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

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

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON ITS CLAIMS AND TO DISMISS, OR ALTERNATIVELY, FOR SUMMARY JUDGMENT DISMISSING, DEFENDANT'S COUNTERCLAIMS

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March 4, 2021

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Plaintiff (the "Owner") submits this reply brief in further support of its motion (Dkt. No. 29).

PRELIMINARY STATEMENT

The facts of this case are simple and undisputed: Discovery, Owner's commercial tenant, retained possession of its rented space (the "Premises") for two months after the May 31, 2020 "Termination Date" under the Lease. During these two months, Discovery used the Premises to store its property and concededly continued to access the Premises for "mailroom, facilities, security, and office management purposes." And Discovery did not purport to "quit and surrender" the Premises to Owner until July 27, 2020. But the Lease required Discovery to pay 150% in rent if it failed to surrender the Premises upon the termination of the Lease. And Discovery did not pay this holdover rent.

Discovery attempts to muddy the waters by raising irrelevant factual issues. But this case can be resolved based solely on the unambiguous terms within the four corners of the Lease and the undisputed facts above.

First, as explained below, this motion is not premature. Indeed, no amount of discovery can change the undisputed facts above, which give rise to Discovery's liability. And in any event, all the discovery that Discovery claims it needs is either in its possession, relates solely to legal issues concerning interpretation of the Lease, or relates to factual issues that have no bearing on the outcome of this case.

Second, there is no triable issue of fact concerning whether Discovery was a holdover. Indeed, the Lease expressly requires Discovery to "remove [its] Property from the Premises" and "quit and surrender" at the end of the Lease—which Discovery indisputably did not do until two months later.

Third, the force-majeure clause does not relieve Discovery of its obligation to pay rent, holdover or otherwise. Indeed, this clause states that it does not apply to the payment of "Rent"—the definition of which includes all amounts Discovery owes under the Lease, including holdover rent. Further, though this Court need not even reach this issue, the force-majeure clause does not expressly apply to governmental restrictions or executive orders, or even a pandemic. And under controlling authority, the catch-all language in this clause does not expand its coverage to Governor Cuomo's executive orders.

Fourth, Discovery's claim that the holdover clause applies only when the Lease is terminated early is meritless. The Lease defines the last day of the term, May 31, 2020, as the "Termination Date." And the parties' most recent amendment to the Lease expressly contemplates the application of the holdover clause after the "Termination Date."

Fifth, Discovery erroneously claims that, under R.P.L. § 232-c, because Owner accepted its partial payment for June rent, it became a month-to-month tenant. But in any event, under controlling caselaw, even if Discovery became a month-to-month tenant after the Termination Date, it was still subject to all the terms of the Lease—including the holdover clause. Moreover, because of the Lease's nonwaiver clause and clause permitting Owner to accept partial rent, Owner's acceptance of Discovery's base rent in June and billing of base rent for July (which Owner corrected three weeks later) did not waive Owner's right to collect holdover rent under the Lease.

ARGUMENT

I. DISCOVERY FAILS TO REFUTE OWNER'S SHOWING THAT THIS COURT SHOULD GRANT SUMMARY JUDGMENT ON OWNER'S CLAIMS

A. Discovery Erroneously Argues That This Motion is Premature

As this Court knows, it is common for courts to grant summary judgment at the outset of a suit by a commercial landlord for unpaid rent. This case is no different. Indeed, the sole questions this Court must answer are (1) whether the Lease permitted Discovery to retain possession of the Premises after the Termination Date without paying rent, and (2) if not, what amount of rent was owed.

This Court can answer both of these questions by looking solely within the four corners of the Lease:

First, under paragraph 25 of the Lease, at the termination of the Lease or Discovery's right of possession (*i.e.*, the May 30, 2020 "Termination Date"), Discovery was required to "remove [its] Property from the Premises, and quit and surrender the Premises to Landlord." Dkt. No. 3 ¶ 25. But Discovery did not do so until the end of July. And even if the force-majeure clause extended the Lease or Discovery's time to surrender (as explained below, it did not), it expressly excluded from its application the obligation to pay rent. *Id.* ¶ 26.03. So the Lease did not permit Discovery to retain possession of the Premises after the Termination Date (or at any time) without paying rent.

Second, under paragraph 22 of the Lease, upon Discovery's failure to surrender "all or any part of the Premises" at the termination of the Lease (*i.e.*, the May 30, 2020 "Termination Date"), Discovery became a tenant at sufferance, and was required to pay 150% of the Base and Additional Rent Due.

No amount of discovery can change these legal conclusions. And so Discovery cannot defeat summary judgment by creating irrelevant factual issues and then claiming it needs discovery on them.

Discovery claims that "facts needed to oppose the motion exist but are not in [its] possession, and the existence of essential facts depends upon knowledge exclusively within [Owner's] possession." Dkt. No. 57 at 3.

But most of the discovery that Discovery claims it needs to oppose our motion is information in ***its*** possession. *See, e.g.*, *id.* at 5 ("whether ***Tenant*** was prevented from removing its property from the Premises by the May 31st Lease expiration date") ("names, dates and number of all of ***Tenant's*** employees that Landlord alleges accessed the building both before and during the Covid-19 pandemic") (emphasis added); *see also Estate of Bachman v. Hong*, 169 A.D.3d 436, 437 (1st Dep't 2019) (plaintiff's summary-judgment motion "not premature" even though "discovery had not yet been taken," because defendant was in possession of relevant "knowledge" and "did not show any need for discovery").

And most of the rest of the "discovery" that Discovery claims it needs relates solely to ***legal*** issues concerning interpretation of the Lease. *See id.* But these legal issues are for this Court to decide, and do not turn on extrinsic evidence outside the four corners of the Lease.

B. Discovery Erroneously Argues That Whether It Was a Holdover Is a Factual Issue

In our opening brief, we showed that Discovery was a holdover under the Lease as a matter of law, because it indisputably failed to "remove [its] Property from the Premises" and "quit and surrender" the Premises until two months after the Termination Date. Dkt. No. 35 at 9–10; *see also* Dkt. No. 3 ¶ 25.

In opposition, Discovery claims that there is an issue of fact concerning whether leaving its property in the Premises after the Termination Date made it a holdover. Dkt. No. 57 at 6–7. And in support, Discovery relies on the First Department's decision in *Lordae Realty Corp. v. Montefiore Medical Center*, in which the court held that 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.'" *Lordae Realty Corp. v. Montefiore Med. Ctr.*, 232 A.D.2d 338, 338 (1st Dep't 1996) (citation omitted); Dkt. No. 57 at 6–7.

But Discovery ignores that, unlike in *Lordae Realty Corp.*, the Lease here expressly describes what Discovery was required to do to "surrender" the premises. *See* Dkt. No. 3 ¶ 25 (for "Surrender of Premises" to occur, Discovery must "remove [its] Property from the Premises," and "quit and surrender the Premises to Landlord"). So the common-law test for determining whether a tenant has become a holdover does not apply, because the Lease expressly controls. And under the Lease, because Discovery failed to satisfy the conditions for a "surrender," and because Discovery does not even argue that it "surrendered" the Premises before July 27, 2020, Discovery became a holdover after May 31, 2020. *See id.* ¶ 22 ("If tenant fails to surrender all or any part of the Premises at the termination of this Lease, occupancy of the Premises after termination shall be that of a tenancy at sufferance.").

But even under the common-law analysis in *Lordae Realty Corp.*, Discovery is indisputably a holdover. Indeed, Discovery concedes that it did not even beginning removing ***any*** of its property until June. Dkt. No. 59 ¶¶ 22, 26–29. This concession is dispositive. *See Niagara Frontier Transp. Auth. v. Euro-United Corp.*, 303 A.D.2d 920, 923 (4th Dep't 2003) (when property left in premises after lease ends "consists of the entire stock and fixtures of a corporation," there is a "holdover tenancy as a matter of law").

Further, Discovery also admits that its employees and contractors accessed the Premises after the Termination Date. Dkt. No. 59 ¶ 19 (Discovery's employees and contractors "accessed the Premises (in some instances on multiple occasions) for mailroom, facilities, security, and office management purposes"); Dkt. No. 59 ¶ 26 (on or after June 8, 2020, "Tenant's employees were thereafter allowed to access the Premises at designated times"); *see also* Dkt. No. 66. So regardless of ***how many*** of its employees accessed or used the Premises after the Termination Date and how often, there is no dispute that Discovery continued to occupy, access, and control the Premises until the end of July. Nor does Discovery claim that it surrendered the Premises to Owner before July 27, 2020.

C. Discovery Erroneously Argues That the Lease's Force-Majeure Clause Excuses Its Payment of Rent, Holdover or Otherwise

1. The Force-Majeure Clause Does Not Excuse Discovery From Its Obligation to Pay Holdover Rent, Because the Force-Majeure Clause Does Not Apply to the Payment of Rent

In our opening brief, we showed that the force-majeure clause excludes the payment of "Rent" from the obligations that would be excused if a force majeure occurred. Dkt. No. 35 at 20; *see* Dkt. No. 3 § 26.03. So even if Discovery is right that a force majeure occurred under the Lease (it is not), Discovery would still be required to pay rent. *Id.* at 20–21.

In opposition, Discovery claims that 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." Dkt. No. 57 at 12. So according to Discovery, it was "not a holdover, and ***no rent***"—base or holdover—was due and owing for June and July 2020." *Id.* (emphasis added). But Discovery is wrong.

Even if the force-majeure clause applied here (as explained below, it does not), this would not relieve Discovery of its obligation to pay "Rent"—which includes Base Rent and "all

sums (exclusive of Base Rent) that Tenant is required to pay Landlord under this Lease," including holdover rent. Dkt. No. 3 §§ 4.01, 26.03. And since Discovery denies that the Termination Date of the Lease was extended by the force-majeure clause (Dkt. No. 6), the "Rent" that Discovery owes after the Termination Date is governed by the holdover clause. *See 98-48 Queens Blvd LLC v. Parkside Mem'l Chapels, Inc.*, 2021 N.Y. Misc. LEXIS 265, at *21 (Civ. Ct. Queens Cty. Jan. 26, 2021) (COVID-19 pandemic did not relieve commercial tenant of obligation to pay ***holdover*** rent despite force-majeure clause that included "restrictive governmental laws" or "regulations," because force-majeure clause excluded from its coverage payment of rent).

2. The Force-Majeure Clause Does Not Excuse Performance Based on Governmental Restrictions

In our opening brief, we also showed that, under the Court of Appeals's decision in *Kel Kim Corp. v. Central Markets, Inc.*, "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused." Dkt. No. 35 at 12 (quoting *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902–03 (1987)). And because the *force-majeure* clause here does not expressly include government restrictions or executive orders, or even a pandemic or disease outbreak, it does not apply here. *Id.*

In opposition, Discovery claims that the COVID-19 pandemic and Governor Cuomo's stay-at-home executive orders were "*force majeure* events under § 26.03 of the Lease." Dkt. No. 57 at 8. Not so.

First, while Discovery briefly cites (*id.)* the "Covid-19 pandemic" as a force-majeure event that purportedly triggered the force-majeure clause, Discovery's own actions and concessions show that this was not the basis for its holding over. To the contrary, Discovery concedes that it was solely ***Governor Cuomo's executive orders*** that prevented it from

surrendering the Premises. *See* Dkt. No. 59 ¶ 24 ("Tenant would have movers in the Premises to remove Tenant's property ***as soon as the law permitted it to do so***.") (emphasis added); Dkt. No. 57 at 8 (force-majeure clause extended Discovery's time to remove its property from the Premises by the exact "number of days the 100% Workforce Reduction Requirement was in place"). And it was solely what Discovery claims were changes in these executive orders that prompted it to move out in late June and July and surrender at the end of July. Dkt. No. 59 at 27–29. Thus, even under Discovery's view of the world, the COVID-19 pandemic itself was not what triggered the force-majeure clause.

Second, Discovery does not refute the controlling authority we cited in our opening brief (Dkt. No. 35 at 12) holding that catch-all language in a force-majeure clause is "not to be given expansive meaning," and is instead "confined to things of the same kind or nature as the particular matters mentioned." *Kel Kim Corp.*, 70 N.Y.2d at 902. Nor does Discovery seriously contend that governmental restrictions or executive orders—the sole basis for Discovery's holding over—are of the "same kind or nature" as the events listed in the force-majeure clause—"strikes, acts of God, shortages of labor or materials, war, terrorist acts, [or] civil disturbances." Dkt. No. 3 § 26.03.

Instead, Discovery relies almost exclusively on a single federal decision (outside the commercial-leasing context) applying a force-majeure clause to the COVID-19 pandemic and Governor Cuomo's executive orders. *See* Dkt. No. 57 at 10–12 (citing *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 U.S. Dist. LEXIS 237085, at *17 (S.D.N.Y. Dec. 16, 2020)). But the clause there was different from the one in the Lease. The force-majeure clause in the Lease lists six specific force-majeure events, and then includes a catch all at the end for "other causes beyond the reasonable control of the performing party." Dkt. No. 3 § 26.03.

But the clause in *JN Contemporary Art LLC*—which was a termination clause—was not limited to specific events. *JN Contemporary Art L.L.C.*, 2020 U.S. Dist. LEXIS 237085, at *6. Instead, it stated that termination of an auction contract was permitted if the auction were "postponed for circumstances beyond our or your reasonable control, ***including, without limitation*** . . ." *Id.* So the clause itself applied to ***any*** circumstances beyond the parties' reasonable control, and then listed some specific events merely as examples. *Id.* And indeed, the court there rejected the application of *ejusdem generis* for this reason, holding that the pandemic "fits within the ***general definition*** in the Termination Provision," and that the specific events listed are included "'without limitation'"—so the "inclusion of listed items cannot narrow the ***general*** definition, in particular when the contract indicates that the listed items are not given to limit the definition." *Id.* at 21.

. . .

As also explained in our opening brief, Governor Cuomo's executive orders did not prevent commercial movers from operating. Dkt. No. 35 at 15–19. But given that the force-majeure clause does not excuse Discovery's obligation to pay holdover rent and does not apply to governmental restrictions in any event, this Court need not even reach this issue.

D. Discovery Erroneously Argues That the Holdover Clause Does Not Apply Because the Lease Was Not Terminated Early

In our opening brief, we showed that the holdover clause—which applies if Discovery failed to surrender all or part of the Premises at the "termination" of the Lease (Dkt. No. 3 § 22)—applies regardless of whether the lease was terminated early or expired by its terms. Dkt. No. 35 at 10–11. Specifically, we showed that May 31, 2020—the date when the lease expired by its terms—is defined as the ***"Termination Date."*** *Id.* at 10 (citing Dkt. No. 3 § 1.06). So the Lease terminated on the Termination Date. *Id.*

In opposition, Discovery argues that the Lease elsewhere uses the words "termination or expiration," so the holdover clause—which refers to only the "termination" of the Lease—must refer only to an early termination of the Lease. Dkt. No. 57 at 15–18. Not so.

As explained in our opening brief and above, the definition of May 31, 2020—the date the Lease expired by its terms—as the ***"Termination Date"*** refutes Discovery's argument. But the Seventh and most recent Amendment to the Lease, executed in May 2018, further refutes Discovery's argument. Indeed, in describing Owner's rights if Discovery did not surrender a portion of the Premises concerning which it was waiving its renewal option, the Amendment states that, "upon the occurrence of the Current Termination Date"—defined as May 31, 2020—this portion of the Premises would no longer be deemed part of the Premises, and would be subject to all the provisions of the Lease "applicable as of the Current Termination Date with respect to the surrender thereof ***(including any holdover thereof)***." Dkt. No. 3, Seventh Am. § 2 (emphasis added). Thus, as shown by this Amendment, the parties contemplated that the holdover clause would apply after the May 31, 2020 Termination Date, not just an early termination.

E. Discovery Erroneously Argues That Owner's Acceptance of Its Partial-Rent Payment Converted Discovery to a Month-to-Month Tenant and Relieved Discovery of Its Obligation to Pay Holdover Rent

In its opposition, Discovery claims that, at most, because Owner accepted its partial-rent payment for June 2020, under R.P.L. § 232-c, it became a month-to-month tenant and was liable only for base, not holdover, rent. Dkt. No. 57 at 18–19. Not so either.

First, R.P.L. § 232-c does not apply, because the holdover clause—which states that Discovery becomes a "tenan[t] at sufferance" if it holds over—is an "agreement either express or implied is made providing otherwise" under R.P.L. § 232-c. *See N. Shore Cmty. Servs., Inc. v. Cmty. Drive LLC*, 120 A.D.3d 1142, 1142–43 (1st Dep't 2014) (tenant's argument that

landlord's "acceptance of its tender of rent for the month following the expiration of the lease agreement created a new month-to-month tenancy" under R.P.L. § 232-c was "refuted by the unambiguous terms of the lease," which stated that, upon tenant's continued occupation of the premises after the lease ended, tenant would be treated as a "tenancy at will").

Second, even if a month-to-month tenancy were created under R.P.L. § 232-c by Owner's acceptance of rent, this month-to-month tenancy continued "on the same terms as those in the original lease." *Anthi New Neocronon Corp. v. Coal. of Landlords, Homeowners & Merchs., Inc.*, 2020 N.Y. Misc. LEXIS 2964, at *8 (Dist. Ct. Suffolk Cty. June 30, 2020) (citing *City of New York v. Pennsylvania R. Co.*, 37 N.Y.2d 298 (1975)). This includes the requirement that Discovery pay ***holdover*** rent. *See Elite Gold, Inc. v. TT Jewelry Outlet Corp.*, 31 A.D.3d 338, 340 (1st Dep't 2006) (though tenant became month-to-month tenant under R.P.L. § 232-c when it remained in possession after lease ended and landlord accepted its payments of base rent, landlord was still entitled to holdover rent under lease); *Thirty-One Corp. v.* FLAX, 2006 N.Y. Misc. LEXIS 793, *4–5 (1st Dep't Appt. Term 2006) (rejecting as "unavailing" tenant's argument that, because it became a month-to-month tenant under R.P.L. § 232-c, it was thus "not a holdover subject to the use and occupancy rate" under the holdover clause in the lease, because lease stated that, if it held over, tenant "would pay use and occupancy at an agreed rate"); *Nejat v. Axiotis*, 2010 N.Y. Misc. LEXIS 4560, at *18–20 (Sup. Ct. N.Y. Cty. Sept. 21, 2010) (Gische, J.S.C.) (even if "month-to-month tenancy [i]s created by law" based on landlord's acceptance of base rent under R.P.L. § 232-c, tenant remains liable for holdover rent set forth in lease).

Discovery also argues that Owner sent it a single invoice for base, rather than holdover, rent and accepted its base-rent payment, and so it waived its right to collect holdover rent. Dkt. No. 57 at 19. But Owner corrected this invoice just weeks later. Dkt. No. 74. And in any event,

the Lease allows Owner to collect partial rent "on account," and also includes a nonwaiver clause stating that Owner's "delay in taking action for a Default, shall not constitute a waiver of the Default, nor shall it constitute an estoppel." Dkt. No. 3 ¶¶ 4.01, 26.02.

This refutes any claim of waiver. *See Teri-Nichols Institutional Food Merchants, LLC v. Elk Horn Holding Corp.*, 64 A.D.3d 424, 425 (1st Dep't 2009) ("[i]t is of no consequence that defendant billed plaintiff for the expired rent for one month as opposed to the holdover rate in view of the express 'no waiver' provision of the lease, which states that receipt of a lesser rent shall not constitute a waiver of the landlord's rights"); *Elite Gold, Inc.*, 31 A.D.3d at 340 ("given the lease's clear and unambiguous language, the court erred in finding that the landlord waived its right to collect the higher holdover rent by billing defendant at the lower rate through March 2004," since "[b]y doing so, the motion court effectively rendered the no waiver clause of the lease meaningless and failed 'to give meaning to all of its terms'") (citations omitted); *Thirty-One Corp.*, 2006 N.Y. Misc. LEXIS 793, at *4 (in accordance with nonwaiver clause and clause allowing landlord to accept partial rent payments and apply them "on account," landlord "did not waive its right to full payment under the lease by accepting a lesser amount"); *Nejat*, 2010 N.Y. Misc. LEXIS 4560, at *3, 20 ("despite a landlord's acceptance of the rent for a long period," landlord is "not precluded from invoking a liquidated damages clause for that period even months after the month-to-month tenancy expired" and even after landlord "billed" for lesser rent amount).

II. DISCOVERY FAILS TO REFUTE OWNER'S SHOWING THAT THIS COURT SHOULD DISMISS, OR ALTERNATIVELY, GRANT SUMMARY JUDGMENT DISMISSING, DISCOVERY'S COUNTERCLAIMS

This Court should dismiss, or alternatively, grant summary judgment dismissing, Discovery's counterclaims for the same reasons it should grant summary judgment on our claims.[1]

CONCLUSION

This Court should grant summary judgment to the Owner on its claims and dismiss, or grant summary judgment dismissing, Discovery's counterclaims.

Dated: March 4, 2021
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[1] In a "gotcha" attempt, Discovery claims that our motion is "procedurally defective" because the pleadings were not attached to it. Dkt. No. 57 at 20. But this argument is frivolous, since, under C.P.L.R. 2214(c), "in an e-filed action, a party that files papers in connection with a motion need not include copies of papers that were filed previously electronically with the court, but may make reference to them, giving the docket numbers on the e-filing system"—as we did here. *See* Dkt. No. 50.

WORD-COUNT CERTIFICATION

In accordance with Rule 17 of the Commercial Division Rules

I certify that this document was prepared on a computer using Microsoft Word 2016 in 12-point, Times New Roman font; that the word count of this document, as calculated in accordance with Rule 17 of the Commercial Division Rules by the computer processing system used to prepared this document, is 3,776; and that this document thus complies with the word-count limit in Rule 17 of the Commercial Division Rules.

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