

At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 6th day of July, 2011.

P R E S E N T:

HON. CAROLYN E. DEMAREST,
Justice.

-----X

J.C. STUDIOS, LLC,

Plaintiff,

- against -

Index No. 30606/10

TELENEXT MEDIA, INC. F/K/A
TELEVEST DAYTIME PROGRAMS, INC., AND
PROCTER & GAMBLE PRODUCTIONS, INC.,

Defendants.

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The following papers numbered 1 to 6 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-4 _____
Opposing Affidavits (Affirmations) _____	_____ _____
Reply Affidavits (Affirmations) _____	_____ _____
_____ Affidavit (Affirmation) _____	_____ _____
Other Papers <u>Memoranda of Law</u> _____	5-6 _____

Upon the foregoing papers, in this action by plaintiff J.C. Studios, LLC (plaintiff) for breach of an agreement for the use of studio space to record the daytime television program “As the World Turns,” defendants TeleNext Media, Inc. (TeleNext), formerly known as TeleVest Daytime Programs, Inc. (TeleVest), and Procter & Gamble Productions, Inc. (Procter & Gamble) (collectively, defendants) move for an order, pursuant to CPLR 3211,

dismissing plaintiff's complaint as against them in its entirety, and, pursuant to 22 NYCRR 130-1.1, sanctioning plaintiff for engaging in allegedly frivolous conduct.

On October 20, 1999, TeleVest entered into an Operating Agreement, whereby plaintiff agreed to provide personnel, services, and production facilities at its studios, located at 1268 East 14th Street, in Brooklyn, New York, for TeleVest's exclusive use in producing the one hour daytime drama, *As the World Turns*, which TeleVest produced for Procter & Gamble. Following the expiration of this initial Operating Agreement, TeleVest and plaintiff entered into a subsequent Operating Agreement on March 23, 2005, which was effective as of January 1, 2005 (the 2005 Operating Agreement). Section V of the 2005 Operating Agreement set forth its General Terms and Conditions, and paragraph (A) of the 2005 Operating Agreement set forth the term of such agreement.

Paragraph V (A) (1) of the 2005 Operating Agreement provided that such agreement was for a two-year term, and it gave TeleVest three one-year options to renew it, commencing on January 1, 2007. Paragraph V (A) (3) of the 2005 Operating Agreement, which set forth its cancellation terms, provided, in pertinent part, as follows:

“The above notwithstanding, TeleVest may cancel this agreement if the show then being produced is terminated by the network and/or Procter & Gamble . . . upon the greater of: (i) at least seven (7) weeks' written notice; and (ii) the notice provided by the network to TeleVest, in the event that [*As the World Turns*], or the show then being produced, is terminated by the network and/or Procter & Gamble . . .”

Paragraph V (L) of the 2005 Operating Agreement provided as follows:

“Notices. Any notices required to be given hereunder shall be [in] writing, and shall be deemed served when personally delivered or, in the alternative, may be served by registered or certified mail, return receipt requested, to each of the parties at the following [listed] addresses.”

This paragraph then listed the address of plaintiff where such notice was required to be sent as 11 Fulton Street, 4th Floor, New York, NY 10038, Attention: Jacob Frydman, with a copy of such notice required to be sent to plaintiff at 1268 East 14th Street, Brooklyn, NY 11230 Navy Yard, Attention: Michael Stiegelbauer. This paragraph further provided that such notice could alternatively be sent “to such other person who may be designated, or address as may be furnished by such party to the other in like fashion,” and that such notice “shall be deemed served when received or reused [sic] by the party to which it is addressed.”

Page 15 of the 2005 Operating Agreement contained a guarantee executed by Procter & Gamble, which provided as follows:

“Procter & Gamble . . . hereby unconditionally and irrevocably guarantees to [plaintiff] the due and punctual payment in full (and not merely the collectibility) of all sums due by TeleVest to [plaintiff], and all other obligations of TeleVest to [plaintiff] as set forth in the [2005 Operating Agreement].”

TeleVest exercised its renewal option under the 2005 Operating Agreement. On March 28, 2008, TeleVest changed its name to TeleNext via a certificate of amendment filed with the New York State Department of State, Division of Corporations. TeleNext then exercised its renewal options for the 2005 Operating Agreement, and on May 27, 2008, a Notice of Renewal and Amendment (the May 27, 2008 Notice of Renewal and Amendment)

was executed by TeleNext and plaintiff. Paragraph 1 of the May 27, 2008 Notice of Renewal and Amendment provided, in pertinent part, as follows:

“Renewal . . . [T]he term of the [2005 Operating] Agreement is hereby extended to January 1, 2010, and provided further that should CBS air the daytime drama *As The World Turns* beyond the 2008-2009 season, the term of the Agreement shall automatically be extended to January 1, 2011.”

Paragraph 6 of the May 27, 2008 Notice of Renewal and Amendment also added a holdover provision to the 2005 Operating Agreement, which, in pertinent part, provided as follows:

“Holdover. In the event TeleNext shall remain in possession of the studio premises after TeleNext terminates as herein provided, or after the expiration of the term of this Agreement, the price payable by TeleNext during such holdover period shall be 200% of the price prior to such termination of holdover (the ‘Holdover Penalty’) . . .”

On December 8, 2009, immediately after TeleNext learned that CBS was canceling *As the World Turns*, Brian T. Cahill, a senior vice-president and managing director at TeleNext, sent a letter dated December 8, 2009 (the December 8, 2009 letter), by certified mail, to plaintiff at One Dag Hammarskjold Plaza, 885 Second Avenue, 34th Floor, New York, NY 10017, Attention: Jacob Frydman, with a copy sent, by certified mail, to plaintiff at 1268 East 14th Street, Brooklyn, NY 11230, Attention: Michael Stiegelbauer.¹ The

¹Brian T. Cahill, in a sworn affidavit by him, attests that he sent this letter by certified mail, and he has annexed copies of certified mail receipts from the United States Postal Service, evidencing that the two copies of this letter were delivered at the above addresses and were signed for by “C. Eisler” and “Sidney” on December 9, 2009.

December 8, 2009 letter, after referring to the 2005 Operating Agreement, as amended by the May 28, 2008 Notice of Renewal and Amendment, stated as follows:

“CBS has informed us it will not pick up *As The World Turns* after the current 2009/2010 broadcast season. Thus, we exercise our right under Paragraph V.A.3. to cancel the [2005 Operating A]greement without liability upon the greater of seven (7) weeks’ written notice or notice provided by the network.

“Because the network has only just informed us of its decision, we have yet to determine our final tape date in the studios and the date we intend to vacate the building. These dates likely will fall between June-September 2010, and we will provide specific dates in writing as soon as possible.”

Plaintiff, upon receiving the December 8, 2009 letter, took the position that TeleNext had terminated the 2005 Operating Agreement by the December 8, 2009 letter and that such termination became effective seven weeks later (i.e., on January 26, 2010). According to Brian T. Cahill, in early February 2010, Jacob Frydman of plaintiff, informed him that plaintiff was deeming TeleNext to be a holdover tenant, and that, pursuant to paragraph 6 of the May 27, 2008 Notice of Renewal and Amendment, TeleNext was subject to a 200% holdover penalty for its continued use of the studio space after the passage of seven weeks from TeleNext’s December 8, 2009 notice of termination.

An e-mail dated February 2, 2010 by Brian T. Cahill to Jacob Frydman and Michael Stiegelbauer of plaintiff reflects that he had received an invoice dated January 23, 2010, which reflected a new rate of payment as of January 20, 2010. In that e-mail, Brian T. Cahill objected to that rate increase. By a second e-mail dated February 2, 2010 to Jacob Frydman and Michael Steigelbauer, Brian T. Cahill stated that TeleNext would continue to provide a

weekly wire transfer as prepayment against the studio facility charge plus labor and services, which were to be applied to plaintiff's weekly invoices, at the \$300,000 rate that had been in place since February 15, 2008 and prior to CBS's cancellation of *As The World Turns*.

Thereafter, plaintiff sent TeleNext weekly invoices for the regular payment amounts, which were paid by TeleNext. In addition, plaintiff sent TeleNext separate invoices for a holdover penalty, which was not paid by TeleNext. Brian T. Cahill claims that in March 2010, he orally informed plaintiff that TeleNext would finish taping in the studio space on June 24, 2010, and that the termination of the 2005 Operating Agreement would be effective as of August 31, 2010. Plaintiff continued to claim that TeleNext was obligated to pay the 200% holdover penalty for its continued use of the studio space after January 23, 2010, and it continued to send invoices billing TeleNext for this holdover penalty. TeleNext vacated the studio space on August 31, 2010.

A Statement dated September 1, 2010 and a duplicate Statement dated September 7, 2010 sent by plaintiff to TeleNext listed weekly invoices from January 23, 2010 to August 31, 2010 for holdover rent payments, totaling \$3,176,017.20. By e-mails dated September 10, 2010 and October 21, 2010, Brian T. Cahill informed plaintiff that TeleNext disagreed with the invoices listed in the Statement, and that TeleNext did not intend to pay them and would continue to disregard them.

On December 17, 2010, plaintiff filed this action against defendants, alleging that notwithstanding that the 2005 Operating Agreement was terminated seven weeks after December 8, 2009, TeleNext continued to utilize its facilities until September 2010, during

which time it failed to pay the full holdover penalty, which amounted to \$3,176,017.20. Plaintiff's complaint seeks recovery of \$3,176,017.20 based upon TeleNext's failure to pay this holdover penalty allegedly owed by it in this amount. Plaintiff's complaint alleges a first cause of action for breach of contract, a second cause of action for an account stated, and a third cause of action for quantum meruit. Plaintiff's claim as against Procter & Gamble is predicated upon its status as a guarantor of the 2005 Operating Agreement.

In addressing defendants' motion, it is initially noted that plaintiff does not contest TeleNext's motion insofar as it seeks dismissal of its second cause of action for an account stated and its third cause of action for quantum meruit. Plaintiff acknowledges that its second cause of action for an account stated is duplicative of its first cause of action for breach of contract (*see Simplex Grinnell v Ultimate Realty, LLC*, 38 AD3d 600, 600 [2007]; *Erdman Anthony & Assoc. v Barkstrom*, 298 AD2d 981, 982 [2002]). In addition, it is undisputed that TeleNext timely objected to the invoices sent by to it by plaintiff (*see Erdman Anthony & Assoc.*, 298 AD2d at 982). Plaintiff also acknowledges that its third cause of action cannot be maintained since it is precluded by the existence of an express contract, i.e., the 2005 Operating Agreement (*see Parker Realty Group, Inc. v Petigny*, 14 NY3d 864, 865-866 [2010]; *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2009]). Thus, dismissal of these causes of action is mandated.

With respect to plaintiff's first cause of action for breach of contract, it is well established that the "[c]onstruction of an unambiguous contract is a matter of law" which may be determined by the court on a motion to dismiss (*Beal Sav. Bank v Sommer*, 8 NY3d

318, 324 [2007]). Where “the intention of the parties may be gathered from the four corners of the instrument[,the contract] should be enforced according to its terms” (*id.*; *see also Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]; *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

Since the interpretation of an unambiguous contract is a question of law for the court (*see West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]; *Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 459 [1957]), on a motion to dismiss pursuant to CPLR 3211, the provisions of the contract establish the rights of the parties and will prevail over the allegations set forth in a complaint (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *First Am. Commercial Bancorp, Inc. v Saatchi & Saatchi Rowland, Inc.*, 55 AD3d 1264, 1266 [2008]; *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [2004]). Thus, on a motion to dismiss pursuant to CPLR 3211, the court must grant dismissal when documentary evidence submitted by the parties, such as the contract, “definitively contradicts the plaintiff’s factual allegations, . . . conclusively disposes of the plaintiff’s claim” (*Berardino v Ochlan*, 2 AD3d 556, 557 [2003]; *see also Prudential Wykagyl/Rittenberg Realty v Calabria-Maher*, 1 AD3d 422, 422 [2003]; *New York Community Bank v Snug Harbor Sq. Venture*, 299 AD2d 329, 329-330 [2002]; *Meyer v Guinta*, 262 AD2d 463, 464 [1999]; *O’Riley v Unique Vacations*, 204 AD2d 610, 611 [1994]), and ““conclusively establishes a defense to the asserted claims as a matter of law”” (*Beal Sav. Bank*, 8 NY3d at 324, quoting *Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005], quoting *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]).

Here, it is undisputed that TeleNext gave plaintiff written notice of its cancellation of the 2005 Operating Agreement by its December 8, 2009 letter, which provided plaintiff with notice nearly nine months before it vacated the studio premises.² Plaintiff, in its complaint, acknowledges receipt of this written notice. Thus, TeleNext gave plaintiff well over seven weeks' written notice, thereby meeting the requirement of paragraph V (A) (3) (i) of the 2005 Operating Agreement of giving plaintiff "at least seven (7) weeks' written notice." In addition, since the network had provided TeleNext with more than seven weeks' notice of termination of *As the World Turns*, TeleNext provided immediate notice of cancellation of the 2005 Operating Agreement, thereby complying with paragraph V (A) (3) (ii) of the 2005 Operating Agreement by providing plaintiff with "the notice provided by the network to TeleNext."

Plaintiff, however, attempts to misconstrue paragraph V (A) (3) (i) of the 2005 Operating Agreement by taking the position that the term "at least" equates to no more than seven weeks, and that as soon as seven weeks passed from the December 8, 2009 letter, the 2005 Operating Agreement was terminated and TeleNext became a holdover tenant. Courts, though, have recognized that the term "at least" "prescribes a minimum notice period, but not a maximum" (*Avramidis v Arco Petroleum Prods. Co.*, 798 F2d 12, 16-17 [1st Cir 1986]; *see also Quantum Corp. v Rodime, PLC*, 65 F 3d 1577, 1581 [Fed Cir 1995], *cert denied* 517

²While the address to which TeleNext sent the December 8, 2009 letter, by certified mail, to Jacob Frydman differs from that listed in paragraph V (L) of the 2005 Operating Agreement, plaintiff does not deny that Jacob Frydman received this notice. The address to which TeleNext additionally sent the December 8, 2009 letter, by certified mail, to Michael Stiegelbauer is the same as that listed in paragraph V (L) of the 2005 Operating Agreement.

US 1167 [1996] [“the term ‘at least’ means ‘as the minimum,’ and therefore when coupled with a specific number sets forth an absolute lower limit of a range”]).

Plaintiff’s position that providing more than seven weeks’ notice would result in the immediate termination of the lease upon seven weeks from the date notice was given ignores the very purpose of the notice provision set forth in paragraph V (A) (3) of the 2005 Operating Agreement, which was to provide plaintiff, as the commercial landlord, with time to make alternative arrangements to lease the studio premises following TeleNext’s vacatur of such premises (*see generally Avramidis*, 798 F2d at 17 [“The purpose of the . . . notice of termination requirements is to give the dealer sufficient advance warning of the impending termination so that he may make appropriate arrangements”]; *Matter of Country Wide Ins. Co. [Meadows]*, 63 AD2d 951, 952 [1978] [noting that the “plain purpose” of statutes requiring notice before termination of an insurance policy “is to give the insured clear and timely notice prior to cancellation so as to permit him to take appropriate action”])). The fact that TeleNext provided more than seven weeks’ notice actually put plaintiff in a better position to arrange for an alternative use of the studio space than if TeleNext had merely provided it with the required seven weeks’ notice.

Furthermore, plaintiff’s argument that the termination occurred exactly seven weeks after the December 8, 2009 letter is contrary to the specific language of this notice of termination, which explicitly informed plaintiff that due to the fact that the network had only just informed TeleNext of its decision that it would not pick up *As the World Turns* after the 2009/2010 broadcast season, it had yet to determine its final tape date in the studios and the

date that it intended to vacate the building, but that these dates likely would fall between June and September 2010. Such language does not evince an intent by TeleNext to immediately terminate the 2005 Operating Agreement so as to require that it vacate the studio premises in seven weeks or be subject to a holdover penalty, since TeleNext would obviously need to continue taping in the studio until the production of *As the World Turns* ended. Rather, such language specifically informed plaintiff that the termination date upon which TeleNext would vacate the studio premises would be between June and September 2010.

Plaintiff argues that it immediately elected to treat the December 8, 2009 letter as providing for exactly seven weeks' notice, after which termination of the 2005 Operating Agreement became effective, based upon the fact that this notice letter did not provide it with an exact vacate date. The network, however, initially only provided TeleNext with a range that could not have a more specific date until the network later finalized scheduling for the conclusion of *As the World Turns*. Thus, plaintiff's argument that TeleNext had to provide an exact vacate date in its timely termination notice, despite the fact that the network had not provided such a date to TeleNext, would lead to an unreasonable and harsh result by penalizing TeleNext for failing to provide plaintiff with information which it did not possess. Where a plaintiff's construction of a contract would lead to unreasonable or harsh results, such an interpretation should be avoided (*see Tri-Messine Constr. Co. v Telesector Resources Group*, 287 AD2d 558, 558 [2001]; *River View Assoc. v Sheraton Corp. of Am.*, 33 AD2d 187, 190 [1969], *affd* 27 NY2d 718 [1970]).

Moreover, contrary to plaintiff's argument, TeleNext was not required to provide an exact termination date as a condition precedent to the termination of the 2005 Operating Agreement. The terms of the 2005 Operating Agreement did not mandate that TeleNext provide an exact vacate date in its notice of termination. Rather, paragraph V (A) (3) of the 2005 Operating Agreement merely provided that TeleNext was required to provide plaintiff with the greater of at least seven weeks' written notice and the notice provided by the network to TeleNext. Thus, under the terms of the 2005 Operating Agreement, TeleNext was only required to provide notice that the 2005 Operating Agreement was being terminated no later than seven weeks prior to such termination and TeleNext gave more than adequate notice under these terms. As discussed above, TeleNext complied with the literal terms of paragraph V (A) (3) of the 2005 Operating Agreement by providing plaintiff with the notice that it was provided by the network, and also notice which was at least seven weeks' notice.

Plaintiff's attorney, in his memorandum of law, raises the argument that TeleNext did not comply with the notice requirements set forth in paragraph V (L) of the 2005 Operating Agreement, which required service in person or by certified mail of any notices required to be given. Plaintiff's attorney contends that if the December 8, 2009 letter is not construed as terminating the 2005 Operating Agreement seven weeks later, then TeleNext did not comply with the notice requirements set forth in paragraph V (L) of the 2005 Operating Agreement by failing to serve a subsequent notice, in person or by certified mail, setting forth the precise date that it would vacate the studio premises. Plaintiff's attorney maintains that this would result in the 2005 Operating Agreement not being terminated and render TeleNext

obligated to pay rent through January 1, 2011, the date upon which the 2005 Operating Agreement, by its terms, ended pursuant to paragraph 1 of the May 27, 2008 Notice of Renewal and Amendment, which had extended the 2005 Operating Agreement's term up until that date.

TeleNext, in response to this argument, has submitted the certified mail receipts, evidencing that it sent the December 8, 2009 letter giving plaintiff notice of termination by certified mail, and plaintiff, in its complaint, has admitted receipt of this December 8, 2009 letter. In addition, Brian T. Cahill, in his sworn affidavit, attests that in March 2010, he gave plaintiff oral notice that the effective date of termination of the 2005 Operating Agreement would be August 31, 2010, and plaintiff does not deny receipt of this March 2010 oral notice of the termination date.³

While it is true that TeleNext did not provide written notice of the August 31, 2010 termination date, no where in plaintiff's complaint does plaintiff cite to paragraph V (L), nor does plaintiff plead the lack of proper notice, by certified mail, as a basis for its complaint.⁴ Plaintiff's complaint does not seek to recover rent from September 1, 2010 to January 1,

³In response to defendants' motion (which annexes documentary evidence and Brian T. Cahill's sworn affidavit), plaintiff has only submitted its attorney's memorandum of law, in which plaintiff's attorney asserts that defendants have not established that they delivered notice, in person or by certified mail, setting forth the precise date that TeleNext would vacate the studio premises.

⁴While plaintiff, in its attorney's memorandum of law, has requested leave to replead, plaintiff has not established that it possesses a viable claim which would constitute a basis for granting its request for leave to replead.

2011, nor does it allege that plaintiff was unable to find a new tenant for this time period. Rather, plaintiff's complaint solely alleges that TeleNext terminated the 2005 Operating Agreement seven weeks after December 8, 2009 and seeks payment of the holdover penalty for the period following the date in which it occupied the premises up until August 31, 2010. Plaintiff only raises this new argument regarding a lack of termination of the 2005 Operating Agreement in its attorney's memorandum of law in response to TeleNext's motion.

Moreover, there is no merit to plaintiff's argument that the notice of termination of the 2005 Operating Agreement was ineffective because notice of the actual termination date was not sent by certified mail in accordance with paragraph V (L) of the 2005 Operating Agreement (*see Rockland Exposition, Inc. v Alliance of Automotive Service Providers of New Jersey*, 706 F Supp 2d 350, 360 [SD NY 2009]; *Suarez v Ingalls*, 282 AD2d 599, 599-600 [2001]; *Dellicarri v Hirschfeld*, 210 AD2d 584, 585 [1994]). Strict compliance with contract notice provisions is not required in commercial contracts when the contracting party receives actual notice and suffers no detriment or prejudice by the deviation (*see Iskalo Elec. Tower LLC v Stantec Consulting Servs., Inc.*, 79 AD3d 1605, 1607 [2010]; *Fortune Limousine Serv., Inc. v Nextel Communications*, 35 AD3d 350, 353 [2006]; *Suarez*, 282 AD2d at 599-600; *Dellicarri*, 210 AD2d at 585). Plaintiff does not dispute that it received actual notice of the termination of the 2005 Operating Agreement, and plaintiff does not allege any detriment caused to it by any claimed deviation from the terms of the 2005 Operating Agreement.

Although plaintiff was not given a certain date as to when TeleNext would vacate the studio premises and on which it could lease the premises to a new tenant, it was given a specific range as to when TeleNext would vacate (i.e., from June 2010 up to September 2010), and TeleNext, in fact, stayed until August 31, 2010. Plaintiff's complaint does not allege that due to this uncertainty as to when in this June to September 2010 time span TeleNext would vacate the studio premises, it lost an opportunity to rent this space to a new tenant, nor does it allege that such uncertainty resulted in it being unable to mitigate any losses from September 2010 to January 2011 caused to it by the premature termination by TeleNext of the 2005 Operating Agreement.

It has been held that where there is no substantial injury resulting to a landlord for the failure to comply strictly with the terms of a lease, the tenant should not be unduly penalized (*see Lake Anne Realty Corp. v Sibley*, 154 AD2d 349, 351 [1989]). While TeleNext's notice of the termination date was oral, the actual termination date was at the end of the range given in writing in TeleNext's December 8, 2009 letter, and TeleNext did not remain in the studio premises past the term of the 2005 Operating Agreement. Thus, the holdover penalty of 200% imposed by plaintiff is unduly harsh, defeats the parties' reasonable expectations, and has no relationship to any actual losses sustained by plaintiff.

In any event, paragraph V (L) of the 2005 Operating Agreement only required notice, in person or by certified mail, of those notices that were required to be given under the 2005 Operating Agreement. As discussed above, the terms of the 2005 Operating Agreement did not require that notice of a specific termination date be given to plaintiff.

While plaintiff's complaint seeks a holdover penalty starting immediately from seven weeks after the December 8, 2009 letter until August 31, 2010, by the express terms of paragraph 6 of the May 27, 2008 Notice of Renewal and Amendment, the holdover penalty only applied if TeleNext "remain[ed] in possession of the studio premises after [it] terminate[d] th[e 2005 Operating Agreement]." Therefore, since the termination of the 2005 Operating Agreement did not become effective until August 31, 2010, the termination date upon which TeleNext vacated the studio premises, TeleNext cannot be subject to a holdover penalty.

"During the period from a notice of termination until the date when [a] termination becomes effective, the contract remains in force and must continue to be performed according to its terms, including making payments at the usual contract rate" (*Szatmari v Rosenbaum*, 128 Misc 2d 232, 233-234 [1985]; *see also* 22A NY Jur 2d, Contracts § 502). Thus, TeleNext was only required to continue to make payments at the usual rate until the August 31, 2010 termination of the 2005 Operating Agreement, which it, in fact, made to plaintiff.

Consequently, the court finds that the documentary evidence submitted by defendants conclusively establishes that there was no breach of the 2005 Operating Agreement by TeleNext. Dismissal of plaintiff's first cause of action for breach of contract as against TeleNext must, therefore, be granted (*see* CPLR 3211 [a] [1]).

With respect to plaintiff's complaint as against Procter & Gamble, Procter & Gamble is sued solely in its capacity as a guarantor of TeleNext's obligations under the 2005

Operating Agreement. Thus, since the court has determined that Procter & Gamble's principal, TeleNext, has no liability to plaintiff under the 2005 Operating Agreement and, Procter & Gamble, as a guarantor, "stands in the shoes of [its] principal," TeleNext, it cannot be held liable herein (*European Am. Bank & Trust Co. v Boyd*, 131 AD2d 629, 630 [1987]). Moreover, Procter & Gamble's guarantee does not, in any event, even apply to the claims asserted in this action since the holdover penalty was added by the May 27, 2008 Notice of Renewal and Amendment, which Procter & Gamble did not execute and to which it did not consent (*see White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]; *Lo-Ho LLC v Batista*, 62 AD3d 558, 559-560 [2009]; *Congregation Ohavei Shalom v Comyns Bros.*, 123 AD2d 656, 656-657 [1986]). Furthermore, since (as noted above) the 2005 Operating Agreement, by its explicit terms, provided only for a two-year term with three one-year options to renew, commencing on January 1, 2007, and, therefore, could only be extended to, at most January 1, 2010, the guarantee could not apply to holdover damages sought for a time period beyond this lease extension (*see White Rose Food*, 99 NY2d at 591). Consequently, dismissal of plaintiff's complaint as against Procter & Gamble is required (*see CPLR 3211 [a] [1], [7]*).

Defendants, in their motion, additionally request an order, pursuant to 22 NYCRR 130-1.1, sanctioning plaintiff for engaging in allegedly frivolous conduct. Defendants argue that sanctions are warranted because plaintiff used tortured reasoning and gross distortions of the 2005 Operating Agreement and the law in support of its claims that TeleNext breached the 2005 Operating Agreement by failing to comply with paragraph V (A) (3). The court,

however, does not find that plaintiff's conduct rises to the level of frivolous conduct within the meaning of 22 NYCRR 130-1.1 so as to warrant the imposition of sanctions against it.

Accordingly, defendants' motion is granted insofar as it seeks an order dismissing plaintiff's complaint as against them in its entirety, and is denied insofar as it seeks sanctions pursuant to 22 NYCRR 130-1.1.

This constitutes the decision, order, and judgment of the court.

E N T E R,

J. S. C.