

<b>361 Broadway Assoc. Holdings LLC v TD Bank, N.A.</b>
2021 NY Slip Op 31756(U)
May 21, 2021
Supreme Court, New York County
Docket Number: 650163/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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361 BROADWAY ASSOCIATES HOLDINGS LLC,

Plaintiff,

Index No. 650163/2018

Motion Sequence No. 005

- against -

TD BANK, N.A.,

Defendant.

----- X  
**CRANE, J.:**

Plaintiff 361 Broadway Associates Holdings LLC (“Landlord”) brings this action, to recover rent arrears, in addition to late fees, interest and reimbursement of all costs, expenses and reasonable attorneys’ fees, against defendant TD Bank, N.A. (“TD Bank”), based on TD Bank’s alleged breach of the parties’ commercial lease (“Lease”) for the retail condominium unit (“Premises”) located on the ground floor of 361 Broadway, New York, New York (“Building”). The complaint asserts claims for: (1) breach of contract, based on TD Bank’s refusal to take possession of the Premises; and (2) declaratory judgment, declaring improper TD Bank’s rejection of the Premises and purported termination of the Lease and that it constituted breaches of, and default under the Lease. In its answer, TD Bank counterclaims for: (1) declaratory judgment, declaring proper TD Bank’s termination of the Lease, due to Landlord’s failure to substantially complete construction by the Lease’s deadline, and that Landlord had an obligation to reimburse TD Bank for costs incurred in connection with the Lease; and (2) breach of contract.

Landlord now moves for summary judgment on its causes of actions and to dismiss TD Bank’s counterclaims.

I. Background and Procedural History

The Lease, dated July 17, 2013, runs from “the Commencement Date” (NYSCEF Doc No. 137, Lease, § 1.25) until “twenty (20) years following the last day of the calendar month in which the ‘Fixed Rent Commencement Date’ occurs” (*id.*, § 1.9). The Lease defines the “Fixed Rent Commencement Date” as “the earlier to occur of (a) the date that Tenant shall open for business at the Premises, or (b) the date which is eight (8) months after the Commencement Date” (*id.*, § 1.12). As to the “Commencement Date,” the Lease provides:

“**Section 2.6** The “Commencement Date” shall be the latest to occur of the date that all of the following conditions (the “Delivery Conditions”) are satisfied: . . . (c) all of the Contingencies (as defined in Section 2.9 below) have been satisfied or waived by Tenant, and (d) Landlord’s Work has been “substantially completed” (as defined in Section 4.2 hereof) . . . .

“If for any reason Landlord is unable to deliver vacant possession of the Premises with Landlord’s Work, if any, substantially complete and with the other Delivery Conditions which are within Landlord’s control satisfied on or before any date that is the estimated Commencement Date, this lease shall not be void or voidable nor shall Landlord be liable to Tenant therefor, monetarily or otherwise, but the Commencement Date shall be delayed until the date on which Landlord delivers vacant possession of the Premises to Tenant with Landlord’s Work substantially completed and with the other Delivery Conditions satisfied. This section constitutes an express provision to the contrary pursuant to Section 223-a of the New York Real Property Law (or any similar Laws, hereinafter defined), which Landlord and Tenant agree is inapplicable to this lease (and Tenant hereby waives any right to damages or to rescind this lease which Tenant might otherwise have hereunder). Notwithstanding anything to the contrary contained herein, if after the Contingencies are satisfied or waived by Tenant, Landlord fails to cause the Commencement Date to occur as a result of its willful act or omission, Tenant shall have the right to terminate this lease on written notice to Landlord, in which event Landlord shall promptly reimburse Tenant for all reasonable third-party costs and expenses incurred by Tenant in connection with this lease (including, without limitation, attorneys’ fees, architects’ fees and engineers’ fees and any and all reasonable third-party costs and expenses incurred in preparing the plans and

filings for and obtaining the Approvals) in an amount not to exceed \$100,000.00 in the aggregate plus the costs of the HVAC Work (as defined in Exhibit B attached hereto) to the extent actually paid to Landlord. Notwithstanding anything to the contrary contained herein, if the Commencement Date has not occurred by the date that is three (3) years after the date (the “Outside Date”) that the Contingencies are satisfied, which Outside Date shall be extended day for day for (y) each day Tenant Delay, as hereinafter defined, and (z) each day of delay due to reasons beyond the Landlord’s control, regardless of whether or not due to Landlord’s willful act or omission, then Tenant shall have the right to terminate this lease on written notice to Landlord” (*id.*, § 2.6).

The Lease obligates TD Bank to pay Fixed Rent, as shown in Exhibit A to the Lease (*id.*, § 1.11), “[f]rom and after the Fixed Rent Commencement Date, . . . in equal monthly installments, in advance, on the first day of each calendar month during the Term” (*id.*, § 2.2). Pursuant to Exhibit A, for each of the Lease’s first four years, the monthly rate is \$50,610, and increases incrementally every four years (*id.*, exhibit A). In addition, the Lease obligates TD Bank to pay “Additional Rent,” that includes TD Bank’s “Proportionate Share” of “Real Estate Taxes,” paid “on a per diem basis as of the Commencement Date” (*id.*, §§ 6.1, 6.3), and common charges (*id.*, § 7.1). The Lease defines TD Bank’s “Proportionate Share” as ninety percent (*id.*, § 1.20).

The Lease also provides:

**“Section 3.4** Tenant shall have no obligation to continually operate in the Premises provided, however, that Tenant must complete Tenant’s initial fit-out work and must all times ensure that the Premises are presented, lit and maintained in a manner so as not to detract from the appearance of the Building.

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**“Section 4.2** Landlord shall, at its expense . . . perform Landlord’s Work in accordance with Exhibit B annexed hereto. ‘Substantial completion’ (or words of similar import) as used herein is defined to mean, with respect to Landlord’s Work, when the only items of Landlord’s Work to be completed are so-called

‘punchlist items’ the non-completion of which will not interfere with the performance of Tenant’s Work . . .” (*id.*, §§ 3.4, 4.2).

Exhibit B to the Lease (Exhibit B), entitled “Landlord’s Work,” provides, in relevant part, as follows:

“Landlord shall be required to perform the following work . . . :

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**“2. Demolition** – Landlord shall provide the premises in a broom clean condition, free of all materials, debris, fixtures, improvements and personal property. Landlord shall repair or replace all deteriorated structural supports on Broadway for the sidewalk vaults adjoining Tenant’s demised area and install a new sidewalk system consisting of new diamond plate or acceptable alternative in conformance with ADA/accessibility requirements.

. . .

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**“15. ADA and Code Compliance** – Landlord shall deliver the Premises with the entrances and area noted as vestibule as shown on Exhibit C annexed to this lease in compliance with accessibility requirements.

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**“18. Landlord’s Work and Completion** – Landlord’s Work shall be performed in accordance with construction industry standards consistent with commercial practices for retail property and in compliance with all applicable legal requirements. Completion of Landlord’s Work shall include obtaining any signoffs from governmental or quasi-governmental authorities having jurisdiction over the permitting, performance and/or approval of such work. All such signoffs for the Premises (including, without limitation, general construction, mechanical, plumbing, sprinkler and fire protection, as well as temporary and permanent certificates of occupancy or a Letter of Completion [whichever is required by NYC DOB]) shall be obtained by Tenant upon completion of Tenant’s work. A copy of temporary and permanent certificates of occupancy or a Letter of Completion (whichever is required by NYC DOB) will be delivered to the owner within 10 days of receipt from the department of buildings. Certificate of Occupancy or Letter of Completion shall be

completed within 90 days of receipt of temporary Certificate of Occupancy” (*id.*, Exhibit B, ¶¶ 2, 15, 17, 18).

In a letter dated March 28, 2014, TD Bank notified Landlord that they had satisfied the contingencies of section 2.9 of the Lease (NYSCEF Doc No. 138). The parties do not dispute that, without accounting for any intervening delays, the Commencement date had to occur by the Outside Date of March 28, 2017 (*see* Lease, § 2.6; NYSCEF Doc No. 133, TD Bank’s statement of facts, ¶¶ 10, 11; NYSCEF Doc No. 187, Landlord’s response to TD Bank’s statement of facts, ¶¶ 10, 11).<sup>1</sup>

According to Landlord, it encountered unforeseen delays during the course of its restoration of the Building, that “was built in 1881-82” (NYSCEF Doc No. 1, complaint, ¶ 8). It alleges that, in the spring of 2015, it discovered cracks in the Building’s original cast iron columns, “necessitating the shoring of the entire building and installing four (4) new structural steel columns, three (3) of which run through the Premises, plus the concrete encasement of two (2) existing cast iron columns in the Premises” (NYSCEF Doc No. 230, Lesser affirmation, ¶ 64). Jourdan Krauss (Krauss), Landlord’s officer and authorized representative (NYSCEF Doc No. 170, Krauss tr at 6:16-7:2), describes the task of repairing the cracks as a “major undertaking,” requiring the installation of “huge temporary steel columns for shoring, and jack[ing] up the building,” before “[the] cracked columns were removed, and four new steel columns were installed into the building in their place” (*id.* at 141:11-142:16). Likewise, in a letter dated April 20, 2017, Landlord’s structural engineer, Robert Silman Associates Structural Engineers, states that “[u]nexpected field conditions did arise” in the form of “a number of

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<sup>1</sup> This decision occasionally cites to documents submitted on a prior motion (motion sequence number 004), because the parties incorporate such documents by reference in their papers on the instant motion (*see* NYSCEF Doc No. 204, TD Bank’s brief in opposition at 16, 31 [incorporating by reference NYSCEF Doc Nos. 79- 134]; NYSCEF Doc No. 217, Landlord’s reply brief at 25 n 5 [incorporating by reference NYSCEF Doc Nos. 187, 188, 197-202]).

columns requiring replacement or reinforcement” and that they were then “replaced from basement to roof” (NYSCEF Doc No. 167)

Anthony Colon (Colon), who worked on the Building as Senior Project Manager for Landlord’s general contractor, Foundations Group, Inc. (Foundations Group) (*see* NYSCEF Doc Nos. 133 and 187, ¶¶ 12-14), testified that he initially estimated that the cracked columns would cause 360 days of delays, and that he prepared a chart summarizing these delays (*see* NYSCEF Doc No. 171, Colon tr at 217:4-222:18; NYSCEF Doc No. 172 [an April 30, 2015 chart of delays encountered at the Building, attributing approximately 180 days in delays to “Cracked Cast Iron Column on the 5th Floor 4B” and another of 180 days to the “Unforeseen Condition” of a “Cracked Cast Iron Column on the Cellar 8B”]). However, Colon clarified, “the actual delays associated with . . . the remediation work for the shoring and the replacement of the steel columns” took 205 days, rather than “the 360 that were estimated earlier on” (Colon tr at 230:2-7). Colon testified that, to account for these delays and additional costs, Foundations Group issued two change orders on June 9, 2015, number 94 and 95, showing 205 days in delays and \$761,309.25 in additional costs (*id.* at 227:20-229:5; *see* NYSCEF Doc No. 169 [change order number 94 for “Cast Iron Column Replacement of Columns 4, 8 & 10,” showing \$567,412.10 in additional costs and 156 days in delays]).<sup>2</sup> As for the impact of the cracked columns on Landlord’s Work in the Premises, rather than on the project overall, Colon averred that they caused approximately 180 to 200 days of delays, because three of the columns required reinforcement ran through the Premises (Colon tr at 216:5-14; 232:1-7; 246:2-248:17).

On July 29, 2015, TD Bank’s permit expediter, Bohler Engineering NY, PLLC (“Bohler”) (NYSCEF Doc No. 103, Deal aff, ¶ 9), filed an Alteration Type 2 (ALT 2) permit

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<sup>2</sup> While the Lesser affirmation indicates that both change orders, 94 and 95, are provided (Lesser affirmation, ¶ 67), the annexed exhibit contains change order 94 only (*see* NYSCEF Doc No. 169).

application for the installation of sprinklers in the Premises (NYSCEF Doc No. 199). On October 7, 2015, the New York City Department of Buildings (“DOB”) “disapproved” the application (*id.*). Instead, the DOB issued a “Notice of Objections,” specifying the missing information and paperwork necessary for approval (NYSCEF Doc No. 200).

In a letter dated October 20, 2015, TD Bank informed “Landlord that upon timely completion of Landlord’s Work (as defined in the Lease) Tenant intend[ed] to accept delivery provided all delivery requirements [were] met, but Tenant [would] not operate a bank branch at the Premises” (NYSCEF Doc No. 146).<sup>3</sup> TD Bank also acknowledged that it “[would] not be relieved of its obligations under the Lease, including the obligation, if any, to pay rent, operating costs, real estate taxes and any other additional rent and [would] make such payments in accordance with the requirements of the Lease” (*id.*).

Following its decision not to open a bank branch at the Premises, TD Bank “internally discuss[ed] not spending additional money on the Lease, and instructed its contractors not to pull permits” (NYSCEF Doc No. 205, Wishna aff, ¶ 19; *see also* NYSCEF Doc No. 147 [internal email, dated October 13, 2015, listing the Building among the projects that TD Bank was placing “on hold” and “not spend(ing) any money on”]; NYSCEF Doc No.149 [November 16, 2015 email from TD Bank’s construction manager, instructing its sign vendor not to proceed with permits]; NYSCEF Doc No.150 [January 18, 2016 email from TD Bank’s construction manager, stating that the “(p)roject is currently on hold, no further expenditures allowed till further notice”]). This included instructing Bohler, via email dated October 20, 2015, to “completely pull . . . back from procuring approvals and permits” for the Premises (NYSCEF Doc No. 148).

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<sup>3</sup> The parties devote large portions of their arguments to whether this decision was part of TD Bank’s overall restructuring strategy and to whether its subsequent decision to terminate the Lease was in furtherance of this strategy. However, as the court explained during oral arguments, TD Bank’s motive is irrelevant (*see* NYSCEF Doc No. 248, 9/17/2020 tr at 29:21-30:5; 47:18-51:17). It either had the right to terminate the Lease or it did not. Therefore, this decision does not address these arguments.

Scott Wishna (“Wishna”), a Senior Real Estate Manager at TD Bank at the time, worked with Robert Walsh (“Walsh”), then a Regional Development Services Manager for TD Bank, in overseeing work on the Premises (NYSCEF Doc No. 80, Wishna 1/10/2020 aff, ¶ 4). According to Wishna, TD Bank never changed its instructions to Bohler (NYSCEF Doc No. 225, part 1 of Wishna tr at 102:23-103:4) and Bohler did not do permitting work for the Premises (*id.* at 109:19-110:8).

TD Bank then made two offers to terminate the lease - one offer on January 21, 2016 and the other on July 13, 2016. The Landlord rejected the lease termination offers (*see* NYSCEF Doc Nos. 152, 155).

By letter dated December 12, 2016, Landlord “advised that [it] had substantially completed Landlord’s Work in accordance with the Lease, all of the other Delivery Conditions set forth in Section 2.6 of the Lease [were] satisfied and Landlord [would] be delivering possession of the Premises to Tenant on December 13, 2016” (NYSCEF Doc No. 160).

By letter dated December 22, 2016 (Rejection Notice), TD Bank informed Landlord that, following an inspection on December 21, 2016, “[it] [did] not consider the Premises to be substantially complete” and that it would not consider it to be so “unless and until the [listed] open items . . . [were] completed in the manner provided in Exhibit B to the Lease” (NYSCEF Doc No. 162). The Rejection Notice listed 16 items that TD Bank deemed incomplete, including:

“1. **Demolition** installation of the diamond plate sidewalk and entry to TD space is not complete ADA accessibility to space will not be achieved without this work being complete.

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“13. **ADA Compliance** . . . This is an open item.

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“16. **Completion** Governmental sign-offs on Landlord’s Work, including, without limitation, TCO for base building work, have not been obtained as of this date” (*id.*).

In response to TD Banks’s request for an update on the “remaining open items,” Krauss informed Wishna, in an email dated December 29, 2016, that Landlord had begun “finalizing any items that [were] Landlord’s responsibility” (NYSCEF Doc No. 163 at 1-2).

In a January 5, 2017 email exchange with Foundations Group, regarding the Rejection Notice’s open items, Krauss reminded Foundations Group that “[Landlord] ha[d] a deadline to turn over the space in accordance with the lease before it [could] be nullified by the tenant,” stating: “I don’t need to tell you what the financial impact of losing a 20 year lease with TD Bank would entail” (NYSCEF Doc No. 120 at 1). In another email, dated January 11, 2017, Landlord’s representative urged Foundations Group that “[i]t really [was] so important that we get this work completed as soon as possible” (NYSCEF Doc No. 121 at 1).

On February 17, 2017, Foundations Group quit (NYSCEF Doc Nos. 133 and 187, ¶ 19). According to Krauss, Landlord then had to engage a replacement construction manager, “resulting in 45 days of delay in substantial completion of Landlord’s Work” (NYSCEF Doc No. 231, Krauss aff, ¶ 48).

In a letter dated March 27, 2017, Landlord “advised that [it] ha[d] substantially completed Landlord’s Work in accordance with the Lease (i.e. the only items of Landlord’s Work which remain[ed] to be completed [were] so-called ‘punchlist items’ the non-completion of which [would] not interfere with the performance of Tenant’s Work)” and that “all of the other Delivery Conditions set forth in Section 2.6 of the Lease ha[d] been satisfied and Landlord

[would] be delivering possession of the Premises to Tenant on March 28, 2017 (which date [would] be the Commencement Date of the Lease)” (NYSCEF Doc No. 164).

In a letter dated April 10, 2017 (“Termination Letter”) TD Bank informed Landlord that, based on an April 5, 2017 walkthrough, “the Premises [was] not ‘substantially complete’ within the meaning of Sections 2.6 and 4.2 of the Lease” (NYSCEF Doc No. 165). TD Bank claimed that it “[could not] obtain the building permit to perform Tenant’s Work” and that “the Premises [was] not in a condition which would permit Tenant to commence its work without interference from the incomplete or unfinished work” (*id.*). The Termination Letter concluded that, because “Landlord [had] not dispute[d] the matters identified in [the Rejection Notice]” and had not completed many of those items, “Landlord . . . ha[d] failed to deliver possession of the Premises in the condition required by the Lease on or before [March 28, 2017,] the Outside Date” and, as such, TD Bank was “exerc[ising] its termination right set forth in . . . Section 2.6 of the Lease” (*id.*).

TD Bank annexed to the Termination Letter the report from the walkthrough, that identified the following purportedly outstanding items of Landlord’ Work, numbered according to the relevant paragraphs of the Lease’s Exhibit B:

**“#2: Demolition:** Installation of the diamond plate sidewalk and entry to TD space remains incomplete and, as a result, ADA accessibility into space cannot be achieved without this work being complete.

**“#4: Floors** - Landlord has not provided structural drawings for TD to review that the structural support for floor meets the design load criteria outlined in the lease. Landlord has not provided NYLPC approval for the Exterior Improvements.

**“#6: Sanitary Sewer:** waste and vent lines were not brought to the designated area, below TD’s Premises space and confirmation of connection to building system could not take place

“#8: **Central HVAC System:** confirmed that units (2) are on roof, properly installed and can visibly confirm the termination end of refrigerant lines within the TD space, however, the refrigerant lines are not connected to the units

“#10: **Fire Alarm:** Conduits from demised space to LL main FA panel with drag line exist, however, the connection to the base building main fire alarm panel was not made and the main fire alarm panel is not operational

“#11 **Fire Sprinkler:** The temporary loop and riser is installed; gauge in Tenant’s Premises shows 40 PSI, however, gauges in the basement show 0 PSI, indicating that the system is not operational.

“#15: **ADA Compliance:** there are no sidewalks on the side of the building facing Franklin Street, exposing the open foundation of the building to the street, sidewalk is boarded up by construction shed, there is no diamond plate fronting the premises, causing no ability to access the Premises from an ADA perspective.

“#18: **Landlord’s Work and Completion:** Landlord has provided evidence of two sprinkler inspections on 4/6 from 1/30/17 and 2/1/17, however, DOB sign-off of the open sprinkler application has not been provided. Landlord has not provided NYLPC approval for the Exterior Improvements” (*id.*, exhibit A).

Landlord responded on April 17, 2017 (Landlord’s Letter), reiterating “[its] position that Landlord’s Work [had been] substantially completed as of March 27, 2017” and that “[t]he outstanding items of Landlord’s Work [were] all in the nature of ‘punchlist items’ which [would] not interfere with the performance of Tenant’s Work and [would] be completed in due course” (NYSCEF Doc No. 166 at 2). In addition, the letter stated that, pursuant to section 2.6, “the Outside Date ha[d] been extended due to reasons beyond Landlord’s control for an aggregate of 475 days and [was] . . . scheduled to occur on July 15th, 2018” (*id.*). It attributed the delays to:

“(a) discovery of cracked columns in the Building necessitating the shoring of the entire building and installing four new structural steel columns . . . (resulting in 430 days of delay in substantial completion of Landlord’s Work), and (b) Landlord’s construction manager walking off the job without justification . . . (resulting in

45 days of delay in substantial completion of Landlord's Work)"  
(*id.*).

Landlord's Letter declared that the "Lease remain[ed] in full force and effect" (*id.*).

Exhibit 1 to Landlord's Letter stated that "none of the purported items interfered with TD Bank obtaining an Alt-2 building permit and proceeding with their tenant buildout" (*id.*, exhibit 1). It then responded to each of the items identified in the Termination Letter. In response to the diamond plate and ADA compliance, exhibit 1 to Landlord's Letter, it stated:

"Item #2 – Demolition:

"The diamond plate sidewalk has been available and ready for installation for many months. It is not an item that needs to be installed in order to provide access for the tenant to proceed with their work.

"To attest to the fact that the diamond plate is indeed available and ready for installation (even though not needed at this time), we are enclosing a copy of the certification from the fabricator and installer along with photographs (annex #1).

"In addition, in January 2017, Jourdan Krauss discussed this matter with Scott Wishna, specifically stating the above and voicing his concern that installing the diamond plate at this time, and then letting the tenant move all of the construction materials over it could result in significant and costly damage which would be the responsibility of the tenant. Mr. Krauss was advised by Mr. Wishna to hold off on installing the diamond plate at that time. With that being said, if the tenant now wants the diamond plate installed and tenant will agree to accept responsibility for any damage to the diamond plate, make any repairs to the diamond plate which may be required to comply with applicable codes, and cure any violations which may result due to the diamond plate being out of repair, then we can give instructions to our vendor to proceed expeditiously to have it installed.

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"Item #15 – ADA Compliance:

"The tenant space is leased to have access from Broadway and not from Franklin Street. On the Broadway side, the

construction shed allows access to the tenant's premises for construction (see annex #8- photograph showing construction access door).

“Please note that if we remove the construction shed, the tenant would have to put it back at its additional expense since it is a requirement of the D.O.B. when the tenant does construction on the facade of its space, such as when installing its entry doors” (*id.* at 4, 6-7).

“Annex #1” to exhibit 1 of Landlord's Letter, entitled the “Sidewalk Diamond Plate Certification” and dated April 11, 2017, consisted of a notarized statement from the manufacturer that a location in Talladega, Alabama could ship the diamond plate. It contained photographs of the packaged diamond plate and highlighted site plan drawings “as proof of fabrication for all project material.” (*id.*, exhibit 1, annex # 1.)

Landlord also maintained that the remaining six items of Landlord's Work had been completed. For “Item # 4 – Floors,” Landlord explained that the floors met the load criteria and it had available any structural drawings on site for inspection at any time TD Bank wished to review them. Landlord also provided an April 7, 2017 letter from its structural engineer, stating that Landlord completed the structural work on the floors (*id.* at 4-5 and annex # 2.) It also stated that approval for exterior improvements had been obtained from the NYC Landmarks Preservation Commission on September 29, 2015, and annexed a copy of the permit (*id.* at 5 and annex # 3). For “Item # 6 - Sanitary Sewer,” Landlord stated that the waste and vent lines were installed in the designated areas, and provided photographs of both (*id.* at 5 and annexes # 4, 5). For “Item #8 - Central HVAC System,” Landlord explained that all of Landlord's Work was completed, provided photographs of refrigerant lines in the Premises and at the roof unit, stated that its contractor completed testing and that the contractor could repeat the testing in front of a TD Bank representative. Further, Landlord said that TD Bank had a responsibility to supply

condenser components and connect the refrigerant lines to the units (*id.* at 5-6 and annexes # 6, 7). For “Item # 10 - Fire Alarm,” Landlord stated that it could not provide a “**final** connection of the Tenant fire alarm system to the base building main fire alarm panel” until TD Bank installed its fire detection devices. It explained that, only after “the completion of the tenant’s build out,” could “the system . . . be connected to the base building, part of which [would] require programming the completed tenant’s system.” (*id.* at 6.) For “Item 11 - Fire Sprinkler,” Landlord explained that the complained of pressure gauge was in no way connected to the Premises and that the pressure gauge showing “40 PSI” in the Premises served as evidence that Landlord had completed its work (*id.*). For “Item #18 - Landlord's Work and Completion,” Landlord noted that this item was fully address in its response to items # 11 (Fire Sprinkler) and # 4 (Floors) (*id.* at 7).

Exhibit 1 to Landlord’s Letter concluded that “[n]one of these items preclude[d] the landlord from delivering possession of the premises and allowing the tenant to perform its tenant’s work” (*id.* at 7). Landlord also annexed a letter from its building and zoning law consultants, William Vitacco Associates, that explained the permitting process:

“[o]nce the tenant’s space is completed and all of their necessary inspections have taken place (Plumbing, sprinkler, Fire Alarm, etc.), the DOB will conduct a walkthrough under our ALT 1 filing to add the retail space to the TCO. That aforementioned walkthrough is only to occupy - they can file their ALT 2 (‘renovation to existing commercial space - no change of use’) and perform their work without this walkthrough with no problem as retail use is clearly reflected under the schedule A for that floor/space as existing” (*id.*, exhibit 1, annex #9).

According to Wishna, “[he] never instructed Landlord not to install the diamond plate in January of 2017” (Wishna aff, ¶ 29). He also testified that—because he had “relied on Walsh’s observations and conclusions concerning the Incomplete Work Items” to write the Termination

Letter and had made no effort to ascertain whether the statements in the Landlord's Letter were correct (*id.*, ¶¶ 46-51)—he had no basis to confirm or deny Landlord's representations regarding: (1) the availability of the structural drawings and the satisfaction of the Lease's load criteria for the floors (NYSCEF Doc No. 226, part 2 of Wishna tr at 311:10-15; 321:5-20); (2) the location of the waste and vent lines (*id.* at 330:9-331:10); (3) the connection of the refrigerant lines to TD Bank's equipment not being Landlord's Work and requiring TD Bank to first purchase and install its condenser components (*id.*, 334:22-336:20 [stating that this "seem(ed) reasonable"]); (4) the main fire alarm system for the Building being operational (*id.* at 337:9-343:18); and (5) the pressure gauge in the Premises (*id.* 345:7-349:18). He also stated that he did not dispute Landlord's claim that the shed on "the Broadway side of the building" as unnecessary (*id.* at 350:24-351:16).

Wishna did concede that some of the purportedly open items were completed. Wishna stated that he had no further objection regarding the New York City Landmarks and Preservation Committee's approval for exterior improvements (*id.* at 316:25-317:15; 319:6-11; 321:2-4) and "confirm[ed] that there was not supposed to be access from Franklin Street" (*id.* at 350:19-23).

On the topic of sprinkler permits, Wishna testifies that, at the time that he wrote the Termination Letter, TD Bank's permit expediter could not tell whether the base building sprinkler system had passed inspection. Wishna speculated that the records might not have been publicly available at that time. However, upon being presented with the DOB records, Wishna acknowledged that the Building's sprinkler system had passed inspection. (*id.* at 361:10-365:17.)

According to TD Bank, the Termination Letter constituted the first time that the Landlord informed it of delays that would impact the Outside Date (*see* Wishna aff, ¶¶ 54, 56-57;

NYSCEF Doc No. 206, Grove aff, ¶¶ 35-37; NYSCEF Doc No. 212, Walsh aff, ¶¶ 25-28).

Landlord does not claim otherwise (*see* Krauss tr at 144:12-145:7 [testifying that he did not inform TD Bank that the Outside Date would be moved and that he did not recall informing it of construction delays due to the discovery of cracked columns]).

Landlord states that the diamond plate that it fully installed the plate on May 10, 2017 (Krauss aff, ¶ 57). In response, Wishna states that “[he] did not go back to the Premises after . . . TD Bank’s termination” and that he “[has] no knowledge of what additional work Landlord may have done after the April 5, 2017 second inspection” (Wishna aff, ¶¶ 50, 51; *see* part 2 of Wishna tr at 306:25-307:23 [stating that he made no effort to ascertain whether the diamond plate was ultimately installed]).

On June 2, 2017, Landlord issued an invoice for TD Bank’s proportionate share of real estate taxes (Krauss aff, ¶ 87; NYSCEF Doc No. 174). TD Bank did not pay the June 2, 2017 invoice (Krauss aff, ¶ 87). On August 22, 2017, Landlord issued a notice to cure (*id.*; NYSCEF Doc No. 175). TD Bank did not pay the June 2, 2017 invoice after receiving the notice to cure (Krauss aff, ¶ 87).

On November 14, 2017, Landlord issued an invoice covering the Fixed Rent for the last three days of November 2017 and the month of December 2017 (Krauss aff, ¶ 88; NYSCEF Doc No. 176). Landlord then issued a notice to cure, dated January 3, 2018 (Krauss aff, ¶ 88; NYSCEF Doc No. 177). TD Bank did not pay the November 14, 2017 invoice (Krauss aff, ¶ 88).

Landlord commenced this action on January 11, 2018. TD Bank filed its answer with counterclaims on August 3, 2018.

On January 10, 2020, TD Bank moved for summary judgment on its counterclaims (motion sequence 004). On the same day, Landlord filed this motion for summary judgment (motion sequence number 005). On June 5, 2020, Landlord moved to strike a reply affidavit that TD Bank offered in support of its motion for summary judgment (motion sequence number 006). On September 17, 2020, the court held oral argument on all three motions. This court denied TD Bank's motion for summary judgment, denied the motion to strike as moot and reserved judgment on Landlord's motion (*see* 9/17/2020 tr at 78:6-79:3). The court now addresses Landlord's motion for summary judgment.

## II. Argument

Pursuant to CPLR 3212 (b), “[t]o obtain summary judgment, the movant ‘must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact’” (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant satisfies its burden, the opposing party must “produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (*id.*, quoting *Alvarez*, 68 NY2d at 324). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

### A. Breach of Contract (First Cause of Action)

Landlord argues that it is entitled to summary judgment on its breach of contract cause of action because, on March 28, 2017, it delivered the Premises with all of Landlord's Work substantially completed. While it acknowledges that Landlord did not install the diamond plate, Landlord argues that this was merely a “punchlist item[]” the non-completion of which [did] not

interfere with the performance of Tenant's Work" (Lease, § 4.2). In addition, Landlord argues that the Outside Date for substantial completion of Landlord's Work received an extension of 180-205 days, due to delays beyond Landlord's control. Thus, Landlord contends, the Outside Date installation of the diamond plate by May 10, 2017 was well within the Outside Date.

TD Bank counters that Landlord's Work was not substantially completed by the Outside Date of March 28, 2017. It argues that, pursuant to the plain language of the Lease, Landlord had to install the diamond plate and ensure that, at the time of delivery, the entrance was ADA compliant. In addition, TD Bank argues that it could not obtain an ALT 2 sprinkler permit for its Tenant's Work, because Landlord failed to close out its sprinkler permit. As to the Lease's extension clause for the Outside Date, TD Bank argues that Landlord waived the extension when it failed to invoke it prior to TD Bank's termination of the Lease and that, post-termination, Landlord is estopped from invoking it.

A cause of action for breach of contract requires a plaintiff to demonstrate "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). "[W]hen parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal quotation marks and citation omitted]). This rule has "special import in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length" (*id.* [internal quotation marks and citation omitted]; *see 159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 358-359 [2019] [same]). Thus, in the context of a commercial lease, "[e]ven if the result . . . is economically harsh, where . . . the lease is entered

into at arm's length between two sophisticated parties, the courts will not interfere" (*Murray Hill Mews Owners Corp. v Rio Rest. Assoc. L.P.*, 92 AD3d 453, 454, [1st Dept 2012]).

1. Substantial Completion of Landlord's Work by March 28, 2017

Here, the Lease defines Landlord's Work as "[t]he work described in Exhibit B" (Lease, § 1.14) and gives the tenant the right to terminate the Lease if such work is not "substantially completed" by the Outside Date (*id.*, § 2.6). The Lease defines "substantially completed" as "when the only items of Landlord's Work to be completed are so-called 'punchlist items' the non-completion of which will not interfere with the performance of Tenant's Work (as hereinafter defined)" (*id.*, § 4.2). Thus, in determining whether Landlord satisfied its obligations under the Lease, the inquiry is not whether Landlord completed every item of work described in Exhibit B, but whether Landlord "substantially completed" each item, as defined in section 4.2 of the Lease, i.e. "non-completion . . . [would] not interfere with the performance of Tenant's Work" (*id.*; see *Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [internal quotation marks and citation omitted] ["courts should read a contract as a harmonious and integrated whole to determine and give effect to its purpose and intent"]).

Landlord establishes a prima facie showing of entitlement to summary judgment because it substantially completed Landlord's Work by March 28, 2017.

First, it submits the Landlord's Letter, providing a detailed response to each item of Landlord's Work that TD Bank identified as outstanding in its Termination Letter, along with supporting photographs and documentation (NYSCEF Doc No. 166, exhibit 1, annexes # 1-9). Landlord also submits the deposition of Foundation Group's senior project manager, who testified that, with the exception of the diamond plate (Colon tr at 192:14-19; 210:1-12). In

addition, Landlord relies on Wishna's testimony, conceding that several of the Termination Letter's "open items" were, in fact, completed (*see* part 2 of Wishna tr at 316:25-317:15; 319:6-11; 321:2-4; 350:19-351:1; 364:4-22 [acknowledging that: (1) the New York City Landmarks and Preservation Committee's approval for exterior improvements had been obtained; (2) Franklin Street access should have never occurred; (3) a shed on Broadway would have been necessary during Tenant's Work; and (4) the Building's sprinkler system had passed inspection]), while being unable to confirm or deny Landlord's assertions as to the remaining items, because TD Bank never followed up to determine whether its initial assessment of the purportedly outstanding items of Landlord's Work was correct (*see id.*, at 311:10-15; 321:5-20; 330:9-331:10; 334:22-336:20; 337:9-343:18; 345:7-349:18).

Landlord also demonstrates that it procured all necessary permits and approvals for the Building's sprinkler system and that TD Bank could have obtained an ALT 2 sprinkler permit for the Premises, had it chosen to do so. Landlord provides copies of publicly available filings and materials from the DOB Buildings Information System, showing that: its permit application for the main sprinkler system had been approved on March 24, 2014; the permit was issued on May 13, 2014; and the permit was annually renewed on May 5, 2015, April 19, 2016, April 14, 2017, April 18, 2018, and November 21, 2019 (*see* NYSCEF Doc No. 198). Furthermore, Landlord submits a copy of the ALT 2 application, that Bohler filed on behalf of TD Bank in July 2015 (NYSCEF Doc No. 199), and the October 7, 2015 Notice of Objections, deny the permit (NYSCEF Doc No. 200). The Notice of Objections lists technical objections regarding missing information and paperwork and cites pertinent code sections, policies and procedures (*id.*). It does not mention the Building's sprinkler permit as one of the reasons for denying TD Bank's

application (*id.*). This demonstrates, *prima facie*, that Landlord's sprinkler permit was not a reason for the DOB's denial of TD Bank's ALT 2 permit application.

Lastly, as concerns the diamond plate and ADA compliance, Landlord demonstrates, *prima facie*, that these items of Landlord's Work were substantially completed, within the meaning of the Lease. Exhibit B requires Landlord to "pair or replace all deteriorated structural supports on Broadway for the sidewalk vaults adjoining Tenant's demised area and install a new sidewalk system consisting of new diamond plate or acceptable alternative in conformance with ADA/accessibility requirement" (Lease, Exhibit B, ¶ 2). It also requires Landlord to "deliver the Premises with the entrances . . . in compliance with accessibility requirements" (*id.*, ¶ 15).

Landlord submits evidence that: (1) the diamond plate was ready to ship for installation (*see* Landlord's Letter, exhibit 1, annex # 1); (2) the installation would take 24 hours (*see* Colon tr at 210:14-22); (3) all that remained of Landlord's Work was the installation of the diamond plate (*see id.* at 210:1-12); (4) upon installation, Landlord would have achieved its portion of ADA compliance (*see id.* at 117:11-14); and (5) the absence of the diamond plate neither impeded access to the Premises nor TD Bank's ability to perform its work (*see* Krauss Aff. ¶ 54 [stating that TD Bank had access to the Premises through the work shed and providing a photograph of the shed and the entrance]; Colon tr at 210:19-211:8 [stating that the lack of the diamond plate did not impact TD Bank's ability to do its Tenant's Work and that ADA compliance is not necessary during construction as "(contractors) can't get on ladders . . . from wheelchairs"]). Therefore, Landlord demonstrates, *prima facie*, that the lack of the diamond plate constituted a punchlist item under the Lease, as its absence would not have interfered with Tenant's Work, and that it substantially completed Landlord's Work by March 28, 2017.

In opposition, TD Bank fails to raise an issue of fact as to whether Landlord substantially completed Landlord's Work as it relates to the Building's sprinkler permit, the diamond plate or accessibility. TD Bank makes no attempt to raise an issue of fact with respect to any other item of Landlord's Work that it identified in its Termination Letter.<sup>4</sup>

First, TD Bank argues that Landlord's failure to close out its sprinkler permit (i.e. procure a final sign-off or a Letter of Completion [LOC]) prevented TD Bank from obtaining an ALT 2 sprinkler permit, without which it could not complete Tenant's Work. In support of its position, it relies on the affidavit of Joseph A. Deal (Deal), a Bohler principal and "TD Bank's expert permit expediter" (TD Bank's brief in opposition at 14). In his affidavit, Deal states that "Bohler . . . was advised by DOB Plan examiner Mahmoud Gouda, that, as of March 27, 2017, TD Bank would not have been able to obtain an ALT2 Permit from the DOB to proceed with work on the sprinkler system in the Premises" (Deal aff, ¶ 25). More specifically, Deal avers that the DOB "represent[ed] that it would not approve an application for an ALT2 Permit to modify a sprinkler system if it had not signed off on the main building sprinkler system" (*id.*, ¶ 30). Deal also relies on "[his] experience as an engineer and permit expediter" and opines "that TD Bank would not have been able to obtain an ALT2 permit from the DOB to proceed with work on the sprinkler system in the Premises as of March 27, 2017" (*id.*, ¶ 26). In addition, TD Bank submits an April 19, 2017 letter, in which Deal conveys this information to Walsh (NYSCEF Doc No. 104).

However, Deal's statements regarding his conversation with the DOB, whether offered in the form of an affidavit or correspondence with Walsh, are hearsay (*Nucci v Proper*, 95 NY2d

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<sup>4</sup> Notably, TD bank briefly mentions a fourth item, stating as follows: "Landlord Failed to Provide TD Bank with Structural Drawings to Confirm that the Floors Met TD Bank's Load Requirements" (TD Bank's brief in opposition at 17) and "Structural Drawings - were not provided to TD Bank to verify that the floors met the design load criteria" (*id.* at 19). However, these two statements are the entirety of TD Bank's argument on this issue and appear to be included on the instant motion in error, by copying and pasting portions of TD Bank's brief from its motion for summary judgment (*see* NYSCEF Doc No. 134, TD Bank's brief in support of its motion for summary judgment at i, 21). Therefore, this decision does not address this item of Landlord's Work.

597, 602 [2001] [internal quotation marks and citation omitted] [“(o)ut-of-court statements offered for the truth of the matters they assert are hearsay and may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule . . .”). “While hearsay statements may be offered in opposition to a motion for summary judgment, hearsay statements cannot defeat summary judgment where it is the only evidence upon which the opposition to summary judgment is predicated” (*Gonzalez v 1225 Ogden Deli Grocery Corp.*, 158 AD3d 582, 584 [1st Dept 2018] [internal quotation marks and citation omitted]; see *Waiters v Northern Trust Co. of N.Y.*, 29 AD3d 325, 327 [1st Dept 2006] [finding that a hearsay statement was insufficient to raise an issue of fact where no “acceptable excuse (was) offered for (the) reliance on the hearsay statement”]; see also *Stankowski v Kim*, 286 AD2d 282, 283 [1st Dept 2001]). Here, TD Bank neither substantiates Deal’s statements nor offers an excuse for its reliance on hearsay.

To the extent that TD Bank seeks to circumvent its hearsay problem by offering Deal’s affidavit as an expert opinion, the attempt fails.<sup>5</sup> Deal does not cite to pertinent building code, DOB policy or procedure. He offers his opinion without any basis. Where, as here, “the expert’s ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment” (*Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; see also *Commissioner of Dept. of Social Servs. of City of N.Y. v Morello*, 8 AD3d 154, 155 [1st Dept 2004] [finding that an expert’s opinion, which “fail(ed) to provide any basis for such opinion,” was “without probative value and insufficient to raise a triable issue of fact”]).

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<sup>5</sup> Landlord is correct that TD Bank never disclosed Deal as an expert witness pursuant CPLR 3101 (d) (1) (see NYSCEF Doc No. 219, Plaintiff’s First Set of Interrogatories, ¶¶ 35, 36; NYSCEF Doc No. 220, TD Bank’s Answer to Plaintiff’s First Set of Interrogatories, ¶¶ 35, 36; NYSCEF Doc No. 218, Lesser’s reply affirmation, ¶ 3). However, “the court shall not decline to consider [an expert affidavit, submitted on a motion for summary judgment,] because [such a disclosure] was not furnished prior to the submission of the affidavit” (CPLR 33212 [b]).

Therefore, Deal's statements are inadmissible hearsay and are insufficient, without more, to raise an issue of fact as to whether Landlord substantially completed Landlord's Work with regard to the Building's sprinkler permit.<sup>6</sup>

TD Bank's argument regarding the diamond plate and ADA compliance fares no better. It argues that the plain language of the Lease requires Landlord to "install a new sidewalk system" and to "*deliver* the Premises with the entrances. . . in compliance with accessibility requirements" (Lease, exhibit B, ¶¶ 2, 15 [emphasis added]). It also contends that, contrary to Krauss' assertion in the Landlord's Letter, TD Bank never agreed to postpone compliance with either provision until completion of Tenant's Work. Additionally, it points out that the diamond plate could not have been installed within 24 hours, when it was awaiting shipment in Alabama.

TD Bank is correct that the Lease requires Landlord to perform this work. However, as explained above, TD Bank cannot simply point to Exhibit B and demand strict compliance. "[A] contract [should be read] as a harmonious and integrated whole" (*Nomura Home Equity Loan, Inc.*, 30 NY3d at 581 [internal quotation marks and citation omitted]). Here, "the right to terminate this lease" hinges on whether "Landlord's Work has been 'substantially completed' (as defined in Section 4.2 hereof)" (Lease, § 2.6). In other words, was the absence of the diamond

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<sup>6</sup> Landlord argues that:

"Deal's 'opinion' is also eviscerated by the express terms of the Lease which make clear that obtaining *all* signoffs, Letters of Completion and Certificates of Occupancy for the Premises (including sprinklers and fire protection) are the obligation of TD Bank, **and not** Landlord, as was TD Bank's obligation to provide the sprinkler branch lines and sprinkler heads as part of its Tenant's Work" (Landlord's reply brief at 24, citing Lease, Exhibit B, ¶¶ 11, 18)

The court is not convinced that this is so. The Lease places the responsibility for obtaining final sign offs "*for the Premises*" on TD Bank (Lease, Exhibit B, ¶ 18 [emphasis added]). It, however, also provides that "[c]ompletion of Landlord's Work shall include obtaining . . . signoffs" (*id.*). Therefore, the Lease does not resolve the parties' dispute over whether Landlord was obligated to close out the main sprinkler permit before TD Bank could obtain its ALT 2 permit. Nonetheless, as explained above, Landlord offers the DOB's Notice of Objections, which does not list Landlord's main sprinkler permit among the reasons for denial of TD Bank's permit application, whereas TD Bank offers hearsay and an unsupported expert opinion.

plate, and the resulting noncompliance with accessibility requirements, such that their “non-completion . . . interfere[d] with the performance of Tenant’s Work” (*id.*, § 4.2). TD Bank does not address the issue, much less offer any evidence of how the incomplete work interfered with Tenant’s Work. Thus, TD Bank fails to raise an issue of fact as to whether Landlord substantially completed Landlord’s Work as it relates to the diamond plate and accessibility requirements.

Therefore, Landlord demonstrates, *prima facie*, that it delivered the Premises with the Landlord’s Work substantially completed, as required by the Lease, and TD Bank fails to raise an issue of fact as to whether any of the allegedly open items interfered with its ability to perform Tenant’s Work.

## 2. Extension of the Outside Date

Even assuming that Landlord’s failure to install the diamond plate and to satisfy accessibility requirements meant that Landlord’s Work was not substantially completed by March 28, 2017, Landlord makes a *prima facie* showing that the Outside Date was extended, due to delays beyond its control, and that it completed this work within that time.

Landlord demonstrates that the discovery of the cracked support columns, and the subsequent remediation work, delayed Landlord’s Work by, at a minimum, 180 days (*see* Colon tr at 216:5-14; 232:1-7; 246:2-248:17 [testifying that cracked columns running through the Premises delayed work on the Premises by 180-200]; NYSCEF Doc No. 169 [change order 94, dated June 9, 2015, for the replacement of columns running through the Premises, showing a delay of 156 days]). In addition, it points to the abrupt end of its relationship with Foundations Group as the cause of an additional 45 days of delays (*see* Krauss aff, ¶ 48). Accordingly, Landlord demonstrates that, pursuant to section 2.6 of the Lease, the Outside Date was extended,

“day for day for . . . each day of delay due to reasons beyond the Landlord’s control,” a minimum of six months and that its installation of the diamond plate by May 10, 2017 (*see* Krauss aff, ¶ 57) was well within the Outside Date.

In opposition, TD Bank does not dispute that Landlord installed the diamond plate by May 10, 2017, as it never made any effort to ascertain whether the work was completed (*see* Wishna aff, ¶¶ 50, 51; *see* part 2 of Wishna tr at 306:25-307:23). Nor does it contest Landlord’s claims as to the delays it encountered or their impact on Landlord’s Work. Instead, TD Bank argues that Landlord waived the Lease’s extension clause. It also argues that Landlord is estopped from invoking it, because “Landlord consistently confirmed that the Outside Date was March 28, 2017 and TD Bank relied on these representations” (TD Bank’s brief in opposition at 2). These arguments are unavailing.

“[I]t is axiomatic that waiver is an intentional relinquishment of a known right and should not be lightly presumed. Such intention must be unmistakably manifested, and is not to be inferred from a doubtful or equivocal act” (*Echostar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010] [internal quotation marks and citations omitted]).

Here, TD Bank fails to identify an unmistakable manifestation of Landlord’s intent to waive the extension clause. In support of its waiver argument, it relies on Landlord’s emails to Foundations Group, urging the contractor to “get this work completed as soon as possible” (NYSCEF Doc No. 121 at 1) and reminding it that there was “a deadline to turn over the space in accordance with the lease before it [could] be nullified by the tenant” (NYSCEF Doc No. 120 at 1). TD Bank also points to the fact that Landlord made two attempts to deliver the Premises before March 28, 2017 (*see* NYSCEF Doc Nos. 160, 164), without ever informing TD Bank of the delays or invoking the extension clause (*see* Wishna aff, ¶¶ 54, 56-57; Grove aff, ¶¶ 35-37;

Walsh aff, ¶¶ 25-28; Krauss tr at 144:12-145:7). While these communications unmistakably manifest Landlord's desire to deliver the Premises expeditiously, none identify an Outside Date, much less confirm it as March 28, 2017.

In addition, nothing in the Lease requires Landlord to inform TD Bank of delays or to invoke the extension clause. Instead, the Lease unambiguously provides that "Outside Date *shall be extended* day for day for . . . (z) each day of delay due to reasons beyond Landlord's control" (Lease § 2.6 [emphasis added]). "The parties could have negotiated and included an explicit notice requirement . . . . They did not do so" and the court may not insert one for them (*Vermont Teddy Bear Co.*, 1 NY3d at 472, 476). "Absent a duty to speak or act, [Landlord's] silence or inaction could not result in a waiver . . . ." (*Cole v Macklowe*, 125 AD3d 44, 52 [1st Dept 2014] [finding no waiver, where the contact at issue "imposed no affirmative duty . . .to take action"]; *see Bank of N.Y. v Murphy*, 230 AD2d 607, 608 [1st Dept 1996] [finding that the defendant did not raise an issue of fact with his waiver argument, because "plaintiffs' silence . . . did not amount to acquiescence or waiver where there was no duty to speak"]). Ultimately, "[TD Bank] points to no affirmative action on [Landlord's] part from which one can infer that [Landlord] surrendered its contractual right to" an extension of the Outside Date (*Echostar Satellite L.L.C.*, 79 AD3d at 618).

What is more, the Lease expressly provides that "[n]o term of this lease shall be considered waived by Landlord or Tenant unless the waiver is in a writing signed by the waiving party" (Lease, § 19.6).<sup>7</sup> Therefore, "[w]aiver is unavailing because the contract provides that a waiver requires a signed writing" and there is no writing waiving the extension clause (*Wind Point Partners VII-A, L.P. v Hoya Corp.*, 185 AD3d 478, 478-479 [1st Dept 2020] [internal

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<sup>7</sup> Landlord relies on section 23.8 of the Lease to argue that there can be no implied waiver in the face of a nonwaiver clause (*see* NYSCEF Doc No. 239, Landlord's reply brief at 19). However, upon searching the record, the court finds that section 19.6 is more apt.

citation omitted] [finding that there was no waiver of a contractual deadline, because “there (was) no writing signed by plaintiff waiving the . . . deadline”]; see *Jeppaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984] [finding that a lease’s “nonwaiver and merger clause . . . preclude(d) a finding of waiver”]; see also *Dove Hunters Pub, Inc. v Posner*, 211 AD2d 494, 495 [1st Dept 1995] [holding that the “(tenant’s) claim of waiver (was) without merit in view of the nonwaiver clause in the lease”]).

TD Bank’s promissory estoppel argument also fails. In order to prevail on a theory of promissory estoppel, a party must establish “(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance” (*Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017] [internal quotation marks and citation omitted]). TD Bank is unable to show any of these elements.

First, none of the cited communications (see NYSCEF Doc Nos. 120, 121, 160, 164) identify an Outside Date, much less establish that Landlord “clearly and unambiguously promised” that the Outside Date would remain March 28, 2017 (*Condor Funding, LLC*, 147 AD3d at 411). Second, “[a]s discussed above, [TD Bank] was not justified in relying on its perception that [Landlord] had decided not to enforce the [extension clause], because nothing about [Landlord’s] conduct permitted such an inference” (*Echostar Satellite L.L.C.*, 79 AD3d at 619). Also, TD Bank never explains how it could have relied on communications between Landlord and its contractor (NYSCEF Doc Nos. 120, 121), when TD Bank was not privy to these communications. Moreover, the assertion that a sophisticated party such as TD Bank believed that Landlord would forgo invoking the extension clause, even though Landlord never indicated that it would, “strains credulity” (*Bank of New York*, 230 AD2d at 608 [finding that the

defendant failed to raise an issue of fact with his estoppel argument, because, among other things, as “a sophisticated, experienced real estate investor,” he could not demonstrate reasonable reliance on “an unwritten modification of an agreement involving millions of dollars”]; *see* NYSCEF Doc No. 227 [internal communication, dated September 24, 2015, cautioning TD Bank employees that “NYC landlords especially . . . want TD’s credit” and providing an example of a landlord who “said go ahead and sublease as long as I still have TD on the hook”]). Lastly, TD Bank’s contention, that it would be prejudiced should the court find that the Outside Date was extended, rings hollow. The record reflects that TD Bank decided not to spend any money on the Premises as early as October 2015 (*see* *Wishna* aff, ¶ 19; NYSCEF Doc No. 147) and that it decided to pursue termination of the Lease as early as January 2016 (NYSCEF Doc No. 152).<sup>8</sup> It is, therefore, unclear how TD Bank’s Termination Letter was a change of position in reliance on Landlord’s representations, rather than a continuation of its chosen path (*see Bank of New York*, 230 AD2d at 608 [finding no estoppel, where “there was no evidence of prejudice in the form of conduct by defendant clearly based upon representations stemming from the alleged new agreement”]; *see also Echostar Satellite L.L.C.*, 79 AD3d at 619 [finding that the plaintiff’s claim of injury “unavailing, considering that the alleged injustice was (the plaintiff) having to honor an obligation negotiated into the agreements at arms length”]).

Accordingly, TD Bank’s arguments of waiver and estoppel fail to raise an issue of fact.

For the foregoing reasons, Landlord’s motion for summary judgment on its breach of contract is granted as to liability.

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<sup>8</sup> TD Bank argues that its offers to terminate the Lease (NYSCEF Doc Nos. 152, 155) are inadmissible under CPLR 4547. CPLR 4547 is inapplicable “since the proposal[s] [were] not . . . offer[s] to compromise a claim, but an attempt to reach a business agreement” (*Colliers ABR, Inc. v Famurb Co.*, 101 AD3d 409, 410 [1st Dept 2012]; *see also Java Enters., Inc. v Loeb, Block & Partners LLP*, 48 AD3d 383, 384 [1st Dept 2008] [internal quotation marks and citation omitted] [stating that “CPLR 4547. . . applies only to offers to compromise a claim which is disputed”]).

### 3. Damages

The parties dispute the amount of damages that Landlord may recover. Landlord argues that, in addition to reasonable attorneys' fees and expenses, late fees and interest, it is entitled to all amounts of Fixed Rent and Additional Rent that accrue under the Lease up to the time of judgment on the instant motion. TD Bank counters that, because the Lease does not contain an acceleration clause, any recovery is limited to arrears owed from November 28, 2017, the alleged Fixed Rent Commencement Date, through January 11, 2018, the commencement date for the instant action.

In the absence of an acceleration clause, a landlord may not "assert[] a cause of action for future rent not yet due when it file[s] its [complaint]" (*23 E. 39th St. Dev., LLC v 23 E. 39th St. Mgt. Corp.*, 172 AD3d 964, 966 [2d Dept 2019]; *see 226 Fifth Ave. LLC v SBF Intl., Inc.*, 2012 NY Slip Op 33491[U], \*7-9 [Sup Ct, NY County 2012] [dismissing a breach of contract claim that "(sought) judgment by way of accelerating the rate to be due, rather than as the rent (fell) due on a monthly basis," where the lease "specifically provide(d) that the rent (was) to be paid monthly"]). As such, a landlord's damages are generally limited to "the rent deficiency that had already accrued by the filing date of [its] complaint" (*Runfolo v Cavagnaro*, 78 AD3d 1035, 1035 [2d Dept 2010]; *see also McCready v Lindenborn*, 172 NY 400, 407 [1902] [finding that the landlord's damages were limited to the amounts owed for each month "until the action was commenced"])). Nonetheless, "it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]). In such a case, "the court may deem the pleadings amended to conform to the proof" (*id.*).

Here, Landlord has demonstrated that it delivered the Premises with Landlord's Work substantially completed on March 28, 2017, marking it as the "Commencement Date" (*see id.*, §§ 2.6, 4.2). Therefore, pursuant to the Lease, the "Fixed Rent Commencement Date" (i.e. "eight [8] months after the Commencement Date") was November 28, 2017 (*id.*, § 1.12 [b]).

In support of Additional Rent owed, Landlord submits the June 2, 2017 invoice, for "the tax payment due from TD Bank in connection with the NYC Real Estate Taxes due on July 3, 2017, as well as the per diem of taxes from the previous period," totaling \$45,261.68 (Krauss aff, ¶ 87; NYSCEF Doc No. 174). Pursuant to the Lease, the invoice calculates TD Bank's "Proportionate Share" of the real estate taxes "on a per diem basis as of the Commencement Date" (Lease §§ 6.1, 6.3). Landlord also submits a notice to cure, dated August 22, 2017, which it sent to TD Bank pursuant to section 18.1(a) of the Lease (Krauss aff, ¶ 87; NYSCEF Doc No. 175). Krauss states that TD Bank did not pay the November 14, 2017 invoice (Krauss aff, ¶ 88).

In support of amounts owed as Fixed Rent, Landlord submits the November 14, 2017 invoice, that it sent to TD Bank for rent covering the last three days of November 2017 and the month of December 2017, totaling \$55,671 (Krauss aff, ¶ 88; NYSCEF Doc No. 176). It also submits the January 3, 2018 notice to cure that it sent after TD Bank's failed to pay the Fixed Rent (Krauss aff, ¶ 88; NYSCEF Doc No. 177). Accordingly, Landlord demonstrates its entitlement to summary judgment for Fixed Rent and Additional Rent owed at the time it commenced this action on January 11, 2018.

While the Lease does not contain an acceleration clause, nonetheless Landlord may also recover the amounts that were already due when it moved for summary judgment (*see Weinstock* 254 AD2d at 166; *see also see Pikoulas v Hardina*, 52 Misc 3d 44, 46 [App Term, 2d Dept, 9th

& 10th Jud Dists 2016] [finding that plaintiff demonstrated entitlement to rent due for February, March and April 2014, because, even though she filed the complaint on February 27, 2014, “by the time plaintiff moved for summary judgment, all three months’ rent were allegedly due and owing”). TD Bank has not been misled to its prejudice. Landlord stated in the complaint its intention to seek arrears as they accrued during the pendency of this action and in the relief sought in the summary judgment motion (*see Pikoulas*, 52 Misc 3d at 47; *see* complaint, ¶ 54 [a]; NYSCEF Doc No. 135). As proof of arrears, Landlord submits a detailed statement—showing the Fixed Rent, Additional Rent, contractual interest of twelve percent per annum and late charges of five percent (*see* Lease § 19.7) owed through January 1, 2020—totaling \$1,877,411.59 (Krauss aff, ¶ 91; NYSCEF Doc No. 178). In opposition, TD Bank does not raise any issues of fact as to the amounts owed. Therefore, to the extent Landlord seeks \$1,877,411.59 in arrears through January 1, 2020, the motion for summary judgment is granted (*see Matter of Moskowitz v Jorden*, 27 AD3d 305, 306 [1st Dept 2006] [finding that the owners were entitled to summary judgment on the issue of rent arrears, where “[t]he claim for arrears owed . . . was not denied, and the owners clearly explained and documented how the monthly rent had been determined”]; *see also Pikoulas*, 52 Misc 3d at 46-47).

Landlord is also entitled to recover reasonable attorneys’ fees and expenses incurred in connection with the instant action, pursuant to sections 19.5 and 23.9 (a) of the Lease.

However, to the extent Landlord seeks to recover rent due through the date of judgment, the motion is denied. “Claims for additional rent as it accrues may be made by means of supplemental pleading pursuant to CPLR 3025 (b)” (*226 Fifth Ave. LLC*, 2012 NY Slip Op 33491[U]).

B. Declaratory Judgment (Second Cause of Action)

Landlord seeks a declaration that, under the terms of the Lease: (1) the Commencement Date is March 28, 2017; (2) the Fixed Rent Commencement Date is November 28, 2017; (3) Landlord is entitled to all amounts of Fixed Rent and Additional Rent due under the Lease, plus penalties and interest, up to the time of judgment; and (4) such amounts shall continue to accrue over the 20-year Lease term as they become due. It argues that a declaratory judgment is necessary to prevent TD Bank from avoiding its rent obligations in the future. In opposition, TD Bank challenges Landlord's ability to recover amounts not yet owed at the time Landlord commenced this action, which argument the court has already addressed above.

"A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract" (*Apple Records v Capitol Records*, 137 AD2d 50, 54 [1st Dept 1988]).

Here, the declaratory judgment claim "merely seek[s] a declaration of the same rights and obligations as [have already been] determined under the first . . . cause[] of action" (*id.*). This court's "determination of the breach of contract claim will 'sufficiently guide the parties on their future performance of the contract[ ], thereby obviating any need for' other alternative relief" (*204 Columbia Hgts., LLC v Manheim*, 148 AD3d 59, 70-71 [1st Dept 2017], quoting *Apple Records*, 137 AD2d at 54 [dismissing causes of action for declaratory judgment and injunctive relief]). Therefore, Landlord fails to demonstrate the necessity for resorting to declaratory judgment and the court dismisses the claim (*see* CPLR 3212 [b]).

### C. Counterclaims

For the reasons stated, the court grants Landlord's motion for summary judgment dismissing TD Bank's counterclaims and dismisses the counterclaims.

Accordingly, it is

**ORDERED** that the motion for summary judgment is granted in favor of plaintiff to the extent of:

1. granting judgment on the first cause of action in the amount of \$1,877,411.59, together with interest at the rate of 12% per annum from the date of February 1, 2020 until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs and the Clerk is directed to enter judgment accordingly;
2. dismissing defendant's counterclaims; and it is further

**ORDERED** that the court denies plaintiff's request for a hearing on attorney fees but grants the opportunity to make an application by motion for the attorneys' fees within 30 days of the e-filed date of this order. The parties are encouraged to stipulate to an amount of attorney's fees; and it is further

**ORDERED** that summary judgment is granted in favor of defendant, pursuant to CPLR 3212 (b), to the extent of dismissing the second cause of action.

Dated: May 21, 2021

ENTER:



HON. MELISSA A. CRANE J.S.C.