SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JAMES E. D'AUGUSTE** **PART** **55**

Justice

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ADBH 22ND FLOOR, INC., DAVID L. CANGELLO, MD, PLLC, MAUREEN MOOMJY FERTILITY, GYNECOLOGY AND REPRODUCTIVE MEDICINE P.C., SCOTT A. RESNICK, D.M.D. AND THOMAS J. ZICARELLI D.D.S., P.C. (D/B/A NEW YORK CITY ENDODONTICS, P.C.), PUREBEAU USA, INC., RONALD R. BLAND, P.C., VOGRUG LLC, and WERNER CHIROPRACTIC P.C.,

Plaintiffs,

- v -

N.Y. PARK N. SALEM INC. and JOHN/JANE DOE NOS. 1-3,

Defendants.

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INDEX NO. 650978/2020

MOTION DATE 07/15/2020, 07/08/2021

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20, 23, 24, 25, 26, 27, 28, 29, 30, 43

were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 84, 85, 86

were read on this motion to/for JUDGMENT - SUMMARY.

Motion sequence nos. 001 and 003 are consolidated for disposition.

This commercial landlord/tenant dispute stems from certain charges assessed against plaintiffs David L. Cangello, MD, PLLC (Cangello), Maureen Moomjy Fertility, Gynecology and Reproductive Medicine P.C. (Moomjy), Scott A. Resnick, D.M.D. and Thomas J. Zicarelli D.D.S., P.C. (D/B/A New York City Endodontics, P.C.) (Endodontics), Purebeau USA, Inc. (Purebeau), Ronald R. Bland, P.C. (Bland) and Werner Chiropractic P.C. (Werner) (collectively, plaintiffs) by defendant N.Y. Park N. Salem Inc. related to a central cooling tower system. In motion sequence no. 001, plaintiffs move, pursuant to CPLR 602 (b), to remove an action currently pending in Civil

Court, New York County captioned *N.Y. Park N. Salem, Inc. v Maureen Moomjy Fertility, Gynecology and Reproductive Medicine, P.C.*, index No. L&T 053101/2020 (the Moomjy Action) and consolidating that action with the present plenary action for purposes of discovery and joint trial. In motion sequence no. 002, plaintiffs move, pursuant to CPLR 3212 (e), for partial summary judgment against defendant on the fourth, seventh, tenth, eleventh, fourteenth, seventeenth, twenty-third and twenty-fourth causes of action in the first amended complaint (the complaint).

BACKGROUND

Defendant owns a building located at 30 East 60th Street, New York, New York (the Building) (NY St Cts Elec Filing [NYSCEF] Doc No. 85, defendant's Response to Statement of Material Facts, ¶ 1). Nonparty ESA Properties, Inc. (ESA) served as defendant's property manager (*id.*, ¶ 32). At some unknown date, defendant constructed an 11-story tower (the New Tower) on top of the existing 14-story Building (NYSCEF Doc No. 57, Michael J. Giusto [Giusto] affirmation, exhibit B, ¶ 12). To provide heating and air conditioning services to tenants in the New Tower and to certain tenants in the original part of the Building, defendant erected a cooling tower (the Cooling Tower) atop the Building's roof (NYSCEF Doc No. 85, ¶ 2).

Plaintiffs are current tenants in the New Tower (NYSCEF Doc No. 57, ¶ 13). Cangello leased Suite 2501 pursuant to a 15-year lease dated July 6, 2017 (NYSCEF Doc No. 58, Giusto affirmation, exhibit C at 1). Moomjy executed a 12-year lease dated February 27, 2017 for Suite 1901 (NYSCEF Doc No. 59, Giusto affirmation, exhibit D at 1). Endodontics occupies the eighteenth floor under a 21-year, 6-month lease dated August 22, 2017 (NYSCEF Doc No. 60, Giusto affirmation, exhibit E at 1). Purebeau rented Suite 2303 for a 10-year term pursuant to a lease dated February 27, 2017 (NYSCEF Doc No. 61, Giusto affirmation, exhibit F at 1). Bland occupies a portion of the seventeenth floor under a 10-year lease dated October 24, 2017 (NYSCEF

Doc No. 62, Giusto affirmation, exhibit G at 1). In September 2018, Werner leased a portion of the fifteenth floor for an 11-year term (NYSCEF Doc No. 63, Giusto affirmation, exhibit H at 1).

Each plaintiff executed a "Standard Form of Office Lease(s)." The terms in each lease cited below are nearly identical, except where noted. Article 29 titled "Services Provided by Owner" discusses the provision of water and heating, ventilation and air conditioning (HVAC) services by defendant, and reads, in pertinent part that:

> "Owner shall provide: … (c) water for ordinary lavatory purposes, but if Tenant uses or consumes water for any other purposes or in unusual quantities (of which fact Owner shall be the sole judge), Owner may install a water meter at Tenant's expense … to register such water consumption, and Tenant shall pay for water consumed as shown on said meter as additional rent as and when bills are rendered … (e) If the demised premises are serviced by Owner's air conditioning/cooling and ventilation system, air condition/cooling will be furnished to Tenant from May 15th through September 30th on business days (Mondays through Fridays, holidays excepted) from 8:00 a.m. to 6:00 p.m., and ventilation will be furnished on business days during the aforesaid hours except when air conditioning/cooling is being furnished as aforesaid … Rider to be added in respect to rates and conditions for such additional service"

(NYSCEF Doc No. 58 at 4; NYSCEF Doc No. 59 at 4; NYSCEF Doc No. 60 at 4; NYSCEF Doc No. 61 at 3; NYSCEF Doc No. 63 at 4). Article 29 in Bland's lease differs to the extent that defendant agreed to furnish "hot and cold water" and that any reference to HVAC services was stricken (NYSCEF Doc No. 62 at 7).

Each lease was accompanied by a rider which controlled in the event of a conflict between the terms of the lease and rider (NYSCEF Doc No. 58 at 9; NYSCEF Doc No. 59 at 7; NYSCEF Doc No. 60 at 8; NYSCEF Doc No. 61 at 8; NYSCEF Doc No. 62 at 12; NYSCEF Doc No. 63 at 8). Each rider contains articles titled "HVAC Equipment; Installations" (Article 44) and "Electricity/Utilities" (Article 47), or in the case of Bland's lease, "Electricity" (Article 39), "Services" (Article 44) and "Heat and Air Conditioning" (Article 45).

Regarding HVAC services, plaintiffs agreed they would maintain the ventilating and air conditioning facilities in their leased premises at their expense (NYSCEF Doc No. 58 at 18 [Article 44(B)]; NYSCEF Doc No. 59 at 18 [Article 44(A)]; NYSCEF Doc No. 60 at 18 [Article 44(A)]; NYSCEF Doc No. 61 at 16 (Article 44(A)]; NYSCEF Doc No. 62 at 21 [Article 45(B)]; NYSCEF Doc No. 63 at 16 [Article 44(A)]). The Cangello, Moomjy, Endodontics and Purebeau leases also contain the following:

> "Notwithstanding anything to the contrary contained herein, Owner shall not be responsible for providing heat to the demised premises. Tenant acknowledges that the heat shall be supplied to the demised premises through the tenant controlled heating, ventilation and air conditioning facilities to be installed in the demised premises. It shall be the sole responsibility of Tenant to pay for the electrical costs relating to the operation of the heating ventilation and air condition system in accordance with the provisions of Article 47"

(NYSCEF Doc No. 58 at 18 [Article 44(C)]; NYCSEF Doc No. 59 at 18 [Article 44(B)]; NYSCEF Doc No. 60 at 18 [Article 44(B)]; NYCSEF Doc No. 61 at 19 [Article 44(B)]). Bland agreed to pay all electrical costs related to the operation of the HVAC unit in its premises in accordance with Article 39 of its lease (NYSCEF Doc No. 62 [Article 45(D]). Werner's lease does not specify that Werner was responsible for paying for any costs related to the operation of the HVAC system.

Electricity consumption in the spaces leased to Cangello, Endodontics and Bland were to be measured by submeters installed by defendant. Article 47(A) in the Cangello and Endodontics leases provides that the "Owner shall measure Tenant's demand for and consumption of electricity in the demised premises using a submeter that is, or submeters that are, installed by Owner, at Owner's expense" and that each tenant shall pay as additional rent, or "Electricity Additional Rent," an amount "equal to 110% of the amount charged by the utility company for the consumption of electricity" (NYSCEF Doc No. 58 at 21; NYSCEF Doc No. 60 at 20). Similarly, Article 39(A) in Bland's lease states that "Landlord shall provide redistributed electricity to the

Premises hereunder on a submetered basis, and Tenant agrees to pay Landlord for same at charges established by applying to Tenant's measured electrical demand and consumption (as determined by a dedicated Tenant meter(s) or submeter(s) installed by Landlord" (NYSCEF Doc No. 62 at 14). In addition to the metered charges, Bland agreed to pay "an additional ten (10%) percent of such aggregate amount representing the cost of utility service distribution within the Building, overhead, supervision, and account administration" as additional rent (*id.* at 14-15). Moomjy, Purebeau and Werner agreed to pay for their electricity usage as additional rent based upon an assessment made by a consultant retained by defendant. Article 47(A) in the Moomjy, Purebeau and Werner leases, states, in part:

> "Tenant agrees that an electrical consultant, selected by Owner, may make a survey of the electrical usage and power load to determine the average monthly electric current consumption in the demised premise … The findings of the consultant as to the proper rent increase based on such average monthly electric consumption … shall be binding upon the parties and the amount thereof as multiplied by one hundred ten percent (110%) shall be added to the fixed rent payable monthly on the first day of each and every month in advance for each month during the Term hereof"

(NYSCEF Doc No. 59 at 20; NYSCEF Doc No. 61 at 19; NYSCEF Doc No. 63 at 17-18).

The Cangello, Moomjy, Endodontics, Purebeau and Werner leases also contain the following provision or a slight variation thereof:

> "Tenant shall, throughout the Term of this Lease, be responsible to pay for the cost of all utilities being provided to the demised premises, unless otherwise provided, except that the cost of hot water and sprinkler charges is included in Fixed Rent, as elsewhere in this Lease provided. If in Owner's reasonable judgment it is necessary for Tenant to install either an electric or water meter based on excessive consumption, Tenant agrees that Tenant shall pay for same and, subsequent to such installation, remain responsible throughout the Term of this Lease for the maintenance of such meter or meters"

(NYSCEF Doc No. 58 at 21 [Article 47(F)]; NYSCEF Doc No. 59 at 22 [Article 47(H)]; NYSCEF Doc No. 61 at 20 [Article 47(H)]; NYSCEF Doc No. 63 at 20 [Article 47(H)]). Bland agreed to pay for water consumed in its leased space under Article 44(C), which states that:

> "all water consumed by Tenant at the Premises, as measured by a water meter, only if required pursuant to Article 29(c) of this Lease, measuring consumption of water at the Premises … shall be paid for by the Tenant directly to the municipal authority or utility providing same (or to Landlord, at Landlord's sole option). Any charge Landlord incurs for the reading of said meters shall be paid by Tenant to Landlord, as Additional Rent, plus a ten percent (10%) charge for Landlord's administrative costs related thereto"

(NYSCEF Doc No. 62 at 21). Defendant installed the HVAC system in plaintiffs' leased premises (NYSCEF Doc No. 85, ¶¶ 4, 9, 14, 19, 24 and 28). Defendant has not installed an electricity or water submeter to measure "excessive" consumption for the premises leased to Cangello, Moomjy, Endodontics, Purebeau and Werner (*id.*, ¶¶ 6, 11, 16, 21 and 30).

Article 19 in each lease permits defendant to recover its attorneys' fees, and reads:

> "If Owner … in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorneys' fees, in instituting, prosecuting or defending any action or proceeding, and prevails in any such action or proceeding, then Tenant will reimburse Owner for such sums so paid, or obligations incurred, with interest and costs. The foregoing expenses incurred by reason of Tenant's default shall be deemed to be additional rent hereunder, and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefor"

(NYSCEF Doc No. 58 at 3; NYSCEF Doc No. 59 at 3; NYSCEF Doc No. 60 at 3; NYSCEF Doc No. 61 at 4; NYSCEF Doc No. 62 at 6; NYSCEF Doc No. 63 at 3).

By memorandum dated October 25, 2018, Peter Nichols (Nichols) of ESA advised all tenants connected to the Cooling Tower that, "[i]n accordance with your lease, there will appear on your monthly statement charges for use of the building's cooling tower system for your HVAC.

The rates you are being charged are $700 per ton of HVAC per year, broken down in monthly payments" (NYSCEF Doc No. 65, Giusto affirmation, exhibit J at 1). The Cooling Tower charges assessed to each plaintiff are as follows:

Tenant	Monthly Charge	Annual Charge
Cangello	$630	$7,560
Moomjy	$320.83	$3,850
Endodontics	$875	$10,500
Purebeau	$163.33	$1,960
Bland	$233.33	$2,800
Werner	$145.83	$1,750

(NYSCEF Doc No. 85, ¶ 38). Defendant has assessed late fees against Cangello, Moomjy, Endodontics, Purebeau and Werner and legal fees against Cangello, Moomjy, Endodontics and Purebeau for failing to pay the Cooling Tower charges (*id.*, ¶¶ 38-39).

Cangello, Moomjy, Purebeau and Werner or their counsel have all challenged whether the charges were permissible under their respective leases (NYSCEF Doc No. 72, Giusto affirmation, exhibit Q; NYSCEF Doc No. 74, Giusto affirmation, exhibit S; NYSCEF Doc No. 77, Giusto affirmation, exhibit V; NYSCEF Doc No. 79, Giusto affirmation, exhibit X). Nichols cited Articles 29, 44(A) and 47(H) in the leases as the bases for the charges in response (NYSCEF Doc No. 72 at 2; NYSCEF Doc No. 74 at 4-5; NYSCEF Doc No. 79 at 3-4).

On February 12, 2020, Endodontics paid defendant $8,810.49, with such sum representing the full amount of the Cooling Tower charges due through that date, without prejudice and with a full reservation of rights (NYSCEF Doc No. 85, ¶¶ 44-45). Endodontics has continued to pay the Cooling Tower charges and related fees each month (NYSCEF Doc No. 57, ¶ 130), and has paid a total of $21,935.49 through May 1, 2021 (NYSCEF Doc No. 85, ¶ 46).

Pursuant to Article 40(D)(5) in its lease, Werner was entitled to a rent abatement each September between 2017 and 2019 (NYSCEF Doc No. 85, ¶ 47). Werner mistakenly paid monthly

rent for September 2018 (*id.*, ¶ 48). Instead of remitting the funds, defendant applied $291.16 to the Cooling Tower charges assessed against Werner for November and December 2018 (*id.*).

Defendant has issued a default notice dated November 5, 2019 to Purebeau for the Cooling Tower Charges and associated fees (NYSCEF Doc No. 85, ¶ 53; NYSCEF Doc No. 78, Giusto affirmation, exhibit W). Defendant has also issued a default notice to Moomjy in January 2020 (NYSCEF Doc No. 57, ¶ 25) and commenced the Moomjy Action against it (NYSCEF Doc No. 75, Giusto affirmation, exhibit T). In its petition against Moomjy, defendant alleges that Moomjy has failed to pay "additional rent consisting of monthly cooling tower charges of $320.83 for November 2018 through January 2020 and additional rent consisting of late charges of $261.03" (*id.* at 4).

PROCEDURAL HISTORY

Plaintiffs, including plaintiffs ADBH 22nd Floor, Inc. (ADBH) and Vogrug LLC (Vogrug), commenced this action by February 12, 2020. The complaint alleges that defendant's counsel, in response to Vogrug's protests regarding the unauthorized Cooling Tower charges, wrote, "As for water tower charges, I have been unable to find express support for this line item [in Vogrug's Lease]" (NYSCEF Doc No. 57, ¶ 23) (italics removed). The complaint further alleges that in a January 30, 2020 letter to Moomjy, defendant's counsel wrote, "Tenant currently is billed for monthly electrical charges based upon survey which excludes the electrical charges associated with the water cooling tower. The electrical charges associated with the cooling tower are separately charged on a $700 per ton per year basis for all tenants in the building" (*id.*, ¶ 102) (italics removed).

The complaint dated August 12, 2020 pleads 25 causes of action. In the first, fourth, seventh, tenth, fourteenth, seventeenth, twentieth and twenty-third causes of action, plaintiffs seek

a judgment declaring that each plaintiff is not obligated under its respective lease to pay the Cooling Tower charges, inclusive of late fees and associated charges. In the second, fifth, eighth, twelfth, fifteenth, eighteenth, twenty-second and twenty-fifth causes of action, plaintiffs plead claims for breach of the implied covenant of good faith and fair dealing. As third, sixth, ninth, thirteenth, sixteenth and nineteenth causes of action, ADBH, Cangello, Moomjy, Endodontics, Purebeau and Bland plead claims for breach of contract and seek specific performance relating to, among other issues, a temporary certificate of occupancy. As an eleventh cause of action, Endodontics pleads a claim for unjust enrichment and seeks to recover the Cooling Tower charges it has paid to defendant. As a twenty-fourth cause of action, Werner pleads a claim for unjust enrichment for $291.16 related to the September 2018 rent abatement. As a twenty-first cause of action, Vogrug seeks its attorneys' fees.

In its answer, defendant interposed a single counterclaim seeking recovery of its attorneys' fees. In a decision and order dated March 18, 2021, this court permitted counsel for ADBH and Vogrug to withdraw (NYSCEF Doc No. 45). The remaining plaintiffs now move, pursuant 3212 (e), for partial summary judgment on several causes of action and to remove and consolidate the Moomjy Action with this action.

DISCUSSION

A. The Motion to Consolidate (motion sequence no. 001)

Plaintiffs move by order to show cause signed March 9, 2020 to remove the Moomjy Action and join that action with this plenary action. Plaintiffs argue that the Moomjy Action is predicated upon the nonpayment of the Cooling Tower Charges and related late fees, and that defendant commenced the Moomjy Action only one day after plaintiffs had forwarded a courtesy

copy of the summons and complaint in this action to defendant's counsel (NYSCEF Doc No. 5, Giusto affirmation, ¶ 13).

Defendant, in opposition, argues that plaintiffs have not incurred any damages because none of them have paid the Cooling Tower charges. In any event, even if defendant sought to evict Moomjy (or any plaintiff) for the nonpayment of rent, Moomjy may interpose a defense in the Moomjy Action. Because Civil Court is the preferred forum for adjudicating landlord/tenant disputes, defendant urges the court to deny plaintiffs' motion.

CPLR 602 (a) gives the trial court discretion to consolidate actions involving a common question of law and fact (*see Matter of Oct. 31, 2017 Terrorist Attack/Lower Manhattan Litig.*, 194 AD3d 645, 646 [1st Dept 2021]). CPLR 602 (b) allows the court to remove an action pending in another court and order a consolidation when the two actions are interrelated (*see Braun v Fraydun Realty Co.*, 158 AD2d 430, 431 [1st Dept 1990]). "[C]onsolidation is generally favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right" (*Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337, 339 [1st Dept 2006] [internal quotation marks and citation omitted]).

Plaintiffs have demonstrated that the Moomjy Action and this action involve common questions of law and fact and should be joined (*see Barkagan v S&L Star Realty, LLC*, 185 AD3d 643, 644 [2d Dept 2020]; *Rogin v Rogin*, 90 AD3d 507, 508 [1st Dept 2011]). The two actions concern whether the Moomjy lease allows defendant to collect the Cooling Tower charges and associated fees, and both matters involve the same witnesses, documents, facts and transactions. To avoid the "possibility that injustice would result from inconsistent results in the two actions"

(*Bernstein v Silverman*, 228 AD2d 325, 326 [1st Dept 1996]), plaintiffs' motion for removal and consolidation is granted.

Notwithstanding the principle that "Civil Court is the preferred forum for resolving landlord-tenant issues" (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]), defendant has failed to demonstrate that it will suffer substantial prejudice from the consolidation. Significantly, Moomjy seeks declaratory relief related to the allegedly improper Cooling Charges, and New York City Civil Court lacks authority to grant declaratory relief (*see London Paint & Wallpaper Co., Inc. v Kesselman*, 138 AD3d 632, 633 [1st Dept 2016]).

B. The Motion for Summary Judgment (motion sequence no. 002)

A party moving for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The motion must be supported by evidence in admissible form (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and by the pleadings and other proof such as affidavits, depositions and written admissions (*see* CPLR 3212). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to meet its prima facie burden, the motion must be denied without regard to the sufficiency of the opposing papers (*see Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

1. *The Fourth, Seventh, Tenth, Fourteenth, Seventeenth and Twenty-Third Causes of Action for a Declaratory Judgment*

Plaintiffs posit that a declaratory judgment in their favor is warranted. They contend that defendant is contractually obligated to furnish air conditioning during certain months of the year and that nothing in their respective leases requires them to separately pay the Cooling Tower

charges. Plaintiffs' representatives aver that defendant never raised the charges with them at any time during their lease negotiations, and defendant only began levying the charges in November 2018, well after their lease terms began (NYSCEF Doc No. 50, ¶ 5; NYSCEF Doc No. 51, ¶ 5; NYSCEF Doc No. 52, ¶ 5; NYSCEF Doc No. 53, ¶ 5; NYSCEF Doc No. 54, ¶ 6; NYSCEF Doc No. 55, ¶ 5). Plaintiffs also observe that defendant is engaged in separate litigation against ADBH, Vogrug, and Purebeau for unpaid fixed rent in actions captioned *N.Y. Park N. Salem Inc. v ADBH 22nd Floor Inc.*, Sup Ct, NY County, index No. 656616/2020 (Nock, J.); *N.Y. Park N. Salem Inc v Vogrug LLC*, Sup Ct, NY County, index No. 656614/2020 (Love, J.); *N.Y. Park N. Salem, Inc. v Purebeau USA, Inc.*, Sup Ct, NY County, index No. 656607/2020.[1] The sums sought by defendant in the first two actions do not include the Cooling Tower charges or associated late fees and legal fees (NYSCEF Doc No. 49, Giusto affirmation at 7 n 15).

To the extent the leases require each plaintiff to pay for water or electricity usage in the spaces leased to them, plaintiffs argue that the Cooling Tower charges are not grounded on actual usage. On this point, Nichols testified that the Cooling Tower charges are not a water or electricity usage charge (NYSCEF Doc No. 64, Giusto affirmation, exhibit I at 33). He explained that the charges were based solely on "AC tonnage," or the capacity of each plaintiff's air conditioning unit and the amount per ton (*id.*). The charges assessed to each plaintiff did not account for actual usage of the HVAC system (*id.* at 52). Nichols further explained that ESA set the rate at $700 per ton per year from the results of a "Google" search (*id.* at 51).

As to the issue of legal fees, plaintiffs argue that Article 19 in each lease allows defendant to recoup its legal fees for instituting, prosecuting or defending any action or proceeding related

[1] The court observes that as of November 1, 2021, Vogrug has satisfied the judgment of $199,822.67, which had been docketed against it on September 27, 2021 (NYSCEF Doc No. 51, satisfaction of judgment in *N.Y. Park N. Salem Inc v Vogrug LLC*, Sup Ct, NY County, index No. 656614/2020).

to the performance of plaintiffs' obligations under their leases only when defendant prevails in any such action or proceeding. A legal invoice printed May 15, 2020 shows that defendant has incurred $7,423.82 in legal fees between October 2018 and May 2020 related to Vogrug, Endodontics, Moomjy, ADBH, Purebeau and Cangello (NYSCEF Doc No. 69, Giusto affirmation, exhibit N). Plaintiffs, though, submit that defendant has not prevailed in an action or proceeding against them.

Defendant opposes the motion and proffers an affidavit from one of its officers, Alessandro Bonecchi (Bonecchi) (NYSCEF Doc No. 84, Bonecchi aff, ¶ 1). Bonecchi avers that plaintiffs are the first tenants leasing space in the New Tower and that their HVAC systems were the first to be connected to the Cooling Tower (*id.*, ¶ 9). Bonecchi explains that the tower "provides both cooling and heating" all year (*id.*, ¶ 11). Because plaintiffs' HVAC systems are connected to the Cooling Tower, Bonecchi states that plaintiffs use less electricity than those tenants who are not connected to the tower (*id.*, ¶ 9). Bonecchi describes the $700 per ton per year charge as a "standard charge for cooling towers in New York City," and adds that defendant is merely "charging for a service that the moving Plaintiffs are actually using" (*id.*, ¶ 10) as is permissible under Article 47(F) in the leases (*id.*, ¶ 12). He characterizes the failure to charge plaintiffs for this utility as an "oversight" (*id.*, ¶ 19). Bonecchi also claims that Article 57(D) in the leases allows defendant to recover its legal fees as additional rent.

CPLR 3001 provides, in part, that the "court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." A declaratory judgment action requires an actual controversy (*see Long Is. Light. Co. v Allianz Underwriters Ins. Co*., 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 9 NY3d 1003 [2007]). Relief is limited to a declaration

of the parties' legal rights based on the facts presented (*see Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 100 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010]).

It is well settled that "[a] lease is a contract" (*D'Alto v 22-94 129th St., LLC*, 76 AD3d 503, 506 [2d Dept 2010], citing *Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). As such, a lease must be construed under the "rules of construction applicable to any other agreement" (*George Backer Mgt. Corp. v Acme Quilting Co*., 46 NY2d 211, 217 [1978]). "A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract" (*Goldman v White Plains Ctr. for Nursing Care, LLC*, 11 NY3d 173, 176 [2008]). "[W]hen parties set down their agreement in a clear, complete document, their writing should … be enforced according to its terms" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Moreover, "[t]he courts may not rewrite a term of a contract by 'interpretation' when it is clear and unambiguous on its face" (*see Fiore v Fiore*, 46 NY2d 971, 973 [1979]).

Applying these principles, plaintiffs have met their prima facie burden by demonstrating that their leases do not permit defendant to levy an annual or monthly "Cooling Tower" charge predicated on AC tonnage. Article 29 in each lease provides that defendant shall furnish HVAC services. The riders to the Cangello, Moomjy, Endodontics, Purebeau and Bland leases plainly and unambiguously require these plaintiffs to pay the electrical costs related to the operation of the HVAC system in their leased premises (NYSCEF Doc No. 58 at 18 [Article 44(C)]; NYCSEF Doc No. 59 at 18 [Article 44(B)]; NYSCEF Doc No. 60 at 18 [Article 44(B)]; NYCSEF Doc No. 61 at 19 [Article 44(B)]; NYSCEF Doc No. 62 at 22 [Article 45(D)]). The leases provide that fees for electricity usage would be determined from a submeter reading or by defendant's electrical consultant (NYSCEF Doc No. 58 at 21; NYSCEF Doc No. 59 at 20; NYSCEF Doc No. 60 at 20;

NYSCEF Doc No. 61 at 19; NYSCEF Doc No. 62 at 14; NYSCEF Doc No. 63 at 17-18). No mention is made of any water consumption charges levied against these five plaintiffs related to the HVAC system. The rider to the Werner lease makes no mention of any fees related to Werner's use of the HVAC system. Thus, the leases require only five of the six plaintiffs to remit as additional rent the electricity usage charges related to the operation of the HVAC system. Nothing in the leases allowed defendant to impose charges for total AC tonnage, or cooling capacity, as opposed to the amount of electricity consumed in running the system in their demised premises. Accordingly, plaintiffs are entitled to a declaratory judgment in their favor.

Defendant complains that plaintiffs are not paying their fair share of the costs associated with operating the Cooling Tower under Article 47 in each lease, which obligates each plaintiff to "pay for the cost of all utilities being provided to the demised premises, unless otherwise provided, except that the cost of hot water and sprinkler charges is included in Fixed Rent, as elsewhere in this Lease provided"[2] (NYSCEF Doc No. 84, ¶ 12) (emphasis removed). This argument is unpersuasive. At the outset, defendant agrees that the leases are unambiguous (NYSCEF Doc No. 84, ¶ 18). As such, defendant cannot ignore the phrase "unless otherwise provided" cited above. "'[C]ontract provisions should be harmonized, if reasonably possible, so as not to leave any provision without force and effect'" (*Matter of Wells Fargo Bank, N.A.*, 198 AD3d 156, 164 [1st Dept 2021] [citation omitted]). Here, Articles 44 or 45 in five of six leases provide that those plaintiffs shall pay for the electrical costs associated with operating the HVAC system. To construe the leases in the manner suggested by defendant, i.e. measuring the cost of furnishing HVAC services as AC tonnage, would leave those articles without full force and effect and

[2] This phrase appears in the Cangello and Moomjy leases (NYSCEF Doc No. 58 at 22; NYSCEF Doc No. 59 at 22). Article 47 in the Bland lease discusses defendant's liability on a personal or money judgment (NYSCEF Doc No. 62 at 22).

ultimately contradicts the intent of the parties that Cangello, Moomjy, Endodontics, Purebeau, and Bland would pay only for the electrical costs. The Werner lease does not instruct Werner to pay for any of the costs associated with operation of the HVAC system at all. Because the Cooling Tower charges based upon total AC tonnage are impermissible, the late fees assessed against Cangello, Moomjy, Endodontics, Purebeau and Werner and the legal fees charged to Cangello, Moomjy, Endodontics and Purebeau are likewise impermissible. Article 19 in each lease allows defendant to recoup its reasonable attorneys' fees if it prevails in any action brought by or against a tenant, and the fees charged to Cangello, Moomjy, Endodontics and Purebeau did not arise in an action or proceeding.

Defendant fails to raise a triable issue of fact in opposition. Defendant's reliance on Article 57 for the proposition that it is entitled to recover all "sums equal to all losses, costs, liabilities, claims, damages and expenses referred to in this Article" as additional rent is misplaced[3] (NYSCEF Doc No. 84, ¶ 14). Article 57 primarily concerns claims brought by a tenant against defendant for property damage and for claims related to repairs or alterations in the Building or in each tenant's demised premises. The only language relevant to this action appears in Article 57(C) or 57(D) in five of the leases and in Article 50 in Bland's lease. Article 57(C) or 57(D) provides that Cangello, Moomjy, Endodontics, Purebeau and Werner shall indemnify and save defendant "harmless of from and against all reasonable counsel fees … incurred in connection with or arising from (i) any default by Tenant in the observance or performance of any the terms, covenants or conditions of this Lease on Tenant's part to be observed or performed" (NYSCEF Doc No. 58 at

[3] This phrase appears in Article 57(D) in the Cangello, Moomjy, Endodontics and Purebeau leases (NYSCEF Doc No. 58 at 32; NYSCEF Doc No. 59 at 32; NYSCEF Doc No. 60 at 31-32; NYSCEF Doc No. 61 at 30) and Article 57(E) in Werner's lease (NYSCEF Doc No. 63 at 29). This phrase does not appear in Article 57 in Bland's lease, which discusses a tenant's work and alterations (NYSCEF Doc No. 62 at 27-28) or anywhere else in the lease.

32; NYSCEF Doc No. 59 at 31; NYSCEF Doc No. 60 at 31; NYSCEF Doc No. 61 at 29; NYSCEF Doc No. 63 at 29 [Article 57(D)]). In Bland's case, Article 50 reads, in part, that Bland "shall defend, indemnify and hold harmless Landlord … from any and all claims … including reasonable attorneys' fees … arising from or in connection with: (a) any breach of default by Tenant in the full and prompt payment and performance of any of Tenant's obligations hereunder" (NYSCEF Doc No. 62 at 25). As determined above, however, the Cooling Tower charges, late fees and legal fees are not authorized, and, thus, plaintiffs cannot have defaulted on a covenant or obligation in their leases.

2. *The Eleventh and Twenty-Fourth Causes of Action for Unjust Enrichment*

Endodontics seeks to recover $21,935.49 and Werner seeks to recover $291.16 paid to defendants as Cooling Tower charges.

Unjust enrichment is "the receipt by one party of money or a benefit to which it is not entitled, at the expense of another" (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). To state a claim for unjust enrichment, "plaintiff must show that (1) the other party was enriched; (2) at that party's expense; and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Kramer v Greene*, 142 AD3d 438, 442 [1st Dept 2016] [internal quotation marks and citation omitted]).

Endodontics and Werner have demonstrated their entitlement to summary judgment on these claims, and defendant has acknowledged that it will reimburse these two plaintiffs if this court determines that the charges are improper (NYSCEF Doc No. 84, ¶ 8).

3. *Plaintiffs' Demand for Punitive Damages*

Plaintiffs also seek an award of punitive damages based on a pattern of misconduct on the part of defendant. First, defendant continued to invoice plaintiffs for the Cooling Tower charges

even after defendant's counsel acknowledged that there was no basis in Vogrug's lease to do so. By letter dated December 13, 2019, defendant accused Cangello of "haranguing other tenants in the building" and advised that it may seek to terminate Cangello's lease if the objectionable behavior continued (NYSCEF Doc No. 73, Giusto affirmation, exhibit R at 1-2). Defendant served two 14-day default notices upon two of the plaintiffs herein. Defendant owns two other buildings on the same block – 26 and 36 East 60th Street – and is currently engaged in litigation commenced by nonparty the City of New York captioned *The City of New York v Fortusa Realty Corp.*, Sup Ct, NY County, index No. 450957/2019, for unresolved building, health and fire code violations and other claims (NYSCEF Doc No. 70, Giusto affirmation, exhibit O). Finally, plaintiffs allege that defendant's misconduct towards another lessee in the Building has result in $2.3 million judgment against it (NYSCEF Doc No. 49 at 12; *Bistro Shop, LLC v N.Y. Park N. Salem, Inc.* 175 AD3d 1181 [1st Dept 2019]). Defendant submits that that punitive damages are not warranted.

Punitive damages may be awarded where there is a need to vindicate a public right or "where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible, and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations'" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995] [internal quotation marks and citation omitted]). "The misconduct must be exceptional, 'as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness … or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or rights'" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007] [citation omitted]). Therefore, to successfully plead a claim for punitive damages arising out of a breach of contract, the plaintiff must plead that "'(1) defendants conduct must be actionable as an independent tort; (2) the tortious conduct must be of

[an] egregious nature … ; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally'" (*Matter of Part 60 Put-Back Litig.*, 36 NY3d 342, 360 [2020], quoting *New York Univ.*, 87 NY2d at 316).

The request for punitive damages is denied. While plaintiffs allege that defendant has embarked on a pattern of intentional, harassing conduct towards them, they have not alleged that defendant's conduct was directed at the public generally (*see Residential Bd. of Millennium Point v. Condominium Bd. of Millennium Point*, 197 AD3d 420, 424 [1st Dept 2021]; *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]).

Accordingly, it is

ORDERED that the motion brought by plaintiffs David L. Cangello, MD, PLLC, Maureen Moomjy Fertility, Gynecology and Reproductive Medicine P.C., Scott A. Resnick, D.M.D. and Thomas J. Zicarelli D.D.S., P.C. (D/B/A New York City Endodontics, P.C.), Purebeau USA, Inc., Ronald R. Bland, P.C. and Werner Chiropractic P.C. to consolidate the action captioned *N.Y. Park N. Salem, Inc. v Maureen Moomjy Fertility, Gynecology and Reproductive Medicine, P.C.*, index No. L&T 053101/2020, pending in the Civil Court of the City of New York, County of New York: Housing Part, with this action (motion sequence no. 001) is granted to the extent of removing that action to this court and consolidating it for joint discovery and trial; it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a certified copy of this order upon the Clerk of the Civil Court, New York County, and shall contact the Clerk to arrange for the effectuation of this transfer in an efficient manner; it is further

ORDERED that service upon the Clerk of the Civil Court, New York County shall be made in accordance with any applicable protocol or other procedures of said county; it is further

ORDERED that the Clerk of the Civil Court, New York County, shall transfer to the Clerk of the Supreme Court, New York County, all of the papers on file in the action captioned *N.Y. Park N. Salem, Inc. v Maureen Moomjy Fertility, Gynecology and Reproductive Medicine, P.C.*, index No. L&T 053101/2020, Civil Court, New York County; it is further

ORDERED that the Clerk of the Civil Court, New York County, and the Clerk of this court shall coordinate the transfer of the documents being transferred so as to ensure an efficient transfer and to minimize insofar as practical the reproduction of documents, including with regard to any documents that may be in digital format; it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy of this order with notice of entry upon the Clerk of the Supreme Court, New York County (60 Centre Street, Room 141B); it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); it is further

ORDERED that upon receipt of the case file from the Clerk of the Civil Court, New York County, the Clerk of this Court shall, without further fee, assign a New York County index number to the matter transferred pursuant to this order and shall file under this number the documents transferred; it is further

ORDERED that as applicable and insofar as is practical, the Clerk of this Court shall file the documents transferred to this court pursuant to this order under the New York County index number assigned to the transferred matter in the New York State Courts Electronic Filing System

or make appropriate notations of such documents in the e-filing records of the court so as to ensure access to the transferred documents; it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), together with a Request for Judicial Intervention ("RJI") in the action that is transferred to this county pursuant to this order, or if an RJI had already been filed in that action, with a copy of that RJI (in which event, no further fee shall be imposed); it is further

ORDERED that the Clerk of the General Clerk's Office shall assign the transferred action to the undersigned; it is further

ORDERED that, upon payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness in each of the above actions, to each of which the filer shall annex a copy of this order with notice of entry, the Clerk of the General Clerk's Office shall place the aforesaid actions upon the trial calendar for a joint trial of both matters before the undersigned or another Justice of this court; it is further

ORDERED that service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the aforesaid Protocol; it is further

ORDERED that the Housing Court action captioned *N.Y. Park N. Salem, Inc. v Maureen Moomjy Fertility, Gynecology and Reproductive Medicine, P.C.*, index No. L&T 053101/2020 is hereby stayed pending removal to this court; and it is further

ORDERED that the part of the motion brought by plaintiffs David L. Cangello, MD, PLLC, Maureen Moomjy Fertility, Gynecology and Reproductive Medicine P.C., Scott A. Resnick, D.M.D. and Thomas J. Zicarelli D.D.S., P.C. (D/B/A New York City Endodontics, P.C.), Purebeau USA, Inc., Ronald R. Bland, P.C. and Werner Chiropractic P.C. for summary judgment in their

favor on the first, fourth, seventh, tenth, fourteenth, seventeenth and twenty-third causes of action of the first amended complaint and a declaratory judgment with respect to the subject matter of those causes of action (motion sequence no. 003) is granted; and it is further

ADJUDGED and DECLARED that plaintiffs David L. Cangello, MD, PLLC, Maureen Moomjy Fertility, Gynecology and Reproductive Medicine P.C., Scott A. Resnick, D.M.D. and Thomas J. Zicarelli D.D.S., P.C. (D/B/A New York City Endodontics, P.C.), Purebeau USA, Inc., Ronald R. Bland, P.C. and Werner Chiropractic P.C. are not obligated to pay the "Cooling Tower" charges measured by "AC tonnage" or associated late fees and legal fees assessed against them; and it is further

ORDERED that the branch of plaintiffs' motion for summary judgment on the eleventh and twenty-fourth causes of action (motion sequence no. 003) is granted to the extent of granting partial summary judgment in favor plaintiffs Scott A. Resnick, D.M.D. and Thomas J. Zicarelli D.D.S., P.C. (D/B/A New York City Endodontics, P.C.) and Werner Chiropractic P.C. and against defendant N.Y. Park N. Salem Inc. on the eleventh and twenty-fourth causes of action as follows; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff Scott A. Resnick, D.M.D. and Thomas J. Zicarelli D.D.S., P.C. (D/B/A New York City Endodontics, P.C.) and against defendant N.Y. Park N. Salem Inc. in the amount of $21,935.49, together with interest at the rate of 9% per annum from the date of May 1, 2021, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that the Clerk shall enter judgment in favor of plaintiff Werner Chiropractic P.C. and against defendant N.Y. Park N. Salem Inc. in the amount of $291.16, together with interest at the rate of 9% per annum from the date of December 1, 2018, until the date of the

decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk; and it is further

ORDERED that the fourth, seventh, tenth, eleventh, fourteenth, seventeenth, twenty-third and twenty-fourth causes of action are severed and the balance of the claims are continued.

This constitutes the decision and order of this Court.

1/3/2022
DATE

JAMES D'AUGUSTE, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE