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

----------X **Index No. 21380/2014E**

327 Realty, LLC,

Plaintiff,

-against- **DECISION and ORDER**

Nextel of New York, Inc. d/b/a/ Sprint Nextel,

Defendants.

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of plaintiff's motion to re-argue pursuant to CPLR 2221(d).

Papers Submitted	Numbered
Notice of Motion, Affirmation & Exhibits	**1**
Memorandum of Law	
Notice of Cross-Motion, Affirmation & Exhibits	**2**
Affidavit of Masud Tarafder	**3**
Memorandum of Law	**4**
Memorandum of Law in further support	**5**
Reply Affirmation	**6**

By Order dated April 20, 2015, the Hon. John A. Barone granted, on default, plaintiff's motion to reargue the court's Decision & Order dated January 23, 2015, which denied plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment and related relief. By Order dated January 6, 2016, this Court granted defendant's motion to vacate that Decision & Order pursuant to CPLR 5015, to stay entry of judgment and restore plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment and related relief to the Court's motion calendar.

Plaintiff's motion to reargue is granted and, upon reargument, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment and related relief are decided as follows:

On January 28, 2003, plaintiff/landlord 327 Realty, LLC ("327 Realty") and defendant/tenant Nextel of New York, Inc. d/b/a/ Sprint Nextel ("Nextel") entered into a lease to construct and operate a wireless communication facility at a building owned by 327 Realty and

located at 327 Walnut Avenue, Bronx, NY. The initial term of the lease was five years, automatically renewable for three additional five-year terms, unless Nextel notified the landlord of its intention not to renew. The lease was most recently renewed, by its terms, on December 15, 2013. Pursuant to Section 10(vi) of the lease, Nextel also had the unilateral right to terminate the lease if Nextel determined that the premises were no longer "appropriate for its operations for technological reasons." On February 12, 2014, Nextel notified 327 Realty that it was exercising its right to terminate the lease under Section 10(vi), effective June 30, 2014.

On March 28, 2014, 327 Realty brought suit against Nextel for, *inter alia,* breach of the lease. Nextel served its answer on July 2, 2014. 327 Realty then served a Notice to Admit, dated July 11, 2014, pursuant to CPLR 3123. Nextel did not respond to the Notice to Admit within the statutory 20 days. On August 12, 2014, 327 Realty moved for summary judgment based upon the "admissions" in the Notice to Admit. Nextel responded to the Notice to Admit on August 13, 2014, and cross-moved for summary judgment and related relief on October 8, 2014.

In his affirmation in support of summary judgment, 327 Realty's counsel alleges that "[a]s the within motion is based upon the admissions contained in the Notice to Admit, there are no disputed issues of fact warranting a trial in this matter," and that summary judgment should be awarded to 327 Realty declaring Nextel to be in breach of the lease and holding it responsible for paying rent provided for under the lease until its expiration date of December 14, 2018. The gravamen of 327 Realty's argument is that Nextel terminated the lease purely for economic reasons, which it is not permitted to do under the terms of the lease.

In its cross-motion, Nextel seeks, *inter alia,* an order extending its time to respond to 327 Realty's Notice to Admit and ordering that the Answer to Plaintiff's Notice to Admit, served August 13, 2014, be deemed served *nunc pro tunc*. Given the minimal delay in responding to the Notice to Admit, the purpose of a Notice to Admit, and the Court's preference to determine matters on their merits, the Court grants Nextel's request and Nextel's Answer to Plaintiff's Notice to Admit, served August 13, 2014, is deemed served *nunc pro tunc.*

Other than the alleged "deemed" admissions, 327 Realty does not proffer any evidence in support of its motion for summary judgment. As the allegations set forth in the Notice to Admit do not constitute admissions by Nextel, 327 Realty has failed to meet its *prima facie* burden. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Accordingly, 327 Realtys's motion for summary judgment is **denied**.

In its cross-motion, Nextel also seeks summary judgment declaring that Nextel lawfully terminated the parties' lease. In support of summary judgment, Nextel submitted, *inter alia,* the affidavit of Masud Tarafder who states, in pertinent part, the following: He worked for Nextel as a radio frequency engineer beginning in 2002, and has worked for Sprint as a Senior RF Engineer since the 2005 merger of Sprint and Nextel. His responsibilities include the "planning and assessment of the companies' wireless network needs and deployment." Before the merger, Sprint and Nextel provided wireless communications services through different wireless network technologies using physically separate network facilities, and continued to do so under the "Sprint" and "Nextel" brands following the merger. Before the Nextel network was shutdown on June 30, 2013, Nextel provided wireless communications services using iDEN technology over the 800 MHZ SMR frequency band. In contrast, Sprint used CDMA/EVDO technology over the 1900 MHZ spectrum. The CDMA/EVDO technology used by Sprint and the iDEN technology used by Nextel are not compatible. In 2010 and 2011, Sprint Nextel announced plans to upgrade and modernize its networks under a plan called Network Vision. His team handled RF planning for the shutdown of the iDEN network. Part of that planning process was to determine what locations had leased premises that were appropriate for the operation of Network Vision technology. If an iDEN site's leased premises were at a location determined to have adequate RF coverage and capacity provided by an existing "CDMA/EVDO site or existing or planned Network Vision site," the iDEN premises were determined to not be appropriate for ongoing network operations. The majority of IDEN leased premises did not fit the plan for deployment of the new Network Vision technology. The subject premises is not appropriate for current network operations because "the new technology deployed under the Network Vision plan presently provides adequate RF coverage in the area."

Rather than eliminate any triable issues of fact, the Tarafder affidavit raises issues of fact as to whether the lease was terminated for technological or economic reasons, or both. As such, Nextel has failed to meet its *prima facie* burden. *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986).

Nextel's arguments with respect to its application for sanctions and costs lack merit. Accordingly, Nextel's cross-motion is **granted solely to the extent that** its Answer to Plaintiff's Notice to Admit, served August 13, 2014, is deemed timely served *nunc pro tunc;* however, the remainder of Nextel's cross-motion is **denied in its entirety**.

Dated: Bronx, New York
January 31, 2017

Hon. Julia I. Rodriguez, J.S.C.