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

PRESENT: Hon. MICHAEL D. STALLMAN PART 7
Justice

MEGAFIT CORPORATION,

Plaintiff,

- v -

EXCEL ASSOCIATES,

Defendant.

INDEX NO. 117229/08

MOTION DATE 6/1/09

MOTION SEQ. NO. 003

MOTION CAL. NO. 70

The following papers, numbered 1 to 7 were read on this motion for use and occupancy and cross motion for contempt and reargument

	PAPERS NUMBERED
Order to Show Cause— Affidavit— Exhibits F	1-2
Answering Affirmation — Exhibits A-F	3
Notice of Cross Motion—Affirmation — Exhibits A-F	4-5
Answering Affidavit — Exhibits A-D	6
Replying Affidavit – Exhibit A	7

Cross-Motion: X Yes ☐ No

Upon the foregoing papers, it is ordered that this defendant's motion and plaintiff's cross motion are decided in accordance with the annexed memorandum decision and order.

Dated: 12/07/09
New York, New York

J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MICHAEL D. STALLMAN

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7

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MEGAFIT CORPORATION,

Plaintiff,

- against -

EXCEL ASSOCIATES,

Defendant.

----------X

Index No. 117229/2008

Decision and Order

HON. MICHAEL D. STALLMAN, J.:

In this commercial lease dispute, defendant-lessor Excel Associates (Excel) moves, by order to show cause, for entry of judgment against plaintiff-lessee Megafit Corporation (Megafit) for all amounts of unpaid use and occupancy due (Motion Seq. No. 003). Megafit cross-moves for an order of contempt against Excel, for alleged violations of so-ordered stipulations, and for reargument of a prior decision directing payment of use and occupancy. Excel also moves for partial summary judgment against Megafit. This decision addresses both motions and plaintiff's cross motion.

BACKGROUND

Excel is the master lessee of five floors of commercial space in the Excelsior Building, located at 301 East 57th Street in Manhattan. Pursuant to a commercial lease with Excel dated June 22, 1984, as amended, Megafit uses and occupies approximately 18,000 square feet of the fifth floor, including an existing swimming pool, to be used as a private health club (the Excelsior Health Club).

According to Megafit, water leaks stem from the gutter system of the swimming pool of the health club. In June 2008, Megafit drained the swimming pool, allegedly at Excel's express request. Megafit asserts that it has suffered a dramatic loss in income because it no longer has a working

swimming pool. By a notice to cure dated December 18, 2008, Excel gave notice that Megafit was in breach of the lease due to rent arrears and a failure to provide Excel copies of insurance policies for coverage that it was required to obtain under the lease, among other things.

On December 24, 2008, Megafit commenced this action against Excel. Megafit asserts 14 causes of action against Excel. Megafit maintains that the condition of the gutter system is Excel's responsibility to repair and/or replace.[1] Megafit also moved for a *Yellowstone* injunction. Excel contends that the lease requires Megafit to waterproof the swimming pool and support systems to ensure against leaks.

On January 7, 2009, the Court held a conference on the *Yellowstone* application, and the parties entered into a so-ordered stipulation. The stipulation provides, in relevant part,

"1. THE T.R.O . ORDERED DECEMBER 29, 2008 IS CONTINUED, SUBJECT

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[1] Megafit asserts that the leaks are the result of fractures in the gutter system of the pool, based on work of a contractor that Megafit hired. Megafit points out that, pursuant to paragraph 4 of the parties' lease, it must "take good care of the demised premises and the fixtures and appurtenances therein and at Tenant's sole cost and expense make all non-structural repairs thereto as and when needed to preserve them in good working order . . ." Because Megafit believes that the gutter system is structural, it concludes that the obligation to repair and/or replace the gutters of the swimming pool falls upon Excel.

Excel argues that the pool is Megafit's responsibility under Paragraph 55 D (iii) of the parties' lease, which provides, in pertinent part, that Megafit must:

> "Waterproof the swimming pool and support systems (e.g. pumps and pump area, etc.) to ensure against the possibility of any leakage to any portion of the building situated under the Demised Premises. Such waterproofing shall include the installation of a new fiberglass liner for the swimming pool. All waterproofing work performed by tenant shall be approved by a professional swimming pool consultant employed by Tenant at Tenant's own cost and expense, but subject to Landlord's approval, such approval not to be unreasonably withheld or delayed."

The Court cannot determine from these partes and the parties' conflicting arguments what the condition of the pool is, what, if anything is needed to restore it, and who must do it.

TO SUBSEQUENT ORDERS OF THE COURT AND CONDITIONED UPON THE FOLLOWING: . . .

b. ON OR BEFORE JANUARY 16, 2009, PLAINTIFF SHALL PAY TO DEFENDANT THE SUM OF $83,787.05 REPRESENTING USE AND OCCUPANCY/RENT ADDITIONAL RENT FOR DECEMBER, 2008 AND JANUARY, 2009;

c. PLAINTIFF SHALL POST A BOND OR UNDERTAKING OF $329,287.87, REPRESENTING CLAIMED UNPAID RENT OR ADDITIONAL RENT THROUGH NOVEMBER 2008. PLAINTIFF MAY, IN LIEU OF POSTING SUCH BOND OR UNDERTAKING DEPOSIT SUCH SUM WITH DEFENDANT'S COUNSEL'S ESCROW ACCOUNT TO BE HELD PENDING THE ORDER OF THIS COURT OR AN AGREEMENT OF THE PARTIES. (* SEE # d, below)

2. WITHOUT PREJUDICE TO THE RIGHTS, CLAIMS OR REMEDIES OF THE PARTIES, DEFENDANT SHALL PROMPTLY CONTRACT FOR -AND HAVE PERFORMED THE WORK OUTLINED IN THE NOV. 13, 2008 POOL PROPOSAL OF CHESTER POOL SYSTEMS. PLAINTIFF SHALL PAY FOR THE OUTLAY OF THE EXPENSE FOR SUCH WORK SUBJECT TO A DETERMINATION OF ** [whose] RESPONSIBILITY IT IS FOR PAYING FOR SAME. . . .

*d - PLAINTIFF SHALL PAY MONTHLY U+O IN THE SUM OF $41,893.54 BEGINNING WITH FEBRUARY, 2009 ON OR BEFORE THE 15TH OF EACH MONTH.
** whose responsibility it is to perform the work, what work needs to be performed and whose . . ."

Tockstein Aff., Ex D; Davidson Affirm., Ex C. By stipulation dated January 22, 2009, the parties agreed that,

"Defendant shall notify Plaintiff two (2) days prior to its entering the premises to perform any work and/or repairs there to the extent of the work to be performed and which portion of the premises it will be utilizing during [illegible] work and/or repair. Plaintiff shall not interfere with Defendant's access as provided in the stipulation dated 1/7/09."

Davidson Affirm., Ex D.

Megafit has admitted that it "was unable to place the rent arrears in an escrow account or

make the use and occupancy payments because it simply did not have the money as a direct result of the swimming pool's closure." Davidson Opp. Affirm. ¶ 16. Accordingly, the *Yellowstone* injunction expired. On January 28, 2009, Excel allegedly served Megafit with a notice of termination. In an amended answer dated February 12, 2009, Excel asserted eight counterclaims, two which seek ejectment. In reply, Megafit asserted nine affirmative defenses.

By decision and order dated March 11, 2009, this Court granted defendant's motion for use and occupancy, to the extent of directing plaintiff to "pay ongoing use and occupation, pendente lite, in the amount of $41,893.54 per month." Davidson Aff., Ex F.

Excel now moves, by order to show cause, for entry of judgment against plaintiff Megafit Corporation (Megafit) for all amounts of unpaid use and occupancy due pursuant to the March 11, 2009 decision and order. Megafit cross-moves for an order of contempt against Excel, for alleged violations of so-ordered stipulations dated January 7, 2009 and January 22, 2009, and for reargument of a Court's March 11, 2009 decision and order. Excel also moves for partial summary judgment against Megafit in its favor on its first counterclaim, for summary judgment dismissing Megafit's affirmative defenses and dismissing Megafit's first through tenth, and thirteenth causes of action.

DISCUSSION

Motion Seq. No. 004

Excel has shown its prima facie entitlement to summary judgment as a matter of law on its first counterclaim to eject Megafit from the premises, based on Megafit's failure to pay Fixed Rent, Operating Expenses and Real Estate Tax Escalations, as provided for in the lease.

Megafit's annual rent for the relevant period is set pursuant to a formula set forth in paragraph 3 (d) of a "Modification of Lease" made as of September 10, 1996. Defendant's Ex A.

Pursuant to paragraph 56 of the lease, Megafit is also required to pay, as additional rent, a portion of the "Tax Escalations," which the lease defines as 12.69% of the real estate taxes exceeding a base amount of real estate taxes that Excel paid in the 1984-1985 tax year. In addition, paragraph 59 of the lease requires Megafit to pay, as additional rent, 22.48% of the Excel's annual operating costs of the commercial portion of the building. Defendant's Ex A. In support of its motion, Excel submits a tenant ledger indicating that, from June 2005 through April 2009, Megafit owes $543,619.60. Defendant's Ex B.

In opposition, Megafit's President, James DeLaunay, contends that, in June 2005, Excel billed Megafit for $62,000 in costs that Excel claims were not previously collected due to a clerical error, that Excel charged Megafit for electricity at 50% more than actual cost charged by the utility, and improperly charged Megafit for management fees and administrative fees which it claims is not allowable under the lease. DeLaunay Aff. ¶¶ 31, 33, 34. He maintains that he has not seen itemized statements of Excel's actual operating costs. *Id.* ¶ 29. Thus, Megafit contends that Excel may not collect additional rent for operating costs.

However, these arguments do not raise any material issues of fact warranting denial of Excel's motion for summary judgment in its favor on the counterclaim for ejectment. Although Megafit disputes the amount owed, the accuracy of the amount owed is not a material issue of fact. Megafit admitted that it "was unable to place the rent arrears in an escrow account or make the use and occupancy payments because it simply did not have the money as a direct result of the swimming pool's closure." Davidson Opp. Affirm. ¶ 16. Because Megafit admittedly did not pay any rent, Excel has demonstrated that Megafit violated its lease obligations to pay rent and additional rent.

Next, Megafit argues that the lease was not automatically terminated due to non-payment of

rent. In arguing that the lease was terminated by a conditional limitation, Excel relies upon Paragraph 17 of the lease, which provides, in pertinent part:

> "(2)...if Tenant shall make default in the payment of the rent reserved herein or any item of additional rent herein mentioned or any part of either as in making any other payment herein required; then...Landlord may without notice re-enter the demised premises either by force or otherwise and dispossess Tenant by summary proceedings or otherwise,... and Tenant hereby waives the service of notice of intention to re enter or to institute legal proceedings to that end."

Defendant's Ex A. As Excel indicates, one court interpreted an almost identical provision as a condition limitation. *Queen Art Publrs., Inc. v Animazing Gallery, Inc.*, 2002 NY Misc LEXIS 159 (Civ Ct, NY County2002). As Megafit indicates, another court reached the opposite conclusion in *Lambert Houses Redevelopment Co. v Adam & Peck Organization,* NYLJ, Sep 6, 1995, at 22, col 5 (Civ Ct, Bronx), *affd as modified* 169 Misc 2d 667 (App Term, 1st Dept 1996).

Whether paragraph 17 (2) creates a conditional limitation or a condition subsequent theoretically might bear on the question whether the lease was terminated.

> "A lease does not end instantly upon the breach of a condition subsequent, but continues until the landlord enforces a forfeiture by re-entry, or by otherwise complying with the provisions of the lease relating to mode of enforcement of forfeitures. . . .The right of re-entry can be exercised only when the right is expressly reserved in the lease, for without such reservation the remedy of the lessor under the lease and independent of the statute is confined to an action on the covenant."

74A NY Jur 2d, Landlord Tenant, § 839. Here, even if paragraph 17 (2) were not a conditional limitation, Excel's counterclaim claim for ejectment can be viewed as the exercise of a right of entry clearly granted under paragraph 17 (2) of the lease, based on Megafit's default in payment of rent and additional rent. "Although the nonpayment of rent does not operate as a forfeiture of the term or confer upon the lessor any right of re-entry in the absence of a provision in the lease allowing such or of a statute so declaring, such a provision in leases for a term of years for forfeiture or right to

re-enter for nonpayment of rent are valid and enforceable." *Id* § 835. Thus, the Court need not decide the issue of whether paragraph 17 (2) creates a conditional limitation, or a condition subsequent, as Megafit advocates. If paragraph 17 (2) were not a conditional limitation, then Excel would be required to commence an ejectment action in Supreme Court, which it has done. *See 40 West 67th Street v Pullman*, 296 AD2d 120, 134 (1st Dept 2002), *affd* 100 NY2d 147 (2003).

Thus, for the purposes of this motion, it is irrelevant whether the lease was validly terminated. Accordingly, the Court does not address Megafit's arguments that the notice to cure and the notice of termination were defective. "At common law, if a lease provided a right of reentry for nonpayment of rent, a demand for rent was a condition precedent to bringing an action of ejectment." 5 Warren's Weed on NY Real Property § 41:17, citing *Jackson ex dem. Van Rensselaer v Collins*, 11 Johns 1 (1814). However, by virtue of paragraph 17 (2) of the lease, Megafit waived its right to any predicate notices for the commencement of an action for ejectment.

Next, Megafit maintains that it was constructively evicted from the premises. This defense lacks merit. "[T]o assert a defense of constructive eviction, the tenant must abandon the premises." *Gallery at Fulton Street, LLC v Wendnew LLC*, 30 AD3d 221, 221 (1st Dept 2006). Here, Megafit did not abandon the premises. Although Megafit argues that its purported constructive eviction was partial, it has not shown that it abandoned the premises, in whole or in part and gave the lessor notice of the abandonment.

Megafit's reliance on *Barash v Pennsylvania Terminal Real Estate Corp.* (26 NY2d 77 [1970]) is misplaced. There, the Court of Appeals clearly stated, "Since the eviction, if any, is constructive and not actual, the tenant's failure to abandon the premises makes the first cause of action insufficient in law." *Id.* at 86.

Moreover, despite asserting a partial constructive eviction, Megafit ceased paying anything, despite its admitted continuous use of most of the space while continuing to operate the health club. Therefore, the Court grants Excel summary judgment on the first counterclaim against Megafit for ejectment. Because the third counterclaim against Megafit also seeks ejectment (but on different grounds), the third counterclaim will merge into the judgment of ejectment by operation of law.

Excel has demonstrated that Megafit's affirmative defenses are without merit. As discussed above, the Court has ruled that Megafit was not constructively evicted. Therefore, the first affirmative defense is dismissed.

Summary judgment dismissing the second, third, and fourth affirmative defenses of laches, waiver, and equitable estoppel is denied, to the extent that these defenses might be viable defenses to Excels' other counterclaims. Excel makes factual arguments that it did not delay in taking action, that it has never waived its rights, and that it ever made any representations so as to mislead Megafit. However, summary judgment based on factual arguments is premature. It appears that discovery has not been completed. The Court notes that the defense of laches does not appear applicable to the remaining counterclaims, which seek monetary and declaratory relief,[2] but Excel did not argue that point on this motion.

The sixth, seventh, eighth, and ninth affirmative defenses are dismissed. Based on the record,

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[2]Aside from ejectment, the remainder of Excel's counterclaims seek money damages. The equitable defense of laches is unavailable to action at law. *Warin v Wildenstein & Co., Inc.* 297 AD2d 214 (1st Dept 2002); *see Republic Ins. Co. v Real Dev. Co.*, 161 AD2d 189, 190 (1st Dept 1990). The fourth and eighth counterclaims seek declaratory relief, but the defense of laches would appear not to apply. "[T]he defense of laches consists of an unreasonable delay by a plaintiff to the prejudice of the defendant." *Weiss v Mayflower Doughnut Corp.*, 1 NY2d 310, 318 (1956). "But mere delay, however long, without the necessary elements to create an equitable estoppel, does not preclude the granting of equitable relief." *Id.*

the Court finds that the defenses of Excel's alleged comparative negligence and contribution and unclean hands do not apply to the remaining counterclaims. The defense of failure to state a cause of action is without merit.

Excel has not demonstrated, as a matter of law, that the fifth affirmative defense (statute of limitations) is without merit. Although Excel claims that its claims go back no further than 2005, this is not clear from the complaint. The second counterclaim alleges that Megafit is in arrears in the amount of $453,090.49. Defendant's Ex F [Amended Answer ¶ 215]. In its memorandum of law in support of its motion for partial summary judgment, Excel states that, "In June 2005, Excel realized that, due to a clerical error, it had not been charging Megafit for increases in Excel's operating expenses in the years 1999 through 2004. Upon making the aforesaid realization, by letter dated June 20, 2005, Excel billed Megafit . . . ($62,813). . ." Mem. at 16. To the extent that the arrears that Excel seeks to recover include a portion of operating expenses that were not billed for more than 6 years prior to the interposition of the counterclaim, the statute of limitations defense may have merit. Excel does cite any authority for the proposition that the claim for operating expenses for all of the years 1999-2004 accrued as of the demand for their payment, i.e. June 2005.

Turning to the complaint, Excel correctly indicates that the first, second, and fifth causes of action are academic. In these causes of action, Megafit seeks a judgment declaring that Excel's notice to cure was defective and of no force and effect. Because the Court has granted summary judgment in Excel's favor on its counterclaim for ejectment, there is no longer a justiciable controversy over the validity of Excel's notice to cure. Therefore, the first, second, and fifth causes of action are dismissed for lack of a justiciable controversy.

In the third and fourth causes of action, plaintiff seeks a declaration that it was constructively

evicted from the premises. As discussed above, the Court ruled that Megafit was not constructively evicted from the premises, in deciding Excel's motion for summary judgment. Therefore, Excel is granted summary judgment declaring that Megafit was not constructively evicted.

The tenth cause of action is dismissed as academic. Here, Megafit argues that, because Excel allegedly advised Megafit not to take any action with regard to the leaks, it elected not to hold Megafit in default under the lease. To the extent that Megafit seeks a declaration to that effect, the declaration is academic. The Court has determined that Megafit should be ejected from the premises, and Megafit did not raise the argument set forth in the tenth cause of action in opposition to Excel's motion for summary judgment.

The thirteenth cause of action is dismissed for lack of a justiciable controversy. Megafit seeks a declaration that the notice to cure is defective, insofar as the notice states that Megafit did not provide proof of insurance. However, Excel's counsel states that, "Subsequent to the commencement of this Action, Megafit did produce proof of insurance, thereby demonstrating a cure of the allegation in the Notice to Cure relating to a breach of the Lease's insurance provisions." Tockstein Aff., at 4 n 2.

The sixth cause of action seeks a declaration as the parties' respective rights and obligations under the lease, i.e., whether Megafit violated the lease. Insofar as the Court has determined that Megafit did not pay rent under the lease, a declaration as to whether Megafit violated the lease is unnecessary. A declaration as to whether the notice to cure is defective, which is also sought in this cause of action, is academic. However, the amended complaint alleges that, on June 12, 2008, on behalf of Megafit, Versatile Welding welded closed a fracture that appeared in the swimming pool's aluminum gutter system, and welded another fracture on June 27, 2008. Amended Complaint ¶¶ 29,

32. To the extent that Megafit is seeking a declaration as to whether Excel has the responsibility under the lease to maintain the gutter system, and therefore should reimburse Megafit for the costs it incurred, there remains a justiciable controversy notwithstanding Megafit's ejectment. Contrary to Excel's argument, these allegations are pled with requisite detail so as to provide Excel with notice as required under CPLR 3013.

Summary judgment dismissing the seventh cause of action is denied. The seventh cause of action seeks to recover no less than $100,000 in damages from Excel, as a result of the allegedly wrongful and improper issuance of the notice to cure. The amended complaint alleges that, "As a direct result of the inability to use the pool, Megafit's club membership declined as did sales for new memberships." According to Megafit's President, without a working pool, its was unable to attract new members, and its income plummeted. DeLaunay Opp. Aff. ¶ 13. In the Court's view, notwithstanding that there is no current justiciable controversy regarding the notice to cure, there is a factual question regarding the condition of the pool and the responsibility for it. Megafit's claim for damages is therefore adequately pled given these issues.

Summary judgment dismissing the eighth cause of action is denied. In this cause of action, Megafit seeks a declaration determining the correct amount of "Operating Costs Escalation," as defined under the lease, for the years 1999 through 2004. As mentioned above, Excel demanded this as additional rent in June 2005. Excel argues that the cause of action is legally without merit, but summary judgment dismissing this cause of action is premature. The parties dispute whether "management fees" are chargeable as Operating Cost Escalations, which Excel claims are recoverable under paragraph 59 of the lease as falling under "any professional and consulting fees related to the operation of the commercial portion of the building." The broadly-worded rubric of

"management fees" does not itself establish, as a matter of law, that they constitute "professional and consulting fees related to the operation of the commercial portion of the building." Discovery is needed to determine whether those portions of the management fees were for services related to the operation of the building. Moreover, it does not appear that the Vice President of the managing agent of Excel has personal knowledge as to the computation of the "Operating Costs Escalation." *See* Tockstein Aff. ¶ 64.

Summary judgment dismissing the ninth cause of action for an accounting is denied. Excel's legal argument in favor of dismissal is that Megafit has not pointed to any such provision in the lease that entitles it to an accounting. However, it Excel's prima facie burden to establish that the lease does not contain such a provision, and that Megafit is not entitled to an accounting by virtue of the parties' landlord-tenant relationship. Excel failed to meet that prima facie burden.

Motion Seq. No. 003

Excel seeks a money judgment against Megafit for unpaid use and occupancy directed by the Court's decision and order date March 11, 2009. Megafit cross-moves, in part, to reargue the March 11th decision, which the Court will address first.

The branch of the cross motion seeking reargument of the Court's decision and order dated March 11, 2009 is denied. Megafit argues that Excel was not entitled to payment of use and occupancy when it moved for such relief because the *Yellowstone* stay sought by Megafit had expired. However, because Excel asserts a counterclaim for ejectment, it may recover as damages the rent or the value of use and occupancy of the property. *See* RPAPL 601. Contrary to plaintiff's argument, "[t]he award for use and occupancy was pendente lite and not a final award, so a hearing was not required at the time of the order." *Morris Heights Health Center, Inc. v DellaPietra,* 38

AD3d 261, 261 (1st Dept 2007). The Court did not overlook Megafit's defense of constructive eviction in setting the amount of use and occupancy, given that the defense is, as discussed above, without merit.

The branch of the cross motion seeking an order of contempt against Excel for failing to comply with the so-ordered stipulations dated January 7, 2009 and January 22, 2009 is denied. It bears repeating that Megafit itself did not comply with the January 7, 2009 so-ordered stipulation, wherein Megafit agreed to pay use and occupancy pendente lite. Because "plaintiff failed to comply with the conditions imposed by an order . . . , and in that circumstance there should be no adjudication of contempt for the failure of the defendant to comply with other conditions in said order." *White v White*, 265 App Div 942, 942 (2d Dept 1942).

Excel's motion for a money judgment against Megafit for the unpaid use and occupancy due since the March 11th decision and order is granted. As discussed above, Excel is entitled to recover use and occupancy in an ejectment action. The Court fixes the amount of monthly use and occupancy in the amount of $41,893.54, which is the amount of Megafit's monthly rent. Megafit acknowledges that the rent under the lease provides the starting point for determining use and occupancy. *See e.g. Kuo Po Trading Co., Inc.*, 273 AD2d 111, 112 (1st Dept 2000). The other factor which Megafit advocated the Court to consider in fixing the amount of use and occupancy was the defense of constructive eviction, which the Court found was without merit. Therefore, a hearing fixing the amount of use and occupancy for entry of judgment (as opposed to use and occupancy awarded *pendente lite*) is not warranted.

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion by defendant Excel Associates (Motion Seq. No. 003) is granted, and the Clerk is directed to enter judgment in favor of defendant Excel Associates against Megafit Corporation in the amount of $41,893.54 per month from the date of March 11, 2009 until entry of judgment, as calculated by the Clerk; and it is further

ORDERED that cross motion by plaintiff Megafit Corporation for an order of contempt and for reargument is denied; and it is further

ORDERED that the motion for summary judgment by defendant Excel Associates (Motion Seq No. 004) is granted; and it is further

ORDERED and ADJUDGED on the first and third counterclaims that defendant Excel Associates is entitled to possession of the leased premises, embracing all space commonly known as the Excelsior Health Club, consisting of 18,000 useable square feet, located on a portion of the 5th (top) floor of the Excelsior Building, at 301 East 57th Street, New York, New York as against plaintiff Megafit Corporation, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly, and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, defendant may exercise all acts of ownership and possession of the premises, embracing all space commonly known as the Excelsior Health Club, consisting of 18,000 useable square feet, located on a portion of the 5th (top) floor of the Excelsior Building, at 301 East 57th Street, New York, New York New York, New York, including entry thereto, as against plaintiff Megafit Corporation, and it is further

ORDERED that the first, second, fifth, tenth, and thirteenth causes of action of the amended

complaint are dismissed; and it is further

ADJUDGED and DECLARED as to the third and fourth causes of action that Excel Associates did not constructively evict plaintiff Megafit Corporation from the leased premises; and it is further

ORDERED that the first, sixth, seventh, and ninth affirmative defenses of the reply are dismissed; and it is further

ORDERED that the remainder of the action (the sixth through ninth, eleventh, twelfth, and fourteenth causes of action of the complaint, and the second, fourth, fifth, sixth, seventh, eighth, and ninth counterclaims) is severed and shall continue.

Dated: December 7, 2009
New York, New York

ENTER:

J.S.C.

MICHAEL D. STALLMAN
J.S.C

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)