Sator Realty, Inc. v Coventry Real Estate Advisors, LLC

2022 NY Slip Op 32491(U)

July 25, 2022

Supreme Court, New York County

Docket Number: Index No. 657321/2020

Judge: Mary V. Rosado

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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SATOR REALTY, INC.	INDEX NO.	657321/2020
Plaintiff,	MOTION DATE	12/20/2021, 05/19/2022
- v -		
COVENTRY REAL ESTATE ADVISORS, LLC,	MOTION SEQ. NO.	004 005
Defendant.		

DECISION + ORDER ON MOTION

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HON. MARY V. ROSADO:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138
were read on this motion to/for PENDENTE LITE.

Upon the foregoing documents, Motion Sequences 4 and 5 are jointly decided and ordered as follows:

Plaintiff Sator Realty, Inc ("Landlord") seeks an order pursuant to CPLR §§ 3211(a)(1), (a)(5), (a)(7) and 3212 dismissing the affirmative defenses and counterclaims of defendant Coventry Real Estate Advisors ("Tenant"), granting monetary judgment in favor of Landlord and ordering a hearing on attorneys' fees and costs Tenant owes Landlord. In response, Tenant cross-moves seeking to compel disclosure of certain discovery pursuant to CPLR § 3124 and an order denying or staying Landlord's motion for summary judgment pursuant to CPLR § 3212(f).

For the following reasons, Landlord's motion dismissing Tenant's affirmative defenses and counterclaims is granted in part. Further, pursuant to the plain and unambiguous terms of the

commercial lease, which was negotiated and agreed to by sophisticated commercial entities, the Court grants Landlord's motion seeking money judgment and a hearing on attorneys' fees. Tenant's cross-motion is denied.

I. Factual Background

Landlord is the net-lessee of One East 52nd Street, New York, New York (the "Building") (a/k/a 655 Fifth Avenue) (NYSCEF Doc. No. 66 at ¶ 4). Tenant is a commercial entity operating a real estate investment management company (Id. at ¶ 7). The first two floors of the Building consist of retail space occupied by luxury retailer Salvatore Ferragamo, while the remaining five floors are commercial office space. (NYSCEF Doc. No. 87). Tenant and Landlord executed a lease dated August 20, 2004 ("Original Lease") whereby Tenant leased the entire fourth floor of the Building (NYSCEF Doc. No. 1 at ¶ 9). The Original Lease was modified by a First Amendment of Lease dated April 1, 2014 (the "Amendment") (Id.).

Section 2.2 and 2.3 of the Original Lease requires Tenant to pay fixed rent and additional rent on the first day of each calendar month during the lease term "without any abatement, deduction or setoff whatsoever" (Id. at ¶ 10).

In Section 5.2 of the Original Lease, Tenant agreed to pay as additional rent "a sum equal to Tenant's Tax Proportionate Share of the amount by which the Taxes payable…exceed the Base Tax" which "shall be due and payable by Tenant in full within twenty (20) days after receipt of a demand therefor from Landlord, based upon the most recent Landlord's Statement." (Id. at ¶ 12). Section 5.1 of the Original Lease provides the following pertinent definitions: (i) "'Tenant's Tax Proportionate Share' shall be deemed to mean 11%"; (ii) "'Real Property' shall mean the Building and the land beneath same", and (iii) "'Taxes' shall mean…all real estate taxes and assessments…foreseen or unforeseen, which may be assessed, levied or imposed upon all or any

part of the Real Property" (Id. at ¶ 13). Pursuant to the Amendment, "Base Tax" under the Lease was modified to mean "the Taxes for the twelve-month period ending December 31, 2014" (Id. at ¶ 14).

In Section 5.14 of the Original Lease, Tenant and Landlord agreed that:

> Each Landlord's Statement shall be conclusive and binding upon Tenant, and each of Landlord's estimates given pursuant to this Article 5 shall be conclusively deemed to be a reasonable estimate, unless within thirty (30) days after receipt of such Landlord's Statement or estimate...Tenant shall notify Landlord that it disputes the correctness of Landlord's Statement or reasonableness of such estimate, specifying the particular respects in which...[it] is claimed to be incorrect...[or] unreasonable.

(Id. at ¶ 15).

Tenant and Landlord further agreed in Article 15 of the Original Lease that Tenant will pay as Additional Rent the amount of electricity consumed by the Tenant as determined by a submeter, "plus a fee equal to five (5%) percent of such charge to Landlord representing the administrative and overhead costs to Landlord" (Id. at ¶ 17).

Pursuant to Section 33.1 of the Lease, "Tenant expressly acknowledges and agrees that Landlord has not made and is not making... any warranties, representations, promises or statements, except to the extent they are expressly set forth in this Lease..." and "Tenant, in executing and delivering this Lease, is not relying upon" any representations or warranties (NYSCEF Doc. No. 70 at §33).

From 2004 until 2019 Tenant never objected to the payment or method of calculating real estate tax escalation charges ("RET") (NYSCEF Doc. No. 66 at ¶ 23). However, after receiving the 2019/2020 RET statement, Tenant inquired whether Landlord was attempting to reduce the assessed taxes (Id. at ¶ 25). It was not until June 10, 2020 that Peter Henkel, the Chief Executive Officer of Tenant, wrote to Landlord formally objecting to the RET (NYSCEF Doc. No. 75). In

sum and substance, Henkel's objection to the RET "is not necessarily a question that the taxes are too high for the building" but rather that Tenant was "paying the high taxes assessed on the rents and value of the retail space and not taxes related to the rents and value of our office space." (Id.) Henkel requested that Tenant's "tax escalations be revised to reflect the value of only the office portion of the building starting in FY 2015-2016." (Id.). Landlord declined this request and sent the 2020/2021 RET statement to Tenant in July of 2020. (NYSCEF Doc. No. 73). According to Landlord, Tenant has made only a few sporadic payments during 2020, and has failed to pay any rent or additional rent beginning January 2021. (NYSCEF Doc. No. 66 at ¶ 30).

II. Procedural Background

Landlord filed a Complaint on December 29, 2020 alleging Breach of the Lease, Unjust Enrichment, Use and Occupancy, Declaratory Judgment, and Attorneys' Fees Under the Lease. (NYSCEF Doc. No. 1) In reply, Tenant filed a motion to dismiss causes of action duplicative of the Breach of the Lease claim. (NYSCEF Doc. No. 8). The Court dismissed Landlord's unjust enrichment and declaratory judgment claims as duplicative (NYSCEF Doc. No. 18). Tenant then filed its Answer with Affirmative Defenses and Counterclaims on July 6, 2021 (NYSCEF Doc. No. 20). Tenant pleaded 39 affirmative defenses and asserted counterclaims. (Id.)

On July 28, 2021, Landlord filed a notice of motion seeking fixed rent and metered electric charges commencing July 2021 *pendente lite*, as well as a bond in the amount of $413,408.52 to secure outstanding arrears for fixed rent and electric charges through June 30, 2021 (NYSCEF Doc. No. 40). The Court denied Plaintiff's application for a bond to secure outstanding arrears but ordered Tenant to pay fixed rent and electric charges *pendente lite* from July 2021 (NYSCEF Doc. No. 115). Since entry of that Order, no payment has been made. (NYSCEF Docs. No. 136-137). Landlord filed an order to show cause seeking entry of the money judgment awarded in Motion

Sequence 3 and provided an accounting of Landlord's total outstanding arrears up to June 2022. (NYSCEF Docs. No. 128, 131, 133-136).

III. The Pending Motions

Landlord seeks dismissal of Tenant's affirmative defenses and counterclaims pursuant to CPLR 3211 § § (a)(1), (a)(5), and (a)(7) and summary judgment awarding Landlord damages for Tenant's breach of the Lease pursuant to CPLR § 3212 (NYSCEF Doc. No. 65). Landlord argues that it is entitled to summary judgment as the terms of the Lease are clear and unambiguous and must therefore be enforced. Landlord asserts that Tenant's counterclaims should be dismissed per the terms of the Lease and the voluntary payment doctrine. Further, Landlord provides a variety of grounds as to why Tenant's 39 affirmative defenses must be dismissed. In response, Tenant filed a cross-motion pursuant to CPLR § 3124 seeking to compel certain discovery and requesting the Court to deny or stay Landlord's motion for summary judgment pursuant to CPLR §3212(f). Landlord has also moved seeking entry of money judgment to enforce its right to rent *pendente lite* pursuant to the Court's decision in motion sequence 3 (see NYSCEF Doc. No. 115).

IV. Discussion

A. Dismissal of Counterclaims

i. Breach of Implied Duty of Good Faith and Fair Dealing

Landlord seeks dismissal of Tenant's counterclaim for breach of implied duty of good faith and fair dealing. While a complaint is to be liberally construed on a motion to dismiss, the court is not required to accept factual allegations that are plainly contradicted by documentary evidence. (Excel Graphics Technologies, Inc. v CFG/AGSCB 75 Ninth Avenue, L.L.C., 1 AD3d 65 [1st Dept 2003]). A written agreement that is complete, clear and unambiguous on its face must be

enforced according to the plain meaning of its terms. (Kolmar Americas, Inc. v Bioversal Inc., 89 AD3d 493 [1st Dept 2011]).

In its counterclaim alleging breach of the implied duty of good faith and fair dealing, Tenant alleges that there have been "exorbitant real estate tax charge increases." (NYSCEF Doc. No. 20 at ¶72). Moreover, Tenant alleges that "[Landlord] failed and refused to cooperate with [Tenant] to set real estate tax charges at a reasonable level." (Id. at ¶86). Tenant further alleges that "Plaintiff has construed and attempted to enforce the Lease in an untenable manner. Plaintiff has charged and collected unreasonable and unconscionable real estate tax charges from [Tenant]." Absent from the pleadings is any allegation that the formula used to calculate RET was misapplied.

The implied covenant of good faith and fair dealing is breached when a party to a contract acts in a manner that would deprive the other party of the right to receive the benefits under their agreement (Rowe v Great Atlantic & Pac. Tea Co., Inc., 46 NY2d 62, 68 [1978]; City of New York v Shellbank Restaurant Corporation, 169 AD3d 581, 582 [1st Dept 2019]). The implied covenant of good faith and fair dealing does not impose an obligation that would be inconsistent with the terms of the contract (Horn v New York Times, 100 NY2d 85, 92 [2003]; Murphy v American Home Products Corp., 58 NY2d 293 [1983]). If a tenant alleges breach of the implied covenant of good faith and fair dealing regarding an escalation clause, but fails to allege that the landlord is misapplying the formula set forth in the clause, a tenant's claim for breach of good faith and fair dealing will fail (Accurate Copy Serv. Of Am., Inc. v Fisk Bldg. Assoc. L.L.C., 72 AD3d 456, 457 [1st Dept 2010]). Moreover, "escalation clauses are common in commercial leases and have been approved and enforced according to their terms." (Meyers Parking Sys. V 475 Park Ave. S. Co., 186 AD2d 92 [1st Dept 1992] [clear and unambiguous RET escalation clause, contained in lease negotiated at arm's length and abided by for over 20 years, was enforced absent

showing of unjust enrichment, unconscionability, mutual mistake or violation of public policy]). Unambiguous terms of a lease will not be disregarded for the purposes of alleviating a hard or oppressive bargain (George Beck Mgt. Corp. v Acme Quilting Co., 46 NY2d 211, 219 [1978]).

Tenant fails to state a claim alleging breach of the implied duty of good faith and fair dealing as the allegations are predicated on Landlord's refusal to renegotiate the method of calculating RET. There is no allegation that the Landlord is not properly applying the method of calculating RET as expressly agreed—the same method which has been applied since 2004. Further, the Lease was amended to lessen Tenant's RET burden in 2014 when the base tax upon which RET was to be calculated was reset to the 2014 assessment. The implied covenant of good faith and fair dealing does not impose obligations that would be inconsistent with the terms of the contract; therefore, there was no obligation for the Landlord to change the method upon which RET was calculated, especially after using the same calculation from 2004-2019 without any previous objection regarding method of calculating RET. It was expressly agreed in Section 5.2 of the Original Lease that Tenant would pay all RET "foreseen or unforeseen" – therefore, given the length of time the RET calculations were acquiesced to and the plain and unambiguous language of the Lease, there is no bad faith on the part of Landlord for seeking payment of RET from Tenant.

ii. Unjust Enrichment

Tenant's claim for unjust enrichment is dismissed. Pursuant to the plain and unambiguous terms of §5.14 of the Lease, the amounts sought and paid are conclusive and binding (Salomen Smith Barney Holdings, Inc. v 7 World Trade Co., L.P., 278 AD2d 63 [1st Dept 2000]; Home Ins. Co. v Olympia & York Maiden Lane Co., 219 AD2d 469 [1st Dept 1995]). The limitation provided by §5.14 of the Lease, which has remained unchanged since 2004, bars Tenant's claims for unjust enrichment. Moreover, the existence of the Lease is not in dispute, thereby barring any relief

sought in quasi-contract. Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987] [the existence of a valid and enforceable written contract precludes recovery in quasi contract for events arising from contract]; see also NYSCEF Doc. No. 18 ["Accordingly, the Court finds there is no "bona fide dispute" such that the unjust enrichment claim should be dismissed."]). Finally, the voluntary payment doctrine bars Tenant's unjust enrichment claim. (Eighty Eight Bleecker Co., LLC v 88 Bleecker St. Owners, Inc., 34 AD3d 244 [1st Dept 2006] [tenant's claim for rent overcharge was barred by voluntary payment doctrine when charges were paid without protest or inquiry and were not paid under any material mistake of fact.])

B. Dismissal of Affirmative Defenses

Landlord seeks dismissal of Tenant's 39 affirmative defenses. After review of the record, the Court finds all of Tenant's affirmative defenses, except for the thirtieth affirmative defense, to be either conclusory, without requisite supporting facts, barred by the terms of the Lease, or without merit. (Holy Props., L.P. v Kenneth Cole Prods., 208 AD2d 394 [1st Dept 1994] affd 87 NY2d 130 [1995] [Landlord has no obligation to mitigate damages in commercial lease]). 70 W. Vill. Assocs. v G&E Realty, Inc., 56 AD3d 372, 372-373 [1st Dept 2008] [commercial tenant's challenged affirmative defenses which pleaded conclusions of law without supporting facts were properly stricken as insufficient]; 600 Lexington Owner LLC v Kaplowitz, 149 AD3d 590 [1st Dept 2017] [dismissing defense based on lack of consideration where tenant continued to occupy the premises]; 136 Main Realty Corp. v Wang Law Office, PLLC, 49 Misc3d 51, 55 [App. Term 1st Dept 2015] ["A clear and unambiguous no-waiver clause in a commercial lease, such as the clause at issue, will be enforced."]). Indeed, the overwhelming majority of Tenant's affirmative defenses are no longer than a sentence.

Tenant only defended certain affirmative defenses in its opposition brief; however, Tenant's opposition is unavailing. Tenant's affirmative defense stating it should be entitled to recission of the contract is dismissed, as recission requires some misrepresentation that induces a party to enter into a contract, while here there are no allegations of any misrepresentation or fraud other than a conclusory sentence stated in the eleventh affirmative defense. (Board of Managers of Soundings Condominium v Foerster, 138 AD3d 160, 164 [1st Dept 2016]). Tenant's affirmative defense stating the Lease should be reformed is dismissed, since in order to reform a written agreement, it must be demonstrated that parties came to an understanding, but in putting the agreement into writing, through either mutual or unilateral mistake or fraud, there was an omitted provision (Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V. , 44 AD3d 511 [1st Dept 2007]). Again, there is no allegation of fraud, mistake, or misrepresentation, other than conclusory allegations pleaded in affirmative defenses. Although Tenant makes vague references to a "mistake," simply because Tenant did not expect its RET to increase to the extent it did under the RET calculation does not equate to the invocation of mistake. Again, there is no evidence of fraud or misrepresentation here – Tenant knew it was leasing office space above a premier luxury fashion retailer adjacent to "billionaire's row" where it would be liable for RET as Additional Rent; it cannot now claim "mistake" to get out of its agreed to lease obligations.

Tenant's thirtieth affirmative defense asserts that Landlord's claims must be offset by the amount of Tenant's security deposit. According to Article 38 of the Original Lease, Tenant provided a security deposit in the sum of $115,716.67. Where nothing in a lease prevents a plaintiff seeking rent arrears from applying the security deposit to the arrears, the security deposit should be credited to the rent arrears prior to the calculation of any interest on the arrears (Wooster 76 LLC v Ghatanfard, 892 NYS2d 310 [1st Dept 2009]. While Article 30 does not obligate Landlord

to apply the security deposit to defaults under the Lease, it also does not prevent Landlord from applying the security deposit to arrears. Thus, Tenant's thirtieth affirmative defense is not dismissed. Tenant may have its damages offset by the security deposit retained by Landlord.

C. Summary Judgment

i. Standard

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (See e.g., Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 [1st Dept 2002]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial. See e.g., Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1st Dept 2003]. Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see Banco Popular North Am. v Victory Taxi Mgt., Inc., 1 NY3d 381 [2004]; Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

To sustain a cause of action for breach of contract, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see Markov v Katt, 176 AD3d 401, 402 [1st Dept 2019]; Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010])

ii. Landlord Mets its Prima Facie Burden

It is undisputed that the Lease has been in effect since 2004. Landlord has performed its obligations during the Lease term. It is further undisputed that Tenant has failed to pay RET or Fixed Rent. Landlord has been damaged by not receiving sums owed under the Lease.

Although Tenant argues that Landlord's motion for summary judgment should be denied based on procedural grounds, this Court finds those arguments to be unavailing. (Studio A Showroom, LLC v Yoon, 99 AD3d 632 [1st Dept 2012] [Failure to include pleadings was properly overlooked where the pleadings were filed electronically and therefore were available to the parties and the court]; Martinelli v Polish Army Veterans Ass'n of Am., 2022 NY Slip Op 30050 (U) [Sup Ct New York County 2022]; Liberty Mut. Ins. Co. v Farquhar, 2021 NY Slip Op 32815(U) [Sup Ct New York County 2021] [Rejecting defendant's argument that summary judgment should be denied because of plaintiff's failure to file a statement pursuant to 22 NYCRR 202.8-g]). Moreover, although Tenant argues the Stecker Affidavit is insufficient because Stecker allegedly lacks the requisite personal knowledge, this Court finds Tenant's argument lacking and contrary to applicable precedent (DeLeon v Port Authority of New York and New Jersey, 306 AD2d 146 [1st Dept 2003]). Tenant's other arguments related to standing and the authenticity of the invoices and ledger produced by Landlord's agent, Cushman & Wakefield, are similarly unpersuasive. (Ciras, Inc. v Katz, 202 AD3d 590 [1st Dept 2022]; Bd of Managers of Ruppert Yorksville Towers Condo v Hayden, 169 AD3d 569 [1st Dept 2019]. Further, the Court finds Tenant's standing argument baseless.

Landlord has satisfied its burden of making a prima facie case that Tenant breached the Lease. (Jimenez v Henderson, 41 NYS3d 26, 27 [1st Dept 2016] ["Landlords met their prima facie burden by submitting the lease and various invoices."]). Because Plaintiff has made a prima facie case for judgment as a matter of law, the burden shifts to Defendant "to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (Giuffrida v. Citibank, 100 NY2d 72, 81 [2003]; Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

iii. Tenant Fails to Establish the Existence of Material Issues of Fact

Although Tenant attempts to argue that "changed circumstances" precludes summary judgment, this argument fails. A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (Center for Specialty Care, Inc. v CSC Acquisition I, LLC, 185 AD3d 34 [1st Dept 2020]). This rule has even greater force in the context of real property transactions, in which commercial certainty is of paramount concern, especially where the instrument was negotiated between sophisticated business entities. (Id.) The "changed circumstances" upon which Tenant attempts to avoid its contractual obligations stem from the increased assessed value of the building; however, Section 5.2 of the Original Lease clearly states that "'Taxes' shall mean...all real estate taxes and assessments...foreseen or unforeseen, which may be assessed, levied or imposed upon all or any part of the Real Property." Moreover, Real Property is defined as "the Building and the land beneath same." Tenant expressly agreed that it would pay Real Estate taxes, **foreseen or unforeseen**, assessed against the entire Building. Tenant is a sophisticated real estate investment firm that agreed to the express terms of the lease and knowingly leased office space above a prestigious global luxury fashion brand; Tenant cannot now ask the Court to completely reform or rescind its Lease because its Additional Rent has increased due to the increase in assessed real estate value in one of Manhattan's wealthiest neighborhoods.

Moreover, Tenant's reliance on a series of cases where Courts have not passed on increases in additional rent to tenants due to increases in assessments of the building resulting from improvements to the building is misplaced (Credit Exch. Inc. v 461 Eighth Ave. Assocs., 69 NY2d 994, 995 [1987]; Enchantments Inc. v 424 E. 9th LLC, 129 AD3d 589, 590 [1st Dept 2015]; 223 W. Coirp. v B & D Leistner Props., 21 AD3d 810 [1st Dept 2005]). In each of those cases, the

additional rent was increased due to an increased assessed value from improvements to the building that were to the sole benefit to the landlord. Here, there is no evidence that the value of the Building increased due to improvements, let alone any improvements that were to the sole benefit of the Landlord. Rather, Tenant indicates that the value of the building increased after Vornado purchased a 92.5% interest in the Building for $302 million (NYSCEF Doc. No. 86 at ¶17).

The Court finds the line of cases which enforce rent escalation clauses pursuant to their plain and unambiguous meaning to be more persuasive where, as here, the only change to the premises introduced into the record is that the assessed value of the building increased after Vornado purchased a large interest in the building to the detriment of both Landlord and Tenant in their tax burdens. Barnan Assocs. LLC v 196 Owners Corp., 14 NY3d 780, 784 [2010]; Toys-R-Us-Delaware, Inc. v 44-45 Broadway Realty Co. LLC, 110 AD3d 521 [1st Dept 2013]; 239 E. 79th Owners Corp. v. Lamb 79 & 2 Corp., 30 AD3d 167 [1st Dept 2006]; Meyers Parking Sys., Inc. v 475 Park Ave. So. Co., 186 AD2d 92 [1st Dept 1992]. Tenant cannot avoid its obligations under the provisions of the Lease simply because its liability under the RET has increased. Since the parties have been calculating RET using the same methodology since 2004, the terms regarding RET calculation are clear, and the Lease was negotiated between sophisticated commercial parties, Tenant's alleged "changed circumstances" do not defeat Landlord's motion for summary judgment 159 MP Corp. v Redbridge Bedford, LLC 33 NY3d 353, 359-60 [2019]; NY Overnight Partners, L.P. v Gordon, 99 NY2d 716 [1996].

D. Tenant's Cross-Motion

Tenant's Cross-Motions seeking to compel discovery and deny Landlord's motion for summary judgment pursuant to CPLR 3212(f) is denied. "A grant of summary judgment cannot

be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." DaSilva v Haks Eng'rs, 125 AD3d 480, 482 [1st Dept 2015]; Orange County-Poughekeepsie LTd. Partnership v Bonte, 37 AD3d 684 [2d Dept 2007] ["[t]o speculate that something might be caught on a fishing expedition provides no basis pursuant to CPLR 3212(f) to postpone decision on [a] summary judgment motion.". A lease that is complete, clear and unambiguous must be enforced per the plain meaning of its terms. Tenant cannot delay enforcement of the Lease by mere hopes that discovery will introduce some ambiguity into a clear and unambiguous contract. W.W.W. Assocs. v Giancontieri, 77 NY2d 157 [1990]; Ashwood Capital, Inc. v OTG Mgmt., Inc., 99 AD3d 1, 9 [1st Dept 2012]. Thus, Tenant's motion pursuant to CPLR 3212(f) is denied. Since Landlord's motion for summary judgment is granted, Tenant's motion to compel further discovery is rendered moot.

E. Motion Sequence 5 (Order to Show Cause)

Pursuant to a Decision & Order of this Court dated March 29, 2022, Tenant was directed to pay fixed rent and metered electric charges *pendente lite* commencing July, 2021 in the sum of $41,657.53 per month pursuant to the clear, plain, and unambiguous terms of a lease that Tenant has been privy to since 2004 (NYSCEF Doc. No. 115). Landlord now makes this application seeking a money judgment enforcing the Court's prior Order due to Tenant's failure to heed this Court's direction.

The Court, (which in an exercise of leniency, provided Tenant another opportunity to file opposition to Landlord's instant application after Tenant appeared for oral argument having failed to file a timely opposition), rejects Tenant's arguments as meritless. However, because Landlord is being awarded the relief it seeks in its motion for summary judgment, including rent arrears through July 2022, motion sequence 5 is rendered moot.

Accordingly, it is hereby

ORDERED that Landlord's motion to dismiss Tenant's affirmative defenses is granted in part and denied in part; and it is further

ORDERED that Tenant's counterclaims are dismissed; and it is further

ORDERED that Tenant's cross motion is denied; and it is further

ORDERED that the Clerk is directed to enter judgment in favor of the Landlord against Tenant in the amount of $1,697,634.28, together with interest, for fixed rent, RET and metered electricity charges[1] accrued as of the date of this disposition; and it is further

ORDERED that Plaintiff's motion seeking entry of a money judgment in Motion Sequence 5 pursuant to this Court's Decision & Order in Motion Sequence 3 is rendered moot by the above; and it is further

ORDERED that the amount of additional electricity charges and RET that have accrued for the month of July 2022 that Landlord may recover from Tenant, along with reasonable attorney's fees for which Landlord is entitled, is referred to a Special Referee to hear and report.

This constitutes the decision and order of the Court.

7/25/2022		Mary V Rosado
DATE		HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		x	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☒ REFERENCE

[1] This amount was calculated based on Tenant's total arrears (NYSCEF Doc. Nos. 135, 137) and adding rent for July 2022 (NYSCEF Doc. No. 47). Tenant's Security Deposit of $115,716.67 may be credited to offset these damages.