

**Coresite 32 Ave. of the Ams., LLC v 32 Sixth Ave. Co.
LLC**

2023 NY Slip Op 32441(U)

July 17, 2023

Supreme Court, New York County

Docket Number: Index No. 652792/2019

Judge: Andrea Masley

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

-----X
CORESITE 32 AVENUE OF THE AMERICAS, LLC, INDEX NO. 652792/2019
Plaintiff, MOTION DATE
- v - 012 013 014
32 SIXTH AVENUE COMPANY LLC and TELX - NEW MOTION SEQ. NO. 015
YORK 6TH AVE. LLC,
Defendants. DECISION + ORDER ON MOTION
-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 012) 272, 273,¹ 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 353, 419, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 494, 557, 558, 559, 597, 598, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 651 were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

The following e-filed documents, listed by NYSCEF document number (Motion 013) 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 354, 355, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 560, 561, 562, 563, 569, 570, 571, 572, 629, 631, 653 were read on this motion to/for PARTIAL SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 014) 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366,² 367, 368, 369, 541, 542, 573, 574, 577, 579, 581, 633, 634 were read on this motion to/for JUDGMENT - SUMMARY

¹ The parties are directed to read Commercial Division Rule 202.8-g(d) which requires that for Rule 19A statements, each statement of fact "must be followed by citation to evidence submitted in support of or in opposition to the motion." (See also Part 48 Procedure 8 [C].)

² Individual statements of facts, responses to statement of facts, and supplemental statements of facts are filed in contravention of Part 48 procedures 8(C) and are treated as party affidavits.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 370, 371, 372,³ 373, 374, 375, 376,⁴ 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 420, 491, 492, 493, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 564, 565, 566, 567, 568, 575, 576, 578, 580, 582, 583, 584, 585, 591, 592, 593, 594, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 630, 632, 652

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER

This case is about pricing of 24 port fiber-optic panels that connect customers to telecommunication carriers under a 2007 fifteen-year lease which set an initial price of \$700 per panel per month, with an annual objective increase (\$700+Rate), and whether that \$700+Rate applies to new panels (ordered after the first 2 years of lease) or could plaintiff be charged an alleged market rate that is significantly higher per month.

In motion sequence number 012, plaintiff Coresite 32 Avenue of the Americas, LLC (CoreSite) moves pursuant to CPLR 3212, for partial summary judgment against defendant 32 Sixth Avenue Company LLC (Owner) on CoreSite's Count I for a declaratory judgment that the Owner and Telx must honor the \$700+Rate; Count II for breach of section 29.09 of the lease between CoreSite and Owner; Count IV for indemnification for amounts paid above the \$700+Rate, attorneys' fees and costs; and dismissal of the Owner's remaining fourth affirmative defenses of mitigation of damages to reduce the Owner's liability and eleventh defense requiring arbitration of the claims under the Telx Lease.

³ The parties' insistence on using exhibit numbers instead of NYSCEF docket numbers is contrary to Part 48 Procedure 5(A) slows down the decision making of this court. Highlighting an exhibit number is useless. Sprinkling a few NYSCEF numbers does not help.

⁴ Transcripts are to be filed in NYSCEF in their entirety. (See Part 48 Procedure 5 [D].) Parties cannot violate this court's procedures and then read the omitted portions of transcripts into the record of the argument. (See NYSCEF Doc. No. [NYSCEF] 651, tr 31:1-13.)

In motion sequence number 013, defendant Telx – New York 6th Ave., LLC, (Telx) moves pursuant to CPLR 3212 to dismiss CoreSite’s Count I for declaratory judgment and Count III for breach of contract against Telx.⁵

In motion sequence number 014, the Owner moves pursuant to CPLR 3212 for summary judgment on the issue of liability on its first cross-claim for indemnification against Telx and on the issue of liability for its first counterclaim for indemnification against CoreSite.

In motion sequence number 015, CoreSite moves pursuant to CPLR 3212 for summary judgment on Count I for a declaratory judgment against Telx; Count III for breach of the Telx Lease by overcharging for panels since March 2019; dismissal of Telx’s second affirmative defense for mitigation; and dismissal of Telx’s third affirmative defense for ratification. In opposition to CoreSite’s motion, Telx effectively asserts reverse summary judgment by seeking the following relief: “(1) declaring that the plain reading of the CoreSite Lease requires CoreSite to pay Telx’s standard charges, subject to a yearly 3% increase; (2) declaring that CoreSite’s preferential pricing expired upon the “Reservation Deadline Date”; (3) declaring that the no-waiver provision in the Telx Lease prohibits any post-Reservation Deadline Date conduct from being deemed a waiver; (4) dismissing CoreSite’s claims for damages as a third-party beneficiary of the Telx Lease; (5) denying CoreSite’s request for summary judgment on Telx’s affirmative

⁵ Telx also moves for summary judgment on its counterclaim for declaratory judgment against CoreSite, but the court could not locate such a counterclaim in Telx’s answer and none of the parties addressed this request as such in their motion papers. (See NYSCEF 342, Telx’s notice of motion [mot. seq. no. 013].) However, in opposition to CoreSite’s motion 015, Telx seeks declaratory relief.

defenses of mitigation and ratification.” (NYSCEF 582, Telx mem of law in opposition to CoreSite’s motion for summary judgment [mot. seq. no. 005].)

Legal Standard

A party moving for summary judgment under CPLR 3212 “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.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The “facts must be viewed in the light most favorable to the non-moving party.” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted].) Once this prima facie burden has been met, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a material issue of fact. (*Alvarez*, 68 NY2d at 324.) The moving party’s “[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” (*Id.*)

Discussion

Section 29.09 of the Lease

The issue is whether Telx may increase the Owner’s rates previously charged to CoreSite for leasing panels. Section 29.09 of CoreSite’s June 30, 2007 lease of fifteen years with the Owner (Lease) provides:

“Neither Tenant nor Tenant's Telecommunications Service Provider shall use any portion of the Building, including any risers, shafts, conduits or other facilities, to bring such telecommunications services to the Demised Premises without the prior written consent of Owner in each instance, and with it understood that pursuant to Article 3 Tenant has rights to use certain areas of the Building; provided that Owner shall not unreasonably withhold or delay its consent to Tenant's Telecommunications Service Provider's bringing telecommunications services to the Demised Premises from

the ‘meet-me’ room⁶ on the twenty-fourth (24th) floor of the Building, on the condition that Tenant or Tenant's Telecommunications Service Provider shall agree to pay Owner's standard charges for any patch panels or other equipment or space utilized therein. Owner agrees that for the period from the date hereof through and including the Reservation Deadline Date, (x) the rate for leasing patch panels shall be \$700.00 per month per fiber patch panel (24 fiber connections) and (y) the rate for leasing cabinet space shall be \$1,000.00 per month per cabinet; and that, during the term of this Lease, such amounts shall not be increased by greater than the greater of (x) three percent (3%) per annum and (y) the annual percentage increase, if any, in the Consumer Price Index (as defined herein) from that in effect with respect to the preceding year.”

(NYSCEF 274, Lease at 71 [emphasis added].)

CoreSite began by leasing two panels in October 2008 from the Owner.

(NYSCEF 273, JSF ¶ 17.) CoreSite and Owner signed an October 1, 2008 letter memorializing the agreement. (*Id.*; NYSCEF 284, Letter Agreement.) The Reservation Deadline Date expired in April 2009, which triggered the Owner’s right to charge the \$700+Rate. (NYSCEF 274, Lease §§ 3.09, 1.05.) “In May 2009, CoreSite leased its third fiber panel, for which the Owner charged CoreSite \$700/month. (NYSCEF 273, JSF ¶ 18.) “By July 2013, . . . CoreSite was using 26 panels.” (*Id.* ¶ 19.) “By then, the monthly charge for the 2 panels ordered under the October 2008 letter agreement had been increased from \$700 by 3% each year and was approximately \$790. For the other 17 panels, the Owner charged CoreSite \$700 each month.” (*Id.*)

⁶ The “meet-me” room is also known as the Hub. “The Owner purchased the Building in 1999 and installed on the 24th floor an area known as the ‘Hub’ that included an upgraded “meet-me room” or “MMR,” a managed, secure space for interconnection of tenants and telecommunications carriers.” (NYSCEF 273, Joint Statement of Facts [JSF] ¶ 4.)

On July 10, 2013, Telx entered into a lease with the Owner pursuant to which Telx assumed control of the operation of the Hub (Telx Lease). (See generally NYSCEF 285, Telx Lease.) Under the Telx Lease, Telx is the “tenant.” (*Id.*, preamble.) Section 2.01(G) of the Telx Lease provides, in part: “Tenant agrees that Tenant shall not charge any tenant or occupant in the Building any fees or charges above the then fair market rates for such space and/or services (as such may be determined, in the event of a dispute, as referred to in Section 2.05)” (*Id.* at 27.) Section 2.05 of the Telx Lease contains an arbitration clause. (*Id.* at 30.) According to Robert Friedman, Telx’s attorney, Telx filed an arbitration against the Owner to determine the “fair market rate”⁷ under the Telx Lease, but that is not at issue on these motions and arbitration is stayed. (NYSCEF 651, tr 66:1-6; see NYSCEF 68, August 27, 2019 decision and order.) In 2015, Telx was acquired by Digital Realty Trust, Inc. (NYSCEF 273, JSF ¶¶ 30.)

CoreSite continues to pay the Owner for 19 panels. (*Id.* ¶¶ 26.) Since 2013 CoreSite ordered panels from Telx for which Telx charged the \$700+ Rate. (NYSCEF 318, June 26, 2015 email chain between Joseph Rydarowski and Jeff Martin.) By September 2018, CoreSite had 66 panels for which it paid Telx the \$700+ Rate. (NYSCEF 319, Telx September 1, 2018 Invoice.) In September 2018, when CoreSite ordered 2 new panels, Telx charged the alleged market rate. (NYSCEF 273, JSF ¶¶ 32-33.) Since October 2018, CoreSite has requested 22 panels. (*Id.* ¶¶ 43.)

⁷ The court rejects Telx’s effort to confuse the Telx Lease’s “fair market rate” with the Lease’s “Owner standard charges,” an undefined term that appears once in section 29.09 in the Lease. (NYSCEF 71, Lease at 67.) The former goes to arbitration while the latter is not subject to arbitration.

On May 9, 2019, CoreSite commenced this action for (1) a declaratory judgment that the Owner and Telx must honor section 29.09(A) and continue to provide CoreSite panels at the \$700+Rate for the duration of the Lease; (2) breach of contract against the Owner for breaching section 29.09(A); and (3) indemnification from the Owner under § 19.05 of the Lease. In addition to a declaratory judgment, CoreSite seeks actual damages plus all additional amounts CoreSite has been charged for panels in excess of the \$700+ Rate through the date of judgment, CoreSite's attorneys' fees and costs under §19.05 of the Lease, and pre-judgment interest. The Owner asserted 14 affirmative defenses. (NYSCEF 339, Owner Answer ¶¶ 73-86.)

The Owner effectively has no opposition to that part of the motion concerning application of section 29.09 of the Lease. Significantly, the Owner does not offer a reading of section 29.09 different than CoreSite's reading. In 2018, Rob Steinman, the Owner's negotiator on the Lease, rejected Telx's alternative reading of section 29.09 because it was not what the parties intended. (NYSCEF 300, Matthew Gavejan⁸ depo tr 238:8-239:10.) Steinman's statement is a party admission that satisfies CoreSite's evidentiary burden. (*Mindlin v Dorfman*, 197 AD 770, 772 [1st Dept 1921] [party admission binds party "unless he can show that it was not made, intended or correctly understood"].) Having established a right to summary judgment, the burden shifts to the Owner. However, the Owner's ambivalent response is not sufficient to satisfy its burden. Therefore, the court is compelled to grant plaintiff's motion for summary judgment against the Owner on Counts I and II.

⁸ Gavejian is a Telx employee who oversaw Hub pricing in 2018.
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Motion No. 012 013 014 015

In opposition to motion sequence number 015, and in support of Telx's motion sequence number 013, Telx takes the position that the first two panels that CoreSite ordered prior to the Reservation Deadline Date are subject to the \$700+Rate while all subsequent panels are subject to Telx's alleged market rate plus 3% of market price per year. Telx objects to CoreSite's interpretation of section 29.09 as impermissibly requiring the court to omit the phrase "through and including the reservation deadline date." Telx relies on the drafting history of the Lease and communications between the Owner and CoreSite immediately after Telx suggested that it could raise the rate.

First, the court looks to the contracting parties' intent, not Telx's. (*See Donohue v Cuomo*, 38 NY3d 1, 4-5 [2022].) "The best evidence of what parties to a written agreement intend is what they say in their writing." (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002] [citation omitted]; *see also W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157, 162 [1990] ["when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms."].)

The court finds that the parties' intent is crystal clear from the Lease. Section 29.09 of the Lease is unambiguous: the monthly rate was \$700 from day one of the Lease until the Reservation Deadline Date of April 21, 2009, two years after the date of the Lease, after which the price could be increased the greater of 3% or the CPI "during the term of the lease" of fifteen years.⁹ It cannot be arbitrarily increased to any rate, as Telx urges.

⁹ In relevant part, "CPI" is defined in the Lease as "Consumer Price Index." (NYSCEF 274, Lease at 71.)

The Court rejects Telx's interpretation of the Lease, to which it is not a party. (*AQ Asset Mgt. LLC v Levine*, 111 AD3d 245, 257 [1st Dept 2013] [refusing to enforce nonparties' "own interpretation of an agreement to which they were not parties"].)

Telx's hyperfocus on the phrase "through and including the reservation deadline date" is a distraction. The court's reading does not read that phrase out of the Lease. Indeed, that phrase is integral as it triggers the Owner's annual right to increase the price the greater of 3% or the CPI. Likewise, the court rejects Telx's argument that the court's interpretation renders the term "Owner's Standard Charge"¹⁰ "mere surplusage." (NYSCEF 582, Telx's mem of law in opposition to CoreSite's motion for summary judgment at 12.) The court rejects Telx's reading that the general sentence with the term "Owner standard charges" controls pricing as contrary to the rules of contract interpretation. (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956] ["Even if there was an inconsistency between a specific provision and a general provision of a contract (we find none), the specific provision controls."].) Rather, the specific sentence controls pricing. Telx's preoccupation with the nonbinding letter of intent (NYSCEF 275), as proof of intent, is misplaced. Parties get to evolve during negotiations. CoreSite is not trapped by its first offer in its negotiation with the Owner. Repeating it does not make it so. CoreSite wanted price protection and section 29.09 demonstrates that eventually, the Owner conceded. The court also rejects Telx's invitation to insert the words "ordered or installed" before the words "reservation deadline date," which is barred by rules of contract construction. Likewise, the court rejects Telx's interpretation which requires the word "leasing" to be changed to "leased" or "have leased." The court

¹⁰ Currently, the Owner's Standard Charge is approximately \$861. (NYSCEF 372, Hunt aff ¶ 7, analyzing NYSCEF 387, the Owner's recent invoices.)

cannot “add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.” (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004] [internal citations and quotations omitted].) Telx’s theory that the \$700+Rate applies to the two panels CoreSite purchased before the Reservation Deadline Date and all subsequent panels are charged at a market rate is convoluted and unworkable; it is simply not there. Likewise, Telx’s reliance on Patrick Shelly’s unremarkable statement that Reservation Deadline Date expired is irrelevant since there is no dispute that it expired. Further, Telx cannot create an ambiguity with an interpretation that is not clear on the face of the Lease. (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008] [“... clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations.”], *affd* 13 NY3d 398 [2009].) Indeed, Telx admitted at argument that the ambiguity comes from the drafting history, not the document itself. (NYSCEF 651, tr at 63:6-9.) “If that intent is discernible from the plain meaning of the language of the contract, there is no need to look further.” (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004].)

However, even if there were an ambiguity, all of the facts support CoreSite’s reading of section 29.09. When there is an ambiguity, which there is not here, the best evidence is course of conduct. (*Fed. Ins. Co. v Americas Ins. Co.*, 258 AD2d 39, 44 [1st Dept 1999].) Looking at course of conduct is not inconsistent with the no waiver clause, as Telx argues. Rather, course of conduct establishes that the Owner charged \$700 and did not raise the rate, not even by the greater of the 3% or CPI, though it could have. Further, CoreSite did not object when Telx retroactively increased the monthly rate consistent with the greater of 3% or the CPI; nor could it since that would be a

violation of the no waiver clause. (NYSCEF 274, Lease at 65 [§ 24.02].) Telx's interpretation is not reasonable. CoreSite signed a long-term lease of 15 years. CoreSite could not be expected to invest millions to build a data center without some price protection on the connections essential to its data business. (*Schoellkopf v Coatsworth*, 166 NY 77, 84 [1901] ["... in seeking the parties' intent, the fact that a proposed construction would make the contract unreasonable, and place one of the parties at the mercy of the other, may be properly taken into consideration."]; accord *Metro. Life Ins. Co. v Noble Lowndes Intl., Inc.*, 84 NY2d 430, 438 [1994] ["Language in contracts placing one party at the mercy of the other is not favored by the courts."].) CoreSite's lease negotiator, Rob Rockwood, stated that the parties intended CoreSite's panel pricing to be guaranteed for the duration of the Lease (see NYSCEF 381, Rockwood depo tr at 31:4-8, 42:24-43:4) and the Owner's negotiator Rob Steinman agreed (see *id.* at 58:19-21); Steinman told Telx that its reading was "not the intent of the language" in section 29.09(A). (NYSCEF 300, Gavejian depo tr at 238:5-239:10; 241:19-24.) The court rejects Telx's opposition to such testimony as improper since witness testimony is relevant extrinsic evidence. (See, e.g., *China Privatization Fund (Del.), L.P. v Galaxy Entertainment Group Ltd.*, 187 AD3d 596, 597 [1st Dept 2020] [trial court properly credited deal attorney's testimony about parties' intent, rejecting argument that testimony was "after-the-fact expert testimony."].) Finally, and most convincingly, for five years, Telx charged the \$700+Rate.

Third Party Beneficiary

CoreSite is a third-party beneficiary to the Telx's Lease. A party is a third-party beneficiary where there is (1) "a valid and binding contract between other parties," (2) "the contract was intended for [their] benefit" and (3) a "benefit to [them]" which is

sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [them] if the benefit is lost.” (*State of California Pub. Employees’ Retirement Sys. v Shearman & Sterling*, 95 NY2d 427, 434-435 [2000] [internal quotation marks and citations omitted] ; *Mendel v Henry Phipps Plaza West, Inc.*, 6 NY3d 783, 786 [2006].) Here, Section 1.07(B)(1) of the Telx Lease very clearly requires Telx to “fully perform [the Owner’s] obligations under the Existing Hub Agreements.” (NYSCEF 285, Telx Lease at 15.) That the Telx Lease was intended to benefit CoreSite is evidenced by the fact that the Owner was required to tell CoreSite, and other tenants, that it “transferred the business of operating The Hub” to Telx and “Telx will be responsible for the day-to-day operation and management of the Hub,” with “all inquiries with respect to such Hub operation and management” being directed to Telx. (NYSCEF 285, Telx Lease at 16 [§ 1.07 [C] [1]]; *id.* at 155, Schedule C-2.) As a result, there would be no interruption in CoreSite’s telecommunications; the benefit could not be more immediate.

CoreSite’s Motion to Dismiss the Owner’s Affirmative Defenses (Motion Sequence Number 012) and to Dismiss Telx’s Affirmative Defenses (Motion Sequence Number 015) is Granted

The Owner’s fourth affirmative defense and Telx’s fifth affirmative defense of mitigation is dismissed. To avoid Telx’s higher than \$700+Rate, Telx and Owner argue that CoreSite should have moved its New York City customers to its New Jersey facility. Alternatively, Telx and Owner suggest that CoreSite could have passed along Telx’s price increases to CoreSite’s customers. To assert a mitigation defense, defendants have the “burden to establish not only that plaintiff failed to make diligent efforts to mitigate its damages, but also the extent to which such efforts would have diminished its damages. Moreover, if plaintiff reasonably made such diligent efforts to mitigate, it does

not matter if, in retrospect, another, better means of limiting the financial injury was possible.” (*LaSalle Bank Nat. Assn. v Nomura Asset Capital Corp.*, 47 AD3d 103, 107-108 [1st Dept 2007] [citations omitted].)

CoreSite has satisfied its initial burden in tendering sufficient evidence to eliminate disputed material issues of fact as to mitigation beginning with the Owner’s verified interrogatory in which the Owner has no basis for its mitigation defense. Next, CoreSite asked the Owner if it could “run its own direct fiber connections outside of the Building without the need to run those connections through the meet-me room.” (NYSCEF 332, CoreSite’s June 28, 2019 letter to Owner at 4.) Owner did not grant CoreSite’s request. (NYSCEF 334, Owner’s July 11, 2019 response at 1-2.) Since CoreSite satisfied its burden to offer prime facie evidence, the burden shifted to defendants who have not established that CoreSite failed to make diligent efforts. Rather, defendants offer two theories but fail to support those theories with facts showing how CoreSite could mitigate. For example, how is CoreSite to make connections to New Jersey? An expert explaining such a process would have been helpful. Thus, there is no issue of fact here. It is not enough to assert that CoreSite could have done something different. (*Bank of Am., N.A. v J.P.T. Automotive, Inc.*, 52 AD3d 553, 555 [2d Dept 2008] [citation omitted].) Moreover, defendants utterly fail to show how such efforts would decrease CoreSite’s damages.

The court also rejects Owner’s procedural argument in support of this affirmative defense. CoreSite has not impermissibly shifted the burden to Telx and the Owner. Rather, CoreSite offered prima facie evidence which shifts the burden to defendants.

Arbitration

CoreSite's motion dismiss the Owner's eleventh affirmative defense based on the arbitration provision in Telx's lease is granted based on law of the case. (See NYSCEF 177, tr at 13-16 [Feb. 14, 2020 argument] [rejecting Owner's effort to shift to Telx Owner's obligations to CoreSite under the CoreSite Lease]; NYSCEF 77, so ordered tr at 38:8-21 [explaining that the court must "start with [Section] 29.09" of the CoreSite Lease and "that's an issue for the Court and not for the arbitrator"].) That the court finds that CoreSite is a third-party beneficiary to the Telx Lease does not transform CoreSite into a signatory of that agreement subject to its arbitration provision and the Owner cites no law otherwise.

Ratification

Finally, Telx's third affirmative defense is dismissed. "Ratification is in essence, a waiver of existing rights." (*In re Levy*, 69 AD3d 630, 632 [2d Dept 2010].) CoreSite did not ratify or consent to Telx's market rate. CoreSite objected, included a statement of reservation of rights before signing a new service order, and filed this action. When Telx balked at the reservation of rights, CoreSite struck it, but such behavior precludes a defense of ratification. This litigation defeats Telx's ratification defense because "the formal pleading of a claim . . . all but eliminates any subsequent implication of ratification." (*Prudential Ins. Co. of Am. v BMC Indus., Inc.*, 630 F Supp 1298, 1302 [SD NY 1986].)

Indemnification

The Owner seeks indemnification from Telx pursuant to section 19.02 of the Telx Lease which provides:

“Section 19.02 Tenant's Indemnity and Liability Insurance Obligations: A. Except to the extent caused by the negligence or willful misconduct of Owner or Owner's Indemnitees as hereinafter defined Tenant agrees to indemnify and save Owner and Owner's Indemnitees harmless of and from all loss cost liability damage and expense including but not limited to reasonable counsel fees penalties and fines incurred in connection with or arising from i any default by Tenant in the observance or performance of any of the terms covenants or conditions of this Lease on Tenant's part to be observed or performed or ii the breach or failure of any representation or warranty made by Tenant in this Lease or iii the use or occupancy or manner of use or occupancy of the Demised Premises or other areas of the Building permitted to be used by Tenant or any person claiming through or under Tenant including without limitation those areas referred to in Sections 3.09 3.10 and 38.04.”

(NYSCEF 285, Telx Lease.)

One of the lease provisions with which Telx was to abide was section 1.07(c), which requires Telx to abide by any pricing restrictions. While the court is not impressed by Telx's defenses, the court is barred by the arbitration provision from opining on Telx's defenses. Therefore, the Owner's motion is denied.

CoreSite's Indemnification Claim Against the Owner

In motion sequence number 012, CoreSite seeks indemnification from the Owner based on section 19.05 of the Lease, entitled Owner's Indemnity, which provides:

“Owner agrees to indemnify and save Tenant and Tenant's officers directors and employees Tenant's Indemnitees harmless of and from all loss, cost, liability, damage and reasonable expense including but not limited to reasonable counsel fees penalties and fines incurred in connection with or arising from (i) any default by Owner in the performance or observance of any of the terms covenants or conditions of this Lease on Owner's part to be observed or performed or (ii) the breach or failure of any representation or warranty expressly made by Owner in this Lease or....”

(NYSCEF 274, Lease at 53.)

Having found a violation of section 29.09, CoreSite is entitled to indemnification.

The language in section 19.05 is clear and the Owner is silent on this topic.

The court has considered all other arguments by all parties and finds they do not change the outcome.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment (mot. seq. no. 012) against defendant 32 Sixth Avenue Company LLC on liability on Counts I, II, and IV is granted and defendant 32 Sixth Avenue Company LLC's remaining affirmative defenses are dismissed; and it is further

ORDERED that the balance of the action—damages—is severed and continued; and it is further

ORDERED that defendant Telx – New York 6th Ave. LLC's motion for partial summary judgment (mot. seq. no. 013) is denied; and it is further

ORDERED that defendant 32 Sixth Avenue Company LLC's motion for summary judgment for indemnification against Telx (mot. seq. no. 014) is denied without prejudice and against CoreSite is denied; and it is further

ORDERED that plaintiff CoreSite's motion for summary judgment against Telx (mot. seq. no. 015) is granted as to Counts I and III and Telx's affirmative defenses are dismissed; and it is further

ADJUDGED and DECLARED that defendants 32 Sixth Avenue Company LLC and Telx – New York 6th Ave. LLC must honor Section 29.09(A) of the Lease and continue to provide plaintiff with panels at the \$700+Rate for the duration of the Lease; and it is further

ORDERED that a Judicial Hearing Officer (JHO) or Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the issue of the amount of damages owed to plaintiff and
- (2) the issue of the amount of attorneys' fees owed to plaintiff;

(this referral does not preclude the parties from reaching an agreement as to amounts owed and shall email the court immediately if an agreement is reached); and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the

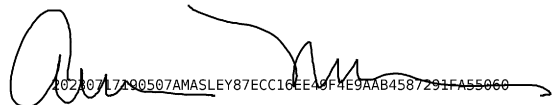
Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, if the JHO or referee requires a pre-hearing conference, the parties shall appear for such; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.


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7/17/2023
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: