SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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CHAIM MILLER and 49 DUPONT LOFTS LLC, **Index No.: 512723/2015**

Plaintiffs,

-against-

JOSEPH BRUNNER, ANMUTH HOLDINGS LLC, and BLACK ROCK TITLE AGENCY

Defendants.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF A MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AND TO QUASH SUBPOENAS

Defendants Anmuth Holdings LLC ("Anmuth"), and Joseph Brunner ("Brunner"), who is now improperly named in this action *via* Plaintiff Chaim Miller's ("Miller" or "Plaintiff") and 49 Dupont Lofts LLC's ("49 Dupont") purported Amended Complaint, submit this reply brief, together with the Reply Affirmation of Alexander Tuttle, dated April 6, 2016 (the "Tuttle Reply to Sur-Reply Aff."), in further support of Anmuth's motion to dismiss Plaintiff's Complaint and to quash the Subpoenas[1] (the "Motion") and in reply to Plaintiffs' Sur-Reply to the Motion. This reply is further submitted per a stipulation entered into by the parties' counsel on March 9, 2016, following the last return/oral argument date on the instant Motion.

Contrary to Plaintiffs' contention, the manner in which Plaintiffs have intended to proceed against Brunner (to amend their complaint or, as stated in Paragraph 1 of their original Complaint, file a "series of lawsuits", notwithstanding documentary evidence refuting their claims), requires having the instant Motion apply to Plaintiffs' Amended Complaint. In fact, it is the most efficient way to proceed so as to preclude Plaintiffs' ongoing frivolous and calculated

[1] All capitalized terms shall have the same meaning as set forth in the Anmuth's moving brief and reply papers.

personal attack on Brunner. It should further be noted that this motion has been marked final for the upcoming return date on April 13, 2016.

PRELIMINARY STATEMENT

Here is a brief recap of Plaintiffs' litigation tactics and claims, all of which are, as a matter of law, frivolous and should be dismissed:

1. On October 19, 2015, Plaintiff Miller files his original Complaint against Anmuth.

2. The Complaint's sole allegation is that a letter of credit issued in favor of Dupont Street Developers LLC ("Dupont") in the amount of $4,700,000.00 was released to Anmuth and that Anmuth failed to honor its agreement with, and pay, Plaintiff $4,353,500.00 out of the $4,700,000.00 released to Anmuth.

3. It is undisputed that the Complaint was inaccurate and false. Documentary evidence produced by Anmuth to dismiss the Complaint confirmed that the Letters of Credit have, at all times, remained in full force and effect and never been released.

4. On February 9, 2016, Plaintiffs, on the eve of oral argument on Anmuth's Motion to dismiss the original Complaint and without communication to the undersigned counsel, concede that the Complaint was baseless and file an Amended Complaint with four (4) new causes of action, alleging:

    i. under the First and Second Causes of Action, an entirely separate scheme of "fraud" against Brunner, Anmuth, and Black Rock, which, even if deemed true, arose prior to, and were well within Plaintiffs' knowledge as of, September 18, 2014, the date Plaintiffs entered into a binding general Release precluding these very claims (and yet further, conspicuously absent from Miller's original Complaint in October, 2015); and

    ii. under the Third and Fourth Causes of Action, that the Letters of Credit were instead improperly extended beyond May 20, 2015, based on an unwritten "understanding" by Miller that the funds subject to the Letters of Credit would absolutely be released by a hard date of May 20, 2015.

5. Again, Plaintiffs' claims are false and precluded as a matter of law. It is undisputed that Plaintiffs and Sprei executed the general Release, dated September 18, 2014, covering any and all claims against the Defendants, from the beginning of time through the date of the Release, including Plaintiffs' First and Second Causes of Action. Further, Plaintiffs' Third and Fourth Causes of Action, that Anmuth improperly extended the Letters of Credit, are improperly alleged and neither ripe nor serve as the basis for a breach of contract claim or an injunction.

Plaintiff Miller now claims in his Sur-Reply that the Release itself was fraudulently induced by Brunner. This is simply ridiculous and flies in the face of long-standing New York law governing broad releases. In fact, Miller is a savvy New York City real estate developer[2] for approximately 30 years. Miller was fully aware of the subject 49 Dupont transaction prior to September 18, 2014, and entered into the Release freely and with counsel, which covers known and *unknown* claims as alleged here.

To the extent Plaintiffs intended to cause Brunner and Anmuth unnecessary legal expense in seeking to dismiss Plaintiffs' claims, bravo, their efforts succeeded. Anmuth and Brunner have been compelled to (i) file a Motion to Dismiss against Miller's undisputed baseless claims in his original Complaint; (ii) address Plaintiff's already failed attempts in federal bankruptcy court to obtain the records sought by the Subpoenas herein (trying now in State court); (iii) address Plaintiffs' and their attorneys' frivolous and sanctionable conduct in filing an Amended Complaint on the eve of oral argument of Anmuth's Motion to Dismiss without any prior communication to the undersigned counsel; (iv) address Plaintiffs' manufactured "new" claims elicited solely from Miller's gamesmanship in filing an initially defective Complaint and inviting a Motion to Dismiss, all of which are barred by the duly executed Release and otherwise fail to state a claim as a matter of law and barred by documentary evidence; and (v) now address Plaintiffs contention that the Release itself was somehow fraudulently induced by Brunner.

And let's not forget the source of these allegations. Miller is a known fraudster. As bears repeating, he and his partner Sprei are involved in 18 different lawsuits since 2014, and 10 in the past year in New York. For example, as cited in Anmuth's initial Memorandum of Law, in December 2015, Justice Demarest in the Second Department held, in *Drazin*, *supra*, Index

[2] See http://therealdeal.com/new-research/topics/people/chaim-miller/ (as of 2015, Miller's New York portfolio of real estate is over 1 million square feet of space; it is believed that Miller started in the real estate business in the 1980's under Abraham Leser).

#512405/2014, that Plaintiff Drazin clearly and convincingly proved willful and intentional fraudulent conveyances of Sprei's interests by Miller and Sprei in that action and required $1.56 million be disbursed to Plaintiff Drazin from the pending sale of 97 Grand Avenue, a 62-unit Clinton Hill rental building that Miller and Sprei purchased in 2013. Brunner, on the other hand, is a well-respected real estate owner and a pillar of his community—never once been held liable of fraud or any other such nefarious conduct.

Accordingly, Plaintiff's Amended Complaint should be dismissed, the Subpoenas should be quashed, and sanctions and costs should be issued against Plaintiff, 49 Dupont, and Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara & Wolf, LLP ("Abrams LLP").[3]

STATEMENT OF FACTS

The relevant facts, for purposes of this reply, are as follows:

i. All facts cited in Anmuth's initial Motion papers and Anmuth's and Brunner's Reply papers, dated March 8, 2016.

ii. Plaintiffs have failed to introduce any new facts in its Sur-Reply or pleadings that warrant denying the relief sought herein.

iii. Assuming all facts are true, Plaintiffs' Amended Complaint fails as a matter of law and should be dismissed.

ARGUMENT

I. MILLER FAILS TO STATE A CAUSE OF ACTION RELATED TO THE LETTERS OF CREDIT AND THE THIRD AND FOURTH CAUSES OF ACTION SHOULD BE DISMISSED AS A MATTER OF LAW

Plaintiffs misapply law and argue patently untenable positions in seeking to substantiate their claims that the Letters of Credit were improperly extended.

[3] Plaintiffs' Sur-Reply fails to dispute that the Motion is moot or that the Letters of Credit have been submitted in admissible form, despite previously representing that the Motion was moot and that the Letters of Credit were inadmissible in Plaintiffs' Opposition to the Motion.

At the outset, the Third Cause of Action in the Amended Complaint (while captioned against Brunner) alleges solely that "**Anmuth** [not Brunner] materially breached the [September 18, 2014] Agreement by failing to promptly and deliver and pay $4,353,500.00 to Miller following the return to Anmuth of the collateral for the Letters of Credit." (Amended Complaint, ¶ 77). In fact, no claim has been made against Brunner in connection with breaching the September 18, 2014 Agreement (the "LC Agreement"; Ex. 2 to Miller Aff.- LC Agreement). Further, the Third Cause of Action fails as a matter of law, since it is undisputed that Anmuth never received the "return of the collateral for the Letters of Credit." Therefore, there can be no breach as alleged.

In an effort to re-plead the Third Cause of Action through Plaintiffs' Sur-Reply, Plaintiffs argue that Miller "understood" and "expected" that he would receive the return of collateral no later than May 20, 2015, and that the LC Agreement should be interpreted to restrict an extension of the Letters of Credit absent an express term permitting such right in the LC Agreement and/or Letters of Credit. (Miller Aff., dated March 23, 2016, ¶¶ 27, 29). Plaintiffs allege, in the first instance, that the LC Agreement implicitly includes an expiration date for the return of the collateral subject to the Letters of Credit, and, in the second instance, that Anmuth somehow breached the LC Agreement by improperly extending the Letters of Credit. This argument is directly contrary to New York law

The LC Agreement is the sole governing and dispositive document for purposes of this Motion. The terms and conditions of the Letters of Credit (Exh. B to Tuttle Aff., dated December 7, 2015) are not relevant to, nor are they incorporated into, the LC Agreement. If anything, the LC Agreement is a "unilateral promise" by Anmuth to make payment to Miller

under a condition precedent (the return of the collateral under the Letters of Credit), executed solely by Anmuth. Miller is not a signatory to the LC Agreement.

New York law is well settled that a condition precedent is an act or an uncertain event that must occur before the agreement of the parties becomes operative. *Thor Props., LLC v. Chetrit Group LLC*, 27 Misc. 3d 1216(A), 910 N.Y.S.2d 766 (Sup. Ct. 2010), *aff'd*, 91 A.D.3d 476 (2012). Terms such as "if," "provided that," "when," "while," "after," or "as soon as" are often used. *Id., citing* 12 Am. Jur. § 295, at 849; 5 Williston, Contracts [3d ed] § 671, at 161. If that condition precedent is not fulfilled, the parties are excused from performing under the contract. *Id.* That is exactly what happened here. The collateral was not returned to Anmuth. Therefore, the condition precedent was not satisfied giving rise to Anmuth's promise to pay Miller.

Further, even by Plaintiffs own recitation of basic contract law, per *North Fork Bank & Trust Co. v. Romet Corp.*, 192 A.D.2d 591 (2nd Dep't. 1993), which concedes that a court 'will not imply a term where the circumstances surrounding the formation of the contract indicate that the parties, when the contract was made, must have foreseen the contingency at issue and the agreement can be enforced according to its terms', there can be no reasonable interpretation of the LC Agreement that holds Anmuth in breach. *Id., citing Henrich v. Phazar Antenna Corp.*, 33 A.D.3d 864, 867 (2d Dep't 2006), *quoting Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001). Plaintiffs seek to improperly read into the LC Agreement an implied term of a hard date (or any date for that matter) for the return of the collateral under the Letters of Credit, which is contrary to the plain meaning of its terms. The LC Agreement requires the return of funds as a contingent event and not the basis for a "loan default" as Plaintiffs would characterize it. If the LC Agreement were intended to be a loan in this sense, it surely would not be a half-

page document detailing a contingency for the return of $4.35 million in funds (principle only). Instead, it would be drafted as an express default in the event funds were not returned by some date, let alone May 20, 2015. Additionally, it was certainly not the parties' expectations that the Letters of Credit be absolutely returned by May 20, 2015, as the plain language in the LC Agreement "in the event that Anmuth Holdings LLC receives a return of the collateral …", has no correlation to such a date or even to the Letters of Credit themselves. (*See* Ex. 2 to Miller Aff.).

Moreover, as the express terms of the LC Agreement state ["i]n the event Anmuth Holdings LLC receives a return of the collateral …", this anticipates a "financial distribution event" from Dupont Street Developers, LLC to Anmuth (under LLC law or their governing operating agreements). (Ex. 2 to Miller Aff.). This never occurred. As specifically referenced in the LC Agreement, Dupont Street Developers LLC would be the initial recipient of the return of the collateral funds. This also never occurred, nor is claimed to have occurred. Accordingly, it is undisputed that neither Dupont Street Developers LLC nor Anmuth has received funds from the return of the collateral under the Letters of Credit, and therefore, there can be no "breach" as specifically claimed in the Amended Complaint, and no right by Miller to receive payment as that right never arose. *See Consolidated Edison Inc. v. Northeast Utils.*, 426 F.3d 524 (2005) (where the Court of Appeals specifically ruled that a beneficiary's right to claim a breach of contract only arose after the triggering event--in that case, "upon completion of the merger"). Nor is there anything in the LC Agreement or Letters of Credit that would give Miller an "understanding" of when exactly the distribution event would occur between Dupont Street Developers LLC and Anmuth.

Plaintiffs then argue by extension that, notwithstanding that Miller is not a beneficiary under the Letters of Credit, but rather is an "interested party" in such funds (much like anyone that might have participated in securing the Letters of Credit), the Letters of Credit were improperly extended, triggering a default under the LC Agreement. Yet, the Letters of Credit were in fact extended and Plaintiffs have no standing to object to such extension, as they are neither the beneficiary nor applicant under the Letters of Credit. Miller was only a recipient of the return of funds upon two triggering events—the return to Dupont Street Investors LLC and a distribution to Anmuth.

Contrary to Plaintiffs reliance upon *Koolerie Serv. & Installation Corp. v. Board of Educ.*, 28 N.Y.2d 101 (1971), as the basis for precluding "Brunner" from extending the Letters of Credit under the New York "prevention doctrine", Anmuth did not intentionally frustrate the intent of the LC Agreement. First, there was no hard date established in the LC Agreement for the return of funds from the Letters of Credit or any requirement or restriction on Dupont Street Developers LLC, the applicant under the Letters of Credit, on extending the Letters of Credit. In fact, Dupont Street Developers LLC, which is not a party to the LC Agreement, was well within its rights to extend the Letters of Credit and did so without any self-interest. Neither Dupont Street Developers LLC nor Anmuth have any claim to the subject collateral other than returning it to Miller upon completing the remediation obligations pursuant to the underlying real estate contract to acquire 49 Dupont. This is distinguished from *Koolerie*, as the Board of Education in that case requested that the Comptroller not follow a mandatory duty to certify funds as the condition precedent to Plaintiff enforcing the contract, whereas here, there was no mandatory duty of Investors Bank to return the collateral by May 20, 2015.

Second, the New York prevention doctrine, as clarified by the Court of Appeals in 2005 in *Consolidated Edison Inc. v. Northeast Utils.*, 426 F.3d 524 (2005), "creates nothing more than an implied contractual obligation, similar to-and perhaps rooted in-the implied covenant of good faith and fair dealing." *Id.* (*citing* 9 Arthur L. Corbin, *Corbin on Contracts* § 947, at 721-22 (Interim ed.2002); 23 Richard A. Lord, *Williston on Contracts* § 63:26, at 528 (4th ed.2002); 13 *id.* § 39:6, at 527-32; Restatement, *supra,* § 245 cmt. a.) The doctrine therefore exists to serve the intent of the parties, and does not operate at cross-purposes to that intent. *See, e.g., Murphy v. American Home Prods. Corp.,* 58 N.Y.2d 293, 304 (1983) ("No obligation can be implied ... which would be inconsistent with other terms of the contractual relationship."); *Neuman v. Pike,* 591 F.2d 191, 194 (2d Cir.1979) ("It is ... well established in New York that, where the expressed intention of contracting parties is clear, a contrary intent will not be created by implication."); *see also Fesseha v. TD Waterhouse Inv. Servs.,* 305 A.D.2d 268, 268 (1st Dep't 2003) ("While the covenant of good faith and fair dealing is implicit in every contract, it cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights.").

In *Consolidated Edison*, the Court of Appeals ruled on an analogous set of circumstances as here—that a beneficiary (contrary to Miller, who was not a "beneficiary" and has less rights) had nothing more than a right to certain funds only after the triggering event occurred. Nor could the beneficiary apply the New York prevention doctrine to transform a narrow right to "secure payment if and when" the triggering event occurred into a "billion-dollar penalty" (here, a $4.35 million penalty) for the claimed underlying "breach". Accordingly, the law in *Koolerie* is inapposite to the circumstances here and the contingency contemplated under the LC Agreement is viable and dispositive in denying Plaintiffs' claim. And, contrary to

Plaintiffs contention, the Letters of Credit could not be indefinitely extended in theory, as they are linked to an underlying real estate transaction with a specific set of terms, including a timeline of conditions involving the environmental remediation serving as the bases for the Letters of Credit.

Finally, in another glaring misapplication of law and fact, Plaintiffs cite to the International Standby Practices 1998 (ISP98) as the basis for stating that "no evidence of [the beneficiaries' consent to any amendment to the Letters of Credit] has been proffered by Brunner in support of his motion," under the presumption that an extension to the Letters of Credit required Miller's consent as a "beneficiary". (Sur-Reply Memorandum of Law, Footnote 2). In fact, 49 Dupont Realty Corp. (i.e. the "Seller" of the underlying real estate transaction)—not Dupont Street Developers, LLC, nor any party to this Action--is the "beneficiary" under the Letters of Credit. Miller has no basis as an "interested party" to require his consent to the extension of the Letters of Credit.

Accordingly, the Third and Fourth Causes of Action are refuted by documentary evidence and fail to state a cause of action under CPLR Rule 3211(a)(7).

II. MILLER EXECUTED A RELEASE THAT IS FULLY BINDING AND WARRANTS DISMISSAL OF THE FIRST AND SECOND CAUSES OF ACTION

The Court of Appeals has specifically and definitively ruled that a broad release, such as the Release herein, is meant to release any and all claims, including fraud claims both known and unknown at the time. *Pappas v. Tzolis*, 20 N.Y.3d 228, 233-34 (2012). Such broad releases are not voidable on the basis of prior unknown frauds. *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 280 (2011) ("[where a release] was intended to bar the very claims that Plaintiffs bring, and Plaintiffs fail to allege that the release was induced

by any fraud beyond that contemplated by the release", the complaint should be dismissed). Here, Plaintiffs fail to allege that the fraud specifically induced Plaintiffs to sign the general Release.

By way of example, in *Powell v. Adler*, 128 A.D.3d 1039, 1040-41 (2d Dep't 2015), the Second Department affirmed denial of a motion to dismiss and found that there was a triable issue of fact as to whether general release was fraudulently induced. In *Powell*, the plaintiff submitted sworn affidavits stating that the release was signed when the defendant insurance adjuster visited plaintiff while the plaintiff was recovering from his injuries, was still on pain medication, and defendant misrepresented that small money payment was for plaintiff's "inconvenience" rather than to settle all claims (as was set forth in the release). In other words, in *Powell,* there were separate fraudulent misrepresentations, supported by two affidavits with specificity, that led plaintiff to believe the release was not what it in fact was. No such allegations exist here.

There can be no dispute that the fraud Miller alleges against Anmuth, Brunner, and Blackrock was expressly within the scope of the Release. In fact, it both (1) predates the release; and (2) is contemplated by its broad language. The Release releases all existing claims against the released parties. Miller was well aware of his relationship with the released parties, including vis a vis the Contract flip transaction to Zhu (the "Zhu Flip Transaction"). *See also Alvarez v. Amicucci*, 82 A.D.3d 687, 688 (2d Dep't 2011) (nearly identical language, granting CPLR 3211 motion).

Miller also concedes that he knew the Release "was part of the [Zhu] buy-out transaction" (the "Zhu Buy-Out"). (Miller Aff. ¶ 19). What could the release have possibly done if it failed to prevent Miller from now claiming that he was defrauded by Brunner in advising

him about the Zhu Buy-Out, including any threat of the RICO lawsuit? And even if the alleged fraud related to the Zhu Flip Transaction could not have been known by Miller, the Zhu Flip Transaction itself was known. That is the point of a general release: "A valid general release will apply not only to known claims, but may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is fairly and knowingly made." *Rivera v. Wyckoff Heights Med. Ctr.*, 113 A.D.3d 667, 670-71 (2d Dep't 2014) (claims barred by release under similar language). Miller's only claimed excuse is that he didn't ask about the breadth of the release. But he didn't have to. The language is plain.

Additionally, contrary to Miller's allegation that Hansen Law PLLC, Black Rock, Clay Riverview, or Anmuth were fraudulently added to the Release, such inclusion actually highlights the absurdity of Miller's claims. Why would Miller release these other parties if the Release was solely related to the Zhu Buy-Out? Miller knew he was releasing these entities for any claim or related dealings between him and these parties. Miller knew that his dealings between these individuals and entities involved the claims now asserted in the Amended Complaint.

Nevertheless, and dispositive in its own right, Miller fails to allege anywhere that Brunner defrauded him into believing that the Release was something which it was not. Instead, Miller tries to hide behind his own ignorance: (Miller Aff. ¶ 20, "I did not question why Brunner was asking for the release."). Even accepting Miller's allegations as true, that is not reasonable reliance; it is deliberate ignorance. *Centro*, 17 N.Y.3d 269, 278-79 (plaintiff must "make use" of "the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, . . . or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.").

Additionally, Miller concedes he is an experienced "businessman involved in New York real estate," Miller Aff. para. 14, and is widely known in the community as being in the business for over 30 years, hardly a patsy who could not understand the plain language of the documents he was signing, and was represented by counsel. As the Court of Appeals explained:

> As sophisticated entities, they negotiated and executed an extraordinarily broad release with their eyes wide open. They cannot now invalidate that release by claiming ignorance of the depth of their fiduciary's misconduct. In addition to failing to allege that the release was induced by a separate fraud, plaintiffs have failed to allege that they justifiably relied on defendants' fraudulent statements in executing the release. [I]f the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations. *Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 278-79 (2011). *See also Matter of O'Hara*, 85 A.D.2d 669, 672 (2d Dep't 1981) (no fraudulent inducement of release where O'Hara was aware of the facts and events and represented by counsel even where plaintiff "was pressured into signing the release").

Claims, such as those alleged by Miller, seeking to invalidate similarly clear and unambiguous general releases are routinely rejected by New York courts. *See, e.g.*, *Centro*, 17 N.Y.3d 269; *Pappas,* 20 N.Y.3d 228, 233-34 (2012); *see also Engel v. Deutsche Bank Natl. Trust Co.*, 116 A.D.3d 915, 916-17 (2d Dep't 2014) (no fraudulent inducement of general release "based upon alleged misrepresentations which predated the release, and were not separate from the subject of the release"). The same ruling should apply here, and Plaintiff's First and Second Causes of Action should be dismissed based upon the Release.

CONCLUSION

For the reasons set forth above and in the accompanying Tuttle Reply Aff. and Brunner Reply Aff., Anmuth respectfully requests that the Court enter an Order:

(a) dismissing the Complaint and Amended Complaint, pursuant to CPLR Rule

3211(a);

(b) quashing the Subpoenas, pursuant to CPLR § 2304;

(c) precluding Plaintiff, 49 Dupont, and Sprei from filing any claims and/or a lawsuit against Brunner, Anmuth, and/or Black Rock that are barred by the documentary evidence, including the Release, attached to this Motion;

(d) awarding costs and sanctions as against Plaintiff, 49 Dupont, and Abrams LLP; and

(e) such other relief as the Court deems proper.

signature page follows

Dated: New York, New York
April 6, 2016

TUTTLE YICK LLP

By: _____

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