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SCANNED ON 2/28/2008

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 603596/2004

RUSSELL BEDFORD STEFANOU

VS.

20 WEST 37TH STREET OWNERS LLC

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. 603596-04

MOTION DATE 6/20/07

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

) read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 002 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that the issue of the computation of the amount of money damages due from plaintiffs to defendants in this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants 20 West 37th Street Owners, LLC, Marilyn Back and Stanley Back, for the entry of a summary judgment for money damages in an amount certain, is held in abeyance pending receipt and confirmation of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt and confirmation of the determination of the Special Referee or the designated referee; and it is further

FILED

FEB 28 2008

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: _____

Page 1 of 2

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Russell, Bedford, Stefanou, Mirchandani, LLP, and Peter Stefanou is in all respects denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

Dated 2/21/08 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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RUSSELL, BEDFORD, STEFANOU,
MIRCHANDANI, LLP, and PETER STEFANOU,
Plaintiffs,

Index No.:603596/04
DECISION/ORDER

-against-

20 WEST 37TH STREET OWNERS, LLC,
MARILYN BACK and STANLEY BACK,
Defendants.

----------X

HON. CAROL EDMEAD, J.S.C.:

In this commercial landlord/tenant action, defendants move (again) for partial summary judgment against plaintiffs on the issue of damages (motion sequence number 002), while plaintiffs move separately for partial summary judgment against defendants on the issue of liability, as well as for leave to amend their pleadings (motion sequence number 003). For the following reasons, defendants' motion is granted on the issue of damages, but held in abeyance pending a referee's report, and plaintiffs' motion is denied.

BACKGROUND

This action results from the now terminated commercial tenancy of the plaintiff accounting firm of Russell, Bedford, Stefanou, Mirchandani, LLP (RBSM) in the eighth floor office suite of a building located at 20 West 37th Street in the State, City and County of New York (the building). See Notice of Motion (defendants), Exhibit B (complaint), ¶ 1. Plaintiff Peter Stefanou (Stefanou) is one of the partners in RBSM. Id., ¶ 6. Defendant Marilyn Back (Back) is the sole trustee of a trust that is, in turn, also the sole managing member of the building's former owner and landlord, corporate defendant 20 West 37th Street Owners, LLC (collectively, the landlord). Id., ¶ 8. Co-defendant Stanley Back (Back) is Marilyn Back's

husband. Id., ¶ 9.

On September 30 2002, RBSM executed a commercial lease with the landlord for the eighth floor office suite in the building (the lease). Id.; Back Affidavit, ¶ 4; Exhibit 1. Contemporaneously, Stefanou executed a guaranty pursuant to which he agreed to be personally liable to the landlord for RBSM's rental payments (the guaranty). Id., ¶ 5; Exhibit 2. The lease term commenced on November 1, 2002 and was to endure for a period of five years.[1] Id. at 1. It set forth the following schedule of monthly base rents:

> $91,000.00 per annum ($7583.33 per month) from November 1, 2002 to and including October 31, 2003;
> $93,730.00 per annum ($7810.83 per month) from November 1, 2003 to and including October 31, 2004;
> $96,5451.90 per annum ($8045.16 per month) from November 1, 2004 to and including October 31, 2005;
> $99,438.16 per annum ($8286.51 per month) from November 1, 2005 to and including October 31, 2006;
> $102,421.00 per annum ($8535.11 per month) from November 1, 2006 to and including October 31, 2007.

Id., ¶ 64. The rider to the lease contained an additional handwritten clause (duly initialed) providing that "the parties agree that the base rent shall be increased by $1600.00 p/a for the entire term." Id. As the court noted in its earlier decision (motion sequence number 001), the lease rider also provided that:

> In the event that Landlord has not substantially completed the renovation of the lobby of the building ... on or before August 31, 2003, then ... the Base Rent payable by Tenant to Landlord shall be reduced by twenty-five (25%) percent for the period beginning on September 1, 2003 and ending on the date substantial completion of such renovation occurs... For purposes of this paragraph the lobby work for which substantial completion must occur means (a) expansion of walls, (b) new ceiling, (c) new flooring, (d) new exterior entrance doors, and expressly

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[1] Plaintiffs paid a $15,366.67 security deposit which defendants have maintained in an interest bearing account. See Notice of Motion, Back Affidavit, ¶ 8.

excludes the hanging of limestone on the walls.

Id., Rider at 10. Defendants now point out that, at his deposition, RBSM partner Anil Kamat (Kamat) conceded that defendants had completed the last of the building lobby renovations[2] by late October of 2003. See Notice of Motion, Gross Affirmation, Exhibit E.

The lease also provided that RBSM would be liable for "additional rent" consisting of water charges, sprinkler charges and a pro-rated portion of the building's assessed real estate taxes and utility charges. Id.; Back Affidavit, Exhibit 1, ¶¶ 29, 30, 43, 44.

Finally, section 18 of the lease provided, in pertinent part, as follows:

> In case of any such default ... (c) Tenant or the legal representatives of Tenant shall also pay to Owner as liquidated damages for the failure of tenant to observe and perform said tenant's covenants herein contained, any deficiency between the rent hereby reserved and or covenanted to be paid and the net amount, if any, of the rents collected on account of the subsequent lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of the Owner to re-let the premises or any part or parts thereof shall not release or affect the Tenant's liability for damages.

Id., ¶ 18.

RBSM ceased making its monthly rental payments in June of 2004, and eventually vacated the building on approximately October 1, 2004. Id., ¶ 7. In that same month, the landlord commenced an action in the Civil Court of the City of New York for non-payment of rent pursuant to the lease and the guaranty. In response, RBSM and Stefanou commenced this action on October 28, 2004 by serving a complaint that set forth causes of action for fraudulent inducement, breach of lease, constructive eviction and personal injuries (negligence). Id.; Gross

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[2] Specifically, the installation of the new bronze, satin-clad entrance doors. See Notice of Motion, Gross Affirmation, Exhibit E.

Affirmation, Exhibit B. On December 21, 2004, the landlord served an answer in this action that included counterclaims for, among other things, the relief that it had requested in the Civil Court action (i.e., non-payment of rent and other charges). Id., Exhibit C. The parties eventually settled and discontinued the Civil Court action in January of 2005.

On February 28, 2006, the landlord moved for summary judgment on its counterclaims against RBSM and Stefanou, and those plaintiffs cross-moved to lift the automatic stay on discovery (motion sequence number 001). On March 14, 2006, this court entered a decision that granted the landlord's motion solely on the issue of liability, and denied the plaintiffs' cross motion as moot. Id., Exhibit A. The March 14, 2006 decision found, in pertinent part, that:

> It is undisputed that the Tenant herein (i.e., RBSM) paid rent until June 2004, and vacated the Premises on or about October 1, 2004, before the expiration of the Lease on October 30, 2007. It is further uncontested that the Tenant failed to pay additional rent, *to wit*: water charges and sprinkler charges, and the Tenant's share of real estate taxes. Under Sections 17 and 18 of the Lease, if the Premises becomes vacated, the Tenant is expressly liable for the Tenant's default in the payment of the rent or any item of additional rent. Further, the Tenant is obligated to pay liquidated damages for any deficiency between the rent amount and the net amount, if any, of the rents collected on any subsequent lease of the Premises "for each month of the period which would otherwise have constituted the balance of the term of the lease." As such, the Landlord has satisfied its burden of establishing liability against the Tenant for rent and additional rents as noted. ...
>
> Nonetheless, paragraph 17 does not obviate the Landlord's burden, as the movant for summary relief, to establish the absence of any material fact as to the amounts for which the Tenant is liable. The Lease sets forth the base rent due, which was subject to a 25% reduction in the event the Landlord "has not substantially completed the renovation of the lobby" as defined in paragraph 72 of the Lease. The Landlord failed to establish the appropriate rent (and additional rent due) under the Lease, or that the rent reduction does not apply. The Landlord failed to establish how it arrived at the amounts sought, and whether such amounts take into consideration the 25% reduction due to the alleged failure to substantially complete the lobby renovations. Accordingly, judgment against the Tenant in the amount sought by the Landlord is denied, at this juncture.

> With respect to build-out costs and brokerage fees, the Landlord failed to establish, as a matter of law, a right to recover such expenses. Section 18 of the Lease provides that in computing liquidated damages, "there shall be added to the said deficiency [between the rent amount and the net amount, if any, of the rents collected on any subsequent lease] such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorneys' fees, brokerage, advertising and for keeping the demised premises in good order or for preparing the same for re-letting." In support of its claim for build-out costs ... the Landlord submits an estimate ... signed by the Tenant. ... There is nothing in the record to support the amount that the Landlord seeks for build-out costs. Moreover, this estimate ... does not appear to be made in connection with re-letting the premises due to the tenant's default, as provided for in section 18 of the Lease. Similarly, the brokerage fees claim ... appears to be related to the Tenant's lease, and not made in connection with re-letting the premises due to the tenant's default, as provided for in section 18 of the Lease. Accordingly, the landlord has failed to establish Tenant's liability for the build-out costs and brokerage fees alleged. Consequently, attorneys' fees in favor of the landlord are not warranted at this juncture.

Id.

Following the entry of the court's March 14, 2006 decision, the parties undertook discovery and both now aver that that process is complete. Id.; Gross Affirmation, ¶ 4; Notice of Motion (plaintiffs); Marquet Affirmation, ¶ 2. The landlord now moves for summary judgment on the issue of damages (motion sequence number 001) while plaintiffs separately for partial summary judgment on the issue of liability, and for leave to amend their reply to the landlord's counterclaims (motion sequence number 002).

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form,

sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Tr. Auth., 304 AD2d 340 (1st Dept 2003). Pursuant to CPLR 3212 (c), "[w]hen, on a motion for summary judgment, only issues of fact remain which relate to the extent and amount of damages, 'the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper'." Trocom Const. Corp. v Consolidated Edison Co. of New York, Inc., 7 AD3d 434 (1st Dept 2004). The court has previously awarded defendants a summary judgment on the issue of liability. After reviewing the evidence, the court now concludes that a further hearing must be held in order to resolve the issue of the exact amount damages for which plaintiffs are liable.

Defendants' Motion

The first section of landlord's brief addresses the prior determination herein that "the Landlord failed to establish (the amount of rent and additional rent due), and whether such amounts take into consideration the 25% reduction due to the alleged failure to substantially complete the lobby renovations." Landlord now admits that said 25% reduction was in fact warranted because they had not "substantially completed" renovations to the building's lobby, as the lease defines that term,[3] by August 31, 2003. Landlord avers, however, that it did substantially complete those renovations on or about October 23, 2003, and concedes that

[3] Paragraph 72 of the lease states that "the lobby renovation work for which substantial completion must occur means (a)expansion of walls, (b) new ceiling, (c) new flooring, (d) new exterior entrance doors, and expressly excluding the hanging of limestone on the walls [emphasis added]." See Notice of Motion, Back Affidavit, Exhibit 1.

plaintiffs are therefore entitled to a 25% abatement through that date. Further, as previously noted, at his deposition RBSM partner Anil Kamat conceded that landlord had indeed installed a set of bronze, satin-clad doors (the last of the building lobby renovations) by late October of 2003. See Notice of Motion, Exhibit E. In their opposition papers, plaintiffs assert that the documentary evidence shows that the doors were not installed until February 15, 2004. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion, at 19-21. However, upon examination, this documentary evidence merely consists of a receipt from an entity called "Advantage Locksmith" which evidently installed a secondary, magnetic lock on the subject doors on or about that date. See Notice of Motion, Campbell Affidavit, Exhibits A, B. The court cannot infer from this document, as plaintiffs wish, that there were no new doors in the building's lobby on October 23, 2003, as Kamat has stated. Rather, the only inference to be drawn is that defendants had those doors fitted with an additional magnetic lock on February 15, 2004. Therefore, the court finds that plaintiffs have failed to raise an issue of fact in this matter, and accepts defendants' assertion that plaintiffs are due a 25% rent abatement through October 23, 2003.

The court also notes that the amounts of base rent due through October 1, 2004, when RBSM left the building, and the amounts that accrued thereafter until October 31, 2007, as liquidated damages, are now susceptible of easy calculation. All that need be done is to take the amounts set forth in the base rent schedule of the lease, increase those amounts by the $1600.00 per month provided for in the lease rider, and to subtract a 25% abatement for the period of November 1, 2002 through October 23, 2003. That does not end the current inquiry, however.

As previously noted, the lease also provided that plaintiffs were to pay "additional rent"

each month consisting of water charges, sprinkler charges and a pro-rated portion of the building's assessed real estate taxes and utility charges. Id.; Back Affidavit, Exhibit 1, ¶¶ 29, 30, 43, 44. The court's March 14, 2006 decision awarded defendants' summary judgment finding plaintiffs liable for additional rent, but also specifically found that "the Landlord failed to establish the appropriate rent (and additional rent) due under the lease [emphasis added]." Id.; Gross Affirmation, Exhibit A, at 15. The court further found that the additional rent payments were also subject to the 25% abatement (discussed above). Id. Defendants now present an affidavit from Back that purportedly calculates accurately the amounts of "additional rent" due pursuant to the lease. Id.; Back Affidavit, ¶¶ 9-23. Consequently, at this juncture, the court must assess each "additional rent" component in turn.

With respect to water charges, the lease provides that plaintiffs were to pay either the cost of installing a water meter for their portion of the premises and any monthly water usage charges that said meter might reflect, or a monthly amount of $50.00 in the event that separate water meters were not installed in the building's commercial units. Id.; Back Affidavit, Exhibit 1, ¶ 29. Back's affidavit in support of this motion incorporates a $50.00 monthly charge in her calculations of additional rent due, but does not state whether or not RBSM's unit had been metered, or annex any copies of water meter readings.

With respect to sprinkler charges, the lease provides that plaintiffs were to pay for either the cost of installing or upgrading a sprinkler system in their portion of the premises, at the determination of their fire insurance carrier, as well as a monthly maintenance charge of $50.00 as additional rent. Id.; Back Affidavit, Exhibit 1, ¶ 30. Back's affidavit incorporates the $50.00 monthly charge in her calculations of additional rent due, but does not state whether or not

RBSM had also been ordered to install or upgrade the sprinkler system in its commercial unit.

With respect to real estate taxes, the lease rider provides that plaintiffs were obligated to pay 3.5% of the building's assessed real estate taxes and any building improvement district charges levied during a given tax year, as well as a pro-rated portion of any special assessments and/or the costs of contesting any levied taxes, in any year when these aggregate charges exceeded a certain "base tax" amount. Id.; Back Affidavit, Exhibit 1, ¶ 43. Back's affidavit makes no mention whatsoever of any real estate taxes for which plaintiffs might be liable, nor does it annex any of the building's tax returns for the years relevant to defendants' claims.

With respect to utility charges (which the court did not discuss in its March 14, 2006 decision), the lease rider provides that plaintiffs were obligated to pay 3.5% of the building's total utility expenses (consisting of gas, steam, electricity, heat, ventilation, air conditioning, water, telephone, etc., together with any taxes thereon) in any year during which those expenses exceeded the utility expenses incurred during the first year of plaintiffs' tenancy. Id.; Back Affidavit, Exhibit 1, ¶ 44. Back's affidavit makes no mention whatsoever of any utility charges for which plaintiffs might be liable, nor does it annex any of the building's utility bills for the years relevant to defendants' claims.

In conclusion, the court finds that defendants have not presented sufficient evidence to support the amounts of "additional rent" claimed in Back's affidavit. However, it is clear that such evidence (i.e., water meter and sprinkler bills, if any, together with the building's tax records and utility bills for the years in question) is of a sort which is readily available, and that any questions regarding the correct amount of "additional rent" due to defendants could therefore be easily resolved by briefly reviewing such evidence. Thus, the court believes that the best

approach is to refer the issue of the calculation of "additional rent" to a special referee to hear and report, pursuant to CPLR 4317 (b), together with the issues of calculating the 25% abatement due on the aggregate amount of rent and additional rent due for the period of November 1, 2002 through October 23, 2003, and the determination of what aggregate amounts fell due during the period of RBSM's occupancy of the building and what amounts fell due thereafter as liquidated damages.

The second section of defendants' brief asserts that they properly credited plaintiffs' security deposit against RBSM's "liquidated damages," rather than crediting Stefanou against the "unpaid rent" for which he is liable pursuant to the guaranty. See Defendants' Memorandum of Law at 8. Defendants argue that the lease entitled them to apply said security deposit "to post abandonment damages rather than unpaid rent." Id. The court notes that defendants have switched the meanings of the terms "unpaid rent" (which refers to amounts that accrued during occupancy) and "liquidated damages" (which refers to amounts accrued after vacatur) as set forth in the lease. The court also notes that plaintiffs do not address defendants' argument at all in their own memorandum of law. Nevertheless, the lease provides that:

> ... in the event Tenant defaults in respect of any of the terms, covenants and conditions of this lease ... Owner may use, apply or retain the whole or any part of the security so deposited to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or for any sum which Owner may expend or may be required to expend by reason of Tenant's default in respect of any of the terms, covenants and conditions of this lease, including but not limited to, any damages or deficiency in the re-letting of the premises, whether such damages or deficiency accrued before or after summary proceedings or other re-entry by Owner [emphasis added].

See Notice of Motion; Back Affidavit, Exhibit 1, ¶ 32. The foregoing contractual language is clearly permissive and grants defendants the discretion to apply plaintiffs' security deposit

against any one (or more) of three items of potential indebtedness. Thus, defendants are free to credit plaintiffs' $15,366.67 security deposit against such amounts as accrued during RBSM's occupancy of the building rather than against the amounts that accrued thereafter for which Stefanou is liable under the guaranty. Accordingly, the court directs that the special referee include that calculation in his/her report.

The third section of defendants' brief argues that they are entitled to prejudgment interest pursuant to section 18 of the lease and CPLR 5001. See Defendants' Memorandum of Law, at 8-9. Plaintiffs respond that the liquidated damages provision set forth in section 18 of the lease is unenforceable beyond the date that RBSM surrendered possession of the premises. See Plaintiffs' Memorandum of Law in Opposition to Motion, at 13-19. For the reasons discussed in the second portion of this decision, the court rejects plaintiffs' argument. The court also notes that, pursuant to CPLR 5001, prejudgment interest is generally awarded as a matter of right to landlords who prevail against tenants on non-payment of rent claims. See Solow v Bradley, 273 AD2d 75, 76 (1st Dept 2000) (Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.... Attorney fees are not damages for breach of any substantive provision of a contract or substantive property right. Rather, they represent a conditional award or prerogative which does not mature until the underlying action or proceeding has been determined.). Accordingly, the court finds that defendants are entitled to prejudgment interest on the amounts of rent and additional rent for which plaintiffs are liable, and directs that the referee

include a calculation of such interest in his or her report. The court also directs that, pursuant to the holding of Solow v Bradley, the referee's calculations not include an award of prejudgment interest on defendants' legal fees claims which, as will be discussed, are not yet mature.

The fifth section of defendants' brief argues that they are entitled to recover legal fees from plaintiffs, pursuant to both the lease and the guaranty, and that no hearing on the matter is required. See Defendants' Memorandum of Law, at 13-15. Plaintiffs deny that defendants are entitled to any legal fees, and argue that a hearing on the matter would be required by law in any case. See Plaintiffs' Memorandum of Law, at 21-25. Although plaintiffs are incorrect in claiming that New York State case law requires legal fees hearings to be conducted in every case, the court believes that here, holding such a hearing would be the most just course. Most recently, in Solow Management Corp. v Tanger (19 AD3d 225 [1st Dept 2005]), the Appellate Division, First Department, reiterated the rule that:

> Before ordering one party to pay another party's attorneys' fees, the court always has the authority and responsibility to determine that the claim for fees is reasonable. Underlying this responsibility is "the traditional authority of the courts to supervise the charging of fees for legal services under the courts' inherent and statutory power to regulate the practice of law." As a general matter, case law establishes that where a landlord has a right to recover attorneys' fees pursuant to a lease provision, the recoverable fees are those that are reasonable. Moreover, inasmuch as a tenant's reciprocal entitlement to attorneys' fees under Real Property Law § 234 specifically authorizes recovery of "reasonable" attorneys' fees, the attorneys' fees to which a landlord is entitled under a lease must be similarly restricted [citations omitted].

19 AD3d at 226. In Dupuis v 424 East 77th Street Owners Corp. (9 Misc3d 1121(A) [Sup Ct, NY County] 2005), this court (Acosta J.) discussed both the foregoing rule and its exception:

> When a party legitimately challenges the amount claimed and the legal services performed, a court's award of counsel fees may only occur following an adversarial hearing where counsel fees must be proved and the opposing party

> may assert the right to cross-examine. However, the converse is also true: a court is not required to hold an adversarial hearing when no legitimate dispute exists regarding the attorneys fees in question [citations omitted].

9 Misc3d at **2. A long line of Appellate Division decisions hold that the determination of whether or not a "legitimate dispute" exists depends upon such factors as whether the prevailing party has submitted documentation to support its legal fees claims and whether the unsuccessful party has raised a detailed and credible challenge to such claims. See e.g. In re Arbitration Between Fidelity Brokerage Services, Inc., 294 AD2d 244 (1st Dept 2002); Banco Do Estado De Sao Paulo, S.A. v Mendes Jr. Intern. Co., 249 AD2d 137 (1st Dept 1998); Old Paris, Inc. v G.E.B.M. Intern., Inc., 170 AD2d 392 (1st Dept 1991); Kumble v Windsor Plaza Co., 128 AD2d 425 (1st Dept 1987). In Dupuis v 424 East 77th Street Owners Corp., the sole case that defendants cite in support of their argument against the necessity of a legal fees hearing, Justice Acosta found that the challenge was not credible because the parties had previously agreed upon the amount of legal fees at issue and had placed the monies in escrow. Here, however, the parties have neither executed any such agreements, nor have they placed any monies in escrow, and Dupuis is therefore distinguishable on the facts. This does not end the inquiry, however. The court notes that defendants have indeed presented a detailed accounting of their attorneys' legal work and the corresponding charges incurred.[4] See Notice of Motion, Back Affidavit, ¶¶ 29-33; Exhibits 5, 6, 7. By contrast, plaintiffs have done little more than to allege, in a conclusory fashion, that "[t]he attorneys' fees claimed by defendants are unreasonable, and include

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[4] The court further notes that this submission addresses the actual fees that defendants have incurred, as opposed to the submission annexed to their prior motion (motion sequence number 001), which dealt with brokerage and re-letting fees, and which the court found inadequate in its March 14, 2006 decision.

attorneys' fees for work that was premature and wholly unnecessary;" specifically, legal work related to defendants' prior motion for summary judgment. See Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion, at 21-25. Such arguments do not appear to address the question of whether the legal fees that defendants' attorneys charged for the work that they performed constituted reasonable compensation for that work. Nevertheless, the court believes that plaintiffs should be afforded the opportunity to raise such challenges as they may wish to, and will withhold its judgment on the reasonableness of the claimed legal fees until after a hearing on the matter. Accordingly, the court finds that the referee should also hear and report on the issue of defendants' legal fees claims.

Finally, the fourth section of defendants' brief argues that RBSM's liability is not affected by defendants' sale of the building on January 31, 2006. See Defendants' Memorandum of Law, at 9-13. Plaintiffs argue the opposite. See Plaintiffs' Memorandum of Law in Opposition to Motion, at 9-13. For the reasons discussed in the following portion of this decision, however, the court rejects plaintiffs' argument. Therefore, the court finds that defendants' motion should be granted on the issue of damages, and that the issue of the calculation of such damages should be submitted to a special referee to hear and report on in accordance with the findings set forth in this decision, after which the parties may move to confirm or deny the referee's report. Accordingly, defendants' motion is granted in part, but the entry of summary judgment is held in abeyance pending the receipt and confirmation of the referee's report.

Plaintiffs' Motion

The bulk of plaintiffs' motion, and their opposition to defendants' motion, relies upon two arguments that defendants' sale of the building on January 31, 2006 created a legal bar to

defendants' ability to seek any money damages for breach of either the lease or the guaranty that accrued after that date. For the following reasons, the court finds that neither argument is persuasive.

Plaintiffs first argue that defendants' sale of the building on January 31, 2006 constituted an acceptance of RBSM's surrender of the premises, which thereby terminated RBSM's rental liability under the lease. See Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, at 5-9; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at 9-13. Plaintiffs derive this argument entirely from the Appellate Division, Third Department's, holding in Altamuro v Capoccetta (212 AD2d 904 [3d Dept 1995]), a case involving a landlord who leased a commercial building to a tenant for the purposes of operating a restaurant. The tenant suffered several heart attacks and was obliged to close his restaurant prior to the expiration of the lease term. The parties agreed orally that the tenant would vacate the premises and leave his inventory behind, and that the landlord would attempt to sell the building. Subsequently, the tenant did vacate and the landlord did ultimately sell the building. Afterwards, however, the landlord sued the tenant for the rent due for the balance of the lease term. In modifying the trial court's judgment in favor of the plaintiff, the Appellate Division, Third Department, noted that:

> When defendant surrendered the premises, plaintiffs had three options: (1) they could have done nothing and collected the full rent due under the lease, (2) they could have explicitly accepted the surrender or, by operation of law, impliedly accepted it by doing some act inconsistent with the landlord-tenant relationship, thereby relieving defendant from further liability for rent, or (3) under the terms of the lease they could have relet the premises and looked to defendant for any deficiency (citations omitted). In this case, plaintiffs' attempt to sell and the actual sale of the premises after defendant surrendered possession were acts obviously inconsistent with the landlord-tenant relationship. Therefore, we find

> that, by operation of law, plaintiffs accepted defendant's surrender and are precluded from seeking damages that accrued thereafter.

212 AD2d at 905. Here, plaintiffs argue that they occupy essentially the same position as the defendant in Altamuro, and are therefore entitled to the same benefit of the Third Department's holding. Because of several key factual distinctions, however, the court disagrees. Firstly, plaintiffs herein leased only a single unit within a large commercial building, rather than the entire building itself, and defendants did not sell the subject building until January 31, 2006; i.e., more than a year after plaintiffs vacated the premises on October 1, 2004. Also, the parties herein never reached any agreement, oral or otherwise, regarding plaintiffs' vacatur of the premises. Without any agreement between the parties, and considering the time lapse between plaintiffs' vacatur and defendants' sale of the building, there are no grounds upon which to conclude that said sale was an act "inconsistent with the landlord-tenant relationship." Instead, the court concludes that defendants' sale of the building was an unrelated act. This conclusion is supported by the additional fact that plaintiffs' unit was merely one of a number of commercial units. Since the tenants of the other units were presumably making timely rental payments, it is unlikely that plaintiffs' vacatur caused defendants sufficient financial distress to precipitate the sale of the building (as it apparently did in Altamira). Thus, the court cannot find that defendants herein committed any act that could be construed as an acceptance of plaintiffs' surrender of the instant premises. Accordingly, the court finds that plaintiffs' reliance upon Altamira v Capacity is misplaced.

The law controlling the instant situation is instead set forth in the Court of Appeals holding in Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc. (87 NY2d 130 [1995]), a

case in which a commercial tenant unilaterally vacated the subject premises during the pendency of a lease term. There, the Court noted that:

> When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relent them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. ... Once the tenant abandoned the premises prior to the expiration of the lease, ... the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease.
>
> Defendant urges us to reject this settled law and adopt the contract rationale recognized by some courts in this State and elsewhere. We decline to do so. Parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents. In business transactions, particularly, the certainty of settled rules is often more important than whether the established rule is better than another or even whether it is the "correct" rule. This is perhaps true in real property more than any other area of the law, where established precedents are not lightly to be set aside.
>
> Defendant contends that even if it is liable for rent after abandoning the premises, plaintiff terminated the landlord-tenant relationship shortly thereafter by instituting summary proceedings. After the eviction, it maintains, its only liability was for contract damages, not rent, and under contract law the landlord had a duty to mitigate. Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please. If the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable (citations omitted).

87 NY2d at 133-134. Here, defendants correctly point out that section 18 of the lease contains a liquidated damages clause that specifically provides that plaintiffs are liable for all rent due for the unexpired portion of the lease term in the event that they default by vacating the premises. See Notice of Motion, Back Affidavit, Exhibit 1, ¶ 18. Pursuant to the Court of Appeals holding in Holy Properties Ltd., L.P. v Kenneth Cole Productions, Inc., this court finds that such a clause is enforceable. See also Gallery at Fulton Street, LLC v Wendnew LLC, 30 AD3d 221 (1st Dept

2006). Accordingly, the court rejects plaintiffs' argument regarding surrender and acceptance.

Plaintiffs also argue that the lease's liquidated damages provision is unenforceable beyond the date of the building's sale, because "any damages that extend beyond that date would be disproportionate to the actual loss." See Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, at 9-13; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at 13-19. They correctly cite the Court of Appeals' holding in Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc. (41 NY2d 420 [1977]) that:

> A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced (citations omitted).

41 NY2d at 425. Plaintiffs then argue as follows:

> [S]ince the sale of the building terminated 20 West's ability and right to collect rent or any monies whatsoever in connection with leasing or renting portions of the building, 20 West has no loss after the sale. Therefore, to allow 20 West to collect rent, additional rent or other monies from RBSM beyond the date of its sale of the building, under the guise of liquidating damages, would not only be disproportionate to 20 West's non-existent loss, but would be, by definition, a windfall for 20 West: 20 West would get the benefit of the sale of the building ... along with the value of an estate it can no longer transfer.

See Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, at 12-13; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at 16. Defendants respond that RBSM did not bargain for or obtain any right to a credit towards or a cut-off to its liability. See Memorandum of Law in Further Support of Defendant's Motion for Summary Judgment, at 8. This is true. The court also notes that "'on a

motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." Maysek & Moran, Inc. v S.G. Warburg & Co., Inc., 284 AD2d 203, 204 (1st Dept 2001), quoting Lake Constr. & Development Corp. v City of New York, 211 AD2d 514, 515 (1st Dept 1995). Here, the court construes the liquidated damages provision in favor of defendants.

The instant liquidated damages clause provided that, in case of a default, plaintiffs would pay "any deficiency between the rent hereby reserved and or covenanted to be paid and the net amount ... of the rents collected ... for each month of the period which would otherwise have constituted the balance of the term of this lease." Although that amount was "incapable or difficult of precise estimation" because of such factors as calculating additional rent payments, utility payments and rent abatements (discussed above), the court finds that the amount liquidated certainly bears "a reasonable proportion to the probable loss and the amount of actual loss" because it is based on fixed monthly rent payments over a fixed term. Thus, the only remaining question is whether "the amount fixed is plainly or grossly disproportionate to the probable loss." The court finds that it is not. The court has already determined that defendants' sale of the building was an act separate and unrelated to plaintiffs' vacatur of the premises. Thus, there is no rationale from which to conclude that defendants' realization of a profit from the sale of the building would constitute a "windfall" over their collection of liquidated damages resulting from plaintiffs' breach of the lease. Accordingly, the court rejects plaintiffs' disproportionality argument..

The balance of plaintiffs' motion seeks leave to amend their verified reply to defendants' counterclaims to include the affirmative defense of surrender and acceptance. See Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, at 13-18; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, at 19-25. The Appellate Division, First Department, has noted that "[i]t is well established that leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action ... or is palpably insufficient as a matter of law." Davis & Davis, P.C. v Morson, 286 A.D.2d 584, 585 (1st Dept 2001). Here, for the reasons discussed above, the court has already determined that plaintiffs' allegations of surrender and acceptance are unavailing under the facts of this case. Therefore, pursuant to lang-standing Appellate Division precedent, the court denies plaintiffs request for leave to amend. Accordingly, the court finds that plaintiffs' motion should be denied in full.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the issue of the computation of the amount of money damages due from plaintiffs to defendants in this action is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of defendants 20 West 37th Street Owners, LLC, Marilyn Back and Stanley Back, for the entry of a summary judgment for money damages in an amount certain, is held in abeyance pending receipt and confirmation of the report

and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt and confirmation of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee.

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs Russell, Bedford, Stefanou, Mirchandani, LLP, and Peter Stefanou is in all respects denied; and it is further

ORDERED that counsel for defendants shall serve a copy of this order with notice of entry within twenty days of entry on counsel for plaintiffs.

Dated: New York, New York
February 21, 2008

ENTER:

Hon. Carol Edmead, J.S.C.