's protected trade name in its advertising or marketing materials.

In view of the above, defendants' request for alternative relief is denied as moot.

It is hereby

ORDERED that defendants' motion which the court treats a motion for summary judgment is GRANTED; and it is further

ORDERED that the amended complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendants.

This constitutes the decision and order of the court.

DATED: February 25, 2014

ENTER,

<<signature>>

O. PETER SHERWOOD

New York Skyline, Inc. v. Empire State Budg. Co. L.L.C.
2014 WL 769895 (N.Y.Sup.) (Trial Order)

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