SUPREME COURT OF THE STATE OF NEW YORK — New York COUNTY

PRESENT: O. PETER SHERWOOD — ***Justice*** — **PART 49**

BRILL SVG 5, LLC, *et al.*,

Plaintiffs,

-against-

BB CAPITAL NY LLC, *et al.*,

Defendants.

INDEX NO.	650715/2017
MOTION DATE	May 14, 2018
MOTION SEQ. NO.	002
MOTION CAL. NO.	

The following papers, numbered 1 to ______ were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 16, 2018

O. PETER SHERWOOD, *J.S.C.*

Check one: ☑ **FINAL DISPOSITION** ☐ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**

☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
--X
BRILL SVG 5, LLC and BRILL TIME SQUARE, LLC,

Plaintiffs,

-against-

BB CAPITAL NY LLC, BB BRILL MANAGER LLC, ILAN BRACHA and HAIM BINSTOCK,

Defendants.
--X

DECISION AND ORDER
Index No.: 650715/2017

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

This decision supplements the decision rendered from the Bench on May 14, 2018. "The fundamental rule of 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).

In accordance with these principles, a court should interpret a contract "so as to give full meaning and effect to the material provisions" (Beal Savings Bank v Sommer, 8 NY3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). "A reading of a contract should not render any portion meaningless . . . . Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325, quoting *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]).

Section 1(a) of the Guaranty provides:

> Guarantor, jointly and severally, absolutely, unconditionally and irrevocably guarantees (i) to put up the sum of One Million ($1,000,000.00) Dollars ("Initial Escrow Deposit") in escrow with Navid Aminzadeh, Esq. ("Escrow Agent") on or before January 22, 2016, TIME BEING OF THE ESSENCE and (ii) to put up the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars (Additional

> Escrow Deposit") in escrow with Escrow Agent on or before February 22, 2016, TIME BEING OF THE ESSENCE. The Initial Escrow Deposit and the Additional Escrow Deposit shall hereinafter collectively be referred as the "Escrow Deposit". Guarantor, jointly and severely, absolutely, unconditionally and irrevocable guarantees to Maller that in the event that either (i) the Approval is not obtained within sixty (60) days from the date hereof or (ii) the Closing of the Premises is not consummated in accordance with the terms and provision of the Purchase Agreement, or (iii) the Guarantors fail to fund the Initial Escrow Deposit or the Additional Escrow Deposit, Guarantor shall immediately and unconditionally pay Maller the sum of Two Million Five Hundred Thousand ($2,500,000.00 [collectively, the "Guaranteed Obligations"]). In the event that Property Owner or Sole Member shall sell or transfer its interest prior to the Closing on the Premises, Maller shall be entitled to its proportionate share of the profits. Guarantors hereby further acknowledge and agree that in the event Guarantor default with respect to any of its obligations set forth in this Section 1(a), then Escrow Agent is hereby authrized *(sic)* to release the Escrow Deposit to Maller upon written demand for same.

It is undisputed that the Guaranty and Escrow Deposit relate to a Purchase and Sale Agreement for the parties to this suit to acquire a developed property located at 1619 Broadway, New York, New York. It is also undisputed that defendants deposited $2,500,000 with the Escrow Agent and that such deposit was released in two payments upon plaintiff's consent. The first payment in the amount of $1,000,000 was released from the Escrow Deposit pursuant to the terms of a First Amendment to Guaranty dated as of March 9, 2016 and the Escrow Amount was reduced to $1,500,000. The second payment was made at a closing on the property which occurred after the "Closing" date contemplated in section 1(a)(ii) of the Guaranty. Nevertheless, plaintiff now maintains that because the Closing did not occur at the time and on the terms that existed at the time the Guaranty was signed, they are entitled to payment of an additional $1,500,000.00 because under section 1(a)(ii), the "Guarantor . . . guarantees to Maller that in the event that either . . . (ii) the Closing of the Premises is not consummated in accordance with the terms and provisions of the Purchase Agreement . . . , the Guarantor shall . . . pay Maller the sum of [$1,500,00.00]". As noted, sale of the property closed and plaintiff consented to release of all remaining funds in the Escrow Account even through the sale was not on the terms contemplated at the time the Guaranty was executed. Because the obligation contemplated in section 1(a)(ii) was satisfied at the Closing and the Escrow Funds were released, plaintiffs cannot now seek to be paid the funds set aside in the Escrow Account and released at the Closing as that would constitute double payment..

The last sentence of section 1(a) provides a remedy upon occurrence of any of three events set forth in section 1(a)(i) through (iii). The sentence states that

> in the event Guarantor defaults with respect to *any of its obligations* set forth in this Section 1(a), then Escrow Agent is hereby authrized (sic) to release the Escrow Deposit upon Maller's written notice" (emphasis added).

There is no allegation that plaintiffs claimed the Guarantor had defaulted and objected to release of the Escrow Deposit at or shortly after the Closing. The documentary evidence before the court shows otherwise (*see* July 19, 2016 email, NYSCEF Doc. No. 72 ["Simon is willing to release the escrow money…"]). In any event, plaintiffs never sought to invoke their right to release of the Escrow Deposit to Maller by giving written notice as the last sentence requires. The first cause of action must be dismissed.

Regarding the third cause of action for breach of an alleged oral loan agreement, the only written evidence on that subject is the July 19, 2016 email sent by plaintiffs' transaction lawyer that consented to release of the Escrow Deposit and arguably provided plaintiffs with an option to convert their member interests into a loan. The email in its entirety states:

> Simon is willing to release the escrow money provided Ilan and Haim sign a three year promissory note at 10% annual interest rate. Simon has a three month to make a decision to stay as member or be a lender. In addition, the interest shall be calculated from January 1, 2016. In the event Simon decides to be a lender, Ilan and Haim shall provide proper collateral for Simon's part of the loan.

(NYSCEF Doc. No. 72). It is undisputed that the "escrow money" was released and that plaintiffs did not attempt to convert their member interest within the three-month period indicated. The option having expired unexercised, no loan was created. The third cause of action must be dismissed.

As to the second cause of action for fraud which also relates to conversion of the member interest to a loan, the claim must be dismissed as plaintiffs cannot show any material misrepresentation as to the purported loan or any detrimental reliance on such misrepresentation. The documentary evidence shows that on July 19, 2016, plaintiffs sought a three-month option to convert their member interests *(see id.)*, not that defendants represented "that they accepted and agreed to treat [the escrow deposit] as a loan" (Plaintiffs Br. at 20, NYSCEF Doc. No. 73). As noted above, plaintiffs failed to satisfy the terms they set under the option by failing to exercise it in a timely fashion.

Accordingly, it is hereby

ORDERED that the complaint is dismissed in its entirety.

This constitutes the decision and order of the court.

DATED: May 16, 2018

ENTER,

O. PETER SHERWOOD J.S.C.