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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Arthur F. Engoron Justice PART 37

Index Number : 109017/2007
WOMEN'S INTERART CENTER INC
vs.
NYC ECONOMIC DEVELOPMENT CORP.
SEQUENCE NUMBER : 025
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH MEMORANDUM DECISION, ATTACHED.

FILED
MAY 19 2014
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/28/14

_____, J.S.C.
HON. ARTHUR F. ENGORON

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

----------x

WOMEN'S INTERART CENTER, INC.,

Plaintiff,

- against -

NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION, CITY OF NEW YORK, DANIEL DOCTOROFF, Deputy Mayor, City of New York, MICHAEL BLOOMBERG, Mayor, City of New York, et al.,

Defendants.

----------x

WOMEN'S INTERART CENTER, INC.,

Plaintiff,

- against -

CLINTON HOUSING DEVELOPMENT FUND CORP.,

Defendant.

---------- x

Index Number: 109017/07 - Action # 1

Motion Sequence Numbers: 22, 25, 26

Decision and Order

Index Number 113088/07 - Action # 2

Arthur F. Engoron, Justice

Motion Sequence Numbers 22, by Clinton Housing Development Fund Corp., for partial summary judgment, and the Cross-Motion thereto, by Women's Interart Center, Inc., for summary judgment; 25, by various defendants in Action # 1, for summary judgment; and 26, by the City of New York, for leave to intervene in the landlord-tenant proceedings consolidated into Action # 1, are consolidated for disposition and disposed of as follows:

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 29, were used on these motions:

PAPERS OF RECORD

Papers Numbered:

1. 5/1/13 - CHDFC Notice of Mot. for Partial S.J.; Restuccia and Steinitz Affs.; Exhs. A-T; A-Q.

2. 6/28/13 - City Defendants' ("City's") Notice of Motion for S.J.; Shapiro Aff.; Exhs. A-F.

3. 6/28/13 - Goldfinger Aff. in Support of the City's Motion for S.J.; Exhs. A-S (except Exh. D).

4. 6/28/13 - Goldfinger Aff. in Support of City's Motion for S.J., Exh. D, Volume 1.

5. 6/28/13 - Goldfinger Aff. in Support of City's Motion for S.J., Exh. D, Volume 2.

6. 6/28/13 - Goldfinger Aff. in Support of City's Motion for S.J., Exh. D, Volume 3.

7. 6/28/13 - Goldfinger Aff. in Support of City's Motion for S.J., Exhs. T-TT.

8. 6/28/13 - Weinberg Aff. in Support of City's Motion for Summary Judgment; Exhs. A-PP.

9. 6/28/13 - Plaintiff's Notice of Cross-Motion for S.J.; Stern and Geist Affs.; Exhs. A-X.

10. 8/1/13 - CHDFC Reply in Support of Partial S.J., Steinitz Aff.; Exhs. 1-7.

11. 8/2/13 - City's Notice of Motion to Intervene; Shapiro and Weinberg Affs.; Exhs. A-L; A-E.

12. 9/9/13 - Plaintiff's Reply in Support of S.J. and Opp. to Intervene, Stern Aff.; Exhs. A-H.

13. 9/12/13 - CHDFC's Aff. of No Opposition to City's Motion to Intervene.

14. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Aff.

15. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Aff., Exhs. A-Q.

16. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Aff., Exhs. R-VVV (except Y).

17. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Aff., Exh. Y.

18. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Aff., Exhs. WWW-ZZZZZ.

19. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Aff., Exhs. AAAAAA-BBBBBBBB.

20. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Addendum 1.

21. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Addendum 2.

22. 10/5/13 - Plaintiff's Opp. to City's Motion for S.J., Lewitin Addendum 3.

23. 9/30/15 - Plaintiff's Opp. to City's Motion for S.J., Glascoff Aff.; Exhs. 1-33.

24. 9/30/15 - Plaintiff's Opp. to City's Motion for S.J., Friedman Affs.; Exhs. 1-6; 1-3.

25. Misc. Dates - Plaintiff's Opp. to City's Motion for S.J., Eldridge, Firestone, Geist, etc., Affs.

26. 10/4/13 - Plaintiff's Opp. to City's Motion for S.J., Stern Aff.; Exhs. A-O.

27. 11/20/13 - City's Reply in Support of Motion for S.J., Shapiro Aff.; Exhs. A-G; Braverman Aff.; Exhs. A-B; Ulrey Aff.; Exh. A.

28. 12/3/13 - Plaintiff's Sur-Reply in Opp. to City's Motion for S.J., Glascoff and Friedman Affs.; Exhs. 1-5.

29. 3/12/14 - City's Sur-Sur-Reply in Support of Mot. for S.J., Shapiro and Braverman Affs.; Exhs. A-G.

PAPERS NOT OF RECORD

Papers Lettered:

A. 7/1/13 - City's Memorandum in Support of Motion for Summary Judgment.

B. 9/30/13 - Plaintiff's Memorandum as to Meaning of Contract Terminology "In Place."

C. 10/7/13 - Plaintiff's Memorandum of Law in Opposition to City's Motion for S.J.

D. 10/15/13 - Plaintiff's letter explaining corrections to exhibits.

E. 11/21/13 - City's Reply Memorandum of Law in Support of Summary Judgment

F. 12/10/13 - City's Letter of 12/10/13 addressing Sur-Replies.

Plaintiff's request for oral argument is denied, in the Court's discretion, as unnecessary.

Abbreviations:
CCB = Community Capital Bank
CDBG = Community Development Block Grant
CHDC = Clinton Housing Development Company
CHDFC = Clinton Housing Development Fund Corp. (collectively with CHDC, "CHDFC")
CURA - Clinton Urban Renewal Area
EDC = Economic Development Corporation of the City of New York
EDI = Economic Development Initiative
ESDC = Empire State Development Corporation

EST = Ensemble Studio Theatre
HPD = New York City Department of Housing Preservation and Development.
HUD = United States Department of Housing and Urban Development
IDA = New York City Industrial Development Agency
IRSC = The Interart Rehearsal Studio and Cultural Center Complex
NYSERDA = New York State Energy Research and Development Authority
ODM = New York City Office of the Deputy Mayor
OMB = NYC Office of Management and Budget
OSB = Old School Building (552 West 53rd Street)
ULURP = Uniform Land Use Review Procedure
WIC = Women's Interart Center, Inc.

Cast of Characters (affiliations are indicated as of the times relevant hereto):
Alper, Andrew - EDC President
Balder, Robert W. - EDC Executive VP for Real Estate and Development
Bahat, Roy - ODM Senior Policy Advisor and liaison to EDC
Basser-Bigio, Barbara - EDC employee
Blatchford, Laurel - ODM Senior Policy Advisor and liaison to HPD
Bloomberg, Michael - City of New York Mayor
Brannick, Patricia - EDC General Counsel
Braverman, Jill - EDC attorney
Carey, Michael G. - EDC President
Cataldo, Paul - OMB Director of Community Development
Collignon, Kate - EDC Real Estate Division employee and IRSC Project Manager
Dempster, Curt - EST Artistic Director
Doctoroff, Daniel - ODM Deputy Mayor for Economic Development and Rebuilding
Edwards, Carolyn - EDC Vice President
Eldridge, Ronnie - NYC Council Member and (later) WIC Board Member
Friedman, Theodore - WIC Attorney
Geist, Veronica - WIC's Director of Special Projects
Glascoff, Donald, Jr. - WIC's transactional attorney; partner at Cadwalader, Wickersham & Taft
Goldfinger, Susan - EDC Senior VP for Real Estate Transactions
Harding, Robert - OMB Director and (later) Deputy Mayor for Development and Finance
LaPalme, Robert - EDC transactional attorney
Larsen, Brian - EDC Capital Program Division employee
Lewitin, Marguerite A. L. - WIC President and Artistic Director
Marcus, Jed - EST Attorney
Martinez, Mel - HUD Secretary
Nederlander, James, Sr. - Nederlander Organization, Principal
Perine, Jerilyn - HPD Deputy Commissioner and (later) Commissioner
Restuccia, Joe - CHDFC Executive Director and Treasurer
Rutstein, Valerie - EDC Finance Division employee and IRSC financial analyst

Shapiro, Susan - NYC Assistant Corporation Counsel
Steinitz, Jeffrey - CHDFC Attorney
Stern, Anna - WIC Attorney
Warren, John - HPD First Deputy Commissioner
Weinberg, Harold - HPD Director of Special Litigation

Short Version of This Opinion

By the Final Closing Date of the subject contract, WIC did not have signed commitments for all budgeted financing; WIC had not secured sufficient "swing space" for the tenants in the subject building; the building was not vacant; and nobody else was legally responsible for these defaults. Thus, defendants were entitled to terminate the contract and, now, to summary judgment.

Long Version of This Opinion

Background

Artistic Space

WIC was founded in 1969. Its self-proclaimed "mission is to promote the arts by organizing workshops, seminars, productions and exhibitions to encourage and advance the development and expression of artists' skills and creativity, with a particular emphasis on women artists." Intervention Motion Exh. B, Action # 1 Complaint ("Complaint") ¶ 1. In 1971, WIC began to occupy space in 549 West 52nd Street, New York, NY ("the 549 Building"), a ten-story commercial building in the Midtown-West (a/k/a "Clinton" or "Hell's Kitchen") neighborhood of Manhattan, as a month-to-month tenant of the owner, defendant the City of New York ("the City"). A few months later, EST, another artistic organization, also began occupying space in the 549 Building.

According to WIC, by at least the 1990s, bad blood ("ill feelings," to quote Justice Karen Smith, infra) existed between it and various City entities. WIC's complaints of "leaks, flooding, [a] malfunctioning boiler and radiators, and broken windows," in the 549 Building and the City's complaints of non-payment of rent resulted in mutual criticism and extensive landlord-tenant litigation. See, e.g., Compliant ¶¶ 25-31; see generally, Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 2005 WL 1241919, 2005 US Dist LEXIS 10027 (SDNY May 23, 2005) (Batts, J.) (detailing extensive adversarial litigation between WIC and the City).

In or about 2000, HPD designated CHDFC as the managing agent for 552 West 53rd Street, the OSB, which was owned by the City. In or about the spring of 2001, the City, acting through HPD, net leased the OSB to CHDFC. The plan was to convert the OSB to "supportive housing ("the OSB Supportive Housing Project"). See generally, Weinberg Aff. ¶ 46.

Pre-Contract Background and Negotiations

Real estate drives New York City, and WIC had big plans. "Plaintiff WIC proposed to purchase (for $1 each) [the 549 Building] and an adjacent City-owned property [a vacant lot generally described as 543-551 West 52nd Street], and rehabilitate and expand the commercial building (and construct a new [8-story]

building on the adjacent vacant lot) to create a . . . market[-]rate rehearsal space and cultural complex . . . called the [IRSC]." Goldfinger Aff. ¶ 5. WIC was to relocate certain tenants of the 549 Building to so-called "swing space" during construction and return them at below-market rents. Ibid. HPD, the custodian of the 549 Building, was to convey the properties from the City to EDC, which would sell them to WIC. To facilitate funding for the IRSC Project, the City, on behalf of WIC, applied for and, on November 15, 2000, was awarded $13.595 million in HUD Section 108 loan guarantees and a $2 million HUD EDI grant. During the course of applying for said funding, Cataldo e-mailed Brannick (Lewitin Opp. Aff., Exh. IIIII) that "it now appears the financing is in place."

The IRSC dream always had a hazy-sunlight, feel-good glow to it:

> WIC's story is that of a non-profit, with limited means of its own, which started in the 1970s in Clinton producing and supporting off-off-Broadway theatre and providing rehearsal and work and show space for artists, sculptors, and actors and dramatists, focused [on] women. By the 1990s it conceived of a Project; take the low rent, City[-]owned dilapidated building [WIC] occupied on 52nd Street and 11th Avenue, gut and renovate it, build on the vacant plot alongside, and emerge with a new 10[-]story Cultural Center containing a 499[-]seat theatre, two 99[-]seat theatres, and a whole set of studios and rehearsal and production and show space for movie companies, theatre companies, artists, sculptors and performers. All it would cost would be $20,000,000 and years of dedicated effort by WIC's personnel.

Friedman Opp. Aff. ¶ 6.

The main fly in the ointment, at least as later events would unfold and reveal, was that three tenants planned, indeed, were determined, to stay put: EST, which had a right to return to the 549 Building after its rehabilitation; Medicine Show Theatre Ensemble ("Medicine Show"), a tenant on the Third Floor, which did not have a right to return, because it took possession after a 1994 ULURP; and Soundscape, Inc., a marble-sculptor on the Eighth Floor, which did not have a right to return because HPD determined that it had committed certain bad acts (these latter two entities collectively, "M&S"). Due to the IRSC Project's receipt of HUD Section 108 funds, all three tenants were entitled to various notices and help in relocating, which even under the best of circumstances (i.e., voluntary compliance) could complicate and delay their removal. Weinberg Aff. ¶ 8. In or about November 2000, HPD served the required 90-day Notices to Vacate, etc. on M&S. Id. ¶ 9. (At that time, the evictions of M&S might have appeared more daunting and time-sensitive than the eviction of EST, because of the latter's right to return, or for other reasons.)

On or about June 8, 2001, WIC and CHDFC entered into a "License Agreement" (Lewitin Opp. Aff., Exh. VV; Stern Cross-Moving Aff. ¶ 14; Weinberg Aff., Exh. HH) for space in the OSB. The license terminated December 31, 2001. After said date, pursuant §§ 1.1 and 32.1, CHDFC had an unconditional right to terminate the license upon 30 days prior written notice. CHDFC had sole discretion to extend the license for up to another year. In or about the summer of 2001, WIC raised, then spent, somewhere between $200,000 and $300,000 to rehabilitate portions of the OSB, to be used as "swing space" for tenants from the 549 Building.

Meanwhile, Donald Glascoff, a seasoned real estate attorney, on behalf of WIC, and Robert LaPalme, a transactional attorney, on behalf of EDC, were negotiating the subject contract. "There were at least eight versions (and there may have been more) that went back and forth between us, each with numerous handwritten changes and remarks by both Mr. LaPalme and myself." Glascoff Opp. Aff. ¶ 8. Thus, the contract was intensely negotiated and carefully worded, at arm's length, by two sophisticated attorneys.

The Subject Contract

WIC's grandiose plans were embodied in the subject contract ("the Contract"), titled "CONTRACT OF SALE between NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION and WOMEN'S INTERART CENTER," encompassing 34 pages, and dated August 30, 2001 (Goldfinger Aff., Exh. B). As stated in an opening recitation (at 2), EDC would "acquire title to the Property by a deed from the City, prior to or simultaneously with the closing of title hereunder."

Section 1(a) provides that EDC will sell all "right, title and interest" in the property to WIC. See Exhibit A, "Property Metes and Bounds Description," apparently encompassing the 549 Building and the adjacent vacant lot. Section 2(a) provides that the purchase price would be $2.00, "paid by [WIC] in cash or by check" (demonstrating EDC's generosity and flexibility in equal measure). Section 4(b) provides that WIC "shall promptly and in good faith take all steps necessary to fulfill the conditions for closing set forth in Section 6 hereof ('Conditions for Closing') ... ."

Section 4(f) provides as follows:

> By the earlier of September 15, 2001 or 30 days prior to the date, if any [WIC] and [EDC] have agreed on for the Closing, [WIC] shall (x) obtain, and furnish [EDC] with signed copies of, financing commitments from institutions and/or governmental entities, and/or (y) demonstrate to [EDC's] reasonable satisfaction that equity of [WIC] is in place, which (i) is in an aggregate amount which is not less than $18,469,824 or such greater amount which is, to [EDC's] reasonable satisfaction, sufficient to finance the purchase of the Property [$2.00???] and any rehabilitation on the Property required by this Contract and the Deed (the 'Project Budget Amount') and (ii) is on terms that Seller reasonably determines will permit such rehabilitation to be completed. Any such financing commitment must state the amount, interest rate and payment terms of the loan. The provisions of this Section 4(f) are inserted for the benefit of [EDC] only and may be waived only by [EDC] in its sole discretion.

Section 4(g) provides as follows:

> [WIC] shall have entered into a loan agreement with [EDC], in a form acceptable to [EDC] in its sole discretion, which shall provide for, among other things, the right of [EDC] to requisition up to $100,000 in loan proceeds, for the purpose of paying HPD's fees, costs and expenses... incurred in connection with the relocation of [M&S].

Section 4(h) provides as follows:

> By the earlier of September 30, 2001 or 15 days prior to the date, if any, [WIC] and [EDC] have agreed on for the Closing, Purchaser shall furnish Seller evidence, in a form satisfactory to [EDC] in its sole discretion, that it has made good faith reasonable efforts to enter into binding agreements to (x) lease to the tenants shown on Exhibit B attached hereto (the "Existing Tenants") their current premises within the Building (which leases will be effective after the renovation of the building upon the issuance of temporary certificates of occupancy for the Building), it being understood that the leases will include below market rent terms and other terms satisfactory to [EDC] in its sole discretion, and (y) relocate, at [WIC's] expense each Existing Tenant to temporary premises in Manhattan (below 110th Street), comparable to such Existing Tenant's current premises within the Building, for use during the renovation of such Tenant's Building premises, for which [WIC] shall pay the rental costs (but not the utility or build-out costs) of such relocation premises and the cost of relocating such Existing Tenant to the Building upon the issuance of a temporary certificate of occupancy for such Existing Tenant's Building premises, all to [EDC's] satisfaction, in its sole discretion. The provisions of this Section 4(g) [sic; intended to be 4(h)] ... may be waived only by [EDC] and in its sole discretion.

Section 4(i) provides as follows:

> If [WIC] shall not comply with the requirements of Sections 4(a) [through] 4(h) [inclusive], then, [EDC][,] after giving [WIC] notice and such time (subject in all cases to the time periods set forth in Section 5 hereof, which shall not be extended by application of this section 4(h) [sic; intended to be 4(i)], to cure such non-compliance as is necessary under the circumstances then prevailing, may upon notice to [WIC] terminate this Contract on account of [WIC's] default, and shall have the remedies set forth in Section 15 hereof.

Section 5 provides, in relevant part, as follows:

> (a) The closing of title pursuant to this Contract (the "Closing") will take place . . . on October 15, 2001 (the actual date of the Closing being herein referred to as the "Closing Date") ... .
>
> * * *
>
> (c) [I]f the Closing does not take place on October 15, 2001, [EDC] reserves the right to notify [WIC] of the date on which the Closing will take place (including during any Extension Period), with time of the essence as against [WIC] (which date shall be deemed to be the Closing Date). Such date shall not be less than 14 days following [WIC's] receipt of such notice. If the Closing does not take place on or before such date or other date on which the Closing is to occur, the contract shall be deemed terminated on such date or such extension date and, if [WIC] is in default under this Contract at such time, Seller shall have the remedies set forth in Section 15(b) of this Contract. (Failure of the Closing to take place

on or before such date or such extension date due to the fault, default or delay of [WIC] shall be a default by [WIC] under this Contract.)

Section 6, "Conditions of Closing," provides, as here relevant, as follows:

The following are Conditions for Closing:

* * *

(j) [WIC] shall have closed on the financing and/or funded equity of [WIC] required by Section 4(f) of this Contract. At the Closing, [WIC] must provide [EDC] with an affidavit signed by an officer of [WIC] that the above commitments are still in effect and the above equity is still in place. Failure to do so shall be a default by [WIC]. The provisions of this Section 6(j) . . . may be waived only by [EDC] in its sole discretion.

* * *

(o) [EDC] shall have determined, in its sole discretion, that the Building is vacant and that there are no persons with claims or interests as holdover tenants or other asserted occupancy rights, other than Existing Tenants which have been relocated to other premises and have agreed to return to the renovated Building as tenants on terms approved by both [EDC] and [WIC] in accordance with paragraph 4(h) hereof.

If, prior to the Closing, [EDC] reasonably believes that any of the conditions specified above cannot be fulfilled by the latest date set forth for the Closing in Section 5, then [EDC] may notify [WIC] in writing that the Contract is terminated for such reason. Thereafter neither party shall have any rights against or liabilities to the other by reason of this Contract.

If, on the date set for the Closing, any of the conditions specified above shall not have been fulfilled, then [EDC] shall have no obligation to transfer and convey the Property to [WIC] ... and, except where such condition has not been fulfilled on account of [WIC's] failure to perform its obligations under Section 4 hereof (in which case [EDC] shall have the rights and remedies set forth in Section 4(h) and Section 15 hereof), neither party shall have any rights against or liabilities to the other by reason of this Contract.

Section 15(b) provides that "If [WIC] . . . shall default in the performance of any of its . . . obligations under this Contract . . . then [EDC] shall have the right to terminate this Contract." Section 17(b) constitutes a standard "merger" clause. Exhibit B to the Contract, "Permitted Tenants," lists the following: Dorothy Gillespie; Gary DePasquale; Studio for Visual Research (including Don Porcaro, Leslie Wayne and David Shapiro); David Slivka; EST; and WIC. Michael G. Carey signed the Contract on behalf of EDC, and Ms. Lewitin signed on behalf of WIC.

The Period Between the Execution and the (Purported) Termination

From August 30, 2001, when the parties executed the Contract, to December 10, 2002, when EDC purported to terminate it, WIC scrambled to put all of the pieces in place. However, not all of the pieces, most ominously EST, were cooperating.

In or about September 2001, WIC effected the relocation of all but three of the existing 549 Building long-term cultural tenants, including WIC itself (collectively "the OSB Tenants"), to the OSB. Complaint ¶ 59; Opp. Memo, at 36. EST and M&S remained in the 549 Building.

On or about November 30, 2001, a mere two months later, CHDFC served Notices to Terminate on the OSB Tenants, ostensibly to move ahead with the OSB Supportive Housing Project. Lewitin Opp. Aff. ¶ 74; Stern Cross-Moving Aff. ¶ 14. WIC suggests that this was actually a "pretext" for the diabolical plan to kill the IRSC Project. Complaint ¶ 76. According to former City Council Member Ronnie Eldridge, the OSB Supportive Housing Project "was a long-range plan and ... the actual construction required to convert the [OSB] into residential use would not begin until after the IRSC Project was completed and the [OSB Tenants] resettled into the [549] Building." Eldridge Aff. ¶ 2; Lewitin Opp. Aff. ¶ 153. "Once the [OSB Tenants] relocated [to the OSB] in September of 2001, since the [CHDFC] project was still not ready to be submitted for ULURP, I fully expected that the artists would not be required to move before 2004." Eldridge Aff. ¶ 5; see also, Geist Opp. Aff. ¶ 3 ("Restuccia described the affordable housing rehabilitation planned for the [OSB] as 'long-range.'"); Glascoff Opp. Aff. ¶ 106 ("The [CHDFC] project is no where near ready to go into the ground. ... [T]he City should just permit [the OSB Tenants] to stay in the [OSB] until [CHDFC] is really ready to start construction[.]")

Premature eviction from the OSB would be fatal to the IRSC Project because, at a minimum, as Lewitin acknowledged in her deposition (Shapiro Aff., Exh. E, at 691:15-17), WIC's budget "assumed that the [OSB Tenants] were gonna be staying in the OSB" until after completion of the 549 Building rehabilitation and did not budget for any additional rent and relocation costs.

In the fall of 2001 there were some positive signs and developments. In a letter dated October 18, 2001 (Goldfinger Aff., Exh. C), a mere month and a half after execution of the Contract, EDC wrote to WIC that the closing conditions that WIC still needed to satisfy were, as here relevant: "[6](j) Closing on financing and/or funded equity; [and] (o) Building confirmed vacant." EDC indicated that WIC had satisfied certain of the remaining closing conditions and that as to the rest, "EDC does not anticipate any obstacles to satisfying these, or that WIC will not be found to be in compliance." Ironically (in retrospect), WIC was worried about obtaining too much funding, because in that case it would lose its federal funding, which was available only if needed. Shapiro Moving Exh. E, Lewitin EBT 664:1 to 665:13.

In a Memorandum of Understanding ("MOU") dated November 27, 2001 (Lewitin Opp. Aff., Exh. I; Weinberg Aff., Exh. G), HPD, on behalf of the City, and EDC agreed, essentially, that if EDC satisfied two pre-conditions, the first requiring EDC to provide certain on-site (at the 549 Building) information to HPD, and the second requiring EDC to make available certain funds, HPD would "provide ... Relocation [which seems, at least in part, in this context, to be a euphemism for "Eviction"] Services," and EDC would reimburse HPD for said services. The "evictees" were M&S and EST (an earlier version of this MOU had

only covered M&S). See generally, Stern Opp. Aff. ¶ 5 (the MOU "ensured that HPD would be reimbursed by WIC [through EDC] for the costs ... of relocating or evicting [M&S and EST]"). Section 4(d) provided that "If HPD and EDC disagree as to the interpretation or application of any Laws, HPD's interpretation or application shall prevail."

Following right on the heels of this MOU, on or about November 30, 2001, HPD served 30-day Notices To Terminate on M&S and a 90-day Notice to Vacate on EST (Weinberg Aff. ¶¶ 13, 26). Goldfinger Aff., Exh. D, at Exh. I through Exh. K.

In 2002, the Bloomberg Administration assumed office. Later that year, numerous municipal entities approved the IRSC Project. Complaint ¶ 34.

In January 2002, HPD commenced summary holdover proceedings against M&S. Weinberg Aff. ¶ 26. The proceedings were repeatedly adjourned, including on November 13, 2002, two days before the Final Closing Date (infra), until they lapsed. Opp. Memo, at 71, nn. 108, 109.

In an e-mail dated February 15, 2002, Warren, who was aware of the Contract's vacancy requirement, directed that the eviction efforts against M&S and EST be "put on hold until we know if the [IRSC] project is proceeding." Lewitin Opp. Aff., Exh. CCCC. The "hold" was never rescinded, and HPD never resumed the eviction proceedings against M&S and never commenced eviction proceedings against EST.

In an e-mail to Blatchford and Bahat (Lewitin Opp. Aff., Exh. FFFF) dated March 23, 2002 (incidentally, a Saturday, burnishing his reputation as a hard-worker), Doctoroff wrote, "Let the [IRSC] project proceed."

On or about March 21, 2002, CHDFC commenced an eviction proceeding (L&T Index No. 66084/02) against the OSB Tenants (April 21 and 23, 2014 e-mails to the Court, copied to all counsel). WIC claims that CHDFC did this with the knowledge and approval (indeed, at the direction) of ODM and HPD. Lewitin Opp. Aff. ¶ 75; Opp. Memo, at 125. This was "only months after [the OSB Tenants] had moved into a building [i.e., the OSB] renovated for them with $300,000 [$200,000 to $300,000?] of public and private funds." However, WIC does not seem to claim, much less have any evidence, that the ODM and HPD directed CHDFC to do this in order to scuttle the IRSC Project. Weinberg says (Weinberg Aff. ¶ 43) that "HPD was not involved in the decision by [CHDFC] to bring eviction proceedings against [the OSB Tenants]."

At HPD's request, CHDFC adjourned the OSB eviction proceeding from April to June, 2002. According to Stern (Stern Cross-Moving Aff. ¶ 14) CHDFC halted the OSB eviction proceeding in April 2002; revived it in August; halted it again in September; and revived it again in December. In a slightly different version, Steinitz says (April 21 and 23, 2014 e-mails to the Court, copied to all counsel) that on September 5, 2002 (Stern says September 9) CHDFC withdrew the March 2001 proceeding; that on November 5, 2002 CHDFC instituted a new proceeding (L&T Index No. 106578/02), and that pursuant to a stipulation dated January 21, 2003, that second proceeding was settled.

On or about March 27, 2002, HPD served a 30-day Notice to Terminate on EST. Weinberg Aff. ¶ 37, Exh. Z. EST demanded that HPD rescind the Notice; HPD refused. Weinberg Aff. ¶ 39. HPD and WIC went to great lengths to help, or force, EST and M&S ("the 549 Building Tenants"), to "relocate." These three "recalcitrant" tenants had facility requirements particularly difficult to satisfy. Weinberg Aff. ¶¶ 14-25.

Weinberg states as follows:

> [W]henever I am assigned to handle an eviction proceeding involving a project that requires that a tenant ... be evicted from a building ... so that the project ... can move forward, I [communicate] with the HPD staff who are involved with the project so that I stay informed about the status of the project.
>
> The progress of a project and its status are essential considerations in moving an eviction proceedin[g] forward, especially if a commercial (or cultural) tenant cannot be relocated amicably into a different space where the tenant can continue its livelihood. In our experience at HPD ... a court will not permit the eviction of a commercial (or cultural) tenant from a City-owned building, even i[f] the tenant is a month-to-month commercial tenant, so that a development project can go forward, unless the project is imminent.

Weinberg Aff. ¶¶ 28-29; accord, Warren EBT (Stern Cross-Moving Aff., Exh. J) at 53-55 ("the ultimate Warrant of Eviction is not going to get issued by a judge, in our experience, until a project start is imminent"). In an e-mail dated February 15, 2002, Warren directed Weinberg to "put [the M&S eviction proceedings] on hold until we know if the [IRSC] project is proceeding." Warren Aff. ¶ 32. In late March 2002, HPD consented to adjourn the M&S eviction proceedings as, Weinberg claims, the lesser of two evils, the greater evil being having a judge mark them "off calendar," which would require a motion to restore. Weinberg Aff. ¶¶ 32-34. Thus, "because neither Medicine Show nor Soundscape could be relocated amicably, the progress and status of the [IRSC] project informed HPD's prosecution of the eviction proceedings against [M&S]." Weinberg Aff. ¶ 32. When HPD adjourned the M&S eviction proceedings, WIC did not yet have a construction contract for the 549 Building; indeed, WIC did not have one (Goldfinger Aff., Exh. T) until late October 2002. Thus, from April through August 2002, "all that [HPD] did with respect to moving forward the eviction proceeding against [EST] was to file a thirty[-]day [Notice to Terminate]." Lewitin Opp. Aff., Exh. Y, Tab 12 (Warren EBT), at 202-03.

Stern methodically assaults what she aptly denominates (Stern Opp. Aff. ¶ 9) the "imminent project defense," which could be defined as "we did not pursue a summary holdover proceeding because a judge will only evict a tenant to make way for a construction project that is 'imminent.'" Her painstaking deconstruction of various cases relied upon by Weinberg and Warren (id., *passim*) leads her to conclude that "the City defendants can produce no case where 'a court will not permit the eviction of a commercial (or cultural) tenant from a City-owned building, even if the tenant is a month-to-month commercial tenant, so that a development can go forward, unless the project is imminent.'" Id. ¶ 15. Thus (id. ¶ 17), "Weinberg's and Warren's rationale for asserting the imminent project defense is as hollow and unsubstantiated as the defense itself, leaving one to surmise that [it was] fabricated after the termination of the contract."

By defendants' reckoning, in the crucial spring and summer of 2002, planning for the IRSC Project, on the one hand, and the eviction proceedings against the 549 Building Tenants, on the other hand, went into something of a death spiral, neither accommodating the other. By WIC's reckoning (Stern Opp. Aff. ¶ 18), "Weinberg and Warren were the makers of the very condition they claimed was preventing them from evicting [the 549 Building Tenants]." In any event, the 549 Building Tenants refused to budge.

In WIC's telling, the past is prologue, and HPD Deputy Commissioner, later Commissioner, Jerilyn Perine, who had clashed with WIC in the landlord-tenant battles, personally decided, due to "her irrational, arbitrary, and capricious vendetta to punish [WIC] for its past political and legal challenges to her authority," that the IRSC Project "should be scrapped." Complaint ¶¶ 28, 46. Perine allegedly found her stalking horse in EST. Due to EST's own irrational intransigence and/or Perine's promise to provide EST with superior space nearby, EST refused to relocate. Complaint ¶ 36 et seq. "[O]n information and belief, EST's intransigence was the product of defendant Perine's pledge to 'take care of' EST in exchange for EST's assistance in scuttling [WIC's] IRSC Project." Complaint ¶ 55. Apparently, neither Perine nor any of her successors ever honored any such pledge, as EST has stayed put to this day.

EST's obstinacy may have resulted from the "controversial management style" of its visionary Artistic Directory, Curt Dempster (incidentally, recently deceased), who "refused to consider the advantages of growing by improving the physical constraints of the space at [the 549 Building]." Firestone Opp. Aff. ¶ 3. Or perhaps EST's motive was pure malice. Parnes Aff. ¶ 14 ("EST's unwillingness to [relocate to the Houseman] reflected my suspicion that their only goal was to stop the IRSC project.") Be that as it may ... .

In a June 7, 2002 Memorandum to ODM (Goldfinger Aff., Exh. D, at Exh. K, at Exh. W; Lewitin Opp. Aff., Exh AAAAA), Balder and Collignon wrote as follows: "WIC's latest submission ... did not demonstrate that the project financing is secured and included increased revenue projections that raised new questions. EDC is not able to conclude, as per a requirement in the contract of sale, that the project is financially feasible."

In or about June 2002, EDC "loaned" (without seeking repayment) money to WIC to pay for construction drawings and to relocate the 549 Building Tenants. Goldfinger Aff. ¶ 12. EDC also hired AMS Planning and Research Corp. an outside consultant, to assess the financial viability of the IRSC Project. Ibid. The AMS report, titled "Plan Evaluation," issued August 8, 2002 (Lewitin Opp. Aff., Addendum 2, Exhibit E), indicated certain risks inherent in the project, as defendants would have it, and/or "confirmed the economic feasability of the Project even under its projected worst[-]case scenario," as plaintiff would have it, Complaint ¶ 80; see Parnes Aff. ¶ 13 (the report concluded that "the IRSC met all threshold criteria and was found feasible"). The final sentence of the Executive Summary of the report, at 4, in classic consultant-speak, reads as follows: "Based on our research, we developed a series of alternate forecasts. These three scenarios all illustrate a negative variance from WIC's forecast but project neutral to positive result in the base year (year 5) of our analysis if all other assumptions hold."

In a July 11, 2002 letter (Weinberg Aff., Exh. DD) Collignon wrote to EST as follows:

> [the] sale of the [549 Building] to [WIC] is expected to move forward pending fullfillment [sic] of all contract requirements. * * *

> [T]he eviction action [sic; would have been a proceeding] [against EST] is expected to proceed in order to keep the [IRSC Project] on time and on budget. However, we believe that there is a basis to resolve many of the outstanding issues and hope to work toward an amicable and mutually agreeable solution concurrently with the eviction proceeding [sic; one was never begun].

By late July, CHDFC was eager to move forward on the OSB Supportive Housing Project. Weinberg Aff. ¶ 47. In a July 22 e-mail to Blatchford (Lewitin Aff., Exh WW), Warren wrote as follows:

> I met with Joe Restuccia on Friday and he mentioned that he needs to start the eviction case against [WIC] on the space in the [OSB] ([to facilitate the OSB Supportive Housing Project]) so that [WIC] is out in the fall for his closing.
>
> We had asked that [Restuccia] hold off for awhile back in May. He needs to start now. I wanted to touch base with you before I gave him the green light. I think he needs to begin.

Sure enough, CHDFC "reactivated" the OSB eviction proceeding in late July, 2002.

The Dueling Scenarios

In or about early August 2002, apparently in preparation for an August 16 meeting, EDC prepared two "Scenarios" for the IRSC Project: a "Project Completion Scenario" and a "Termination Scenario" ("the Dueling Scenarios"). Lewitin Opp. Aff. ¶ 150, Exh. D. The "Goal" was "To resolve all outstanding issues on the WIC project in the most expeditious, fiscally responsible, and legally appropriate manner."

The rationales for the "Completion Scenario" were the need of government to subsidize artistic rehearsal space; the federal financing available; and that "WIC has spent extensive time and money on a project that they were led to believe had the City's support." The "Next Steps" would have included "Extend[ing the Contract] through January 2003"; adjourning the OSB evictions; and commencing the EST, and continuing the M&S, evictions. The least costly result would have been to evict EST and have the project succeed; the most costly result would have been to pay for EST's relocation and, nevertheless, have the project default.

The rationales for the "Termination Scenario" were as follows:

> • City can't afford the associated risk
> • Too many moving pieces – Value-engineered GMP [i.e., Gross Maximum Price Construction Contract]; Nederlanders [sic]; Old School Building; EST, Soundscape and Medicine Show. May be impossible to get them all into place. If it is possible, can only be done with effort disproportionate to level of project priority.

The "Next Steps" would have included not renewing the contract, stopping the OSB eviction and the EST and M&S evictions, moving the OSB Tenants back to the 549 Building, and, ominously, "[p]repar[ing] for WIC litigation." The least costly result would have been to "Win WIC litigation"; terminate the leases; and sell the whole kit and caboodle. The "likely" costs were "[s]ome payment to WIC" and selling the 549

Building below market value. The most costly result would have been to lose the WIC litigation and to continue to lose money on the real estate.

EDC further broke down its alternatives to four: (1) provide WIC 45 days to meet contractual requirements; (2) continue tenant relocation negotiations; (3) commence EST eviction without further ado; and (4) terminate the Contract immediately. Each alternative was subject to a "costs/benefits" and "pros/cons" analysis. A "pro" of the first alternative is that it created the "Strongest legal basis should termination prove necessary." A "con" of the first alternative is that it "Creates hurdles for WIC before termination." The point is not clear, but, significantly, creating hurdles for WIC was viewed as a negative (unless the entire exercise was mere window-dressing). A "con" of the second alternative is that it "Likely simply postpones ultimate demise of project." A "pro" of the fourth alternative is that a "Legal basis exists for termination." A "con" is "Anticipate lengthy litigation from WIC."

Upon forwarding the AMS report and the seventh contract extension, the one to October 31, 2002, to WIC, EDC's Collignon warned WIC, in a letter dated August 23, 2002 (Goldfinger Aff., Exh. E, p. 2) "that failure to meet WIC's obligations under the Contract by this date will result in termination of the contract."

By a Notice of Discontinuance dated September 5, 2002, four days prior to a conference that Justice Smith had scheduled, CHDFC withdrew the OSB proceeding. Lewitin Opp. Aff. ¶¶ 157, 166; Weinberg Aff. ¶ 48.

EST's Federal Action

In this tense time, early September 2002, the ground shifted.

> EST commenced a federal law suit [in the district court for the the Southern District of New York against] WIC, the City of New York, Michael Bloomberg, HPD, EDC, [IDA,] HUD and Mel Martinez (Secretary of HUD) ... seeking "declaratory and injunctive relief arising from the efforts of Defendants WIC, EDC, HPD and the City to destroy plaintiff EST, by evicting EST from its home of 30 years, while not providing for EST's relocation as promised by defendants."

Lewitin Opp. Aff. ¶ 114; Stern Cross-Moving Aff. ¶ 22. Defendants claim that this action caught them off guard.

> In early September 2002, HPD was prepared to file an eviction proceeding against EST in Civil Court. However, as ... Warren said in his September 6, 2002 e-mail to me: "[T]iming is everything – [Marcus] just called to tell me that he is going to court to enjoin us from moving ahead on the eviction." * * * I had "the [Termination N]otice prepared and it was going to get served on [EST] on [September 9 or 10].
>
> On ... September 6, 2002, EST's counsel advised HPD and the City Law Department that EST was commencing an action in federal court challenging the [IRSC] project and on ... September 9, 2002 would be seeking a temporary restraining order staying HPD from moving ahead on its eviction of EST .... * * * Apparently, [EDC] had notified EST that

> HPD would press the eviction proceedings and seek court intervention to remove EST from the building in anticipation of the WIC project closing in September 2002.

Weinberg Aff. ¶¶ 40-41. EST's pre-emptive strike was assigned to Judge Naomi Reice Buchwald, who urged settlement, presided over several conferences, and offered binding arbitration. She did not enjoin HPD from evicting EST. "Judge Buchwald urged the City and HPD to refrain for a brief period from filing an eviction proceeding against EST ... while the parties attempted to resolve their differences .... After due consideration, the City and HPD complied with the Court's request." Weinberg Aff. ¶ 42, see also, Exh. GG: "Despite not signing the TRO, the judge strongly urged the city not to commence a summary proceeding since she did not think that adding another layer of litigation at this point would prove helpful to the parties' resolving their differences." According to defendants (Moving Memo, at 27), "[i]n September, 2002, in an attempt to resolve the [EST federal action], HPD, [EDC] and ... WIC agreed that HPD would not file an eviction proceeding ... pending WIC's attempt to offer EST comparable ... space during the construction period of the [IRSC] project." Goldfinger Aff. ¶ 57; but see Weinberg Aff. ¶ 42 ("After due consideration, the City and HPD complied with the Court's request [that HPD refrain for a time from filing an eviction proceeding].").

The Contract Extensions

Overall, EDC "granted WIC eight contract extensions (from an original Closing Date of October 15, 2001 until November 15, 2002) to enable [WIC] to satisfy the closing requirements of the Contract." Goldfinger Aff. ¶ 7. Those extension dates were December 15, 2001 and February 15, April 13, May 13, June 7, July 31, October 31, and November 15, 2002. The extension to October 31 (Lewitin Aff., Exh MMMMM) was dated August 24, 2002, after July 31 (see Lewitin Opp. Aff. ¶ 153). The aforesaid "closing requirements" included, in EDC's view, "securing [WIC's] own unconditional financing commitments and equity funding and ... swing space available for the entire construction period for the [OSB Tenants]." Goldfinger Aff. ¶ 7. As defendants point out (Moving Memo, at 24), each extension necessarily delayed the commencement, and thus the completion, of the 549 Building construction. This gave WIC more time to secure funding and evict the 549 Building Tenants, but it made WIC's "swing space" obligation correspondingly more difficult, as CHDFC was pushing to move forward on the OSB project.

By letter dated October 24, 2002 (Goldfinger Exh. K, at 2), Glascoff requested an eighth extension of the contract Closing Date, to Friday, November 15, 2002, 5:00 PM. In a responsive letter dated October 30, 2002 (Goldfinger Aff., Exh. N), EDC agreed "as a courtesy . . . to a final extension of the Contract of sale [to] November 15, 2002." In a letter dated the next day (Goldfinger Exh. O) EDC sent drafts of an extension agreement, and the following dire notice:

> As you know, this letter amendment will be the final extension of time for this Contract of Sale and WIC must satisfy all conditions for closing . . . before the close of business on Friday, November 15, 2002. [F]ailure to meet WIC's obligations under the Contract of Sale by November 15, 2002 will result in termination of the Contract of Sale.

The eighth, and final, contract extension agreement, dated October 31, 2002 (Goldfinger Aff., Exh. P; Lewitin Opp. Aff., Exh. VVVVV) provides, in part, as follows:

4. A seventh extension was agreed to by [EDC] and [WIC], resulting in the revised Closing Date being October 31, 2002 (the "Revised Closing Date["]).

Because all Conditions were not satisfied by the Revised Closing Date, the Closing did not take place.

Therefore, [EDC] and [WIC] hereby agree to an eighth extension of the Closing Date[,] to November 15, 2002, provided that Time is of the Essence. Purchaser is hereby advised that certain conditions to Closing that are Purchaser's responsibility to satisfy have not been met, and that failure to satisfy those conditions shall result in the termination of the Contract on November 15, 2002. No further extensions of the Closing Date will be granted by [EDC] unless all closing conditions that are the responsibility of [WIC] are satisfied by such date. Specifically, but without limiting or waiving any of the other conditions or other obligations of [WIC] under the Contract [WIC] must satisfy the conditions set forth in sub-Sections 4(f) [financing], 4(h) [tenant relocation], [and] 6(j) [financing] of the Contract. Notwithstanding that [WIC] may satisfy the aforementioned conditions by November 15, 2002, Seller has the right to terminate the Contract if Seller reasonably believes that any of the conditions for Closing set forth in Section 6 of the Contract cannot be fulfilled by the Closing Date including, but not limited to, the conditions set forth in sub-Section 6(o) [building vacant] of the Contract.

Ms. Lewitin "acknowledged and agreed" to the foregoing by her signature at the bottom thereof.

EDC's transmittal letter, dated November 4, 2002 (Goldfinger Aff., Exh. Q), continued to emphasize the finality of the November 15, 2002 Closing Date and pointedly asked, at 2, "whether WIC intends to submit additional documentation to EDC on or before November 15, 2002, or whether WIC's submissions stand complete."

By letter dated November 7, 2002 (Goldfinger Aff., Exh V), WIC, by Glascoff, replied that it had "submitted all required documentation."

EDC established a four-person team (Collignon, Rutstein, Larsen, and Braverman) that, upon preliminary review (Goldfinger Aff. ¶ 16), had "numerous questions and concerns." In a letter to WIC dated November 8 (Goldfinger Aff., Exh. W), EDC raised various issues, including funding commitments; "comparable" tenant relocation and return; and relocations and related costs for which WIC was responsible. According to the review team (Goldfinger Aff. ¶ 17), the October 31, 2002 project budget (Glascoff Opp. Aff., Exh. 12) was $20,889,624, while WIC's own "IRSC Project Account" (Goldfinger Aff., Exh. X, at D11964) indicated $17,664,371 available at closing. See generally, Goldfinger Aff., Exh. W, at D13189. (Interestingly, plaintiff's Complaint, ¶ 3, refers to "plaintiff's $22.3 million" art center.) EDC asked WIC for various financial and relocation details. Id. WIC responded by letters dated November 14 (Goldfinger Aff., Exhs. Y and Z). WIC stated that CCB had approved a $1,000,000 loan "on November 6, 2002, contingent on receiving commitment fees of $10,000 and certain financial information from [the Nederlander Organization]," and that the $200,000 ESDC grant "had already been approved ... and was due to be paid after all the paperwork cleared."

By the Final Closing Date defendants were taking the position that WIC "continued to be unable to pull together the multiple pieces of its proposed project." Goldfinger Aff. ¶ 6. "Even by November 15, 2002, the date established by the eighth and final extension of the Contract, WIC could not demonstrate that it had satisfied all of the required Conditions for Closing contained in Section 6 of the Contract." Goldfinger Aff. ¶ 7. From November 16 to December 10, 2002, EDC apparently mulled over whether or not to declare the Contract terminated.

The Termination Letter

By letter dated December 10, 2002 ("the Termination Letter") (Goldfinger Aff., Exh. NN), which Balder signed at Doctoroff's direction, or at least with his acquiescence (e.g. Geist Opp. Aff. ¶ 4 "[T]he [termination] decision had been made by Doctoroff."), EDC purported to terminate the Contract, on the ground that WIC had failed to satisfy its obligations under Sections 4(f), 4(h), 6(j) and 6(o) of the Contract.

The operative text of the letter is as follows:

> As provided in our letter agreement dated as of October 31, 2002, all of WIC's submissions to meet its Conditions for Closing in the [subject] Contract were due [by] November 15, 2002 ... .
>
> EDC has reviewed WIC's submissions dated October 31, 2002 and November 14, 2002. Based upon EDC's analysis of these submissions and as set forth below, EDC has determined that WIC has not satisfied its obligations under the Contract, and EDC reasonably believes the Conditions for Closing . . . cannot be fulfilled. Therefore, as of this date, EDC hereby terminates the Contract, pursuant to Section 6 thereof . . . .
>
> Specifically, WIC failed to demonstrate that as of November 15, 2002, it had sufficient financing commitments to finance the purchase of the Property and the rehabilitation of the Property required by the Contract (Contract Sections 6(j) and 4(f)). WIC failed to provide commitment letters for $1.2 million in financing represented in its $20,889,624 budget submitted October 31, 2002.
>
> Nor has WIC demonstrated that it made a reasonable effort to relocate certain tenants to comparable premises, as required under Contract Sections 6(o) and 4(h). ... WIC has not identified satisfactory relocation space for six tenants currently relocated at 552 West 53rd Street (Old School Building). WIC never provided specific relocation information for the full anticipated construction term with confirmed location(s), availability, rental, price and funding in WIC's budget for these tenants.
>
> In addition, WIC's offer of a combination of the basement of the Houseman Studio Theater Center plus several weeks for two seasons at the Mint Theater is not comparable relocation space for [EST], as EDC indicated to WIC in our letter dated November 14, 2002. To the extent WIC still seeks to propose alternate relocation space for EST, WIC has never confirmed to EDC final terms, including location(s), availability, rental price and relocation moving costs as funded in WIC's budget. In light of WIC's failure to make relocation space

> available to EST that is acceptable to EST, EDC believes that the Condition to Closing specified in Contract Section 6(o), requiring that the Property be vacant at closing, will not be fulfilled.

In a valiant, if vain, attempt to assuage the inevitable hard feelings, EDC added the following:

> EDC recognizes and appreciates WIC's tremendous efforts to bring this complex project to fruition for over more than a decade, and regrets that the project will not be completed. However inasmuch as the Closing Conditions have not been met, even after eight Contract extensions, and EDC reasonably believes that they will not be met in the future, EDC has resolved to terminate the Contract.

According to WIC (Complaint ¶ 93), the Termination Letter claimed that WIC "(I) had not demonstrated that it had made reasonable efforts to relocate the artists already relocated in the Old School Building now that HPD had decided to evict them; (ii) had not shown that the Property would be vacant at closing because EST had not agreed to any of [WIC's] numerous relocation efforts and had not been evicted by HPD; and (iii) had not shown that it ha[d] sufficient financial commitments for $1.2 million of the nearly $21 million budget."

Post-Termination, Pre-Litigation

On December 13, 2002, three days after EDC purported to terminate the Contract, EST withdrew its motion for an injunction against eviction. The federal court discontinued the action four days later.

After receiving the Termination Letter, WIC and its advocates and allies made concerted efforts, including dangling millions of more dollars in front of EDC's eyes, to get EDC, and the powers that be, to change their minds; but their eyes and minds were shut tight. Defendants refused all further entreaties from WIC et al. See generally, Lewitin Opp. Aff. ¶¶ 61-62. A December 20, 2002 letter from Doctoroff (Goldfinger Aff. Ex OO, at D7503, explained, in part, as follows:

> WIC did not identify alternative relocation space for the [OSB tenants]. [The OSB] is not available for the duration of WIC's proposed construction period. All that WIC provided was a bare list of addresses with no relocation terms. The fact remains that the City cannot delay [the OSB Supportive Housing Project] for the duration of WIC's construction period.

By stipulation dated January 21, 2003 (Weinberg Aff., Exh. PP), WIC settled the OSB eviction proceeding by agreeing to leave. In or about September of 2003, after new doors were installed in the freight elevator, the OSB Tenants returned to the 549 Building, where WIC has remained ensconced. EST never left and, as of the writing of this opinion, is still there. E.g., Complaint ¶ 96; www.ensemblestudiotheatre.org.

WIC's Federal Action

On or about June 16, 2003, WIC commenced an action in federal district court alleging three First Amendment and Equal Protection claims, pursuant to 42 USC § 1983, and the same three state law claims it later brought in this court. Southern District Judge Deborah A. Batts dismissed the federal claims with

prejudice and the state claims without prejudice. Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 2005 WL 1241919, 2005 US Dist LEXIS 10027 (SDNY May 23, 2005). The Second Circuit Court of Appeals affirmed. Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 212 Fed Appx 12 (Jan 3, 2007).

The State Actions - Action # 1

On or about June 28, 2007, plaintiff commenced Action # 1, asserting breach of contract, promissory estoppel, and tortious interference with contractual relations ["tortious interference"] causes of action against various defendants, including the above-named. The action was assigned to Justice Karen Smith. The complaint demands declaratory relief, specific performance, and compensatory and punitive damages. WIC claimed (Complaint ¶ 103), as still relevant, that EDC breached the contract by, in particular

> (ii) allowing HPD to attempt to evict [the OSB Tenants] from the [OSB] (iii) garnering EST's assistance or allowing HPD to garner EST's assistance in resisting all reasonable relocation efforts; [and] (v) manufacturing bogus and unreasonable grounds for terminating the contract.

WIC claimed, as still relevant, that Doctoroff, Bloomberg, and the City tortiously interfered with the contract by, essentially, inducing EDC to breach (¶ 114) and rendering WIC unable to perform (¶ 115), as just indicated.

Prequel to the Commercial Landlord-Tenant Summary Holdover Special Proceedings

At all times relevant hereto, in addition to owning the 549 Building, the City has owned 500 West 52nd Street, New York, NY ("the 500 Building"). On or about January 25, 1996, the City, through HPD, as landlord, and WIC, as tenant, entered into a month-to-month lease for Unit 2W at the 500 Building (Steinitz Moving Aff., Exh. N), while occupying five spaces, the basement and all or part of the 6th, 7th, 9th and 10th floors, in the 549 Building. On or about April 15, 1999, the City and CHDFC entered into a net lease for certain real estate. Stern Cross-Moving Aff., Exh. C. The 500 Building was added to the net lease on or about May 1, 2006, and the 549 Building was added to the net lease on or about April 1, 2007. On or about September 27, 2007, CHDFC served Notices of Termination (see Steinitz Moving Aff., Exh. A), dated September 20, 2007, on WIC as to all of WIC's premises. The 500 Building is also, apparently, slated for "supportive housing." Stern Cross-Moving Aff. ¶¶ 18-20.

The State Actions - Action # 2

On September 28, 2007, WIC commenced Action # 2. The first cause of action in the complaint (Intervention Motion Exh. D) seeks a declaration that CHDFC is not a net lessee from the City and therefore does not have standing to evict WIC. The second cause of action seeks to enjoin CHDFC from seeking to evict WIC. The first "Third Cause of Action" is for tortious interference. The second "Third Cause of Action" is for prima facie tort. On February 29, 2008, Action # 2 was consolidated with Action # 1 before Justice Smith. By Order dated March 9, 2011 (Shapiro Moving (Intervention) Aff., Exh. A), Justice Cynthia Kern allowed the City to intervene in Action # 2 as a party defendant.

Intermediate Procedural History

In a "Trial Order" dated July 14, 2008 in Action # 2, Justice Smith dismissed the tortious interference claim and the request for punitive damages in the fourth (prima facie tort) cause of action. Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 2008 NY Slip Op 31997(U) (Sup Ct, NY County 2008).

In the intervening years, Justice Smith dismissed Action # 1 completely as against Alper and Perine (EDC, the City, Doctoroff, and Bloomberg remain as defendants); dismissed the promissory estoppel claim in Action # 1 as against all defendants; and dismissed the tortious interference claim in Action # 2 (infra).

In a decision dated February 28, 2008, Justice Smith found that the federal litigation collaterally estopped plaintiff from claiming that defendants breached the Contract by repeatedly "raising the bar" that WIC had to hurdle to comply with the closing conditions; that Perine tortiously interfered with the Contract; and that HPD's refusal to bring eviction proceedings against EST, Medicine Show and Soundscape, without a Memorandum of Understanding, was improper. The Appellate Division affirmed, Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 65 AD3d 426, 427 (1st Dept 2009), stating in part:

> plaintiff was precluded from relitigating the issue of whether ... EDC had "willfully, wrongfully, unilaterally and materially breached" its contract with [WIC] by "repeatedly raising the bar" for transfer of certain City property, because the District Court found that EDC had not repeatedly imposed new closing conditions but instead had insisted that plaintiff perform responsibilities assigned to it in the contract.

WIC was also barred from litigating whether Perine "had tortiously interfered with the contract by unjustifiably encouraging and inducing EDC to breach it," as the district court found that "Perine's negative views of WIC stemmed from WIC's history of nonpayment of rent, illegal subletting and its inability to gain consensus among other tenants in the building in favor of its performing arts project." Id. at 427.

The Prior Summary Judgment Motion

In or about September 2009, in Action # 1, EDC and the City moved for summary judgment. In a Decision dated June 21, 2010, Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 2010 NY Slip Op 31577(U) (Sup Ct, NY County, June 21, 2010), Justice Smith set the stage for the instant motions. First, she described the background of the instant dispute and the making of the Contract. Next, she dismissed the promissory estoppel cause of action due to a lack of evidence, the Contract's merger clause, and the fact that "promissory estoppel is a theory of relief more appropriately utilized in circumstances in which a complaining party does not have a contract on which to sue [and i]n this matter, there is not only a contract of which all parties were aware, but it is the subject of plaintiff's breach of contract and tortious interference causes of action."

Justice Smith began her discussion of plaintiff's tortious interference claim as follows:

> The elements of a cause of action for tortious interference of contract are: the existence of a valid contract between the plaintiff and a third party; the defendants' knowledge of that contract; the defendant's [sic] intentional procurement of the third party's breach of the contract without justification; and an actual breach of the contract and damages resulting

from such breach (Kronos, Inc. v AVX Corp., 81 NY2d 90, 94 [1993]; Israel v Wood Dolson Co., 1 NY2d 116, 120 [1956]).

The only one of these elements in dispute is whether Doctoroff, Bloomberg and the City, or any of their employees induced EDC to terminate the Contract either by design or by taking steps to render WIC's fulfillment of its obligations under the Contract impossible. According to plaintiff, defendants interfered with the Contract by seeking to evict WIC and the other relocated tenants from their temporary space in the [OSB], by encouraging EST to resist all reasonable relocation efforts, and by hindering the EST, Medicine Show, and Soundscape relocation and/or eviction efforts, in order to derail the financing arrangements, ... many of which had time-based restrictions.

In response to these accusations and in an effort to demonstrate entitlement to judgment in their favor, defendants assert that EDC was justified in terminating the Contract based on the fact that on November 15, 2002, WIC lacked firm commitments for both its project financing and relocation plans. They also assert that EDC's decision was appropriate in light of WIC's history of rent payment problems, and Perine and HPD's classification of it as an "incompetent" tenant. Defendants point to both of these factors as evidence that WIC's ability to fully fund the IRSC without defaulting on a Community Development Block Grant (CDBG) loan and needing financial (loan repayment) help from the City, is questionable at best.

WIC responds to the motion by offering a series of documents which raise questions as to whether these defendants did, in fact, harbor an intent to scuttle the IRSC project. Among these is an Office of the Deputy Mayor internal memorandum, dated March 13, 2002, from Laurel Blatchford (policy advisor/EDC liaison) and Roy Bahat (deputy) to Deputy Mayor Doctoroff which states, in relevant part:

> As per our discussion last week about Women's Interart Center:
>
> * * *
>
> While the current financing structure does entail some risk to the city should WIC default on the $16M in CDBG loans, the financing package that WIC has assembled meets the city's criteria. Moreover, according to EDC, WIC has met every requirement that they have set along the way to ensure that the financing is sound.
>
> At this point, it appears that the political cost of pulling the plug is quite high. In addition, we could effectively pull the plug and ensure that WIC's financing collapsed by stalling, a path of action that would incur even greater political costs. The risks of moving forward are real, but can be mitigated. One risk is that WIC will not be able to meet the financing requirement; however, as mentioned above this is unlikely as they have been able to do so consistently

> and the Nederlander Group's recent involvement as an equity partner ensures the continued short-term stability of the project.
>
> The other major risk to moving forward is ... EST's dissatisfaction with the [relocation] options[. However,] it is likely that we can mitigate this risk by providing EST with alternative space.
>
> * * *
>
> If this negotiation falls through, mov[e] forward with eviction proceedings against EST.

In another joint memo to Doctoroff (dated March 22, 2002), Blatchford and Bahat

> recommend that the WIC project move forward immediately, beginning with issuing an eviction notice, before April 1, to [EST] ... EDC is comfortable that under the current financing structure, WIC will be financially viable and will not default on the CDBG-backed loan. Further delays will only jeopardize WIC's ability to complete the project successfully.
>
> [I]f the project is delayed further, WIC's guaranteed-minimum price contract bids may expire ... Currently the building is nearly vacant and is going unused while the decision of whether or not to proceed is being made.

Also submitted is a memorandum from EDC's Collignon to Blatchford and (copied to) Bahat and two others, dated February 21, 2002, which outlines the status of the IRSC project and notes, among other things, the need for HPD to get the Building vacant and, if necessary, to evict the tenants in order to prevent unnecessary delays which could affect the funding arrangements.

Along with this is the sworn affidavit of WIC's Director for Special Projects, Veronica Geist (Geist), in which she reports on a conversation she had with Collignon in February 2002. According to Geist, Collignon called, expressing her concern about the future of the IRSC project and asking whether there was anyone associated with WIC who had contact with anyone who knew Doctoroff because HPD was in Doctoroff's office causing difficulties with the project.

In addition to the March 13, 2002 memorandum, by late spring 2002, other letters and internal memoranda began to circulate, questioning whether the project financing was secure, and whether projected construction costs were accurate. Among these was a June 7, 2002 memorandum from Collignon and EDC's Executive Vice President, Robert Balder, to Doctoroff, expressing concern over the financial feasibility of the IRSC. Two months later, Valerie Rutstein, EDC's financial analyst for the IRSC project, drafted a memorandum (dated August 12, 2002) stating, in relevant part:

> Eight weeks ago, the Deputy Mayor advised EDC to obtain a consultant's review of the financial feasibility of the project and to inform WIC that the project had to demonstrate the ability to achieve a debt service coverage of 1.2 or better or the project would be reconsidered.
>
> The Project closing remains contingent on WIC's ability to meet factors specified in the Contract of Sale with EDC, the key factors being that a plan for tenant relocation satisfactory to EDC be in place, that the project is financially feasible, and that the final construction costs are established. The last two items are in place at this time, however, the tenant issues remain outstanding .... Closing will require HPD to evict tenants to vacate the building ... .
>
> * * *
>
> While the idea of terminating the project has been expressed internally, given that WIC has a signed Contract of Sale with EDC, the legal implication of such an action need[s] to be further examined[.]

Despite further submissions from WIC and continued discussions between WIC and EDC during the autumn of 2002, EDC issued the December 10, 2002 termination letter.

* * *

An examination of the parties' submissions reveals a stark contradiction between the views expressed by defendants and their employees in February and March of 2002 in which they confirm EDC's satisfaction with WIC's efforts to meet the Contract's stringent obligations, and the positions taken by defendants and their employees to the contrary only a few months later. The apparent change in position raises questions as to what occurred during the interim between EDC and the other defendants, and whether there is merit to WIC's claim that, once the City administration made an internal decision to derail the IRSC project, defendants City, Doctoroff and/or Bloomberg took steps to frustrate the Contract, including not evicting EST, a tenant which has been described by various parties as "recalcitrant.

Justice Smith addressed WIC's breach of contract claim, in toto as follows:

> The basis for plaintiff's breach of contract claim is that EDC did not act in good faith and deal fairly with WIC when it elected to terminate the Contract. Every contract has an implied covenant of good faith and fair dealing governing the actions of parties to a contract (Van Valkenburgh, Nooger & Nelville, Inc. v Hayden Pub. Co., 30 NY2d 34, 45 [1972]). The purpose of the WIC/EDC Contract was to enable WIC to develop the IRSC on the site of the Property. According to WIC, by suddenly and belatedly changing its position as to whether WIC had secured adequate financing and had made reasonable efforts to relocate tenants, including EST, EDC knowingly jeopardized WIC's ability to meet its pre-closing obligations,

> the contractual prerequisite for WIC to develop the IRSC. This, WIC argues, demonstrates, or at least raises a question as to EDC's motivations and whether EDC's stated reasons for terminating the Contract were sincere or made with the specific intent of frustrating the Contract. Under the circumstances, EDC has not tendered sufficient evidence to eliminate any material issues of fact as to whether EDC breached the Contract by failing to proceed with good faith towards the success of the Contract (see Winegrad v New York Univ. Med. Center, 64 NY2d 851, 853 [1985]).

In sum, in Action # 1 Justice Smith granted summary judgment dismissing the promissory estoppel claim; denied summary judgment on the tortious interference claim, because WIC was entitled to disclosure on this issue; and denied summary judgment on the breach of contract claim, because EDC had "not tendered sufficient evidence to eliminate any material issues of fact as to whether EDC breached the Contract by" violating its "implied covenant of good faith and fair dealing." Thus, the burden was on WIC to sustain the tortious interference claim; and the burden was on defendants to defeat the "good faith" claim. (Defendants have confused, or at least conflated, the two causes of action in their Reply Memo, at 2-3, when they state that the tortious interference claim "fails because [WIC] cannot establish that defendants ... failed to proceed in good faith towards the success of the contract [etc.]." "Not proceeding in good faith" is a breach of contract doctrine, not a tortious interference doctrine. At the very least, defendants' nomenclature could lead to confusion).

In the ensuing years, the parties conducted gargantuan disclosure. See generally, Shapiro Moving Aff. ¶¶ 8-10, *passim*. This has resulted, in turn, in gargantuan submissions on the instant motions (plaintiff calculated 6,500 pages in support of defendants' summary judgment motion in Action # 1 alone). The reading has not been light, but there have been moments of levity, as when plaintiff's 137-page Memo of Law, at 51, refers to Medicine Show as "Medicare Show."

The Commercial Landlord-Tenant Summary Holdover Special Proceedings

Meanwhile, on the landlord-tenant front, on or about March 24, 2008, CHDFC, as petitioner, commenced six commercial landlord-tenant summary holdover special proceedings ("the L&T Proceedings") in Civil Court against WIC, as respondent, all titled, simply put, Clinton Hous. Dev. Fund Corp., as net lessee of the City of New York v Women's Interart Ctr., Inc., L&T Index Numbers 63773/08 (Unit 2W at the 500 Building), 63771/08 (the 10th Floor of the 549 Building), 63772/08 (the 7th Floor" of the 549 Building), 63767/08 (the 6th Floor" of the 549 Building), 63774/08 (the 9th Floor" of the 549 Building) and 63775/08 (the basement of the 549 Building). On or about April 17, 2008, CHDFC served WIC with the Notices of Petition and Petitions. WIC answered (Steinitz Moving Exh. H) the petitions, asserting one "objection in point of law," i.e., that WIC cannot be evicted while its claim for specific performance is still pending; five jurisdictional defenses; and 33 affirmative defenses. By Order dated May 15, 2008, Justice Smith removed the L&T Proceedings to this court and consolidated them into Action # 1. Actions # 1 and # 2 and the L&T proceedings were eventually bequeathed to this Court.

In a Decision dated August 19, 2010 (Steinitz Moving Exh. K), Justice Smith agreed with WIC that CHDFC's arrangement with the City was a management agreement, not a net lease, for the properties, and that CHDFC therefore lacked standing to bring the L&T proceedings. However, she did not expressly order

them dismissed, occasioning some lingering confusion. In a Decision dated May 17, 2012 (Steinitz Moving Exh. L), the Appellate Division reversed, definitively "declaring that CHDFC has standing pursuant to Real Property Actions and Proceedings Law 721(10) to commence eviction proceedings with regard to WIC's tenancy at 500 West 52nd Street and 549 West 52nd Street." Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 97 AD3d 17, 23 (1st Dept 2012). Following Justice Smith's lead, the court did not expressly order the L&T proceedings reinstated.

On or about May 21, 2012, CHDFC served Notices of Termination on WIC. On or about July 12, 2012, CHDFC commenced summary holdover proceedings against WIC in Civil Court. On or about August 24, 2012, WIC moved, pursuant to CPLR 3211(4), to have them dismissed on the ground of prior proceedings pending. CHDFC cross-moved for "use and occupancy" ("U&O"). On or about November 5, 2012, Judge Frank Nervo dismissed the L&T proceedings, on the ground that the 2008 L&T proceedings "are still pending"; he referred the U&O issues to Supreme Court.

CHDFC subsequently moved, pursuant to CPLR 603 and 325(d), to sever the L&T proceedings and remove them back to Civil Court, on the ground that "Civil Court can order an immediate trial," which would avoid "confusion, delay and prejudice to CHDFC." In a Decision and Order dated February 28, 2013 (Steinitz Moving Exh. M), this Court denied that motion for several reasons, including that keeping the cases in Supreme Court would prevent WIC from being evicted "with all of the attendant dislocation, prior to resolution of its claim for specific performance." To the plaintive cry that WIC was not paying any U&O, the Court stated that "CHDFC can apply to this Court for any relief to which it deems itself entitled."

The Instant Motions

The L&T Proceedings

By Motion Number 22 CHDFC now moves (1) for "partial summary judgment ... with respect to Civil Court Index No. L&T 63773/08, previously consolidated into Action No. 1, dismissing respondent's objection in point of law, jurisdictional defenses and affirmative defenses and for possession of the the [sic] premises known as 500 West 52nd Street, Unit 2W, New York, NY, together with a warrant of eviction"; (2) for "an order and judgment for the amount of arrears in use and occupancy/rent owed by [WIC] if any with respect to ... 500 West 52nd Street, Unit 2W, New York, NY and 549 West 52nd Street, New York, NY, 6th, 7th, 9th and 10th floors; and (3) to "[m]odif[y] the amount of use and occupancy payable by WIC to CHDFC from the date of this motion because of changed circumstances."

In response, WIC now cross-moves for summary judgment dismissing the L&T proceedings on the grounds, inter alia, that the City's (purported) net lease to CHDFC is void because it was entered into in violation of New York City Charter § 197-c, which sets forth ULURP, and City Charter § 1802, which sets forth the "Powers and Duties" of the Commissioner of HPD.

By Motion Number 26 the City now moves, pursuant to CPLR 1012(a)(2) or, alternatively, CPLR 1013, to intervene in the L&T proceedings and, upon intervention, to oppose WIC's cross-motion for summary judgment therein.

Action # 1

By Motion Number 25 EDC, the City, Doctoroff and Bloomberg, to wit, the four remaining defendants in Action # 1, now move for summary judgment in Action # 1 on the grounds that: (1) "WIC lacked firm commitments for project financing and tenant relocation plans and [EDC] terminated the Contract pursuant to its terms; and (2) WIC cannot establish tortious interference with contract."

Discussion

Breach of Contract

The main issue in this litigation is whether EDC justifiably terminated, or unjustifiably breached, the Contract. EDC recognizes (as this Court held in a Decision and Order dated January 31, 2013) that the Termination Letter limits that inquiry to the grounds set forth therein. A review of that letter indicates that the three grounds are, simply put, as follows: WIC's financing was short $1,200,000 in "signed commitments"; WIC had not sufficiently provided and budgeted for "swing space" for the OSB Tenants; and WIC had not offered comparable swing space to EST, resulting in the 549 Building not being vacant by the November 15, 2002 Final Closing Date.

First Ground - Financing

WIC's "Project Budget Amount," as that phrase is used in Contract Section 4(f) (WIC's "magic number," if you will), was $20,889,624 (e.g., WIC Opp. Memo, at 19). The operative budget appears to be the "IRSC Project Budget, 2002," transmitted by Lewitin to Collignon by letter dated October 31, 2002. Glascoff Aff., Exh. 12. This one-page budget lists both "uses" (i.e., expenses or costs) and "sources" (i.e., funds or income) as $20,889,624.

The sources are the HUD Section 108 loan of $13,595,000 (see Braverman Reply Aff., Exh. B); the EDI grant of $2,000,000; a "Community Enhancement Facility Grant" of $500,000; a "State of New York MERF Loan" of $500,000; a "Construction Manager's Loan" of $1,399,624; "WIC Equity" of $1,895,000; and two $500,000 NYSERDA loans from CCB, one to WIC; one to the Nederlander Organization (apparently to a Nederlander subsidiary called "Off-Broadway 52nd Street LLC"). These amounts add up to $20,889,624, the magic number.

The $1,200,000 that the Termination Letter found wanting in WIC's financing referred to the two CCB loans and the $200,000 ESDC grant. As WIC points out (e.g., Glascoff Opp. Aff. at 16, n.3), the Termination Letter was incorrect in including the $200,000 ESDC grant, because WIC did not include that as a "source" in the budget (the budget's transmittal letter discussed this grant, presumably causing, if not excusing, EDC's confusion).

Determining whether the two $500,000 CCB loans should or should not be included in WIC's funding requires analyzing the standard for inclusion that the Contract sets forth. Section 4(f) basically requires (1) signed copies of "financing commitments" and/or (2) "equity ... in place." Simple enough: signed commitments and/or equity. Section 6(j) requires that WIC have "closed on [this] financing or funded equity [as] required by Section 4(f)." (WIC itself defines "closing" (Lewitin Opp. Aff. ¶ 23) as "transfer of title" of property.) It also requires that at closing, "the above commitments are still in effect and the above equity is still in place."

The phrase "closed on" is slightly problematic, but the overall requirement is clear: WIC was obligated to have "signed commitments" to borrow money and/or cash on hand (i.e., equity) that totaled the magic number, $20,889,624. Only the former is in issue; defendants have not and are not contesting the "equity" portion.

EDC's formulation (Goldfinger Aff. ¶¶ 47 and 48) that "WIC was required to demonstrate to [EDC] that it possessed firm financing commitments (that is, that the actual funds are available and accessible without conditions)" puts an unfair gloss on the Contract, which only required commitments, not that the funds be "available and accessible without conditions." But, depending upon what, exactly, the vague terms "available" and "accessible" mean, EDC is not too far off the mark.

WIC, on the other hand, is very far off the mark. Friedman (in his inimitable style) has written an entire Memorandum of Law on the meaning of the phrase "in place." However, whatever that phrase means is beside the point, because "in place" only refers to WIC's equity, which is not at issue, rather than the financing commitments, which are at issue.

Glascoff's mantra (Glascoff Opp. Aff. ¶ 10, *passim),* that funding was "in place" if it "could reasonably be expected to be available when needed" (or "that there was a reasonable basis to believe [was] going to be there when needed") (or "that EDC could, or should, have reasonably believed was … available to WIC when needed") is belied by the Contract, which expressly requires "signed copies [of] financing commitments." It is hornbook law that courts are not to second-guess contracts entered into by sophisticated parties operating at arm's length. A "signed commitment" is a straightforward concept, far different from the loose language of "reasonable expectations." Furthermore, Glascoff may be a giant in the field, but he does not appear to claim experience with the type of contract at issue here, in which two parcels of midtown real estate could have changed hands for a dollar apiece.

One of the two CCB $500,000 loans was to go directly to WIC, and CCB's Loan Committee approved this on November 6, 2002 (albeit with conditions, but which this Court finds were de minimis). As of the contract Closing Date, the application for the second of these loans, to benefit the IRSC Project, but which was to be to the Nederlander Organization, was still incomplete. ("Q. Do you [Ms. Lewitin] have a loan commitment letter for the Nederlander loan? A. No." Shapiro Moving Aff., Exh. E, at 647:23-25; see also, 645:21-24.) WIC apparently received the proceeds of that loan, or at least a written commitment to provide them, in early 2003.

WIC argues (Opp. Memo, at 32) that there was no "reason to doubt that once [James] Nederlander submitted his financials, … approval of the loan … was *pro forma*, such that it was 'in place'." Thus, far from having a "signed commitment" for this $500,000 loan, Nederlander had not even submitted the application. And again, this was "financing," not "equity," so the phrase "in place" is (drum-roll, please!) out of place.

WIC notes that at her deposition (Lewitin Opp. Aff., Exh. Y, tab 11) Rutstein testified as follows:

> Q: If you knew that the money had been approved, if you knew that [CCB was] going to pay the money and had a reasonable belief that the money was going to be paid, what was it that you needed? A sheet of paper that said ["]this is a commitment letter.["]

A: Absolutely. We need [sic] a financing commitment, which is a document that is essential for all the financing in this project.

Q: Was not the requirement with respect to the money being in place that you would have a reasonable belief that the money would be in place? Was that not the measure?

A: No.

* * *

Q: How about a reasonable belief that the money was in place, that the money would be available? Was that not sufficient?

A: No.

Of course, this is completely consistent with defendants' position and the Contract.

Ms. Lewitin says (Lewitin Opp. Aff. ¶ 152) that she "must wonder" whether defendants told Nederlander that the project was a goner, and that rushing his financials to CCB would be imprudent. There is no evidence of this; and the burden of proof is more exacting than "must wonder."

As with other of its obligations, WIC was whipsawed. Lewitin tells us (Lewitin Opp. Aff. ¶ 27), "Not wishing to make his financial position public until absolutely necessary, [James] Nederlander [Sr.] told me that he would only submit his financials when the transfer took place, but not before." WIC could not close without the financials; and the financials were awaiting the closing. There is no evidence that EDC (or the other defendants) created this conundrum.

WIC argues that the $200,000 ESDC grant represents a $400,000 "swing" in WIC's favor: WIC's budget did not rely on it, which is true; and WIC was entitled to rely on it, which this Court rejects. The grant "was approved on December 19, 2002." Shapiro Moving Aff., Exh. E, Lewitin EBT, at 705:6-8; Opp. Memo, at 26, n. 25 ("the grant disbursement agreement was executed on December 19, 2002"); "In Place" Memo, at 17 ("the … $200,000 [g]rant had been finally approved on December 19, 2002); Shapiro Moving Aff., Exh. E, Lewitin EBT, at 711:1-5; see also, id., at 639:2-22:

Q. Did [a May 28, 2002 letter from NYSERDA] assure you that you would get funding from NYSERDA?

A. * * * [I]n that letter it is quite clear that the [IRSC] project is eligible to receive up to a million dollars in NYSERDA loans.

Q. But that doesn't guarantee that the project will, in fact receive a million dollars in NYSERDA loans, does it?

A. I never said it did.

Q. This is an eligibility a letter [sic] saying the project is eligible.

A. Ms. Shapiro, that's what I just said.

Q. It's not saying that it's a commitment.

A. That what I just said to you.

Even Glascoff crows (Glascoff Opp. Aff. ¶ 13) that certain documents prove Nederlander's "eligibility" for a $500,000 NYSERDA loan. Even so, WIC did not receive this money until March 26, 2003.

In the one-paragraph discussion of WIC's breach of contract claim in her extensive June 21, 2010 Decision, Justice Smith seems not even to have considered the possibility that WIC actually satisfied its pre-closing financial obligations. Rather, what survived was WIC's claim that defendants breached the covenant of good faith and fair dealing by preventing WIC from doing so. Indeed, there is obvious irony in WIC arguing strenuously that defendants prevented WIC from meeting its pre-closing financial obligations, but that WIC managed to do so anyway ("WIC … was in full compliance with, and had satisfied the requirements of the Contract." Opp. Memo, at 1). Justice Smith plainly thought that the former argument trumped the latter.

In their March 22, 2002 Memorandum to Doctoroff (Lewitin Opp. Aff., Exh EEEE), from which Justice Smith quoted (supra), Blatchford and Bahat state that "EDC is comfortable that under the current financing structure, WIC will be financially viable and will not default on the CDBG-backed/HUD loan." This is unattributed hearsay from employees in a mayoral agency not a party to the Contract. It rings true, but so what? The question is not what EDC (allegedly) thought eight months before the Closing Date about how things would turn out months or years after the Closing Date; the question is what signed commitments and equity existed on the Closing Date.

Glascoff (Opp. Aff. ¶¶ 33-37) and Friedman note that in or about December 2001 and June 2002, in attempting to have HUD keep the $13,595,000 federal funds in place, EDC told OMB to tell HUD that WIC was reasonably relying on the viability of the two $500,000 NYSERDA CCB loans. Glascoff says, "I do not know of any valid basis for EDC treating the two NYSERDA Loans as 'satisfactory' on June 19, 2002 … and reversing itself 180 degrees … six months later." Glascoff Opp. Aff. ¶ 37. Glascoff suggests that defendants are estopped from claiming that these loans were not in place. To this Court, the "valid basis" is that the standards for asking that a source of funding simply be kept in place are not the same as the standards for determining whether an express contractual condition precedent has been satisfied. Another "valid basis" may be the mere passage of time: the CCB loans may have seemed reasonably imminent in June; but by November, Nederlander still had not sent the required financial statements to CCB. That a party took inconsistent positions in different contexts many months apart is insufficient to invoke the doctrine of estoppel.

The parties also vigorously disagree as to whether a default by WIC on the $13,595,000 HUD loan would have endangered the City's CDBG funding, but this Court need not and does not resolve that dispute.

WIC makes the curious, counter-intuitive argument ("In Place" Memo, at 16-17) that WIC need not have had all of its financing "in place" by November 15, 2002, or even by December 10, 2002, because "at the time of the ... Termination Letter the closing [i.e., the property transfer, etc.] was many months away." Yes, any actual property transfer would have been somewhere in the future, because, as WIC acknowledges, the 549 Building Tenants were still sitting tight; so tight, in fact, that a condition for closing had not been met by the Final Closing Date, giving EDC the right to terminate the Contract pursuant to § 6(o), a right it exercised.

WIC's strained logic is evident in the following statement, *partially in italics,* no less, by Lewitin (Lewitin Opp. Aff. ¶ 147): "It is interesting to note that *as of June 3, 2002, Rutstein was including the two NYSERDA loans in her computations of the IRSC Projects* [sic] *debt service coverage."* Of course she was! WIC was relying on those loans to meet its funding obligations. If the loans were not consummated, and alternatives could not be found, EDC would terminate the contract, and there would be no need to calculate debt service. If the loans were consummated, interest would have to be paid, i.e., WIC would have to meet its debt service. So Rutstein's including the loans in her calculations only made sense, and was not evidence that these loans-in-formation met the stringent contractual standards.

WIC also quotes from the August 12, 2002 memorandum (Goldfinger Aff., Exh. D, at Exh. DD; Lewitin Opp. Aff., Exh. FFFFF) that Rutstein e-mailed to Basser-Bigio and Edwards, which Justice Smith quoted from (supra), to the effect that the financing was "in place at this time." The financing may have been in the pipeline, but the full amount was not in the form of signed commitments, as required. While on the subject of this memorandum, more of it deserves to be quoted: "the tenant [relocation] issues remain outstanding. In the life of this project, every time any one of the above three factors [i.e., tenant relocation, financial feasibility, construction costs] is settled, the other one or two become undone, triggering cyclical delays."

WIC correctly points out that courts should interpret contracts so that they accomplish their primary purpose. The parties' "primary purpose" is this Court's lodestar in contract interpretation. Thus, if A contracts to sell x to B for y dollars, this Court will interpret the contract to mean that they both intend that the sale will occur, not that one party or the other will be looking for a way out. However, again, the Contract here had significant conditions precedent and should be interpreted to mean that if those conditions were satisfied, then, and only then, both sides wanted the transaction to occur. Indeed, what places the instant contract off the beaten path is that "y dollars" was $2.00. EDC was essentially bargaining for satisfaction of the conditions precedent; that was the actual consideration, the quid pro quo. In that sense the Contract was a "unilateral" one, in which one party (EDC) promised to do something (convey the real estate) in return for the other party's performance (satisfaction of the conditions precedent), rather than in return for the other party's promise. As WIC failed to perform, EDC's promise was not called into play.

The Alleged $617,537 Error

The primary financial argument in WIC's bag of tricks is the claim that the "costs" in its budget were mistakenly overstated by $617,537 in interest expense that would not have been incurred, because the $13,595,000 HUD loan would have been drawn down over time, not received immediately, and interest would only have accrued on the outstanding balance. See Lewitin Opp. Aff. ¶ 45; Opposition Memo, at 26 and n. 29; Glascoff Opp. Aff. at 7-8, n.1, ¶ 57, *passim*; Glascoff Reply Aff. ¶¶ 3-15. Defendants hotly

dispute this. Reply Memo 13-15. Lewitin claims (Lewitin Opp. Aff. ¶ 46) that she communicated this to EDC's Braverman in a telephone conversation "on or about December 6, prior to the date that the Termination Letter was written." Braverman denies that this conversation, or any conversation between her and Lewitin, ever took place. Braverman EBT, Lewitin Opp. Aff., Exh. Y, tab 4, at 126 *passim*. They each have their reasons for their positions. This Court need not and does not (indeed, cannot) decide that factual issue (although one would have expected Lewitin and/or Glascoff to have communicated this in writing without waiting six days, until December 12, to do so).

Particularly in his reply, Glascoff adamantly asserts that WIC never would have agreed to pay the "extra" $617,000 (rounded off) in interest on the HUD loan. He never explains how this statistically significant error could have remained uncorrected during those fraught months of fall, 2002, when the fate of the IRSC Project hung in the balance. Braverman just as adamantly asserts (Braverman Reply Aff. *passim*) that the original interest figure, including the $617,000, was correct. She explains in some detail how the HUD money would have been handled; and she claims experience with a similar project in which a developer had to pay interest on the full amount of a similar loan from Day One.

Whether WIC's original calculation or its amended calculation was the correct one is a question towards the limits of this Court's pay grade. If a decision has to be made, defendants have provided a more detailed and nuanced explanation of how HUD Section 108 loans work, and seem to have the better of the argument.

> The resolution authorizing ... the issuance and sale of $13,595,000 in taxable bonds (or notes) that was adopted by [IDA] described in detail the financing structure, as follows: I) the entire amount of $13,595,000 is deposited into project accounts that are held by a Collateral Agent (analogous to a bond trustee); ii) thereafter, as eligible expenses are expended ... WIC could requisition funds from the project accounts. However, WIC's repayment obligations do not mimic a construction loan. Rather, interest begins accruing on the full $13,595,000 immediately from the date that the funds are deposited; [the interest payments] follow a debt service amortization schedule for the expected term of the taxable bonds/notes, with anticipated semiannual payments of interest and then interest plus principal on the entire $13,595,000 for the term, with a possible balloon payment.

Defendants' Reply Memo, at 15. This is what Ms. Braverman attests to, although not as succinctly, in ¶ 7 of her Reply Aff., and at even greater length, and in yet more detail, in her Sur-Sur-Reply Aff. A close look at Exhibit B to Braverman's Reply Aff., the "Resolution ... Authorizing the Issuance and Sale of Not to Exceed $13,595,000 Principal Amount of Bonds," reveals mortgage, not construction loan, language, and does not indicate any draw-down or other support for WIC's contention of a $617,000 savings.

WIC included the full interest amount in the Project Budget expenses, and at best told EDC, orally, several weeks after the Final Closing Date, and only a few days prior to the Termination Letter, of WIC's alleged error, which, in any event, it does not appear to have been.

In a slight stretch of the truth, Lewitin claims (Lewitin Opp. Aff. ¶ 49) that Collignon testified that "it would have been inappropriate for anyone at EDC, including Braverman, to have withheld the information [i.e., about the alleged $617,000 miscalculation] solely because it came in after the final submission date." What

Collignon actually said (Lewitin Opp. Aff., Exh. Y, tab 5, at 427) was, "I don't know. I don't think [it would have been appropriate]." In another slight stretch of the truth, Lewitin claims (Lewitin Opp. Aff. ¶ 49) that "Goldfinger, admitted that if the $617,000 recalculation was true and that only a minimal amount of funding was missing, she didn't see how termination could be recommended." What Goldfinger actually said (Lewitin Opp. Aff., Exh. Y, tab 6, at 301) was, assuming all the winds were blowing in WIC's favor, and "the only thing was that [WIC was short a] tiny, tiny amount [i.e., "eight, nine-tenths of one percent"], then I don't think, I don't know for sure, but I don't see how a recommendation for termination could be made."

WIC states (Friedman Opp. Aff., Blatchford EBT Digest, at 7) that Doctoroff had certain concerns about the WIC Project ("operational financing", "debt service") that were not a condition of closing and/or not set forth in the Termination Letter. WIC claims these were "not a valid reason to terminate." This misses the point. Objectively, defendants had the right to terminate only if WIC failed to satisfy a condition precedent imposed by the Contract and if EDC set this forth in the Termination Letter. Subjectively, EDC could terminate for any reason it wanted, as it had valid, objective reasons to do so.

WIC often argues that because some of defendants' employees had different opinions (say, as to the adequacy of WIC's financing), that an issue of fact exists. E.g., Friedman Opp. Aff., Exh. 1, Bahat EBT, at 6-7:

> One defendants' employee [Bahat] contradicting others (Rutstein, Collignon, Goldfinger). Triable issues of fact [exist] whether EDC, if acting in good faith, would have accepted what WIC did provide as sufficient assurance NYSERDA money would be there when needed.

Although a difference of opinion is often the touchstone of an issue of fact ("Was the traffic control device green in the north-south direction? Was the tumor cancerous?"), WIC's argument is flawed for numerous reasons. Principally, whatever Bahat, Rutstein, Collignon and Goldfinger might have thought, whether WIC met the Contract's closing conditions is a question of law for this Court to decide (the relevant facts being largely undisputed). Furthermore, the contractual criterion was not whether the "money would be there when needed"; it was whether the money was there. Morever, often in WIC's arguments of this sort, the employee at issue is prognosticating several months or more into the future; the question before the Court is whether an issue of fact exists as to the situation on the Final Closing Date, when all of WIC's moving parts had to be in place. The question is not what defendants' different employees at different times thought about WIC's financing; the question is whether WIC satisfied the Contract's financial conditions precedent.

WIC claims (Lewitin Opp. Aff. ¶ 5, see also, ¶¶ 50-54) that yet more money was available: "a $720,000 cash infusion from the National Development Council ... Corporate Equity Fund/Historic Tax Credits"; "a $100,000 grant sponsored by Assemblyman Scott Stringer from the New York State Assembly Community Capital Assistance Program"; and "at least **$1 to $2 million** in savings provided by an amendment to the state Public Authorities Law that qualified the IRSC Project to participate in the Tax Exempt Equipment Leasing Program (TELP) available ... through the Dormitory Authority of the State of New York." Who knew so much funding was freely available, there for the taking, like low-hanging fruit?! WIC allegedly demonstrated to EDC the availability of the $720,000 "[w]ithin a month of the Termination Letter" ("In

Place" Memo, at 17), far too late. This "other" funding is hazy at best and cannot be taken into account at this late date.

To recapitulate, WIC argues that the $1,200,000 shortfall that the Termination Letter claimed should be reduced as follows: by the $200,000 ESDC grant, because WIC's budget did not rely on that; by the $500,000 CCB loan to WIC, because the bank loan committee had approved that loan; by the $500,000 CCB loan to the Nederlander Organization, because the bank loan committee was going to approve that loan; by the $617,000 in interest on the HUD loan that WIC would not have had to pay; by the $200,000 ESDC grant that WIC would have received; and by the millions of dollars of other available funding. This Court finds that the Termination Letter was incorrect in assuming that WIC had relied on a $200,000 ESDC grant, because it did not; was incorrect in asserting that WIC did not have a signed commitment for the $500,000 CCB loan to WIC, because WIC did; was correct in asserting that WIC did not have a signed commitment for the $500,000 CCB loan to the Nederlander Organization, because WIC did not; was correct in omitting the $617,000 in interest savings on the HUD loan, because WIC would have had to pay that interest, and because WIC raised the issue way too late in the day; was correct in omitting the $200,000 ESDC grant, because there was no signed commitment for that; and was correct in omitting the millions of dollars in other available funding because its availability was problematic, clearly there were no signed commitments for it, and because EDC did not have any timely notice of what, in any event, was just a gleam in WIC's eye.

All of which left WIC $500,000 short on the Closing Date.

Substantial Performance

WIC argues that it "substantially complied" with its financial obligations. As the Court of Appeals stated in Miller v Benjamin, 142 NY 613, 617 (1894):

> The right of a party to enforce a contract will not be forfeited or lost by reason of technical, inadvertent or unimportant omissions or defects. A substantial performance must be established in order to entitle the party claiming the benefit of the contract to recover, but this does not mean a literal compliance as to details that are unimportant. There must be no willful or intentional departure, and the defects of performance must not pervade the whole, or be so essential as substantially to defeat the object which the parties intended to accomplish. Whether in any case such defects or omissions are substantial or merely unimportant mistakes that have been or may be corrected is generally a question of fact.

See also, F. Garofalo Elec. Co. v New York Univ., 300 AD2d 186, 189 (1st Dept 2002) ("The question of whether there has been substantial performance--or a breach--is to be determined, whenever there is any doubt, by the trier of fact."). On the other hand, "Although the issue of substantial performance is usually one of fact, 'if the inferences are certain, the question involves only a matter of law and is to be decided by the court.'" Anderson Clayton & Co. v Alanthus Corp., 91 AD2d 985, 985 (2d Dept 1983).

In a practical frame of mind, in Hadden v Consolidated Edison Co., 34 NY2d 88, 96 (1974), the court fleshed out the particulars of the inquiry as follows:

> There is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance.

The penultimate factor favors WIC; the ultimate factor favors EDC.

Defendants argue (Moving Memo, at 21, n. 12) that whatever WIC's alleged shortfall was, it should be measured against "WIC's contribution to the project budget," which defendants calculate as $5,294,624 (the difference between the project budget of $20,889,624 and the $15,595,000 federal loan and grant money). This raises a series of difficult philosophical questions about "relativity." Suffice it to say that this Court believes the correct touchstone is the full $20,889,624.

Notwithstanding the general law as to "substantial performance" set forth above, the legal principle that controls that issue in this particular case is set forth in several New York appellate court decisions (see Defendants' Reply Memo, at 17). "[A] condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises. * * * Express conditions must be literally performed; substantial performance will not suffice." MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009) (emphasis added) (citations and internal quotation marks omitted); accord, Stanton v Power, 254 AD2d 153, 153 (1st Dept 1998) ("Since this case involves an express condition precedent ..., we perceive no basis upon which the doctrine of substantial performance might be invoked."); see also, Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co., 86 NY2d 685, 692 (1995):

> The flexible concept of substantial compliance "stands in sharp contrast to the requirement of strict compliance that protects a party that has taken the precaution of making its duty expressly conditional" (2 Farnsworth, Contracts § 8.12, at 415 [2d ed 1990]). If the parties "have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event" (Restatement [Second] of Contracts § 237, comment d, at 220). Substantial performance in this context is not sufficient, "and if relief is to be had under the contract, it must be through excuse of the non-occurrence of the condition to avoid forfeiture" (id.; see, Brown-Marx Assocs. v Emigrant Sav. Bank, 703 F2d 1361, 1367-1368 [11th Cir]; see also, Childres, Conditions in the Law of Contracts, 45 NYU L Rev 33, 35).

All of which makes sense to this Court. The basic principle is that the intent of the parties should govern. Here, EDC made its intent very clear. One can make the argument that generally speaking, parties intend substantial performance to be sufficient, to avoid "ha ha, gotcha" situations; but not when the contract expressly states, in the form of a condition precedent, precisely what is required.

Thus, WIC's reliance on the doctrine of "substantial performance" is unavailing.

In sum, the Termination Letter correctly asserted that EDC had a right to terminate the Contract on the ground that WIC had failed to satisfy its funding obligations.

Second Ground - Tenant Relocation - Swing Space

The second and third grounds in the Termination Letter are related, but they should not be confused, as they need to be considered separately. Both of these grounds fall under the rubric of what might be called WIC's "tenant relocation" obligations.

In order to accommodate the extensive rehabilitation of the 549 Building, its tenants had, first, to be removed, and second, housed for a time in "swing space" (effecting their return presumably would not have been a problem and is not an issue herein). The OSB Tenants were successfully removed to the OSB, but almost as soon as they arrived, CHDFC, their landlord, threatened to evict them. Thus it was that the second ground states that "WIC never provided specific relocation information for the full anticipated construction term with confirmed location(s), availability, rental, price and funding in WIC's budget for these tenants." As Goldfinger tells it (Goldfinger Aff. ¶ 30), "What happened in late 2002 is that WIC proposed alternate relocation spaces, but never confirmed their availability, rental price or funding in WIC's budget, all of which was critical to the viability of the [IRSC] project." If the "swing space" WIC proposed was insufficient, if the OSB Tenants could or would be evicted prior to completion of the 549 Building rehabilitation, WIC would be in violation of Contract §§ 4(h) and (arguably) 6(o).

CHDFC's evicting the OSB Tenants before they could return to the 549 Building would have created defaults in WIC's tenant relocation and financial obligations, because the expense of further relocations, which WIC would have had to shoulder, would have increased WIC's overall costs, and the budget had no contingency for this. See Goldfinger Aff. ¶¶ 27-29, 35. Sure, there was no telling when the OSB evictions would occur; but there was also no telling whether the 549 Building rehabilitation would be delayed due to construction difficulties or administrative glitches. Then too, WIC had to perform its "swing space" obligations "all to [EDC's] satisfaction, in its sole discretion."

In sum, the Termination Letter correctly asserted that EDC had a right to terminate the Contract on the ground that WIC had failed to satisfy its obligation, set forth in § 4(h) of the Contract, to secure sufficient "swing space" for the OSB Tenants.

Third Ground - Tenant Relocation - Comparable Space and Building Vacant

Comparable Space

This Court sees no need to rehash the parties' vociferous arguments as to whether WIC offered EST "comparable" relocation space; an issue of fact clearly exists. E.g., Lewitin Opp. Aff. ¶ 93, Exh. UUU (and Stern Cross-Moving Aff., Exh O), October 19, 2000 e-mail from Collignon to Goldfinger and LaPalme: "the Houseman [Theatre] is a good trade for EST"; Mead Aff. ¶ 2: "In my view the John Houseman Studio Theaters were comparable, if not superior, to EST's spaces at [The 549 Building]"); Opp. Memo, at 46-47. The evidence of comparability is plentiful. Indeed, and sadly, "between October 2000 and November 2002, WIC paid more than $182,000" in rent on the Houseman for space that EST never occupied. Stern Cross-Moving Aff. ¶ 22; Lewitin Opp. Aff. ¶ 94. EDC may or may not have known about these payments. WIC claims (Lewitin Opp. Aff. ¶ 94) that having found and rented this space, "the responsibility to 'relocate' — and, if necessary, to evict — was entirely EDC's, through HPD," a claim addressed elsewhere herein.

Although defendants have raised some Certificate of Occupancy issues, there is at least an issue of fact as to whether the Houseman space was, indeed, "legal." Mead Aff. ¶ 6 ("The theaters were legal.").

Building Vacant

WIC admits, as it must, that "one of the conditions of closing was that the building be vacant." E.g., Lewitin Opp. Aff. ¶ 129. HUD regulations also required this. Opp. Memo, at 130.

This Court has a saying, "Moving a mountain is easier than moving a person." Although "moving a person is mostly meant in a figurative sense, anyone familiar with New York City's ubiquitous, interminable Landlord-Tenant Wars knows just how difficult "moving a tenant," in a literal sense, can be. Hinging a make-or-break plan on evicting a tenant by a certain date is reckless; if the planner lacks the power to effect the eviction itself, the plan is foolhardy. EST's wily intransigence proves this point perfectly. To close, WIC had to demonstrate that the 549 Building was vacant, and the inconvenient fact is that it was not.

In the face of that fact, WIC argues that defendants were obligated to make it so. E.g., Complaint ¶ 68; Opp. Memo, at 62. Anybody versed in City practices would be dubious instantaneously. Nevertheless, this Court has deconstructed the Contract, has examined it minutely from top to bottom, and it simply does not obligate EDC, HPD, the City, Bloomberg, Doctoroff, or anyone else, anyone else except, perhaps, WIC itself, to evict anyone from the 549 Building. Any possible inferences are contrary to WIC's position. For example, pursuant to Section 11(a)(2), WIC represented that it "ha[d] made a full and thorough examination and investigation before entering into this Contract and, in entering into this Contract, [WIC] has not been induced by and has not relied upon any representations, warranties or statements, whether oral or written, express or implied, made by seller or any agent, employee [etc.], which are not expressly set forth in this Contract concerning the Property, its ... condition ... tenancies or occupancies ... or any other matter affecting or relating to the Property or this Transaction." Similarly, pursuant to Section 12, "Nothing contained in this Contract shall obligate [EDC] to incur any expense or to bring any action or proceeding in order to cure any defects, encumbrances or other objections to title or to render title marketable or in accordance with this Contract."

WIC claims (Lewitin Opp. Aff. ¶ 19) that "the condition of closing that the building be vacant ... was solely in the control of EDC, through HPD, the City's real property manager and the lessor of the Building – hence the inclusion in the Contract of [Section] 4(g), which obligated EDC to relocate or evict [M&S]." Section 4(g) does no such thing; it essentially obligates WIC to reimburse HPD for up to $100,000 for expenses in "relocating" M&S. A contract to which HPD was not a party could not have obligated it to do anything; and the Contract simply made EDC a conduit for money flowing from WIC to HPD. As noted elsewhere herein HPD seems to have controlled EDC, rather than vice versa. That Section 4(d) of the MOU provided that "If HPD and EDC disagree as to the interpretation or application of any Laws, HPD's interpretation or application shall prevail," is a smidgen of evidence that HPD, not EDC, was the top dog in whatever relationship they had. According to WIC (Opp. Memo, at 61), HPD is "an agency of defendant City of New York"; it was not an agency, or an agent, of EDC. Finally, whatever obligation Section 4(g) imposed, and on whom, EST, the real sticking point in attempts to vacate the building, is noticeably absent from its reach.

Ironically, WIC itself is ambivalent as to who, if anyone, exactly, was "obligated" to evict EST, as it refers (Opp. Memo, at 56) to "WIC's contractual obligation or defendants' contractual obligation to evict [EST]."

In point of fact, the Contract obligated neither party to evict EST; the "obligation" was that the building be vacant (§ 6(o)), absent which EDC had the right to terminate the contract. The Contract could not have "obligated" EDC to evict EST, because EDC did not have the power; and it could not have obligated the other defendants, because they were not parties to the contract. WIC claims (Lewitin Opp. Aff. at 6) that "HPD wholly refused to fulfill its obligation to EDC under the Contract to relocate [the 549 Building Tenants]." WIC would not even have standing to sue for a breach of this far-fetched obligation.

At Weinberg's deposition (Lewitin Opp. Aff., Exh. Y, Tab 13, at 31-32; see also, Opp. Memo, at 66), when told to assume that EST had refused a reasonable relocation offer made by WIC, and asked whether in that instance, "the responsibility for evicting EST [was] that of HPD," he answered "Yes." Weinberg may simply have meant that as between EDC and HPD, only HPD could evict EST.

Similarly, at Warren's deposition (Lewitin Opp. Aff., Exh. Y, Tab 12, at 101-02), when told to assume the same, and asked whether "the available next step was to bring eviction proceedings," he testified as follows:

> A. Yes.
> Q. And that that responsibility and that obligation lay with H.P.D., true?
> A. Yes.
> Q. And laid only with H.P.D., all the other agencies, the alphabet soup, H.P.D., E.D.C., it was H.P.D. and only H.P.D. who could bring such conviction [sic!] proceedings against E.S.T., true?
> A. Yes.

Warren, similar to Weinberg, may simply have meant "obligation" in the sense that only HPD could evict EST. In any event, to the extent that Weinberg and Warren were opining on a matter of law, that is for this Court ultimately to determine. See Mallad Constr. Corp. v County Fed. Sav. & Loan Assn., 32 NY2d 285, 291 (1973) (courts are tasked with the "responsibility of … interpret[ing] written instruments").

Thus, WIC's constant refrain that the contract "obligated EDC, through HPD, to relocate and/or evict" certain tenants (e.g., Opp. Memo, at 62), is unavailing. The contract easily could have said so, but it does not.

Even assuming, arguendo, that HPD had been obligated to evict EST, it seems to have made reasonable efforts to do so. Much of the first half or so of Weinberg's affidavit details HPD's efforts to find EST comparable "swing space"; the second half or so details HPD's efforts to evict EST. True, those efforts, at least in hindsight, were not all-out, gung-ho; they may even have been somewhat laggard; but there is no evidence that they were perfunctory or in bad faith. WIC's claim that HPD was "obligated" to evict EST begs the question, "By when?" Whether or not, as Weinberg and Warren claim, commercial L&T judges routinely refuse to evict non-profit and/or cultural tenants until the last possible moment is incapable of a simple answer. But again, whether or not HPD could have evicted the 549 Building Tenants apace, it was not obligated to do so, and certainly not by the Closing Date.

Glascoff's exegesis of the third ground set forth in the Termination Letter is mystifying at best, disingenuous at worst. He starts off (Opp. Aff. ¶ 111) conceding that the 549 Building "was not vacant on November 15, 2002 or December 10, 2002." He then states as follows:

> EDC does not, in fact, rely on that fact as a ground to repudiate its August 30, 2001 Contract with [WIC]. The Termination Letter [Exh. 3 to his Aff.] asserts as its Ground 3:
>
> > "WIC's failure to make relocation space available to EST that is acceptable to EST."

The entire sentence, of which he has quoted only part, is as follows: "In light of WIC's failure to make relocation space available to EST that is acceptable to EST, EDC believes that the Condition to Closing specified in Contract Section 6(o), requiring that the Property be vacant at closing, will not be fulfilled." Thus, contrary to Glascoff's statement, ground three of the Termination Letter expressly (if inartfully) relies on the 549 Building not being vacant. Ironically, WIC's own pleading belies Glascoff's position; ¶ 93 of the Complaint acknowledges that the Termination Letter "claimed that WIC ... (ii) had not shown that the [549 Building] would be vacant at closing."

Another way in which to view WIC's failure to fulfill its pre-closing tenant relocation obligations is to examine the circumstances surrounding the final contract extension. By late October 2002, EDC clearly had the upper hand in the extension negotiations. Financing remained incomplete, the 549 Building Tenants were staying put, the OSB Tenants were being evicted, and the October 31 deadline loomed large. Desperate to prevent EDC from terminating the Contract, WIC seemingly would have signed anything ... and it did. In the Eighth Contract Extension Agreement, WIC stipulated that, inter alia, "all Conditions were not satisfied by" October 31, 2002; that "Time [was] of the Essence"; that (again) "certain conditions to Closing that are [WIC's] responsibility to satisfy have not been met"; and, perhaps most forebodingly, that

> [EDC] has the right to terminate the Contract if Seller reasonably believes that any of the conditions for Closing set forth in Section 6 of the Contract cannot be fulfilled by the Closing Date including, but not limited to, the conditions set forth in sub-Section 6(o) of the Contract.

Supra (emphasis added). Section 6(o) conditioned closing on EDC "hav[ing] determined, in its sole discretion, that the Building is vacant," and EDC did not need to exercise much discretion to determine that the 549 Building was not vacant, as EST (not to mention M&S) was still there, "interminably intransigent," in WIC's phrase (Opp. Memo, at 55), thumbing its nose at everyone.

In a strange twist, WIC complains that "EDC ... never communicated to WIC or Glascoff a date when the defendants anticipated that they would have satisfied their obligations under the contract re: delivering the Building vacant." The Contract does not obligate EDC (much less the other defendants) to deliver a vacant building. Rather, pursuant to § 6(o), EDC had sole discretion to determine whether the building was vacant. This was a right, not an obligation. Also, the Contract could hardly have obligated EDC to deliver a vacant building and then given EDC sole discretion to determine whether or not it had done so; rather, if EDC determined that the Building was not vacant, it had a right to terminate the contract, not a right to find that EDC itself had breached the contract!

In sum, the Termination Letter correctly asserted that EDC had the right to terminate the Contract on the ground that the 549 Building was not vacant on the Final Closing Date.

Good Faith and Fair Dealing

WIC correctly notes that New York law imposes a "covenant of good faith and fair dealing" on every contract. Defendants correctly note that WIC did not assert a "good faith" claim in its complaint. In this Court's view, a separate "good faith" claim is superfluous; assuming, arguendo, it is required, this Court would allow an amendment to add one; and Justice Smith obviously considered such a claim, which is "law of the case."

The Court of Appeals described the covenant in Dalton v Educational Testing Serv., 87 NY2d 384, 389 (1995) (Kaye, C.J.):

> Encompassed within the implied obligation of each promisor to exercise good faith are "any promises which a reasonable person in the position of the promisee would be justified in understanding were included." This embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion. The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that "would be inconsistent with other terms of the contractual relationship."

The "limits" on the duty of good faith and fair dealing are on full display in Suthers v Amgen Inc., 441 F Supp 2d 478, 485 (SDNY 2006) (applying New York law):

> Plaintiffs have no support for the broad proposition that an entity violates the implied covenant of good faith and fair dealing by acting in its own self-interest consistent with its rights under a contract. Indeed, courts have refused attempts to impose liability on a party that engaged in conduct permitted by a contract, even when such conduct is allegedly unreasonable.

This quote is particularly pertinent here for at least two reasons. First, defendants' internal documents, including the Dueling Scenarios, show no more than that in invoking its rights under the contract, EDC was attempting to discern, and act in, what it considered to be its own self-interest. Second, when all is said and done, WIC's real gripe is that EDC acted "unreasonably" in terminating, and failing to revive, the Contract.

WIC argues (Lewitin Opp. Aff. ¶ 149), and internal documents somewhat support, that by August of 2002, a sense of foreboding, if not doom and gloom, about the IRSC Project had overtaken some of defendants' employees. Still, nobody ever says, in so many words, "WIC is able to fulfill its obligations, but we will not let them." Comments included: "Discussed [the IRSC Project], all agreed it is not feasible." "[I]f and when [the IRSC] is really dead … ." "While the idea of terminating the project has been expressed internally, given that WIC has a signed Contract of Sale with EDC, the legal implications of such an action need to be further examined." None of these comments are actionable.

Indeed, WIC has submitted a whole host of defendants' internal documents, some of which are bullish on the IRSC Project, and some of which are bearish. WIC tries to have it both ways: the bullish documents show that WIC fulfilled its obligations and that there was no reason for the contract to founder; the bearish documents show that defendants were out to kill the deal. Either way, says WIC, "the Giants win the pennant." This Court sees a different picture. Nobody is salivating at the prospect of the IRSC Project's demise (and nobody seems to have gloated over its expiration). Instead, everybody is taking a hard look at a fluid situation. Emblematic of defendants' matter-of-fact mindset is an August 22, 2002 e-mail (Lewitin Exh. NNNNN) from Bahat to Blatchford saying that the purpose of the extension to October 31 was to, "essentially, give [WIC] until October 31 to meet the obligations in their contract and terminate the project if they don't." Ambivalence, not glee, characterizes the Contract's drawn-out denouement, from about August to December 2002.

True, different people, working for different agencies, at different times, had different views as to whether the IRSC Project would, or should, go forward. That is human nature. That is also why we have contracts.

In a case with a *ratio decidendi* applicable here, Randall's Is. Aquatic Leisure, LLC v City of New York, 92 AD3d 463, 464 (1st Dept 2012), the First Department concluded:

> The breach of contract claim against the City for terminating the agreement to build a recreation center fails because plaintiffs did not comply with the obligation to obtain financing. Plaintiffs' allegation of a course of conduct and oral promises extending their financing deadlines is belied by the record, which demonstrates that all extensions granted by the City were in writing, and reserved to the City all of its rights under the agreement, including the right to terminate if plaintiffs failed to meet certain financing conditions. Obtaining loan commitments by a date certain was a contractual obligation. Plaintiffs failed to meet the condition, and the City terminated the agreement. Thus, the breach of contract claim was correctly dismissed as against it. The good faith and fair dealing claim fails because the City's termination of the agreement was consistent with the agreement's express terms.

Id. at 464 (emphasis added) (citations omitted).

F & S Pharm., Inc. v Dandra Realty Corp., 302 AD2d 204, 206 (1st Dept 2003), which WIC cites (Opp. Memo, at 104, n. 159) is readily distinguishable. There, the subject lease provided that plaintiff-tenant had the right to purchase the subject building from defendant-landlord for a set amount of money, "on terms agreeable to both parties." When plaintiff attempted to exercise this option, defendant sought to impose harsh financing terms, including requiring plaintiff to take out a purchase-money mortgage, pay a high rate of interest, and be limited in the ability to pre-pay. Plaintiff balked at the onerous terms; defendant refused to sell; plaintiff sued for specific performance; and the trial judge granted the defendant summary judgment on the ground that there was never a "meeting of the minds" on the essential terms of the option. The Appellate Division reversed, finding that the essential term of the option was the contract price, and that defendant had no right to impose a particular type of funding, i.e. the purchase-money mortgage. Defendant's insistence thereon "raise[d] an issue as to whether defendant breached the covenant of good faith and fair dealing implicit in all contracts." Contrary to WIC's blatant and self-serving

mischaracterization, the operative concern was not "whether plaintiff would be able to obtain financing," but, rather, whether defendant could unilaterally add conditions to this financing that the contract did not contemplate.

WIC has also played "fast and loose" in interpreting Justice Smith's June 21, 2010 Decision (supra). According to WIC (Opp. Memo, at 109), Justice Smith found that WIC had raised issues of fact "in every branch of" WIC's breach of contract, good faith, and ['WIC believes'] tortious interference claims." Not so. To begin with, Justice Smith did not dissect the claims into "branches"; she does not even use that word in the opinion, so the statement that she found issues of fact "in every branch" is a fabrication. Next, as noted above, "Justice Smith seems not even to have considered the possibility that WIC actually satisfied its pre-closing financial obligations." So the straightforward breach of contract claim, as distinct from the good faith claim, is out the window (although, out of an abundance of caution, is considered at great length herein). Next, she did not find issues of fact as to the tortious interference claim; she found that WIC was entitled to further disclosure to look for evidence that might create issues of fact. Finally, in the one bright spot for WIC, she found that "EDC has not tendered sufficient evidence to eliminate any material issues of fact as to whether EDC breached the Contract by failing to proceed with good faith." Although reasonable minds could disagree, this Court believes that Justice Smith left open the possibility that after disclosure was complete EDC could "tender sufficient evidence to eliminate any material issues of fact as to whether EDC ... fail[ed to] proceed with good faith." Justice Smith's roadmap provided a simple "sauce for the goose is sauce for the gander" justice: WIC could use disclosure to support its tortious interference claim; and EDC could use disclosure to defeat WIC's good faith claim. That so much disclosure subsequently ensued may have validated Justice Smith's approach.

WIC claims (Opp. Memo, at 87) that "EDC engaged in a number of acts that violated its duty of good faith and fair dealing ... includ[ing] repeatedly granting short extensions of the contract, plainly inadequate for closing conditions to be met." As EDC was not obligated to grant any extensions at all, other than the three built into the contract (see Section 5(b)), the last of which expired on April 15, 2002, granting "inadequate" extensions hardly could have violated any duty. In hindsight, an extension of several more months probably would have resulted in WIC satisfying its funding obligations, and possibly its tenant relocation obligations. But this is all just so much fantasy-land. If WIC's argument is that EDC breached its duty of good faith and fair dealing by refusing to grant more or longer extensions, this Court utterly rejects it. As EDC was not obligated to grant any extensions beyond the three built into the contract, the greater number or length that WIC needed is tantalizing but irrelevant.

Continuing in this vein, WIC argues (Opp. Memo, at 91) that "far from a 'gift' to WIC," the extensions were evidence of "bad faith." "Bad faith" could have dictated no extra extensions at all; and defendants would have avoided more than a decade of dreary litigation, inasmuch as, beyond a shadow of a doubt, WIC had not satisfied the closing conditions by the April 15, 2002, end of the built-in extensions. Consider that more than six months later, in asking for the eighth extension, WIC stipulated that it still had not satisfied the closing conditions. Indeed, much of WIC's argument about having met its financial and other obligations, such as CCB's $500,000 loan to WIC, depends upon developments that occurred shortly before November 15, 2002, and certainly after April 15, 2002.

Another alleged breach of the duty of good faith and fair dealing was "designing and then executing a 'Project Termination Scenario' that doomed the IRSC Project." This puts the cart before the horse. By the summer of 2002 the IRSC Project was *in extremis*, given that the 549 Building Tenants were refusing to move (Ground Three) and the OSB Tenants were being forced to move (Ground Two). The Termination Scenario did not cause the IRSC Project to fail any more than the Completion Scenario caused it to succeed. Drafting the Dueling Scenarios was not a dastardly scheme; rather, it was a prudent business practice in the face of a looming legal crisis and financial catastrophe (half-empty buildings with non-paying tenants not being good for the bottom line).

Parnes claims (Parnes Aff. ¶ 5) that "the cancellation of the IRSC project by the City seemed to have nothing whatsoever to do with the merits or 'risks' associated with the IRSC. The decision to terminate was apparently determined independently of an evaluation of the IRSC." The Dueling Scenarios, which were the culmination of months of soul-searching and hand-wringing, seemingly put that claim to rest.

Glascoff complains vociferously (Opp. Aff. ¶ 61-75) about EDC's alleged, and apparent, failure, in or about the summer of 2002, to "respond to WIC's requests that EDC prepare closing documents" (normally a seller's obligation), claiming that this demonstrates that at least from July 2002 "[d]efendants were no longer acting in good faith … and had decided to terminate the contract." This is too thin a reed to support a "good faith" claim, especially following right on the heels of EDC's June 2002 (unrepaid) loan to WIC in furtherance of the IRSC Project. Also, perhaps what is "normal" does not apply when the real estate is, for practical purposes, being given away. The Contract could have, but did not, obligate the seller to prepare the documents. The Dueling Scenarios a month later suggest that in July EDC had not decided anything. Assuming, arguendo, that by the summer of 2002 EDC, or some of its employees, saw the writing on the wall, that EST could not be dislodged within a reasonable period of time, this would not be a breach of the covenant of good faith and fair dealing, which, despite its nomenclature, dictates what a contracting party must do, not what it must think. Finally, WIC has not demonstrated that had EDC prepared closing documents, or prepared them sooner, EDC would not have had the right to terminate the Contract for the reasons sustained today. The overarching point is that WIC, not EDC, had a deadline to meet.

Lewitin claims (Lewitin Opp. Aff. ¶ 150) that the Dueling Scenarios were "created" "[i]n furtherance of the plan to terminate the Contract." There is nothing internal or external to the Scenarios to suggest that they were other than an attempt to assess the Contract. They could, conceivably, have been part of a fiendish plan to kill the IRSC Project; but a finding of fact must be based on more than pure speculation. Bernstein v City of New York, 69 NY2d 1020, 1021-22 (1987). The Completion Scenario appears to be a good-faith schematic of how the IRSC Project could have been brought to fruition, including an assessment of costs and an estimate of timing. In WIC's telling (Lewitin Opp. Aff. ¶ 150), by virtue of the Completion Scenario "defendants admit that they had the ability, and the discretion to," proceed with the IRSC Project. However, "ability" plus "discretion" does not equal "obligation." Also, the Completion Scenario antedated the Final Closing Date and the Termination Letter by several months, months during which WIC was still unable to satisfy the Contract's conditions precedent. The Termination Scenario also appears to be nothing more or less than a good-faith, pragmatic, cost-benefit analysis.

Glascoff also complains (Glascoff Opp. Aff. ¶ 109) that "had the Defendants been acting in good faith and seeking to accommodate the WIC Project, … given the August 4, 2004 date for the general construction

permits [for the OSB Supportive Housing Project], [CHDFC] would not have needed the OSB vacant ... anytime before July 2004." See generally, Lewitin Opp. Aff. ¶¶ 82, 86. This confounds WIC's "good faith" and "tortious interference" claims, because "good faith and fair dealing" did not bind the tortious interference defendants. The Court notes in passing that today's decision leaves standing WIC's prima facie tort claim against CHDFC.

WIC's *cri de coeur* that defendants violated the covenant of good faith and fair dealing by refusing to allow Justice Smith to resolve whether the OSB Supportive Housing Project or the IRSC Project would be the first to proceed is just plain silly. Even assuming Solomonic wisdom on her part, defendants were not obligated "to submit these disputes for judicial resolution" (Reply Memo, at 28), and any such resolution would probably have been *ultra vires*.

Similarly WIC was overly optimistic as to how any decision by Judge Buchwald would have affected the EST situation. "Judge Buchwald's decision would ... either [have] giv[en] EDC (through HPD) the federally sanctioned right and power to evict EST *or* find that EST could not be evicted, thus making the building vacancy provision of the Contract incapable of performance." Opp. Memo, at 56, n. 85. The first prong of WIC's formulation "makes a virtue (winning the lawsuit) of necessity"; if unsuccessful, EST's lawsuit would not have "assisted" HPD in evicting EST, but, if successful, it would have prevented HPD from doing so. The second prong of WIC's formulation conjures the "incapable of performance" doctrine from its usual habitat, where it excuses both parties to a contract from performing, thus effecting the cancellation of the contract, and attempts to transplant it to the condition precedent area, where it has no practical application: if EST could not be evicted, then WIC could not close on the contract (not what WIC wanted or wants). A condition precedent that cannot be satisfied is not "excused"; rather, it provides a basis to terminate the contract for failure of a condition precedent.

WIC considers EST's federal lawsuit to be nefarious activity; but there is no evidence that it is other than the result of an independent actor's attempt to further what it considered, rightly, wrongly, or indifferently, to be in its own self-interest. When, on December 13, 2002, EST effectively withdrew its federal action, WIC thinks this was "in order to foreclose binding arbitration that could have solved the EST issue once and for all." If "the EST issue" was whether federal law prevented defendants in that action from evicting EST, binding arbitration (to which EST probably would never have agreed) might have solved that issue; but it would not have solved the EST problem, i.e., EST's continuing presence in the 549 Building. For WIC, victory over EST in federal court was necessary, but not sufficient. In any event, EST presumably withdrew its federal action because the apparent demise of the IRSC Project obviated the need for it.

Yet another item in WIC's lengthy litany of evidence of bad faith and evil motives is that the Termination Letter incorrectly assumes that WIC is relying on the $200,000 ESDC grant to fulfill its financing obligations. EDC did not make up out of whole cloth this amount and source; WIC listed this amount as a source of funding in an October 31, 2002 letter to EDC and discussed the grant extensively in its November 14, 2002 letter to Collignon (Goldfinger Exh. Y), so a mistake was easy enough. In any event, if defendants were attempting to pull the wool over the world's eyes, they certainly would not have relied on such a transparent subterfuge. Ms. Lewitin says (Lewitin Opp. Aff. ¶ 31) that WIC "was to receive" the funds after the execution of a "grant disbursement agreement." So WIC did not have a "signed" commitment.

As Ms. Lewitin eloquently argues (Lewitin Opp. Aff. ¶ 15), defendants, collectively, "could have" made the IRSC a reality: they (EDC) could have extended the Closing Date; they (CHDFC) could have discontinued (or delayed) the OSB evictions; they (HPD) could have evicted the 549 Building Tenants. But while the obligation of good faith and fair dealing does not allow one contracting party to stymie the other, it does not require that party to guarantee the contract's success.

WIC posits that defendants' refusal to reconsider the Contract termination, especially in light of WIC's offer to increase the purchase price by more than a million-fold (from $2.00 to $2.4 million), is evidence of bad faith. This refusal could be evidence of any number of things: obstinacy; relief that the ordeal was over; lack of faith in WIC; belief that the 549 Building Tenants could not be evicted prior to the OSB Tenants being evicted; etc. As evidence of "bad faith," it is rather paltry. This Court is not aware of, and its attention has not been directed to, any case that says failure to reconsider a valid termination is evidence of bad faith, either before or after the termination.

There is a pattern here. If defendants discontinue an eviction proceeding against WIC itself; if they grant WIC an "unrealistic" extension; if they refuse to participate in settlement negotiations (which every litigant has a right to do); if they deliberate in private whether to exercise their express (albeit conditional) right to terminate a contract; if they make an understandable mistake; if they refuse to change their minds; all is done in "bad faith." This Court does not buy it; and, acting reasonably, and without speculating, no jury could, either.

WIC notes (Lewitin Opp. Aff. ¶ 127) that Warren testified (Lewitin Opp. Aff., Exh. Y, Tab 12, at 80) that "New administrations look at things differently, and when a new administration comes in, they are free to look at the issues that prior administrations had opined on." A new administration does not have the right to violate contractual rights with impunity; but it does have the right to put its own stamp on municipal matters; it can refuse to excuse the failure to satisfy contractual conditions precedent towards which a prior administration might have turned a blind eye. In New York City, the current "new administration," the de Blasio administration, is looking at police "stop-and-frisk" tactics and charter schools and income disparities and carriage horses differently from the prior administration (it might even look at a women's art center differently).

Tortious Interference

Under New York Law, a tortious interference plaintiff must demonstrate the existence of a contract between the plaintiff and a third person; defendant's knowledge of that contract; defendant's intentional procurement of the breach of that contract; and damages. Israel v Wood Dolson Co., 1 NY2d 116, 120 (1956) (Fuld, J). Restated forty years later, "where there is an existing, enforceable contract and a defendant's deliberate interference results in a breach of that contract, a plaintiff may recover damages for tortious interference with contractual relations." NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 621 (1996). Here, HPD's actions might be described at worst as "hesitant cooperation" rather than "deliberate interference"; but it is of no moment, as there was no breach (supra).

The archetypical tortious interference cause of action arises when A contracts to sell its entire output of widgets to B for X dollars; C, knowing this, offers A X+Y dollars for these same widgets, and A accepts;

and B must purchase the same amount of widgets from D for X+Y+Z dollars (it sounds more complicated than it is). Such a scenario is a far cry from inter-related municipal entities sharing opinions or advice, or perhaps even influencing one another. According to Justice Smith's June 21, 2010 opinion, 2010 NY Slip Op 31577(U), "EDC ... is administered by HPD, the agency responsible for urban renewal within New York City." HPD, in turn, is an agency within the Office of the Mayor of the City of New York. See http://www.nyc.gov/html/hpd/html/about/about.shtml. Can contract law prohibit what politics surely allows: (alleged) pressure by defendants Michael Bloomberg, Mayor of the City of New York; Daniel Doctoroff, "Deputy Mayor for Economic Development and Rebuilding for the City of New York" (http://en.wikipedia.org/wiki/Daniel_L._Doctoroff); and a mayoral agency under their control, to wit, HPD, brought to bear on a not-for-profit corporation (EDC) that the agency "administered"? This Court is only too aware that the judiciary must be loathe to interfere with municipal discretion.

On a more personal level, am I liable for tortious interference if my friend contracts to purchase a motor vehicle and I convince this friend not to close on the deal because I believe that the vehicle is a lemon? I hope not. Context must matter here.

As noted (supra), the Appellate Division has stated that "WIC was also barred from litigating whether Perine had tortiously interfered with the Contract by unjustifiably encouraging and inducing EDC to breach it, finding that Perine's negative views of WIC stemmed from WIC's history of nonpayment of rent, illegal subletting and its inability to gain consensus among other tenants in the Building in favor of its Project." If Perine's "negative views" insulated her, this whole house of cards collapses; WIC has spent innumerable pages detailing defendants' alleged negative views of WIC. This Court does not see how any remaining defendant could be liable, particularly as WIC has cast Perine as a principal villain in its story.

WIC is habitually eager (e.g., Friedman Digest of Blatchford EBT, at first page) to pounce on any evidence that HPD and ODM are entities separate and apart from EDC because, the thinking goes, this strengthens WIC's tortious interference claim. However, it weakens WIC's case overall. A contracting party is bound by the obligation of good faith and fair dealing. A non-party has much greater latitude, indeed, has no affirmative obligations at all, can just stay put and do nothing. Also, just as a matter of pure logic, the more distinct EDC is from HPD and ODM, the tougher is WIC's task. The fundamental requirement of a tortious interference claim is a breach of contract. Proving that the party with whom you contracted breached the contract is easier than proving that and proving that a third-person affirmatively interfered with performance of the contract.

WIC claims (Opp. Memo, at 12) that HPD and the City tortiously interfered with the Contract by, inter alia, "approving or directing CHDFC in bringing eviction proceedings against [the OSB Tenants]." These eviction proceedings were the predicate for Ground Two of the Termination Letter. Tortious interference may be an elastic concept, but applying it to a fourth-party (the City) asking a third-party (CHDFC) to do what it has an absolute right to do (i.e., evict the OSB Tenants, one of whom is the first-party and the others of whom are non-parties) would seem to stretch it beyond recognition. CHDFC's actions indirectly resulted in one ground for the termination of a contract, they did not prod a party to breach the contract.

In a telling comment, Lewitin states (Lewitin Opp. Aff. ¶ 135) that "EDC had been doing its best to persuade HPD to perform EDC's relocation/eviction obligations under the contract." As stated *ad nauseum*

herein, the Contract did not obligate EDC to vacate the 549 Building; it arguably obligated WIC to do so, at least if WIC wanted to close. And if "EDC had been doing its best to persuade HPD to" evict the 549 Building Tenants," then where is the "bad faith"?

WIC claims (see generally, Opp. Memo, at 62 et. seq) that HPD's failure to act expeditiously in evicting EST directly contravened ODM's directives. That would, first and foremost, be a political issue between ODM and HPD, rather than a matter for judicial oversight, at least not in the context of the current litigation. WIC itself explains why, in the long run, this was unlikely to have happened:

> When I said to [an HPD staffer] directly that Deputy Mayor Harding had supported the project[,] calling for HPD to prosecute the evictions[,] he said, "Do you really think that if the Deputy Mayor had told the Commissioner [of HPD] to relocate and evict the [549 Building Tenants] and she didn't do so, she would still have her job"?

Weinberg says (Weinberg Aff. ¶ 48) that

> HPD and the City supported both projects [i.e., the OSB Supportive Housing Project and the IRSC Project] and the City was under no obligation to stop [the OSB Supportive Housing Project] so that WIC and the visual artists could remain in the [OSB] until WIC entered into a construction contract, assembled its financing and completed construction at its project site.

By the time of this telling, September 2002, the City's "support" for the IRSC Project was decidedly ambivalent, but, more to the point, Weinberg is correct on the law.

Whatever "the City" felt about the IRSC Project, there is hearsay evidence that Weinberg's own "support" was rather thin. See Lewitin Opp. Aff., Exh ZZZZZZZ, Letter of May 23, 2002, Lewitin to Blatchford, cc to Bahat: "Weinberg [is] continuing to state publicly that the [IRSC Project] would not move forward."

Weinberg's view of the status of CHDFC's OSB Supportive Housing Project in that general time frame (late August 2002) contrasts sharply with WIC's. In Weinberg's rendering (Weinberg Aff. ¶ 49), CHDFC had jumped through numerous impressive-sounding hoops: "environmental review"; "land use approvals"; "zoning change"; "Urban Development Action Area Project designation [and] approval"; "Borough President approval"; "City Council resolution"; "Mayoral authorization"; and so on. Former City Council Member Ronnie Eldridge had a different take (Eldridge Aff. ¶ 2): "any such conversion was a long-range plan and ... the actual construction required to convert the [OSB] into residential use would not begin until after the IRSC Project was completed and the [OSB Tenants] resettled into the [549] Building." Eldridge Aff. ¶ 2; accord, Lewitin Opp. Aff. ¶ 153. These two views are hardly in harmony, but they are not mutually exclusive. Instead of a material issue of fact, there is an irrelevant difference of opinion.

However, whatever the status of CHDFC's OSB Supportive Housing Project, whether on the verge of shovels in the ground or hopelessly mired in bureaucratic red tape, HPD was not obligated to force CHDFC not to evict licensees in a building as to which CHDFC was the net lessee. Although this Court sees the matter slightly differently from how Justice Batts saw it (with a different case, a different record, and a different context), she is well-worth quoting on this point:

> Thus WIC is left only with HPD's authorization of CHDC's eviction proceeding against WIC in the spring of 2002, which on its own hardly constitutes "a pattern of antagonism," nor does it represent a procedurally or substantively improper decision, given CHDC's right under its license agreement with WIC to terminate the latter's occupancy of the Old School Building at any time.

Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 2005 WL 1241919, at 32, 2005 US Dist LEXIS 10027 (SDNY May 23, 2005) (emphasis added). Proving "bad faith" is an uphill battle, if not utterly futile, when the actor has an absolute right to do something.

Furthermore, it cannot be emphasized enough that WIC's § 4(h) tenant relocation obligations had to be performed "to [EDC's] satisfaction, in its sole discretion." No reasonable jury could find that EDC's determination that WIC had not satisfied its obligation to find adequate "swing space" for the OSB Tenants was not within its discretion.

There never was a guaranty that CHDFC would not evict the OSB Tenants, who knowingly accepted a short-term license, prior to completion of the IRSC Project construction. Lewitin admitted that HPD never said that WIC (and, presumably, the other OSB Tenants) could remain in the OSB until the 549 Building rehabilitation was complete. See Shapiro Aff., Exh. E, Lewitin Tr 553:17-554:23.

As defendants argue (Reply Memo, at 19-20):

> Plaintiff has not controverted ... that its budget assumed that the [OSB] would be available as a relocation resource for the duration of the [IRSC] construction project. * * * Thus, WIC failed to satisfy the tenant relocation and building vacancy requirements contained in the closing conditions of the Contract with respect to the returning tenants whom WIC had removed to the [OSB] in the fall of 2001 under a license agreement with [CHDFC].

Thus, the precarious, one might say "untenable," position of the OSB Tenants negatively impacted WIC's ability to satisfy both its tenant relocation and financial obligations under the contract. The moral of the story is, "If you do not want to be evicted after a few months, obtain a lease for a few years."

In any event, despite WIC's claim (Opp. Memo, at 37, n. 45) that CHDFC was a pawn of HPD, there is absolutely no direct evidence that the tortious interference defendants asked or directed CHDFC to evict the OSB Tenants. True, the Dueling Scenarios (supra) arguably suggest that EDC had some control or influence over the OSB evictions. Queried about this in a post-submission e-mail, the City responded as follows:

> Lewitin Ex. D is a "decision tree" type of internal memorandum prepared by NYCEDC staff for internal discussion and discussion with City Hall staff. A decision tree is a tool (taught in business schools) in which various scenarios are outlined for people who have to make a decision, typically including the steps to be taken and associated anticipated costs and/or timeline for each required step. Lewitin Ex. D does not suggest that the potential "actor" for all possible actions is NYCEDC. To the contrary, particularly in the "Completion Scenario", WIC would have undertaken some actions. Nor does it suggest that NYCEDC had the power

or ability to direct or influence actions described. NYCEDC did not have power or influence on CHDFC's relationship to the Old School Building tenants.

April 9, 2014 e-mail of Susan Shapiro to the Court, copies to all counsel.

This Court interprets the Dueling Scenarios reference to the OSB evictions being halted (strangely, this "step" is in both diametrically-opposed scenarios) as a piece of a puzzle that would have to fall into place, not as something the Action # 1 defendants controlled. As Ms. Shapiro points out, the scenarios include actions by WIC, and EDC certainly did not control WIC. And again, not only did CHDFC have an absolute right to evict the OSB Tenants, it had an arguable reason (the OSB Supportive Housing Project) to do so. IN any event, from "defendant told my contractual supplier to stop shipping to me" to "defendants told a landlord to evict licensee tenants from the landlord's building, which was slated for rehabilitation for a 'supportive housing' project, so that they would have nowhere to go, resulting in a condition precedent in a contract between one of those tenants and another party not being satisfied" is a far cry.

The Court notes in passing that the tortious interference claim is superfluous. If EDC did not breach, than an essential element of a tortious interference claim is missing. See, e.g., NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d 614, 621 (1996) ("breach of contract has repeatedly been listed among the elements of a claim for tortious interference with contractual relations"). If EDC did breach, then WIC can hold EDC accountable for breach of contract. In the business world, the tortious interferer may be the only "deep pocket," or the plaintiff may have personal or commercial reasons for not wanting to sue the breacher. That would not seem to be an issue here, given that WIC has sued EDC.

Superfluous or not, defendants are entitled to summary judgment dismissing WIC's tortious interference claim.

The L&T Proceedings

Generally

Intervention

As noted (supra), WIC claims, and is cross-moving for summary judgment, on the grounds that the City's (purported) net lease to CHDFC is void because it was entered into in violation of New York City Charter §§ 197-c ("ULURP") and 1802 (powers of HPD). In support of intervention, the City argues that WIC's claims that the (purported) net lease is regulated by and subject to these provisions, and therefore void, "are of 'real and substantial interest'" to the City, citing, among other authority, George v Grand Bay Assoc. Enter., Inc., 45 AD3d 451, 452 (1st Dept 2007) (purchasers of property permitted to intervene in suit to cancel deed). CHDFC has submitted an "Affirmation of No Opposition." WIC does oppose, stating that "The City's motion to intervene is just another of the bullying tactics employed by the collective defendants in their effort to overwhelm WIC." Just as, if not more, likely is that WIC's opposition is an attempt to vex the City. This Court grants intervention as of right, pursuant to CPLR 1012, and as a matter of discretion, pursuant to CPLR 1013.

Merits

ULURP

As noted (supra) WIC argues that the net leases are void ab initio because they violate ULURP. The City argues that (1) WIC is collaterally estopped from asserting this position (Shapiro Moving (Intervention) Aff. ¶¶ 6-18); and (2) that WIC is incorrect on the merits, because the leases do not violate ULURP (id. ¶ 21). WIC argues that it is not collaterally estopped. However, WIC raised these defenses in its Action # 2 Complaint, ¶ 35; it raised them in its Memorandum of Law in Opposition to Defendant's (First) Motion for Summary Judgment (see Steinitz Reply Aff. ¶ 8, Exh. A, at 15); and it addressed them in its opposition to defendant's appeal of that summary judgment decision (id. ¶ 9, Exh. B, at 45). The Appellate Division was aware of WIC's ULURP arguments when it (supra) "declar[ed] that CHDFC has standing ... to commence eviction proceedings with regard to WIC's tenanc[ies]." This Court believes that having heard argument that ULURP rendered the net leases void ab initio, the Appellate Division would not have declared that CHDFC had standing, pursuant to those very leases, to maintain eviction proceedings, if it had any question that the leases were valid. Put another way, the holding that CHDFC had standing, pursuant to leases that had been challenged on ULURP grounds, to commence eviction proceedings, necessarily included a finding that the leases did not violate ULURP. Any other conclusion would allow for, if not encourage, piecemeal litigation. Having argued that the net leases were not net leases, WIC was obligated also to argue that they were void ab initio under ULURP ... and WIC did! The Appellate Division was cognizant of this argument and rejected it by implication.

This Court is not aware of any basis for WIC's claim(s) (Stern Cross-Moving Aff. ¶¶ 7, 9) that "If 500 and 549 are not part of an urban renewal plan, than [sic] HPD did not have the power to transfer management of 500 and 549 to the Net Lease [sic] because neither property is residential" or that "the transfers of both 500 and 549 to CHDFC under the Net Lease are null and void because they are not residential properties." Indeed, WIC's position (by implication), that such transfers would or could have been valid only if the properties had been residential, takes the statute's solicitude for residential property and turns it on its head.

This Court need not and does not reach the City's argument (Shapiro Moving (Intervention) Aff. ¶¶ 19, 20) that WIC's ULURP argument is untimely.

HPD's Powers

WIC's claim that the net leases to CHDFC are void ab initio because they violate City Charter § 1802 is unavailing because the 500 and 549 Buildings are in an "urban renewal area," namely, CURA, (e.g., Complaint ¶ 20), which means that HPD has broad powers to lease space in the buildings. On a more general level, WIC acknowledges that "[HPD] is the agency charged with responsibility for urban renewal within the City of New York, including the CURA [running from 50th to 56th Streets between 10th and 11th Avenues]." Complaint ¶ 21. WIC's argument that HPD can only rent residential space in an Urban Renewal Area appears to be completely misplaced. Rather, HPD's ability to rent residential space is more limited than its ability to rent commercial space. Defendants also plausibly argue that if WIC is correct, WIC would be subject to immediate eviction (Shapiro Moving (Intervention) Aff. ¶ 23). Also plausible is defendants' argument that as HPD's net leasing to CHDFC was an administrative action that could have been the subject of a CPLR Article 78 proceeding, WIC's § 1802 argument is barred by the four-month Statute of Limitations that CPLR 217 imposes.

Thus, WIC's New York City Charter §§ 197-c and 1802 arguments are foreclosed and/or wrong on the merits.

The 500 Building - Eviction

Objection in Point of Law

As CHDFC points out, the space WIC occupies in the 500 Building, Unit 2W, is not a subject of WIC's claim for specific performance of the Contract to purchase the 549 Building, so WIC's "objection in point of law" does not apply to the 500 Building. CHDFC says (Restuccia Moving Aff. ¶ 3) that CHDFC "was designated by the City as the not-for-profit developer for 500 West 52nd Street ... into 45 units of supportive housing for the formerly homeless, mentally ill and community residents." Furthermore (id.), "WIC ... currently operates theater and office space in 500 West 52nd Street. WIC can relocate ... to the 7th floor of 549 West 52nd Street, currently used by WIC as an income[-]producing rental space for major film production companies." WIC's recent tax returns apparently validate this last statement, as of the time they speak. WIC considers this suggestion "outrageous" "audacious," and "blithe" (Stern Cross-Moving Aff. ¶ 22), not to mention "disingenuous," "fallacious," and "ill-willed" (id. ¶ 25). CHDFC might consider WIC's having continued to rent out the 549 Building's 7th Floor space (at least until March 15, 2013, when film production companies took their business elsewhere because they needed more elevator access than CHDFC is providing) for significant income, while not paying rent, outrageous, audacious, blithe, disingenuous, fallacious and ill-willed. But most importantly, CHDFC is not obligated to house WIC (or to insure its survival). See Stern Cross-Moving Aff. ¶ 34.

Jurisdictional Defenses

WIC's five jurisdictional defenses are as follows: improper (or lack of) service of the Notice of Petition and Petition (first); lack of standing (second); improper (or lack of) service of the predicate notice (third); "The petition ... does not bear the imprimatur of the Court and is otherwise so disorganized as to be incomprehensible and fatally defective (fourth); and, the grounds asserted in the petition are insufficient (failure to state a cause of action?) (fifth). Documentary evidence precludes the first and third jurisdictional defenses; WIC has also waived them by inaction. See Steinitz Moving Aff. ¶¶ 29 and 30). WIC concedes that the Appellate Division decision on standing precludes the second jurisdictional defense. The fourth affirmative defense is non-jurisdictional (lack of imprimatur) and/or makes no sense. The fifth jurisdictional defense is incorrect as a matter of law.

Affirmative Defenses

WIC's 33 affirmative defenses can loosely be categorized as follows (keeping in mind that some defenses straddle, if not create, or attempt to create, new categories): first through third, eighteenth, and twenty-fourth, the legal conclusion that CHDFC has no right to evict WIC and/or that WIC has a right to remain in possession; fourth through sixth, ninth through sixteenth, and twenty-first, lack of standing; seventh, failure to join necessary parties; eighth, petition fails to state grounds for termination; seventeenth and twenty-sixth, Statute of Limitations; nineteenth, twentieth, thirtieth, and thirty-second, unclean hands; twenty-second, failure to state a cause of action, twenty-third, twenty-fifth, and twenty-seventh, WIC does not owe any rent and/or U&O; twenty-eighth and twenty-ninth, landlord's breach of lease and/or constructive eviction; thirty-third, prior action pending; and thirty-first ("The Notice of Termination is in breach of the covenant of quiet enjoyment."), uncategorizable.

This Court frowns on such blunderbuss pleading, which is easy to draft, more difficult to defend against and dispose of. WIC's failure to support or withdraw such pleading, in the face of a dispositive motion, could be considered sanctionable, and certainly adds insult to injury. The entire laundry list is hereby deemed and declared a nullity.

Nevertheless, the Court has reviewed each defense individually, on the merits; none of them holds any water, legally and/or factually; and WIC barely argues that they do. See Steinitz Reply Aff. ¶ 32 ("WIC does not dispute the validity of the remaining grounds for CHDFC's motion to dismiss WIC's affirmative defenses with respect to the 500 Building.").

In addition to dismissing them en masse (supra), the Court hereby dismisses them individually for the following reasons:

Legally incorrect: one, two, three, eighteen, twenty-two, twenty-four.

Precluded by Appellate Division decision: four, five, six, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, twenty-one.

Incorrect and precluded: seven.

Factually and legally incorrect: eight, seventeen, twenty-six.

Factually unsupported: nineteen, twenty, thirty, thirty-two.

Factually incorrect; legally irrelevant: twenty-three, twenty-five, twenty-seven.

Factually unsupported; legally irrelevant: twenty-eight, twenty-nine.

Legally irrelevant: thirty-one.

Factually incorrect: thirty-three.

In sum, WIC is a month-to-month tenant on the second floor of the 500 Building; CHDFC is the net lessee, and its net lease entitled it to commence eviction proceedings (see Restuccia Aff. ¶ 7); CHDFC validly and properly served WIC with a Notice of Termination; WIC failed to vacate; the tenancy ended; CHDFC validly and properly commenced the subject L&T proceedings; and thus, WIC's objection in point of law and jurisdictional and affirmative defenses to eviction are subject to dismissal and are hereby dismissed. Therefore, CHDFC is entitled to evict WIC, to a judgment of possession, to a warrant of eviction, and to a judgment for monetary damages (infra).

Retroactive Rent and/or U&O

Background

Like other aspects of the instant litigation, CHDFC's attempts to collect rent and/or U&O have been complex. On August 14, 2008, Justice Smith inspected the 549 Building. Stern Cross-Moving Aff. ¶ 29.

She determined, then or later, that WIC had been constructively evicted from the basement, half of the ninth floor, and the entire tenth floor of the 549 Building, and she order U&O adjusted accordingly. Restuccia states (Moving Aff. ¶ 9 et seq.) that on October 14, 2008, Justice Smith orally ordered WIC to pay $532.00 a month for each of its six spaces in the 500 and 549 Buildings, adjusted pursuant to the constructive eviction determination. See generally, Stern Cross-Moving Aff. ¶ 29.

In a handwritten decision dated April 30, 2009 (Stern Cross-Moving Aff., Exh. S), Justice Smith ordered CHDFC to "repair by 6/25/09 the leaks and the elevators in [the 549 Building] or face sanctions. Parties to bring proof by 6/25/09 of compliance or non-compliance." This Court is not clear as to whether any such "proof" was submitted by said date. However, Stern alleges (id. at, ¶ 28) that "there are still leaks caused by window and roof issues that have not been repaired as of [June 28, 2013].

In an order dated September 17, 2009 (Stern Cross-Moving Aff., Exh U; see Restuccia Aff. ¶ 9), Justice Smith "relieved [WIC] of all obligations of U&O until defendants can show compliance with [the] Court's April 30, 2009 order, the U&O which has previously been ordered is to be held by [WIC's then-attorney] in escrow unless plaintiff provides all parties with an affidavit that no outside persons are living or renting the space[,] in which case the escrow provision is withdrawn." However, "WIC admittedly has not put any U&O in escrow." Geist Cross-Moving Aff. ¶ 20. WIC provided affidavits dated November 3, 2009 (Stern Cross-Moving Aff., Exh. X), stating that no one ever "reside[d]" in its premises, but admitting that "for the months of November and December 2009 WIC will be licensing the 7th floor (of the 549 Building) for the development and rehearsal of a theatre project." See generally, Restuccia Aff. ¶ 13.

After September 17, 2009 WIC took the position that lack of repairs relieved it of all U&O obligations. Indeed, WIC apparently has not paid CHDFC any rent and/or U&O for any space since August 2009. Restuccia Aff., Exh. T.

CHDFC claims (id. ¶ 12) that "renovations to the 549 Building have been ongoing." CHDFC also claims that WIC has been making a pretty penny "licensing" the 7th floor of the 549 Building to "motion picture and other production companies." This "licensing"" clearly violates WIC's lease(s).

Geist responds (Geist Cross-Moving Aff. 17) that because of the severe limitations of elevator service in the 549 Building, "The 7th floor has been empty since March 15, 2013." Geist also says (Geist Cross-Moving Aff. ¶ 13) that the 9th and 10th floors remain unrepaired, and "WIC has been locked out of the basement." She claims that the 549 Building passenger elevator is indefinitely out of service, id. ¶ 14, and the freight elevator has severely limited hours of operation, id. ¶ 15. CHDFC (Restuccia Aff. ¶ 21) explains in detail that the freight elevator operates 40 hours a week and can be hired for additional hours (at $15 an hour). The parties seem to agree that the old passenger elevator is kaput.

There is emotional appeal to, without reaching the legal merit of, CHDFC's response (Steinitz Reply Aff. ¶ 41) to WIC's complaints about the allegedly lamentable condition of its premises:

> Throughout the history of this litigation, WIC has complained, non-stop, about the same, alleged "deplorable" conditions at the 549 Building. WIC has a remedy. It could have

"abandoned" its tenancy long ago, claimed an actual eviction and applied for relief from its rental obligation. It could also have claimed damages.

It hardly needs citation that it is "inequitable for [a] tenant to claim substantial interference with the beneficial enjoyment of [its] property and remain in possession without [paying] rent." Barash v Pennsylvania Term. Real Estate Corp., 26 NY2d 77, 83 (1970).

Retroactive Rent and/or U&O

Geist claims (Geist Cross-Moving Aff. ¶¶ 18-20) that prior to May 2008, when the L&T cases commenced, WIC was paying $225 per month for space in the 500 Building and $1,503 per month "for all five of its floors at 549"; that Restuccia's facts and figures "cannot be supported by testimony or documentation"; that on October 23, 2008, Justice Smith orally ordered WIC to pay U&O retroactive to May 2008; that she "set the U&O at $532.52 for each floor of WIC's total leaseholds" (excepting the constructive evictions); that WIC "paid the retroactive arrears, in the amount of $11,183.34, and paid the monthly total U&O of $1,863.89 until WIC was 'relieved' of paying U&O by Justice Smith's September 17, 2009 order"; and that WIC has not made a "net profit" on renting out the seventh floor since 2007.

Restuccia claims that WIC owes $334,368.23 in rent and/or U&O to CHDFC, and he has marshaled mind-numbing details in support. Id. ¶ 22 et seq.; Exh. T). However, these details omit at least one overarching circumstance: Justice Smith's September 17, 2009 order, which, in Restuccia's own words, "relieved [WIC] of all obligations of U&O until defendants can show compliance with the Court's April 30, 2009 order." CHDFC does not appear to have shown compliance, although it claims compliance, at least up to a point. Nevertheless, CHDFC's rent ledgers (Restuccia Aff., Exh. T) do not reflect any change in the rent due after September 17, 2009; and its "Notes/Comments" column fails to reflect the Order at all. This Court often relies on rent ledgers to untangle complex rent and/or U&O disputes, but the glaring omission in this one renders it fatally defective.

Thus, CHDFC's request for retroactive rent and/or U&O is denied without prejudice to being resubmitted with valid supporting documentation.

Prospective U&O

CHDFC claims (Restuccia Aff. ¶ 4) that the U&O for the 549 Building should be increased due to the following changed circumstances: "the improvements made to the 549 Building since September 17, 2009 and WIC's unjust enrichment in its receipt of substantial licensing fees for occupancy on the 7th Floor … ." CHDFC claims (Restuccia Aff. ¶ 21) that from fall 2009 to fall 2012 the building underwent an enormous amount of expensive exterior work, including "complete replacement of the roofing system." CHDFC also claims (ibid.) expensive repairs or upgrades to various building systems, including plumbing and heating.

Based on factors and calculations set forth in his affidavit, including (¶ 29) "HPD's stated policy" of renting to non-profits for 50% of market value, and a comparison of "comparable" spaces in the area, and based on an April 21, 2014 e-mail to the Court, copied to all counsel, CHDFC asks that going forward, U&O for the 6th, 7th, 9th and 10th floors of the 549 Building be set at $5,950.00 per month, each. WIC has failed to refute CHDFC's specific figures.

However, as noted (supra), CHDFC commenced the the L&T proceedings in Civil Court. In her Decision of May 15, 2008, Justice Smith removed them to this court and consolidated them with Action # 1, essentially because they were deemed to be part and parcel of WIC's quest for specific performance. CHDFC subsequently moved to have them returned to Civil Court. This Court's Decision and Order of February 28, 2013 denied that request.

Whether or not, at this late date, CHDFC would rather they stay here or be sent back to Civil Court, this Court finds that that is where they belong. Action # 1 is over. Action # 2 is unrelated to the L&T proceedings. As garden-variety summary holdover proceedings, the L&T litigation belongs in Civil Court, with its expertise, its ability to bring cases to trial more quickly, and where the rent and/or U&O issues, retrospective and prospective, can best be resolved.

Epilogue

The instant litigation was born of catastrophe. Had the IRSC Project come to fruition, "the City and the Clinton community would already be reaping the benefits of approximately $18 million in federal and state financing for a vibrant new IRSC housing a 499-seat theater, two 99-seat theaters, two state of the art theatrical rehearsal studios, three non-profit arts organizations, numerous visual artists, an art gallery and café." Complaint ¶ 4. Who would not want that?! In the words of Anna Stern (Stern Cross-Moving Aff. at 32-33), the IRSC would have been a "cultural gem" and a "boon" to the City. "WIC raised and spent $6,000,000 moving the Project forward, to the point it had architects' plans and blue prints and a fixed Guaranteed Maximum Price Contract … that identified the locations, number, and cost of each toilet and doorknob." Friedman Aff. ¶ 9.

Yes, the IRSC Project "coulda, woulda, shoulda" happened. WIC laments (Opp. Memo, at 136) that "EDC could – and should – have exercised its discretion to reconsider and rescind its earlier determination, and a trier of fact could so find." Any such finding by the trier of fact, however understandable, would be irrelevant; if EDC had discretion to reconsider, obviously it was not obligated to do so. Legal liability does not spring from "coulda, woulda, shoulda." And, as an old saying put it, "Men must turn square corners when they deal with the Government." Rock Is., Ark. & La. R.R., Co. v United States, 254 US 141, 143 (1920) (Holmes, J.). Furthermore, policy-makers must be allowed to make policy.

In the final analysis, WIC's reach exceeded its grasp. A combination of bad blood (Perine's views), bad luck (Doctoroff's views), bad drafting (this Court's view), bad timing (Nederlanders' delay), bad neighbors (the 549 Building Tenants), and bad karma (the OSB Supportive Housing Project), not EDC's bad faith, conspired to snatch defeat from the jaws of victory.

In Battle Cry of Freedom: The American Civil War, James McPherson wrote that Pickett's charge represented the Confederate war effort in microcosm: "matchless valor, apparent initial success, and ultimate disaster." That could be a fitting epitaph for the IRSC. While lamenting WIC's Icarian tragedy, this Court has found it to be a tragedy significantly, and legally, of its own making.

Disposition
Thus, for the reasons set forth herein:

(1) Motion Number 22 is granted to the extent that CHDFC is awarded partial summary judgment dismissing the objection in point of law and the jurisdictional defenses and affirmative defenses in Civil Court Index No. L&T 63773/08 and awarding CHDFC a judgment of possession and a warrant of eviction against WIC for 500 West 52nd Street, Unit 2W, New York, NY;

(2) Motion Number 22 is denied without prejudice to the extent that it seeks retroactive rent and/or U&O and to amend the amount of prospective U&O for all of WIC's premises, including 500 West 52nd Street, Unit 2W, New York, NY;

(3) The landlord-tenant proceedings referred to herein, Clinton Hous. Dev. Fund Corp., as net lessee of the City of New York v Women's Interart Ctr., Inc., L&T Index Nos. 63771/08 (the 10th Floor of the 549 Building), 63772/08 (the 7th Floor" of the 549 Building), 63767/08 (the 6th Floor" of the 549 Building), 63774/08 (the 9th Floor" of the 549 Building), 63775/08 (the basement of the 549 Building), and 63773/08 (see above), are hereby remanded to Civil Court of the City of New York, County of New York; and the clerk shall remand the matters accordingly;

(4) WIC's cross-motion for summary judgment is denied;

(5) Motion Number 26 is granted, and the City of New York is hereby deemed a petitioner in Civil Court of the City of New York, County of New York, L&T Index Numbers 63767/08, 63771/08, 63772/08, 63773/08, 63774/08, and 63775/08, and the party designations in the captions thereof shall be amended to Clinton Housing Development Fund Corp., as net lessee of the City of New York, and The City of New York v Women's Interart Center, Inc.; and

(6) Motion Number 25 is granted, and the remaining four defendants are hereby granted summary judgment dismissing Action # 1 with prejudice. Action # 1 and Action # 2 are hereby severed, and plaintiff may proceed on its one remaining claim, for prima facie tort, in Action # 2.

The clerk shall enter judgments according to the foregoing "Disposition."

Dated: April 28, 2014

Arthur F. Engoron, J.S.C.