

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

<p>850 THIRD AVENUE OWNER, LLC,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p style="text-align: center;"><i>-against-</i></p> <p>DISCOVERY COMMUNICATIONS, LLC,</p> <p style="text-align: center;"><i>Defendant.</i></p>	<p>Index No.: 654148/2020</p> <p>Hon. Barry R. Ostrager</p> <p><u>NOTICE OF APPEAL</u></p> <p>Mot. Seq. No. 1</p>
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PLEASE TAKE NOTICE that Plaintiff 850 Third Avenue Owner, LLC appeals to the Appellate Division, First Department, from the order (Dkt. No. 98) (the “Order”) of the Honorable Barry R. Ostrager, dated and entered March 22, 2021, and served with Notice of Entry on March 23, 2021 (Dkt. No. 99), denying Plaintiff’s motion for summary judgment on its claims and denying Plaintiff’s motion to dismiss, or for summary judgment dismissing, Defendant’s counterclaims.

A copy of the Order, with notice of entry, is attached as Exhibit A. An informational statement is attached as Exhibit B.

Dated: New York, New York
March 24, 2020

SCHLAM STONE & DOLAN LLP



By:

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*Attorneys for Plaintiff 850 Third Avenue
Owner, LLC*

Exhibit A

**SUPREME COURT OF THE STATE OF NEW
YORK NEW YORK COUNTY**

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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850 THIRD AVENUE OWNER, LLC,

Plaintiff,

- v -

DISCOVERY COMMUNICATIONS, LLC,

Defendant.

INDEX NO.	654148/2020
MOTION DATE	
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

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HON. BARRY R. OSTRAGER

The motion by plaintiff 850 Third Avenue Owner, LLC (“Owner”) for summary judgment, declaring defendant Discovery Communications, LLC to be a holdover tenant and/or liable for two months unpaid rent for the months of June and July 2020, is denied, as is its motion to dismiss defendant's counterclaims seeking reimbursement of the security deposit and declaratory relief.

If ever a case cried out to be mediated and not litigated, this is such a case. The defendant's lease at 850 Third Avenue expired on May 31, 2020 at the height of the COVID-19 pandemic. Consequently, the defendant, Discovery Communications, LLC (“the Tenant”), claims it could not relocate its very substantial office furnishings and equipment until the end of July, 2021. The plaintiff Owner claims that the defendant Tenant simply opportunistically delayed moving because the premises to which the Tenant planned to move were not ready for the Tenant’s occupancy.

There are substantial questions of fact, including, but not limited to: (1) whether the COVID-19 pandemic triggered the force majeure provision of the lease, *see JN Contemporary*

Art LLC v. Phillips Auctioneers LLC, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020); (2) whether movers were precluded by New York State Executive Orders from operating from March 20, 2020 to May 18, 2020 and beyond; and (3) the extent to which the defendant Tenant could and did utilize the demised premises during the relevant time period. Consequently, the motion is, in all respects, denied and the May 14, 2021 oral argument on the motion is cancelled.

A Preliminary Conference is scheduled for April 22, 2021 at 10:30 a.m. The parties will provide dial in access for that conference by efiled correspondence. Alternatively, counsel shall download the Preliminary Conference Order form available on the Court’s web page <http://ww2.nycourts.gov/courts/comdiv/ny/newyork.shtml>. Counsel are directed to meet and confer and complete and efile the form by April 14 with a Note of Issue deadline no later than 22 months after the date of the Order and interim deadlines agreed to by the parties. A compliance conference date should be selected by counsel for a Tuesday in July. If the proposed Preliminary Conference Order is acceptable to the Court, no appearance will be necessary on April 22.

Dated: March 22, 2021


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

Exhibit B

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance
850 THIRD AVENUE OWNER, LLC <p style="text-align: center;">- against -</p> DISCOVERY COMMUNICATIONS, LLC		Date Notice of Appeal Filed
Case Type		Filing Type
<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case		
<input type="checkbox"/> Administrative Review <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Family Court <input checked="" type="checkbox"/> Real Property (other than foreclosure)	<input type="checkbox"/> Business Relationships <input type="checkbox"/> Domestic Relations <input type="checkbox"/> Mortgage Foreclosure <input type="checkbox"/> Statutory	<input checked="" type="checkbox"/> Commercial <input type="checkbox"/> Election Law <input type="checkbox"/> Miscellaneous <input type="checkbox"/> Taxation
<input checked="" type="checkbox"/> Contracts <input type="checkbox"/> Estate Matters <input type="checkbox"/> Prisoner Discipline & Parole <input type="checkbox"/> Torts		

Informational Statement - Civil

Appeal

Paper Appealed From (Check one only):		If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.	
<input type="checkbox"/> Amended Decree	<input type="checkbox"/> Determination	<input checked="" type="checkbox"/> Order	<input type="checkbox"/> Resettled Order
<input type="checkbox"/> Amended Judgment	<input type="checkbox"/> Finding	<input type="checkbox"/> Order & Judgment	<input type="checkbox"/> Ruling
<input type="checkbox"/> Amended Order	<input type="checkbox"/> Interlocutory Decree	<input type="checkbox"/> Partial Decree	<input type="checkbox"/> Other (specify):
<input type="checkbox"/> Decision	<input type="checkbox"/> Interlocutory Judgment	<input type="checkbox"/> Resettled Decree	
<input type="checkbox"/> Decree	<input type="checkbox"/> Judgment	<input type="checkbox"/> Resettled Judgment	
Court: Supreme Court	County: New York		
Dated: 03/22/2021	Entered: 03/22/2021		
Judge (name in full): Hon. Barry R. Ostrager	Index No.: 654148/2020		
Stage: <input checked="" type="checkbox"/> Interlocutory <input type="checkbox"/> Final <input type="checkbox"/> Post-Final	Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury		
Prior Unperfected Appeal and Related Case Information			
Are any appeals arising in the same action or proceeding currently pending in the court?		<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.			
Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:			
N/A			
Original Proceeding			
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus		Date Filed:	
Statute authorizing commencement of proceeding in the Appellate Division:			
Proceeding Transferred Pursuant to CPLR 7804(g)			
Court: Choose Court	County: Choose County		
Judge (name in full):	Order of Transfer Date:		
CPLR 5704 Review of Ex Parte Order			
Court: Choose Court	County: Choose County		
Judge (name in full):	Dated:		
Description of Appeal, Proceeding or Application and Statement of Issues			
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.			
Appeal from an order, dated and entered March 22, 2021, denying Plaintiff's motion for summary judgment on its claims and denying Plaintiff's motion to dismiss, or for summary judgment dismissing, Defendant's counterclaims.			

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The lower court erred in denying Plaintiff's motion for summary judgment because there were no triable issues of fact that (1) Defendant's lease expired on May 31, 2020; (2) Defendant held over for an additional two months without paying full base rent, let alone holdover use and occupancy; and (3) the lease required Defendant to pay 150% of base and additional rent during any holdover period. The lower court further erred in holding that questions of fact arose as to whether or not the COVID-19 pandemic triggered the force majeure provision of the lease (it did not), whether commercial movers were precluded from operating during the shutdown (they were not), and the extent to which Defendants were able to utilize the premises during the holdover period (they were able to do so, and did so). The lower court also erred in denying Plaintiff's motion to dismiss Defendant's counterclaims, which were mirror images of Plaintiff's claims, for the same reason.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	850 THIRD AVENUE OWNER LLC	Plaintiff	Appellant
2	DISCOVERY COMMUNICATIONS, LLC	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Joshua Wurtzel, Schlam Stone & Dolan LLP			
Address: 26 Broadway, 19th Floor			
City: New York	State: NY	Zip: 10004	Telephone No: (212) 344-5400
E-mail Address: jwurtzel@schlamstone.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name: Mitchell D. Haddad, Sills Cummis & Gross, P.C.			
Address: 101 Park Avenue, 28th Floor			
City: New York	State: NY	Zip: 10178	Telephone No: (212) 643-7000
E-mail Address: mhaddad@sillscummis.com			
Attorney Type: <input checked="" type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 2			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			
Attorney/Firm Name:			
Address:			
City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: <input type="checkbox"/> Retained <input type="checkbox"/> Assigned <input type="checkbox"/> Government <input type="checkbox"/> Pro Se <input type="checkbox"/> Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above): 1			

Informational Statement - Civil