STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

FEDDER INDUSTRIAL PARK,

Plaintiff, DECISION AND ORDER

v. INDEX No. 2005/03437

R.P. FEDDER CORPORATION,

Defendant.

This action arises out of a lease agreement between the parties dated March 2, 2000 and two subsequent Addendums. Plaintiff and landlord, Fedder Industrial Park, moves pursuant to CPLR 3212 for an order granting plaintiff summary judgment and dismissing defendant's seven affirmative defenses on the grounds that they are not supported by the facts. Defendant and tenant, R.P. Fedder Corporation, cross moves for an order denying Plaintiff's motion for summary judgment and granting its cross motion to dismiss plaintiff's complaint.

The Lease Agreement and Addendums pertain to a premises located at 1237 East Main Street, Rochester, New York. Defendant leased approximately 45% of the commercial space at the premises. The initial terms of the lease was for January 1, 2000, through December 31, 2002. By a second Addendum executed by the parties and dated December 13, 2002, the term of the Lease was extended through December 31, 2003. Defendant occupied the premises for

this entire period, as well as a Holdover Period beginning on January 1, 2004 through April 30, 2004. In all, defendant leased the premises from January 1, 2000 through April 30, 2004.

During the tenancy period, defendant made monthly rental payments through the end of the Holdover Period, during which time Defendant was required to pay 120% of the regular rental rate. The original Lease contains the following provisions which are in dispute herein:

> 3. RENT. (a) The full amount of the rent, in the amount of See Addendum Dollars ($___), is due and payable for the full lease term at the commencement of the lease. For the convenience of the Tenant, and while the Tenant is not in default of this lease, the rent for the Premises shall be payable to the Landlord at the above address, at the rate of See Addendum Dollars ($___) per month, in advance on or before the first day of each month without the necessity of any demand or billing. Time is of the essence and there will be a late fee charged of five percent (5%) of the amount due (which shall be paid as additional rent) when the rent or additional rent is paid ten (10) or more days late...
>
> 5. UTILITIES. Tenant will pay for all utilities to the Premises (e.g., light, heat, power, electricity, gas, water, fuel, sewerage, etc.). If Tenant is unable to pay for any utilities, Tenant will so notify the Landlord before such utilities are terminated. With respect to utilities that are not separately metered, Tenant will pay, as additional rent, within thirty (30) days, after being billed by the Landlord, a Prorated Portion of all utilities to the building in which the Premises is located. The Tenant's prorated portion of the utilities is 45.46%.

The First Lease Addendum also contains the following provision relevant to these proceedings:

> 3. Common Area Maintenance. Solid Waste Removal. Tenant agrees to pay its proportionate share of the cost of solid waste removal from the Premises as determined by landlord. The initial allocated share of this expense is estimated at $100.00 per month and is subject to adjustment on usage and future costs.
>
> Snow Removal. Tenant agrees to pay its proportionate share of snow removal costs from the common driveway, parking and docking areas, as determined by landlord. These charges will be payable on December 1st, February 1st and April 1st in each lease year of occupancy.
>
> 4. Taxes. Tenant shall pay its Prorated Portion of any increases in Monroe County taxes of City of Rochester and School taxes for the premises. For the purposes of this paragraph, the base year for the County taxes shall be for the year 2000 and the base year for the City and School Taxes shall be the year 2000/2001. The additional taxes due shall be payable within 15 days after receipt by tenant from the landlord of a bill substantiating the new increase.
>
> In the event the landlord applies for a reduction in the assessment of the premises or of a reassessment, the base year shall be the year in which the assessment is reduced.

In his reply affidavit, Scott Fedder states that no claim is made by plaintiff for snow removal for the period January 1, 2000 through December 31, 2003, or on the tax escalator. See S. Fedder reply affidavit dated July 3, 2007, at ¶10.

Shortly before the end of defendant's tenancy during the

holdover period, defendant received, from the landlord/plaintiff (through counsel) letters relative to payments landlord required of defendant, which included RG&E charges for the period December 5, 2003, through January 15, 2004, charge for a replacement battery in the alarm system on January 21, 2004, late fee for payment of rent in December 2003, RG&E charges for the period February 6, 2004, through March 5, 2004, RG&E charges for January 15, 2004 through February 16, 2004, and snowplowing charges for the months of January and February 2004. Defendant alleges, and plaintiff does not dispute, that these letters sent by plaintiff's counsel to defendant's counsel were the first time during the tenancy period (beginning in January, 2000) that plaintiff demanded, billed, or otherwise sought payment for such charges. Defendant vacated the leased premises on April 30, 2004.

On June 11, 2004, again through counsel, plaintiff notified defendant that it sought payment for utilities, snow removal, trash removal, late fees, and taxes for the entire tenancy period: January 1, 2000 through April 30, 2004. In response, defense counsel offered payment for the charges that accrued during the Holdover Period. Plaintiff's counsel rejected that payment on behalf of his client. The instant action then ensued. Plaintiff's complaint states the following causes of action: (1) seeking rent that defendant allegedly failed to pay in the amount

of $40,119.96, (2) pro-rata share of utilities, common area maintenance, taxes, and snow plowing expenses in the amount of $195,645.16, (3) quasi-contract/unjust enrichment, (4) $10,442.13 in damages sought for cleaning and repairing plaintiff allegedly had to perform at the leased premises after defendant vacated, (5) attorneys fees sustained in connection with evicting defendant and collecting back rent. Defendant's answer states the following affirmative defenses: failure to state a claim, waiver, barred due to failure to demand during tenancy period, laches/ estoppel, failure of conditions precedent, and waiver of claim for sums incurred during the holdover period due to plaintiff's failure to accept payment for such sums.

Summary Judgment

It is well settled that "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986) (citations omitted). See also Potter v. Zimber, 309 A.D.2d 1276 (4th Dept. 2003) (citations omitted). "Once this showing has been made, the burden shifts to the nonmoving party 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 Corp., 100 N.Y.2d 72, 81 (2003), *citing* Alvarez, 68 N.Y.2d at

324. "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the responsive papers." Wingrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985) (citation omitted). See also Hull v. City of North Tonawanda, 6 A.D.3d 1142, 1142-43 (4th Dept. 2004). When deciding a summary judgment motion, the evidence must be viewed in the light most favorable to the nonmoving party. See Russo v. YMCA of Greater Buffalo, 12 A.D.3d 1089 (4th Dept. 2004). The court's duty is to determine whether an issue of fact exists, not to resolve it. See Barr v. County of Albany, 50 N.Y.2d 247 (1980); Daliendo v Johnson, 147 A.D.2d 312, 317 (2nd Dept. 1989) (citations omitted).

First Cause of Action

Plaintiff's first cause of action alleges that defendant failed to pay rent as required during the holdover period since the alleged termination of the lease on December 31, 2001, and seeks damages in the amount of $40,119.96, plus late fees of $7,901.23 and interest from April 30, 2004. As a preliminary matter, the court notes that the Second Addendum to the Lease, dated December 13, 2002, extended the term of the lease and first addendum to December 31, 2003. As such, to the extent plaintiff seeks to recover holdover rental payments at the rate of 120% of the regular rent rate, defendant's motion for summary judgment is granted. The documentary evidence before the court unequivocally

establishes that defendant was not obligated to pay the holdover rental rate for the year 2003. See Affidavit of S. Quinn dated June 25, 2007 at Exhibit A. Plaintiff has failed to raise an issue of fact.

The remainder of the first cause of action seeks recovery of late charges for the alleged eleven times defendant was late with the rent. The schedule of late fees accrued, attached to plaintiff's motion papers as Exhibit D, alleges that defendant was late with rent during the following months: January, April, September, and December of 2001; January, February, March, and May, and July of 2002; and June and August of 2003. As quoted more fully above, the Lease states the following with respect to the payment of late charges for rent:

> Time is of the essence and there will be a late fee charged of five percent (5%) of the amount due (which shall be paid as additional rent) when the rent or additional rent is paid ten (10) or more days late....

Defendant alleges that these late charges, which plaintiff never sought to recover until after the termination of the lease in April 2004, have been waived. Plaintiff, of course, disagrees, citing the following paragraph of the Lease:

> 39. WAIVER; ENTIRE AGREEMENT; MODIFICATION; REMEDIES; ETC. (a) No failure of landlord to insist upon strict compliance with every term or condition hereof shall be deemed a waiver by Landlord of Landlord's rights hereunder... (c) This Lease contains the entire agreement between the parties and no oral statements or modifications and no prior oral statements or

> written matter shall have any force or effect. This lease may be modified by a writing signed by both Landlord and Tenant.

"A waiver is the voluntary abandonment or relinquishment of a known right." Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York, 61 N.Y.2d 442, 446 (1984). See also, Town of Hempstead v. Incorporated Village of Freeport, 15 A.D.3d 567 (2nd Dept. 2005). Waiver is not "lightly presumed." Gilbert Frank Corp. v. Fed. Ins. Co., 70 N.Y.2d 966, 968 (1988). See also, Navillus Tile, Inc. v. Turner Const. Co., 2 A.D.3d 209, 211 (1st Dept. 2003). Rather, waiver "is essentially a matter of intent which must be proved." Jefpaul, 61 N.Y.2d at 446. Further, waiver must be "'unmistakably manifested, and is not to be inferred from a doubtful or equivocal act.'" Ess & Vee Acoustical & Lathing Contractors, Inc. v. Prato Verde, Inc., 268 A.D.2d 332, 332 (1st Dept. 2000), *citing* Orange Steel Erectors, Inc. v. Newburgh Steel, 225 A.D.2d 1010 (3d Dept. 1996). Waiver will be implied:

> [w]hen one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby.

Frontier Ins. Co. v. State, 160 Misc.2d 437, 451 (N.Y. Ct.Cl.

1993), *citing* Black's Law Dictionary, 5th ed., p. 1417.

"Waiver 'may be accomplished by express agreement or by such conduct or failure to act as to envince an intent not to claim the purported advantage...' and is generally a question of fact." Dice v. Inwood Hills Condominium, 237 A.D.2d 403, 404 (2d Dept. 1997), *quoting* Hadden v. Consolidated Edison Co. of NY, 45 N.Y.2d 466, 469 (1978). "Moreover, the existence of a nonwaiver clause does not in itself preclude waiver of a contract clause." Id.; Kenyon & Kenyon v. Logany, LLC, 33 A.D.3d 538 (1st Dept. 2006). Indeed, "[w]hile waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise." Jefpaul, 61 N.Y.2d at 446. The Court of Appeals in Jefpaul enforced a non-waiver clause which particularly and expressly stated that the landlord's receipt of rent with knowledge of a breach could not be deemed a waiver of the breach. Id. Of significance here is the court's acknowledgment that "waiver may be inferred from the acceptance of rent in some circumstances." Id.

Here, the no-waiver clause does not specifically make mention of the acceptance of rental payments, as the lease did in Jefpaul. Moreover, the circumstances are such that waiver may be inferred by a trier of fact despite the no-waiver clause.

Plaintiff in the instant action accepted the rental payments for the entire duration of the tenancy period (including the holdover period) from January 1, 2000 through April 30, 2004. Although intermittent throughout this period, defendant made eleven late rental payments. Plaintiff never charged a late fee at the time of the late payment or otherwise called attention to defendant's tardiness in payment.

This failure is important for the following reason. On defendant's reading of the lease, the late fee provision in Paragraph 3(a) states that when a rental payment is late "a late fee charged of five percent (5%) of the amount due (which shall be paid as additional rent) when the rent or additional rent is paid ten (10) or more days late." A reading of this provision of Paragraph 3(a) reveals that the late fee was to be charged as additional rent, not, as plaintiff argues, as a cumulative lump sum payment after the termination of the lease. Moreover, the provision requiring that such a late fee is levied when either the "rent or additional rent is paid ten (10) or more days late" suggests that the additional rent (late fees) were to be paid at the same time as regular rental payments, not in a cumulative payment after the termination of the lease. According to defendant, paragraph 3(a)'s provision for a late fee to be assessed on the payment of additional rent (late fee) if made ten or more days late, demonstrates that the late fees were to be

charged, if at all, at the time of the late payment so that the additional rent could become due on the same schedule as normal rental payments. Allowing plaintiff to cumulate the late fees and charge them in a lump sum at the end of the lease might be considered by the fact finder to contradict the language of Paragraph 3(a), quite apart from questions of waiver.

The language is unclear, however, as to the necessity of demand or billing for late fees as a condition precedent for the right to payment. One construction could require that tenant send "additional rent" with a late monthly rental payment without demand or billing by landlord, where landlord's acceptance of such late rental payment before collecting the late fee/additional rent constituted waiver of the late fee/additional rent. See Jefpaul at 447. Another construction would require that tenant be responsible to be aware of all accruing late fees without notification, where accruing late fees/additional rent not paid do not put tenant in default and such accruing fees become due with interest in a final, cumulative lump-sum "additional rent" payment upon landlord's demand at the expiration of the entire tenancy term without waiver by landlord. Id. Since the procedure and due date for payment of late fees/additional rent is unclear, it is not possible to determine upon the contract language alone the point at which a late fee would have been waived, if at all. The language is susceptible

to many interpretations and the determination of the intent of the parties depends on inferences to be drawn from the credibility of extrinsic evidence. I have held before that non-waiver may be determined on summary judgment, but that waiver may not be summarily determined. See Fashion Bug, 10 Misc.3d 1053(A), 2005 WL 31973702, at *5 (citing In re Caldor, 217 B.R. 121, 133), and that decision was affirmed "for the reasons stated" below, id, 32 A.D.3d 1168 (4th Dept. 2006). As such, it is for a jury to determine the intent of the parties, not this court. See Sutton v. East River Sav. Bank, 55 N.Y.2d 550. Summary judgment on the first cause of action is denied as to late fees and interest.

Second Cause of Action

The second cause of action alleges that defendant was responsible for its pro-rata share of utilities, common area maintenance, taxes, and snow plowing and seeks damages in the amount of $195,645.16. In papers submitted on these motions, plaintiff represents that it does not seek any tax money. Defendant alleges that plaintiff waived collection of these amounts as well, as no demand for their payment was ever made during the tenancy period, with the exception of requests made for current periods during the last few months of the lease. Payments for utilities, snow removal, and trash removal for the period January 1, 2000 through December 1, 2003 was not sought by

plaintiff until June 11, 2004, nearly six weeks after the end of the tenancy period.

The law of waiver as stated above in equally applicable as to the charges sought in the second cause of action. First, the court notes that the charges sought by plaintiff as set forth in the April 1 and 5, 2004 letters from plaintiff's counsel (attached as Exhibits B and C to the Affidavit of S. Quinn dated June 25, 2007) were not waived and were properly charged by plaintiff. Defendant's motion for summary judgment is denied as to the charges set forth in the April 1 and 5, 2004 letters.

The utilities and trash removal for the period January 1, 2000 through December 1, 2003 pose a question of fact as to waiver that cannot be resolved on summary judgment. The solid waste removal charge set forth in paragraph 3 of the First Addendum states that the "expense is estimated at $100.00 per month and is subject to adjustment on usage and future cost." These charges, though specifically estimated at $100.00 per month in the addendum, were never sought on a monthly basis and became part of the lump sum sought by plaintiff on June 11, 2004. Likewise, the utilities, which were billed monthly to plaintiff, were not sought throughout the duration of the tenancy, but were the subject of the June 11, 2004 demand for payment. Though plaintiff received monthly billings for the utility charges (plaintiff's Exhibit J), the court notes that Paragraph 5 of the

Lease states that utility payments are due from the tenant (Defendant) "within thirty (30) days, after being billed by the Landlord."

It may be inferred that since landlord/plaintiff did not provide a monthly, written "notice" of additional charges that it may have been "required to give to another party," as laid out in Paragraph 34 of the lease agreement, landlord/plaintiff effectively waived "additional rent" required of tenant for utility expenses incurred each month by accepting tenant's monthly rental payments without sending any kind of "bill, statement, or communication." See Ginsberg v. Lo Bright Mfg. Co., Inc. 2001 N.Y. Slip Op. 40147(U), 2001 WL 1221652 (Sup. Ct. Nassau Co., July 23, 2001). However, this conclusion relies on an interpretation of the contract which must be determined by extrinsic evidence as to the subsequent reasonable expectations, intent and conduct of the parties, since the contract language alone is not clear as to the periods in which utilities are to be paid. See Fashion Bug at *3. On the one hand, it was required that rent be paid in monthly installments, and it could be inferred that "additional rent" should be paid on the same basis. Conversely, it could be inferred that these "additional rent[s]" required no procedure other than payment within thirty days "after being billed by the landlord," which would permit a lump-sum charge at the end of the entire tenancy

period. Either interpretation can be made, but no conclusion can follow from the contract language alone, since "the language of the agreement makes it susceptible to the construction offered by both parties." Id. Therefore, summary judgement regarding the utility fees is denied, as there remains an issue of fact to be determined by a jury. See Dice, 237 A.D.2d at 404.

In Ginsberg a 10-year lease authorized landlord/plaintiff "to collect additional rents attributable to real estate taxes in an annually accrued lump sum payment upon the landlord's presentation of supporting real estate tax bills." No attempt to bill for tax increases was made until landlord demanded payment days prior to the expiration of the original lease term. Id. Despite tenant/defendant's failure to remit pay for such increases, plaintiff agreed to renew the lease without reference to the additional rents previously demanded and continued to accept the base monthly rent during the renewal term without requesting any earlier sought or newly accruing "additional rents or increases." Id. It wasn't until days prior to the expiration of the renewal term that "landlord made a written demand for a $1,142,734.06 lump-sum payment . . . accruing from the inception of the parties' original leasehold." Id. The court found that the lease provisions governing tax increases contemplated an "annual, lump-sum payment to be made throughout each year of the term" of the lease, "which payment is due upon the landlord's

presentation of the real estate tax bill indicating such additional cost." Id. Since no demands for additional rents were made nor any tax bills provided to defendant throughout each year of the lease term, landlord "failed to establish compliance with the relevant condition precedent to the Defendant's obligation to pay." Id.

Like the landlord's failure in Ginsberg to make demands for additional rents throughout each year of the lease term despite the clause requiring lump-sum payment to be made throughout each lease year, landlord/defendant in this case failed to make demands or bill tenant for snow removal which would be "payable . . . in each lease year of lease occupancy," as stated in the Addendum to the lease. Id. As such, the charges were not "payable" on "December 1st, February 1st, and April 1st in each year of lease occupancy" prior to 2004, since landlord never billed tenant for these lease years throughout the entire tenancy period. Tenant's requirement to pay its share of snow removal costs through December of 2003 did not arise due to plaintiff's failure to establish compliance with the relevant condition precedent to tenant's obligation to pay such costs. Id. Summary judgement regarding the snow removal costs is granted for defendant, not as a question of waiver so much as as a question of a failure of the relevant condition precedent giving rise to the obligation to pay. Viewed as a matter of a failied condition

precedent, the matter may be summarily determined on this undisputed factual record.

The provision in the Addendum regarding solid waste removal states that "[t]enant agrees to pay its proportionate share of the cost of solid waste removal . . . as determined by landlord." It further states that "[t]he initial allocated share of this expense is estimated at $100.00 per month and is subject to adjustment based on usage and future costs." The language of this provision estimates the initial expense per month and does not expressly require *billing* on a monthly basis, although it suggests that solid waste removal costs were to be *paid* on a monthly basis, not in a cumulative payment after the termination of the lease. Under one reading, if landlord intended to make waste removal expenses "subject to adjustment based on usage and future costs," it must follow that there was an *initial* amount expected to be paid prior to any such adjustment. Indeed, landlord included the phrase "initial allocated share" in the provision to indicate that tenant's allocated expense shares would come in installments. Much as an electric or gas utility company estimates usage costs and bills its customers in between actual adjusted readings, landlord (under this reading) intended to estimate tenant's expense monthly and adjust tenant's expense as the waste removal company billed landlord with actual costs.

Whether tenant was responsible to include this payment

without being billed by landlord each month along with it's monthly rental payments until it was "determined by landlord" that an adjustment needed to be made, or landlord was responsible to bill tenant separately for every subsequent month's allocated expense share is immaterial because either finding could well be found by the fact finder to result in the same conclusion: Landlord's acceptance of monthly rental payment through December of 2003 without objection constituted waiver of landlord's right to collect under the solid waste removal provision, since landlord had knowledge of violation of the monthly payment requirement. See Jefpaul at 447. As such, defendant's motion for summary judgment should be denied as to solid waste removal expense, and plaintiff's motion also is denied inasmuch as defendant raises an issue of fact on the waiver issue.

Third and Fifth Causes of Action

The third and fifth causes of action are premises upon equitable claims for quasi contract and/or unjust enrichment, seeking damages for the alleged reasonable value of the rent and services rendered. "It is impermissible... to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." Clark-Fitzpatrick, Inc. v. Long Island R. Co., 70 N.Y.2d 382, 389 (1987); Scavenger, Inc. v. GT Interactive

Software Corp., 289 A.D.2d 58 (1st Dept. 2001); Waldman v. Englishtown Sportswear, Ltd., 92 A.D.2d 833 (1st Dept. 1983). As the third and fifth causes of action indisputably cover the same scope as the Lease and addenda, the motion for summary judgment dismissing the them must be granted.

Fourth Cause of Action

The fourth cause of action alleges that it was necessary to clean the rental area and make repairs after the termination of the tenancy. Plaintiff alleges damages in the amount of $10,442.13. The breakdown of these charges is provided in the Affirmation of Jared Hirt dated June 25, 2007, ¶60. Each will be addressed in turn.

Plaintiff seeks $3,745 for the removal of a wall and the construction of a new wall as a result of alleged damage caused by defendant. Defendant alleges Plaintiff waived this alleged damage, as defendant had offered to repair the wall before it surrendered the premises. On the papers before it, the court cannot determine whether this has been waived. The motion for summary judgment is denied as to the $3,745 sought for wall replacement.

Plaintiff seeks $4,490 for removal of items left at the premises. Defendant submits a DVD of the final walk-through as proof that its items were removed when it vacated the premises. (My chambers could not get this DVD to play on our computers).

On the facts and evidence before it, the court cannot grant summary judgment as to this charge. The motion is denied as to the $4,490 sought for removal of items.

Plaintiff seeks $989.00 for the replacement of a common loading dock at Building 1. Defendant states that this dock is part of a common area accessible and used by all tenants and delivery trucks. Paragraph 14 of the lease states that the landlord will repair and maintain common areas, within a reasonable notice of notice from a tenant or other source. In response to defendant's representation that the dock is in a common area, plaintiff has submitted nothing to the court to raise a question of fact. The motion for summary judgment is granted as to the $989.00 charge.

Plaintiff seeks $762.13 for removal of drums of Dimethyl Sulfoxide, solid oil, and machine oil in the basement of Building 1. In addition to noting that these items were found in a common area in which plaintiff is responsible for maintenance and repairs, defendant submits the affidavit of Stephen Quinn who attests that such products were not used by defendant and did not belong to defendant. See S. Quinn Affidavit dated June 25, 2007, ¶¶33-35. Plaintiff has not raised a question in response to these representations. The motion for summary judgment is granted as to the $762.13 charge.

Lastly, plaintiff seeks $456.00 for the replacement and

repair of a sprinkler line and water line located in the basement of Building 1 that feeds the leased premises. Again, through the affidavit of Mr. Quinn, defendant denies that having caused any such damage and moreover maintains that the line is a feeder line that feeds the leased premises. Thus Mr. Quinn concludes that it is plaintiff's responsibility pursuant to the lease at paragraph 14(a) where it states that plaintiff will repair and maintain "HVAC, plumbing, and utility lines and systems that feed the Premises but that are not contained within the Premises." The court cannot grant defendant summary judgment on the information before the court. Defendant admits that the sprinkler and water lines are located in the basement of the building. Paragraph 14(a) makes plaintiff liable for repairing and maintaining lines feeding the premises, "but that are not contained within the Premises." The court has no reason to conclude on the information before it that the basement is not considered within the premises. The motion is denied as to the $456.00 charge.

Sixth Cause of Action

The sixth cause of action seeks legal fees pursuant to Paragraph 8(e) of the First Addendum, which states:

> The tenant covenants and agrees to pay on demand the landlord's reasonable attorneys' fees incurred in enforcing any material breach of any obligation of tenant under the lease, including the obligation to pay rent.

Given the court's decision above which leaves open alleged

breaches that are material (i.e., the utility payments), the motion for summary judgment on the sixth cause of action is denied.

Affirmative Defenses

Plaintiff moves for dismissal of each of the seven affirmative defense raised by defendant in its answer.

First Affirmative Defense

The first affirmative defense alleges that the complaint fails to state a claim. Plaintiff's motion for summary judgment is granted as to this affirmative defense, as the complaint sufficiently states a claim.

Second Affirmative Defense

The second affirmative defense alleges waiver. The motion for summary judgment on this affirmative defense is denied, given the court's discussion *supra*.

Third Affirmative Defense

The third affirmative defense alleges that plaintiff failed to request payment for the utilities, trash removal, and other charges within a reasonable amount of time. This is a relevant and vital issue that will be part of the jury's inquiry into these charges, along with the waiver issue. The motion for summary judgment is denied on the third affirmative defense.

Fourth Affirmative Defense

The fourth affirmative defense alleges laches and estoppel.

Akin to the third affirmative defense, these issues will be relevant at trial. The motion for summary judgment on the fourth affirmative defense is denied.

Fifth Affirmative Defense

The fifth affirmative defense alleges that Plaintiff's leases with other tenant were similar to defendant's lease and that, likewise, Plaintiff failed to bill those tenants for utilities, trash removal, and similar charges. The fifth affirmative defense ultimately alleges waiver. The motion for summary judgment on the fifth affirmative defense is denied.

Sixth Affirmative Defense

The sixth affirmative defense relates to the tax bill, for which plaintiff represents to the court it no longer seeks payment. The motion for summary judgment on the sixth cause of action is consequently moot.

Seventh Affirmative Defense

The seventh affirmative defense alleges that defendant tendered payment for the charges incurred during the holdover period in the amount of $29,634. Because Plaintiff ultimately rejected that payment for fear that defendant would argue that the payment was accepted in satisfaction of all of the alleged outstanding charges, defendant alleges that Plaintiff should be deemed to have waived that amount. Given the court's discussion above, these items were not waived, and the motion for summary

judgment dismissing the seventh affirmative defense is granted.

SO ORDERED.

_____
KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: August 8, 2007
Rochester, New York