Ninety-Five Madison Co., L.P. v Karlitz &n Co., Inc.
2014 NY Slip Op 30512(U)
February 27, 2014
Supreme Court, New York County
Docket Number: 653113/2011
Judge: Melvin L. Schweitzer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45

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NINETY-FIVE MADISON COMPANY, L.P.,

Plaintiff,

-against-

KARLITZ & COMPANY, INC.,

Defendant.

---x

KARLITZ & COMPANY, INC.,

Third-Party Plaintiff,

-against-

DEPLANO GROUP INC.,

Third-Party Defendant.

---x

Index No. 653113/2011

DECISION AND ORDER

Motion Sequence No. 001

MELVIN L. SCHWEITZER, J.:

In this landlord-tenant dispute, plaintiff, Ninety-Five Madison Company, L.P. (Ninety-Five), moves for an order granting it summary judgment against its lessee's subtenant, defendant/third-party plaintiff Karlitz & Company, Inc. (Karlitz). Karlitz opposes the motion and cross-moves for an order dismissing Ninety-Five's complaint or alternatively compelling it, pursuant to CPLR 3124, to comply with Karlitz's discovery request. Karlitz also seeks an order directing its lessor/third-party defendant, DePlano Group, Inc. (DePlano), to return Karlitz's security deposit, and/or entering a judgment against DePlano in the amount of that deposit, with interest.

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Background

By letter of May 27, 2004 from Marco DePlano, DePlano's president, to Herb Karlitz, Karlitz's principal, Marco DePlano advised that DePlano planned to enter into a lease with Ninety-Five and that DePlano had agreed to sublet half of its space to Karlitz for half of the lease's base rent and additional rent. That day, Herb Karlitz, remitted a check to DePlano, made out to it, for $91,800, and Marco DePlano acknowledged receipt of that payment "which represent[ed] one-half of the security deposit under the terms of the Lease." Handel-Harbour aff in support, Ex. C.

Later that day, DePlano signed a lease for the 16th floor of 95 Madison Avenue for a term of 11.5 years, commencing on June 1, 2004 and expiring on November 30, 2015, unless terminating sooner as set forth in the lease. The lease, which was executed on behalf of Ninety-Five by Rita Sklar (Sklar) as its general partner, was on a preprinted form which contained articles 1 through 40, and had a rider which included articles 41 through 82. The lease provided for a monthly fixed rent, and any other payment due under it was deemed additional rent. All remedies and rights applicable to fixed rent were applicable to the additional rent. *Id.*, article 41. Fixed rent was due on the first of each month, "without any set off or deduction whatsoever ... ." *Id.*, Preamble. In general, the tenant had no obligation to pay for any additional rent item until the landlord billed and/or demanded payment from the tenant for that item. *See e.g.* lease articles 28; 42 A (5), C; 44 B (1), (2); 46 D; 59; 61.

The lease recited that DePlano had provided Ninety-Five with a $183,600.00 security deposit to ensure DePlano's faithful performance of its lease obligations, and a check, dated May 26, 2004, in that amount was issued to Ninety-Five. In the event of DePlano's default or

breach of a covenant which had not been cured before the end of any applicable grace or cure period, Ninety-Five was permitted to use the security deposit to the extent required "to cure any default," including in the payment of rent or additional rent, and upon the use of the deposit to cure a default and Ninety-Five's demand, DePlano was required to immediately restore the security deposit to its full amount. *Id.*, articles 32, 49 C, D. The failure to restore the security deposit within 10 days of a written notice to cure entitled the landlord to serve a three-day notice of cancellation of the lease, and on the expiration of such three days, the lease would expire as if it were the last day of the lease term, and the tenant, at the end of the three days was required to quit and surrender the premises. *Id.*, article 17 (1). If the tenant defaulted in the payment of rent, additional rent, or any other payment due under the lease, the landlord could, without notice, re-enter the premises and dispossess the tenant via summary proceedings or other means. *Id.*, article 17 (2); *see generally* 2 Robert F. Dolan, Rasch's Landlord & Tenant-Summary Proceedings § 23:12 at 177 (4th ed 1998) (breach of this latter condition subsequent would not result in the end of the lease "until the landlord enforces a forfeiture thereof by re-entry").

Any expenditure, including attorneys' fees, incurred by the landlord in connection with the tenant's default in performing any lease covenant or in paying rent, was payable by the tenant to the landlord. *Id.*, article 19. Similarly, if the landlord commenced an action against the tenant in connection with the lease, and such action was disposed of favorably toward the landlord, it would be entitled to reasonable attorneys' fees and disbursements. *Id.*, article 72. With respect to possession of the premises at the lease's expiration or on earlier termination, the tenant, acknowledging the importance to the landlord of such possession, agreed, among other things, to

pay the landlord monthly use and occupancy in the amount of three times the fixed and additional rent paid in the month preceding the lease's expiration or termination. *Id.*, article 70.

Lease article 11 provided that, if the premises were sublet, the owner could, "after default by [t]enant," collect rent directly from any under-tenant and apply it to the rent owed by the tenant, but such collection was not to be considered as an acceptance of the under-tenant as the tenant. That article concluded with "See Rider Art. 65," which appears to have construed article 11 to apply only to defaults in rent or additional rent, and recited that each sublease was required to include provisions that if the tenant defaulted in the payment of "any rent," the owner could collect the subtenant's rent and apply it to the tenant's rent and additional rent, without accepting the subtenant as a direct tenant. Article 65, D, ix, 4, 6. Any sublease also had to recite that it was "subject to all of the terms, covenants, agreements, provisions, and conditions of this Lease." *Id.*, D, ix, 1.

On July 8, 2004, DePlano subleased half of the 16th floor to Karlitz for a term beginning on an unspecified date when DePlano received possession of the demised premises from the landlord and expiring on November 29, 2015, unless terminated pursuant to law or by the terms of the sublease. In essence, Karlitz was to pay DePlano a monthly base rent and additional rent in half the amounts charged by Ninety-Five to DePlano, excluding any interest charge imposed by Ninety-Five due to DePlano's late payment. The base rent was due before the 1st of each month, and all other payments were due within 10 days of demand, which was to be accompanied by bills and/or invoices. Sublease, ¶ 5 (d), (e).

The sublease provided that it "was subject and subordinate to the DePlano lease" (*id.*, ¶ 8) and that it incorporated all the terms and conditions of that lease subject to certain "exceptions,

modifications and supplements." *Id.*, ¶ 9. Specific lease articles, including article 32, which deals with DePlano's security deposit and how it could be used by Ninety-Five, were not incorporated into the sublease. Tacked onto the end of article 32 was "See Rider article 49," which latter article was not specifically excluded from the sublease, but dealt only with the $183,600 security deposit that DePlano was to deliver to Ninety-Five on the execution of the lease. The sublease, for reasons not revealed here, failed to state, as required by the lease, that if the tenant defaulted in the payment of "any rent," the owner could collect the subtenant's rent and apply it to the tenant's rent and additional rent, without accepting the subtenant as a direct tenant. Article 65, D, ix, 4, 6.

Karlitz was required under sublease paragraph 17 (a) to reimburse DePlano for all costs, including reasonable attorneys' fees and disbursements, related to DePlano's enforcement of Karlitz's sublease obligations, after Karlitz defaulted. Such amounts were to be considered additional rent, irrespective of whether they were incurred after the sublease's termination. Further, if the DePlano lease were surrendered, cancelled, or terminated, the sublease would simultaneously end, and, if the termination were due to DePlano's failure to perform any of its lease obligations to Ninety-Five, any liability of DePlano to Karlitz would survive the termination. *Id.*, ¶ 10 (a).

After Karlitz moved into the premises, it continued to meet its financial obligations under the sublease. In October through December 2009, DePlano did not pay its rent. Consequently, Ninety-Five drew $63,680.33 from DePlano's security deposit to cover the rent and additional rent for those three months. Sklar aff, ¶ 3; Complaint, ¶ 7. According to Sklar, after correspondence was sent to DePlano demanding that it replenish its security deposit, Ninety-

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Five, by letter of December 28, 2009, caused a 10-day notice to cure to be sent to DePlano, based on DePlano's failure to replenish that deposit. Ninety-Five's counsel, by letter dated December 30, 2009, advised Karlitz, without specifying why, that DePlano was in default under its lease, reminded Karlitz that it had agreed that the sublease was subject and subordinate to the lease, and alleged that lease article 11 permitted Ninety-Five to collect rent directly from Karlitz if DePlano were in default under the lease. Ninety-Five's counsel then demanded that, beginning on January 1, 2010, all rent due under the sublease be paid to Ninety-Five.

DePlano, according to Richard Feldman (Feldman), a member of the law firm representing Ninety-Five, asserts that, in response to the notice to cure, DePlano commenced an action in this court against Ninety-Five for a Yellowstone injunction. *See First Natl. Stores, Inc. v Yellowstone Shopping Ctr.*, 21 NY2d 630 (1968). No copy of the complaint in that action has been furnished. Ninety-Five in that action cross-moved for an order directing DePlano to replenish the security deposit, continue paying rent, and, according to Sklar (aff, ¶ 6), to turn over rent collected from Karlitz, but, according to Justice James, to refrain from interfering with Ninety-Five's collection of rent from Karlitz. *See* Feldman aff, Ex. B.

Ninety-Five filed an answer, dated January 25, 2010, to DePlano's complaint essentially denying that complaint's allegations, asserting that DePlano had no right of setoff and could only sue for specific performance, and alleging various counterclaims, specifically that, because DePlano breached its lease by failing to pay its rent and additional rent in October through December 2009, Ninety-Five was entitled to use and occupancy, rent acceleration, damages for re-letting the premises, attorneys' fees, and to recover the rent collected by DePlano from Karlitz,

and to have DePlano enjoined from interfering with Ninety-Five's right to collect rent directly from Karlitz. Handel-Harbour aff, Ex. M.

By order dated April 1, 2010, Justice James granted the Yellowstone injunction, pending a determination of whether DePlano was in default under the lease, conditioned on DePlano's paying use and occupancy for the duration of the injunction. Ninety-Five's cross motion was granted to the extent that DePlano was required to pay use and occupancy, as it became due. Further, Justice James decided that, in the event DePlano failed to remit such rent payments, Ninety-Five was to collect Karlitz's rent directly from Karlitz, without DePlano's interference. On the same day that the foregoing order was issued, DePlano and Ninety-Five's counsel entered into a preliminary conference order which included a so-ordered clarification of that day's order, specifically "that subtenant rent of Karlitz & Company shall be paid to [DePlano] provided that [DePlano] is in compliance with its obligation to pay use & occupancy from April 1, 2010 onward as provided in said order. In the event [DePlano] fails to comply in payment of said use & occupancy, [Ninety-Five] may then collect subtenant's rent directly from subtenant as provided under the lease." Feldman aff, Ex. B.

Meanwhile, Karlitz, which was not a party to the DePlano action, paid its January, February, and March 2010 rent into its attorney's escrow account, and, four days after Justice James issued her April 1 orders, turned over those funds directly to DePlano. Karlitz also continued to pay its rent to DePlano for the remainder of 2010, along with sums for various other charges. Handel-Harbour aff, Ex. N. DePlano, on the other hand, did not pay rent to Ninety-Five for January through March 2010, paid use and occupancy for April and June 2010, but evidently not for May (Sklar aff, ¶ 9; *id.*, Ex. A, ¶ 18), and ceased paying use and occupancy altogether in

July 2010. Ninety-Five moved to vacate the Yellowstone injunction, and, on January 11, 2011, Justice James granted the motion and vacated the injunction "unless [DePlano] remits rent in an amount equal to the rent due under the Lease through January 11, 2011 within 10 days of service of this order with notice of entry." Feldman aff, Ex. C.

In the meantime, Karlitz issued a check, dated January 4, 2011, to DePlano, for that month's rent, which check was endorsed by DePlano. *See* Handel-Harbour aff, Ex. N. By letter dated January 4, 2011, and received by Karlitz on an unspecified date, Ninety-Five's counsel notified Karlitz that DePlano had ceased paying rent in July 2010. That letter referred to the December 2009 letter demanding that Karlitz pay rent directly to Ninety-Five and asserted that Justice James's order had permitted DePlano to collect rent from Karlitz provided that DePlano continued to pay rent. In light of DePlano's failure to pay rent since July, Ninety-Five's counsel demanded that Karlitz directly pay Ninety-Five all past due rent from July 2010 in the amount of $94,007.20, an amount which represented only the fixed rent from July 2010 through January 2011. According to Herb Karlitz, once he was made aware that DePlano was not tendering its rent to Ninety-Five, funds, in unspecified amounts, were tendered in 2011 to Karlitz's counsel's escrow account. Herb Karlitz aff, ¶ 11.

By letter of February 14, 2011, Stephen Rosenberg (Rosenberg), another attorney from the firm representing Ninety-Five, informed Karlitz that a notice of cancellation advising DePlano of its lease's termination had been delivered to DePlano on February 8, 2011, and that, under lease section 17, DePlano was required to quit and surrender the premises, but had failed to do so, and that DePlano was, therefore, responsible, under lease section 70, for use and occupancy in an amount equal to three times the fixed and additional rent. Rosenberg asserted

that, since the lease was terminated, the sublease was also terminated, and that Karlitz was responsible for half the amount of DePlano's use and occupancy. Sklar aff, Ex. F. He further advised that nothing set forth in the letter gave Karlitz the right to hold over or to possession and that Ninety-Five reserved all rights.

Karlitz, after paying, upon Ninety-Five's demand, a freight elevator moving day use fee of $1,800 and the $5,614.68 bill of an air-conditioning maintenance contractor, which was apparently retained by Ninety-Five, vacated the premises on September 7, 2011. DePlano vacated in February 2012. On April 23, 2012, DePlano and Ninety-Five's counsel, without reserving any rights, executed a stipulation of discontinuance, with prejudice, of DePlano's action, including Ninety-Five's counterclaims. Meanwhile, on November 9, 2011, Ninety-Five commenced this action solely against Karlitz.

The Pleadings

Under its first cause of action, Ninety-Five asserts that Karlitz must pay it half of DePlano's fixed rent for all the months starting in January 2010 and ending in February 2011, except for the months of April and June 2010, and half of DePlano's unpaid additional rent. That cause of action further alleges that, as a result of Karlitz's holding over, it is liable for half of DePlano's use and occupancy at the treble rent and additional rent rate for the months of March through September 2011. Ninety-Five's second cause of action seeks its legal fees and costs.

Karlitz answered asserting, among other things, that it lacked privity with Ninety-Five; the lease did not create a legal obligation for Karlitz to pay rent to Ninety-Five; the demand for treble rent holdover damages was an unenforceable penalty; as a result of Ninety-Five's failure to provide passenger elevator service for two years, Karlitz was damaged, there was a failure of

consideration, and/or that Ninety-Five breached the warranty of fitness for intended use, and that, accordingly, no use and occupancy should be awarded to Ninety-Five; and that the claim for legal fees and costs fails to state a cause of action. Karlitz also asserted two "counterclaims," the first seeking damages for Ninety-Five's refusal to allow Karlitz to use the elevator to remove its belongings unless Karlitz paid for using the freight elevator and for air-conditioning maintenance, and the second seeking punitive damages.

Karlitz also commenced a third-party action against DePlano demanding that DePlano indemnify it, including for legal fees, in the event that Ninety-Five obtains a judgment against Karlitz; seeking the return of Karlitz's alleged $91,800.00 security deposit, which DePlano purportedly converted; and demanding the reimbursement of any legal fees and costs incurred by Karlitz in this action because of DePlano's alleged default and in connection with Karlitz's defense of an unspecified proceeding commenced by Ninety-Five in 2011 in the landlord-tenant court. DePlano answered the third-party complaint, denying, on information and belief, that Karlitz had deposited security money with it, asserting various defenses, and alleging two counterclaims against Karlitz, respectively for rent and additional rent owed it since April 2011 and for attorneys' fees.

The Instant Applications

In its notice of motion, Ninety-Five moves for an order granting it "summary judgment." Sklar's moving affidavit in support of Ninety-Five's motion (¶ 12) asserts that Ninety-Five is entitled to a judgment in the sum of $361,303.44, which sum only represents the rent, but not any additional rent, set forth under Ninety-Five's first cause of action. Sklar claims that Ninety-Five is entitled to the $361,303.44 because it served a notice to cure on DePlano and its counsel after

sending it other correspondence demanding that DePlano replenish the security deposit; Ninety-Five sent the two letters demanding that Karlitz pay rent directly to it based respectively on DePlano's "default" and its failure to pay rent as required by Justice James's orders; Rosenberg sent the letter advising Karlitz that its sublease was terminated; and because lease article 70's treble rent holdover use and occupancy provision is binding on Karlitz. Feldman adds in his reply affirmation (at ¶ 3 [j]) that Justice James's January 11, 2011 order was served with notice of entry on DePlano on an unspecified date and that, therefore, the Yellowstone injunction was vacated and the DePlano lease terminated that month.

Karlitz opposes Ninety-Five's motion and cross-moves for an order dismissing the complaint. Karlitz's opposition is largely a reiteration of its answer's allegations. Herb Karlitz adds (aff, ¶ 16) that the lease rider provision permitting Ninety-Five to collect Karlitz's rent if DePlano were in default in the payment of its rent, did not create any obligation on Karlitz's part to pay Ninety-Five. Also, Karlitz observes that it paid its rent to DePlano, and that, instead of going after Karlitz, Ninety-Five should have gone after DePlano, which failed to pay its rent. Karlitz additionally claims that because Ninety-Five and DePlano ultimately executed a stipulation of discontinuance in the DePlano action, and thereby also discontinued all of Ninety-Five's counterclaims in that action, Ninety-Five is judicially estopped and is barred by principles of res judicata from urging that DePlano was in default.

Furthermore, Karlitz contends that it was constructively evicted because the only passenger elevator which went to the 16th floor was frequently out of service, thereby raising an issue as to whether Karlitz was required to pay rent and use and occupancy to Ninety-Five. Karlitz maintains that, in light of the lack of elevator service, it wanted to vacate the premises at

an unspecified time during the summer of 2011, but was prevented from moving by Ninety-Five's improper demands for air-conditioning maintenance and freight elevator operation fees. Verified answer, ¶ 35.

Alternatively, Karlitz, which asserts that its November 2011 request for documents is necessary to address its affirmative defenses and Ninety-Five's complaint (Karlitz memorandum of law, point VI), cross-moves for an order requiring Ninety-Five to comply with that document demand, which seeks copies of leases and lease brokerage agreements from January 1, 2010 through the end of July 2011 relating to the subject building; documents, bank statements, and ledgers relating to the security deposit furnished to DePlano and to lease charges attributable to, and payments tendered by, Karlitz under the lease; "appraisals or other indicia of evaluation so as to determine the monthly use and occupancy" of the building's 16th floor; and records relating to the building's elevators. Handel-Harbour aff, Ex. K.

Karlitz's also cross-moves for an order directing DePlano to immediately return Karlitz's security deposit and/or entering judgment in its favor against DePlano in the amount of $91,800.00 with 9% interest from July 2004. Herb Karlitz claims that Karlitz tendered the $91,800.00 as a security deposit "in consideration for the [s]ublease," and that he believes that those funds were never segregated into an account which held them in trust for Karlitz, nor has that amount ever been returned to Karlitz "despite due demand," and the fact that Karlitz paid its rent to DePlano. Herb Karlitz aff, ¶¶ 8, 9. Karlitz takes the position that DePlano has failed to meet its burden of establishing that it did not commingle the security deposit and that an inference of commingling should be drawn where a landlord fails to comply with the requirements of General Obligation Laws § 7-103 (2), which requires a landlord to notify its

tenant of the bank in which the tenant's security deposit is held, the bank's address, and the amount of the deposit. Karlitz further urges that the statutory interest rate of 9% applies from the moment of commingling, and evidently takes the position that because the sublease was executed on July 8, 2004, interest must run from "July 2004." Notice of cross motion, ¶ D.

DePlano opposes the branch of Karlitz's cross motion applicable to it. Marco DePlano contends that the $91,800.00 was not Karlitz's security deposit. Rather, DePlano asserts that Karlitz agreed to pay half of the security deposit that DePlano owed to Ninety-Five, and that DePlano turned over the entire security deposit to Ninety-Five. According to Marco DePlano, the parties agreed that there was to be no security deposit under the sublease, and that this is evidenced by the sublease which has no security deposit provision and specifically excludes the lease's security provision set forth in article 32. *See* sublease, ¶ 9 (a). He further advises that Ninety-Five has never returned any portion of the security deposit to DePlano.

In reply to its summary judgment motion and in opposition to Karlitz's cross motion, Ninety-Five modifies its demand set forth in its initial moving papers as to the number of months for which it seeks rent, and adds that it is entitled to additional rent. *See* Feldman aff, ¶ 10. In particular, Ninety-Five asserts that, because Justice James's April 1, 2010 orders did not specifically mention Karlitz's obligation to pay rent directly to Ninety-Five for the period of December 2009 through March 2010, that meant that she intended that Ninety-Five was entitled to collect Karlitz's rent and additional rent for that period. Ninety-Five further claims that, once it notified Karlitz, by letter of January 4, 2011, that DePlano had failed to pay rent since July 2010 and that Justice James's April 1, 2010 order permitted Ninety-Five to collect rent from Karlitz if DePlano failed to pay use and occupancy, Karlitz was obligated to pay Ninety-Five its

February 2011 (*see* Sklar aff in support, Ex. G) rent, evidently its additional rent for that month, and its use and occupancy from March through September 2011 at the treble rent and additional rent rate.

Ninety-Five urges that, because the lease was incorporated into the sublease, Karlitz: once DePlano defaulted, was bound to pay its rent and additional rent directly to Ninety-Five; was required, once the lease and sublease were terminated, to pay Ninety-Five treble holdover rent and additional rent as use and occupancy; and has to pay Ninety-Five's attorneys' fees. Further, Ninety-Five asserts that res judicata is inapplicable because this is a case in which Karlitz is primarily liable to it, rather than one involving joint tortfeasors, and that, accordingly, the discontinuance of the DePlano action has no effect on Karlitz's liability. Ninety-Five also contends that, because it was not in privity with Karlitz, Karlitz's constructive eviction claim lacks merit. Relying on lease article 19, Ninety-Five maintains that, because the sublease incorporates the terms of the lease, it is entitled to attorneys' fees. Ninety-Five, thus, claims that it is entitled to summary judgment on liability and to an inquest on the issues of the amount of rent, additional rent, holdover charges, and attorneys' fees owed it.

In reply, Karlitz's counsel asserts that DePlano converted Karlitz's security deposit, commingled it with DePlano's own funds, and used it to pay half of DePlano's own security deposit, as evidenced by the fact that Karlitz's security deposit check was issued, not to Ninety-Five, but to DePlano. Karlitz claims that DePlano's assertion, that Karlitz waived its right to a security deposit for DePlano's benefit, defies logic and is contrary to the reason why a tenant would provide a security deposit. As to Ninety-Five, Karlitz, relying on *NPS Engrs. & Constructors v Underweiser & Underweiser*, 73 NY2d 996 (1989), adds that Ninety-Five is not

entitled to collect treble holdover rent and additional rent as use and occupancy because the sublease did not specifically state that such lease provision was applicable to the sublease, but only contained a boilerplate provision incorporating the terms of the lease into the sublease.

Discussion

The movant on a summary judgment application bears the initial burden of prima facie establishing its entitlement to the requested relief, by eliminating all material allegations raised by the pleadings. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Kuri v Bhattacharya*, 44 AD3d 718 (2d Dept 2007). The failure to do so mandates the denial of the application, "regardless of the sufficiency of the opposing papers." *Winegrad*, 64 NY2d at 853. Where the moving party makes its required showing, the burden shifts to the opponent to demonstrate the existence of a material fact. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 (1986).

Preliminarily, because Ninety-Five did not move for summary judgment with respect to, or even mention, Karlitz's "counterclaims," the court cannot grant any relief with respect to them, and to the extent, if any, that Ninety-Five is seeking an order dismissing those "counterclaims," such application is denied. Similarly, the initial moving papers only demanded judgment in the amount of fixed rent and treble rate use and occupancy based on the fixed rent. While Ninety-Five's reply papers demanded additional rent as well, no evidence of the amount of any such additional rent, or the items comprising it, was set forth. Nor did Ninety-Five indicate that it or DePlano ever sent the requisite notices and demands, accompanied by bills and/or invoices, for any additional rent for the months in issue, including for the month upon which the treble rate use and occupancy was to be calculated. Thus, to the extent that Ninety-Five seeks

additional rent and any portion of use and occupancy based on additional rent, its request set forth in its reply papers is denied.

Estoppel

Karlitz's claim that Ninety-Five is judicially estopped from asserting its claims against Karlitz, as a result of DePlano and Ninety-Five's stipulation discontinuing their action with prejudice, is unavailing. Judicial estoppel serves to prevent a party from taking a position in a legal proceeding, obtaining a judgment in that party's favor, and thereafter taking the opposite position in another proceeding because of changed interests. *Wells Fargo Bank Natl. Assn. v Webster Bus. Credit Corp.*, 113 AD3d 513 (1st Dept 2014). A stipulation of settlement discontinuing an action, standing alone, is not a "'judicial endorsement'" of a party's position; therefore, the doctrine of judicial estoppel is inapplicable.[1] *Manhattan Ave. Dev. Corp. v Meit*, 224 AD2d 191, 192 (1st Dept 1996); *Chemical Bank v Aetna Ins. Co.*, 99 Misc 2d 803, 805 (Sup Ct, NY County 1979).

Res Judicata

The branch of Karlitz's cross motion which seeks an order dismissing Ninety-Five's complaint on the ground that Ninety-Five's claims are barred by the res judicata doctrine as a result of Ninety-Five's having stipulated to discontinue its counterclaims in the DePlano action, with prejudice, is denied. The doctrine of res judicata serves to afford finality to dispute resolutions. *Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 124 (2008), *cert denied*, 555 US 1136 (2009); *see also Schuylkill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-

[1] The court also notes that, because such a stipulation does not constitute the actual litigation of an issue, it lacks collateral estoppel effect. *Maybaum v Maybaum*, 89 AD3d 692, 695 (2d Dept 2011); *Color By Pergament, Inc. v O'Henry's Film Works*, 278 AD2d 92, 93-94 (1st Dept 2000); *see also Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-457 (1985).

307 (1929). Under the doctrine, a "final judgment bars future actions between the same parties on the same cause of action ... [and] all other claims arising out of the same transaction or series of transactions ..., even if based upon different theories or if seeking a different remedy." *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12-13 (2008) (internal quotation marks and citation omitted).

Further, a stipulation discontinuing an action with prejudice can have res judicata consequences in future litigation. *North Shore-Long Is. Jewish Health Sys., Inc. v Aetna US Healthcare, Inc.*, 27 AD3d 439, 440 (2d Dept 2006); *Singleton Mgt. v Compere*, 243 AD2d 213, 216 (1st Dept 1998) (stipulation of discontinuance with prejudice raises presumption that in future litigation stipulation will have res judicata effect); *see also Nottenberg v Walber 985 Co.*, 160 AD2d 574, 575 (1st Dept 1990). An action's settlement is afforded preclusive effect because "[t]here would, otherwise, be no incentive for a [party] to settle if it could not be assured that by doing so it would put to rest the claim brought against it and forever bar that claim from again being litigated against it." *Singleton Mgt., Inc. v Compere*, 243 AD2d at 216.

"One linchpin of res judicata is an identity of the parties actually litigating successive actions against each other ... ." *City of New York v Welsbach Elec. Corp.*, 9 NY3d 124, 127 (2007); *Private Capital Group, LLC v Hosseinipour*, 86 AD3d 554, 555 (2d Dept 2011). The doctrine applies not only to parties to the prior action but to those in privity with them. *See Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 93-94 (1st Dept 2013); *Simmons v New York City Health & Hosps. Corp.*, 71 AD3d 410, 411 (1st Dept 2010).

"Privity ... is an amorphous concept not easy of application ...." *D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 (1990) (internal citation omitted). "[T]he concept ...

requires a flexible analysis of the facts and circumstances of the actual relationship between the party and nonparty in the prior litigation." *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d at 93 (internal quotation marks and citations omitted). "[P]rivity entails a relationship so strong that it 'enables the court to be perfectly comfortable in visiting the consequences of the first action on the party to the second one.' (Siegel, NY Prac § 458 at 770 [4th ed 2005])." *Board of Mgrs. of 129 Lafayette St. Condominium v 129 Lafayette St. LLC*, 2013 NY Slip Op 32332(U), **7, 2013 WL 5434002 (Sup Ct, NY County 2013).

Privity between parties is generally found where "the connection between the parties [is] such that the interests of the nonparty can be said to have been represented in the prior proceeding ... [or] when the party to be precluded can be said to have controlled the conduct of the prior action to further his own interests." *Green v Santa Fe Indus.*, 70 NY2d 244, 253-254 (1987). Thus, there can be privity between a shareholder and the corporation in a shareholders' derivative action, a creditor and the bankruptcy trustee, an insurer and its insured, and a union and its member. *Board of Mgrs. of 129 Lafayette St. Condominium v 129 Lafayette St. LLC*, 2013 NY Slip Op 32332(U) at **7, 2013 WL 5434002. Privity, requiring dismissal of a subsequent action, has also been found where the plaintiff to the prior and subsequent actions alleges that the defendant to the prior action and the defendant to the subsequent action were close corporate affiliates, which acted in concert to commit a fraud, as one entity, and without regard to their corporate formalities. *Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d at 531.

Further, privity can exist where a party's obligations or rights in a subsequent action are derivative of, or conditioned on, another party's rights in an earlier action. *See D'Arata v*

New York Cent. Mut. Fire Ins. Co., 76 NY2d at 664; *Green v Santa Fe Indus.*, 70 NY2d at 253. In the case of a wholly derivative claim, where it has been determined that the prior plaintiff has no case, neither does the subsequent derivative plaintiff, such as a spouse who is asserting a loss of consortium claim. *Fischbach v Auto Boys*, 106 NYS2d 416, 417 (Sup Ct, Kings County 1951), *revd on other grounds*, 279 App Div 789 (2d Dept 1952); Siegel, NY Prac § 458 at 770; *see also LaVigna v Capital Cities/ABC*, 245 AD2d 75, 76 (1st Dept 1997) (where husband's claim was barred by res judicata, so was wife's, since her claims were merely derivative).

Here, Karlitz's obligation to pay rent to Ninety-Five and Ninety-Five's ability to terminate Karlitz's sublease were wholly derivative of and dependent on whether DePlano was in default and whether DePlano's lease was terminated. *380 Yorktown Food Corp. v 380 Downing Dr., LLC*, 107 AD3d 786, 788 (2d Dept 2013); *see also Ashton Holding Co., Inc. v Levitt*, 191 App Div 91, 93 (1st Dept 1920) (a "subtenant's rights are measured by those of his immediate landlord, the original tenant, and the cancellation of the lease, by its own terms, as to one cancels it as to both") (internal quotation marks and citation omitted); 1 Robert F. Dolan, Rasch's Landlord & Tenant-Summary Proceedings § 9:62 at 393 (4th ed 1998). Hence, there is sufficient privity between Karlitz and DePlano. Indeed, a subtenant is not even a necessary party to an action alleging the prime tenant's breach of its lease (*Joscar Co. v Arlen Realty*, 54 AD2d 541, 541 [1st Dept 1976]), to a defaulting prime tenant's summary proceeding (*Teachers Coll. v Wolterding*, 77 Misc 2d 81, 82 [App Term, 1st Dept 1974]), or to a holdover proceeding against the prime tenant (*Triborough Bridge & Tunnel Auth. v Wimpfheimer*, 165 Misc 2d 584, 586 [App Term, 1st Dept 1995]). Moreover, where a dispossess proceeding results in the termination of the prime tenant's lease due to its failure to pay rent, all of the subtenant's rights under its lease

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also fall, even though the subtenant was not a party to the dispossess proceeding, since its rights "were subordinate to and depending on the primary lease ... ." *New York Rys. Corp. v Savoy Assoc., Inc.*, 239 App Div 504, 506-507 (1st Dept 1933).

In an attempt to refute the presumption that the stipulation of discontinuance is entitled to res judicata effect, Ninety-Five has simply argued that this is not a tort case and that Karlitz has a primary obligation to it. However, if this were a tort case, the stipulation would not necessarily have res judicata effect. *See e.g. Riviello v Waldron*, 47 NY2d 297, 305-307 (1979). Further, Ninety-Five has not specifically urged any reason why in the interest of justice the "with prejudice" language should be ignored. *Trepani v Squitieri*, 107 AD3d 696, 697 (2d Dept 2013).

Nevertheless, each of Ninety-Five's counterclaims in the DePlano action was predicated on limited transactions or series of transactions, namely DePlano failure to pay rent in October through December 2009. Once Ninety-Five used DePlano's security deposit to cover the rent and additional rent for those months, any default in paying that rent and additional rent was cured under the lease's provisions, and was, thereafter, replaced by DePlano's failure to meet its new obligation to replenish the security deposit. Therefore, Ninety-Five's counterclaims, at the time they were interposed, were essentially meritless. Ninety-Five's claims in the instant action, while tangentially related to the failure to pay rent for those three months, do not directly arise out of the same transactions or series of transactions. Accordingly, Ninety-Five's discontinuance of its counterclaims in the DePlano action have no res judicata effect here.

Rent/Use and Occupancy

Karlitz's assertion that Ninety-Five's attempt to seek rent from it is barred by Ninety-Five's constructive eviction of Karlitz arising out of Ninety-Five's failure to provide elevator

service between 2009 and 2011, is unavailing, even assuming for argument's sake that Karlitz did not unreasonably delay in vacating the premises. *See Leider v 80 William St. Co.*, 22 AD2d 952, 953 (2d Dept 1964) (constructive eviction claim waived by unreasonable delay in vacating premises). The rent that Ninety-Five was seeking to collect was rent owed by Karlitz to DePlano under the sublease, which provided that DePlano was not obligated to supply any services to Karlitz or to the building, nor would it be liable for Ninety-Five's failure to do so, "except if such failure [were] due to [DePlano's] failure to perform its obligations under this Sublease in a timely manner." Sublease, ¶ 9 (a). On Karlitz's written request, DePlano was required to present, in its own name, any of Karlitz's demands for services which Ninety-Five was required to supply. *Id.*, ¶ 9 (b). Karlitz alleges that it and DePlano made elevator repair requests to Ninety-Five. Answer, ¶ 27.

Ninety-Five's failure to provide any services it was required to provide under the prime lease and any interruption of services provided by Ninety-Five would not entitle Karlitz to an abatement or diminution of sublease rent or additional rent, nor would the sublease "be affected by reason of any such failure ...." Sublease, ¶ 9 (b). Further, "[e]xcept as expressly provided in th[e] sublease, any covenants, representations, and other undertakings of Landlord under the DePlano lease [were] not [to] be deemed to be made by, or otherwise constitute obligations of, [DePlano] under th[e] Sublease." Sublease, ¶ 9 (c). In addition, the sublease provided that payment of the rent was due without any abatement, setoff or deduction, "for any reason whatsoever." *Id.*, ¶ 5 (d). Based on the foregoing, it is clear, with respect to any rent owed by Karlitz to DePlano which was to be paid to Ninety-Five, that Karlitz was required to pay such rent irrespective of any lack of elevator service.

Further, a landlord's breach of duty to its tenant does "not suspend the tenant's independent obligation to pay rent, which continue[s] as long as the tenant remain[s] in possession." *Earbert Rest. v Little Luxuries*, 99 AD2d 734, 734 (1st Dept 1984); *see also Westchester County Indus. Dev. Agency v Morris Indus. Bldrs.*, 278 AD2d 232, 232 (2d Dept 2000); *Lincoln Plaza Tenants Corp. v MDS Props. Dev. Corp.*, 169 AD2d 509, 512 (1st Dept 1991). Moreover, a constructive eviction defense is unavailable for the period before a tenant vacates; thus, the tenant is required to pay rent for that period. *Feldman v Park Rug Shops*, 10 AD2d 732 (2d Dept 1960); *see also City of New York v Pike Realty Corp.*, 247 NY 245, 247 (1928). The court further observes that Karlitz has no direct claim against Ninety-Five for constructive eviction. *Jones & Brindisi, Inc. v Bernstein*, 119 Misc 697, 699 (App Term, 1st Dept 1922); *cf. Wright v Catcendix Corp.*, 248 AD2d 186 (1st Dept 1998) (subtenant had no claim against cooperative corporation for constructive eviction, breach of warranty of habitability, or breach of covenant of quiet enjoyment, where landlord-tenant relationship and contractual agreement were lacking).

Karlitz's assertion that it is not bound by the lease's provisions authorizing Ninety-Five, in the event of DePlano's default in paying rent, to collect rent from Karlitz, is without merit because the sublease incorporates those provisions as sublease terms. *Timur on 5th Ave. v Record Explosion*, 290 AD2d 221, 221-222 (1st Dept 2002). Therefore, since Ninety-Five advised Karlitz in January 2011 that DePlano was not paying rent in violation of Justice James's order, Ninety-Five is entitled to at least Karlitz's February 2011 fixed rent of $13,439.60, which was due before the first of the month, i.e. at the latest by January 31, 2011, with interest from that date.

Ninety-Five's claim in its reply papers, that it is entitled to Karlitz's December 30, 2009 rent, is without merit, because the December 2009 letter demanding its rent, only sought rent beginning in January 2010. As to the rent of January through March 2010, Justice James's April 1, 2010 orders were silent as to those months, and it is not readily apparent whether those orders were inferentially holding that Ninety-Five was barred from collecting rent for that period. In this regard, the parties did not provide all of the papers which were submitted to Justice James, and it is unclear what was argued before her. Nevertheless, because Sklar asserted that part of the relief sought by Ninety-Five in its cross motion before Justice James was an order compelling DePlano to turn over rents collected by DePlano from Karlitz and since there were allegations that DePlano was interfering with Ninety-Five's collection of rent, it may be that Justice James intended that Ninety-Five not be able to collect Karlitz's rent for the months of January through March 2010. Therefore, assuming that Ninety-Five's request for rent for that period is otherwise viable, without a further order from Justice James clarifying whether her April 1, 2010 orders intended to preclude Ninety-Five from collecting Karlitz's rent for the months of January through March 2010, no relief can be afforded to Ninety-Five with respect to the rent for those months.

Moreover, as seemingly elucidated by lease rider article 65, D, ix, 4, it appears that the intent of lease article 11 was to permit Ninety-Five to collect fixed rent and additional rent from a subtenant based, not on any type of default, but on a default in paying "any rent." *Cf. Monarch Info. Servs. v 161 William Assoc.*, 99 AD2d 1007, 1008 (1st Dept 1984), *opinion recalled on other grounds by* 103 AD2d 703 (1st Dept 1984) (the default by the prime tenant required under article 11, which seems to be virtually identical to the parallel portions of article 11 in the instant case, refers either to a default in failing to get the landlord's consent to a sublet or assignment or

to a default in paying rent). Here, DePlano's default in collecting October through December 2009's rent, was, as previously noted, cured before Ninety-Five issued its December 30, 2009 letter to Karlitz demanding that it pay its rent, beginning in January 2010 to it. Thus, that demand, on the record presently before this court,[2] would seem to have been a nullity. Whether, at any time after that letter was issued, and before Ninety-Five sent Karlitz the January 4, 2011 letter advising it that DePlano had stopped paying rent, Ninety-Five had advised Karlitz that DePlano had again ceased paying rent, and had demanded that Karlitz pay it's rent to Ninety-Five is not revealed here. Therefore, Ninety-Five has not demonstrated that it is entitled to Karlitz's rent for January through March 2010.

Karlitz's contention that the sublease does not incorporate the lease's treble holdover rent and additional rent rate for use and occupancy is baseless. This is not a case where the sublease, in boilerplate fashion, incorporated the provisions of the lease. Rather, the sublease also set forth those specific provisions which would not apply. Under that circumstance, where the lease's treble rent holdover rate provision was not specifically excluded, it constitutes part of the sublease. *Geltzer v DuFour Pastry Kitchens, Inc.*, 34 AD3d 364, 365 (1st Dept 2006); *see also PHH Mortgage Corp. v Ferro, Kuba, Mangano, Skylar, Gacovino & Lake, P.C.*, 113 AD3d 831 (2d Dept 2014); *Butler, Fitzgerald & Potter v Westinghouse Elec. Corp.*, 571 F Supp 1258, 1259-1260 (SD NY 1983).

Karlitz's conclusory assertion that the use and occupancy holdover rate, essentially a liquidated damages clause, constitutes an unenforceable penalty, is insufficient to meet its burden

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[2] The issue of the meaning of the tenant's "default" under lease article 11 has not directly been addressed by the parties. The court, thus, at this juncture in the litigation where there has been no input from the parties, declines to definitively rule on this issue.

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on this issue. *JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 380, 384-385 (2005) (burden of proving liquidated damages are a penalty, is on party seeking to avoid them, and conclusory affidavit does not suffice). The court further notes that liquidated damages of two and a half to three times the monthly rent have been sustained. *See Teri-Nichols Inst. Food Merchants, LLC v Elk Horn Holding Corp.*, 64 AD3d 424, 425 (1st Dept 2009); *Thirty-Third Equities Co. v Americo Group*, 294 AD2d 222, 222-223 (1st Dept 2002); *Federal Realty Ltd. Partnership v Choices Women's Med. Ctr.*, 289 AD2d 439, 442 (2d Dept 2001).

Additionally, assuming that the term of the DePlano lease was ended as a consequence of the notices sent to it, the sublease was also terminated, because the sublease was dependent on "and limited by the terms and conditions of the paramount lease ...." *380 Yorktown Food Corp. v 380 Downing Dr., LLC*, 107 AD3d at 788. If Karlitz's lease's term was at an end, Ninety-Five was entitled to collect use and occupancy from Karlitz, even absent privity, because such a claim does not spring from a contract between the two, but is based on a quantum meruit theory, which is imposed to bring about a just result, irrespective of the parties' intentions. *Eighteen Assoc. v Nanjim Leasing Corp.*, 257 AD2d 559, 559-560 (2d Dept 1999); *450 7th Ave. Assoc. LLC v Global Economic Transactions, Inc.*, 2012 NY Slip Op 32043(U), *5, 2012 WL 3260301 (Sup Ct, NY County 2012); *see also Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419, 420 (1st Dept 2013).

Nonetheless, Ninety-Five has failed to meet its prima facie burden of establishing that DePlano's lease, and, thus, Karlitz's sublease, were terminated, since, aside from the fact that there is no evidence in Sklar's affidavit or in Feldman's affirmation as to exactly when and by whom Justice James's January 11, 2011 order vacating the Yellowstone injunction was served on

DePlano (*see also* complaint, ¶ 21), no admissible evidence has been presented by anyone claiming to have firsthand knowledge as to when and by whom the three-day notice of cancellation of the DePlano lease was served on DePlano. All that has been provided is Rosenberg's letter which indicates that the cancellation notice had been delivered on February 8, 2011, and Feldman's affirmation claiming that the lease terminated in January 2011. Further, the complaint, verified by Sklar, alleges that the cancellation notice was served on DePlano with a copy to Karlitz on February 7, 2011, but Sklar does not indicate that she served it or how she knows it was served, and Karlitz's answer, verified by Herb Karlitz, denies this allegation, and no copy of the cancellation notice been provided on these applications. Accordingly, Ninety-Five has failed to demonstrate that it is entitled to treble rent rate use and occupancy for March through September 2011.

Ninety-Five's Costs and Attorneys' Fees

Given the sublease provisions permitting the collection of attorneys' fees and the incorporation of the lease provisions which entitle the landlord to attorneys' fees, Ninety-Five would be entitled to such fees in connection with any portion of its motion seeking rent and use and occupancy on which it is successful. *See Teri-Nichols Inst. Food Merchants, LLC v Elk Horn Holding Corp.*, 64 AD3d at 425 ("in accordance with sublease," matter remanded for a hearing on the landlord's reasonable attorneys' fees in connection with the subtenant's use and occupancy, where record on appeal set forth sublease which incorporated provisions of lease, which entitled landlord to collect attorneys' fees). Because Ninety-Five has established that it is entitled to Karlitz's fixed rent for the month of February 2011, it is entitled to its reasonable attorneys' fees in connection with that issue. However, for the sake of judicial economy, the

hearing on the amount of any such fees owing Ninety-Five will be held at the conclusion of the action, when it can be combined with the determination of the amount of any other attorneys' fees owing. The court declines to grant costs at this point in the action.

The Security Deposit

The branch of Karlitz's cross motion which seeks an order granting it partial summary judgment against DePlano on the third-party complaint's second cause of action alleging that DePlano has converted Karlitz's $91,800.00 security deposit, is denied. Neither DePlano nor Karlitz disputes that funds given as security for the performance of a sublease are required to be placed in an interest-bearing account, constitute a trust fund for the person providing the money, and may not, with limited exceptions, be commingled. General Obligations Law § 7-101 (1). It is further undisputed that, when a security deposit is commingled, the party which provided the deposit is entitled to its immediate return (*Matter of Perfection Tech. Servs. Press* [*ChernopDalecar Realty Corp.*], 18 NY2d 644, 645 [1966]), with 9% statutory interest from the date of the commingling. *Tappan Golf Dr. Range, Inc. v Tappan Prop., Inc.*, 68 AD3d 440, 441 (1st Dept 2009). Nor do the parties dispute that, when such funds are advanced, the party receiving the funds is required to notify, in writing, the party providing the funds as to which bank the funds have been placed and how much has been placed into that bank. General Obligations Law § 7-103 (2). However, Herb Karlitz and Marco DePlano's conflicting affidavits, neither of which details when, where, or between whom, the nature of the May 27, 2004 $91,800.00 payment was discussed, and the evidence raise a triable issue as to whether that money was given by Karlitz to DePlano as security for the performance of the sublease.

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Clearly, that the funds were given to DePlano without providing security to Karlitz would be illogical. Further that the check was issued to DePlano, instead of Ninety-Five, suggests that the funds were to provide security under the sublease. Also, although the sublease does not specifically discuss a security deposit, it does, as previously noted, indicate that, in addition to half of the rent and the expenses and escalations, Karlitz was to provide half of "any and all other charges imposed" by Ninety-Five on DePlano. Lease, ¶ 5 (f). However, that Karlitz's check was issued in May 2004, when DePlano executed its lease, and not in July, when Karlitz executed its sublease, that the sublease specifically excluded the lease's security provision and did not set forth a separate security provision under the sublease, and that Marco DePlano's letter of May 27, 2004 to Herb Karlitz stated that the $91,800.00 represented half the security deposit under the lease, raise issues as to why the funds were given and suggest that they may have been given by Karlitz to DePlano without any thought as to what would happen in the event of DePlano's default under the prime lease. It is not even clear on the present record whether Karlitz was represented by counsel in its sublease negotiations. In light of the foregoing and the conclusory nature of the principals' affidavits, this branch of Karlitz's cross motion must be and, hereby is, denied.

Karlitz's Document Demand

The branch of Karlitz's cross motion which seeks an order compelling Ninety-Five to respond to Karlitz's November 22, 2011 document demand's request for production is granted except as to the records set forth in items "6" through "9", since they pertain to the elevators' condition, which as previously noted, is not a basis for a constructive eviction claim.

Conclusion

Accordingly, it is

ORDERED that plaintiff Ninety-Five Madison Company, L.P.'s motion for an order granting it summary judgment against defendant, Karlitz & Company, Inc., is granted as follows:

(1) Plaintiff is granted partial summary judgment against defendant on that portion of plaintiff's first cause of action which seeks to recover defendant's February 2011 fixed rent, and plaintiff is, therefore granted judgment on that portion of its first cause of action in the amount of $13,439.60, with interest at the statutory rate from January 31, 2011 until the date of the entry of judgment as calculated by the Clerk, without costs, but with disbursements to be taxed by the Clerk, upon submission of an appropriate bill of costs, and the portion of plaintiff's first cause of action seeking defendant's fixed rent for the month of February 2011 is severed, and the Clerk is directed to enter judgment accordingly;

(2) Plaintiff is granted partial summary judgment against defendant on that portion of its second cause of action which seeks attorneys' fees from defendant in connection with that portion of the action which sought defendant's fixed rent for February 2011, and a hearing on the issue of the amount of plaintiff's legal fees related to that issue will be held at the conclusion of the action, when it can be combined with the determination of the amount of any other attorneys' fees owing; and it is further

ORDERED that the branch of Karlitz & Company, Inc.'s cross motion which seeks an order granting it summary judgment dismissing Ninety-Five Madison Company, L.P.'s complaint is denied; and it is further

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ORDERED that the branch of Karlitz & Company, Inc.'s cross motion which seeks an order granting it partial summary judgment on the second cause of action of its third-party complaint, compelling third-party defendant, DePlano Group Inc., to return the $91,800.00 given to it by Karlitz & Company, Inc. and/or entering a judgment against DePlano Group Inc. in that amount, with interest of nine percent from an unspecified date in July 2004, is denied; and it is further

ORDERED that the branch of Karlitz & Company, Inc.'s cross motion which seeks an order compelling Ninety-Five Madison Company, L.P. to respond to its November 22, 2011 document demand's request for production is granted to the extent that, within 10 days of service of a copy of this order with notice of entry, Ninety-Five Madison Company, L.P.'s counsel is directed to arrange with the other parties' counsel for a prompt mutually agreeable date for copying and inspecting only the records set forth in items "1" through "5" of that request for production; and it is further

ORDERED that the balance of plaintiff's first cause of action shall continue, as shall plaintiff's second cause of action, defendant's counterclaims, and the third-party action.

Dated: February 27, 2014

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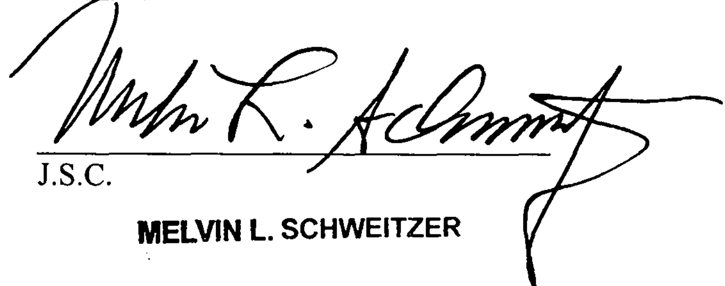

J.S.C.

MELVIN L. SCHWEITZER