GMDC Two Corp. v Pensato
2018 NY Slip Op 30394(U)
February 6, 2018
Supreme Court, Kings County
Docket Number: 500268/2011
Judge: Carl J. Landicino

FILED: KINGS COUNTY CLERK 02/15/2018 INDEX NO. 500268/2011
NYSCEF DOC. NO. 38 RECEIVED NYSCEF: 03/02/2018

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of February, 2018.

P R E S E N T:
HON. CARL J. LANDICINO. JSC

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GMDC TWO CORPORATION,

Plaintiff,

Index No.: 500268/2011

TRIAL DECISION

- against -

ANTONIO PENSATO and PENSATO INDUSTRIES, LLC.,

Defendants.

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Procedural History

Plaintiff GMDC Two Corporation (hereinafter "Plaintiff" and "GMDC Two") commenced this action by the filing of the Summons and Complaint on or about March 3, 2011 as against Defendant Antonio Pensato (hereinafter "Defendant Pensato") and Defendant Pensato Industries, LLC (hereinafter "Pensato LLC") (collectively hereinafter "Defendants"). The action concerns money damages allegedly owed pursuant to a lease agreement dated March 15, 2003 (hereinafter the "Lease") for space 4-4-1 (hereinafter the "Unit") in relation to the premises known as 1155-1205 Manhattan Avenue, Brooklyn, New York (hereinafter the "Premises"). Plaintiff alleges damages in relation to unpaid rent, additional rent and other charges in the amount of $252,982.99 plus interest from August 17, 2010.

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The trial in this matter was held on March 27, 2017 before this Court. The attorneys thereafter submitted written summations together with the trial transcript on July 27, 2017 at which time the matter was reserved for decision.

Testimony of Brian Coleman, CEO of GMDC, LDC, non-party witness

Mr. Coleman testified that he was employed by Greenpoint Manufactures Design Center, Local Development Corporation ("GMDC, LDC"). (Pg. 7, Lines 23-25) Mr. Coleman testified that he has been overseeing all subsidiaries, including Plaintiff GMDC Two, Manhattan Avenue Holding Corporation and a number of other entities that are not related to this action, all since in or about 2003. (Pg. 8, Lines 2-11) Mr. Coleman testified that his duties as CEO include being responsible for the day-to-day operations of the organization, management of its employees, protection of assets and keeping of records. (Pg. 8, Lines 13-20) Mr. Coleman further testified that he reports directly to the board of directors. (Pg. 8, Lines 15-17).

Mr. Coleman indicated that GMDC, LDC is a Section 501(c)(3)[1] of the United States Internal Revenue Code, nonprofit real estate development corporation that has been in business for about 24 years. (Pg. 8, Lines 20-24 and Pg. 9, Line 4) Mr. Coleman further testified that GMDC, LDC was a parent company that created and controlled several entities that were engaged in the furtherance of GMDC, LDC's operation and management. He stated that Plaintiff GMDC Two was formed in

[1] (3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office. 26 U.S.C.A. § 501

Delaware in 2004 and he indicated that it was a 501(c)(4)[2] entity under the United States Internal Revenue Code, that is related to the Subject Premises, which Premises includes the Unit. (Pg. 9, Lines 8-11).

Mr. Coleman testified that the Premises was approximately 300,000 square feet and had 75 businesses as tenants. Mr. Coleman estimated that over 300 people were employed at the Premises. (Pg. 10, Lines 4-6).

Mr. Coleman sought to explain through the use of a series of deeds and merger/acquisition documents the history of the ownership of the Premises that he represented resulted in the Plaintiff's ownership of the Premises. (Pgs. 11-19) (Plaintiff's Exhibits 1-9)

Mr. Coleman, upon review of Plaintiff's Exhibit 1 describes it to be a deed dated February 24, 1994, reflecting that the Subject Premises was transferred from the City of New York to the New York City Economic Development Corporation ("EDC"). (Pg. 11, Lines 12-20 and Pg. 12, Lines 7-8) Mr. Coleman, upon a review of Plaintiff's Exhibit 2 (Deed from EDC to GMDC), testified to a further transfer of the Premises from the New York City EDC to GMDC, LDC on or about February 24, 1994. (Pg. 12, Lines 16-23) Mr. Coleman testified that GMDC, LDC paid a dollar for the acquisition of the Subject Premises subject to a requirement to make certain improvements that had to be completed by GMDC, LDC within a specified period of time. (Pg. 12, Line 24-25 and Pg. 13, Lines 3-7) Mr. Coleman testified that the improvements were completed within the specified time limit provided for in the deed (Pg. 13, Lines 9-12)

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[2] (4)(A) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

(B) Subparagraph (A) shall not apply to an entity unless no part of the net earnings of such entity inures to the benefit of any private shareholder or individual. 26 U.S.C.A. § 501

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Mr. Coleman testified in relation to Plaintiff's Exhibit 4. He stated that Plaintiff's Exhibit 4 was a second modification of the original acquisition deed, dated September 18, 2001. (Pg. 15, Lines 2-12) Mr. Coleman further testified that the parties to the second modification were EDC and the Manhattan Avenue Holding Corporation ("MAHC") as successor in interest to GMDC, LDC. Mr. Coleman stated that MAHC succeeded GMDC, LDC's interest in the Premises. (Pg. 15, Lines 13-16) Mr. Coleman, upon review of Plaintiff's Exhibit 5, stated that it was the third modification of the original deed between New York City EDC and GMDC, LDC dated October 12, 2002. (Pg. 15-16, Lines 17-6) Mr. Coleman indicated that MAHC became the owner of the Premises in 2002 and as such this third modification was between EDC and MAHC. (Pg. 16, Lines 7-8)

Mr. Coleman testified in relation to a certificate of merger (Plaintiff's Exhibit 7) by and between MAHC and GMDC Two which was filed on June 1, 2004 with the Secretary of State of Delaware. Mr. Coleman testified that as a result of that merger, all of the holdings (including leases) of MAHC were transferred to GMDC Two. (Pg. 17, Lines 4-20) Mr. Coleman on cross-examination testified that while he believes that there was a deed that specifically transferred the Premises to GMDC Two, he was not employed at that time and had no personal knowledge of it.

Mr. Coleman explained by means of the admission and review of Plaintiff's Exhibits 8 and 9 (Restated Certificate of Incorporation of GMDC Two and IRS Determination of Tax Exempt Status of GMDC Two, respectively) that subsequent to the merger of MAHC and GMDC Two, the application for IRS nonpofit status had been made (by GMDC Two) but that it took several years to receive that approval. (Pg. 19, Lines 7-24).

Mr. Coleman upon review of Plaintiff's Exhibit 10, testified that it was the Lease dated March 15, 2003 by and between MAHC and Antonio Pensato ("Defendant Pensato") and Pensato Industries,

LLC ("Pensato LLC") (collectively "Defendants"). (Pg. 20, Lines 18-24) Mr. Coleman testified that as of the date of the Lease MAHC owned the Premises. Mr. Coleman testified that Defendant Pensato was included on the Lease because he was the owner of the Defendant Pensato LLC and that it was intended that he be personally liable as a tenant therein. (Pg. 21, Lines 2-11) Mr. Coleman testified that from May of 2003 until the merger between MAHC and Plaintiff that occurred in 2004, he oversaw between 5 to 10 lease signings with other Tenants. However, Mr. Coleman acknowledged that he was not present when the subject Lease was executed in or around March of 2003. (Pg. 22, Lines 1-9)

Mr. Coleman testified that the signatures appearing on the Lease are that of David Sweeny, former CEO (his predecessor) and the Defendants. (Pg. 23, Lines 11-19) Mr. Coleman further indicated that page 12 of the Rider to the Lease (the "Rider") has Mr. Sweeny's signature as representative for MAHC. He also indicated that in relation to the tenant, there is one signature on the document, which he believed to be Defendant Pensato's signature. (Pg. 24, Lines 13-20) Mr. Coleman testified as to paragraph 44 of said Rider which is entitled "Rent." (Pg. 24 -25, Lines 22-4)

Mr. Coleman testified concerning Plaintiff's Exhibit 11. He stated that Plaintiff's Exhibit 11 was a tenant statement dated August 8, 2014[3] and that it reflected rent and other miscellaneous charges for the subject Unit at the Premises and was the subject of the Lease. (Pg. 25, Lines 5-15) Mr. Coleman indicated that this rent statement reflected a total of $252,982.99 as due and owing as of August 8, 2014. He further stated that this amount reflected a calculation based on rent, electricity, other special charges, and late fees. (Pg. 25, Lines 18-22) Mr. Coleman, testified in relation to an entry on the tenant statement (Plaintiff's Exhibit 11) entitled legal fees. He stated that the entry was for the legal fees associated with the ultimate eviction of the Defendants. (Pg. 25-26, Lines 23-3)

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[3]Plaintiff's Exhibit 11 actually has the date of August 17, 2010.

Mr. Coleman testified that the legal fees that were reflected in the statement were partial and that he was personally aware that there was a total of $10,000 for legal fees in relation to the eviction of Defendants. (Pg. 26-27, Lines 21-2) Mr. Coleman testified in relation to two separate check stubs (Plaintiff's Exhibit 12) and indicated that two separate checks, in the amount of $7,000 and $8,000, were made to B Hammer Demo Corp., an outside vendor, hired by the Plaintiff to remove debris left by the Defendants after eviction. (Pg. 29, Lines 4-8) Mr. Coleman testified that the day after the Defendants were evicted, photos (Plaintiff's Exhibit 13) were taken to depict the condition of the Unit at that time. Utilizing these photographs Mr. Coleman showed that there was "...garbage, trash, illegal construction, illegal electricity, hazardous materials, hazardous fluids, paints, solvents, lumber, racks, dust, dirt, garbage, vermin, bugs...". (Pg. 29-30, Lines 14-3)

Mr. Coleman testified, in relation to Plaintiff's Exhibit 14 (Notice of Motion including an Affidavit of Defendant Pensato, dated April 14, 2010, in support of a Motion to Dismiss the prior related Civil Court eviction proceeding). In that Affidavit, Defendant Pensato stated that "the former lease was between the landlord and A. Pensato Industires, LLC and me. That lease expired long ago and A. Pensato Industries, LLC remained as a month-to-month tenant always paying the rent by an A. Pensato Industries LLC check." (Pg. 33, Lines 5-19) Mr. Coleman also testified that it was his understanding that both Defendants were tenants on the Lease. (Pg. 33, Lines 22-23)

On cross-examination Mr. Coleman explained that he was hired and began working for Plaintiff on or about May 27, 2003. (Pg. 34, Lines 6-16) Mr. Coleman upon review of Plaintiff's Exhibit 4, testified that MAHC became a successor to GMDC, LDC before he was working there and that for that reason he did not know specifically how the transfers took place. He stated that he had an understanding that the Premises were transferred from GMDC, LDC to MAHC. (Pg. 34, Lines 18-25 and Pg. 35, Lines

2-6) Mr. Coleman testified that "GMDC Two... purchased the stock, purchased rights to its assets and all of its assets and liabilities" of MAHC in 2004 when the Certificate of Merger (Exhibit 7) of MAHC with GMDC Two (the Plaintiff) was accomplished and filed. (Pg. 36, Lines 2-14)

Mr. Coleman testfied that Plaintiff's Exhibit 8, entitled Restated Certificate of Incorporation of GMDC Two, was signed by him as President of GMDC Two and was notarized on October 6, 2004. (Pg. 36, Lines 21-25 and Pg. 37, Lines 1-4) Mr. Coleman testified in relation to the language of the Lease (Plaintiff's Exhibit 10) and that it stated the "party of the first part hereinafter referred to as the owner" and "referred to as owner and Antonio Pensato and Pensato Industries, LLC jointly." (Pg. 37, Lines 6-20) As to the Rider of the Lease at page 12 (Plaintiff's Exhibit 10), Mr. Coleman testified that he believed that under the word "tenant" Mr. Pensato's name was crossed out and that the signature to the left of Mr. Pensato's signature appeared to be Mr. Sweeny's signature. Mr. Coleman testified that he could not identify what appeared to be a third signature to the left of the two afore-referenced signatures. (Pg. 38, 2-15)

Mr. Coleman testified that the rent statements (Plaintiff's Exhibit 11) were prepared by the Plaintiff and issued to Pensato Industries in relation to the Unit. (Pg. 39, Lines 6-14) Mr. Coleman further testified that the amounts that are alleged to be due on a monthly basis are the rent amounts with "any and all appropriate escalations and other charges" as provided for in the Lease. (Pg. 39, Lines 18-25) Mr. Coleman testified that electricity use was one of the other charges provided for in the Lease, that the electric charges were calculated by a sub-metering system and that the Unit had at least one sub meter. (Pg. 40, Lines 4-11) As to the electric charge, Mr. Coleman testified that it was calculated by a formula that includes solar power, and that the formula was established by either MAHC or the Plaintiff. (Pg. 40, Lines 15-25)

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Mr. Coleman testified that the Tenants received regular statements that provided a notice of how the electricity price was determined. (Pg. 41, Lines 2-4) Mr. Coleman also testified that late fees appearing on the Rent statement were calculated and applied based upon the terms of the Lease. (Pg. 41, Lines 5-11) Mr. Coleman testified regarding a charge reflected as "legal - A. Pensato" in the amount of $4,246.50. Mr. Coleman stated that he believed that the charge related to the legal fees related to an incident when Mr. Pensato "...got into environmental trouble with DEP." (Pg. 41, Lines 12-20) As to a charge dated June 10, 2006 as included in Plaintiff's Exhibit 11 (Statement of Defendant's Account), Mr. Coleman testified that the charge, reflecting the reference "UNLEV. Rent, Inc., as per '05 AUD" was related to an audit that was performed due to unpaid rent. Mr. Coleman stated that the calculations were performed on a retroactive basis. (Pg. 41, Lines 21-25 and Pg. 42, Lines 1-6) Mr. Coleman stated that he did not have the related audit report at the time of the trial. (Pg. 42, Line 5-8).

Mr. Coleman testified in relation to other charges reflected on Plaintiff's Exhibit 11 (Statement of Defendant's Account). In relation to an October 2, 2006 entry stating "Environmental Violation" in the amount of $3,000.00, Mr. Coleman stated that it related to "...when Mr. Pensato got in trouble for illegally dumping hazardous materials in the public realm. And we were fined on his behalf." (Pg. 42, Lines 9-14)

Mr. Coleman testified in relation to two statements (Plaintiff's Exhibit 12) that totaled $5,000.00 for partial services of Mr. Aronson (the Plaintiff's Landlord Tenant Attorney). He further testified that those were the only Statements provided, and that was the reason that the Defendant's Statement (Plaintiff's Exhibit 11) by entry dated August 25, 2010, included a legal fee charge of $10,000.00. (Pg. 43, Lines 4-23)

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Mr. Coleman testified that a charge for $31,334.26 labeled "finance charge" was based upon the late fees and rent that the building had to finance, due to the tenant's failure to pay rent pursuant to the Lease. (Pg. 44, Lines 1-11)

Mr. Coleman testified that he did not recall which entity (GMDC Two or MAHC) had retained Mr. Aronson for the landlord/tenant proceeding. (Pg. 44, Lines 23-25) Mr. Coleman testified that although the check stubs (Plaintiff's Exhibit 12) indicated that MAHC paid Mr. Aronson, it was regular practice to internally refer to the Premises as MAHC's but that it was more likely that the fees were paid by Plaintiff because MAHC most likely did not have a bank account in 2010 when those payments were made to Mr. Aronson. (Pg. 45, Lines 13-25 and Pg. 46, Line 1)

Mr. Coleman testified in relation to Defendants' Exhibit B. He testified that Defendants' Exhibit B was a letter on GMDC stationary containing his signature at the bottom, and that page 2 of that Exhibit was an electric invoice from GMDC issued to Pensato Industries concerning the Unit. (Pg. 46, Lines 11-15 and Pg. 47, Lines 17-19) Referring to Defendants' Exhibit C, Mr. Coleman testified that it was a copy of a check payable to GMDC from Defendant, LLC, for the Unit. (Pg. 47, Lines 21-22 and Pg. 48, Lines 8-15) Mr. Coleman testified in relation to Defendants' Exhibits D, E, and F and testified that those Exhibits were invoices for electric charges for Pensato Industries in relation to the Lease. (Pg. 49, Lines 13-25)

In relation to a charge on the rent statements entitled "Additional Security" for March 9, 2009 (Plaintiff's Exhibit 11), Mr. Coleman stated that because the tenant was responsible to tender two full months rent as security pursuant to the Lease and had not done so, there was a difference between what was being held by GMDC and what Mr. Pensato was obligated to have tendered. Mr. Coleman testified

that the aforementioned charge of $9,854.16 in relation to the unpaid security, was included in determining the total amount due and owing by Defendant. (Pg. 50, Lines 7-23)

Mr. Coleman testified that it was his understanding that the Lease had never been renewed because the Defendants were ineligible for an extension as they were not tenants in good standing when the lease expired in March of 2008. (Pg. 51, Lines 2-15)

Mr. Coleman testified that Plaintiff's Exhibit 16 was a statement of charges specifically for late fees and corresponding outstanding balances in relation to the Lease, amounting to a total of $31,334.26. (Pg. 52, Lines 11-24) Mr. Coleman testified that Plaintiff's Exhibit 11 at page 9, reflected a finance charge for a period of two years (August 25, 2010 to August 16, 2010) in relation to that $31,334.26 charge and were reflected in Plaintiff's Exhibit 16. (Pg. 53, Lines 2-8) Mr. Coleman testified that the Lease (Plaintiff's Exhibit 10), on page 4 of the Rider at Paragraph 52-A indicates how the Plaintiff would assess the sub metered electricity and that Paragraph 52-C indicates that even when there is not a meter installed, the "...owner may estimate tenant's electric or water use based upon a reasonably analogous period. Any such estimate shall be binding on the tenant." (Pg. 53, Lines 21-24 and Pg. 54, Lines 3-19) Mr. Coleman also testified that the electric charges contained in Plaintiffs's Exhibit 11 were either those read off of a meter or determined based upon an estimate of the building owner. (Pg. 54, Lines 20-23)

Mr. Coleman testified that the signature page of the Lease, Plaintiff's Exhibit 10, reflects that Mr. Pensato's name was "crossed off" and that there is a signature on behalf of MAHC next to the cross out, he knew to be David Sweeney's signature. (Pg. 55, Lines 3-11) Mr. Coleman testified that Mr. Sweeney might not have noticed that the name was crossed out, because "he was blind. I don't know how else to describe it. By this time Mr. Sweeney was completely blind. I can tell by his signature." Mr. Coleman

also indicated that Mr. Pensato and Mr. Sweeney were the only signatories on that page. (Pg. 55, Lines 12-25)

Mr. Coleman, in relation to Defendants' Exhibits C-F (Plaintiff's Rent Statements to Defendant), testified that Pensato Industries was the only name listed on these documents but that in his 14 years in the organization these statements only contained the name of the business and did not include the name of the guarantor. (Pg. 56, Lines 1-11) Mr. Coleman testified that "all of our leases are personally guaranteed..." and that the statement always contained the name of the business not the personal guarantor, "unless the individual is listed – it is only an individual listed on the lease." (Pg. 56, Lines 12-16) Mr. Coleman testified that he was unaware of any legal document other than the Lease that Mr. Pensato signed. (Pg. 57, Lines 21-23)

Mr. Coleman testified that Dennis Niswander "had was, for lack of a better expression, a kind of a co-founder of the organization." Mr. Coleman stated that he had not personally worked with Dennis Niswander because he had been gone several years prior to the time Mr. Coleman commenced his employment in May of 2003, approximately two months after the Lease was purportedly signed. (Pg. 87, Lines 2-23)

Testimony of Marc Aronson, Esq. Attorney for Plaintiff in prior Civil Court proceeding

Mr. Aronson testified that he was an attorney admitted to practice in New York State in 1979 and has had his own legal practice since 1981. He stated that his practice focused on landlord/tenant and real estate legal services. He stated that he has worked on various committees and other associations in relation to landlord/tenant law. (Pg. 60, Lines 10-18) Mr. Aronson testified that Plaintiff's Exhibit 15

was a Civil Court (landlord/tenant) stipulation dated June 23, 2010 and that he was a signatory on the stipulation. (Pg. 61, Lines 4-12)

Mr. Aronson testified that about seven years prior to the date of trial there was a summary proceeding "in which the landlord sued the tenant in this proceeding...for the eviction of the respondents because of the nonpayment of the rent..." and various other grounds. Mr. Aronson also testified that it was necessary "to name and serve all the parties because if not, the proceeding will be dismissed for failing to name and serve all parties." (Pg. 61, Lines 17-25 and Pg. 62, Lines 1-5) Mr. Aronson in relation to Plaintiff's Exhibit 14 identified it as the motion to dismiss the prior Landlord/Tenant proceeding, made by counsel for respondents in that proceeding. (Pg. 62, Lines 12-25 and Pg. 63, Lines 1-2). Mr. Aronson testified in relation to the Affidavit of Mr. Pensato, apparently sworn to on April 14, 2010, in support of that motion. He indicated that the Affidavit, stated that "the former lease was between the landlord and A. Pensato Industries, LLC and me..." and was signed by Mr. Pensato. (Pg. 63, Lines 12-23) Mr. Aronson testified that the caption in the Civil Court action was amended as a correction because the "A" in A. Pensato Industries, LLC was not originally included in the caption and the case accordingly continued as against the correctly named LLC and Mr. Pensato as the two respondents. (Pg. 64, Lines 2-6)

Mr. Aronson stated that MAHC was the Petitioner in the Landlord/Tenant proceeding because the Lease provided that MAHC was the owner and "pursuant to the Lease both tenants Antonio Pensato and Pensato Industries, LLC were named." (Pg. 65, Lines 1-5) Mr. Aronson testified that because Mr. Pensato's name was on the front page of the Lease, the signature on the Lease is meaningless because his experience as a landlord/tenant attorney is that, the case would likely be dismissed based upon a failure to name all the parties on a Lease. (Pg. 65, Lines 19-25 and Pg. 66, Lines 1-3)

Mr. Aronson testfied that he did not remember how much he had received from the Plaintiff to handle the Landlord/Tenant proceeding. He also stated that he did not check on the status of MAHC because he "rel[ies] on what [his] client tells [him]. And rel[ies] on the lease terms." (Pg. 66, Lines 10-18)

Testimony of Antonio Pensato, Defendant

Mr. Pensato testified that the Lease (Planitiff's Exhibit 10), did include his signature at the bottom of the second to last page. (Pg. 71, Lines 10-20) Mr. Pensato testified that he had been given a copy of the Lease about a week or more prior to being called to the owner's office to sign it. (Pg. 71, Lines 24-25) Mr. Pensato also testified that he had conversations with Mr. Sweeney and his assistants during which he informed them that he would not be responsible for the Lease and that he was only signing for the LLC. (Pg. 72, Lines 1-3) Mr. Pensato testified that he recalled that he was presented with the Lease in the Plaintiff's office a few days after the conversation(s) he had with Mr. Sweeney and his assistants. (Pg. 72, Lines 4-7)

Mr. Pensato testified that he had kept a copy of the Lease for his records and had provided it to his counsel. (Pg. 72, Line 8-10) In relation to his copy of the Lease, (Defendants' Exhibit G), Mr. Pensato testified that his signature was on this document, and that Mr. Sweeney, one of his assistants, whom he believed was Dennis Niswander, and Mr. Sweeney's service dog were present when he signed the Lease. (Pg. 73, Lines 4-11) Mr. Pensato testified that on page 12 of the Lease, where his name is crossed off and Mr. Sweeney's signature appears next to it, was how the Lease was presented to him and that he had not crossed off his own name. (Pg. 73, Lines 12-20)

Mr. Pensato testified concerning his affidavit in relation to the Respondents' Civil Court proceeding Motion to Dismiss (Plaintiff's Exhibit 14) at page 2. Mr. Pensato stated that he prepared the document for the landlord/tenant proceeding about a day before and that he had not checked the Lease prior to preparing it. (Pg. 74, Line 20-25 and Pg. 75, Lines 3-10) Mr. Pensato testified that in filling out the paperwork, he had used the document provided by the Court. (Pg. 75, Lines 9-10) Mr. Pensato was shown the petition as part of the Notice of Motion (Plaintiff's Exhibit 14) and testified that it was the document provided by the Court that he used, in conjunction with his attorney, to prepare the affidavit in support of the motion. (Pg. 76, Lines 5-12)

Mr. Pensato testified that the Tenant Statement of Account (Defendants' Exhibit C) included a company check from Pensato Industries, LLC on the second page and that the check was made payable to GMDC for $1,200 for either rent or electric. (Pg. 76, Lines 19-25 and Pg. 77, Lines 1-4) Mr. Pensato testified that he paid the landlord with company checks. (Pg. 77, Lines 5-7) Mr. Pensato further testified that due to being locked out of the Premises and requesting that Mr. Coleman permit him in to the premises to get his belongings, he was given a two hour period to obtain whatever he could. He stated that with the assistance of four or five other individuals they removed as much as they could but left much behind. He stated that for that reason he had a very limited number of copies of company checks. (Pg. 77, Lines 8-20)

Mr. Pensato testified that he had viewed all of the photos offered as Plaintiff's Exhibit 13. He stated that in relation to some of those photographs, (Defendant's Exhibit H) they depict garbage, and things belonging to A. Pensato Industries that had been piled by the elevator door while he was attempting to get everything out during the limited time he was permitted to return to the Premises. He stated that these photographs represented some of the items that he left behind. (Pg. 79, Lines 4-11)

Mr. Pensato testified that he was represented by counsel in the Civil Court proceeding that resulted in a signed Stipulation (Plaintiff Exhibit 15) that required the tenant to vacate the premises by July 31, 2010. (Pg. 80, Lines 9-25 and Pg. 81, Lines 1-10) Mr. Pensato further testified that while there may have been a date certain by which he had to vacate he was disassembling a shop and that he had to ask the landlord for another two hours a couple of weeks thereafter. (Pg. 81, Lines 11-22)

Mr. Pensato testified in relation to the Statement of Account (Plaintiff's Exhibit 11) wherein it was reflected that the Tenant was charged for environmental violation. He testified that Mr. Coleman had provided him with a summons from the Department of Environmental Protection ("DEP") when it occurred. (Pg. 81, Lines 24-25 and Pg. 82, Lines 1-4) Mr. Pensato testified further that he paid the DEP, after both A. Pensato Industries and the building received notice of the violations. Mr. Pensato testified that he negotiated a settlement whereby half of the amount reflected on the original violation/ticket would be paid. (Pg. 82, Lines 5, 23-24) Mr. Pensato testified that he was fined $3,000.00 for the violation. (Pg. 82, Lines 24-25)

Mr. Pensato testified that his signature appeared on the affidavit in support of the Civil Court proceeding motion (Plaintiff's Exhibit 14) on the signature page. (Pg. 83, Lines 8-23) Mr. Pensato, when asked whether he believed that he was not a party to the Lease and that only his company was, answered "yes, A. Pensato Industries, LLC.." (Pg. 84, Lines 1-13) Upon his review of page 12 of the Lease (Plaintiff's Exhibit 10), Mr. Pensato testified that David Sweeney signed to the left of his name on that page and that Dennis Niswander was also there at the signing. (Pg. 84, Lines 14-24) Mr. Pensato testified that while there appear to be initials at the bottom of that same page, he did not know who's initials they were because they were on the document prior to him signing the Lease, and that he saw Mr. Sweeney sign in his presence. (Pg. 85, Lines 3-25)

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CREDIBILITY

It is axiomatic that with respect to the credibility of the parties the Court during the trial " had the opportunity to view the demeanor of the witnesses," and accordingly "was in the best position to gauge their credibility." *Massirman v. Massirman*, 78 AD3d 1021, 911 N.Y.S.2d 462 [2 Dept.,2010], quoting *Peritore v. Peritore*, 66 AD3d 750, 888 N.Y.S.2d 72 [2 Dept.,2009]; *see also Varga v. Varga*, 288 AD2d 210, 732 N.Y.S.2d 576 [2 Dept.,2001], quoting *Diaco v. Diaco*, 278 AD2d 358, 717 N.Y.S.2d 635 [2 Dept.,2000]; *Ferraro v. Ferraro*, 257 AD2d 596, 684 N.Y.S.2d 274 [2 Dept., 1999]. The Court in this case viewed the parties during their respective testimony under examination. "In a non-jury trial, evaluating the credibility of the respective witnesses and determining which of the proffered items of evidence are most credible are matters committed to the trial court's sound discretion." *Goldstein v. Guida*, 74 AD3d 1143, 904 N.Y.S.2d 117 [2 Dept.,2010], quoting *Ivani v. Ivani*, 303 AD2d 639, 17 757 N.Y.S.2d 89 [2 Dept., 2003], quoting *L'Esperance v. L'Esperance*, 243 AD2d 446, 663 N.Y.S.2d 95 [2 Dept.,1997]; *see also Schwartz v. Schwartz*, 67 AD3d 989, 890 N.Y.S.2d 71 [2 Dept.,2009].

An assessment of credibility by the trial court is given a significant level of discretion and deference by the appellate courts. This Court had the ability to observe the witnesses over the course of examination during trial on many issues related to the Lease and the history of the relationship between the Plaintiff and the Defendants.

Mr. Coleman was credible. He was candid and reflected that he wanted to assist the Court with the facts. He acknowledged that he was not present at the time of the Lease execution. His testimony however does have to be examined in light of that reality. He was not a witness and was in no position to call into question what the Lease terms reflect. As to the time of the Lease execution, Mr. Coleman is in

no position to present or dispute facts. As to the Lease, the Court is only in a position to review the Lease itself and address the credibility of Mr. Pensato in relation to its execution. Mr. Pensato, while somewhat cautious did not appear troubled or surreptitious. He was clear and his representations were plausible and credible.

The Court finds that both parties were credible.

FINDINGS

Plaintiff provided a copy of the Lease, entered as Plaintiff Exhibit 10 and Defendant entered the tenant's original Lease as Defendant Exhibit G. Neither party indicated that there were differences in the documents and upon review by the Court, the Court finds that both documents contain the same indications and are identical. As such there is no dispute relating to the authenticity of the Lease proffered.

STANDING TO PURSUE THIS ACTION

The parties remain in dispute as to whether Plaintiff had standing to prosecute this action. Plaintiff provided evidence in order to prove that Plaintiff is a proper party and has standing to prosecute this action. It is undisputed by the parties and corroborated by Plaintiff's evidence that the following has occurred in relation to the ownership of the Premises. On February 24, 1994 the City of New York transferred the Premises by deed to the New York City Economic Development Corporation ("EDC") (Plaintiff's Exhibit 1). On February 24, 1994 EDC transferred the Premises by deed to Greenpoint Manufacturing and Design Center Local Development Corporation ("GMDC, LDC"). This indenture contained the following language at Paragraph C on page 3 thereof:

> "Grantee [GMDC], on behalf of itself, its successors and assigns covenants that, for a period of ten (10) years from the date hereof, neither the premises, nor any part thereof (and any improvements thereon), nor any interest therein shall be conveyed except...(ii) to a wholly owned subsidiary of Grantee." (Plaintiff's Exhibit 2)

Included, as Exhibit A to the Deed, the deed reflected 10 improvements/modifications that were required to be made to the Premises within 5 years of the date of the Deed. It is apparent that due to those modifications not having been completed within the specified time limit, there was a First Modification (Plaintiff's Exhibit 3) to the Deed between EDC and GMDC, LDC dated September 29, 1999. This First Modification between EDC and GMDC, LDC extended by 1 year, the time for the improvements to be completed. While changes and additions were made to the acquisition Deed in this First Modification, none of those changes directly addressed or modified Paragraph C of Plaintiff's Exhibit 2. (Plaintiff Exhibit 3)

A "Modification of Covenants and Restrictions" (Plaintiff's Exhibit 4) was executed on September 18, 2001 seemingly to permit Grantee more time for the improvements to be made at the Premises. This modification, however, was made between EDC and Manhattan Avenue Holding Corporation ("MAHC"). It states that "construction obligations and use restrictions which run with the land and bind Grantee as successor to GMDC." (Second Modification, pg. 2) A Third Modification (Plaintiff's Exhibit 5) was executed on October 12, 2002 between EDC and MAHC to further modify the agreement of the parties in order to allow grantee additional time for the improvements to be made. This Third Modification states that the Grantor [EDC] did "remise, release and quitclaim unto GMDC, its successor-in-interest, Grantee and Grantee's successors and assigns forever the premises described therein...". (Third Modification, pg. 1)

On March 15, 2003 MAHC entered into the Subject Lease concerning the Unit for commercial purposes only. As indicated in paragraph 43 of the Rider to the Lease (hereinafter "Rider") the Lease term ran from March 1, 2003 through March 30, 2008. The Lease contained an option to renew upon written notice of intent to do so from the Tenant by a date certain, provided the Tenant was not in default. On April 16, 2004 Greenpoint Manufacturing and Design Center Local Development Corporation Two ("GMDC Two") was formed as evidenced by a Certificate of Incorporation filed with the Secretary of State of the State of Delaware (Plaintiff's Exhibit 6). In June of 2004 a Certificate of Merger (Plaintiff's Exhibit 7) was signed and filed in the State of Delaware, making GMDC Two the surviving Corporation of the merger with MAHC. This merger document also contains language that GMDC, LLC wholly owns and controls the merged entity known as GMDC Two[4]. However, neither party proffered documentary evidence that since the 2002 Third Modification to the Deed that any other Deed transfers or modifications exist in relation to the Premises.

Defendants assert that Plaintiff has failed to meet their burden in proving that it is the rightful owner of the Premises under the Lease. Defendants aver that there was no documentation proffered reflecting the transfer of the property from GMDC, LDC to MAHC, as a successor in interest, as required under New York Business Corporation Law §906(a) and (b). Defendants contend that there was no sufficient chain of title established prior to the Lease of March 2003 and that therefore, MAHC had no right to enter into the Lease with Defendants. Defendant accordingly contend that there is no valid contract to be enforced. Plaintiff contends that the transfer of interest in and to the Premises from

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[4]"SECOND: That an Agreement and Plan of Merger and Reorganization between the parties to the merger has been approved, adopted, certified, executed and acknowledged by each of the constituent corporations in accordance with the requirements of section 252 of the General Corporation Law of Delaware."

GMDC, LDC to MAHC as successor in interest is valid in that the Second and Third Modification reflects MAHC as a successor-in-interest to GMDC, LDC and indicates MAHC as the Grantee of the Subject Premises. More specifically, Plaintiff argues that the Second Modification includes the following language indicating that the property has been validly transferred and conveyed to MAHC:

> "...the Deed contains certain transfer restrictions, but permits GMDC to convey the premises to a wholly owned subsidiary upon the satisfaction of certain conditions; and
> WHEREAS, GMDC, having satisfied the pre-conditions to transfer the premises, by an indenture dated August 31, 1999 and recorded on September 22, 1999 in the offices of the City Register in the County of Kings in Reel 4593, Page 1788, as corrected by a Correction Deed dated as of August 31, 1999 and recorded in the Register's Officer on February 4, 2000 in Reel 4752, Page 2273, did grant and release unto Grantee its successors and assigns forever the premises...." (Plaintiff Exhibit 4, pg. 2)

Plaintiff contends that even if the Court finds that there was ineffective transferring of title during these years, the property was "operated under both claim of title and claim of right, openly and notoriously, exclusively, and continuously by the GMDC, MAHC, and GMDC II." (Plaintiff Post Trial Memorandam)

In determining whether a party is a successor-in-interest to "the performance of a particular contract is generally a question of fact that depends on the circumstances of the case." *Board of Managers of 100 Congress Condominium v. SDS Congress, LLC, et al*, 152 A.D.3d 478 (App. Div. 2d. Dept., 2017); See *Armonk Snack Mart, Inc. v. Robert Porpora Realty Corp.*, 138 A.D.3d 1045 (App. Div. 2d. Dept., 2016), *VAC Serv. Corp. v. Technology Ins. Co. Inc.*, 49 A.D.3d 524 (App. Div. 2d. Dept., 2008), *H. Morris & Partners v. Opti Ray, Inc.*, 290 A.D.2d 486 (App. Div. 2d. Dept., 2002). The Plaintiff did provide documentary evidence that indicated that both the Grantor (EDC) of the Deed and the Plaintiff legally accepted, represented openly and recognized that MAHC was the successor-in-interest of GMDC, LDC as indicated in the Third Modification. Additionally, the Defendant, did not put

forth any documentary evidence that would legally rebut the contention that MAHC was the successor-in-interest to GMDC, LDC. *Board of Managers of 100 Congress Condominium v. SDS Congress, LLC, et al*, 152 A.D.3d 478 (App. Div. 2d. Dept., 2017); see *Encore Lake Grove Homeowners Assn., Inc. v. Cashin Assoc., P.C.,* 111 A.D.3d 883 (App. Div. 2d. Dept., 2013), *Granada Condominium III Assn. v. Palomino*, 78 A.D.3d 997 (App. Div. 2d. Dept., 2010) It is clear that these not-for-profit entities were created and managed for the purpose of operating the facility. The ongoing business of these entities, short of an actual indenture proffered, indicated through subsequent deed modifications and certificate of incorporation and Merger Certificate that GMDC, LLC clearly intended and openly represented that GMDC Two had the right and authority to seek payment and engage with tenants under and pursuant to lease agreements at the Premises. Although the day-to-day operation and ancillary documentation was not pristine, Mr. Coleman's testimony was sufficient to show that he controlled, through GMDC, LLC, all of the entities and recognized GMDC Two as the entity which oversaw the management and Lease enforcement at the Premises which contained the Unit at issue. Pensato, LLC dealt with this entity and the previously merged entity, MAHC. Defendants, are not prejudiced by this finding in that any other entity arguably entitled to this claim against the Defenants are all within GMDC, LLC's control and as reflected in Mr. Coleman's testimony have assented to Plaintiff's pursuit of any arguable claim on their behalf collectively. In addition the language of the recorded and filed documents are sufficient to reflect that Plaintiff has standing to prosecute this action.

Accordingly, for the reasons mentioned, Plaintiff has sufficiently proven that at the time the Lease between MAHC and the Defendant was executed in 2003, MAHC was the successor-in-interest to GMDC, LDC, thereby giving MAHC the legal authority to enter into the Lease and thereafter GMDC, Two the standing to enforce it.

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In 2010 Marc Aronson, Esq. (hereinafter "Mr. Aronson") as the attorney of record for the Petitioner, filed a Landlord Tenant "Commercial Notice of Petition Holdover" in Civil Court Kings County against the same Defendants named in this action. The Petitioner in that proceeding was MAHC. Defendants argue that since MAHC no longer existed as a corporation in 2010 it therefore could not be named in the lawsuit. Defendants argue that this accordingly makes the eviction proceeding and the final stipulation of eviction (Plaintiff Exhibit 15) a nullity. However the Stipulation dated June 23, 2010 executed by Mr. Aronson and Mr. Justwig (the Attorney of record for Defendants during the Housing Court proceeding), states that the claims for "rent, additional rent, charges et al., are severed for a separate plenary action, and are reserved by landlord. Tenant reserves all defenses thereto." (Plaintiff Exhibit 15)

It was undisputed at trial and is clear based upon the evidence that GMDC Two legally merged and consolidated with MAHC in 2004. Plaintiff's Exhibit 6 is GMDC Two's Certificate of Incorporation filed with the Office of Secretary of State of the State of Delaware in April of 2004. Additionally, the Certificate of Merger signed by Brian T. Coleman as President of GMDC Two as successor to MAHC was made effective on the first day of June 2004. (Plaintiff Exhibit 7) BLC 906(b)(1) and (2) read in necessary part as follows:

> "(b) When such merger or consolidation has been effected:
> (1) Such surviving...shall thereafter...possess all the rights, privileges, immunities, powers and purposes of each of the constituent corporations.
> (2) All the property, real and personal...causes of action and every other asset of each of the constituent entities, shall be vest in such surviving or consolidated corporation without further act or deed."

Based upon the specific facts in this case including the documentary evidence and testimony concerning a course of conduct, the Plaintiff has proven that it had legal standing to pursue these claims in this Court based upon a preponderance of the evidence proffered herein.

PERSONAL LIABILITY OF DEFENDANT ANTONIO PENSATO

"'A corporate officer who executes a contract acting as an agent for a disclosed principal is not liable for a breach of the contract unless it clearly appears that he or she intended to bind himself or herself personally.'" *L'Aquila Realty, LLC v. Jalyng Food Corp.,* 148 A.D.3d 1004 (App. Div. 2d. Dept., 2017) quoting *GMS Batching, Inc. v. TADCO Const. Corp.*, 120 A.D.3d 549 (App. Div. 2d. Dept., 2014) quoting *Stamina Products, Inc. v. Zintec USA, Inc.,* 90 A.D.3d 1021 (App. Div. 2d. Dept., 2011). To find an individual liable for a breach of contract on behalf of its principal, there must be "clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *L'Aquila Realty, LLC v. Jalyng Food Corp.,* 148 A.D.3d 1004 (App. Div. 2d. Dept., 2017) citing *Ho Sports, Inc. v. Meridian Sports, Inc.,* 92 A.D.3d 915 (App. Div. 2d. Dept., 2012).

Plaintiff contends that Defendant Pensato can be held liable under the Lease because of his signature on the Lease. Plaintiff also relies mostly on Defendant Pensato's Affidavit dated April 14, 2010 submitted in support of the Defendant's motion to dismiss the prior Civil Court proceeding[5]. In his Affidavit, Mr. Pensato states that "the former Lease was between the Landlord [(MAHC)] and A. Pensato Industries, LLC and me. That Lease expired long ago and A. Pensato Industries LLC remained as a month-to-month tenant always paying the rent by an A. Pensato Industries LLC check." (Plaintiff Exhibit 14) Defendant contends that his attorney at the time prepared this document in a rush do to filing deadlines. The Defendant Pensato testified on the record that it was an inadvertent error to add the word "and me" as possibly indicating that he was personally responsible for tenant obligations under the

[5]Civil court of the City of New York County of Kings. Index No. 64539/2010. Notice of Motion and supporting papers entered as Plaintiff's Exhibit 14.

Lease. He also states that he has never otherwise represented himself to be personally liable as a tenant under the Lease.

Additionally, when there is a written agreement that is "complete, clear and unambiguous on its face [it] must be enforced to give effect to the meaning of its terms and the reasonable expectations of the parties, and the court should determine the intent of the parties from within the four corners of the contract without looking to extrinsic evidence to create ambiguities." *Vivir of L I, Inc. v. Ehrenkranz*, 127 A.D.3d 962, 7 N.Y.S.3d 411 (2nd Dept, 2015) *see, South Rd. Assoc., LLC v. International Bus. Mach. Corp.*, 4 N.Y.3d 272, 793 N.Y.2d 835 (Ct. Of App. 2015). The parol evidence rule "prohibits the introduction of evidence outside a written agreement for the purpose of varying or adding to such an agreement, especially when...the written agreement includes a merger clause." *Katz v. American Technical Industries, Inc.*, 96 A.D.2d 932, 466 N.Y.S.2d 378 (2nd Dept, 1983); *see, Fogelson v. Rackfay Constr. Co.*, 300 N.Y. 334, 340, 90 N.E.2d 881 (Ct. Of App. 1950).

In this case, the first page of the Rider to the Lease (Plaintiff Exhibit 10) at paragraph 41 provides "This rider and the printed portion of the lease constitute the entire lease between Tenant and Owner." in relevant part. The Plaintiff has not argued that the Affidavit upon which they rely should be considered as extrinsic evidence, to contradict the Lease itself. The Lease is not ambiguous, thereby permitting the Affidavit to be considered for purposes of creating a clearer picture. Extrinsic evidence and parol evidence may not be considered in determining the meaning of the written contract when ambiguity does not exist. *South Road Associates, LLC, v. Intern. Business Machines Corp.*, 4 N.Y.3d 272, 826 N.E.2d 806 (2005); see, *Hoeg Corp. v. Peebles Corp.*, 60 N.Y.S.3d 259, 153 A.D.3d 607 (2d Dept. 2017); *ELBT Realty, LLC v. Mineola Garden City Co., Ltd.*, 144 A.D.3d 1083, 42 N.Y.S.3d 304 (2d Dept. 2016)

Defendant Pensato did testify that he had by affidavit, in relation to the Landlord-Tenant Civil Court proceeding stated, that the Lease was between the Plaintiff, "A. Pensato Industries, LLC and me." However the Affidavit of Mr. Pensato in support of the Civil Court proceeding motion to dismiss, and the statements therein are not deemed conclusive but constitute a "informal judicial admission" as evidence "of the facts or admitted." *Gomez v. City of New York*, 215 A.D.2d 353, 625 N.Y.S.2d 646 (2d Dept. 1995); see *Hill v. King Kullen Grocery Co, Inc.*, 181 A.D.2d 812, 581 N.Y.S.2d 378 (2d Dept. 1992).

Defendant Pensato, as owner of Pensato LLC, testified that he had signed the Lease in 2010 and additionally that he had contacted the management office of MAHC to indicate that he was only intending to sign for the LLC and not on behalf of himself personally. Defendant Pensato testified that at the time of the signing, he was presented with the Lease with his name already having been crossed off. Additonally, Mr. Coleman was admittedly not present at the signing and in fact did not commence his employment with GMDC, LLC until 2003, some months after the Lease Execution. He is in no position to contradict Mr. Pensato's testimony.

After a Landlord and a Corporation have entered into a lease and the Tenant has been evicted pursuant to a Summary Proceeding in Civil Court, a Landlord may commence an action for unpaid rent against other parties, alleging that they were personal guarantors of the lease. However, as stated, even where an individual has signed a Lease as "tenant" and does not indicate the Corporation but has on behalf of the disclosed principal signed, the Court has found that there is not "clear and explicit evidence that they intended to bind themselves personally." *L'Aquila Realty, LLC v. Jalyng Food Corp.*, 148 A.D.3d 1004 (App. Div. 2d. Dept., 2017); see *Salzman Sign Co. v. Beck*, 10 N.Y.2d 63, 217 N.Y.S.2d 55, 176 N.E.2d 74 (1961) and *GMS Batching, Inc. v. TADCO Const. Corp.*, 120 A.D.3d 549 (App. Div.

2d. Dept., 2014). In this case Defendant Pensato's name is specifically omitted and his signature only appears once on the form Contract and once on the Rider. Both times in relation to the Defendant LLC. The intent is clear. Even assuming the relevance of the Pensato Affidavit in the Civil Court Proceeding, the affidavit coupled with Defendant Pensato's testimony does not serve to disturb what is clearly reflected in the Lease itself.

Accordingly, the Plaintiff has failed to establish by a preponderance of the evidence that it was intended that Defendant Pensato be personally liable for the tenant's Lease obligations. Therefore, Plaintiff's action is dismissed as against Defendant Antonio Pensato.

DAMAGES

Remaining at issue is whether Plaintiff, by a preponderance of the evidence, has proven the damages sought. Plaintiff has provided documentary evidence and testimony to support its damages claim.

Base Rent Charges

Real Property Law §232-c provides the following in relevant part:

> "Where a tenant whose term is longer than one month holds over after the expiration of such term...landlord may proceed, in any manner permitted by law...or, if the landlord shall accept rent for any period subsequent to the expiration of such term...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."

Defendant contends that because there was no renewal of the Lease after 2008, the Plaintiff was not permitted to charge the proposed increase of rent after the contract had expired. Plaintiff contends that the increases that were charged were indicated in the Lease as follows:

> "...increasing 3% for each year thereafter throughout the term of the Lease. Upon tenant's renewal option, Tenant's annual rent in the first year renewal shall increase 6%. During second year of renewal and for each year thereafter through he term of the lease, tenant's annual rent shall increase 3% per annum..." (Plaintiff Exhibit 10, Paragraph 44 of Rider) (In relevant part)

As noted above, when a Lease or contract is found to be ambiguous, the role of the Court is to interpret the Contract in the language construction most favorable to the nondrafting party. Here, the Court notes that the referenced provision in question utilizes the term "upon tenant's renewal". This is not an ambiguous term. As such increases would apply only upon the renewal of the Lease. After holding over, the Plaintiff accepted the payments from the Defendant and therefore a month-to-month tenancy was created. Mr. Coleman acknowledged that the Lease was not renewed in that the tenant was not in good standing. Since there was no renewal the Plaintiff is only entitled to the annual rent increases provided in the Lease (3 percent annually) for the entire period that the Defendant was in possession of the Unit. *See Logan v. Johnson*, 34 A.D.3d 758 (2nd Dept, 2006); *Northvale Prop. Assoc. v. Osram Sylvania*, 300 A.D.2d 373 (2nd Dept, 1983).

Therefore, this Court finds that the Plaintiff did not have a right under the Lease to increase the rent by 6% in the first year after expiration of the Lease. However, insofar as the Lease provided for a 3% increase every year, the Plaintiff is entitled to the 3% per annum during the holdover period. Accordingly, the Plaintiff is entitled to an annual 3% increase through July, 2010, the date Defendant LLC vacated the Premises.

Late Charges

Plaintiff and Defendant both point to Paragraph 50 of the Lease in relation to the calculation of late fees. Paragraph 50 reads as follows:

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> "50. If any installment or item of rent or additional rent shall not have been paid by the tenth (10) day after which it is due and payable, a charge of five percent (5%) of such installment or item shall be immediately due and payable as liquidated damages for Owner's costs and expenses associated with Tenant's failure to make timely payment. If any such installment or item shall not have been paid by the thirtieth (30th) day after which it was due and payable, an additional charge of five percent (5%) of such installment or item shall be immediately due and payable as liquidated damages for Tenant's further delay in payment. All sums due from Tenant pursuant to this Article 48 shall be additional rent." (Plaintiff Exhibit 10) (Paragraph 50, page 4 of Rider)

Defendants contend that the late fees should only be applied to the base rent and should not apply to any of the other charges on the ledger. Plaintiff contends that the above language (¶50) indicates that the late fee calculation and subsequent charge should be applied to all outstanding payable "installment or item of rent or additional rent." Therefore, the late fees are permitted to be applied by the Plaintiff to both rent and additional rent in accordance with the language of the Lease.

"The construction and interpretation of an unambiguous written contract is an issue of law within the province of the court, as is the inquiry of whether the writing is ambiguous in the first place." *Katina v. Famiglietti*, 306 A.D.2d 440 (2d. Dept. 2003); see *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157 (1990), *Van Wagner Adv. Corp. v. S & M Enters.*, 67 N.Y.2d 186 (1986). When a court determines that the contract is free from ambiguity the meaning of said contract is determined, without resorting to extrinsic evidence, on the basis of the writing alone, as a matter of law. *Katina v. Famiglietti*, 306 A.D.2d 440 (2d. Dept., 2003); *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157 (1990), *Chimart Assoc. v. Paul*, 66 N.Y.2d 570 (1986). The court's objective is to determine the parties' intention as derived from the language employed in the contract. *Katina v. Famiglietti,* 306A.D.2d 440 (2d. Dept . 2003); See *Greenfield v. Phillis Records, Inc.*, 98 N.Y.2d 562 (2002), *Slamow v. Del Col*, 79 N.Y.2d 1016 (1992).

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The Court will consider a contract to be ambiguous when it is "reasonably susceptible of more than one interpretation" if there is nothing to indicate what was intended or there is inconsistent language contained in different parts of the contract. *Natt v. White Sands Condominium*, 95 A.D3d 848 (2d. Dept. 2012) quoting *Chimart Assoc. v. Paul*, 66 N.Y.2d 570 (1986); see *Travelers Ins. Co. v. Castro*, 341 F.2d 882 (1965). If a contract is, "internally inconsistent in material respects" then the Court invokes the rule that "strict construction of the contract [be given] in the light most favorable to the nondrafting party." *Natt v. White Sands Condominium*, 95 A.D3d 848 (2d. Dept. 2012); see *Fernandez v. Prince*, 63 A.D.3d 672 (2d Dept. 2009); *242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 31 A.D.3d 100 (First Dept. 2006) ; *Turner Press v. Gould*, 76 A.D.2d 906 (2d Dept. 1980).

This Court finds that the language in relation to late fees, as articulated in the Lease at ¶44 and ¶50, is unambiguous. Therefore the Court should not and will not resort to extrinsic evidence or provide a modification. The provision clearly intends that a late fee will be assessed for untimely payment of rent and additional rent. Additional rent is defined in ¶34 of the Lease.

Accordingly, the Lease at ¶34 provides that "Additional Rent means all sums which shall be due to the New Owner from Tenant under this lease in addition to the annual rental rate." Although the Defendants dispute some of the charges claimed, the Defendant did not provide the Court with any evidence that indicates that the Plaintiff erred in its application of late fees generally. In fact the evidence provided by Plaintiff was sufficient to establish Plaintiff's practice in this area. The Plaintiff, by the documentary evidence (also provided by the Defendants) and the testimony of Mr. Coleman, reflects that the ledgers reflect the rent and additional rent and accordant late fees provided for in the Lease.

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Electricity Charges

The Defendants contend that the Plaintiff has improperly calculated the charges owed for electricity use at the unit and that the Defendant was never provided a statement reflecting electricity readings. Defendants aver that the Plaintiff just chose a number and added it to the Rent Ledger. Mr. Coleman's testimony however, indicates that the Defendants were provided with regular electricity statements based on the readings through a sub metering system for the individual space. Additionally, the Plaintiff relies on the following language of the Lease:

> "52. Notwithstanding anything to the contrary in this lease, at Owner's election, Owner shall supply to Tenant and Tenant shall purchase solely from Owner or Owner's designated agent, services and/or utilities as follows:
> (c) During any period for which a meter required by or installed pursuant to the requirements of this lease is not installed or not functioning accurately, Owner may estimate Tenant's electric or water usage based on a reasonably analogous period. Any such estimate shall be binding on Tenant." (Plaintiff Exhibit 10, Paragraph 52 (c) page 5 of Rider)

Mr. Coleman testified that the method by which the Owner estimated the electricity usage for the Unit was reasonable and was standard practice. There is no ambiguity in the language and the binding effect of the utilization of estimates and/or submetering. However, the Plaintiff did not provide any evidence (beyond Mr. Coleman's general understanding of the way in which tenants were charged) concerning the formula utilized, the particular Unit's sub-metering system or statements or bills provided to Defendants in relation to electric use. Plaintiff has failed to prove by a preponderance of the evidence that it is entitled to the "Electric" charges claimed. Accordingly there shall be no award for additional rent in relation to electric usage.

Nevertheless as provided for in ¶44 of the Lease[6], the Plaintiff is entitled to apply payments made by the Tenant toward any rent or additional rent owed. Defendant has provided the Court with an electric invoice on GMDC letterhead, Defendant's Exhibit D, which indicates that the Defendant has admitted making payments for electricity on two separate occasions[7]. While the Court has not been provided with proof by the Plaintiff as to the amount owed for electricity, as discussed below, the Defendant was occupying the Unit. A review of photographs of which indicate that significant machinery and equipment was being utilized. To the extent that the Court can determine, by an examination of the Ledger and the aforereferenced Defendant's Exhibit D, which payments made by Defendant LLC were credited towards "electric" or "electricity", those payments will be considered payments credited for electricity use and will be deducted from the credits to Defendant LLC utilized in relation to the payment of other rent due and owing. Defendant has not challenged the application of its payments to electric as reflected in the Ledger. Accordingly to the extent Defendant has acknowledged an obligation to pay and only disputes the amount, Plaintiff is entitled to apply payments to electric usage for purposes of determining credits to Defendant for same.

Demand for Legal Fees

Defendant, premised upon the argument that the entire eviction proceeding in Housing Court against the Defendant's by MAHC was a nullity, due to MAHC's dissolution, contends that there accordingly should be no legal fees awarded in relation to Mr. Aronson's representation of the Plaintiff

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[6]Paragraph 44 of the Lease in pertinent part provides as follows: "Owner may apply any money received from Tenant to any outstanding obligation that Tenant has to Owner, regardless of any direction as to payment by Tenant or any notation on any check."

[7]On an Electric Invoice (Defendant's Exhibit D) including July and August 2008, Defendant LLC has handwritten two separate check numbers next to two separate amounts totaling $775.74. Additionally, Plaintiffs Exhibit 11 (Rent Ledger) reflects these payments.

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in the Housing Court proceeding. As an initial matter, Mr. Aronson testified that he could not recall exactly what a certain $4,246.50 additional charge for legal fees related to. As such these additional legal fees have not been established.

Plaintiff relies on the following provision of the Lease:

> "19. If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under, or by virtue of, any of the terms or provisions in any article of this lease, after notice if required, and upon expiration of the applicable grace period, if any, (except in an emergency), then, unless otherwise provided elsewhere in this lease, Owner may immediately, or at any time thereafter, and without notice, perform the obligation of Tenant thereunder. If Owner, in connection with the foregoing, or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid or obligations incurred with interests and costs. The foregoing expenses incurred by reason of Tenant's default shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefor. If Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages." (Plaintiff Exhibit 10, Paragraph 19.)

Both the Housing Court proceeding and the current action pending before this Court are in relation to the Tenant's breach of the Lease including the failure to tender possession timely and in broomclean condition. Therefore the Plaintiff pursuant to the unambiguous terms of the Lease is entitled to all reasonable attorney's fees incurred due to that breach[8].

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[8]Paragraph 60 of the Lease states as follows: "Time shall be of the essence against Tenant with respect to vacating and surrendering the demised premises in the condition required by this lease upon the expiration or termination of this lease. Tenant shall be liable for all claims, losses, liability, costs, and expenses (including without limitation reasonable attorneys' fees and disbursements) incurred by Owner by reason of any delay by Tenant in vacating the demised premises and any failure by Tenant in surrendering the demised premises to Owner in the

The Court does find however that Plaintiff has not met its *prima facie* burden in relation to its total claim for attorney's fees. In the Summons and Complaint, Plaintiff claims a total amount of $252,982.99 for the "payment rent, electric and other charges." The Plaintiff's Rent Ledger (Plaintiff's Exhibit 11), reflects charges as "Legal" as follows: 1) charge on February 1, 2006 for $4,246.50, and 2) for $10,000.00 charged on August 16, 2010, for a total of $14,246.40. However, the Plaintiff only provided payment receipts from Mr. Aronson in relation to the Civil Court proceeding, totaling $5,000.00. The work performed by the Plaintiff's counsel should provide some detail so that the Court may determine whether the fees sought are reasonable in light of the services provided. *See First Nat. Bank of E. Islip v. Brower*, 42 N.Y.2d 471, 368 N.E.2d 1240 [1977]; *Diaz v. Audi of Am., Inc.*, 57 A.D.3d 828, 873 N.Y.S.2d 308 [2nd Dept, 2008]; *Green Point Sav. Bank v. Tornheim*, 261 A.D.2d 360, 689 N.Y.S.2d 193 [2nd Dept, 1999]; *Marine Midland Bank v. Roberts*, 102 Misc. 2d 903, 424 N.Y.S.2d 671 [Civ. Ct. 1980].

Plaintiff's witness Mr. Aronson only testified as to the $5,000.00 reflected by the payment receipts. The Plaintiff did not provide the Court with any support for legal fees and disbursements for the instant action. The Plaintiff in its Post-Trial Summation represented only that the Plaintiff was entitled to reasonable legal fees, however the Plaintiff represents that it "does not believe this argument needs to be addressed and defers to the Court's discretion." The Court cannot exercise its discretion without a further showing by Plaintiff in relation to attorney's fees and disbursements allegedly incurred for this proceeding. As such no award is granted.

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condition required by this lease."

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Accordingly, the Plaintiff is awarded the sum of $5,000.00 in Legal Fees. Plaintiff's Exhibit 12 indicated the reasonableness of the fee based upon the work performed as reflected in this document. Mr. Aronson testified that he has been an attorney for 38 years and that his practice focuses on real estate and Landlord/Tenant proceedings. This was sufficient for the Court to determine that the fees awarded herein in the sum of $5,000.00 were reasonable.

Charges to Render the Unit Broomclean

Defendant, in defense of the condition of the space upon vacating the Premises, contends that many of the photographs (Plaintiff Exhibit 13) did not depict Defendant LLC's actual Unit and that some of the photographs depicted objects and equipment that were not the property of Defendant LLC. Plaintiff contends that Defendant's defense for not having enough time to vacate the premises and leave it in broom swept condition, as stipulated to in Housing Court (Plaintiff Exhibit 15), is unavailing. The Defendants agreed to the date that the tenant would leave a month prior to the that date. The Defendant LLC had sufficient time to vacate the Unit broomclean. The photographs do not depict a broomclean unit.

Plaintiff offered testimony by Mr. Coleman that the photographs were taken in proximity to the time that the Defendant's vacated the premises and that while some of the photographs did not in fact depict the actual Unit, they depicted nearby hallways and elevator shafts where Defendant LLC discarded it's equipment.

The Housing Court Stipulation addressed the condition of the Premises upon vacating the Premises and the Defendant was given adequate notice (evidenced by the fact that his attorney agreed to the time frame) to vacate the premises and tender it in the agreed upon condition. The testimony of

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Defendant Pensato that he and his assistants were rushed and only had a short time to "take as much as we could" indicates that items were left at the Unit and that the Unit was certainly not left in broomclean condition. Accordingly, Plaintiff is awarded $15,000.00 for debris removal and cleaning as reflected by receipts as a part of Plaintiff's Exhibit 13.

Demand for Additional Security Charge

Plaintiff contends that no security payment was made by Defendants and therefore payment of security is due and owing. Defendant offers no proof or documentary evidence that the security was paid by the Defendant. However, the Security language of Paragraph 32 in the Lease includes the following language:

> "...in the event Tenant defaults in respect of any of the terms, provisions and conditions of this lease, including but not limited to, the payment of rent and additional rent, Owner may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum as to which tenant is in default or for any sum which Owner may expend or may be required to expend by reason of Tenant's default in respect of any of the terms..."

Plaintiff is not entitled to the security payment of $9,854.16. The relevant provisions of the Lease make it clear that the purpose of the security provided for is to secure payment of rent and additional rent. This Court has granted the Plaintiff all unpaid rent and additional rent that it has found that Plaintiff is entitled to. Therefore, the Plaintiff is not entitled to recover the additional $9,854.16 for security.

Demand for 2005 Unlevied Rent/Audit and Finance Charges

Plaintiff has failed to meet its burden by a preponderance of the evidence that an audit that resulted in an additional $9,021.54 line item charge as additional rent occurred. There was no

documentary evidence or testimony presented that would entitle Plaintiff to such a charge. Accordingly, the Plaintiff is not awarded the $9,021.54 charge for the unlevied rent charge of 2005.

Additionally, a charge entered as "Finance Chg (2 yrs)" invoiced for $31,334.26 on the Rent Ledger (Plaintiff's Exhibit 11) is not awarded as the Plaintiff has failed to meet its burden by a preponderance of the evidence. Plaintiff has failed to produce any documentary evidence or testimony in relation to this one time charge. Plaintiff is not awarded the additional $31,334.26 alleged to be in relation to finance charges as a result of unpaid invoices.

CONCLUSION

Generally this Court has been confronted with the task of determining facts in relation to what occurred between the parties based upon a combination of both a lack of evidence and a moderate lack of clarity in relation to the evidence that has been proffered. The totality of the evidence presented reflects that the Plaintiff apparently lacked basic oversight in relation to document maintenance and retention and a less than adequate record keeping practice in relation to the Subject Lease. This decision reflects this and the conclusion is necessarily a product of it.

The Plaintiff is a proper party to bring this action against the Tenant in relation to the Unit and pursuant to the Lease. Defendant Pensato has no personal liability for the Tenant's obligations under the Lease.

Plaintiff, as indicated in the Summons and Complaint, has relied upon Plaintiff's Exhibit 11, the Rent Ledger, as proof of the damages it is seeking. The Court however, will award an amount for Base Rent based upon the language in the Lease between the parties. In keeping with that conclusion, the

Court will credit the Defendant LLC with any payments reflected to have been made in the Rent Ledger (less the noted credits for electricity payments reflected therein as aforementioned) against the total amount awarded.

Pursuant to the Lease, the first year's[9] annual base rent is "$46,000.00, increasing to FIFTY SEVEN THOUSAND THREE HUNDRED ($53,400.00)[10] in year two of the Lease, increasing 3% for each year thereafter throughout the term of the Lease." The base rent for the second year of the Lease shall be $53,400.00 and the correct calculation will be made with a 3% increase annually thereafter. Accordingly, the following calculation for base rent is made:

Year	Annual	Monthly
2003-2004	**$46,000.00**	$3,833.33
2004-2005	**$53,400.00**	$4,450.00
	^3%	
2005-2006	**$55,002.00**	$4,583.50
	^3%	
2006-2007	**$58,302.12**	$4,858.51
	^3%	
2007-2008	**$60,051.19**	$5,004.27
	^3%	
2008-2009	**$61,852.73**	$5,154.39
	^3%	
	$63,708.31	$5,309.03
		x4 (Months)
2009-2010	**$21,236.10 (4 months)**	
Base Rent	$355,844.14	

[9]A year for these purposes is from March 1 through February 28, as reflected in the Lease.

[10]The ambiguity between the written lease amount and the numerical representation will be read in the non-drafting parties (the Defendant's) favor. *Natt v. White Sands Condominium*, 95 A.D.3d 848 (2d Dept. 2012); see *151 W. Assoc. v. Printsiples Fabric Corp.*, 61 N.Y.2d 732, 460 N.E.2d 1344 (1984)

The year 2009-2010 is calculated by what would be the monthly base rent charge and the Defendant is only charged for the four months of that year during which the Unit was occupied. Therefore, the total base rent pursuant to the Lease owed by Defendant LLC for the Lease period, inclusive of the holdover period following the Lease end March 31, 2008 date, is $355,844.14[11].

The Court has calculated, based on the Rent Ledger (Planitiff's Exhibit 11), that the Defendant LLC has made a total sum payment to Plaintiff of $328,931.30 for the relevant period. As aforementioned, the total amount in payments credited to Defendant by the Plaintiff in the Rent Ledger for electric charges is $5,032.92. This amount shall be deducted from the total credits reflected in the Rent Ledger. Therefore, the Defendant LLC will be credited a total sum of $323,898.38 which will be subtracted from the total base rent owed.

Plaintiff is awarded damages for the remaining unpaid rent and additional rent as against the Defendant Tenant LLC as follows:

Base Rent:	$355,844.14
Legal Fees:	$5,000.00
Cleaning:	$15,000.00
Total Rent and Additional Rent:	$375,844.14
Credit Applied:	$323,898.38
Total Award to Plaintiff:	$51,945.76 - plus applicable late fees

[11]The Court notes that a calculation of total base rent alleged to be due and owing pursuant to the Rent Ledger is $387,108.10, an additional $31,263.96 from the calculation based upon the Lease Terms. Plaintiff provided no explanation for this discrepancy.

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As such late fees need to be recalculated and applied for the stated applicable periods in accordance with the terms of the Lease and this decision and shall be reflected with specificity in the proposed Order.

Plaintiff's action against Defendant Antonio Pensato as an individual is dismissed.

Settle Judgment on Notice within 60 days of the date hereof indicating the total damages due and owing in accordance with this Decision together with late fee calculations particularized and clearly shown for each item.

The foregoing constitutes the Decision of the Court.

ENTER:

Carl J. Landicino, J.S.C