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### East 53 BSD LLC v. Hosang

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[\*1]

<b>East 53 BSD LLC v Hosang</b>
2020 NY Slip Op 50808(U)
Decided on July 13, 2020
Civil Court Of The City Of New York, Kings County
Stoller, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on July 13, 2020

Civil Court of the City of New York, Kings County

<p><b>East 53 BSD LLC, Petitioner,</b></p> <p><b>against</b></p> <p><b>Ian Richard Hosang and Claudia Stephens, Respondent.</b></p>
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67975/2019

For Petitioner: Candace Carponter

For Respondent: Scott Gross

Jack Stoller, J.

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Pages numbered

Notice of Motion and Supplemental Affidavit Annexed 1, 2

Affirmation In Opposition 3

Reply Affirmation 4

Upon the foregoing papers, the Decision and Order on this motion are as follows:

East 53 BSD LLC, the petitioner in this proceeding ("Petitioner"), commenced this holdover proceeding against Ian Richard Hosang and Claudia Stephens, the respondents in this proceeding ("Respondents"), seeking possession of the subject premises on the basis that Respondents have been licensees whose license has terminated. The parties settled this matter by a stipulation dated October 31, 2019 ("the Stipulation"). Petitioner now moves for an order awarding it a money judgment for unpaid use and occupancy.

The Stipulation provided, *inter alia*, that Respondents consented to a final judgment of possession in favor of Petitioner with a forthwith issuance of a warrant of eviction and a stay on execution of the warrant through March 31, 2020 ("the Deadline"). The Stipulation stated, "In consideration Petitioner waives, unconditionally claims for past, present + future u + o through 3/31/2020 + any all other claims it may have [sic.][the Waiver']." The Stipulation further conditioned any stay of eviction beyond the Deadline on Respondents' deposit of \$5,000.00, to be remitted to Petitioner on the return date of any motion for a stay brought by order to show cause. The Stipulation also provided that any attempt to stay an eviction by a bankruptcy petition would render the Waiver null and void "should a marshal refuse to execute the warrant."

The papers reveal no dispute that Respondents have not vacated the subject premises as of the Deadline. Petitioner's motion seeks a judgment for unpaid use and occupancy retroactive [\*2]several years before the Stipulation in a total amount in excess of \$100,000.

As a general matter, a waiver of a claim bars any action on a claim regarding the subject of the waiver. *Hack v. United Capital Corp.*, 247 AD2d 300, 301 (1st Dept. 1998). Be that as it may, Petitioner argues that the language in the Stipulation, "[i]n consideration, Petitioner waives . . . [use and occupancy]" means that Respondents' failure to timely and voluntarily vacate voids the Waiver. However, the Stipulation does not expressly condition the Waiver on Respondents' timely vacatur, an omission made all the more striking by the specific language abrogating the Waiver in the event that a bankruptcy petition would cause a marshal to refrain from evicting Respondents.

A stipulation is a contract which the Court construes according to the canons of contractual interpretation. *Matter of Banos v. Rhea*, 25 NY3d 266, 276 (2015), *Econopouly v. Econopouly*, 167 AD3d 1378, 1379 (3rd Dept. 2018). A contract's application of a specific provision to a particular circumstance implies the intended exclusion of that provision from other circumstances. *Two Guys from Harrison-N.Y. v. S.F.R. Realty Assocs.*, 63 NY2d 396, 404 (1984), *2626 Bway LLC v. Broadway Metro Assocs., LP*, 85 AD3d 456, 457 (1st Dept. 2011). The Stipulation expressly permitted a nullification of the Waiver under a particular contingency other than Respondents' default in timely vacating. The Stipulation provided a different, specific remedy for such a default, i.e., a \$5,000.00 payment to Petitioner upon a stay of eviction obtained by an order to show cause. Accordingly, the Stipulation does not appear to condition the Waiver on Respondents' timely vacatur.

Petitioner argues that Respondents' failure to timely vacate differs from an application for a stay of eviction. Even assuming *arguendo* the significance of such a distinction, contingencies in contracts require an express articulation in numerous contexts, more express than that in the Stipulation. *Lui v. Park Ridge at Terryville Ass'n*, 196 AD2d 579, 582 (2nd Dept. 1993)(drafters of an agreement intending to make it contingent upon some eventuality must expressly provide for that). For example, a contingency or limitation on a waiver requires a statement of the contingency or limitation. *Tavoulaareas v. Bell*, 292 AD2d 256 (1st Dept. 2002), *Simkin v. Blank*, 2009 NY Misc. LEXIS 6714, at \*3-4 (S. Ct. NY Co.), *rev'd*, 80 AD3d 401 (1st Dept. 2011), *rev'd*, 19 NY3d 46, 49 (2012). Notably, the Stipulation does not designate Respondents' possession of the subject premises past the Deadline as a limitation on the Waiver. Indeed, the Stipulation actually characterizes the Waiver as "unconditional."

A covenant in a contract that is dependent upon a different covenant in a contract is another kind of contingency. In this context, Petitioner's argument only prevails if the Stipulation's

covenant to waive use and occupancy was dependent on Respondents' covenant to timely vacate. The mere existence of two covenants in a contract does not render the covenants as dependent upon one another. *F.H.R. Auto Sales, Inc. v. Scutti*, 144 AD2d 956, 957 (4th Dept. 1988) [\[FN1\]](#) In order for a covenant to be dependent, the contract it is in must expressly condition performance of the covenant on performance of another covenant. *56-70 58th St. Holding Corp. v. Fedders-Quigan Corp.*, 5 NY2d 557, 563 (1959), *F.H.R. Auto Sales, Inc.*, *supra*, 144 AD2d at 957.

A dependent covenant operates like a condition, *Id.*, a condition being an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due. *IDT Corp. v. Tyco Group, S.A.R.L.*, [13 NY3d 209](#), 214 (2009), *Merritt Hill Vineyards Inc. v. Windy Heights Vineyard, Inc.*, 61 NY2d 106, 112 (1984). A condition that leaves a party's contractual obligations in effect—like the Waiver—pending a possible nonoccurrence—like Respondents failing to timely vacate—would be a condition subsequent. *Miller v. Lou Halperin's Stations, Inc.*, 284 AD2d 439, 441 (2nd Dept. 2001). *See Mereminsky v. Mereminsky*, 20 Misc 2d 21, 26 (App. Term 2nd Dept. 1959)(a contractual obligation amounts to a condition subsequent when its manifestation will defeat an existing obligation); *Benincasa v. Garrubbo*, 141 AD2d 636, 638 (2nd Dept. 1988)(a condition subsequent does not delay the enforceability of a contract, but only preserves the possibility that a contract can be set aside later in time if the condition is not fulfilled).

The law does not favor an interpretation of contractual language to create a condition subsequent, *Trustees of Calvary Presbyterian Church v. Putnam*, 249 NY 111, 115 (1928), thus requiring a clear expression in order to create one. *Lipton v. Bruce*, 1 NY2d 631, 637 (1956), [MPEG LA, LLC v. Samsung Elecs. Co., 166 AD3d 13](#), 21 (1st Dept.), *leave to appeal denied*, 32 NY3d 912 (2018), *Stratis v. Doyle*, 176 AD2d 1096, 1098 (3rd Dept. 1991), *De Bevoise v. Adler*, 147 A.D. 526, 528 (2nd Dept. 1911). Language that is susceptible to any other reasonable interpretation does not create a condition subsequent. *Van De Bogert v. Reformed Dutch Church*, 219 A.D. 220, 225 (2nd Dept. 1927).

The language that Petitioner hangs its hat on, "[i]n consideration," follows not only the Deadline but also Respondent's consent to a final judgment of possession and the issuance of a warrant of eviction. The "consideration" for the Waiver could possibly apply to the consent for a final judgment of possession or an issuance of a warrant just as such as it could apply to the Deadline. The potential applicability of consideration to the Waiver among Respondents' varying

concessions does not meet the high standard of proving that vacatur by the Deadline amounted to a condition subsequent default of which could set the Waiver aside. Again, the Stipulation's characterization of the Waiver as "unconditional" underscores the lack of requisite specificity of a contingent relationship between the Waiver and Respondents' covenant to vacate by the Deadline.

The requirement that contracts expressly state contingencies is consistent with the proposition, apposite to this matter, that a landlord is not entitled to a final judgment on a tenant's breach of a stipulation settling a holdover proceeding unless the stipulation actually provides for that remedy [\*Wallkill Affordable Senior Hous., LP v. Powell\*, 67 Misc 3d 136\(A\)](#)(App. Term 2nd Dept. 2020), [\*133 Plus 24 Sanford Ave. Realty Corp. v. Xiu Lan Ni\*](#), 47 Misc 3d 55, 57 (App. Term 2nd Dept. 2015), [\*Gloria Homes Apartments LP v. Wilson\*](#), [47 Misc 3d 142\(A\)](#)(App. Term 1st Dept. 2015), [\*Johnson v. Hunte\*](#), [8 Misc 3d 133\(A\)](#)(App. Term 2nd Dept. 2005).

Accordingly, the Court denies Petitioner's motion.

This constitutes the decision and order of this court.

Dated: July 13, 2020

New York, New York

HON. JACK STOLLER

J.H.C.

### Footnotes

**Footnote 1:** While this case analyzed a lease, a lease is a contract. [\*Vt. Teddy Bear Co. v. 538 Madison Realty Co.\*](#), [1 NY3d 470](#), 475 (2004), [\*Geraci v. Jenrette\*](#), 41 NY2d 660, 665 (1977), [\*D'Alto v. 22-24 129th St., LLC\*](#), [76 AD3d 503](#), 506 (2nd Dept. 2010).

[Return to Decision List](#)