Telx-New York LLC v 60 Hudson Owner LLC
2018 NY Slip Op 31037(U)
May 25, 2018
Supreme Court, New York County
Docket Number: 650440/2017
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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TELX-NEW YORK LLC,

Plaintiff,

-against-

60 HUDSON OWNER LLC,

Defendant.

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DECISION AND ORDER
Index No.: 650440/2017

Mot. Seq. No.: 002 & 003

O. PETER SHERWOOD, J.:

I. THE FACTS

As this is a motion to dismiss, the facts are taken from the Complaint (NYSCEF Doc. No. 1).

This case involves terms of the electricity charges clause of a long term lease. Defendant 60 Hudson Owner LLC (Hudson) owns a building located at 60 Hudson Street, New York, New York. A predecessor[1] of plaintiff Telx-New York LLC (Telx) leased a portion of the ninth floor of the building from defendant's predecessor on July 6, 1999, pursuant to a lease agreement ("the Lease"). There were various amendments to extend the term, lease additional space, and amend other terms of the Lease (all Telx leased space, the "Premises"). The amendments do not affect the terms of the Lease related to electricity charges.

The Lease provides that Telx will pay Hudson for electricity used on the Premises on a "cost plus" basis,[2] and sets forth a formula for calculating what Hudson may charge (*see id* ¶ 12). Telx claims that Hudson is overcharging for electricity on the order of $13 Million before the filing of the complaint in this action and that continuing to use this erroneous formula will result in additional tens of millions of dollars of overcharges.

Article 42(B) of the Lease provides that Hudson may charge Telx 107% of its costs for electricity. The formula provided in that article states that the fee shall be 107% of the sum of Hudson's average cost per kilowatt times kilowatts of demand, and Hudson's average cost per kilowatt hour times the number of kilowatt hours of consumption. The Lease also provides a definition of average cost per kilowatt (total amount Hudson was billed for kilowatt hours of

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[1] There was an intervening predecessor as well.
[2] Hudson disputes that the Lease provides for calculation of electricity on a cost plus basis (*see* Hudson Reply, p.2, NYSCEF Doc. No. 58).

demand (including associated charges and adjustments) divided by total kilowatt hours of demand for the Premises; and the average cost per kilowatt hour of consumption (including associated charges and adjustments) divided by total kilowatt hours of consumption for the Premises (the Old Formula) (*id,* ¶ 14). Telx argues that Hudson has been overcharging Telx by double counting consumption charges, by including them in both portions of the formula in violation of the Lease, resulting in Hudson charging Telx approximately double its electricity costs, rather than the allowed 107% (the New Formula) (*id,* ¶ ¶ 19-20). Additionally, Hudson calculates the fee including electricity sales tax, and then charges Telx additional fees by multiplying the total by the applicable percentage and charging Telx sales tax twice (*id,* ¶ 21).

Prior to September 2010, Hudson had calculated and billed Telx for the electricity charges correctly (*id,* ¶ 22). On November 23, 2010, Hudson told Telx it had been undercharging for electricity and was going to change its method of calculation. Telx objected (*id,* ¶ 23). On February 18, 2011, the parties entered into a letter agreement (the Electricity Side Letter) which provided that Telx would continue to pay for electricity using the old method for 90 days, and then would pay using the new method, on the condition that payments would not constitute a waiver of Telx's objections or claims (*id,* ¶ 24). The interim period the was extended several times, to September 30, 2011, at which point Hudson returned to using the New Formula.

There are also allegations about the merger between Telx Holdings, Telx's indirect parent, and Digital Realty Trust, Inc. Hudson has declined to give its consent to an amendment to the Lease which would recognize the merger transaction. Telx claims the refusal to consent is unreasonable. Those allegations are not relevant to this motion.

The complaint alleges the following claims:

1- Breach of contract- for improperly charging electricity fees from Sept. 2010- Feb 2011 and from Oct 2011 to present.
2- Declaratory Judgment- that Hudson has overcharged Telx, and clarifying the proper formula for calculating electricity fees.
3- Declaratory Judgment that the acquisition of Telx's parent was not an assignment, and, if it was, Hudson's consent to the assignment was being unreasonably withheld, and Telx no longer has any obligations with respect to obtaining Hudson's consent.

On this motion, defendant moves to dismiss the first claim.

II. ARGUMENTS

A. Arguments of Defendant in Support of Motion to Dismiss

Hudson contends that the language of the Lease is clear and unambiguous, and that Article 42(B), which provides the formula for calculating what Hudson may charge Telx for electricity, specifies the New Formula, as it "unambiguously defines *both* "Landlord's Average Cost Per Kilowatt" *and* "Landlord's Average Cost Per Kilowatt Hour" each to include "charges for fuel, 'on-peak' and 'off-peak' usage, 'time of day' usage and any and all other relevant adjustments and charges," and expressly provides for adding together the kilowatt and the kilowatt hour categories, *including the foregoing same components* under both categories" (Hudson Memo at 1, 6-8 NYSCEF Doc. No. 43 [emphasis in original]). This allows some items to be counted twice (*id.* at 11). The same terms (fuel, on-peak, off-peak and time of day usage charges) are in both bills (for supply and delivery) (*id.* at 14). This allows the landlord to make a profit from the electricity charges to Telx, which Telx does not dispute is permissible under the law (*id.* at 9-10). The parties are sophisticated and well counseled, and should be bound by the terms to which they have agreed (*id.* at 10).

Hudson also claims Telx ratified the Lease and at this point is estopped from challenging Hudson's calculation method because Telx rented other space from Hudson in the same building (pursuant to an earlier lease [the 1997 Lease]) which had a different (cost plus) term regarding electricity charges, and Telx and Hudson entered into an extension agreement in October 19, 2011 (the Extension Agreement), which states that, in exchange for extending the Lease, Telx agreed to the application of the disputed Lease terms to other space Telx leased from Hudson pursuant to the 1997 Lease, after the 1997 Lease expired on October 31, 2017. Hudson contends that the electricity term of the 1997 Lease does not allow the same double counting of the components that are double-counted in the Lease (*id.* at 16). Since the Lease which is the later agreement, has different terms, the parties knew how to draft a more 'tenant-friendly' version had they wanted to do so. Thus, it must be concluded that the parties intended the Lease to allow the double counting (*id.*).

Additionally, the Extension Agreement disclaims any default by Hudson under the Lease, and moots the Electricity Side Letter (*id* at 3, 16-17). There is no reservation of rights in that document. As the Extension Agreement has merger and ratification clauses, ratifying the terms of the Lease and representing that "to Tenant's knowledge Landlord is not in default in the performance of any

of its obligations under the [Lease] as of the date hereof" (*id.* at 17, Extension Agreement, attached as Exhibit E to Yuzek Aff, NYSCEF Doc. No. 30, ¶ 12). As the Extension Agreement came after the Electricity Side Letter, the side letter is superseded, and is irrelevant (Hudson Memo at 17-18). Hudson also argues that, as Telx has failed to reserve its rights, it is equitably estopped from now challenging Hudson's calculation method (*id.* at 19).

Hudson then argues that Telx was a sublessee of another tenant for about half of the relevant time period, and was neither in privity of contract with Hudson nor a third party beneficiary of the over-lease. One portion of the subleased space, known as Suite 900, it accounts for about 40% of the electricity consumption at issue (*id.* at 20). Between September 2010, when Hudson adopted the New Formula through May 13, 2013, there was no direct contract between the parties concerning the subleased space (*id.*). There was a lease between Hudson and XO Communication Services, Inc (XO) for a portion of the 9th floor, including Suite 900 (*id.*). XO subleased a portion of that space to Colo Properties, Inc., which was Telx's predecessor (*id.* at 21), and subsequently subleased the remainder of its 9th floor space to Telx (*id.*). The sublease expired in May 2013. While Hudson consented to the sublease, the consents disclaimed any obligations of Hudson to Telx or any privity of contract, except for payments to be made directly by Telx to Hudson pursuant to those consents (*id.* at 22). Hudson argues that because there is no privity of contract, the portion of the first cause of action stating that Hudson overcharged Telx for electricity used in Suite 900 should be dismissed.

b. Plaintiff's Opposition

Plaintiff argues that its interpretation of Article 42 (B) is correct. The intention of the Lease, and the language of the relevant clause to allows Hudson to be reimbursed for electricity fees, it paid plus a 7% administrative fee. The clause is not intended as a profit center for the landlord (Opp at 2-5, 8). Telx adds that Hudson's interpretation is grammatically incorrect (*id.* at 10-13).

Telex also argues that Hudson has failed to provide documentary evidence which utterly refutes Telx's claims as CPLR 3211 (a)(1) requires (*id.* at 13). Further it is inappropriate for Hudson to attach expert and attorney affidavits at this stage to support its interpretation or for this type of motion (*id.* at 14). The attachments do not constitute documentary evidence, nor do they utterly refute the allegations in the complaint (*id.* at 15). As far as Hudson relies on its characterization of the 1997 Lease, Hudson did not attach that document to its papers or quote the relevant provision. Accordingly, arguments related to the 1997 Lease should be ignored (*id.* at 19-

20).

Telx argues further that it did not ratify Hudson's calculation method, but objected to it (*id.* at 20). The Extension Agreement makes no mention of the method for calculating electricity payments, and the Electricity Side Letter explicitly reserved rights on the issue (*id.* at 20-21).

Nor is there a lack of privity regarding Suite 900 (*id.* at 21). While Telx was a subtenant of XO for a time, Telx had assumed the direct tenant's obligations for electricity charges to Suite 900. While Hudson's consent to the sublease noted it did not recognize any privity of contract between Hudson and Telx, other than for payments to be made by Telx to Hudson, this qualifies, and thus there is privity of contract with regard to those payments (*id.* at 21-22).

Telx seeks discovery to allow it to develop its claims further, understand what it should have been billed for electricity, and see how Hudson interpreted similar clauses in contracts with other tenants (*id.* at 23-24).

c. Defendant's Reply

Defendant reiterates its argument that the language of Article 42(B) is unambiguous, and should be interpreted to support their method of calculating electricity costs to be billed to Telx. Any other interpretation requires making the first parenthetical "mere surplusage," instead of giving effect to every portion of the Lease (Reply at 2-8).

Defendant also argues that the various affidavits and attachments to its motion to dismiss are proper, and do not require transforming the motion into a motion for summary judgment. In any event, the additional evidence is not vital, as the Lease alone, or the Lease and the 1997 Lease attached to the Reply papers are enough (*id.* at 10-12).

Defendant repeats that Telx ratified Hudson's interpretation of the formula for calculating electricity costs in Article 42(B) (*id.* at 11). By entering into the Extension Agreement, which was to apply the terms of the Lease to the portion of the premises previously covered by the 1997 Lease, Telx "ratified and confirmed" all of the "covenants, agreements, terms and conditions" of the Lease (*id.* at 13, quoting Extension Agreement, ¶ 8). The Extension Agreement contains no reservation of rights, and has a merger clause extinguishing prior agreements, including the Electricity Side Letter, making it barred here by the parol evidence rule (Reply at 13).

As to whether electricity fees related to Suite 900 should be divorced from this action, the consent to the sublease disclaims any privity of contract, except as to payments to be made by Telx directly to Hudson which are expressly stated in that document (*id.* at 14, citing Consent, attached

as Exhibit G to Yuzek Aff, NYSCEF Doc. No. 32, at 2). Accordingly, the portion of the first cause of action which relates to Suite 900 for the period during which Telx subleased that space, although it is not clear what portion of the claim that is, should be dismissed.

III. DISCUSSION

a. Standard for Motion to Dismiss- Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 AD3d 987, 989 [2nd Dept 2011]).

b. The Lease

The documentary evidence relied upon by the defendant is the Lease. While the defendant also discusses the 1997 Lease, for comparison, the 1997 Lease was not attached to defendant's moving papers. "The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds [or evidence] for the motion" (*Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 [1st Dept 2006] quoting *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). While the court has discretion on this matter, the court will not excuse Hudson's failure. The additional documentary evidence which is the basis of the motion was submitted only after plaintiff's opportunity to oppose the motion, and will not be considered. Additionally, the term in the 1997 Lease for billing electricity is worded differently than that term in the Lease. It does not utterly refute Telx's claims or conclusively establish there is no claim as a matter of law.

The disputed portion of the Lease involves the formula which Hudson is to use to bill Telx for electricity, "Kilowatts of demand" and "kilowatts of consumption". Although central to the

dispute, neither party explained the difference between. Based on the courts research, consumers are generally only billed for consumption, *ie.* how much electricity they use (whether they have one lightbulb requiring 100 watts burning for 10 hours or 10 such lightbulbs burning for one hour. The same kilowatts of power is used). However, the second hypothetical calls for more demand (as more power has to come through the "pipe" to simultaneously light the 10 bulbs for a shorter period). Commercial or industrial customers are often also billed for their peak demand in addition to their consumption, effectively for having a larger "pipe" carrying electricity to them (*see* think-energy.net). Here, Hess billed Hudson for electricity usage (*see* Hess Bill, attached as Exhibit A to Ma Affidavit, NYSCEF Doc. No. 34) and Con Ed billed for delivery (*see* Con Ed Bill, attached as Exhibit B to Ma Affidavit, NYSCEF Doc. No. 35).

The parties agree that the language of the Lease is unambiguous, but dispute what it means. Paragraph 42(B) provides:

> "From and after the Commencement Date, Tenant shall purchase all electric current consumed in or in connection with the demised premises from Landlord or Landlord's designated agent and shall pay therefor an amount equal to 107% of *the sum of* Landlord's Average Cost Per Kilowatt and Landlord's Average Cost Per Kilowatt Hour (as such terms are hereinafter defined) applied, respectively, to the kilowatts of demand and the kilowatt hours of consumption of all electricity utilized in or in connection with the demised premises during the applicable billing period, both as measured by the submeters for the demised premises.
>
> "Landlord's Average Cost Per Kilowatt" shall be determined by dividing (w) the total dollar amount billed to Landlord by the entity providing electric current to the Building (the "Electric Company") for kilowatts of demand utilized by the Building for the relevant billing period (including, without limitation, all charges for fuel, "on-peak" and "offpeak" usage, "time of day" usage and any and all other relevant adjustments and charges),by (x) the total kilowatts of demand utilized by the Building for such billing period. "Landlord's Average Cost Per Kilowatt Hour" shall be determined by dividing (y) the total dollar amount billed to Landlord by the Electric Company for kilowatt hours of consumption utilized by the Building for the relevant billing period (including, without limitation, all charges for fuel, "on-peak" and "off-peak" usage, "time of day" usage and any and all other relevant adjustments and charges), by (z) the total kilowatt hours of consumption utilized by the Building for such billing period."

"The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on

its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67).

In accordance with these principles, a court should interpret a contract "so as to give full meaning and effect to the material provisions" (*Beal Savings Bank v Sommer*, 8 NY 3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 582 [2004]). "A reading of a contract should not render any portion meaningless . . . . Further, a contract should be read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose" (*id.* at 324-325, quoting *Matter of Westmoreland Coal Co. v Entech, Inc.*, 100 NY2d 352, 358 [2003]).

This contract is unambiguous. Telx is required to pay:

1.07 x [(Landlord's Average Cost per Kilowatt x Kilowatts of Demand) + (Landlord's Average Cost per Kilowatt Hour x Kilowatt Hours of Consumption)]

Landlord's Average Cost per Kilowatt is calculated as follows:

Total $ billed to Hudson for kilowatts of demand, including charges related to the kilowatts of demand, divided by the total Kilowatts of demand used. Landlord's Average Cost per Kilowatt Hour is calculated as follows: Total $ billed to Hudson for kilowatt hours of consumption, including charges related to kilowatts of consumption, divided by the total kilowatt hours of consumption used.

As far as Hudson argues it is allowed to double count fees related to consumption, and include them in the "total billed to Hudson for kilowatt hours of demand" because the demand term includes the parenthetical "(including, without limitation, all charges for fuel, "on-peak" and "off-peak" usage, "time of day" usage and any and all other relevant adjustments and charges)," which refers to charges associated with consumption, Hudson is misguided. While the parenthetical is the same for both usage and delivery, it clearly refers to charges associated with, or appearing on the same bill as, the usage or delivery fees, depending on which element is being calculated. Charges related to delivery may be counted as part of the total amount billed to Hudson for kilowatts of demand. Charges related to consumption may be counted as part of the total amount billed to Hudson for kilowatts hours of consumption.

As the language of the Lease is unambiguous, there is no need to look outside the four corners of this document and examine the text of the 1997 Lease, other documents or affidavits provided by Hudson in connection with its efforts to clarify the meaning of Article 42 (B). Accordingly, the portion of the motion to dismiss based on documentary evidence shall be denied.

c. Standard for Motion to Dismiss- Failure to State a Claim

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

Defendant moves to dismiss Telx's breach of contract claim pursuant to 3211(a)(7) for failure to state a cause of action, but with the inclusion of evidence extrinsic to the complaint, it has made the question "whether the petitioner indeed has a cause of action, not simply whether he or she has stated one in the [] complaint" (Memo at 5, quoting *Matter of La Barbera v Town of Woodstock*, 29 AD3d 1054, 1055 [3rd Dept 2006]). This is effectively a pre-joinder motion for summary judgment and is improper. As Professor David Siegel states, "[t]he utility of the CPLR 3211(a)(7) motion was unfortunately reduced by the Court of Appeals decision in *Rovello v Orofino Realty Co.* [40 NY 2d 633 [1976]] *Rovello* held that as long as the complaint states a claim on its face, the plaintiff need not – in response to the defendant's paragraph 7 objection – come forward with affidavits or other proof unless the court does in fact elect to treat the motion as one for summary judgment. This has resulted in holdings that the court cannot even *consider* the defendant's affidavits on a CPLR 3211(a)(7) motion unless and until it has elected to exercise its treat-as-summary-judgment power" (Siegel, NY Prac §265 at 462 [5th ed 2011], citing *Rovello*). It appears that many courts handle this type of motion by converting it to a motion for summary judgment and allowing additional briefing.

d. Suite 900

While defendant argues that there is no privity between the parties regarding Suite 900 for a portion of the relevant period, because Telx was a sublessee of the Suite 900 space, and the Extension Agreement disclaimed privity, except in certain specific contexts, defendant does not explain how, during this period, Telx was billed for electricity, or pursuant to what agreement. The complaint does not distinguish between Suite 900 and the rest of the premises on that point, and defendants do not provide clarification. If Hudson charged Telx according to the Lease, with Hudson's changing interpretation of how the electricity charge should be calculated, it would seem Telx might have a claim pursuant to the Lease. If Hudson charged Telx according to some other agreement, Telx may not have a claim, but Hudson has not made its burden on this issue.

c. Waiver/Ratification

Hudson argues that Telx ratified Hudson's interpretation of the Lease electricity clause by entering into the Extension Agreement which stated that, in exchange for extending the Lease, Telx would agree to the application of the Lease's terms to the space Telx leased from Hudson pursuant to the 1997 Lease, after the 1997 Lease expired on October 31, 2017. Since, as discussed above, Hudson is incorrect about the proper meaning of the electricity term of the Lease, the agreement to apply the Lease to space previously covered by the 1997 Lease, and ratifying the terms of the Lease, does not mean Telx agreed to use Hudson's interpretation of the electricity term of the Lease. Nor does Telx's payment of the higher fee constitute waiver. As Hudson, itself, argues, "[t]he issue here is the language of Paragraph 42(B) of the 1999 Lease, not what Tenant paid" (Reply at 12 n.7).

As far as Hudson argues that the Extension Agreement disclaims any default by Hudson under the Lease, and moots the Electricity Side Letter, which retained Telx's rights to object, Hudson mis-quotes the Extension Agreement. The Extension Agreement states "Tenant hereby represents that, to Tenant's knowledge, Landlord is not in default in the performance of any of its obligations under the **Current Lease** as of the date hereof" (Extension Agreement, ¶ 12 [emphasis added]). The Lease is defined in the Extension Agreement as the "Existing Lease," and the term "Existing Lease" is used throughout. The 1997 Lease is referred to in that document as the "1997 Existing Lease." It is not clear what is meant by the term "Current Lease" in the Extension Agreement. Accordingly, the claim cannot be dismissed on the basis of waiver/ratification.

IV. Motion to Consolidate (motion sequence number 003)

In motion sequence number 003, Telx explains that Hudson brought a nonpayment proceeding (NPP) in New York City Civil Court demanding payment of the rent which is disputed in this action.[3] As the two actions concern the same issue, *i.e.* whether Telx is indebted to Hudson for unpaid rent based on Hudson's calculations of electrical charges, Telx contends that the NPP should be removed to this court and consolidated with this action.

Defendant concurs that the NPP should be removed and consolidated, on the following conditions: (1) Telx must pay Hudson the $1,484,707.03 Telx has withheld since the commencement of this action, and any additional withheld money; (2) Telx must resume payment of 60 Hudson's monthly invoices in full; and (3) Telx must pay the undisputed portion of the additional rent owned Hudson related to Suite 1107. Items 1 and 2 are related to calculations of the electricity bills at issue in this action. Item 3 relates to a separate dispute between the parties arising from an allegedly defective electricity meter in Suite 1107 which, it is alleged, resulted in Telx being underbilled. Hudson claims that Telx agrees it was underbilled, but disputes the amount owed. Hudson contends Telx owes $2,020,621.10. Telx concedes it owes only $1,246,438.25.

Hudson argues that, in removing a Civil Court summary proceeding to the Supreme Court, Telx's self-help has to be addressed, to restore the status quo until final judgment is entered (Opp at 23, citing *Abright v Shapiro*, 92 AD 2d 452, 453 [1st Dept 1983] ["Balancing the equities, defendants are entitled to the monthly payments for rents or use and occupancy, if only to maintain the *status quo* until rendition of a final judgment:]). Hudson also relies on a Second Department decision modifying a Supreme Court decision consolidating cases to require the tenant party to pay rent (*Marshall v Monegro Inv'rs*, 132 AD 2d 651, 653 [2d Dept 1987] ["We condition our modification of the order appealed form upon the plaintiff's continued payment of a sum denominated as "rent" as it becomes due. Whether we accept the plaintiff's contention that the monthly payments were in the nature of mortgage payments or Monegro Investors' contention that such payments constituted rent, the plaintiff's obligation to make such monthly payment does not abate. The precise nature of the money ordered to be paid by the plaintiff hereunder will be determined at trial."]). If it turns out that Telx has overpaid, it may receive a refund or rent credit (Opp at 4). Hudson argues that, by withholding rent, Telx is effectively holding Hudson's property

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[3] The NPP was filed in the Manhattan Division of the New York City Civil Court and is styled *60 Hudson Owner LLC v Telx-New York, LLC*, Index No. 72765/2017.

for security purposes, and cannot satisfy the requirements of CPLR 6201 for obtaining an order of attachment.

Telx disagrees, repeating several arguments made as to the merits of the motion to dismiss. Telx also argues that the cases cited by Hudson do not require payment, but instead, require the court to the balance the equities, which in this case fall in Telx's favor. Further, the facts of the cases cited are distinguishable. Unlike *Marshall*, it is disputed whether Telx owns Hudson money, and whether Hudson owes Telx a refund for past overbillings. Unlike *Abright*, Telx is still making payments to Hudson.

Telx does not concede that it owes Hudson any money with respect to the purportedly defective meter for Suite 1107 (Reply at 7). Telx also argues that any amount owed to Hudson is eclipsed by the $13 million Hudson owes it in overcharges for electricity. Nonetheless, Telx offers to provide appropriate security by placing funds into escrow, if and in an amount required by the court (Rely at 7-8).

Taking the issues involved on the two motions together, the relative size of the amounts involved and balancing the equities (as it appears Hudson may have used the incorrect formula for calculating the electricity bill) the NPP shall be removed in the interest of judicial economy and consolidated with this action without any requirement for Telx to tender payments or offer security to Hudson.

Accordingly, it is hereby

ORDERED that Hudson's motion to dismiss the first cause of action (motion sequence number 002) is DENIED; and it is further

ORDERED that the papers heretofore filed in the said Civil Court action and in this action shall stand as the papers in the consolidated action; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who shall mark their records to reflect this consolidation; and it is

ORDERED that counsel for the parties shall appear at a status conference to discuss possible revision of the discovery schedule in light of this Decision and Order on June 12, 2018 at 9:30 am, Part 49, Room 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: May 25, 2018

ENTER,

O. PETER SHERWOOD J.S.C.