

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

2024 NY Slip Op 34092(U)

November 18, 2024

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, L.L.C.,

Plaintiff,

- v -

32 SIXTH AVENUE COMPANY LLC an TELX - NEW
 YORK 6TH AVE. LLC,

Defendant.

INDEX NO. 652792/2019

MOTION DATE --

MOTION SEQ. NO. 018

**DECISION + ORDER ON
 MOTION**

-----X

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 018) 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 724, 726, 727, 728, 729

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Defendant 32 Sixth Avenue Company LLC (Owner) moves (1) pursuant to CPLR 4311, for a supplemental order referring to Special Referee Jeremy R. Feinberg the issues of the amount of damages and attorneys' fees owed to Owner as a result of the Indemnification Order, dated September 26, 2023 (NYSCEF 685, Decision and Order [mot. seq. no. 017]), which granted Owner's motion for summary judgment on its crossclaim for indemnification against Defendant Telx-New York 6th Ave. LLC (Telx) arising out of Telx's breaches of the Telx Lease; (2) pursuant to CPLR 2221, for leave to renew the Indemnification Order and upon renewal, holding that the Indemnification Order and Telx's indemnification obligations are not released by Plaintiff CoreSite 32 Avenue of the Americas, L.L.C. (CoreSite)'s exercise of its contractual right of renewal under the CoreSite Lease; (3) pursuant to CPLR 2201, staying Referee Feinberg's consideration of the issue of indemnification pending entry of an order referring the

issue of indemnification to him. (NYSCEF 709, Order to Show Cause [mot. seq. no. 018].)

In the absence of opposition, Owner's motion was granted on the record on November 13, 2024 as to the first request to expand the referral to Referee Feinberg's to include calculation of the amount of damages and attorneys' fees owed to Owner as a result of the Indemnification Order, which granted Owner's motion for summary judgment on its crossclaim for indemnification against Defendant.. Owner is directed to submit the transcript to be so ordered. The remaining issue for decision is the scope of the calculation and whether it includes CoreSite's renewal period.

On May 9, 2019, CoreSite initiated this action for breach of contract. (NYSCEF 2, Complaint ¶ 2 ["The Lease, which is renewable by CoreSite for an additional ten years, also established the rates that CoreSite is to be charged for using specialized telecommunications equipment in the building".]) Since this action was filed, CoreSite's claim has included the renewal period. Therefore, Telx has been on notice that CoreSite's claim includes the renewal period since it was served with the summons and complaint. (NYSCEF 15, Affidavit of Service.) CoreSite exercised its right to renew in its September 27, 2021 letter which provides:

"The Demised Term is currently set to expire on April 21, 2023. Pursuant to Section 39.01A of the Lease, this letter shall serve as notice to Owner of Tenant's exercise of its first option to renew the Lease and the Demised Term for the First Renewal Term, commencing on the First Renewal Term Commencement Date of April 22, 2023. Per Section 39.02 of the Lease, Tenant may exercise said option by notice given by Tenant to Owner on or prior to the date which is eighteen (18) months immediately preceding the First Renewal Term Commencement Date; thus, this notice is timely. (NYSCEF 697, CoreSite's Lease Renewal Letter.)

As a preliminary matter, Owner's motion to renew its motion 017 is properly before the court. The court did not address Telx's opposition to Owner's motion 017 to reargue its motion for summary judgment wherein Telx argued that it was not liable to Owner for the renewal period. (NYSCEF 685, Decision and Order.) A motion for leave to reargue pursuant to CPLR 2221 (d) "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion." (CPLR 2221 [d] [2].) Pursuant to CPLR 2221(d)(3), a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry." Here, Telx failed to timely move to reargue sequence number 017. (NYSCEF 687, Notice of Entry of so-Ordered Transcript [mot. seq. no. 017]; 688, Notice of Entry of Decision and Order [mot. seq. no. 017].) Accordingly, Telx waived this argument.

Owner asserts this motion as one for renewal because Telx asserted to the Referee that it is not liable for the renewal period, as if Telx was successful on Owner's motion to renew summary judgment, which in fact, it waived by failing to timely renew. A motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" or must show that "there has been a change in the law that would change the prior determination" (CPLR 2221 [e] [2]). The Owner has hardly waited too long to raise the issue with the court since Telx only recently asserted this position to the Referee even though Telx waived it by failing to move for reargument in October 2023. (NYSCEF 695, Thompson Aff. ¶ 9 [Telx raised issue on August 2, 2024]; NYSCEF 709, Order to Show Case .) The court agrees that this a new fact, as Owner argues. Accordingly, the Owner has satisfied CPLR

2221. Either way, “[a]lthough renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion, courts have discretion to relax this requirement and to grant such a motion in the interest of justice.” (*Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003].) Justice requires that the court now address the issue of whether Telx is responsible for indemnification following CoreSite’s renewal of the lease. The court rejects Telx’s argument that addressing Telx’s argument now somehow deprives Telx of its due process. In fact, Telx has had two opportunities to be heard on this issue.

The Appellate Division affirmed this court’s decision to enforce Telx’s obligation to indemnify the Owner.

“the motion court properly determined that section 19.02(A)(i) of Telx's lease required it to indemnify the owner for ‘any default by [Telx] in the performance or observance of any of the terms, covenants or conditions of this Lease.’ Because section 1.07 of Telx's lease requires it to honor the owner's pricing commitments in plaintiff's lease, section 19.02(A)(i) of the Telx lease requires it to indemnify the owner for Telx's breach of section 29.09(A) of plaintiff's lease.” (*CoreSite 32 Ave. of the Ams, L.L.C. v 32 Sixth Ave. Co. LLC*, 227 AD3d 493 [1st Dept 2024].)

Contrary to Telx’s argument, the Appellate Division’s decision in no way limits Telx’s indemnification obligation. Rather, Telx’s indemnification obligation expires with its lease in 2033. (NYSCEF 285, Telx Lease dated July 10, 2007.)

Telx’s assertion that it did not see CoreSite’s lease renewal provision before Telx executed its lease with the Owner 17 years ago is irrelevant to Telx’s obligation to indemnify Owner. Telx executed its lease which provides for indemnification based on CoreSite’s lease §29.09(a). Telx cannot complain about its failure to review CoreSite’s June 30, 2007 lease before signing Telx’s July 10, 2007 lease with Owner. (See

NYSCEF 38, CoreSite's Lease.) It certainly could have refused to execute its lease until it reviewed the CoreSite lease.

As to CoreSite's lease, Telx has no consent right in its lease with the Owner. Accordingly, Telx's insistence on reviewing any changes to CoreSite's renewed lease is rejected. The only relevant portion of the CoreSite renewed lease is §29.09(A) and that remains unchanged according to the Renewal Acknowledgement. (NYSCEF 699, Renewal Lease Acknowledgement.) The exercise of a renewal option extends the original lease; it does not create a new lease. (*Dime Sav. Bank, FSB v Montague St. Realty Assocs.*, 90 NY2d 539, 543 [1997] ["Once the option [to renew] is exercised, the original lease is deemed a unitary one for the extended term and a new lease is not necessary. The parties hold, not under any contract of renewal, but by virtue of the original lease"]; See also *Atkin's Waste Materials, Inc. v. May*, 34 NY2d 422, 426 [1974].) This is not an assignee case and thus Telx's cases are inapplicable. For all these reasons, Telx's challenges to CoreSite's renewal as a new contract extinguishing CoreSite's original lease (NYSCEF 71, Notice of Entry of Decision and Order [mot. seq. no. 002]) and CoreSite's renewal rent as not the fair market value are irrelevant to the issue before the court.

The court has considered the parties' remaining arguments and finds them without merit or otherwise not requiring an alternate result.

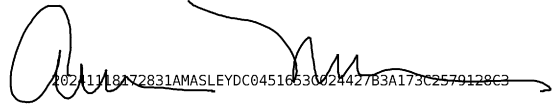
Accordingly, it is

ORDERED that defendant's motion for a supplemental order referring to Special Referee Jeremy R. Feinberg the issues of the amount of damages and attorneys' fees

owed to Owner as a result of the Indemnification Order is granted, and thus denied as to the stay; and it is further

ORDERED that defendant's motion for leave to renew the Indemnification Order pursuant to CPLR 2221 is granted and upon reconsideration, the Indemnification Order and Telx's indemnification obligations are not released by CoreSite's exercise of its contractual right of renewal under the CoreSite Lease; and it is further

ORDERED Owner is directed to submit the transcript to be so ordered.


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11/18/2024

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE