Index No. L&T 156312/2013

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART

MAIDEN LANE PROPERTIES, LLC,

Petitioner-Landlord,

-against-

JUST SALAD PARTNERS LLC,

Respondent-Tenant,

POST TRIAL MEMORANDUM OF LAW

On the brief:
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Respectfully submitted,

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[35845/2]

PRELIMINARY STATEMENT

On October 29, 2012, Superstorm Sandy struck New York City in modes of devastation the likes of which New Yorkers had not previously experienced. While the natural place to look for compensation for such a disaster is the coterie of insurance companies who do or should insure against such losses, they have been disclaiming coverage and the injured parties are looking to other funding sources – in this case the landlord – rather than continuing to pursue the insurance companies, through suit if necessary.

Thus, utterly artificially, the only issue in this case is the manufactured question regarding the Respondent's defense purportedly based upon the problems the Respondent had in resuming operations due to loss of electricity associated with Superstorm Sandy—defenses precluded by the applicable lease provisions and controlling case law.

The tenant in this case is *not* without a remedy, but the remedy lies not against the blameless landlord, but against the insurance company far more anxious to collect premiums than to pay on claims.

There is no dispute that Consolidated Edison turned off the power pre-emptively in order to prevent damage to its equipment by Superstorm Sandy. There is no dispute that there was a lengthy period that the Respondent had to use electricity other than that electricity provided by Consolidated Edison.

There is therefore no dispute that during that period of otherwise generated electricity, the Respondent remained in operation. There is some

dispute about the availability of the connection back to the main electrical bus, but that is a question about *which* electricity was available, not *whether* electricity was available. And *which* electricity is available does not speak to the Respondent's obligations under the lease.

Respondent continuing to run its store, even if under improvised electrical arrangements, can hardly be characterized as a constructive eviction.

SELECTED PORTIONS OF THE TRIAL TRANSCRIPT

The trial began with the Respondent, in essence, stipulating to the Petitioner's *prima facie* case and relegating the trial to a hearing on the purported defenses to that case.

Respondent's *entire* defense is that the problem with electricity is its defense to paying rent. As the Respondent's witness, Nicholas Kenner summed it up at page 37, starting at line 8 of the Trial Transcript:

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8  Q.  So the electric was the only issue that really
9  prevented you from operating?
10 A.  After first few days, yes.
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At page 6, starting at line 23 of the transcript, we find this testimony from the Respondent:

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23                I think over the next two weeks there was
24 dialogue, not a hundred percent sure whether it was e-mail
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25 or phone, but there was dialogue back and forth mostly

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1 initiated by me to find out what the status of the
2 building's electricity was. I would say I am not a hundred
3 percent sure on the date. My best estimate is between two
4 to four weeks after Hurricane Superstorm Sandy, he let us
5 know that the residential tenants in the entire building
6 would be getting electricity via generator for the building,
7 but that he said we would not be, Just Salad and other
8 retail tenants, would not be allowed to use this, because it
9 presented them with liability issues.
10 I then for the next couple days after he told me
11 that pretty much pleaded with him to give us a hookup, and
12 he said other retail tenants have accepted the fact that
13 they were not going to get it and should look and have
14 started to look elsewhere to get generators on their own.
15 At this point he also let me know that he said that the
16 building utilities would not be operational and that there
17 were difficulties with the building systems in Con Edison.

From this passage in the trial testimony, it is clear that very shortly after the storm the Respondent was informed of its options with regard to having electricity provided to it and it made the *business decision* to hope for some better alternative. The nature of this "business decision" as the witness

himself characterized it is made manifest in the next passage beginning in the transcript at Page 8, starting at line 9:

> A. From the point that the landlord determined that there was no way he was going to give me access to a building generator. And that the building, that his estimate was about December, January as far as when he could get building utilities working again.
> And at this point I believe this was about some time in in mid-November, late November right around that range. So for me I made the business decision that it was best to try and get a generator instead of being out the whole month of December and possibly January.

Thus was the "business decision" not only entirely of the Respondent's own volition, but delaying making the decision was as well of the Respondent's own volition.

And, allowing for the possibility, as the witness himself testified, that the decision to get its own generator was not made until the end of November, notwithstanding the Respondent's claim in later testimony that it lacked the economic heft to get a generator sooner, actually, the generator was up and running only a few days after the decision to employ one was made. This is manifest from the passage starting on Page 9 at line 24:

> A. I can't tell you for sure (a) that we got a second generator, and when, if we did, when we got one. What I can

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1 tell you for sure is that we got the first generator on
2 December, operational on December 7th, and I can also tell you
3 there were generator issues which led us to inquire at least
4 inquire about getting a replacement.

At Page 34, lines, 12-13, Respondent says, "From December, sorry, from Superstorm Sandy up until December 7th, we were not open for business."

Respondent's claim is actually that it, a chain of some ten stores, just didn't have the money to get a generator sooner. This appears at Page 25, beginning at line 8 of the transcript:

8 Q. So some time in November as well, you could have gotten
9 a generator just like Chipotle; isn't that true?
10 A. No.
11 Q. What makes you different from Chipotle? Why were you
12 not able to get a generator?
13 A. About a billion dollars makes us different. They are a
14 billion-dollar public company, and we have ten stores in New
15 York City. So there are plenty of differences without going
16 into the menu or corporate structure, but I don't think that
is
17 relevant to go naming the differences between Chipotle and --.
18 Q. So you were not willing to pay what they were willing

19 to pay?
20 A. Incorrect. We were not allowed to use their generator.
21 Wasn't a question of money.
22 Q. What was stopping you from getting your own generator?
23 A. However, they got the generator company team. We
24 didn't have that ability. We didn't have that option.
25 Q. You couldn't do it?

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1 A. Correct.
2 Q. But the landlord was able to do it, and Chipotle was
3 able to do it?
4 A. Correct. We are also talking about different sizes of
5 generators in that building. And Chipotle got, obviously the
6 building is a different ballpark. Generator that Chipotle got
7 was substantively different than ours. Bigger than ours. This
8 is because they do cooking in their space, and we do not.

After the Respondent testified, the Petitioner put on its own witness about the conversations with between the Petitioner and Respondent about the need for the Respondent to get its own electric generation. This testimony of Petitioner's principal, Adam Daniels, appears at Page 42, starting at line 6 of the transcript:

6 Q. What did you tell him to do?
7 A. We told him to see the different resources to either

8 connect through out of their retail tenants that already got it
9 earlier than when he asked me or through the generator company
10 that we reached out to and who we used.
11 Q. So did you help him try to obtain his own generator for
12 the space?
13 A. Yes.
14 Q. Why did you do that?
15 A. Because we have a relation where we thought we would
16 help each other out. We would try to bring easier methods of
17 cooperating, and we did.
18 Q. What about the other retail tenants, did any of them
19 obtain service before the electrical was restored to the
20 building?
21 A. We have one. They ended up getting their own generator
22 for individually, and they were responsible to get it done the
23 way that their electricians told them how to hook up into their
24 electric panel.

Respondent did not call any witness to rebut this account or in its direct presentation say anything to the contrary.

Thus, once, at or about the end of November, the Respondent decided to heed the Petitioner's warning and acquire its own generation, like the other retail businesses were doing, a few days later the generator was up and

running and early in December, the Respondent was occupying its store and plying its trade (but not paying rent). As the transcript at Page 22, lines 22-24 show:

> 22 Q. When was the first day that you began operating at the
> 23 premises, you know, and selling salads after Sandy occurred?
> 24 A. December 7th.

The Respondent had also disputed whether the landlord had in any manner interfered with the Respondent's eventual reconnection to ConEdison supplied electricity. First, it should be noted that this dispute arose nearly two months *after* the Respondent was already using substitute electricity and fully operating its business. Secondly, the only claim for this supposed interference is to be found at pages 21 and 22 of the transcript in the culmination of which, Respondent's counsel said (at page 21, line 25) "The electrician we believe was their agent, was their employee. They presumably hired and paid this electrician." At no point, however, did Respondent seek to introduce proof that the electrician was *in fact* an agent or an employee. Thus, the Respondent never introduced any proof that any person authorized to speak on behalf of Petitioner refused or in any manner interfered with the hook up. There is nothing other than this comment in colloquy.

Nor would the matter of the hook up matter, given the fact that for two months prior to this period and continuously thereafter, Respondent's store remained in full operation, but not paying rent.

Argument

POINT I
THE LEASE IS TO BE ENFORCED AS WRITTEN

That lease clauses such as those that govern this proceeding are to be enforced is black letter law in this State. Cases like *Vermont Teddy Bear Co., Inc. v. 538 Madison Realty Co.*, 1 NY3d 470 (2004) make it clear that the bargain that the parties set forth in their lease is the agreement that is going to be enforced. The core holding of the case is:

> When interpreting contracts, we have repeatedly applied the "familiar and eminently sensible proposition of law [ ] that, when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms" (*W.W.W. Assoc. v. Giancontieri,* 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]; *see Reiss v. Financial Performance Corp.,* 97 N.Y.2d 195, 198, 738 N.Y.S.2d 658, 764 N.E.2d 958 [2001]). We have also emphasized this rule's special import "in the context of real property transactions, where commercial certainty is a paramount concern, and where ... the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*Matter of Wallace v. 600 Partners Co.,* 86 N.Y.2d 543, 548, 634 N.Y.S.2d 669, 658 N.E.2d 715 [1995] [internal quotation marks and citations omitted]). In such circumstances, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Rowe v. Great Atl. & Pac. Tea Co.,* 46 N.Y.2d 62, 72, 412 N.Y.S.2d 827, 385 N.E.2d 566 [1978]). Hence, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss,* 97 N.Y.2d at 199, 738 N.Y.S.2d 658, 764 N.E.2d 958 [internal quotation marks and citation omitted]).
>
> 1 NY3d at 475

POINT II
WHERE LEASE PROHIBITS SET OFFS AND NONE ARE PLEADED, REGARDLESS OF PROOF, NO SET OFFS CAN BE ALLOWED

Paragraph 40(A) of the lease governing this proceeding states:

> Tenant covenants and agrees to pay to Landlord Base Rent, commencing on the Commencement Date, through and including the Expiration Date, without offset, counterclaim or defense and without prior demand therefore (sic)…

In *Lincoln Plaza Tenants Corp. v. MDS Properties Development Corp.*, 169 A.D.2d 509, 564 N.Y.S.2d 729 (1st Dept. 1991), the First Department wrote:

> In light of the provision of the commercial lease requiring payment of rent "without any setoff or deduction whatsoever", we do not disturb the dismissal of these claims as affirmative defenses or the award of summary judgment to plaintiff as to defendant's liability for unpaid rent.

Thus, whatever setoff or defense to the rent the Respondent is claiming cannot be entertained by this Court. The Petitioner clearly preserved this objection in the following passage of the trial transcript at page 11, starting at line 2:.

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2  MR. HALLIGAN:  Objection.  Absolutely no relevance
3  to this proceeding.
4  MR. KIRKPATRICK:  Generator ran on diesel fuel.
5  MR. HALLIGAN:  There is no claim for loss of
6  diesel fuel in our answer to the counterclaim.  No relevance
7  here.  I object even if you could get it into evidence.
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MR. KIRKPATRICK: The relevance is that it shows in addition to having to get a generator, we purchased diesel fuel to run the generator.
THE COURT: You are still objecting as to relevance?
MR. HALLIGAN: Yes.
THE COURT: I am overruling your objection, and again this is a bench trial. Once I read the lease, I can determine what is or is not relevant.
MR. HALLIGAN: What are they offering it for? They are offering it for the proof that they bought fuel for the generator? We don't know why they are offering it. There is no counterclaim for these fuel costs. So they have to have some reason for putting this document in. We don't dispute they had a generator.

On the practical level, this is true as well since the proof that the Respondent put into evidence with regard to expenditures on diesel fuel is meaningless in light of the fact that whatever the Respondent was paying for diesel, it was paying instead of paying Consolidated Edison for electricity. And on a pleading level, this offset is also improper as the Answer gave no notice whatsoever of these claims. The *only* defenses in the Answer were essentially a general denial and a claim of constructive eviction. There was

no notice given of any claimed setoff as indeed, pursuant to the lease, none could be claimed.

INSERT FORMAL DISCUSSION WITH CASE LAW THAT IF IT AIN'T PLEADED, IT AIN'T IN THE CASE

POINT III
THE PERTINENT LEASE CLAUSES LEAVE THE RESPONDENT WITHOUT A DEFENSE TO THIS PROCEEDING

Respondent claims as a defense to this proceeding to have suffered a "casualty." While flooding of space could constitute a "casualty," there are two problems with Respondent's analysis.

In order to make this claim, Respondent relies upon paragraph 9 of the standard boilerplate lease. In pertinent part, this paragraph reads:

> 9.(a) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this lease shall continue in full force and effect except as hereinafter set forth. (b) If the demised premises are partially damaged or rendered partially unusable by fire or other casualty, the damages thereto shall be repaired by and at the expense of Owner and the rent and other items of additional rent, until such repair shall be substantially completed, shall be apportioned from the day following the casualty according to the part of the premises which is usable. (c) If the demised premises are totally damaged or rendered wholly unusable by fire or other casualty, then the rent and the other items of additional ret as hereinafter expressly provided shall be proportionately paid up to the time of the casualty and thenceforth shall cease until the date when the premises shall have been repaired and restored by Owner (or sooner reoccupied in part by Tenant then rent shall be apportioned as provided in subsection (b) above), subject to Owner's right to elect not to restore the same as hereinafter provided.... Unless Owner shall

> serve a termination notice as provided for herein, Owner shall make the repairs and restorations under the conditions of (b) and (c) hereof, with all reasonable expedition subject to delays due to adjustment of insurance claims, labor troubles and causes beyond Owner's control….(f) Tenant hereby waives the provisions of Section 227 of the Real Property Law and agrees that the provisions of this article shall govern and control in lieu thereof.

We know that the basis of the Respondent's defense is Article 9 of the lease because the Respondent says so at Page 23, Lines 12-15:

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12 Q.  And did that affect your business in any way?
13 MR. HALLIGAN:  Objection.  Irrelevant.
14 MR. KIRKPATRICK:  Highly relevant under Article 9
15 whether they can operate the premises.
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This is more strongly set forth in the transcript at Page 30, starting at line 21:

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21 MR. KIRKPATRICK:  Documents showed we incurred
22 costs.  I believe we are entitled to compensation.  We were
23 not able to operate in that premises.  Our reading of the
24 lease is under the casualty provision, the landlord is
25 responsible for providing a premises that is tenantable to
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1  use.  Words of Article 9.  Those are words for the court to
2  determine not for the witness to opine on.
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First, the paragraph 9 in question requires that Respondent notifies Petitioner of there having been a casualty. Respondent effected no such notification and put in no proof of any such notification.

Further, according to that paragraph, so long as Tenant was in occupancy of the premises and using them, the rent was not to be abated. Since the Respondent did, in fact, remain in occupancy of the premises, the fact that it was using substitute electricity is irrelevant under this Paragraph 9. Its use of the premises obliged it to pay rent.

At the head of the Rider to the lease, there is specific language that where there is a conflict between the Rider and the preprinted form, the Rider controls. It says (in all capital letters):

> IN THE EVENT OF ANY CONFLICT BETWEEN PROVISIONS CONTAINED IN THE PRINTED FORM OF THIS LEASE AND ANY RIDER PROVISION, THE TERMS OF THE APPLICABLE RIDER PROVISIONS WILL GOVERN AND CONTROL.

Under Rider paragraph 46 of the lease, Respondent covenanted:

> Tenant acknowledges and agrees that Tenant, at its expense, shall maintain and make all necessary repairs to the electrical, air-conditioning or cooling, ventilation and mechanical systems that exclusively service the demised premises."

Thus, the responsibility for effecting the repairs to the electrical systems that service the Respondent's space is entirely Respondent's.

Further, Paragraph 49(F) of the lease states:

> Tenant… hereby release(s) Landlord and any fee owner or ground or underlying lessors of the Building, to the full extent

> permitted by law, from all claims, of every kind, including loss of life, bodily or personal injury, damage to merchandise, furniture, fixtures, equipment or other property, *or damage to business or for business interruption*, arising directly or indirectly out of or from or on account of such occupancy and use or *resulting from* any present or future condition or *state of repair* of the demised premises *or the Building.* (emphasis supplied).

The clear intent of this paragraph is that *no matter how it arose*, Respondent can *only* look to Respondent's insurer for coverage for business interruption.

Paragraph 50 of the lease specifically references paragraph 9 of the pre-printed form and limits its effect. Paragraph 50A of that paragraph specifically places upon Tenant the obligation to cover any losses it may suffer with appropriate insurance instead of looking to the Landlord. It says:

> Anything contained in Article 9 to the contrary, Tenant shall be solely responsible for the insurance for, and in the event of fire or other casualty, the reconstruction, replacement or repair of any damage to any property within the demised premises, including Tenant's furniture, fixtures and equipment and all other personal property of Tenant and all Alterations, construction and other improvements made to the demised premises (including any Alterations made by Landlord in connection with Tenant's occupancy of the demised premises), or any replacements or additions thereto, and Landlord's obligations, if any, shall be as to the shell, which constitutes the structure of the Building and any Building-wide systems that service the demised premises, up ot the point of connection thereto.

Paragraph 50B of paragraph 50 of the lease says, "Landlord will not be obligated to repair any damage to (Tenant's) improvements or appurtenances" or replace the same.

Paragraph 52A of the lease says:

> Tenant shall arrange to obtain electricity directly from the public utility or other company servicing the Building on or before the Commencement Date…. No such change, unavailability or unsuitability shall constitute an actual or constructive eviction, in whole or in part, or entitle Tenant to any abatement or diminution of rent, or relieve Tenant from any of its obligations under this Lease, or impose any liability upon Landlord, or its agents, by reason of inconvenience or annoyance to Tenant, or injury to or interruption of Tenant's business, or otherwise.

Thus, pursuant to this lease clause, Petitioner was under no obligation to inform the Respondent of electricity availability or options, as it is *always* Respondent's obligation to secure its own electricity supply, whether through Con Edison or otherwise. For that reason and numerous others, Respondent, has no defense to the obligation to pay rent for the period of time from Superstorm Sandy until Respondent made the business decision to obtain its own generator and then got around to obtaining that generator, just like the other retail spaces were doing.

Further, Paragraph 52C of the lease says:

> Landlord shall not be liable to Tenant in any way for any interruption, curtailment or failure, or defect in the supply or character of electricity furnished to the demised premises by reason of any *requirement, act or omission of Landlord or of any public utility* or other company servicing the Building with electricity for any reason except Landlord's *gross negligence or willful misconduct.* (emphasis supplied)

Paragraph 58H of the lease says:

> Landlord reserves the right to stop service of the … electrical… systems or facilities in the Building… when necessary, by reason of accident or emergency, or for repairs… in the judgment of the Landlord desirable or necessary to be made, until said repairs… shall have been completed. Landlord shall have no responsibility or liability for interruption, curtailment or failure to supply… electricity… when prevented… by any cause whatsoever reasonably beyond Landlord's control … or by reason of the conditions of supply and demand which have been or are affected… by emergency. The exercise of such right or such failure by Landlord shall not constitute an actual or constructive eviction, in whole or in part, or entitled Tenant to any compensation or to any abatement or diminution of Rent… or impose any liability upon Landlord….by reason of… interruption of Tenant's business…. Landlord shall not be liable to Tenant in any way for any interruption… of any service furnished… (by) any public utility.

In *85 John Street Partnership v. Kaye Ins. Associates, L.P.,* 261 A.D.2d 104, 689 N.Y.S.2d 473 (1st Dept. 1999), the Appellate Division considered similar language. The court wrote:

> Since the leases for the third and thirteenth floors unequivocally relieve landlord of liability for damages resulting from its provision of electricity *regardless of who is to blame for any defect in respect thereto*, tenant's counterclaim for damages based on defective provision of electricity to the third and thirteenth floors should have been dismissed. (emphasis supplied)

Thus the lease clauses set forth above are enforceable and the tenant in this proceeding can make no claim against landlord by defense, setoff, or otherwise for the problems the tenant had in electric service.

In clause after clause, the Tenant assumed responsibility and the risk of loss. While Tenant seeks to make the Landlord its insurer, the lease does not allow for it.

Under the clear terms of the lease and the teaching of *Vermont Teddy Bear, supra*, Petitioner is entitled to judgment in this proceeding.

POINT IV
THE LEASE ENFORCEABLY CALLS FOR THE TENANT TO PROCURE INSURANCE, NOT FOR IT TO LOOK TO THE LANDLORD AS THE INSURER

The lease governing this proceeding has numerous clauses that make clear that the Respondent's losses, unfortunate as they may be, are entirely the Respondent's responsibility. The Respondent had the option to get insurance to cover it against these mishaps and assumed the risk that would occur if it failed to do so, but, in any event, the Petitioner is not that insurer. *See, Hooters of Manhattan, Ltd. v. 211 W. 56 Assoc.*, 51 A.D.3d 410, 857 N.Y.S.2d 112 (1st Dept. 2008).

Further, as to any losses the Respondent may have suffered, the Answer the Respondent interposed placed Petitioner on notice of no claims for *damages* whatsoever. Thus, even if the lease did not prohibit such claims, Respondent's own pleadings do.

POINT V
BY FAILING TO SATISFY THE NOTICE REQUIREMENTS OF LEASE ARTICLE 9, TENANT IS ENTITLED TO NO RELIEF UNDER ARTICLE 9

Article 9 of the governing lease begins as follows: "9.(a) If the demised premises or any part thereof shall be damaged by fire or other casualty, Tenant shall give immediate notice thereof to Owner and this lease shall continue in full force and effect except as hereinafter set forth."

Thus, it is clear that any rights that the *Tenant* claims under Article 9 of the lease require as a pre-requisite to the exercise of those rights, the giving of notice to the Owner.

Article 27 of the preprinted Lease in its last sentence specifies, "Any notice by Tenant to Owner must be served by registered or certified mail addressed to Owner at the address first hereinabove given or at such other address as Owner shall designate by written notice."

Article 56 of the Rider overrides this to some extent and states:

> *ADDENDUM TO ARTICLE 27 (BILLS AND NOTICES)*: Any notice to be given by either party hereof shall be by registered or certified mail, personal delivery or overnight delivery, addressed as follows:
>
> If to Landlord: Maiden Lane Properties LLC
> c/o Lalezarian Developers, Inc.
> 1999 Marcus Avenue, Suite 310
> Lake Success, New York 11042
>
> with a copy to: Nesenoff & Miltenberg, LLP
> 363 Seventh Avenue
> Fifth (5th) Floor
> New York, New York 10001
> Attention: Ira S. Nesenoff, Esq.

…

At no point did the Respondent even allege that such notice was given. No proof at trial was presented regarding the same. This is particularly significant because in prior correspondence between the parties, Petitioner had specifically set forth its theory that notice was requisite to the invocation of Article 9 relief for the Respondent. So, Respondent, *knowing* that Petitioner was taking this position, went ahead into trial neither having pleaded nor having presented proof of the giving of notice as per the terms of the lease.

In *Milltown Park v. American Felt & Filter Co.,* 180 A.D.2d 235, 584 N.Y.S.2d 927 (Third Dept. 1992), the Appellate Division construed a lease clause apparently identical to the operative language in the lease that governs this proceeding. The court wrote (180 A.D.2d 235 at 237):

> The parties' lease agreement contains a provision which expressly states its intent to replace the terms of Real Property Law § 227 and, therefore, the terms of this commercial lease provision control *(see, Schwartz, Karlan & Gutstein v 271 Venture,* 172 AD2d 226, 228).
>
> The provision relieves defendant of the obligation to pay rent for the time that the premises are unusable. It does not, however, authorize defendant to quit, surrender or abandon the premises. Rather, it requires defendant to give plaintiff "prompt notice of fire, accident, damage or dangerous or defective condition", and the lease contains another clause which provides that "[a]ny notice required [by the lease] shall be in writing by certified mail, return receipt requested". Defendant concedes that it gave no written notice other than the letter dated one day before defendant abandoned the premises.

> According to defendant, plaintiff had actual knowledge of all of the facts and circumstances and, therefore, written notice was not required. In the absence of any statutory prohibition, lease provisions which require written notice, as opposed to actual or constructive notice, are enforceable *(see, Vanderhoff v Casler,* 91 AD2d 49, 51). … Even accepting defendant's conclusory allegation that *238 the premises were unusable, defendant's failure to give the prompt written notice required by the lease bars defendant from obtaining the benefit **929 of the related provision which would relieve defendant from liability for rent while the premises are unusable.

Therefore, since the Respondent never complied with the notice requirement set forth in the lease, the Respondent cannot claim the benefits under Lease Article 9 which would have the effect of abating the rent.

POINT VI
LACK OF ELECTRICITY WITHOUT THE FAULT OF THE LANDLORD IS NOT A CONSTRUCTIVE EVICTION

There is nothing in the proofs presented and nothing in the on the ground reality to show that the landlord was in any manner whatsoever at fault in this sorry business of the Respondent's electricity. The storm was an act of nature. Con Edison's decision to shut down the electricity to Lower Manhattan was *its* decision. While the Petitioner's testimony described moving the main electrical junctions to higher ground, that actually had nothing to do with the Respondent's loss of electricity because that move was effectuated long before Con Edison was ready to re-energize the lower Manhattan grid at the affected area. Nor, in any event, could it be considered *blameworthy* for the landlord to use the opportunity to move the

electrical bus to a higher place against the eventuality that global warming could make Sandy less of a rarity than it historically had been.

Yet, the only substantive defense in the Respondent's answer is "constructive eviction." While the doctrine is fairly old, its classic statement is that of the Court of Appeals in *Barash v. Pennsylvania Terminal Real Estate Corp.,* 26 NY2d 77, 256 NE2d 707, 308 NYS2d 649 (1970).

As the entry level requirement of the doctrine, the *Barash* court wrote (26 NY2d 82):

> To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises (Edgerton v. Page, 20 N.Y. 281; 1 Rasch, Landlord and Tenant, s 849). Of course, the tenant must have been deprived of something to which he was entitled under or by virtue of the lease (52 C.J.S. Landlord & Tenant s 477, p. 292).

Emphasizing that the landlord's conduct has to be wrongful, the *Barash* court continued (26 NY2d at 83):

> On the other hand, constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises.

But the proof that was presented before this court was that the *landlord* did *nothing* wrong. Even if the Respondent had proved that the landlord had wrongfully delayed the Respondent's reconnection to the Con Edison supply of electricity, there would have been no constructive eviction because at the time of any such supposedly wrongful deprivation of

connection, the tenant remained using the subject premises and fully conducting its business. This, the *Barash* court makes clear by stating (*id*):

> Thus, where the tenant remains in possession of the demised premises there can be no constructive eviction.

Since there is not even an allegation that the landlord did anything wrong prior to the rehookup to ConEdison power, there can be no allegation of constructive eviction prior to that point. Since the tenant was fully using the premises at the time of the supposed flap over hookup and remained continuously doing so thereafter, there can be no constructive eviction then either.

In the years since the decision of *Barash* the courts have not wavered in this doctrinal line. In *West Broadway Glass Co. v. I.T.M. Bar, Inc.,* 24 HCR 705A, 171 Misc2d 321, 658 NYS2d 162 (1996) in order for there to be a finding of constructive eviction and citing to *Barash*, the Appellate Term for the First Department wrote:

> A constructive eviction exists where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises

In *Pacific Coast Silks, LLC v. 247 Realty, LLC,* 76 A.D.3d 167, 904 N.Y.S.2d 407 (2010)[1], the First Department wrote:

[1] Also worthy of note is *Pacific Silks*' refusal to allow the tenant an abatement because, *inter alia*, the tenant did not give *written* notice of the defective condition as required by the lease. The court reasoned that the *written* notice was intended to give the opportunity to fix the situation and therefore that aspect of the lease was entitled to full enforcement. The same, of course, can also be said of Paragraph 9 of the lease controlling this tenancy and its written notice requirement that was utterly ignored by the Respondent.

> To establish constructive eviction, a tenant need not prove physical expulsion, but must prove wrongful acts by the landlord that "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises."

Thus, it is clear that the *Barash* doctrines are in full force and effect and the Respondent in this proceeding simply cannot claim any kind of constructive eviction.

CONCLUSION

Since Respondent has no plausible defense to this proceeding, Petitioner should be granted judgment in full for its petition and the matter set down for a hearing on the attorneys' fees to which Petitioner is entitled.

Dated New York, New York
March 18, 2013

Respectfully submitted,

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