

**Core Servs. Group, Inc. v Teams Hous. Dev. Corp.
Fund, Inc.**

2016 NY Slip Op 31634(U)

August 25, 2016

Supreme Court, New York County

Docket Number: 654438/2013

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
CORE SERVICES GROUP, INC., d/b/a,
COMMUNITY FIRST SERVICES, INC.,

Plaintiff,

-against-

Index No. 654438/2013

TEAMS HOUSING DEVELOPMENT
CORPORATION FUND, INC., GERALD MIGDOL,
AARON MIGDOL, and 175 W 137 ST LLC,

DECISION & ORDER

Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Defendants Teams Housing Development Corporation Fund, Inc. (Teams), and 175 West 137 St LLC (Landlord, with Teams, Movants) move, pursuant to CPLR 3212(b), for partial summary judgment against plaintiff, Core Services Group, Inc., d/b/a, Community First Services, Inc.'s (Core). They seek: 1) damages for amounts allegedly past due and owing under a lease; and 2) a declaratory judgment regarding Core's rights under that lease. Core opposes. For the reasons that follow, the motion is granted in part and denied in part.

I. Background

Because Core discontinued its complaint against Teams, the relevant pleadings on this motion are Movants' counterclaims and Core's answer thereto. Dkt 107 & 108.¹ Movants assert three counterclaims, numbered here as in their answer to the amended complaint: 1) damages for breach of the lease from April 2012 through November 2013, including attorneys' fees, interest and late fees; 2) use and occupancy since November 18, 2013; and 3) a declaratory judgment declaring that: the lease is terminated; Core must vacate the Premises; and Core must cease and

¹ References to "Dkt" followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing System.

desist from representing that it has authority to place tenants in the premises. The parties also submitted a Joint Stipulation of Undisputed Facts (Stipulation). Dkt 90.

Since 1981, Teams has been the owner of the premises located at 175 West 137th Street, New York, New York, which it has used as a residential shelter for New York City's homeless and at-risk populations. Reply Affidavit of Corwin Breeden (Breeden Reply Aff), Dkt 152, ¶¶2-3. The building has approximately 160 single room occupancy units and is commonly known as Harlem House. On August 29, 2007, Teams, as landlord, and Community First Services, Inc.,² as tenant, entered into a lease for an initial five-year term commencing September 1, 2007 and ending August 31, 2012 (Lease). Dkt 91. Core is a not-for-profit social services agency that was to use the premises exclusively as a residential shelter for the homeless. Lease, §13.01. The Lease had two, five-year renewal options exercisable by Core, provided that it was not in default (§§ 2.02 & 2.02.01). *Id.* The parties agree that the Lease is governed by New York law and that due to a scrivener's error, it says that New Jersey law is applicable. Stipulation, ¶12.

The Lease's merger clause states that it cannot be modified without a writing signed by both parties.³ It provides that the Landlord's receipt of rent with knowledge of a default by the Tenant does not constitute a waiver of any provision and that waivers by either party of any obligation under the Lease is not a waiver of a subsequent breach. Lease, §27.04.

² In August 2013, Community First Services, Inc., changed its name to Core. Stipulation, ¶4. For simplicity, it will be referred to throughout this opinion as Core or Tenant.

³ Section 27.08 of the Lease provides:

This instrument contains the entire and only agreement between the parties, and no oral statements or representations or prior written matter not contained or referred to in this instrument shall have any force or effect. This Lease shall not be modified in any way or terminated by mutual agreement except by a writing executed by both parties.

Core's President and CEO, Jack Brown, negotiated the Lease with Corwin Breeden, whom Brown avers is Teams' President. Brown Affidavit in Opposition (Brown Aff), Dkt 133, ¶3. Brown testified that he had previously negotiated commercial leases that were similar to the Lease for Harlem House, but had used an attorney for the other leases. Stipulation, ¶24.

At the time Core entered into the Lease, it was a party to an October 24, 2007 Memorandum of Understanding (MOU) with the New York City Human Resources Administration (HRA). Dkt 113.⁴ Pursuant to the MOU, Core was required to set aside sixty rooms, at most, in Harlem House for homeless persons referred to it by HRA for emergency shelter. *Id.* HRA was to pay a nightly rate of \$54 per occupied room. *Id.* The MOU could be terminated by either party upon thirty-days' written notice. *Id.*

Core agreed in the MOU to "ensure" that Harlem House had, *inter alia*, on-site security services, a locked front door, heat, hot water, daily trash removal, clean common areas and bathrooms, and was vermin-free. *Id.* In addition, Core was to ensure that each room had a bed, closet, refrigerator, lighting fixtures and bedding in good condition, and that there was a weekly distribution of a change of linens, towels, soap and toilet paper. *Id.* Core began placing clients in Harlem House in November 2007.

The Lease provided that Core would pay "Basic Rent" calculated as a daily amount for each room occupied:

Section 3.01. Rent During Term ("Basic Rent"). Landlord reserves and Tenant covenants to pay to Landlord, ***without demand or notice, and without any set-off or deduction***, a net basic rental (herein the "Basic Rent") as follows:

3.01.1. Basic Rent shall be computed as follows: For and during the Term of this Lease, Tenant shall pay Landlord approximately \$27.00 per day per room. However, Basic Rent

⁴ The parties' submissions interchangeably refer to HRA as HASA.

shall be computed and due only if such room(s) are occupied and utilized by Tenant and shall not be more than fifty (50) percent of the Tenants monthly receivables from the New York City Human Resources Administration. The number of rooms to be set aside is sixty (60) to (100) rooms.

[emphasis supplied] Dkt 91. The Basic Rent, \$27per day (or up to 50% of what Core received from HRA) was half of the \$54 per night HRA agreed to pay in the MOU. *Id* & Dkt 113.

Section 13.02 required Core to pay Basic Rent and any other money due to the Landlord on the first day of the month. Section 18.04 of the Lease permitted the Landlord to charge a late fee of 1% per month for any rent unpaid after the 20th day of the month when it was due. Pursuant to §28.03, late fees were “additional rent”, which was defined as “all costs and charges of whatever nature to be paid by Tenant under this Lease....” On this motion, Teams does not seek additional rent beyond late fees.

Core also was obligated to pay Teams \$15,000 of rent in advance, upon execution of the Lease. Teams was to use it to abate violations, and to make repairs and improvements. Core was entitled to a rent credit against the \$15,000 for such expenses, as well as a credit for “any additional expenses it incurred to “fit up” the Premises.⁵

⁵ Section 3.02.02 of the Lease provided:

3.02.2. Upon execution of this Lease Tenant shall provide Landlord the sum of \$15,000.00. The \$15,000.00 represents the costs associated with Tenant abating certain code violations on behalf of Landlord and improving the Premises and shall constitute an advance payment of Basic Rent and Additional Rent. The Landlord agrees that Tenant will also incur additional expenses to conduct repairs that are solely the responsibility of Landlord. Landlord shall provide Tenant with a credit for Basic Rent and Additional Rent against the \$15,000.00 and any additional expenses incurred by Tenant to fit up the Premises. In no event shall the \$15,000.00 constitute a Security Deposit.

Teams' obligations for maintenance and services are contained in §§ 8.01 and 20.01 of the Lease. Section 8.01 provided that Teams would make necessary structural repairs to the Premises and load bearing walls; maintain and repair the exterior foundations and roof; and maintain the outside, including landscaping, paving, sidewalks, and the removal of snow, ice and debris. Section 20.01 made Teams responsible for utilities, maintenance personnel and security:

Landlord at its sole cost and expense shall undertake and be responsible for the installation and metering in its name of all utilities to the Premises and agrees to pay, on or before the due date, all charges for same directly to the respective utility companies. Such utilities include water, sewer, electricity, heat, power, telephone, NYS licensed security personnel, qualified maintenance personnel, ADT. Protective Service (or similar serve by another company) or other communication service or other utility or service used by, or rendered or supplied to the Tenant at the Premises throughout the Term.

Dkt 91. The same section further provided that Teams "may incur liability" to Core or any other person for the interruption or delay in furnishing any utility service, and would be liable for the cost of termination and re-establishment of services. *Id.* Brown avers that Teams never paid for utilities and services, or maintained the building. Brown Aff, ¶12.

If Core defaulted in the payment of Basic Rent or any additional rent or "sum herein reserved herein," §18.01 authorized Teams to terminate the Lease *upon written notice*. The notice provision in §11.01 of the Lease requires notices to be sent to Core and its attorney by messenger, certified mail return receipt requested, or overnight courier. Stipulation ¶26. The parties agree that notice to the Landlord and its attorney must be by messenger, overnight courier or certified mail. Lease, §11.01.

After notice of a rent default, §18.01 provides that "the Term shall terminate and expire, and Tenant shall then quit and surrender the Premises to Landlord," who may re-enter and resume possession without notice of intention to re-enter or institute legal proceedings. Section

18.02 permits Teams to recover from Core the reasonable expenses it incurs as a result of or arising from a termination, including reasonable attorneys' fees.

Section 31.01 provides that in the event that the MOU with HRA is terminated, the Lease would terminate. Brown testified that HRA has never terminated the MOU. Brown Examination Before Trial (EBT), Dkt 112, p 161. His testimony is un rebutted.

In the event of Teams' default in performing its obligations, Core was required, pursuant to §33.01 of the Lease, to give Teams notice specifying the default and allow thirty days to cure. Dkt 91. Alternatively, after notifying Teams of a default, Core could cure the default, bill Teams, and withhold rent if Teams did not pay the invoice within thirty days.⁶ *Id.* If the default had a material, adverse effect on Core, and could not be cured at a reasonable cost, Core could

⁶ Section 33.01 provided in pertinent part:

If Landlord defaults in the performance or observance of any of its covenants or obligations set forth in this Lease, Tenant shall give Landlord notice specifying in what manner Landlord has defaulted, and if such default shall not be cured by Landlord within the period of time provided for elsewhere in this Lease, and otherwise within thirty (30) days after the delivery of such notice, Tenant may declare an event of default. If Tenant declares an event of default, Tenant may withhold payment of rent due and to accrue hereunder (to the extent necessary to cover the costs estimated by Tenant to cure such default) so long as Landlord remains in default or cure such default and invoice Landlord for costs and expenses (including reasonable attorneys' fees and court costs) incurred by Tenant. If Landlord does not reimburse Tenant within thirty (30) days after it receives Tenant's invoice, Tenant may deduct all such costs and expenses from the Rent due and to become due hereunder. If Landlord's default materially and adversely affects Tenant's rights under this Lease and the default cannot be cured within a reasonable time or at a reasonable cost by either Tenant or Landlord, as determined by the circumstances, Tenant may terminate this Lease.

Dkt 91.

terminate the Lease. *Id.* Brown, admitted at his deposition that Core never gave Teams a default notice. Stipulation, ¶27.

Harlem House began accepting Core's clients on November 16, 2007. Brown Aff, ¶11. At the outset of the Lease, Core placed HRA tenants in Harlem House. Stipulation, ¶11. Beginning in September 2012, Core also placed tenants in Harlem House through the New York City Department of Housing Preservation and Development (HPD, with HRA, City). Stipulation, ¶12. Core's employee, Marie Martinez, testified that the monthly rent due to Teams was calculated as 50% of what Core received from the City. Stipulation, ¶15, citing Martinez EBT, Dkt 95, p 20. There is no evidence that Teams objected to HPD tenants or the rent it received from their placement, although the Lease provides that Basic Rent is up to fifty percent of the amount paid by HRA.

Brown's affidavit avers that after the Lease was signed, Core installed light fixtures, painted, tiled, furnished the rooms and made repairs throughout Harlem House in order to make it habitable and obtain approval from the City. *Id.*, ¶8. He states that Core was never fully reimbursed for the initial work that it did or for the \$15,000, and that the fire alarm and sprinkler system required upgrades that Teams refused to pay for and Core could not afford. *Id.*, ¶¶ 9 & 10. Brown also says that because the sprinkler system and fire alarm were not functioning, HRA required Teams to have two fire guards at the building at all times until the upgrades were completed, and to this day, the fire alarm has not been fixed. *Id.* Brown further swears that the heat went off because oil was not delivered and many nights there was no security, although he does not specify when this occurred. *Id.*, ¶12.⁷ In addition, Brown says that Core provided rent

⁷ He attaches an email he received in 2010 from a Core employee, which stated that Con Edison was threatening to shut off the electricity for non-payment. Brown Aff, ¶13. However, the email is hearsay.

advances to Teams at Breeden's request and he attaches emails from Breeden, sent in 2010 and 2012, making urgent requests for money. Brown Aff, ¶17 and Ex E [Dkt 138]. Breeden did not say in the emails that the money would be treated as rent advances. *Id.* The record reflects that Core paid numerous rent advances and credited them against the rent. Stipulation, Exs I & J.

Brown's affidavit claims that these lapses by Teams led to an oral agreement to modify the Lease regarding payment of rent and expenses:

Following these instances, I approached Breeden to suggest that Core begin managing the Building's upkeep, maintenance and utilities. Breeden agreed that Core could manage and pay for those expenses, and then would include a credit on the rent for the amounts of expenses incurred.

Id., ¶14. At his EBT, Brown said that he made the proposal in the dead of winter about seven months after the Lease was executed, when Teams had not provided oil to heat rooms occupied by clients with HIV/AIDs. Dkt 150, Brown EBT, pp 52-56.⁸ Core argues that this course of dealing modified the Lease and that it was not practicable to give Teams thirty days' notice to cure lack of heating oil in winter, security, and failure to pay electric bills when Con Edison was threatening to shut off the electricity.

Brown avers that from then on, Core would deduct each expense it incurred for upkeep and maintenance from half the monthly payment received from the City, and Teams accepted the payments. Brown Aff, ¶15. Core specifically relied on Stipulation Exhibits I, J and K to show a course of conduct, in which it took monthly itemized rent deductions for expenses. Core MOL, pp 7 & 17-18. Core claims that it had security expenses that were not deducted from the rent,

⁸ Excerpts from Brown's testimony were filed at Dkt 93,112 & 150. The parties also submitted excerpts from other EBTs. In violation of this court's Individual Practices, no full transcripts were submitted. For the sake of simplicity, all EBT references will be denoted by the name of the witness and transcript page number. The parties also violated the Individual Practices by e-filing exhibits without descriptions and which were not searchable pdfs.

but it failed to quantify them in response to the motion. Core allegedly paid over \$10,000 a month for security, but did not take a credit for it until 2014. Brown Aff, ¶16.

Marie Martinez testified that she was Brown's executive assistant whose responsibilities included keeping track of the money HRA and HPD paid to Harlem House each month. Martinez EBT, pp 11 & 13-14.⁹ She reviews all of the bills sent to HRA and HPD for accuracy before they are sent out. *Id.* She testified that Core uses the accounting software QuickBooks, in which it keeps track of the rent collected and expenses incurred for Harlem House, and that she would check QuickBooks if she wanted to determine the amount of expenses by property. *Id.*, pp 15-18. During her deposition, Core's lawyer promised to provide any updated records that contained additional expenses not recorded in the records used to question Martinez for the year 2012 and February 2015 forward. *Id.*, pp 36-37 & 46-47. None were produced during discovery or on this motion.

Brown testified that Martinez was the Core employee who would have the most information about the offsets Core took from the rent and that specific questions regarding them should be directed to her. Brown EBT, Dkt 150, pp 178-179. However, Core now argues that Martinez is not its QuickBooks manager, accountant or bookkeeper and "not necessarily the appropriate person to create accounting charts on Core's behalf, nor to testify as to Core's accounting practices." Core's Opposing Memorandum of Law (Core MOL), Dkt 146, p 29. The court rejects this argument because Core produced and identified her as the most knowledgeable witness.

On March 22, 2012, the parties renewed the Lease (Renewal) for an additional five years, to August 30, 2017. Dkt 134; *see also* Stipulation, ¶6. Section 1.01 of the Renewal stated that

⁹ Excerpts from Martinez' EBT were efiled at Dkt 118 & 131.

“[Core] has adhered to the terms and conditions of the Lease and the Lease has not been previously cancelled nor terminated by either party.” Thus, if Core took deductions for expenses before the Renewal, as Brown alleges, Teams admitted in the new lease agreement that it was not a default under the Lease.

Brown also says that Core repaid a \$150,000 loan that Teams had taken from a potential investor and credited to the rent. *Id.*, ¶18. At his deposition, Brown testified that the loan was made by a limited liability company called Blackstone, that he wholly owned and managed. Brown EBT, pp 179-180. He also said that his mother, Dolores Brown, provided security and housekeeping services for Core at Harlem House, although she was not a licensed security guard, and that his aunt, Carmen Picart, did administrative work. Brown EBT, pp 192-196. Martinez testified that Brown’s aunt and mother provided housekeeping, and that payments to them were deducted as expenses against the rent. Martinez EBT, pp 38-39.

Brown’s affidavit avers that “at some point,” Teams hired the Migdols’ law firm, which “attempted” to terminate the Lease in November 2013; that beginning in December 2013, Teams refused to accept Core’s rent checks, but Core continued to calculate the rent it owed every month; that the Migdols prevented Core from making necessary repairs; and that Core significantly reduced the amount it expended for expenses. *Id.*, ¶¶ 25-28. Brown says that as a result, Harlem House is in “an extreme state of disrepair.” *Id.*, ¶29.

The Stipulation says that on June 1, 2014, Teams assigned the Lease and its rights and obligations as Landlord to 175 W 137 St LLC (LLC). Stipulation, ¶7. The LLC’s principals include the individual defendants Gerald and Aaron Migdol, both attorneys. However, the annexed agreement between the LLC and the Migdols, referred to in the Stipulation, ¶7, is not an assignment of the Lease from Teams to the LLC. Rather, it states that Teams Housing

Development Fund Company Inc. (Teams HDFC, not Teams) and The Migdol Organization had formed a joint venture under the name of the LLC. Dkt 92. The document further recites that the LLC is the new Lessor/Landlord of the Premises, to whom Teams HDFC assigned the Lease and all past due rent thereunder. *Id.* The operative language of the document states that the LLC is the Landlord under the Lease, the LLC will manage and maintain the Premises, the rent shall be payable to the LLC, c/o The Migdol Organization, and notices shall go to the LLC, c/o The Migdol Organization. *Id.*

Breeden's affidavit tells a very different story from that of Brown. He avers that because Core did not pay the rent, Teams did not have sufficient income to provide services. Breeden Reply Aff, ¶7. He points to §3.01 of the Lease, which required Core to pay Basic rent "without any set off or deduction." Breeden's affidavit denies that he agreed to modify §§ 3.01 and 33.01 of the Lease, which required Core to send thirty-day notices if Teams defaulted. *Id.*, ¶9.

Breeden disputes that Teams allowed Harlem House to fall into disrepair, offering proof of inspection grades of at least "satisfactory" given by the City from January 2011 to July 2014. *Id.*, ¶12. However, Brown and Breeden's affidavits regarding the state of the building were signed in October and November, 2015, respectively, over a year after the last inspection report.¹⁰

¹⁰ Teams asks the court to infer that later inspection reports were at least satisfactory because Brown testified that they were provided by HRA to Core, who failed to produce them during discovery. Teams Reply Memorandum of Law, Dkt 148, p 6, citing Brown's EBT, pp 172-173. But, Brown testified that he got reports from HRA in 2013, whereupon Teams' counsel said Teams did not have them and would make a written request. Brown EBT, pp 170-173. Therefore, it is unclear whether Core received reports after July 2014 or whether Teams requested more than the 2013 reports. In any event, the court cannot consider this argument because Teams made it for the first time in reply. *Schirmer v Athena-Liberty Lofts, LP*, 48 AD3d 223, 224 (1st Dept 2008).

Although Brown says that Teams never paid for utilities or security, Migdol's reply affidavit avers that since taking over as Landlord under the Lease, i.e., in June 2014, the LLC hired all new maintenance, janitorial and security personnel for the Premises, and has provided all services required under the Lease. Reply Affidavit of Gerald Migdol, Dkt154, ¶12. Teams does not contradict Brown's affidavit that Teams failed to pay expenses that were its responsibility from August 2007 through June 2014. And, it relies on a document in the record which reflects that Core paid for security and utilities in 2015. Stipulation Ex K, Dkt 101.

Breeden claims that Core's failure to pay drove Teams into bankruptcy and debt to the IRS, which was part of Core's effort to buy Harlem House at a steep discount. *Id.*, ¶¶ 14 & 15. Breeden avers that Teams was considering Core's buy-out offer in March 2013, when it met the Migdols, who provided legal services. *Id.*, ¶¶16-18. In June 2014, Breeden says that Teams "partnered" with the Migdols and transferred its interest in the Lease to the LLC. *Id.* However, Breeden does not deny that Core paid expenses that were Teams' obligation beginning in 2007; that from 2007 through November 2013 Teams accepted rent from Core that reflected deductions for expenses and Team's loan; or that Teams failed during those years to pay for essential expenses, that were its obligation like heating oil, security, electricity, and maintenance personnel.

Core stipulated that it owes money to Teams, but disputes the amount due. Stipulation, ¶29. Teams prepared a demonstrative chart (Chart) to show the minimum amount of Basic Rent that Core owes for the period April 2012 through August 2015, assuming that it was entitled to deductions from the rent due based on the parties' course of dealing. William Fried Affirmation, Dkt 106, ¶25 & Dkt 119 (Chart). It shows that Core did not pay the rent due beginning in May 2012, even assuming that it was entitled to offset expenses. The Chart is based on various

documents produced by Core. Stipulation ¶¶ 30-35 & Exs F through K thereto [Dkt 96-101]. In its opposing memorandum of law, Core specifically relies on Stipulation Exhibits I, J and K to show a course of conduct, in which it took monthly itemized rent deductions for expenses. Core MOL, pp 7 & 17-18.

Stipulation Exhibit F is a document that Martinez prepared and that she testified was accurate. Dkt 96 & Martinez EBT, pp 22-26. Basic Rent that Core owed Teams for each month in the years 2012 through 2014 can be calculated from this document. *Id.* It shows all of the monthly rent the City paid in those three years. *Id.* It is undisputed that Core was supposed to pay half of the rent collected each month from the City to Teams. Stipulation, ¶15, Martinez EBT, p 20. Consequently, Core's Basic Rent for the years 2012 through 2014 was the monthly totals on Exhibit F divided by two. The Chart accurately reflects that calculation based upon Stipulation Exhibit F. The parties stipulated that Exhibit K [Dkt 101] was produced by Core and reflects the amount of money collected by Core from HRA and HPD between January and August 2015, and the amount Teams was paid by Core during that time. Stipulation, ¶35. Exhibit K was produced by Core, pursuant to court order, after the depositions of Brown and Martinez. 8/19/15 order, Dkt 87. ¹¹

¹¹ As of December 1, 2014, the parties entered into a use and occupancy agreement that required Core to pay \$60,000 per month while this action was pending without prejudice to the parties' positions in the action. U & O Agreement, Dkt 120. The Chart and Stipulation Exhibits G and K reflect that Core paid that amount each month through August 2015. Subsequently, this court modified the use and occupancy agreement because Core was not timely paying, was occupying 18 rooms plus an office not authorized by the Lease, and the \$60,000 was not sufficiently compensatory for 100 rooms. On March 17, 2016, Core was ordered to vacate all rooms not occupied by shelter tenants, i.e., the office, and to pay \$27/day per occupied room by the 5th day of the month and a 1% late fee on amounts not paid by then. 3/17/16 order, Dkt 178 & Transcript, Dkt 180 (U&O Order). In a subsequent order disposing of a motion to hold Core in contempt of the U&O Order, the late fee was increased to 9%. 7/22/16 order, Dkt 207 & Transcript, Dkt 208.

Core points to two errors in the Chart relating to the Basic Rent due. Core MOL, pp 27-29. For April 2012, Teams divided in half the amount Core received from the City using Exhibit F to calculate its share of Basic Rent as \$30,876.36. Core says half of what it received was \$29,475, based upon Stipulation Exhibits I and J. Dkt 99 & 100. Thus, according to Core, it owed \$1,401.36 less for April 2012. For September 2013, using Exhibit F, Teams calculated its share of the rent from HPD for September 2013 as \$69,210. Core claims it should have been \$73,950, or that Basic Rent it owed should be \$4,740 higher. In other words, the errors Core identified prove that the Basic Rent Core owed to Teams should be \$3,338.64 higher than on the Chart [$4,740 - 1401.36 = 3,338.64$].

With respect to offsets for rent, the Chart accurately used the deductions reflected on Stipulation Exhibits G through K to calculate the deductions from Basic Rent that Core took from January 2012 through August 2015, except for one error in Teams' favor, for which Core provided evidence.¹² The parties agreed in the Stipulation that those exhibit were produced by

¹² Core points to two other errors on the Chart relating to expenses it deducted from rent, but quantified only one. Core's MOL, pp 27-29. Teams applied \$33,001.82 instead of \$15,154.18 for expenses in September 2013, which raised Core's claimed offsets by \$17,847.64. The other alleged error is the failure to credit security costs, which Core failed to quantify or document in response to the motion. Martinez testified that Exhibit I "may or may not" have shown all deductions Core took against the 2012 rent, and that Stipulation Exhibit H, which also reflects all deductions Core took in 2012, was a report from QuickBooks, but that it did not reflect security. Martinez EBT, pp 27-31. As previously noted, Martinez also testified that all expenses for Harlem House are entered into QuickBooks, which she relies on to determine expenses by property. Martinez EBT, pp 15-18.

Core and reflected all deductions it took during the periods reflected in those exhibits.¹³

Stipulation, ¶¶ 31-35.¹⁴

Teams says that it is entitled to summary judgment for the Basic Rent, plus late fees and without offsets, in the amounts calculated on two charts annexed to its attorney's affirmation. The first chart calculates the Basic Rent that Teams is owed if Core is not entitled to offsets for expenses (No Offset Rent Chart). Dkt 121. It incorporates the rent collected from the City using the same numbers on the Chart. It shows a balance of Basic Rent due for the period April 2012 through August 2015 (Chart Period) of \$1,595,729.81 ((Basic Rent due – rent and use and occupancy paid). As previously noted, Core owes \$3,338.64 more based on errors it identified on the Chart, or a total of \$1,599,068.45. Core came forward with no other evidence of errors relating to Basic Rent due to Teams during the Chart Period. A second chart (No Offset Late Fees Chart) shows the late fees authorized by §18.04 of the Lease during the Chart Period (allegedly \$317,992.58), using the lower figure in the Chart (\$1,595,729.81). Dkt 122. As it assumes the incorrect lower figure for Basic Rent due, the No Offset Late Fees Chart is not accurate.¹⁵

¹³ Exhibits F through J to the Stipulation were marked as Exhibits 13-17, respectively, at Martinez' EBT.

¹⁴ Stipulation Exhibits H and I [Martinez Exs 15 & 16, Dkt 98 & 99] reflect all deductions Core took in January 2012. Stipulation Exhibit J [Martinez Ex 17, Dkt 100] shows all deductions Core took for January 2013 through November 2013. Stipulation Exhibit G [Martinez Ex 14, Dkt 97] shows all deductions Core took from December 2013 through January 2015. Stipulation Exhibit K [Dkt 101] shows all deductions Core took from January 2015 through August 2015.

¹⁵ A third chart calculates the late fees that Core owes, assuming that it is entitled to offsets (allegedly \$104,457). Dkt 123. It also uses the lower figure in the Chart, making it inaccurate.

As previously noted, Section 11.01 of the Lease provides that all notices to the Tenant shall be given to Core's principal and its attorney, by messenger, overnight courier, or certified mail with return receipt requested. On October 22, 2013, Teams wrote a letter to Core stating that it was in "serious arrears" in paying rent and demanding that it vacate the premises (October Letter). Dkt 102. The October Letter was not delivered in the manner required by §11.01. It was emailed to Brown and not sent to his attorney. Dkt 102. The second purported notice of termination, dated November 1, 2013 (November Letter), was not sent to Core. Dkt 104. Also, that notice alleges a default based on HRA's termination of the MOU, but there is no evidence of such a termination.¹⁶

II. Discussion

A. Standard of Review

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions." CPLR 3212(b). A failure to make such a prima facie showing requires denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). The evidence submitted on

¹⁶ Moreover, the notice self-servingly claims that that the October Letter was a notice of a rent payment default, "receipt of which has been acknowledged." *Id.* Teams points to a letter from Core's attorney responding to the October Letter. The fact that Core's attorney received it does not prove that it was sent in compliance with the Lease's notice provision.

the motion for summary judgment must be examined in the light most favorable to the parties opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997).

On a summary judgment motion, once the movant has laid bare its proof, the opposing party is compelled to do the same. *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 38 (1st Dept 2011). A failure to contradict facts is an admission. *Costello Associates, Inc. v Standard Metals Corp.*, 99 AD2d 227, 229 (1st Dept 1984), *appeal dismissed*, 62 NY2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, at 562. One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim, or must demonstrate acceptable excuse for his failure to offer admissible evidence. *Id.* Nor can summary judgment be defeated by the "shadowy semblance of an issue." *Jeffcoat v Andrade*, 205 AD2d 374, 375 (1st Dept 1994). Although hearsay evidence may be considered in opposition to a motion for summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted. *Arnold v NY City Hous. Auth.*, 296 AD2d 355, 356 (1st Dept 2002). Upon the completion of the court's examination of all of the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Declaratory Judgment

Teams' motion for summary judgment on its declaratory judgment claim is denied and, in searching the record, the third counterclaim is dismissed. Teams seeks a declaratory judgment declaring that it terminated the Lease, Core must vacate, and that Core must "cease and desist

from representing that it has authority to place tenants in the Premises.” However, Teams did not terminate the Lease in accordance with the notice provision contained in §11.01.

To operate as a sufficient notice of an option to terminate under a lease, there must be strict compliance with its terms and anything else is ineffective. *A. Dubois & Son v Goldsmith Bros.*, 273 AD 306, 309 (1st Dept 1948); 2 *Rasch's NY Landlord & Tenant Including Summary Proceedings*, §23.44. In a lease, a condition is subsequent where it has not related to the inception of the lease and the commencement of the tenancy, but gives the landlord, upon its happening or not happening, a right to terminate the lease. *Rasch, supra* at §23.8. Teams' failure to pay rent was a condition subsequent because it occurred after the inception of the Lease. A lease does not end immediately upon the breach of a condition subsequent, but continues until the landlord enforces a forfeiture thereof by re-entry. *Rasch, supra* at §23.12.

The evidence does not support Teams' claim that it terminated the Lease in strict conformity with its notice provisions, and in searching the record, its declaratory judgment claim is dismissed. CPLR 3212(b). Section 18.01 provides that Teams must give Core written notice of a default. Section 11.01 states that notice shall be given to the Tenant and its attorney by messenger, overnight mail, or certified mail, return-receipt requested. The October Letter stating there was a rent default was emailed to Core, but not its attorney. Dkt 102. The November Letter was not sent to Core. 104. Furthermore, there is no evidence that HRA canceled the MOU, the asserted basis for termination in the November Letter. *Id.* Therefore, the Lease is not terminated and Teams is not entitled to a declaration that Core must vacate, or that Core must cease and desist from representing that it can place tenants in the premises.

However, as discussed below, Core defaulted in paying rent. Therefore, if Teams serves a notice of termination for non-payment that complies with the Lease, it can bring a non-payment proceeding in Civil Court.

C. Alleged Modification of the Lease by Conduct

A contract that contains a provision that it cannot be modified without a writing can be modified by a course of conduct, if it has been fully performed, or if it has been partially performed in a manner that is unequivocally referable to the oral agreement. *Rose v Spa Realty Associates*, 42 NY2d 338 (1977); *see also, Messner Vetere Berger McNamee Schmetterer Euro RSCG v Aegis Group*, 93 NY2d 229 (1999); *Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413 (2013); *Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 10-11 (1st Dept 2009), *affirming* Sup Ct NY Co Index No. 600926/2007 (nor) (construing operating agreement, Dkt 739.1, §6.2.9, that required written amendment).

In addition, a party seeking to avoid an oral agreement, that modifies a contract that cannot be amended without a writing, may be estopped from denying that the contract was modified, if its conduct induced the other party to significantly and substantially rely upon the oral modification. *Id.* The estoppel is based on the equitable principle that it would be a fraud or injustice to induce someone to act at variance with the writing, to his detriment, and then stand on the requirement of a written amendment. *Rose, Messner* and *Eujoy, supra*. When the parties dispute whether an oral agreement has been formed, it is the conduct of the party advocating for the oral agreement that is determinative, although the conduct of both parties may be relevant. *Messner, supra* at 237-238; *Eujoy, supra* at 425-426. The party asserting estoppel must show reasonable reliance on the other party's conduct without notice that he has repudiated it. *Messner, supra* at 235-236.

Here, Teams seeks the rent from April 2012 through August 2015. There is no question of fact that from August 2007 through April 2012, the month after the Renewal, both parties acted in accordance with the oral modification and their conduct was unequivocally referable to it. Breeden did not deny Brown's affidavit that Core paid the rent minus expenses from August 2007 through the Renewal, which constitutes an admission of no default by Teams through March 2012. *Costello, supra*. The Chart shows that Core was not in arrears in April 2012, if the offsets are credited, and Teams gave no notice that it repudiated their course of dealing until 2013, when it sent the October Letter.

However, the record also demonstrates that even if the oral modification was acted upon by both parties through April 2012, and Core's reliance on its was reasonable through that date, Core breached its terms beginning in May 2012. Core cannot enforce an oral agreement that it breached. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 (1st Dept 2007) (elements of breach of contract are existence of valid contract, *plaintiff's performance of his/her obligations thereunder*, defendant's breach and resulting damages). The record establishes that beginning in May 2012, Core did not pay all of the rent minus itemized expenses. Core's payment of less than the rent minus expenses beginning in May 2012 was not unequivocally referable to the oral agreement. As in *Eujoy*, its payment of less than all the rent was just as demonstrative of breach of contract as of completion of the purported oral modification. *Eujoy*, at 427. There is no injustice or fraud in permitting Teams to insist on the written terms of the Lease, based on the theory that it should be equitably estopped. One who seeks equity must do equity. *Wheelock v Tanner*, 39 NY 481, 505 (1868). Core did not do equity by paying less than the rent minus offsets.

D. The Amount of Rent Due

In light of Core's breach of the alleged oral agreement, Teams' failure to pay expenses beginning in May 2012 did not relieve Core of the obligation to Basic Rent, without offset or deduction, as provided in §3.01 of the Lease. The tenant's covenant to pay rent, and the landlord's covenant to repair and maintain the premises, in the absence of clear intention to the contrary, are independent covenants. *Rasch, supra* at §18:31, citing *Thomson-Houston Electric Co. v Durant Land Imp. Co.*, 144 NY 34, 43–44 (1894) (where landlord breaches promise maintain, tenant must still pay rent, but may assert counterclaim for damages); *see also Queensboro Dodge, Ltd. v Queens J.K. Mgmt. Corp.*, 284 AD2d 383 (2d Dept 2001); *S. E. Nichols, Inc. v American Shopping Centers, Inc.*, 130 AD2d 855, 856 (3d Dept 1987); *Jackson v Paterno*, 128 AD 474, 477 (1st Dept 1908). Whether covenants are dependent or independent depends on the language of the lease and common sense. *Rasch, supra* at §23.5. In the absence of specific evidence of intent, whether the covenants are dependent or independent may be determined by the order of time performance is required pursuant to the contract. *Id.*

Here, §3.01 of the Lease expressly provides that Core shall pay Basic Rent without set-off or deduction. It expresses a clear intention that Core's obligation to pay rent is not conditioned on Teams' performance of its obligations to pay certain expenses. Teams receipt of rent with knowledge of a default by Core after May 2012 did not constitute a waiver. Lease, §27.04; *International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 528 (1st Dept 2009). At most, Core has a counterclaim that it can assert in Civil Court for expenses that were Teams' obligation. *Rasch, supra*, §18:31; *Thomson-Houston Electric Co., supra*.

In sum, Teams is entitled to a judgment for rent in the amount of \$1,599,068.45 for the period May 2012 through August 2015. Although §18.04 entitles Teams to a 1% per month late fee on unpaid rent, as previously noted the No Offset Late Fees Chart is not accurate. There is

no purpose in sending the late fees computation to a referee, as Teams must serve a proper termination notice and commence a Civil Court proceeding to evict Core. Further, a claim for rent under a commercial lease is not a commercial case. 22 NYCRR §202.70(c)(3). It was brought here only as a counterclaim to the discontinued main commercial claim. Thus, the court will not grant a judgement for late fees, without prejudice to Teams' right to collect them in a Civil Court proceeding.

Teams is not entitled to summary judgment directing a hearing before a referee on attorneys' fees. Section 18.05 of the Lease states that Core shall pay Teams' reasonable expenses and attorneys' fees incurred "as a result of or arising out of a Termination." The court has determined that the Lease has not been terminated. Hence, Teams is not entitled to a judgment for attorneys' fees.

Finally, in light of the decision that Teams did not terminate the Lease, in searching the record, the court dismisses Teams' second counterclaim for use and occupancy. Use and occupancy is payment: 1) for the right to occupy premises by a party who is no longer a tenant; 2) to the prevailing party in a holdover for continued occupation of the premises after termination of the tenancy; or 3) for the right to occupy premises during the pendency of a holdover proceeding. *Rash supra*, §8.4. As Core is still a tenant, the Lease was not terminated, and there is no holdover proceeding pending, the use and occupancy counterclaim is dismissed without prejudice to Teams' right to collect in Civil Court any late fees and/or penalties that Core did not pay in accordance with the U&O Order and the July 22, 2016 order. Accordingly, it is

ORDERED that the motion (Sequence 005) by Teams Housing Development Corporation Fund, Inc., and 175 West 137 St LLC, for partial summary judgment against plaintiff Core Services Group, Inc., d/b/a Community First Services, Inc. ("Core"), is granted

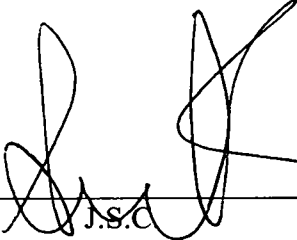
solely to the extent that said defendants are entitled to judgment in the amount of \$1,599,068.45 in Basic Rent for the period May 2012 through August 2015, with interest from December 13, 2013, against Core, without prejudice to said defendants right to collect late fees on said amount in a proceeding in Civil Court, and in all other respects, the motion is denied; and it is further

ORDERED that in searching the record, the court dismisses Teams' third counterclaim for a declaratory judgment; and it is further

ORDERED that in searching the record, Teams' second counterclaim for use and occupancy is dismissed, without prejudice to its right to collect in Civil Court unpaid late fees and penalties owed by Core in accordance with the March 17, 2016 and July 22, 2016 orders of this court; and it is further

ORDERED that upon service upon him of a copy of this order with notice of entry, the Clerk is directed to enter judgment accordingly.

Dated: August 25, 2016


J.S.C.
SHIRLEY WERNER KORNREICH
J.S.C.