Atlantis Mgt. Group II LLC v Grand Concourse Petroleum LLC
2022 NY Slip Op 35177(U)
October 20, 2022
Supreme Court, Bronx County
Docket Number: Index No. 34190/2020E
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---X
ATLANTIS MANAGEMENT GROUP II LLC,
Plaintiff,

- against -

GRAND CONCOURSE PETROLEUM LLC,
RAJAN NABE, and RAHUL NABE,
Defendants.
---X

DECISION and ORDER
Index No. 34190/2020E

HON. MARY ANN BRIGANTTI

Upon the foregoing papers, the plaintiff Atlantis Management Group II, LLC ("Plaintiff") moves for an order pursuant to CPLR 3211(b) and/or CPLR 3212, (1) striking the defendant's first-through-eighth affirmative defenses, and (2) granting Plaintiff summary judgment on its first-through-fourth causes of action, (3) scheduling a hearing as to the reasonable legal fees incurred by Plaintiff, and (4) for such other and further relief as this Court deems just and proper. The defendants Grand Concourse Petroleum, LLC ("GCP"), Rajan Nabe, and Rahul Nabe (individually, "Nabe") (collectively, "Defendants") oppose the motion.

I. Plaintiff's Summary Judgment on its first-through-fourth Causes of Action

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case" (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Once a movant meets their initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

Defendants initially allege that the Plaintiff's statement of material facts submitted pursuant to 22 NYCRR §202.8-g is inadequate because it does not cite to the evidence in support of the statements made. The Court finds, however, that the statement of material facts when coupled with the affidavit in support of the motion substantially complies with the rule, and "blind adherence to procedure" resulting in denial of the motion on this procedural ground is not necessary in this case (*see, e.g., Leberman v. Instantwhip Foods, Inc.*, 207 A.D.3d 850, 851-852 [3rd Dept. 2022]). The motion is therefore reviewed on its merits.

It is axiomatic that a lease is a contract (*see Becker v. Becker*, 13 A.D. 342, 349 [1st Dept. 1897]; *Genovese Drug Stores v. William Floyd Plaza, LLC*, 63 A.D.3d 1102 [2d Dept. 2009], citing *Vermont Teddy Bear Co. v. 538 Madison Realty Co.*, 1 N.Y.3d 470, 475 [2004], and *Matter of Wallace v. 600 Partners Co.*, 86 N.Y.2d 543, 548 [1995]). To prevail on a cause of action for breach of contract, the plaintiff must prove 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 A.D.3d 425, 426 [1st Dept. 2010]). On a summary judgment motion, once a plaintiff satisfies its prima facie burden, it is incumbent upon the defendant to establish by admissible evidence the existence of a triable issue of fact with respect to a bona fide defense (*see, e.g., Zyskind v. FaceCake Mktg. Tech, Inc.*, 101 A.D.3d 550, 551 [1st Dept. 2012]).

In this case, Plaintiff has established the existence of a contract – i.e., the sublease agreement between Plaintiff and GCP (hereinafter, the "Sublease"). Plaintiffs allege that Defendants breached the terms of the Sublease by failing to comply with Paragraph 21.03(d) and (e), which require Defendants to complete daily, ten (10), and monthly inventory reports and maintain them at the premises, and require Defendants to, on a monthly basis, provide Plaintiff or its designee with a copy of all such reports by facsimile transmission without demand. Plaintiffs allege that as a result of the breach, it served a notice to cure on the Defendants demanding compliance with this contractual provision. Defendants did not comply with the notice. Plaintiffs thereafter terminated the tenancy and demanded that Defendants vacate the premises, in compliance with the terms of the Sublease. When Defendants failed to vacate, Plaintiff commenced this action.

In support of the motion, Plaintiff submits an affirmation of its counsel and an affidavit from its member Tumay Basaranlar. The counsel affirmation states in pertinent part: "[o]n October 20, 2020, GCP was served with a notice of intention to terminate the lease unless certain breaches of lease were cured by November 8, 2020" (Affirmation at Par. 8). Counsel then states that GCP failed to cure those breaches of the Sublease, "and on or about November 11, 2020, GCP was served with a notice terminating the lease and requiring GCP to surrender possession of the Subject Premises by November 17, 2020" (*id*. at Par. 9). Basaranlar's affidavit states in pertinent part, upon GCP's failure to provide records and reports as required by the Sublease (Par. 21.03), Plaintiff "served a Notice to Cure demanding" the production of such documents. The affidavit further states "[w]hen GCP failed to produce a single piece of paper in response to the Notice, [Plaintiff] terminated the tenancy and demanded in vacate in compliance with the terms of the" Sublease (Basaranlar Affidavit at Par. 12).

The affidavit and affirmation do not state how the notice to cure or notice of termination were sent, or specifically to whom they were sent. The moving papers do not contain a copy of either the notice to cure or the notice to terminate the Sublease. This information is critical because it goes to the issue of Plaintiff's prima facie burden – specifically, whether Plaintiff performed its obligations under the Sublease by properly terminating the agreement in accordance with the procedures outlined therein.

The Sublease provides in pertinent part, that if the Subtenant is in default in the performance of or compliance with any of the Sublease's terms or conditions:

> "…and such default shall continue for a period of fifteen (15) days after written notice thereof from Sublandlord to Subtenant, provided, that if Subtenant proceeds with due diligence during such fifteen (15) day period to cure such default and is unable by reason of the nature of the work involved, to cure the same within the said fifteen (15) days, its time to do so shall be extended for an additional period not to exceed the time necessary to cure the same….
>
> …then and in any such event, Sublandlord may serve a written five (5) day notice of cancellation and termination of this Sublease, and upon the expiration of said five (5) days, this Sublease and the term thereunder shall end and expire as fully and completely as if the date of expiration of such five (5) day period were the day herein definitely fixed for the end and expiration of this Sublease and the term thereof, and Subtenant shall then quit and surrender to Sublandlord the Demised Premises and each and every part thereof, but Subtenant shall remain liable as hereinafter provided."
>
> (Sublease at Par. 28.01[e]).

The Sublease mandates that notices be served a certain way. Section 32, "Bills and Notices" provides that all such notices that are required to be given pursuant to the Sublease "shall be delivered personally and receipted for or sent by certified mail, return receipt requested, postage prepaid, or by Federal Express, or comparable carrier, prepaid, as follows…" (Sublease at Par. 32.01). Notices intended for Defendants-Subtenant were to be addressed to: "Grand Concourse Petroleum LLC, 350 Grand Concourse, Bronx, New York 10451, Attention: Rajan Nabe or Rahul Nabe."

The above terms instruct that this tenancy could not be terminated based upon noncompliance with a contract term or condition unless (1) the Subtenant was served with a written 15-day notice to cure, and (2) the Subtenant was subsequently served with a five-day notice to terminate or cancel the tenancy, and (3) the notices were served in compliance with Section 32. It is well-settled "that 'equity abhors forfeitures of valuable leasehold interests' " (*Zaid Theatre Corp. v. Sona Realty Co.*, 18 A.D.3d 352, 355 [1st Dept. 2005], quoting *Metropolitan Transp. Auth. v. Cosmopolitan Aviation Corp.*, 99 A.D.2d 767, 768 [2d Dept. 1984], *aff'd*, 64 N.Y.2d 623 [1984]), therefore "courts have required strict compliance with the termination provisions of leases" (*Metropolitan Transp. Auth*., 99 A.D.2d at 768, citing *Fifty State Management Corp. v. Pioneer Auto Parks, Inc.*, 46 N.Y.2d 573 [1979]; *Hendrickson v. Lexington Oil Co., Inc.*, 41 A.D.2d 672 [1973]). If lease termination procedures are not strictly adhered to, the lease remains in effect, the tenancy is not terminated (*see Grenadeir Parking Corp. v. Landmark Assoc.*, 283 A.D.2d 379 [1st Dept. 2001]) and the plaintiff-landlord fails to set forth a prima facie cause of action for breach of contract (*see, e.g., Chinatown Apts v. Chu Cho Lam*, 51 N.Y.2d 786 [1980]; *433 W. Assoc. v. Murdock*, 276 A.D.2d 360 [1st Dept. 2000]). In this case, Plaintiff's failure to establish its strict compliance with the Sublease termination procedures means that Plaintiff failed to establish its own performance under the terms of the contract.

Contrary to Plaintiff's contentions, Defendants' answer denied the allegations that Plaintiff had served the predicate notices (Complaint at Pars. 22-23; Answer at Pars. 22-23), and Plaintiff had the burden of proving that element of its case (*see, e.g., Mautner-Glick v. Glazer*, 148 A.D.3d 515, 515-516 [1st Dept. 2017]). Defendants' stipulation consenting to *in personam* jurisdiction is irrelevant as their objection to proper service of the notices is not a defense based on personal jurisdiction, but based on a landlord's failure to comply with a condition precedent to the termination of the contract (*id*.).

For the above reasons, Plaintiff's motion for summary judgment on its first – through fourth causes of action is therefore denied without reaching that branch of Defendants' opposition papers (*Winegrad*, 64 N.Y.2d at 853).

II. Plaintiff's motion to strike Defendants' second-through-eighth Affirmative Defenses

A plaintiff moving to strike an affirmative defense pursuant to CPLR 3211(b) "bears the heavy burden of showing that the defense is without merit as a matter of law" (*Granite State Ins. Co. v. Transatlantic Reinsurance Co.*, 132 A.D.3d 479, 481 [1st Dept. 2015]). Allegations set forth in the answer are view in light most favorable to the defendant, the answer is liberally construed, and the "defendant is entitled to the benefit of every favorable intendment of the pleading…" (*id*., quoting *534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541, 541 [1st Dept. 2011]), and a defense should not be dismissed where there remain unresolved questions of fact requiring a trial (*id*.).

In this case, Plaintiff has failed to establish entitlement to dismissal of Defendants' first cause of action –asserting "payment of all or part of the sums alleged" (Answer at Par. 53). As held above, the moving papers failed to resolve all fact issues as to whether there was a proper termination of the Sublease.

Defendants' second affirmative defense asserts that the liquidated damages and accelerated rent provisions of the Sublease are "grossly and conspicuously disproportionate to any loss or damages that Plaintiff has suffered or may suffer" and thus those claims are unenforceable (Answer at Pars. 54-55). Liquidated damages in a contract are compensation which the parties have agreed should be remitted to satisfy any loss or injury that results from a breach of the contract (*Seymour v. Hovnanian*, 207 A.D.3d 420, 423 [1st Dept. 2022], citing *Truck Rent-A-Center, Inc. v. Puritan Farms 2nd Inc.*, 41 N.Y.2d 420, 423-424 [1977]). Such a provision is enforceable and sustainable so long as the amount fixed, at the time of the contract, "bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation" (*Truck Rent-A-Center, Inc.*, 41 N.Y.2d at 424). "The party seeking to avoid a liquidated damages provision has the burden to prove that they are an unenforceable penalty" for example if the amount is "grossly disproportionate" to the probable loss (*Seymour*, 207 A.D.3d at 424). Importantly, unless there are "countervailing public policy concerns, '[f]reedom of contract prevails in an arm's length transaction between sophisticated parties'" (*id.*, quoting *Trustees of Columbia Univ. in the City of N.Y. v. D'Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 75 [2020]).

In this case, Plaintiff has established that the second affirmative defense is without merit. The Sublease provides, in pertinent part: "upon expiration or termination of the lease, in the event that the sublandlord shall accept rent payment for a period beyond such termination or expiration, the acceptance of the rent shall be on account of use and occupancy, and shall not be deemed to create any tenancy other than a month-to-month tenancy; and the use and occupancy therefore shall be three times the last monthly rent in effect" (Sublease at Par. 7.01). Plaintiff's papers establish that the parties to the Sublease were sophisticated entities represented by counsel throughout negotiations. Under Plaintiff's primary lease with the property owner, Plaintiff had "certain ongoing and end-of-term obligations, and penalties if they did not timely fulfil their lease obligations" and without this damages provision, "Plaintiff would have required or negotiated alternative provisions to protect its substantial interest including increased rent security, a bond or letter of credit" (Basaranlar Affidavit at Pars. 16-17).

In opposition, Defendants have failed to raise an issue of fact as to the viability of this affirmative defense. Defendants submit no evidence that such a damages provision was barred by the prime lease between Plaintiff and the property owner. Nabe's contention[1] that he was simply unaware of this provision of the Sublease (Par. 7.01) is unavailing, as parties to a contract are presumed to have read and understood its contents (*see Gillman v. Chase Manhattan Bank, N.A.*, 73 N.Y.2d 1, 11-12 [1988]; *Augustine v. BankUnited FSB*, 75 A.D.3d 596, 597 [2d Dept. 2010]). Defendants submit no proof that at the time the contract was signed, damages for a breach thereof were easily calculable. Defendants point to circumstances that purportedly existed at the time of the alleged breach – i.e., Plaintiff's closure of a "Dunkin Donuts" retail store on the premises that impacted Defendants' gasoline sales, and the fact that Plaintiff could no longer re-let the premises in November 2020 because the owner was selling the property. However, what is relevant to this analysis is the circumstances that existed at the time the contract was entered (in this case, the year 2010), not those that existed at the time of the breach (*Seymour*, 207 A.D.3d at 425, citing *Truck Rent-A-Ctr.*, 41 N.Y.2d at 424).

Defendants have also failed to show that at the time the contract was signed, a claim for treble damages was grossly disproportionate to the probable loss. As recently noted by the First Department, "courts have held that liquidated damages clauses that permit a landlord to recover *between two or three times* the amount of existing rent or license fee in a holdover proceeding are not 'grossly disproportionate' to the probable loss and therefore, not a penalty" (*Seymour*, 207 A.D.3d at 424 [emphasis added][citing cases, including *Withers Bregman LP v. Solus Alternative Asset Management LP*, 35 Misc.3d 138[A] [App. Term, 1st Dept. 2012][damages provision allowing three times the specified license fee in the event of a breach was not an unenforceable penalty]; *Carlyle, LLC v. Quik Park Beekman II, LLC*, 59 Misc.3d 35 [1st Dept. 2018][damages provision providing for use and occupancy at two times the rent plus $25,000 per month in the event of a holdover was found enforceable]). In light of the above, Plaintiff's motion to strike Defendants' second affirmative defense

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[1] Contrary to Plaintiff's contentions, the "duly sworn" statements contained in Nabe's affidavit are admissible (*see Citibank, NA v. Abrams*, 144 A.D.3d 1212 [3rd Dept. 2016], citing *Collins v. AA Truck Renting Corp.*, 209 A.D.2d 363 [1st Dept. 1994]; CPLR 2309[b]).

is granted.

Defendants' third affirmative defense alleges that Plaintiff interfered with the business and operations of Defendants thus entitling Defendants to a set-off against any amounts claimed by Plaintiff. Defendants specifically alleges that Plaintiff operated a Dunkin Donuts retail store on the premises, which was important to Defendants' operations since it brought in gasoline customers. In Spring 2020, however, Plaintiff closed the Dunkin Donuts store and as a result, Defendants' business fell off substantially. Defendants claim due to Plaintiff's closure of the store, they are entitled to a set-off against any sums owed to Plaintiff.

Plaintiff has established that this affirmative defense is without merit by pointing to the Sublease itself which contains no provision mandating that Plaintiff maintain operations of a Dunkin Donuts store during the lease term. In opposition, Defendants conclusorily allege that the store closure was "wrongful" without any supporting facts or legal argument. Plaintiff's motion to strike Defendants' third affirmative defense is therefore granted (*see 170 West Village Associates v. G & E Realty, Inc.*, 56 A.D.3d 372 [1st Dept. 2008][conclusory affirmative defenses properly stricken]).

Defendants' fourth, fifth, sixth, and seventh affirmative defenses allege that Plaintiff's claims are barred in whole or in part by the doctrines of waiver (fourth), acquiescence (fifth), course of conduct between the parties resulting in an amendment (sixth), and ratification (seventh). In response to the motion, Defendants allege that Plaintiffs never previously required GCP to provide copies of records and reports as set forth in Par. 21.03 of the Sublease without demand, and this course of conduct continued for ten years, and alternatively Plaintiff waived such compliance with that provision or ratified or acquiesced to GCP's conduct in not providing the records. Defendants also argue that after the purported termination of the Sublease, GCP tendered rent which Plaintiff accepted without objection. In addition, Plaintiff's general counsel acknowledged those payments and did not characterize any of them as "Holdover Rent." Defendants claim that a landlord's acceptance of rent waives any breaches in a notice of termination.

"Waiver is the voluntary abandonment or relinquishment of a known right" (*Excel Graphics Tech. v. CFG/AGSCB 75 Ninth Ave.*, 1 A.D.3d 65, 69 [1st Dept. 2003], *lv dismissed*, 2 N.Y.3d 794 [2004], citing *Jefpaul Garage Corp. v. Presbyterian Hosp.*, 61 N.Y.2d 442, 446 [1984]).

Paragraph 28.06 of the Sublease states:

> "No failure by either party to insist upon the strict performance of any covenant, agreement, term or condition of this Sublease or to exercise any right or remedy consequent upon a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any such breach agreement, term or condition of this Sublease to be performed or complied with by either party and no breach thereof, shall be waived, altered or modified except by written instrument executed by the party charged with such waiver or modification. No waiver of any such breach shall affect or alter this Sublease, but each and every covenant, agreement, term and condition of this Sublease shall continue in full force and effect with respect to any other then existing or subsequent breach thereof."

Paragraph 35.04 of the Sublease states:

> "Upon execution and delivery hereof, this instrument shall constitute the entire Sublease between Sublandlord and Subtenant for the Demised Premises, and all prior verbal and written agreements shall merge into this agreement. This Sublease cannot be changed orally but only by an agreement in writing and signed by the party against whom enforcement of any waiver, change, modification or discharge is sought."

The Sublease thus specifically provides that there is no waiver of any lease terms for failure to insist on compliance, or by accepting full or partial rent during the breach, absent a written instrument executed by the party to be charged with wavier or modification. There was no such writing modifying the terms of the Sublease in this case. "…[I]t is clear that parties to a commercial lease may mutually agree that conduct, which might otherwise give rise to an inference of waiver, shall not be deemed a waiver of specific bargained-for provisions of a lease" (*Excel Graphics Tech*, 1 A.D.3d at 69-70).

While parties to a contract may mutually disregard a "no-waiver" clause, there must be some affirmative performance, or "active involvement" confirming the presence of the modification (*Paramount Leasehold, L.P. v. 43rd St. Deli, Inc.*, 136 A.D.3d 563, 568 [1st Dept. 2016]). Such conduct "must be 'unequivocally referable to the oral modification'" (*id.*, quoting *Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 343 [1977]). Where, as here, there is a lease dispute, "there must be 'sufficient indicia that the reasonable expectations of both parties under the original lease were supplanted by subsequent actions'" (*id.*, quoting *Simon & Son Upholstery v. 601 W. Assoc.*, 268 A.D.2d 359. 360 [1st Dept. 2000]). It has been held that "[a] waiver is not created by negligence or oversight and cannot be inferred from mere silence" (*455 Dumont Associates, LLC v. Rule Realty Corp.*, 180 A.D.3d 735, 737 [2d Dept. 2020]).

Here, Defendants only allege that Plaintiff waived the provision in the lease requiring the submission of monthly inventory reports or records by failing to require such records during the lease term. Defendants do not point to any affirmative conduct or actions on the part of Plaintiff unequivocally confirming such a modification of the Sublease. The Sublease itself explicitly states that a party's failure to insist on performance of a term is not a waiver absent a writing. Defendants also argue that Plaintiff accepted rent payments after the alleged breach without objection. Again, the Sublease explicitly states that there is no waiver even where the landlord accepts full or partial rent payments. In addition, the email exchanges between Defendants and Plaintiff's general counsel, purportedly reflecting that the termination of the sublease was June 1, 2021, were not "unequivocally referrable" to any modification of the terms of the Sublease and fall short of the type of affirmative active conduct necessary to confirm such an oral modification. Where, as here, there is an explicit non-waiver clause and only "passive acceptance" of contract violations, there is no waiver (*see 1890 Adam Clayton Powell LLC v. Penant*, 52 Misc.3d 76 [App. Term, 1st Dept. 2016], citing *BDCM Opportunity Fund II, LP v. Yucaipa Am. Alliance Fund 1, LP*, 112 A.D.3d 509, 511-512 [1st Dept. 2013]). Plaintiff thus established its entitlement to an order striking that affirmative defense insofar as it is predicated upon waiver of the Sublease requirements contained in Paragraph 21.03. Because the other related affirmative defenses (acquiescence, course of conduct between the parties resulting in an amendment, and ratification) are predicated on the same conduct, those defenses are also dismissed insofar as they are predicated upon any alleged oral modifications of the Sublease[2].

The Court, however, makes no determination as to whether Plaintiff, if it properly served the notice to cure and notice of termination, subsequently vitiated the termination (*see 205 E. 78th St. Assocs. V. Cassidy*, 192 A.D.2d 479 [1st Dept. 1993], *revg on dissent of McCooe, J.*, NYLJ, September 27, 1991 at 21, col 4 [App. Term, 1st Dept.]; *184 West 10th Corp. v. Westcott*, 8 Misc.3d 132[A] [App. Term, 1st Dept. 2005]). As noted above, it has yet to be determined whether the Sublease was properly terminated. Consequently, it cannot be determined at this juncture whether Plaintiff, upon accepting subsequent rent payments without categorizing them as "Holdover Rent" on account activity statements,

[2] Defendant's brief in opposition clearly alleges that the fourth, fifth, sixth, and seventh affirmative defenses are all "based upon the course of conduct of the parties and waiver in which Plaintiff did not require GCP to provide it with copies of the Records set forth in Section 21.03 of the Sublease on a monthly basis without demand. This course of conduct continued for a period of approximately ten years and demonstrates a modification of the Sublease's requirement to provide such Records to the Plaintiff. Alternatively, in not requesting the records for approximately ten years, Plaintiff has waived compliance with this provision of the Sublease or otherwise ratified or acquiesced in GCP's conduct in not providing the records" (Defendants' Memo. of Law in Opp. At Page 15-16).

and then affirmatively representing via email to Defendants that the Sublease remained in effect, vitiated such a termination (*see generally BDCM Opportunity Fund II, LP*, 112 A.D.3d at 511 [active involvement can raise issue of fact as to waiver]). To the extent the waiver affirmative defense is based on such conduct it remains viable and cannot be dismissed as a matter of law.

Defendants' eighth affirmative defense – "Plaintiff's claims are barred, in whole or in part, by Plaintiff's own wrongful acts, including commercial tenant harassment prohibited by §22-902 of the New York City Administrative Code" is not supported by factual assertions. As noted above, Defendants have not shown that the Dunkin Donuts franchise closure was improper or prohibited by the Sublease, and there was no waiver or oral amendment of Sublease provisions. Defendants point to no other material facts supporting this affirmative defense. Where, as here, a pleaded defense is a conclusory and without supporting facts, it must be dismissed (*see, e.g., Kronish Lieb Weiner & Hellman LLP v. Tahari, Ltd.*, 35 A.D.3d 317, 319 [1st Dept. 2006]).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on its first-through-fourth causes of action is denied, and it is further,

ORDERED, that Plaintiff's motion to strike Defendants' first affirmative defense is denied, and it is further,

ORDERED, that Plaintiff's motion to strike Defendants' second, third, and eighth affirmative defenses is granted, and this affirmative defenses are dismissed, and it is further,

ORDERED, that Plaintiff's motion to strike Defendants' fourth – through - seventh affirmative defenses is granted in part and only to the extent predicated on the conduct outlined in the above decision.

This constitutes the Decision and Order of this Court.

ENTER

Dated: October 20, 2022

Mary Ann Brigantti, J.S.C.