SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 61

850 THIRD AVENUE OWNER, LLC	:	Index No. 654148/2020
Plaintiff,	:	
	:	**Hon. Barry Ostrager**
-against-	:	
DISCOVERY COMMUNICATIONS, LLC,	:	**Mot. Seq. No. 1**
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S PRE-DISCOVERY MOTION FOR SUMMARY JUDGMENT AND TO DISMISS COUNTERCLAIMS

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PRELIMINARY STATEMENT

This is an action by an opportunistic Landlord seeking to take advantage of the Covid-19 pandemic and the Executive Orders which shut down all "non-essential" business in New York State.[1] Tenant has paid every dollar of rent due under the Lease prior to its expiration on May 31, 2020. However, Landlord claims Tenant owes penalty "holdover" rent for June and July 2020 notwithstanding the fact that Tenant was prevented by law and the Lease, as well as by health and safety concerns, from removing its property from the Premises by the May 31st Lease expiration date.

In response to the Covid-19 pandemic, and even before Governor Cuomo implemented the 100% Workforce Reduction Requirement, Tenant ceased operations at the Premises with no intention of returning. From March 22, 2020 until New York State began easing the closure restrictions, only fourteen of Tenant's 597 employees entered the Premises to perform functions that were deemed "essential," such as security and checking mail. Tenant had no intention to and did not holdover in the Premises; it removed its property therefrom within the time permitted in the Lease.

Tenant also could not move out by May 31st because commercial moving companies were similarly, and entirely, prohibited by law from conducting business in New York City from March 22, 2020 to May 17, 2020. Even after they were deemed "essential" by the Essential Businesses Guidance on May 18th, commercial movers (like residential moving companies before them) were permitted to operate only where "necessary to maintain the safety, sanitation, and essential operations" of a business. Removing Tenant's property from the Premises did not meet this criteria. Once commercial offices were permitted to partially reopen on June 22nd

[1] Capitalized terms not otherwise defined herein have the meaning in the Affidavit of Larry Laque, sworn to February 2, 2021 ("Laque Afd.")

(Phase II Reopening) and the restrictions on commercial moves were lifted, Tenant hired a commercial mover and removed its property from the Premises by July 27, 2020 – or thirty-five days from when the government imposed restrictions were lifted.

The law is clear: Tenant does not become a "holdover" merely by leaving property in the premises after the expiration of a lease. For Landlord to have summary judgment it would need to make an undisputed showing that Tenant left its property in the Premises with the intent to continue its leasehold. Landlord has failed to satisfy its prima facie burden on summary judgment: it submitted no evidence of the type, quantity and extent of any property remaining in the Premises from June 1st to July 27th, or of Tenant's intent to continue the Lease after its expiration. At best, these are factual issues requiring discovery and cannot be determined in a pre-discovery summary judgment/dismissal motion.

Tenant never held over and is not required to pay any rent for June or July 2020 for the additional reason that its time to remove its property from the Premises was extended by the Lease's force majeure provision (§ 26.03). The Covid-19 pandemic and Executive Orders are undeniably force majeure events. Further, the Lease's penalty "holdover" rent provision (§ 22) does not apply where, as here, the Lease has expired. In the alternative, because Landlord billed and collected post-Lease expiration rent, Tenant became a month-to-month Tenant and is not liable for penalty "holdover" rent.

After Tenant served its Answer/Counterclaims and a deposition notice, Landlord made this pre-emptive, pre-discovery and premature motion for summary judgment on its claims and to dismiss Tenant's eight counterclaims. Landlord, however, has failed to satisfy its prima facie entitlement to summary judgment, issues of fact prevail, and Tenant's counterclaims plead valid causes of action. Indeed, Landlord's motion fails to substantively address or deal with Tenant's

counterclaims based on Landlord's breach of the Lease and unjust retention of $833,869.59 that Tenant inadvertently paid for June rent, and for its unlawful draw-down of Tenant's $829,581.42 letter of credit proceeds which Landlord applied to the July rent. Tenant's counterclaims do not "mirror" the Complaint's claims which, in any event, is not a basis for dismissal under New York law. For the reasons that follow, Landlord's motion should be denied.

STATEMENT OF FACTS

For a recitation of the facts for the purposes of this motion only, the Court is respectfully referred to the Laque Afd., the Answer/Counterclaims (Laque Afd., Ex. 1), the Lease (Laque Afd., Ex. 2), and the Haddad Aff., and the exhibits annexed thereto.

ARGUMENT

POINT I

LANDLORD'S PRE-DISCOVERY MOTION SHOULD BE DENIED PURSUANT TO CPLR 3211(D) AND 3212(F) BECAUSE TENANT NEEDS DISCOVERY TO OPPOSE THE MOTION

Landlord's omnibus CPLR 3211 and 3212 motion should be denied because facts needed to oppose the motion exist but are not in Tenant's possession, and the existence of essential facts depends upon knowledge exclusively within Landlord's possession, and which might well be disclosed by cross-examination or by examination before trial.[2] See CPLR 3211(d); Cosmos Mason Supplies Inc. v. Lido Beach Assoc. Inc., 95 A.D.2d 818 (2d Dep't 1983) (motion should be denied "[w]hen facts are necessary for a party to properly oppose a motion to dismiss, and those facts are within the sole knowledge"); see also CPLR 3212(f); Baldasano v. Bank of New York, 199 A.D.2d 184, 185 (1st Dep't 1993) (citing Terranova v. Emil, 20 N.Y.2d 493, 497

[2] The standards on motions to dismiss and for summary judgment are well known by the Court and will not be recited here in the interest of brevity. The bottom line is that the counterclaims' allegations are presumed as true, and Landlord has failed to demonstrate that they fail to state a cause of action as a matter of law. Landlord has also failed to carry its burden of showing that there are no issues of material fact in dispute or that it is entitled to judgment as a matter of law. Should the Court find that Tenant has failed to state a cause of action on any counterclaim, Tenant respectfully requests leave to replead.

(1967)); see also Colicchio v. Port Auth. of New York and New Jersey, 246 A.D.2d 464, 465 (1st Dep't 1998) ("[A] motion for summary judgment … made shortly after a request for pertinent documents has gone unanswered, … should be denied."); Colombini v. Westchester County Healthcare Corp., 24 A.D.3d 712, 715 (2d Dep't 2005) (summary judgment motion should be denied where party has not had opportunity to conduct discovery). These long-standing precepts warrant the denial of Landlord's fact-based dispositive motion.

Tenant served a deposition notice, document requests and interrogatories. (Haddad Aff., Exs. 1-3.) Landlord agreed to produce most of its documents only after counsel agreed on an "ESI protocol" and "custodians and search terms" (which Tenant believes is warranted in this case), but also means that Landlord will not have produced the majority of its documents by the date Tenant responds to this motion. (Id., Exs. 8-9).[3] Tenant also served subpoenas on Filipchenko and Weschler, but no documents have yet been produced. (Id. 4-5). Nor have any depositions been taken. Landlord also served its own discovery requests, including deposition notices, although there is no PC Order requiring it to do so, thereby implicitly conceding that there are factual issues requiring discovery. (Id. Exs. 8-10).

The nature of the allegations and claims in this action require discovery of facts that Tenant does not possess and/or are solely within Landlord's and non-parties' possession, custody, or control. See Jackson v. Hunter Roberts Constr. Grp., LLC, 161 A.D.3d 666, 667 (1st Dep't 2018); Fisher v. City of New York, 128 A.D.3d 763, 764 (2nd Dep't 2015). As set forth at

[3] On January 29, 2021, Landlord produced some of what it calls "paper" documents. A cursory review of the production shows the documents, while likely ESI, are tailored to address Tenant's CPLR 3212(f) defense, which was previously set forth, in part, in Tenant's opposition to Landlord's request to stay discovery. (Dkt. No. 38). While we appreciate Landlord forwarding these materials, the production was not served with sufficient time for Tenant to evaluate same, assess if anything is missing (which seems likely because Landlord and Tenant both agree ESI discovery is required), or incorporate these documents into this opposition, which was due four businesses days later, if applicable. Neither can Landlord modify its prima fascia case on reply.

Laque Afd., ¶¶ 47-49, Tenant needs discovery on numerous issues which include, but are not limited to:

(a) the names, dates and number of all of Tenant's employees that Landlord alleges accessed the building both before and during the Covid-19 pandemic, which will show that Tenant shut down its operations at the Premises and that only a skeleton crew of permissible "essential" workers accessed the Premises during the 100% Workforce Reduction Requirement;

(b) whether Tenant was prevented from removing its property from the Premises by the May 31st Lease's expiration date;

(c) Tenant's electrical usage (billed by and paid to Landlord) both before and during the 100% Workforce Reduction Requirement, which will show that Tenant did not conduct business as usual in the Premises during the 100% Workforce Reduction Requirement;

(d) Landlord's actions and communications with its employees and other tenants about the Covid-19 pandemic and the effects of the 100% Workforce Reduction Requirement on the building and their operations;

(e) whether the commercial moves allegedly conducted by Landlord's affiants (Filipchenko and Wechsler) and their respective companies during the 100% Workforce Reduction Requirement were for "essential" or "non-essential" businesses, were "necessary to maintain the safety, sanitation, and essential operations" of a business, or were for "non-essential" purposes, and the bases of the affiants' allegations;

(f) whether Tenant became a month-to-month tenant by reason of Landlord's billing, acceptance, and refusal to return post-Lease expiration rent;

(g) the parties' intent and understanding of the Lease's penalty "holdover" rent and force majeure provisions (§§ 22 and 26);

(h) the nature and character of the parties' Lease extension negotiations which the Complaint and the motion have put in issue;

(i) Landlord's breach of the Lease and conversion of Tenant's funds as a result of its drawdown of Tenant's letter of credit in the absence of a Monetary Default; and

(j) on the Counterclaims.

Accordingly, the Court should deny Landlord's pre-discovery and premature motion pursuant to CPLR 3211(d) and 3212(f).

POINT II

UNDER WELL SETTLED LAW, WHETHER A TENANT BECOMES A HOLDOVER MERELY BY LEAVING PROPERTY IN THE PREMISES IS AN ISSUE OF FACT, AND LANDLORD HAS FAILED TO MEET ITS PRIMA FACIE BURDEN

"The question of whether the leaving by the tenant of property on the leased premises after expiration of the lease constitutes a holding over 'is usually a question of fact, to be determined by taking into consideration the nature of the property leased, the amount paid as rent, the value of the real property, the value of the personal property left on the leased premises, the intent with which it was left, and all the other facts and circumstances surrounding the transaction'" Lordae Realty Corp. v. Montefiore Med. Ctr., 232 A.D.2d 338 (1st Dep't 1996) (citations omitted).[4]

[4] Moreover, unless it is Landlord's intention to treat Tenant as a month-month tenant based on its acceptance of the June and July 2020 rent, Landlord cannot assert a cause of action for contractual "rent" in any amount. (See Point V, infra; Landlord's Memorandum of Law at 20-21 ("Mem. in Supp."); see also Jaroslow v. Lehigh Val. R. Co., 23 N.Y.2d 991, 993 (1969) ("An action for nonpayment of rent … does not lie, there being no tenancy in fact or at law

Landlord alleges that Tenant left personal property in the Premises after May 31, 2020, and continued to access the Premises during the 100% Workforce Reduction Requirement. (See Affirmation of Jeffery M. Eilender in Support, dated December 14, 2020 ("Eilender Aff."), ¶ 2).[5] The motion is devoid of any factual allegations or evidence regarding the type, amount, nature and value of any remaining property, the intent with which it was left, the fair and reasonable amount of "use and occupancy." Landlord has therefor failed to demonstrate that Tenant is a holdover, that there are no disputed issues of material fact in dispute, and that Landlord is entitled to a judgment for holdover rent as a matter of law.

Landlord also offers no legal support of the proposition that Tenant became a holdover as a matter of law. The sole case cited by Landlord on this issue, Yu Yan Zenhg v. Fu Jian Hon Guan Am. Unity Assn., Inc., 168 A.D.3d 511 (2d Dep't 2019), is a personal injury case dealing with the applicability of a lease indemnity clause. The parties in Yu Yan Zenhg conceded the lease was applicable despite its term having ended, and that the tenant was still in possession of the premises as a holdover. The case is inapposite to the present situation, where there is a dispute and genuine issue of fact regarding whether Tenant is a holdover.

To the extent Landlord claims that Tenant held over because its employees accessed the Premises during the 100% Workforce Reduction Requirement, this raises issues of fact requiring a trial. In this respect, Landlord alleges that its building access records are proof that people regularly accessed the building (and therefore the Premises) hundreds of times. (Eilender Aff., Ex. A). However, the validity, authenticity and admissibility of these documents has not been established, and no discovery has been taken with respect to them. Moreover, as shown at Laque

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obligating the tenant for such rent"). While Landlord arguably may have a claim for "use and occupancy" or for damages, no such claims have been pled and no evidence has been submitted in this regard, requiring the denial of the motion.

[5] The Eilender Aff. has no evidentiary value. Zuckerman v. City of New York, 49 N.Y.2d 5457 (1980).

Afd., Ex. 7, Tenant's analysis of its key-card entries to the Premises from March 22, 2020 to June 7, 2020 (New York City entered so called Phase I Reopening on June 8) shows that only seven of Tenant's employees (out of 597 who used to work at the Premises) accessed the Premises a total of sixty times for "essential" purposes, such as maintaining security, facilities, IT, and the mailroom, and for property retrieval. (Laque Afd. ¶ 19).

The electrical records and Tenant's electrical usage in Landlord's possession before, during and after the 100% Workforce Reduction Requirement will also show the massive change in how Tenant conducted business at the Premises during and after the 100% Workforce Reduction Requirement. The conflicting verified pleadings, affidavits, and exhibits, together with the complete lack of evidence and discovery at this point, precludes summary judgment and/or the dismissal of Tenant's counterclaims. Lordae Realty Corp., 232 A.D.2d at 338.

POINT III

THE COVID-19 PANDEMIC AND EXECUTIVE ORDERS ARE FORCE MAJEURE EVENTS THAT EXTENDED TENANT'S TIME TO REMOVE ITS PROPERTY FROM THE PREMISES

Notwithstanding, the Covid-19 pandemic and the Executive Orders are force majeure events under § 26.03 of the Lease, which extended Tenant's time to remove its property from the Premises by the number of days the 100% Workforce Reduction Requirement was in place from March 22, 2020 to June 22, 2020. (Laque Afd. ¶¶ 15-16). Measured from the May 31st Lease expiration date, Tenant's time to remove its property from the Premises was extended ninety-two days to August 31, 2020. Tenant removed its property within thirty-five days (by July 27, 2020), and therefore, complied with the Lease, is not a holdover, and does not owe Landlord any June or July rent. (Id. ¶ 29). To the contrary, Landlord is liable to Tenant for money that it refused to return or unlawfully converted. (Id. ¶¶ 39-46).

"Force majeure clauses are to be interpreted in accord with their purpose, which is 'to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties.'" Constellation Energy Servs. of New York, Inc. v. New Water St. Corp., 146 A.D.3d 557, 558 (1st Dep't 2017) (citation omitted). "'When the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.'" (id.) (citation omitted).

Although force majeure clauses "are not to be given expansive meaning," they nevertheless encompass "things of the same kind or nature as the particular matters mentioned," Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902-03 (1987), and "when the parties set down their agreement in a clear, complete document their writing should as a rule be enforced according to its terms. D'Alto v. 22-24 129th St., LLC, 76 A.D.3d, 503, 506 (2d Dep't 2010), citing W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990); see also Constellation Energy, 146 A.D.3d at 550 (exemplars in force majeure provision qualified as being "without limitation" must be interpreted as such).

Landlord argues that the Covid-19 pandemic is not a force majeure event for the purposes of the last clause of § 26.03 ("and other causes beyond the reasonable control of the performing party") because a rule of contract interpretation -- ejusdem generis – requires that this "catch-all" provision relate to and be limited by the specific force majeure items listed in § 26.03, such as terrorist attacks or war. Landlord further contends that § 26.03 is not applicable because the provision does not expressly include "governmental restrictions or executive orders." Finally, Landlord argues that the Covid-19 pandemic and the Executive Orders did not frustrate the

purpose of the Lease. Constellation Energy, 146 A.D.3d at 558. Landlord's contentions lack merit.

In JN Contemporary Art LLC v. Phillips Auctioneers LLC, 20-cv-4370 (DLC), 2020 WL 7405262, at *7 (S.D.N.Y. Dec. 16, 2020), the court specifically addressed and denied the same esjudem generis argument proffered by Landlord in this action, and expressly found that the Covid-19 pandemic fit within the agreement's force majeure "catch-all" provision "circumstances beyond our or your reasonable control." 2020 WL 7405262, at *7. Specifically, Judge Cote held:

> The COVID-19 pandemic and attendant government-imposed restrictions on business operations permitted Phillips to invoke the Termination Provision. **The pandemic and the regulations that accompanied it fall squarely under the ambit of paragraph 12(a)'s force majeure clause. That clause is triggered when the auction "is postponed for circumstances beyond our or your reasonable control**."

Id. (emphasis added.)

The "catch-all" provision in Kel Kim Corp., relied upon by Landlord, contained an express limitation only to those that are "similar" to the exemplars specified in that agreement's force majeure provision. 70 N.Y.2d at 93. Here, and unlike Kel-Kim Corp., § 26.03 contains no limitation on what "other causes beyond the reasonable control of the performing party" may constitute a force majeure event. Rather, like JN Contemporary, Landlord and Tenant intended the "other causes beyond the reasonable control of the performing party" in § 26.03 to be expansive. See id. (ejusdem generis "is also a principle of construction that the inclusion of listed items cannot narrow a general definition…"); see also Constellation Energy, 146 A.D.3d at 559. To the extent Landlord contends otherwise, that is an issue of fact.

Landlord's motion also ignores § 26.03's force majeure events "acts of God" and "labor shortages" and does not -- because it cannot -- rationalize how the Covid-19 pandemic is not an

"act of God," which is defined as "an overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado." Black's Law Dictionary (11th ed. 2019). The Covid-19 pandemic is akin to natural disasters such as an earthquake, flood or tornado. See JN Contemporary, 2020 WL 7405262, at *7 ("It cannot be seriously disputed that the COVID-19 pandemic is a natural disaster."). Moreover, the Covid-19 pandemic caused "labor shortages." As shown more fully below, Tenant was unable to hire a commercial mover until June 22nd because "non-essential" commercial moves were a governmentally recognized threat to human life, health, and safety.

Landlord argues that a force majeure event did not occur because § 26.03 fails to include "governmental restrictions or executive orders." (Mem. in Supp. at 14). It further contends that "other causes beyond the reasonable control of the performing party" only extend the specific exemplars in § 26.03 to acts of "disorder," and that the Executive Orders are "acts of law and order." (Id. at 13). Landlord next contends that if the parties intended § 26.03 to cover the Executive Orders they would have put in specific exemplars of "acts of law and order." On these issues too, Landlord is incorrect, and JN Contemporary is instructive.

The force majeure clause in JN Contemporary provided the following exemplars: "natural disaster, fire, flood, **general strike**, **war**, armed conflict, **terrorist attack** or nuclear or chemical contamination." JN Contemporary, supra, at *2 (emphasis added). The JN Contemporary Court held that the Executive Orders were "beyond the reasonable control of the parties" similar to "strikes," "war," or "terrorist acts" because they are "social and economic disruptions." Id. at * 8; see also Kel Kim Corp, 70 N.Y.2d at 902-03. It also recognized that "widespread social and economic disruptions" arising from governmental proclamations (such as these Executive Orders) are no less circumstances "beyond the reasonable control of the parties"

than those like strikes or terrorist acts. Therefore, because § 26.03 contains almost the exact same exemplars as those in JN Contemporary, the Executive Orders are a force majeure event. Landlord's characterization of the Executive Orders as an "act of disorder" or "act of law and order" is irrelevant.

Finally, Landlord's argument that the Covid-19 pandemic was foreseeable is contrary to recent case law interpreting this issue. See Intern. Plaza Assoc. L.P. v. Amorepacific US, Inc., 2020 WL 7416598 (Sup. Ct. N.Y. Co. Dec. 12, 2020) (directing discovery on issue of whether lease's purpose was frustrated because "[c]ontrary to plaintiff's claims [Covid-19] could not have been foreseen and a clause in the lease could not have been designed by defendant."); The Gap, Inc. v. 170 Broadway Retail Owner, LLC, 2020 N.Y. Slip. Op. 33623, 2020 WL 6435136 (Sup. Ct. N.Y. Co. Oct. 8, 2020) (denying motion to dismiss declaratory judgment cause of action brought by retail store seeking judgment that performance was impossible and/or purpose of lease frustrated by coronavirus pandemic).

Accordingly, both the Covid-19 pandemic and the Executive Orders constitute force majeure events, and therefore, Tenant's time to remove its property from the Premises was extended. There was no breach of the Lease, Tenant was not a holdover, and no rent was due and owing for June and July 2020. Landlord, on the other hand, breached the Lease and/or converted Tenant's funds by refusing to return Tenant's June payment and by unlawfully drawing down and retaining Tenant's letter of credit proceeds.

POINT IV

THE EXECUTIVE ORDERS AND THE LEASE PREVENTED TENANT FROM MOVING FOR "NON-ESSENTIAL" PURPOSES PRIOR TO JUNE 22, 2020

Landlord argues that even if the force majeure provision applied, Tenant could have removed its property from the Premises by May 31st because commercial movers were an

"essential" business under Executive Order 202.6. (Mem. in Supp. at 15). Landlord misreads this Executive Order and the Essential Business Guidance which interpret same. (See Laque Afd., Exs. 3, 6, 8-9).

"Courts looking to understand a law must 'accept and apply the presumption that lawmakers use words in 'their natural and ordinary signification.'" See Brathwaite v. Barr, 20-CV-174 (JLS), 2020 WL 4380666, at *6 (W.D.N.Y. July 31, 2020) (citing King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) (quoting Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1, 12 (1878)); Scheja v. Sosa, 4 A.D.3d 410, 411 (2d Dep't 2004) (interpreting September 11, 2001 executive orders according to their plain meaning). Executive Order 202.6 states, in pertinent part, that:

> All businesses … in the state shall utilize, to the maximum extent possible, any telecommuting or work from home procedures that they can safely utilize. Each employer shall reduce the in-person workforce at any work locations by 50% no later than March 20 … Any **essential business or entity providing essential services or functions shall not be subject to the in-person restrictions**. This includes …. **vendors of essential services necessary to maintain the safety, sanitation and essential operations of residences or other essential businesses…** [emphasis added].

Commercial movers were not deemed "essential" when the Essential Business Guidance was promulgated (only residential movers were). (Laque Afd., Ex. 8).[6] They were first deemed "essential" when the guidance was updated as of May 18, 2020, and only to the extent they provided "Essential services necessary to maintain the safety, sanitation and essential operations of residences or other businesses." (Id., Ex. 9). (emphasis added.) The removal of Tenant's property from the Premises was not "necessary to maintain the…safety, sanitation and essential

[6] Landlord has it backwards. If New York State intended any commercial move to be permitted during the 100% Workforce Reduction Requirement, it would have included commercial movers in Category 5 of the Essential Business Guidance titled "essential services," like security, fire prevention or building cleaners or janitors. (Laque Afd., Ex. 6). Commercial movers were not included in this all-encompassing category.

operations" of Tenant's or any other business. (Id. ¶ 22). Neither was Tenant an "essential" business." Therefore, Tenant could not perform a commercial move during the 100% Workforce Reduction Requirement.

Landlord interprets New York State's eventual inclusion of commercial movers in the Essential Business Guidance on May 18, 2020 as meaning that commercial movers were permitted to perform any move -- whether "essential" or "non-essential" -- after that date. However, the Essential Business Guidance states:

> With respect to business or entities that operate or provide both essential and non-essential services, supplies or support, **only those lines and/or business operations that are necessary to support the essential services, supplies, or support are exempt from the workforce reduction restrictions.**

(Id.) (emphasis added.) A commercial mover is capable of supplying both essential support (i.e., moving ventilators or PPP) and non-essential support (i.e., moving office furniture from a corporate office). But during the 100% Workforce Reduction Requirement, the State of New York permitted only the former type of commercial move. It would make no sense, as Landlord contends, for New York State to order all "non-essential" workers to stay home to protect their lives and the lives of others, only to then allow them to participate in potential super-spreader events by removing property from commercial space that the government mandated be shut down.

Finally, while Tenant does not concede its relevance, Landlord has placed in issue as a matter of fact the parties' and the market's understanding and implementation of the Executive Orders and Essential Business Guidance, and whether it was legally permissible for commercial movers to operate for "non-essential" purposes during the 100% Workforce Reduction Requirement. (Mem. in Supp. at 15-17). Landlord's cookie-cutter Filipchenko and Wechsler

affidavits are irrelevant.[7] The affiants' interpretation of Executive Orders and the Essential Business Guidance, and their actual engagement in potentially unlawful and unauthorized moves, also has no relevance to or bearing on the Court's interpretation of the Executive Orders, and cannot contradict the plain language of the Executive Orders or the Essential Business Guidance.[8]

Even less persuasive is the hearsay and lay opinion of commercial movers and advertisements that Landlord cherry-picked from websites and attached to the Complaint. These statements are inadmissible and cannot be considered on summary judgment. People v. Russell, 165 A.D.2d 327, 332 (2d Dep't 1991), aff'd, 79 N.Y.2d 1024 (1992) ("As a general principle of common-law evidence, lay witnesses must testify only to the facts and not to their opinions and conclusions drawn from the facts"); Richardson, Evidence § 7-101 (Prince 11th ed.); Zuckerman v. City of New York, 49 N.Y.2d at 562 (prima facie evidence on summary judgment must be in admissible form). Proskauer Rose LLP's marketing materials discussing the Essential Business Guidance and not made in connection with its representation of Tenant, also prove nothing and are inadmissible on this motion.

POINT V

THE PENALTY "HOLDOVER" RENT PROVISION OF LEASE § 22 DOES NOT APPLY WHEN THE LEASE HAS EXPIRED

Landlord asserts that Tenant is liable for the 150% penalty "holdover" rent amount for June and July 2020 pursuant to Lease § 22. However, this provision by its terms applies only in

[7] Neither affiant provides any particulars or the nature of the commercial moves alleged therein, including whether they involved "essential" businesses or whether those moves were "necessary to maintain the…safety, sanitation and essential operations" of a business.

[8] At the very least, pursuant to CPLR 3211(d) and 3212(f), Tenant is entitled to discovery from these affiants and their companies prior to the Court granting summary judgment or dismissal on this issues.

the event Landlord terminates the Lease or Tenant's right to possession. It has no application where the Lease has expired pursuant to its terms.

As noted above, when the parties set down their agreement in a clear, complete document their writing should as a rule be enforced according to its terms. D'Alto, 76 A.D.3d at 506. Contract terms should be given their ordinary, popular and nontechnical meanings, Benderson v. Wiper Check Inc., 266 A.D.2d 903, 904 (4th Dep't 1999), and the language of a contract should be read as a whole to "seek to give each clause its intended purpose in promotion of the primary and dominant purpose of the contract. William Press, Inc. v. State, 37 N.Y.2d 434, 440 (1975). A court should construe a contract so as to give full and meaning and effect to all of its provisions, Beal Sav. Bank v. Sommer, 8 N.Y.3d 318 (2007), and should not construe it in such a way that renders any term or phrase of a contract meaningless or superfluous. God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP, 6 N.Y.3d 371, 374 (2006); Lawyers' Fund for Client Protection of State of N.Y. v. Bank Leumi Trust Co. of N.Y., 94 N.Y.2d 398, 404 (2000).

Of particular relevance here, the use of different terms in the agreement strongly implies that the words are to be accorded different meanings, NFL Enterprises LLC v. Comcast Communications LLC, 51 A.D.3d 52 (1st Dep't 2008), and where certain language is omitted from a provision in a contract but placed in other provisions, it must be assumed that the omission was intentional. U.S. Fidelity & Guar. Co. v. Annunziata, 67 N.Y.2d 229 (1986).

Here, Lease § 22 provides that "[i]If Tenant fails to surrender all or any part of the Premises at the **termination** of the Lease, occupancy of the Premises after termination shall that of a Tenancy at sufferance. . . " (emphasis added.) Lease § 25 provides that "**at the termination of this lease or Tenant's right to possession**, Tenant shall remove Tenant's property from the

premises. . ." (emphasis added.) Lease § 19 tracks the language of § 25 and permits Landlord to "**Terminate this Lease**" and to "**Terminate Tenant's right to possession"** following an event of default, which requires Landlord's service of a predicate notice and Tenant's failure to cure. (emphasis added.)

That the parties intended § 22 to apply only where Landlord terminated the Lease is evidenced elsewhere in the agreement, such as where the parties repeatedly used the term "upon the termination or expiration of the Lease" when they intended a provision to apply to both situations. (See Lease § 5.02 ("The Report and any copies made from the Report are the Property of Landlord and shall be returned by Tenant or destroyed by Tenant **upon the termination or expiration of the Lease**"); Lease § 26.06 ("The **expiration of the Term**, whether **by lapse of time, termination or otherwise**, shall not relieve either party of any obligations which accrued prior or which may continue to accrue **after the expiration or termination of this Lease**"); §3.03 to Exhibit F to the Lease ("The Dish/Antenna, the appurtenances and the Aesthetic Screening, if any, shall remain the property of the Tenant, and shall be removed by Tenant at its own expense **at the expiration or earlier termination of the Lease or Tenant's right to possession hereunder**"); §5.02 to Exhibit F to the Lease ("Landlord, upon the **expiration date or sooner termination** of this Lease. . ."); and to §6.03 to Exhibit F to the Lease ("Notwithstanding anything herein to the contrary, if the Existing Lease **terminates (or the existing tenant's right to possession is terminated) prior to its stated expiration date** due to a default by the tenant under the Exhibit Lease, . . ."). (emphasis added.).

Further, while the Lease defines "Termination Date" as the expiration of the Lease "Term," the word "termination" in § 22 is lower case and not defined, thereby evidencing the parties' intention that it had a different meaning.

Landlord's strained interpretation of "termination" as synonymous with "expiration" ignores the express language of the provision, would render the other parts of the Lease referencing "expiration" or "expiration or termination" duplicative, meaningless and superfluous, and would re-write the parties' agreement, which this Court should avoid. John Doris, Inc. v. Solomon R. Guggenheim Foundation, 209 A.D. 2d 380, 381 (3d Dep't 1994) (courts may not rewrite agreement to relieve sophisticated party from terms it may later deem disadvantageous). Had Landlord wanted § 22 to apply in any situation where the Lease ended, it would have drafted the Lease in such a manner.[9]

POINT VI

IN THE ALTERNATIVE, TENANT WAS NOT A HOLDOVER BECAUSE LANDLORD BILLED AND ACCEPTED POST-LEASE EXPIRATION RENT, THEREBY CREATING A MONTH-TO-MONTH TENANCY PURSUANT TO RPL 232-C

In the alternative, Tenant never became a "holdover" and is not liable for penalty "holdover" rent because Landlord billed and accepted post-Lease expiration rent from Tenant. RPL § 232-c states in pertinent part:

> if the landlord shall accept rent for any period subsequent to the expiration of [the Lease] term, then, unless an agreement either express or implied is made providing otherwise, the tenancy created by the acceptance of such rent shall be a tenancy from month to month commencing on the first day after the expiration of such term.

[9] To the extent the Court believes the application of § 22 to Lease expiration is ambiguous, any ambiguity should be resolved against the drafter -- Landlord -- under the doctrine of contra proferentem. 151 W. Assoc. v. Printsiples Fabric Corp., 61 N.Y.2d 732, 734 (1984).

"The language in the statute 'unless an agreement either express or implied is made providing otherwise' refers only to extension of the duration of the holdover tenancy beyond a tenancy from month to month." Jaroslow, 23 N.Y.2d at 993. RPL § 232–c "provides a rebuttable presumption that should a landlord knowingly accept an occupant's tender of rent after the term of possession has ended, a new month-to-month tenancy will be created…" Barton v. Truesdell, 183 A.D.3d 979, 981 (3d Dep't 2020); Omansky v. 160 Chambers St. Owners, Inc., 155 A.D.3d 460, 461 (1st Dep't 2017) ("continued acceptance of rent post-lease termination merely creates a month-to-month holdover tenancy.")

Landlord accepted Tenant's June 2020 rent payment, without objection, and refused to return it. (Laque Afd. ¶ 39). 205 East 78th St. Assocs. v. Cassidy, 192 A.D.2d 479 (1st Dep't 1993) revg. N.Y.L.J., Sept. 27, 1991, at 21, col 4 (App. Term. 1st Dep't) (retention of an inadvertently received rent check without immediately returning it or explaining the failure to return it immediately deemed an acceptance of the check) accord. 1411 Broadway LLC v. Great White Bear LLC, 18 Misc. 3d 1121 (N.Y. Co. Civ. Ct. 2007). Landlord thereafter billed Tenant for the Premises' July 2020 base rent, in the amount set forth in the Lease, and followed up by email dated July 7, 2020 requesting that Tenant process and pay it ASAP. (Laque Afd., Ex 16); Metropolitan Ins./Annuity Co. v. Rowinski, 8 Misc. 3d 477, 479 (N.Y. Co. Civ. Ct. 2004) ("fact respondent was billed for rent for a period beyond the termination date stated in the notice militates toward finding of waiver on the part of landlord"). The Amended July Invoices reflect that Landlord drew-down on Tenant's letter of credit and applied the proceeds to the July rent. Landlord's billing and acceptance of the June and July rent created a month-to-month tenancy at the last rental amount under the Lease, such that Tenant was not a "holdover" or liable for penalty "holdover" rent.

POINT VII

LANDLORD'S MOTION IS PROCEDURALLY DEFECTIVE

Landlord's motion is primarily based on the parties' verified pleadings (which substitute for affidavits as per CPLR 105(u)), and to the exhibits to the Complaint. Its failure to attach the pleadings to the moving papers requires denial of the motion on procedural grounds. CPLR 3212(b) and Commercial Division Rule 16 (22 N.Y.C.R.R. 202.70, R. 16) respectively require that "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings, . . ." and that "counsel must attach copies of all pleadings and other documents as required by the CPLR and as necessary for an informed decision on the motion (especially on motions pursuant to CPLR 3211 and 3212.)" (emphasis added).[10] The movant's failure to attach copies of the pleadings to a summary judgment motion renders it procedurally defective, requiring denial of the motion. Washington Realty Owners, LLC v. 260 Washington St., LLC, 105 A.D.3d 675 (1st Dep't 2013).

By letter, dated January 8, 2020 (Dkt. No. 50), Landlord acknowledged and belatedly sought to correct this defect by filing a "supplemental" affirmation along with the Complaint, the Answer/Counterclaims and a brand new Reply to the counterclaims.[11] Relying on Galpern v. Air Chefs, L.L.C., 180 A.D.3d 501, 502 (1st Dep't 2020), Landlord requested this Court exercise its discretion and overlook Landlord's rule violation. Galpern, however, is devoid of any facts or analysis showing why the court exercised its discretion in that case, and provides no guidance for

[10] CPLR 3211 has a similar requirement. Alizio v. Perpignano, 225 A.D.2d 723, 725 (2d Dep't 1996) ("since the defendants failed to provide the Supreme Court with the very pleading necessary to establish the validity of their defenses, the court improperly granted their motion.").

[11] The Reply dated January 6, 2021 did not even exist at the time Landlord filed the motion on December 14, 2020. As noted in Tenant's objection (Dkt. No. 43), Landlord cannot make supplemental filings -- especially when they violate two stipulation regarding the briefing schedule and service of papers on the motion (Dkt. Nos. 24, 28) and contain a pleading that did not exist at the time the motion was made -- to cure a fatal procedural defect in the motion.

this Court to excuse Landlord's failures. Unlike Galpern, the record here is also not "sufficiently complete." No pleadings are attached to Landlord's moving papers. This Court should follow Washington Realty Owners, LLC, 105 A.D.3d at 675, in which the First Department reversed the trial court and held that the movant's failure to attach an Answer to the moving papers required the denial of a summary judgment motion.

POINT VIII

TENANT'S COUNTERCLAIMS ARE WELL PLEADED[12]

The Answer/Counterclaims assert three counterclaims for declaratory relief that (i) the Covid-19 pandemic and Executive Orders were force majeure events triggering the extension of Tenant's time to remove its property from the Premises as per Lease § 26; (ii) Lease § 22 is inapplicable because the Lease expired and was not "terminated;" and (iii) in the alternative, that Landlord's billing and acceptance of June and July rent created a month-to-month tenancy. Tenant has further asserted counterclaims for damages for breach of the Lease, conversion, money had and received, and unjust enrichment based on Landlord's refusal to return Tenant's June rent payment after due demand, Landlord's unlawful draw-down on and retention of Tenant's letter of credit proceeds, and for attorney's fees as the prevailing party in this litigation.

Landlord's motion does not separately address the counterclaims or show that Tenant has not stated valid causes of action. Landlord cites federal procedural case law and argues that Tenant's counterclaims should be dismissed because they are a "mirror image" of Landlord's claims. They are not. In any event, this is not the law of New York.

As with Landlord's summary judgment motion, factual issues exist that cannot be determined on a CPLR 3211 motion, and prior to issue being joined. Law Research Serv., Inc. v.

[12] Because issue has not been joined on Tenant's counterclaims at the time Landlord made its motion, the Court cannot grant summary judgment on those claims.

Honeywell, Inc., 31 A.D.2d 900, 901 (1st Dep't 1969) ("on a motion to dismiss the complaint for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him.") There is a justiciable controversy and genuine dispute regarding whether Tenant's time to remove its property from the Premises was extended by force majeure, whether Landlord is liable in damages to Tenant, whether Tenant was a month-to-month tenant, and whether Tenant is liable for penalty "holdover" rent, among other issues.

Moreover, and contrary to Landlord's assertions, Tenant's damages causes of action are not duplicative of Landlord's claims for breach of the Lease. Where, as here, there is a dispute about the existence of a contract, Tenant may plead its contractual and non-contractual causes of action in the alternative. Joseph Sternberg, Inc. v. Walber 36th St. Assoc., 187 A.D.2d 225, 228 (1st Dep't 1993). Tenant contends the Lease has expired and all rent was paid. If § 26.03 is inapplicable, then Tenant contends that Landlord is entitled to, at most, its actual damages and use and occupancy (which is a quasi-contract remedy). Landlord, on the other hand, contends it is entitled to contractual penalty "holdover" rent under the Lease. Under these circumstances, Tenant can plead in the alternative.

CONCLUSION

For the foregoing reasons, Tenant respectfully requests the Court deny Landlord's motion, with prejudice, and grant Tenant such other and further relief as it deems just and proper.

Dated: New York, New York
February 4, 2020

SILLS CUMMIS & GROSS P.C.

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COMMERCIAL DIVISION RULE 17 CERTIFICATION

The undersigned attorney for Defendants certifies pursuant to Rule 17 of the Rules of the Commercial Division of the Supreme Court that the word count for the foregoing is 6975 words, exclusive of the caption, table of contents, table of authorities, and signature block as counted by the word processing program: Microsoft Word.

/s/ Mitchell D. Haddad
Mitchell D. Haddad

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