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

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NAMDOR, INC.,

Plaintiff,

- v -

BOULEVARD RETAIL LLC and BOARD OF MANAGERS OF THE BOULEVARD CONDOMINIUM,

Defendants.

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INDEX NO. 650773/2018

MOTION DATE N/A

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 183, 184, 185, 186, 187, 188, 189, 190

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In motion sequence number 002, defendant Boulevard Retail LLC (Boulevard) moves for partial summary judgment pursuant to CPLR 3212 (e) on its first and second counterclaims and to dismiss plaintiff Namdor Inc.'s (Namdor) first, second, third, and sixth causes of action.[1]

[1]Although Boulevard's Notice of Motion does not seek dismissal of Namdor's first, second, third, and sixth causes of action (NYSCEF Doc. No. [NYSCEF] 99, Notice of Motion), its memorandum of law and attorney affirmation in support explicitly seek such relief. In its opposition memorandum, Namdor acknowledges that Boulevard seeks dismissal and offers opposition. Subsequently, Boulevard filed an Amended Notice of Motion adding dismissal to its requested relief. (NYSCEF 147, Amended Notice of Motion.) Accordingly, because Boulevard's supporting papers give fair notice of the additional relief sought, the court will consider whether dismissal is warranted. (*See Lakeview Loan Servicing, LLC v Pryce-Breary*, 66 Misc 3d 1212[A], 2020 NY Slip Op

As to the first counterclaim, Boulevard seeks $847,499.60, plus interest for unpaid fixed monthly rent, real estate tax escalation charges, water charges, and late fees due from March 1, 2016[2] through July 31, 2018 pursuant to the parties' now-terminated lease. As to the second counterclaim, Boulevard seeks $868,043.76, plus interest, representing additional damages due under paragraph 18 of the lease for the period of August 1, 2018 through April 10, 2019 as a result of Namdor's alleged abandonment of the premises as of July 31, 2018 and termination of the lease. Boulevard also seeks a finding of liability for professional and attorneys' fees owed as a result of Namdor's alleged default.

In motion sequence number 003, Namdor moves (i) for leave to amend its complaint pursuant to CPLR 3025 (b) to add a claim for constructive eviction, (ii) for leave to take documentary and testimonial discovery from Norman Flitt,[3] Rosenberg &

50071[U], *2-3 [Sup Ct, Orange County 2020], citing *Nehmadi v Davis*, 95 AD3d 1181, 1184 [2d Dept 2012] ["Where the notice of motion contains a general prayer for relief, courts retain jurisdiction to entertain requests for affirmative relief despite a failure to comply with the specificity requirements of CPLR §§ 2214, especially where . . . prejudice is obviated because the motion's supporting papers give fair notice of the relief the movant is seeking"].)

[2] Boulevard states that "Namdor consistently paid the fixed monthly rent at this rate until, as set forth below, Namdor defaulted in September 2017." (NYSCEF 101, Abbot aff ¶ 9.) However, in its answer to the amended complaint, included in its damages request is a rent balance of $2,013.69 for March 2016, $.01 for July 1, 2016 real estate tax escalation payment, $4422.48 in legal fees arising from cooling dispute dated January 1, 2017, $1,925.00 for a consulting fee in connection with the cooling towers dated April 11, 2017, $2,385.00 for a consulting fee in connection with the cooling towers dated April 12, 2017, $.01 for July 1, 2017 real estate tax escalation payment, .01 for August 1, 2017 real estate tax escalation payment, $2,996.80 in water charges for November 30, 2016 through March 6, 2017, and $2,996.50 in water charges for March 6, 2017 through June 6, 2017. (NYSCEF 75, Answer to the Amended Complaint with Counterclaims ¶ 119.) These damages occurred before the alleged September 2017 default and will not be considered.

[3] Flitt, an attorney with Rosenberg & Estis, represents Boulevard in this litigation. (NYSCEF 102, Flitt aff¶ 1.)

Estis, P.C. (Rosenberg & Estis), Edward Pierce Abbot, Jr.,[4] and Cushman and Wakefield pursuant to CPLR Article 31, (iii) to disqualify Flitt from representing Boulevard pursuant to Rule 3.7 of the Rules of Professional Conduct,[5] and (iv) to strike Boulevard's Amended Notice of Motion, or in the alternative, for leave to file a sur-reply. Boulevard cross-moves, pursuant to Rule 130.1.1(c), for sanctions and attorneys' fees against Namdor and its attorneys for bringing this motion.

Background

Boulevard is the owner of a commercial condominium unit in a building located at 2373 Broadway, New York, New York. (NYSCEF 121, Response to Rule 19-a Statement at 1.) On April 25,1988, the parties' predecessors-in-interest executed a lease, whereby they agreed that Namdor[6] would lease the unit for an initial term commencing on October 13, 1988 and expiring on the tenth anniversary of the credit expiration date in exchange for a fixed annual rent payable in equal monthly installments (Lease). (NYSCEF 104, Lease at 2[7], 64[8].) The credit expiration date is

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[4] Abbot of Cushman and Wakefield is Property Manager for Boulevard. (NYSCEF 101, Abbot aff ¶ 1.)
[5] During oral argument, Namdor withdrew the portion of its motion to disqualify Rosenberg & Estis. (NYSCEF 213, tr at 50:12-51:4.)
[6] Although the Lease was executed by Broadway 86th Street Associates, as landlord, and Gristedes Supermarkets, Inc., as tenant, for the purposes of this decision, the court will only reference the parties Boulevard (landlord) and Namdor (tenant).
[7] NYSCEF pagination.
[8] Although the Preamble of the Lease sets the commencement date of May 1, 1988, there is an asterisk that this date is subject to change as discussed below. Page 64 of the Lease is an October 11, 1988 letter confirming the commencement date of October 13, 1988.

defined as the last day Namdor is entitled to a credit under paragraph 41 (b) of the Lease, which provides, in part, that

> "Tenant shall be entitled to a rent credit equal to the lesser of (x) Fixed Annual Rent payable hereunder for the period from the Commencement Date through the date which is one hundred eighty (180 days) after the Commencement Date, and (y) the sum of . . . $1,096.00 . . . per day for each day between the Commencement Date and the date Tenant opens for the conduct of business in the demised premises."

(*Id.* at 9.)

The Lease also provided Namdor with two consecutive options to renew; Paragraph 72(a) provided Namdor with the option to renew for a 10-year term commencing on the date immediately succeeding the expiration date of the Lease and ending on the tenth anniversary of such expiration date (Second Expiration Date) and paragraph 73(a) provided Namdor with the second option to renew for an additional 10-year term commencing on the date immediately succeeding the Second Expiration Date and ending on the tenth anniversary of the Second Expiration Date. (*Id*. at 47-49.) On October 25, 2006, Namdor exercised its second option to renew the Lease (Second Renewal Term). (NYSCEF 105, Renewal Letter.)

In accordance with paragraph 73 (b), the Second Renewal Term was on the "same terms, covenants and conditions" as contained in the Lease with six exceptions: (1) the fixed annual rent was now determined in accordance with paragraph 73 (c)[9], (2) the Threshold amount[10] was now set forth in paragraph 73 (d), (3) any provisions "with

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[9] Paragraph 73 (c) does not provide an actual dollar amount for the fixed annual rent, but rather, provides formulas to determine the amount for designated time periods. (NYSCEF 104, Lease at 50.)

[10] Paragraph 64 (a) of the Lease provides that "[i]n addition to the Fixed Annual Rent payable pursuant to Article 40 hereof, Tenant shall pay, in the manner hereinafter set

respect to Landlord's Work, Landlord's Initial Work, Landlord's Subsequent Work, Landlord's Contribution and any abatement of Fixed Rent and additional rent pursuant to" paragraph 41 (b) were not applicable during the Second Renewal Term; (4) paragraph 73 (a) and (b) relative to Namdor's right to renew the term of this lease were not applicable during the Second Renewal Term; (5) "the Expiration Date shall, for purposes of this lease, be defined as the Second Expiration Date;" and (6) "the Base Taxes shall be the Taxes for the Tax Year ending immediately prior to the commencement of the Second Renewal Term and the Base Common Charges Year shall be the Common Charges Year ending immediately prior to the commencement of the Second Renewal Term." (*Id.* at 49.) In addition to the fixed annual rent and real estate taxes, Namdor was obligated to pay for its water consumption (¶ 28), and if applicable, late fees (¶ 60), costs, and expenses (¶¶ 19, 63). (*Id.* at 5, 37-38, 4, and 39.)

Pursuant to paragraph 50 (b) of the Lease, Namdor was also required to install and maintain all HVAC facilities, including cooling towers, which it installed on the second floor of the building in 1988. (NYSCEF 104, Lease at 18; NYSCEF 123,

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forth and as additional rent hereunder, an amount (hereinafter referred to as the "Percentage Rent") equal to: three percent (3%) of Gross Sales (hereinafter defined) in each calendar year, including the calendar year in which the Commencement Date occurs, any part of which shall occur during the term of this lease, the following amounts (which amounts are hereinafter referred to as the "Threshold Amount"): Thirteen Million Three Hundred Thirty-Three Thousand Three Hundred Thirty Three and 33/100 ($13,333,333.33) Dollars per annum for the period from the Commencement Date to and including the day immediately preceding the fifth (5th) anniversary of the Commencement Date; and Fifteen Million ($15,000,000.00) Dollars per annum for the period from the fifth (5th) anniversary of the Commencement Date to and including the Expiration Date." (*Id.* at 39.)

D'Amico[11] aff ¶ 5.) On May 27, 2016, the New York City Buildings Department issued Namdor an ECB violation notice for a failure to maintain the cooling towers in compliance with the New York City Mechanical Code § 908.3 (Mechanical Code). (NYSCEF 125, ECB Violation.) Namdor retained an engineer to create a plan to cure the violation. (NYSCEF 126, Liebhafsky[12] Email [July 13, 2016].)

Pursuant to paragraph 54 of the Lease, Namdor was required to obtain Boulevard's approval prior to commencing any work involving alteration to the HVAC system. (NYSCEF 104, Lease at 29.) The procedure required Namdor to submit a plan to Boulevard for its written approval. Boulevard had 14 days to respond to the plan or it was deemed approved. (*Id.*) Because Namdor required access to and an easement on the Mezzanine, it also needed the Board of Managers of the Boulevard Condominium's (Board) approval to obtain that access. (NYSCEF 102, Flitt aff ¶ 5; NYSCEF 123, D'Amico aff ¶¶ 10-11.) Thus, on July 13, 2016, Namdor emailed Boulevard and the Board its engineer's plan. (NYSCEF 123, D'Amico aff ¶ 10; NYSCEF 126, Liebhafsky Email.) Namdor continued to follow up regarding the plan and Board approval for access. (NYSCEF 127-128, 130-133, Emails.)

On March 3, 2017, Boulevard sent Namdor a Twenty Day Notice to Cure for Namdor's alleged failure maintaining and operating the HVAC system. (NYSCEF 136, March 2017 Notice to Cure.) On April 4, 2017, Namdor emailed Boulevard's counsel to set up a meeting with the Board; Namdor sent follow-up emails on April 10, 2017 and

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[11] Charles D'Amico is Senior Vice President of Real Estate for Red Apple Group, Inc., parent company of Namdor. (NYSCEF 123, D'Amico aff ¶ 1.)
[12] Andrew Liebhafsky is Director of Real Estate for Red Apple Group, Inc. (NYSCEF 126, Liebhafsky Email.)

May 10, 2017. (NYSCEF 140, April 2017 Email; NYSCEF 141, May 2017 Email.) On November 30, 2017, Boulevard's counsel emailed Namdor stating that it was within Boulevard's discretion to insist that Namdor work with the other commercial tenant regarding the cooling towers and confirming that the extension of the cure date was approved. (NYSCEF 142, November 2017 Email.) On December 18, 2017, Boulevard's counsel emailed the Board asking for a firm commitment permitting Namdor to commence work on the cooling towers ductwork. (NYSCEF 143, December 2017 Email.) On May 11, 2018, the Board and Boulevard executed an easement agreement whereby the Board agreed to grant an easement to perform the repairs; however, it was conditioned on the Board's review and approval of the repair work. (NYSCEF 108, Easement Agreement.)

On July 11, 2018, Boulevard sent Namdor a second notice to cure, advising Namdor that it was in violation of paragraphs 45 (a), 47 and 17 of the Lease for its failure to "continuously, and throughout the term of the Lease, conduct business operations at the premises, and/or otherwise use, operate, occupy or maintain the Premises throughout the term of the Lease, and/or abandoned the Premises and caused the Premises to become vacant on or about July 7, 2018." (NYSCEF 109, Second Notice to Cure.) The notice requested that Namdor cure the default on or before August 6, 2018. (*Id.*) On July 31, 2018, Namdor returned the keys to the unit. (NYSCEF 121, Response to Rule 19-a Statement ¶ 67.)

On August 8, 2018, Boulevard sent Namdor a cancellation notice, terminating "the Lease, Tenant's tenancy at the Premises, and/or Tenant's right to use or otherwise occupy the premises …effective as of August 24, 2018 . . . because Tenant failed to

cure the Lease defaults described in the July 11, 2018 [notice]." (NYSCEF 110, Cancellation Notice.)

Procedural History

On February 16, 2018, Namdor filed this action against Boulevard and the Board seeking (1) declarations that it was not in default, that the default notice was legally insufficient, and that Boulevard was to indemnify Namdor, (2) a permanent injunction enjoining Boulevard from terminating the Lease or commencing proceedings to obtain possession, (3) specific performance, (4) a mandatory injunction, and (5) monetary damages for breach of contract, breach of the covenant of good faith and fair dealing, tortious interference with contract, and tortious interference with prospective economic advantage. (NYSCEF 1, Summons and Complaint.) On March 6, 2018, Boulevard filed an answer with counterclaims against Namdor for breach of contract and attorneys' fees and cross-claims against the Board for breach of fiduciary duty and breach of the covenant of good faith and fair dealing. (NYSCEF 45, Boulevard Answer with Counter and Cross-Claims.)

On March 23, 2018, this court granted Namdor's motion for a Yellowstone injunction, tolling the March 2017 Notice to Cure and enjoining Boulevard from taking any steps to regain possession or terminate the Lease. (NYSCEF 57, Decision and Order [mot. seq. no. 001].) On April 9, 2018, Namdor filed a reply to Boulevard's counterclaims. (NYSCEF 61, Reply to Counterclaims.) On October 5, 2018, Namdor filed an amended complaint removing its claims for a judgment declaring that it was not in default and that the default notice was legally insufficient and adding a claim for nonresidential tenant harassment. (NYSCEF 72, Amended Complaint.) On November

21, 2018, the Board filed an answer with a cross-claim for indemnification against Boulevard. (NYSCEF 74, Board Answer with Cross-Claim.) Boulevard also answered the amended complaint and amended its counterclaims, seeking damages for breach of the Lease prior to July 31, 2018, additional damages arising after July 31, 2018, and indemnification and attorneys' fees. (NYSCEF 75, Boulevard Answer to Amended Complaint with Counter and Cross-Claims.) Boulevard also added cross-claims for tortious interference with contract, tortious interference with prospective business relations, and indemnification. (*Id.*) On February 8, 2019, Namdor filed a reply to Boulevard's amended counterclaims. (NYSCEF 80, Reply to Counterclaims.)

Discussion

Motion Sequence 002 – Partial Summary Judgment

Under CPLR 3212, "the proponent of a summary judgment motion 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].) Once the movant has made such a showing, the burden shifts to the opposing party to demonstrate, with admissible evidence, facts sufficient to require a trial, or summary judgment will be granted. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

First Counterclaim

1. Liability

Boulevard argues that it is entitled to a money judgment against Namdor for unpaid monthly rent, real estate tax escalation charges, water charges and late fees due under the Lease for the period from September 2017, when Namdor defaulted,

through July 31, 2018, when Namdor surrendered the premises, totaling $847,499.60 plus interest.

"The elements of [a breach of contract] claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [citation omitted].) When a contract is unambiguous, its interpretation is a question of law, and summary judgment is appropriate. (*Modell's N.Y. v Noodle Kidoodle*, 242 AD2d 248 [1st Dept 1997].)

In support of its motion, Boulevard submits the Lease that unambiguously establishes that Namdor was obligated to pay fixed annual rent, additional rent if taxes payable for any tax year or any part thereof exceed the base taxes, charges for the use of water, as well as late fees. (NYSCEF 104, Lease ¶¶ 1, 28, 42 [b], 60.) To establish that Namdor failed to pay fixed annual rent, additional rent for taxes, water charges and late fees due for the relevant period, Boulevard submits Abbot's affidavit wherein he avers that Namdor consistently paid $87,527.50 in monthly rent installments until September 2017 installment. (NYSCEF 101, Abbot aff ¶ 9.) Abbot further states that despite receiving rent invoices, as of July 31, 2018,[13] Namdor owed $847,499.60 for fixed monthly rent, real estate tax escalation charges, water charges and late fees and that no payments were made except for certain court-ordered payments, which Namdor was credited for. (*Id.* ¶¶ 24-25.) Boulevard also submits a general ledger showing that

[13] It is undisputed that Namdor did not vacate the premises until July 31, 2018 when it delivered the keys to the premise to Boulevard. (NYSCEF 121, Response to Rule 19-a Statement ¶ 67; NYSCEF 101, Abbot aff ¶ 23; NYSCEF 123, D'Amico aff ¶ 27.)

Namdor made payments for monthly rent and real estate taxes charges. (NYSCEF 111, Rent Ledger 2-4.)

Accordingly, Boulevard has made a prima facie showing of its entitlement to judgment as to Namdor's liability for unpaid monthly rent, real estate tax escalation charges, water charges and late fees due under the Lease for the period of September 2017 through July 31, 2018. The burden now shifts to Namdor.

Namdor does not present proof that it actually paid the rent and other charges for September 2017 through July 31, 2018. Rather, it argues that its obligation to pay rent was excused due to its constructive eviction, asserting that by failing to consent to Namdor's proposals to remediate the cooling tower code violations, Boulevard forced Namdor to incur civil liability and criminal sanctions and interfered with Namdor's use and enjoyment of the premises. (*See* NYSCEF 123, D'Amico aff ¶¶ 26-27.)

"'Eviction as a defense to a claim for rent does not depend upon a covenant for quiet enjoyment . . . It suspends the obligation of payment either in whole or in part, because it involves a failure of consideration for which rent is paid.'" (*Park Towers S. Co., LLC v 57 W. Operating Co., Inc.*, 96 AD3d 443, 443 [1st Dept 2012] quoting *Fifth Ave. Bldg. Co. v Kernochan*, 221 NY 370, 372 [1917].)

> "[C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises . . . . The tenant, however, must abandon possession in order to claim that there was a constructive eviction . . . . Thus, where the tenant remains in possession of the demised premises there can be no constructive eviction . . . . It has been said to be inequitable for the tenant to claim substantial interference with the beneficial enjoyment of his property and remain in possession without payment of rent."

(*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 82 [1970] [citations omitted].) Therefore, "[a] constructive eviction defense is unavailable for the period before a tenant vacates; thus, the tenant is required to pay rent for that period." (*Ninety-Five Madison Co., L.P. v Karlitz & Co., Inc.*, 2014 NY Slip Op 30512[U], *22 [Sup Ct, NY County 2014] [citations omitted].) Here, it is undisputed that Namdor did not vacate the premises until July 31, 2018, and thus, this defense in inapplicable to this counterclaim.[14]

Namdor also argues that its obligation to pay rent was excused under the doctrine of impossibility of performance. Specifically, it argues that, although the Lease mandates that Namdor comply with applicable law, its compliance with the Mechanical Code was impossible because it could not relocate its cooling towers from the mechanical room, where they had to be located pursuant to the Lease, without the prior approval of Boulevard and the Board.

> "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract. The excuse of impossibility is generally limited to the destruction of the means of performance by an act of God, vis major, or by law."

(*Kolodin v Valenti*, 115 AD3d 197, 200 [1st Dept 2014] [internal quotation marks and citations added].) Here, Namdor fails to address, let alone even mention, the requirement that the "impossibility must produced by an unanticipated event that could not have been foreseen or guarded against in the contract." (*Id.*) Thus, it has failed to

[14] The court notes that Namdor did not raise constructive eviction as an affirmative defense and discusses this failure *infra*.

raise a triable issue of fact as to this defense. (*See Pleasant Hill Developers, Inc. v Foxwood Enters.*, LLC, 65 AD3d 1203, 1206 [2d Dept 2009] [citation omitted].) Further, Namdor failed to plead impossibility as an affirmative defense in its answer to Boulevard's counterclaims (*see* NYSCEF 80, Reply to Amended Counterclaims), and thus, this defense is deemed waived. (*Lion Point Capital, LP v Burgerfi Intl., Inc*, 2023 NY Slip Op 33740[U], *7 [Sup Ct, NY County 2023] ["In its amended answer, [defendant] did not plead impossibility as an affirmative defense, and has therefore waived it."].)

Finally, Namdor asserts two additional arguments in defense of this portion of Boulevard's motion. First, it argues that Boulevard's failure to attach the parties' pleading to its motion requires dismissal of the motion. The court, in its discretion, overlooks this procedural defect because the pleadings are filed electronically and available to the parties and the court. (*See Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 632 [1st Dept 2012] [holding that the failure to attached pleadings "was properly overlooked, as the pleadings were filed electronically and thus were available to the parties and the court."].) Second, it argues that Flitt's affirmation should be stricken because Boulevard did not disclose Flitt as a potential fact witness, and Namdor did not have an opportunity to request discovery from or depose Flitt. Attorney affirmations can be considered on summary judgment motions where the attorney has personal knowledge of the facts. (*See Zuckerman v City of New York*, 49 NY2d 557, 563 [1980].) Flitt's moving affirmation attests to his personal knowledge of the Lease provisions, the procedural history of this matter, events that occurred before this court which he was a part of, and negotiation of the Easement Agreement, which he was also involved in.

There is nothing that Namdor points to that go beyond the scope of a permissible attorney affirmation. Further, as shown by its own evidence, Namdor was well aware that Flitt was involved in this matter as early as 2017 (*see* NYSCEF 136, Default Notice; NYSCEF 139, March 2017 Email; NYSCEF 137, January 2018 Email), and could have taken action early on in this litigation.

2. Damages

There are issues of fact as to how much is owed in unpaid monthly rent, real estate tax escalation charges, water charges and late fees due under the Lease for the period from September 2017 through July 31, 2018. The rent ledger does not conclusively show the actual amounts owed for unpaid rent, and in turn late fees, especially in light of paragraph 73 (c) of the Lease, which does not provide an actual dollar amount of the rent due for this period, but rather a formula by which to calculate the rent. Further, there are also issues of fact as to the amounts of real estate taxes, mainly whether Boulevard received any tax refunds, and the actual amount due for water consumption as the invoices submitted are for a period ending on September 6, 2017. (*See* NYSCEF 112, Water Invoice at 5.)

Thus, summary judgment is granted as to liability only on Boulevard's first counterclaim. Damages will be determined at trial.

Second Counterclaim

1. Liability

Boulevard argues that it is entitled to summary judgment as to amounts due under paragraph 18 of the Lease for the period from August 1, 2018 until April 10, 2019,

when the term of the Lease would have expired but for its early termination, totaling $868,043.76 plus interest.

It is clear from the terms of the Lease that Namdor agreed to use, occupy, operate and maintain the premises and conduct business in the unit continuously and without interruption throughout the term of the Lease. (NYSCEF 104, Lease at 13-14, 16 [¶¶ 45 (a), 47].) Pursuant to paragraph 18 (a) of the Lease, if there is a default, the rent and additional rent become due and shall be paid up until the time of the Lease's expiration.

Once again, Namdor asserts that it is not obligated to pay rent as it was constructively evicted from the premises. Constructive eviction may serve as a defense in a landlord's action for rent. (*Johnson v Cabrera*, 246 AD2d 578, 578-579 [2d Dept 1998]; *Goldman v MJJ Music, Inc.*, 17 Misc 3d 1127[A], 1127A, 2007 NY Slip Op 52163[U], *4 [Civ Ct, Kings County 2007].) Although Namdor does not plead this as an affirmative defense, "an unpleaded defense may be invoked to defeat a summary judgment motion or serve as the basis for an affirmative grant of such relief in the absence of surprise and prejudice, provided that the opposing party has a full opportunity to respond." (*Sheils v County of Fulton*, 14 AD3d 919, 921 [3d Dept 2005], citing *Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 885 [1981].) Here, Boulevard does not assert surprise or prejudice as to this defense to Boulevard's counterclaims and addresses it in the reply papers. Thus, Namdor's failure to plead the defense prior to opposing this motion does not bar its consideration by the court. (*See Board of Mgrs. of Manhasset Med. Arts Condominium v Integrated Med. Professionals, PLLC*, 65 Misc

3d 1212[A], 2019 NY Slip Op 51588[U], *1-3 [Sup Ct, Suffolk County 2019] [citation omitted].)

There is an issue of fact as to whether Boulevard's failure to consent to Namdor's proposals to remedy the Mechanical Code violations for almost two years "materially deprive[d] [Namdor] of the beneficial use and enjoyment of the premises." (*Great Am. Realty of E. Indus. Ct., LLC v Guzu, Inc.*, 187 AD3d 719, 721 [2d Dept 2020] [internal quotation marks and citations omitted].)

2. Lease Expiration Date

Regarding the Lease expiration date, Namdor fails to raise an issue of fact as to whether the Lease expired in April 2019. Pursuant to the Lease's Preamble, the Lease was to commence on May 1, 1988 and expire on the day immediately preceding the tenth anniversary of the credit expiration date as defined in paragraph 41(b) of the Lease. (NYSCEF 104, Lease at 2.) However, the commencement date was subject to paragraph 48 of the Lease which provides, *inter alia*, that if Landlord's Work was not completed by May 1, 1988, then "the 'Commencement Date' shall be and shall be defined as, the date on which Landlord's Work shall have been substantially completed and Landlord is able so to deliver possession of the demised premises to Tenant." (*Id.* at 16.) The commencement date was changed to October 13, 1988. (*Id.* at 64.)

The credit expiration date is defined as the last day Namdor is entitled to a credit under paragraph 41 (b) of the Lease., which provides, in part, that

> "Tenant shall be entitled to a rent credit equal to the lesser of (x) Fixed Annual Rent payable hereunder for the period from the Commencement Date through the date which is one hundred eighty (180 days) after the Commencement Date, and (y) the sum of . . . $1,096.00 . . . per day for each day between the Commencement Date and the date Tenant opens for the conduct of business in the demised premises."

(*Id.* at 9.) Therefore, the credit expiration date was April 11, 1989, 180 days after October 13, 1988, and the expiration date of the Lease was April 10, 1999. Paragraph 72 (a) provided Namdor with the option to renew for a 10-year term commencing on the date immediately succeeding the expiration date of the Lease (i.e., April 11, 1999) and ending on the tenth anniversary of such expiration date (i.e., April 10, 2009) (defined as Second Expiration Date). Paragraph 73 (a) provided Namdor with a second option to renew for an additional 10-year term commencing on the date immediately succeeding the Second Expiration Date (i.e., April 11, 2009) and ending on the tenth anniversary of the Second Expiration Date (April 10, 2019). (*Id.* at 47-49.) The fact that Namdor sent written notice of its intent to renew the Lease for a second time on October 25, 2006, does not change the unambiguous language of the Lease as to how to determine the expiration dates. Further, Namdor certified in estoppel certificates that the Lease commencement date was October 13, 1988 and is the expiration date was April 10, 1999. (NYSCEF 149, Estoppel Certificates.)

The court notes that what the parties dispute on this motion is the commencement date. The parties do not indicate the date that Namdor started operating the supermarket at the premises. Rather, the parties focus on whether the commencement date was May 1, 1988 or October 13, 1988 and each calculate the credit expiration date from those dates respectively. Thus, as the parties are silent as to the date when the supermarket opened for business and do not argue that that date is the operative date, the court determines that the credit expiration date is the 180 days after the commencement and not the date that Namdor started operating the supermarket.

Additional Charges

Pursuant to paragraph 63 of the Lease, Boulevard seeks attorneys' fees in connection with its first and second counterclaims.[15] Paragraph 63 (d) provides that Namdor is to indemnify and hold Boulevard harmless for "any and all claims arising from or in connection with . . . (d) any breach or default by Tenant in the full and prompt payment and performance of Tenant's obligations under this lease; together with all costs, expenses and liabilities incurred in or in connection with each such claim or action or proceeding brought thereon, including, without limitation, all attorneys' fees and expenses." (NYSCEF 104, Lease at 39.)

"When a party is not under any legal duty to indemnify, a contract imposing an obligation to indemnify 'must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.' Thus, the intention to indemnify must be 'unmistakably clear from the language of the promise.'" (*Needham & Co., LLC v UpHealth Holdings, Inc.*, 212 AD3d 561, 561 [1st Dept 2023], quoting *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989].)

Here, the language of paragraph 63 (d), provides that Boulevard shall be indemnified for claims arising from Namdor's breach or default under the Lease. While other sections of this provision address third-party claims, section (d) clearly refers to intra-party claims. "[T]he indemnification provision here does not pertain 'only' to third-

[15] Boulevard's third counterclaim seeks indemnification pursuant to paragraphs 63 and 19 of the Lease for costs and expenses, including attorneys' fees, to remediate the cooling tower issues and code violations. (NYSCEF 75, Amended Answer with Counterclaims at 28-30.) On this motion, Boulevard seeks to sever its third counterclaim for a later determination.

party claims but applies to both intraparty and third-party claims under separate and distinct provisions." (*Shah v 20 E. 64th St.*, 198 AD3d 23, 43-44 [1st Dept 2021].)

While the burden now shifts to Namdor, it does not oppose Boulevard's request for attorneys' fees in connection with its first and second counterclaims, and thus, this portion of the motion is granted. However, as an issue of fact as to the second counterclaim exists, attorneys' fees are only owed in connection with the first counterclaim at this stage. The amount will be determined at trial.

Dismissal of Namdor's First, Second, Third and Sixth Causes of Action

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Dismissal is warranted under CPLR 3211 (a) (1) "'where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law.' " (*Seaman v Schulte Roth & Zabel LLP*, 176 AD3d 538, 538-39 [1st Dept 2019], quoting *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002].)

1. Lost Profit Damages

Boulevard asserts that Namdor's entitlement to damages on its first, second, and third causes of action are dependent on whether Namdor had a right to further extend its occupancy beyond the terms of the Lease. Boulevard directs the court to Namdor's responses to Boulevard's demand for a bill of particulars; specifically, Namdor's response to Request 12, which sought a factual basis for Namdor's allegation that it suffered lost profits. (*See* NYSCEF 114, Bill of Particulars at 11.)

In support of its claim for breach of the implied covenant of good faith and fair dealing (second cause of action), Namdor alleges that "Boulevard Retail's wrongful conduct also prevented Gristedes from entering into a Lease extension agreement and performing the Upgrade Work causing Gristedes to suffer damages including, among other things, lost sales." (NYSCEF 72, Amended Complaint ¶ 47.)

"A party may not recover damages for lost profits unless they were within the contemplation of the parties at the time the contract was entered into and are capable of measurement with reasonable certainty." (*Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993].) "The lost profits may not be merely speculative, possible or imaginary." (*O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 283 [1st Dept 2007] [citation omitted].) Here, Namdor fails to allege that the parties contemplated lost profits. (*Kantor v 75 Worth St., LLC*, 95 AD3d 718, 718 [1st Dept 2012] [dismissing claim because the allegations in the complaint did not establish that plaintiff's lost profits were contemplated].)

Further, to the extent that Namdor alleges that Boulevard's conduct prevented the parties from entering into a lease extension, causing damages including lost profits, this is speculative. "A landlord is under no obligation to renew a lease. A tenant who wants a right of renewal must reach an agreement with the landlord and whatever right the tenant has is governed by the terms of the agreement." (*Dime Sav. Bank, FSB v Montague St. Realty Assoc.*, 90 NY2d 539, 542-543 [1997] [citations omitted].)

Dismissal of the other causes of action for a failure to state damages on the basis they are contingent on a further extension of the Lease is without merit as the

amended complaint does not seek lost profit damages for the other causes of action.

2. Breach of Contract

In its first cause of action, Namdor alleges that Boulevard breached express covenants of the Lease by wrongfully withholding its consent to Namdor's proposal to remediate its cooling tower code violations, thwarting Namdor's efforts to resolve the plume discharge issue. (NYSCEF 72, Amended Complaint ¶ 41.)

Boulevard argues that Namdor's breach of contract claim should be dismissed because Namdor is required to cure violations pursuant to paragraph 54 of the Lease and it is not a breach of contract for Namdor to expend sums in doing so. Namdor does not allege that it was a breach of the Lease to require it to cure violations. Rather, in the amended complaint, Namdor alleges that Boulevard breached its obligations under the Lease by wrongfully withholding it consent to Namdor's cooling towers proposal and thwarting Namdor's efforts to remedy the issue. Boulevard fails to address why it is not liable under the Lease for damages incurred by Namdor if, in fact, Boulevard unreasonably withheld consent in violation of the Lease.

Boulevard also argues that this claim must be dismissed because D'Amico testified that Namdor needed the Board's consent to remedy the issue, contradicting the allegation that it was Boulevard's wrongful act of withholding consent that thwarted Namdor's efforts. D'Amico's testimony that Namdor did not obtain permits because the Board never gave Namdor approval to use the low roof does not warrant dismissal of this cause of action for breach of the Lease by Boulevard. (*See* NYSCEF 116, tr at 76:5-76:8 [D'Amico Depo].) Pursuant to paragraph 54 of the Lease, Boulevard had to approve the work on the cooling towers and Boulevard's consent could not be

unreasonably withheld. (NYSCEF 104, Lease at 29.) A breach of this provision is not contingent on the Board's independent actions. Thus, this branch of Boulevard's motion is denied.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

Boulevard argues that Namdor's second cause of action for breach of the implied covenant of good faith and fair dealing should be dismissed because it is duplicative of the first cause of action for breach of contract. "Where a good faith claim arises from the same facts and seeks the same damages as a breach of contract claim, it should be dismissed." (*Mill Fin., LLC v Gillett*, 122 AD3d 98, 104 [1st Dept 2014].) "The conduct alleged in the two causes of action need not be identical in every respect. It is enough that they arise from the same operative facts." (*Id.* at 104-105.)

Here, Namdor's breach of contract claim and implied good faith claim allege identical wrongful conduct by Boulevard Retail, and thus, arise from the same operative facts. (NYSCEF 72, Amended Complaint ¶¶ 41, 42, 45, 46, 47.) Putting aside the claim for lost profits, which is dismissed, Namdor also seeks the same damages for these claims. (*Id.* ¶¶ 42, 46.) Accordingly, the good faith claim is dismissed as duplicative.

4. Declaratory Judgment

Namdor seeks a judgment declaring that Boulevard is obligated to indemnify and hold Namdor harmless from claims by anyone alleging that they have been exposed to hazardous condition as a result of the colling tower plume discharge issue and Namdor's violation of the Mechanical Code. (NYSCEF 72, Amended Complaint ¶ 55.) Boulevard argues that this cause of action must be dismissed as premature because

there are no factual allegations in the complaint that any building resident commenced an action against Namdor or any judgment has been obtained against it.

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009] [internal quotation marks and citations omitted].) "[A] request for a declaratory judgment is ordinarily premature where a future event affecting the obligations of the contracting parties is contemplated, yet uncertain of occurrence and beyond the parties' control." (*Buller v Goldberg*, 40 AD3d 333, 333 [1st Dept 2007].)

This cause of action is premature. The amended complaint is devoid of allegations that anyone has actually commenced a lawsuit against Namdor or that that Namdor made any payments in connection with any exposure. Namdor does not dispute this or even oppose dismissal of this cause of action in its opposition. The third cause of action is dismissed.

5. Violation of Administrative Code of the City of New York § 22-902

Namdor alleges commercial tenant harassment pursuant to Administrative Code of the City of New York § 22-902 (Administrative Code § 22-902). Boulevard argues that this clam is insufficiently plead because Namdor fails to allege any conduct that could constitute harassment pursuant to the statute and instead relies on the legally insufficient theory that Boulevard's conduct prevented Namdor from obtaining an extension or renewal of its tenancy.

Administrative Code § 22-902 (a) (10) provides that

"a. A landlord shall not engage in commercial tenant harassment. . . . [C]ommercial tenant harassment is any act or omission by or on behalf of a

> landlord that (i) would reasonably cause a commercial tenant to vacate covered property . . . and (ii) includes one or more of the following:
> . . .
> 10. engaging in any other repeated or enduring acts or omissions that substantially interfere with the operation of a commercial tenant's business."

Here, Namdor alleges that Boulevard's repeated refusal to approve Namdor's proposals to remedy cooling tower code violations and related nonfeasance substantially interfered with Namdor's ability to conduct its business and that Boulevard l's conduct was intended to and did cause Namdor to vacate the premises. (NYSCEF 72, Amended Complaint ¶¶ 70, 71.) Accordingly, Namdor sufficiently alleges conduct by Boulevard that falls within the definition of commercial tenant harassment pursuant to Administrative Code § 22-902 (a) (10).

Although Boulevard accurately notes that lawful termination of a lease cannot constitute commercial tenant harassment (Administrative Code § 22-902 [b]), the Lease termination is not alleged to form basis of this claim. Also, Administrative Code § 22-903 (b) states any monetary remedy awarded for commercial tenant harassment "shall be reduced by any amount of delinquent rent or other sum for which a court finds such commercial tenant is liable to the landlord" but does not preclude a tenant delinquent on rent from asserting a commercial tenant harassment claim. Accordingly, this branch of Boulevard's motion is denied.

Motion Sequence 003

Leave to Amend

Namdor moves to amend its amended complaint to add a constructive eviction claim. In its proposed amended complaint, Namdor alleges that Boulevard Retail refused to approve Namdor's proposals to remediate its colling tower violations and that

> "79. To comply with law and avoid future civil and criminal liability, [Namdor] was forced to decommission the . . . Cooling Towers in July 2018.
>
> 80. [Namdor] was forced to abandon the Premises in July 2018 because [Namdor] could neither: i) operate its grocery store without the [Namdor] Cooling Towers; nor ii) continue to incur civil and criminal liability based upon Boulevard Retail's and the Condominium Board's bad faith and misconduct.
>
> 81. Boulevard Retail's wrongful actions prevented [Namdor] from using the Premises as intended and constructively evicted [Namdor] from the Premises."

(NYSCEF 179, Proposed Amended Complaint ¶¶ 74, 79-81.) Namdor seeks damages in the amount of no less than $5,000,000. (*Id*. ¶ 83.)

"[L]eave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345(U), *3-4 [Sup Ct, NY County 2021].)

Namdor does not deny that it stopped paying rent in September 2017. "Having elected that remedy, rather than remaining in the premises and paying rent, they are not entitled to damages." (*E-Z Eating 41 Corp. v H.E. Newport, LLC*, 171 AD3d 415, 415 [1st Dept 2019], citing *Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]; *see also Schwartz v. Hotel Carlyle Owners Corp.*, 132 AD3d 541 [1st Dept 2015]; *Robert B. Jetter, M.D., PLLC v 737 Park Ave. Acquisition LLC*, 2017 NY Slip Op 30797[U], *14 [Sup Ct, NY County 2017].) While constructive eviction can be a defense to claims of nonpayment of rent, here Namdor seeks to add it as a claim and seeks monetary damages. Namdor cannot do so when it chose to withhold rent. As a matter

of law, Namdor is not entitled to seek monetary damages for constructive eviction as it elected its remedy to withhold rent. The motion to amend is denied.

Documentary and Testimonial Discovery

Namdor moves to take documentary and testimonial discovery from Flitt, Abbot and their respective employers, Rosenberg & Estis and Cushman and Wakefield. Boulevard does not address this portion of Namdor's motion, and thus, it is granted.

Disqualification of Flitt

Namdor moves to disqualify Flitt pursuant the advocate-witness rule, asserting that it is likely that Flitt will be called as a necessary witness. Namdor points to the court to Flitt's affirmation submitted in connection with Boulevard's partial summary judgment motion, arguing that it contains numerous allegations of material fact that are in dispute.

"A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact." (Rules of Prof Conduct [22 NYCRR 1200.0] rule 3.7 [a].)

> "On a motion for disqualification, [t]he challenging party carries a heavy burden of identifying the projected testimony of the advocate-witness and demonstrating how it would be so adverse to the factual assertions or account of events offered on behalf of the client as to warrant his [or her] disqualification . . . . Disqualification [under the advocate-witness rule] may be required only when it is likely that the testimony to be given by the witness is necessary. Testimony may be relevant and even highly useful but still not strictly necessary. A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence."

(*Dishi v Fed. Ins. Co.*, 112 AD3d 484, 484 [1st Dept 2013] [citations and internal quotation marks omitted].)

Namdor has not shown that Flitt's testimony is necessary to Namdor's case or defense. For example, Flitt's statements regarding the monthly rent amount, i.e., that

the parties agreed upon an annual fixed rent amount of $1,050,330.00 or $87,527.50 a month do not make his testimony necessary. (NYSCEF 203, Flitt aff ¶¶ 19, 20.) The rent amount is determined by the formula set forth in the Lease and the parties have given the court no reason to go beyond that document at this stage. (*See S & S Hotel Ventures LP v 777 S. H. Corp.*, 69 NY2d 437, 446 [1987].) Further, if any additional agreements were reached by the parties, Flitt would not be the only person with knowledge. This is true of other statements as well – Flitt is not the only person with knowledge. (*See e.g.,* NYSCEF 203, Flitt aff ¶ 39.) Finally, Boulevard represents that it has no intention of calling Flitt as a witness. (NYSCEF 198, Opp Memo at 14; *see Patterson v Beth Abraham Nursing Home*, 209 AD3d 538, 539 [1st Dept 2022] ["Plaintiff represents that she is not likely to call [her attorney] as a witness on her behalf on any significant issue in the case, as he does not have any relevant, material knowledge or information regarding the allegations of the complaint."].) Accordingly, this branch of Namdor's motion is denied.

Striking Boulevard Retail's Amended Notice of Motion

Namdor argues that Boulevard's amended notice of motion for partial summary judgment should be stricken. The court addresses this in n.1, *supra*. This branch of Namdor's motion is denied.

Boulevard's Cross-Motion for Sanctions

Boulevard cross-moves for sanctions and attorneys' fees because Namdor's (i) motion to amend the complaint is meritless and premised on lies; (ii) request to

disqualify Flitt is meritless; and (iii) motion is a delay tactic and is undertaken to harass Boulevard Retail and its attorneys.

22 NYCRR § 130-1.1 (c) defines frivolous conduct, which is sanctionable, as conduct if

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

"The imposition of sanctions pursuant to 22 NYCRR 130-1.1 is a matter entrusted to the sound discretion of the trial court." (*Rector, Church Wardens & Vestrymen of the Trinity Church in the City of New York v. Video Editions, Inc.*, 4 Misc 3d 43, 44 [App Term,1st Dept 2004]).

Although unsuccessful, Namdor's motion to amend and disqualify are not meritless as to warrant sanctions. Further, Boulevard fails to show that Namdor's motion was merely a delay tactic intended to maliciously harass. The fact that Namdor filed its motion after Boulevard's motion for partial summary judgment, and four years after the inception of this litigation, is insufficient to show that Namdor's primary purpose was to delay the resolution of the litigation or harass Boulevard and its attorneys. Accordingly, Boulevard's cross-motion is denied.

The court has considered the balance of the parties' arguments and finds that they do not demand an alternate result.

Accordingly, it is

ORDERED that defendant Boulevard Retail LLC's motion for partial summary judgment pursuant to CPLR 3212 (e) on its first and second counterclaims is granted, in

part, to the extent that defendant is granted summary judgment as to liability only on its first counterclaim and defendant's request for attorneys' fees is granted; otherwise, this motion is denied; and it is further

ORDERED that defendant Boulevard Retail LLC's motion to dismiss plaintiff Namdor Inc.'s first, second, third, and sixth causes of action is granted, in part, to the extent that the second (breach of the covenant of good faith and fair dealing) and third (declaratory judgment) causes of action are dismissed; the third cause of action is dismissed without prejudice as premature; and it is further

ORDERED that plaintiff Namdor Inc.'s motion for leave to amend its complaint pursuant to CPLR 3025 (b) to add a claim for constructive eviction is denied; and it is further

ORDERED that Namdor Inc.'s motion for leave to take documentary and testimonial discovery from Norman Flitt, Rosenberg & Estis, P.C., Edward Pierce Abbot, Jr., and Cushman and Wakefield is granted in the absence of opposition; and it is further

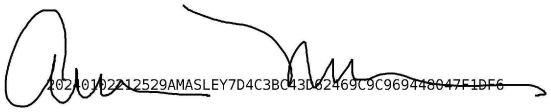
ORDERED that Namdor Inc.'s motion to disqualify Rosenberg & Estis, P.C. is withdrawn; and it is further

ORDERED that Namdor Inc.'s motion to disqualify Flitt from representing Boulevard Retail LLC is denied; and it is further

ORDERED that Namdor Inc.'s motion to strike Boulevard Retail LLC's Amended Notice of Motion is denied; and it is further

ORDERED that Boulevard Retail LLC's cross-motion, pursuant to Rule 130.1.1(c), for sanctions and attorneys' fees against Namdor is denied; and it is further

ORDERED that the parties' are to meet and confer and submit (via SFC-Part48@nycourts.gov and NYSCEF) a proposed discovery schedule within 10 days of the date of this decision and order.



1/2/2024
DATE

ANDREA MASLEY, J.S.C.

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