Schulte Roth & Zabel LLP v Metropolitan 919 3rd Ave. LLC
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July 9, 2025
Supreme Court, New York County
Docket Number: Index No. 655632/2020
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREA MASLEY** **PART** 48

Justice

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SCHULTE ROTH & ZABEL LLP,

Plaintiff,

- v -

METROPOLITAN 919 3RD AVENUE LLC, IN ITS INDIVIDUAL CAPACITY AS SUCCESSOR IN INTEREST TO 919 THIRD AVENUE ASSOCIATES L.P.,

Defendant.

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INDEX NO. 655632/2020

The issues in this action to be determined after a bench trial[1] are (1) whether plaintiff, the tenant, Schulte Roth & Zabel LLP (SRZ),[2] is entitled to an abatement under section 5.4 (Rent Abatement Provision) of the May 13, 1998 lease (SRZ Lease) with defendant, the landlord, Metropolitan 919 3rd Avenue LLC (Landlord)[3] due to Unavoidable Delays as defined by Article 24 (Unavoidable Delays), and (2) if an abatement was triggered, then when did it end. SRZ has the burden of proving, by a

[1] Consistent with Commercial Division Rule 32-a, the trial was conducted with direct testimony by affidavit. (22 NYCRR § 202.70.) Citations to "aff" refer to direct trial testimony affidavits.

[2] SRZ is a law firm with offices on the 19th-27th 27th floors (Premises) at 919 Third Avenue in New York, New York (Property). (NYSCEF Doc. No. [NYSCEF] 244, Joint Statement of Undisputed Facts [JSUF] ¶ 1.)

[3] In 1997, Landlord acquired 919 Third Avenue Associates LP. (NYSCEF 247, Nash aff ¶ 5.) Then, SL Green Realty Corp. (SL Green) acquired Landlord in 2006. (NYSCEF 244, JSUF ¶ 3; NYSCEF 357, Durels tr at 564:3-14.) Steven Durels is the Executive Vice President of SL Green. (*Id.* at 531:19-21.)

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preponderance of the evidence, that the SRZ Lease reads as SRZ contends. (PJI 4:1 at 1.)

The court denied Landlord's motion to dismiss finding the Rent Abatement Provision ambiguous. (NYSCEF 38, Decision and Order [mot. seq. 001].) The Appellate Division affirmed.[4] (*Schulte Roth & Zabel LLP v Metro. 919 3rd Ave. LLC,* 202 AD3d 641 [1st Dept 2022].) The task at trial was to determine the parties' intent upon entering the SRZ Lease: if there was an Unavoidable Delay, does the SRZ Lease also require a landlord breach by failure to provide services to trigger the Rent Abatement Provision. (*Id.* at 642.) "[E]xtrinsic evidence is permitted… to determine the intent of the parties at the time the contract." (*Hambrecht & Quist Guar. Fin., LLC v ElCoronado Holdings, LLC*, 27 AD3d 204, 204 [1st Dept 2006] [citation omitted].)

[4] Specifically, the Appellate Division described the two competing interpretations of the Rent Abatement Provision as follows: "On the one hand, section 5.4 can be reasonably interpreted to mean that plaintiff will be entitled to a rent abatement only if plaintiff's inability to use the premises is a result of defendant's breach of its obligations under the lease. Pursuant to this interpretation, the condition within the parentheses is directly connected to the condition that comes before the parenthesis and means that the plaintiff would be entitled to a rent abatement if the plaintiff is unable to use the leased premises because the landlord breached an obligation under the lease, and the breach is caused, in whole or in part, by an Unavoidable Delay, as defined in the lease, if the Unavoidable Delay continues for more than 15 business days. On the other hand, section 5.4 can also be reasonably interpreted to mean that plaintiff will be entitled to a rent abatement if one of two conditions occur. Specifically, the plaintiff would be entitled to a rent abatement if it is unable to use the leased premises, which is caused by either (i) landlord's breach of an obligation under the lease, or (ii) Unavoidable Delays that continue for more than: 15 business days. Pursuant to this interpretation, the use of the disjunctive "or" at the beginning of the parenthetical clause distinguishes the second condition within the parenthetical as a separate and alternative condition to the first condition, which comes before the parenthesis. Moreover, as a separate condition, it does not require that the landlord breach an obligation under the lease in order for the plaintiff to be entitled to a rent abatement." (*Schulte Roth & Zabel LLP,* 202 AD3d at 642.)

Contentions

SRZ contends that it is entitled to a rent abatement of $38 million flowing from SRZ's inability to use its office for its ordinary business due to the COVID-19 pandemic and related governmental, health and safety orders; requirements; guidelines; and protocols—all of which constituted Unavoidable Delays under the SRZ Lease. Specifically, Article 24 of the SRZ Lease, in part, defines Unavoidable Delays to include "any cause whatsoever" beyond SRZ's, or Landlord's, control, "including but not limited to" laws, rules, and requirements relating to national emergencies and public health and safety matters. (NYSCEF 254, SRZ Lease.) SRZ asserts that, at trial, it established that the parties intended that Unavoidable Delays lasting more than 15 days, such as those caused by the COVID -19 pandemic, without an accompanying breach of the Lease by the Landlord, triggered the Rent Abatement Provision. According to SRZ, the Unavoidable Delays terminated on March 14, 2022. (NYSCEF 247, Nash[5] aff ¶¶ 3-4, 40.)

Landlord opposes the rent abatement arguing that the parenthetical in §5.4 of SRZ's Lease – "(or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of fifteen (15) consecutive Business Days)" -- simply introduces two alternative timings for SRZ's rent abatement, depending on the cause of the predicate Landlord breach. (NYSCEF 254, SRZ Lease.) If the cause of SRZ's inability to use the Premises is due to a Landlord breach resulting from Unavoidable Delays, then SRZ's inability to

[5] Robert S. Nash, Esq. is a real-estate attorney at SRZ. (NYSCEF 247, Nash aff ¶¶ 2-3.)

use the Premises must continue for a period of fifteen business days before SRZ is entitled to a rent abatement. Conversely, if SRZ's inability to use the Premises is due to a landlord breach that is "other than as a result of" Unavoidable Delays, then SRZ is entitled to an immediate rent abatement (i.e., Landlord is not entitled to 15-day grace period). The parenthetical simply gives Landlord a longer grace period in the event of an Unavoidable Delay which is out of the Landlord's control. Landlord also relies on the entirety of Article 24, entitled Inability to Perform,[6] which defines "Unavoidable Delays" and presupposes a delay of performance, countering SRZ's position that "delay" has no meaning in Article 24 based on SRZ's limited reading of Article 24 ("any cause whatsoever reasonably beyond such party's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any Legal Requirements or by reason of the conditions of supply and demand which have been or are affected by war or other emergency"). Rather, Landlord contends that neither Landlord nor SRZ were prevented or delayed from fulfilling any of their lease obligations due to the COVID-19 pandemic and associated workforce reduction orders, and therefore, the COVID-19 pandemic was not an Unavoidable Delay. Landlord contends that the evidence established that the parties intended to require a landlord breach and Unavoidable Delays for 15 days to trigger the Rent Abatement Provision. Alternatively, if the Rent Abatement Provision was triggered, then it terminated on June 22, 2020. (*See* NYSCEF 184, Governor Cuomo announcement at 2 [Governor Cuomo announced that New York had entered Phase II of its phased reopening].)

[6] Of course, the headings are for convenience and not determinative. (NYSCEF 254, SRZ Lease ¶32.3.)

SRZ's Lease

The Rent Abatement Provision in Article 5, entitled "Repairs; Floor Load", of the SRZ Lease provides:

> "Section 5.4 Notwithstanding anything to the contrary contained in any other provision of this Lease, in the event that (a) Tenant is unable to use the Premises, or any portion thereof consisting of 750 Rentable Square Feet or more, for the ordinary conduct of Tenant's business, due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements, in each case other than as a result of Unavoidable Delays or Tenant Delays **(or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of fifteen (15) consecutive Business Days)** after Tenant gives a notice to Landlord (the 'Abatement Notice') stating that Tenant's inability to use the Premises or such portion thereof is solely due to such condition, (b) Tenant does not actually use or occupy the Premises or such portion thereof during such period, and (c) such condition has not resulted from the negligence or misconduct of Tenant or any Tenant Party, then Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be abated as to the Premises or affected portion on a per diem basis for the period commencing immediately (or on the fifteenth (15th) Business Day, if such condition results, in whole or in part, from Unavoidable Delays) after Tenant gives the Abatement Notice, and ending on the earlier of (i) the date Tenant reoccupies the Premises or such portion thereof for the ordinary conduct of its business, or (ii) the date on which such condition is substantially remedied and Landlord has notified Tenant thereof. (NYSCEF 254, SRZ Lease § 5.4 [the disputed language is in bold].) [7]

For context, the Rent Abatement Provision is preceded by § 5.1, which assigns responsibility for repairs of Property's systems and public portions of the Property to the Landlord and of the Premises to the SRZ. (*Id*. § 5.1.) Section 5.2 concerns loads. (*Id*. § 5.2.) Section 5.3 prohibits any "diminution of rental value" or "constructive eviction" and "no liability on the part of Landlord by reason of inconvenience, annoyance or injury

[7] The SRZ Lease has been amended eight times, but "[n]one of the amendments to the initial Lease contains any change to (a) §5.4, (b) § 18.3, (c) Article 24, (d) Article 25, or (e) the definitions of Unavoidable Delay, Legal Requirements, Governmental Authority, or including. (NYSCEF 244, JSUF ¶¶ 12, 14.)

to business arising from Landlord making, or failing to make, any repairs." (*Id*. § 5.3)

Section 5.5 prohibits SRZ from window cleaning from the outside. (*Id*. § 5.5.)

The term Unavoidable Delays is defined within Article 24 of the SRZ Lease, which is entitled "Inability to Perform." It provides:

> "Except as expressly provided herein to the contrary, this Lease and the obligation of Tenant to pay Fixed Rent and Additional Rent hereunder and perform all of the other covenants and agreements hereunder on the part of Tenant to be performed, and the obligation of Landlord to perform all of the covenants and agreements hereunder on the part of Landlord to be performed, will not be affected, impaired or excused because Landlord or Tenant, as the case may be, is unable to fulfill any of its obligations under this Lease expressly or impliedly to be performed by landlord or Tenant (but not including Tenant's obligation to pay Fixed Rent and Additional Rent hereunder or any obligation of Landlord expressly set forth in this Lease to pay monetary amounts to Tenant), as the case may be, or because Landlord or Tenant, as the case may be, is unable to make, or is delayed in making any repairs, additions, alterations, improvements or decorations or is unable to supply or is delayed in supplying any equipment or fixtures, if Landlord or Tenant, as the case may be, is prevented or delayed from so doing by reason of strikes or labor troubles or by accident, or **by any cause whatsoever reasonably beyond such party's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any Legal Requirements or by reason of the conditions of supply and demand which have been or are affected by war or other emergency ('Unavoidable Delays'),** but excluding such party's financial inability. Landlord and Tenant each shall notify the other as promptly as is reasonably practicable after learning of any Unavoidable Delay which prevents such party from fulfilling any of its obligations under this Lease." (NYSCEF 254, Lease at 89-90[8] [Article 24] [provision on which SRZ relies is in bold].)

The initial draft of the SRZ Lease was based on a 1997 lease between DraftWorldwide Inc. (DW), an advertising company,[9] and Landlord (DW Lease). (NYSCEF 244, JSUF ¶ 32.) Nash of SRZ represented Nomura Securities Company

[8] NYSCEF Pagination.

[9] Oddly, DW requested Nomura's approval to build a trading floor and securities trading and sales facility, which Nomura rejected. (NYSCEF 161, October 8, 1997 SRZ Memo at SRZ0002193; NYSCEF 354, Nash tr 106:21-107:3.)

(Nomura)[10] in the DW Lease, while Jonathan Mechanic of Fried Frank Harris Shriver & Jacobson LLP[11] (FF) represented DW. (NYSCEF 244, JSUF ¶ 22, 23; NYSCEF 247, Nash aff ¶ 8.) Soon thereafter, SRZ, which had been in the market for new office space, negotiated with Nomura and moved into the Property. (NYSCEF 249, Waldenberg[12] aff ¶¶ 5-8.) Accordingly, the court first examines the intent of the parties to the DW Lease.

DW Lease Negotiation

"In 1997, the Property was among the largest commercial office buildings in New York City." (NYSCEF 247, Nash aff ¶ 9.) DW was interested in leasing over 100,000 square feet at the Property. (*Id*. ¶ 6.) Nomura was a Japanese lender which was not interested in owning and managing the Property. (NYSCEF 247, Nash aff ¶ 5; NYSCEF 354, Nash tr at 154:1-19, 155:15-20.) Instead, Nomura's plan was to sell the Property, but multiple floors were vacant or expected to be vacated soon. (NYSCEF 247, Nash aff ¶ 6; NYSCEF 248, Miller aff ¶ 8.) For example, Skadden, Arps, Slate, Meagher & Flom LLP, which was one of the largest tenants occupying more than 700,000 rentable square feet across 21 floors, was moving out and Kramer Levin Naftalis & Frankel LLP's lease for several floors was coming to an end. (NYSCEF 247, Nash aff ¶ 6; NYSCEF

[10] Nomura took title to the Property when the Property's then-owner defaulted on a loan from Nomura. (NYSCEF 244, JSUF ¶ 17; NYSCEF 247, Nash aff ¶ 5; NYSCEF 248, Miller aff ¶ 7; *See* NYSCEF 255, January 1998 NY Times article regarding shifts in tenants at the Property [NY Times article].)

[11] FF represents Landlord in this litigation.

[12] Alan S. Waldenberg, Esq. is a member of SRZ's Executive Committee and led the search for new office space and lead the negotiations of the Lease. (NYSCEF 249, Waldenberg aff ¶¶ 1,3, 6)

248, Miller aff ¶ 7; NYSCEF 249, Waldenberg aff ¶ 7; NYSCEF 255, NY Times article; NYSCEF 354, Nash tr at 155:2-14.)

The court credits SRZ's contention that Nomura was "desperate" to lease the Property and rejects Landlord's objection based on a news report that Nomura had four tenants looking to rent 950,000 square feet. (*See* NYSCEF 255, NY Times article at 4-5.) Since Nomura had acquired the Property in a foreclosure and was not a professional landlord, it was, at a minimum, anxious to sell the Property occupied by long-term tenants which would improve the sale price of the Property. (NYSCEF 247, Nash aff ¶ 5; NYSCEF 248, Miller aff ¶ 8; NYSCEF 354, Nash tr at 154:1-19, 155:15-20; NYSCEF 355, Mechanic tr at 282:3-9.)

Nomura engaged Douglas Gardner of then the O'Connor Group[13] and Robert Alexander of Edward S. Gordon (ESG) as brokers to lease the Property and on the DW deal. (NYSCEF 247, Nash aff ¶ 5.) Gardner engaged Nash as leasing counsel for the Property. (NYSCEF 244, JSUF ¶¶ 18-19; NYSCEF 247, Nash aff ¶ 7.)

Nomura's September 15, 1997 draft lease did not include a rent abatement provision. (NYSCEF 363, Nomura's Draft of DW Lease.) The original § 9.8, entitled "No Warranty of Landlord," in the draft the DW Lease provides:

> "Section 9.8 No Warranty of Landlord. Landlord does not warrant that any of the services to be provided by Landlord to Tenant hereunder, or any other services which Landlord may supply (a) will be adequate for Tenant's particular purposes or as to any other particular need of Tenant or (b) will be free from interruption, and Tenant acknowledges that any one or more such services may be interrupted or suspended by reason of Unavoidable Delays. In addition, Landlord reserves the right to stop, interrupt or reduce service of the Building Systems by reason of Unavoidable Delays, or for repairs, additions, alterations, replacements, decorations or improvements which are, in the judgment of

[13] O'Connor Group is an investment advisory group charged with managing and leasing properties. (NYSCEF 247, Nash aff ¶ 5.)

> Landlord, necessary to be made, until said repairs, alterations. replacements or improvements shall have been completed. Any such interruption or discontinuance of service, or the exercise of such right by Landlord to suspend or interrupt such service shall not (i) constitute an actual or constructive eviction, or disturbance of Tenant's use and possession of the Premises, in whole or in part, (ii) entitle Tenant to any compensation or to any abatement or diminution of Fixed Rent or Additional Rent, (iii) relieve Tenant from any of its obligations under this Lease, or (iv) impose any responsibility or liability upon Landlord or its agents by reason of inconvenience or annoyance to Tenant, or injury to or interruption of Tenant's business, or otherwise. Landlord shall use reasonable efforts to minimize interference with Tenant's access to and use and occupancy of the Premises in making any repairs, alterations, additions, replacements, decorations or improvements; provided, however, that Landlord shall have no obligation to employ contractors or labor at 'overtime' or other premium pay rates or to incur any other 'overtime' costs or additional expenses whatsoever. Landlord shall not be required to furnish any services except as expressly provided in this Article 9." (NYSCEF 363, Nomura Draft of DW Lease.)
>
> On October 1, 1997, DW proposed replacing Nomura's § 9.8 with Rider 9.8.

(NYSCEF 160, FF's Draft of DW Lease.)

Rider 9.8 would provide:

> "9.8 Landlord reserves the right, upon reasonable notice, without any liability to Tenant except as otherwise expressly provided in this lease, to interrupt, curtail, suspend or stop any of Landlord's services to Tenant or the Premises (including heating, ventilating, air-conditioning, elevator, water and such other services as may hereafter be undertaken by Landlord for Tenant) at such times as may be necessary, and for so long as may be reasonably required, for the making of repairs or changes which Landlord is required by this lease to make or reasonably deems necessary; provided, however, if necessary to prevent substantial interference with the occupancy and use by Tenant of the Premises, such repairs or changes shall be made and services interrupted, curtailed, suspended or stopped, except in cases of emergency, only after 6:00 p.m. or before 8:00 a.m. or on Saturdays or Sundays, except that if any of the Building's systems shall be seriously damaged and Landlord shall inform Tenant that it intends to repair such damage on a continuous basis (including between 6:00 p.m. and 8:00 a.m.), Landlord shall be entitled also to repair such damage between 8:00 a.m. and 6:00 p.m. In each such case, Landlord shall exercise due diligence to effect restoration of service and shall give Tenant reasonable notice, when practicable, of the commencement or stoppage of any of Landlord's services. If, at any time during the term of this lease, an Untenantable Condition (as herein defined) shall exist, then Tenant, as its sole and exclusive remedy with respect thereto, shall be entitled to an abatement of Fixed Rent and Additional Charges in an amount equal to the Abatement Amount (as herein defined) for the

> period_commencing on the first Business Day for which such Untenantable Condition exists and ending on the date upon which the Untenantable Condition no longer exists. For purposes of this Section: (A) an 'Untenantable Condition' shall be deemed to exist at all times during which (i) there exists a Basic Services Failure, (ii) such Basic Services Failure is not the result of one or more acts or omissions of Tenant or any occupant of any portion of the Premises, and (iii) such Basic Services Failure materially and adversely affects the Premises (or a Substantial Portion thereof that was then being occupied) for a period of three (3) consecutive Business Days after Tenant notifies Landlord of such Basic Services Failure and that the Premises (or such Substantial Portion thereof) have been so materially and adversely affected; (B) a 'Basic Services Failure' shall be deemed to exist at all times during which (i) the elevator access being furnished to the Premises fails to materially comply with Section 15.02(b) hereof, ((ii) the heat, ventilation or air conditioning being furnished at or to the Premises fails to materially comply with Section 15.02(a) hereof, or (iii) the electrical energy being furnished at or to the Premises fails to materially comply with Section 14.07(a) hereof; (C) the term 'Substantial Portion' shall mean any portion of the Premises which consists of at least 5,000 contiguous rentable square feet; and (D) the term 'Abatement Amount' shall mean (i) one hundred (100%) percent of the Fixed Rent otherwise payable hereunder in respect of that portion or those portions of the Premises (1) with respect to which an Untenantable Condition exists, and (2) which as a result thereof become untenantable and have in fact been vacated and are not occupied as a result of the existence of such Untenantable Condition; and (ii) fifty (50%) percent of the Fixed Rent otherwise payable hereunder in respect of that portion or those portions of the Premises (1) with respect to which an Untenantable Condition exists, and (2) which have not in fact been vacated and continue to be occupied. Any dispute between Landlord and Tenant as to whether or not an Untenantable Condition exists or whether or not Tenant is entitled to an abatement pursuant to this Section 15.05 shall be determined by Expedited Arbitration in accordance with the - provisions of Article 39 hereof." (*Id*. at 98 [Rider 9.8].)

FF[14] also added a comment next to § 9.2(f) of the October 1 DW Draft which refers to Rider 9.8 as "the rent abatement provision for loss of services." (NYSCEF 160,

[14] Mechanic cannot identify the handwriting of the mark-up but confirmed that it is not his own handwriting. (NYSCEF 355, Mechanic tr at 300:24-301:2.) Mechanic worked with two associates on the DW deal including Frances P. Schreiber with whom he had worked for ten years. (NYSCEF 145, Mechanic aff ¶ 14; NYSCEF 355, Mechanic tr at 314:2-4, 299:2-5.) However, Mechanic explained that he works with many attorneys. (NYSCEF 355, Mechanic tr at 302:18-19 ["I have a hundred people who work for me. I don't recognize each of their handwriting. It's not my job."]) It is undisputed that FF wrote the comment.

FF's Draft of the DW Lease at 23.) For context, Article 9, entitled Services, states in § 9.1 that landlord shall provide the following services: electricity (§ 9.2); heat ventilation and air condition (§ 9.3); elevators (§ 9.4); cleaning (§ 9.5); garbage removal (§ 9.6.); water (§ 9.7); data transmission equipment (§ 9.9). (*Id.* at 22-27.)

Nash summarized FF's proposed changes in an October 8, 1997 memorandum. (*See* NYSCEF 161, October 8, 1997 Memo.) Nomura rejected several of FF's demands,[15] and countered FF's rent abatement provision with its own language. (NYSCEF 162, Nomura's October 18, 1997 Draft of DW Lease.) In its October 18, 1997 draft, Nash introduced § 5.4 and restored § 5.3. (*Id*. at 16; NYSCEF 354, Nash tr at 57:10-21.) Section 5.4 provides:

> "Section 5.4 Notwithstanding anything to the contrary contained in any other provision of this Lease. in the event that (a) Tenant is unable to use the Premises or any portion thereof consisting of one full floor or more, for the ordinary conduct of Tenant's business due to Landlord's breach of an obligation under this Lease to provide services, perform repairs. or comply with Legal Requirements. in each case other than as a result of Unavoidable Delays, and such condition continues for a period in excess of ten (10) consecutive days (or. if Tenant's inability to use the Premises or portion thereof results. in whole or in part. from Unavoidable Delays and such condition continues for a period in excess of thirty (30) consecutive days) after Tenant gives a notice to Landlord (the "Abatement Notice") stating that Tenant's inability to use the Premises or such portion thereof is solely due to such condition, (b) Tenant does not actually use or occupy the Premises or such portion thereof during such period, and (c) such condition has not resulted from the negligence or misconduct of Tenant or any Tenant Party, then Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be abated as to the Premises or affected portion on a per diem basis for the period commencing on the tenth (10th) day (or thirtieth (30th) day. if such condition results, in whole or in part. from Unavoidable Delays. as the case may be) after Tenant gives the Abatement Notice. and ending on the earlier of (i) the date Tenant reoccupies the Premises or such portion thereof for the ordinary conduct of its business, or (ii) the date on which such condition is substantially

[15] For example, Nomura would not agree "to be reasonable as to Tenant's choice of electrical, plumbing, sprinkler and HVAC contractors," or to provide "heat on Saturdays from 8 a.m. to 1 p.m." (NYSCEF 161, October 8, 1997 Memo at 2-3.)

> remedied." (NYSCEF 162, Nomura October 18, 1997 Draft of DW Lease at 16 [§5.4].)

Nash testified that § 5.4 language was "found" by his team, and he amended the form language to suit the discussions had among DW, Nomura, and their representatives, some of which Nash participated in and some of which were reported to him. (NYSCEF 354, Nash tr at 191:4-25; NYSCEF 247, Nash aff ¶ 11.)

FF summarized the "open" issues discussed at a meeting in an October 27, 1997 memo. (NYSCEF 163, FF October 27, 1997 Memo.) Apparently, § 5.4 was not one of them and Nash did not respond otherwise.

Nash circulated a revised draft of the DW lease on November 10, 1997 which contained edits not relevant to this decision. Section 5.4 remained essentially the same:

> "Notwithstanding anything to the contrary contained in any other provision of this Lease, in the event that (a) Tenant is unable to use the Premises, or any portion thereof consisting of one full floor or more, for the ordinary conduct of Tenant's business, due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements, in each case other than as a result of Unavoidable Delays **or Tenant Delays,** and such condition continues for a period in excess of ten (10) consecutive days (or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of thirty (30) consecutive days) after Tenant gives a notice to Landlord (the "Abatement Notice") stating that Tenant's inability to use the Premises or such portion thereof is solely due to such condition, (b) Tenant does not actually use or occupy the Premises or such portion thereof during such period, and (c) such condition has not resulted from the negligence or misconduct of Tenant or any Tenant Party, then Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be abated as to the Premises or affected portion on a per diem basis for the period commencing on the tenth (10th) day (or thirtieth (30th) day, if such condition results, in whole or in part, from Unavoidable Delays, as the case may be) after Tenant gives the Abatement Notice, and ending on the earlier of (i) the date Tenant reoccupies the Premises or such portion thereof for the ordinary conduct of its business, or (ii) the date on which such condition is substantially remedied **and Landlord has notified Tenant thereof**." (NYSCEF 164, November 10, 1997 Draft of DW Lease at 25 [modified language in Bold].)

Nash described § 5.4 as "a risk-sharing mechanism pursuant to which, if DW were to be unable to use its space at the Property due to Unavoidable Delays, DW initially would bear the risk (i.e., DW would continue to pay the rent even though the Premises was unusable) for a set number of days—the most meaningful period for accepting the risk since, to my knowledge, no event continuing long enough to trigger such a clause had occurred since at least the end of World War II-after which (and after DW notified Landlord of the situation), the risk would be shifted to Landlord (i.e., DW would receive a rent abatement)." (NYSCEF 247, Nash aff ¶ 16.)

Finally, the DW Lease was executed on December 19, 1997; § 5.4 was identical to the November 10, 1997 draft. (*Compare* NYSCEF 256, DW Lease, *with* NYSCEF164, November 10, 1997 Draft of DW Lease.)

Based primarily on the contemporaneous evidence, the court finds that the parties to the DW Lease intended to link the Rent Abatement Provision to Landlord's failure to provide services. The court gives more weight to written evidence over Nash's and Mechanic's oral testimony about a transaction that was negotiated and drafted 26 years ago. (*Segall v Finlay*, 126 Misc 625, 628 [Sup Ct. NY County 1925] ["When there is a conflict in the oral testimony, … contemporaneous writings … have great probative value, and especially when they were intended by the parties to be confirmation of the oral conversations."], *affd*, 245 NY 61 [1927].)

The court cannot conclude that, in 1997, the parties came to an agreement that DW was entitled to a rent abatement without a landlord failure of services. First, FF proposed to add the Rent Abatement Provision to Article 9 -- Landlord's "SERVICES," as is clear from the context, a provision about landlord services. (NYSCEF 354, Nash tr

at 72:9-20; NYSCEF 160 FF Draft of the DW Lease Art 9.) The parties could not have had a meeting of the minds that the rent abatement was not connected to the Landlord's failure to provide services, especially because that is not what DW requested. Second, FF's comment on the October 1 DW Draft next to § 9.2(f) refers to Rider 9.8 as "the rent abatement provision for loss of services." (NYSCEF 160, FF DW Lease Draft at 23.) It is a contemporaneous writing that supports the court's conclusion that DW intended to connect the rent abatement to a failure of Landlord's services. Third, Nash and Nomura were "not having conversations which were parsing the notion of an unavoidable delay related to the landlord's service versus unavoidable delay that was not related to the landlord's service. We were simply talking about unavoidable delays as a general concept and the lease was written that way, which is why from the day it was written and to today, I believe that it was intended to a very broad definition of unavoidable delays and was not in any way tied to being able to demonstrate a specific failure on the part of the landlord to provide a service." (NYSCEF 354, Nash tr at 162:1-19.) "[O]ne party's subjective interpretation of contract, which was not communicated to other party until litigation commenced, 'cannot be used to establish that [parties] had such intent and understanding when they entered into the … contract.'" (*LaSalle Bank N.A. v Nomura Asset Cap. Corp*., 424 F.3d 195, 207 n10 [2d Cir 2005] [citation omitted] [applying New York law].) Here, Nash and his client were not even having conversations about landlord's services or the absence thereof.

The court finds Nash generally credible and reliable. For example, he answered honestly, even when the answer was not helpful. (NYSCEF 354, Nash tr at 162:4-19.) He explained why the 1997-98 transactions at the Property were memorable to him and

what makes a transaction memorable to him; giving DW or getting SRZ a concession on an abatement, while "bespoke" in the industry, was not memorable. (NYSCEF 355, Nash tr at 194:6-195:12, NYSCEF 354, Nash aff ¶¶ 9-13.) The court credits Nash's recollection that DW sought a rent abatement provision to protect its tenancy from the repercussions of Y2K.[16] (NYSCEF 247, Nash aff ¶¶ 10-17.) However, Y2K would result in Landlord's failure to provide services, and thus, it does not support SRZ's contention that a landlord breach was not required for the Rent Abatement Provision. (*See* NYSCEF 360, June 1, 1997 Newsweek article ["The elevator that took you up to the party ballroom may be stuck on the ground floor, your car might not start, the traffic lights might be on the blink, the phones may not work, the office building might be locked up with a handwritten sign that says 'Out of Business Due to Computer Error"].) Accordingly, this is not useful testimony for SRZ. Likewise, implicit in Nash's explanation of a landlord and tenant sharing the risk for force majeure events, is Landlord's failure to provide services making "the Premises unusable." (NYSCEF 247, Nash aff ¶¶ 16-17; NYSCEF 354, Nash tr 58:14:59:6.)

However, Nash's testimony is contradicted by his statement that Nomura authorized him to "negotiate and to agree to a lease provision that, as DW requested, would entitle DW to a rent abatement should it find itself unable to use its offices in its ordinary course due to factors beyond the control of –and not necessarily resulting from a breach by –either party to the lease." (Compare NYSCEF 247, Nash aff ¶ 15; NYSCEF 354, Nash tr 162:10-13 ["We were simply talking about unavoidable delays as

[16] Miller corroborated that Nash mentioned Y2K regarding the SRZ lease. (NYSCEF 355, Miller tr at 210:14-21.)

a general concept and the lease was written that way, which is why from the day it was written and to today, I believe that it was intended to a very broad definition of unavoidable delays and was not in any way tied to being able to demonstrate a specific failure on the part of the landlord to provide a service"].) Also, Nash's testimony is undermined by the fact that the brokers were reporting about the negotiations to Nash, as is the custom in the industry, but he was not present. (NYSCEF 354, Nash tr at 72:17-73:17 [negotiations regarding the rent abatement were based on discussions among the brokers for DW and Landlord, not Nash].)

Again, while Nash was a credible witness, admittedly, and not at all surprisingly, he could not recall the transaction details of 26 years earlier, and on occasion, contradicted himself, or documentary evidence was inconsistent with his testimony. (NYSCEF 354, Nash tr at 52:19-22 [Nash could not recall the DW broker with whom he spoke], 50:18-51:1 [Nash testifying at his deposition that he erred in saying that Sonnenschein represented DW].) For example, Nash could not recall the meetings he had with Landlord and DW concerning whether the DW Lease could be drafted in a way that would provide DW relief if DW was not able to access the Property. (*Compare* NYSCEF 354, Nash tr at 56:2-19 [Nash testifying that he participated in one meeting with landlord and DW], *with* NYSCEF 247, Nash aff ¶ 11 ["I participated in a number of discussions with Landlord and DW"].) Further, Nash's oral testimony and affidavit regarding the timelines of negotiations is inconsistent with documentary evidence, and thus some of Nash's recollections are inaccurate. (*Compare* NYSCEF 247, Nash aff ¶¶ 15-16 ["When the negotiations were in their final stages, Landlord and DW agreed to include in the DW lease a risk-sharing mechanism…."], *and* NYSCEF 354, Nash tr at

65:16-23 ["[m]y recollection had been that [language in §5.4] had been resolved quite late in the negotiations. I'm not sure that was accurate.] *with* NYSCEF 256, DW Lease [Lease was executed in mid-December 1997—two months after Nash first drafted §5.4 in October 18, 1997 which was essentially identical].) Finally, Nash testified repeatedly that Unavoidable Delays presupposes delay. (NYSCEF 354, Nash tr 103:13-104:12 [(testifying that "Unavoidable Delay" refers to Landlord or Tenant "being prevented or delayed from some obligation that it may have"), Nash tr 121:10- 13 [testifying that the words "prevented or delayed from so doing" in the definition of Unavoidable Delay "generally refer[] to performing any obligation under the lease"]; Nash tr 130:4-10 [testifying that "Unavoidable Delays" refers to delays in performing obligations and is distinct from force majeure events].) The next day, Nash retracted his earlier testimony and took the position that the definition of "Unavoidable Delays" is limited ("any cause whatsoever reasonably beyond such party's control, including but not limited to, laws, governmental preemption in connection with a national emergency or by reason of any Legal Requirements or by reason of the conditions of supply and demand which have been or are affected by war or other emergency") and thus, effectively, "delay" has no meaning in Article 24. (NYSCEF 355, Nash tr at 198:139-203:13 [Nash stating that he misspoke earlier at trial about the word "delay" in Article 24].) Based on Nash's credible testimony on the first day of trial, the court rejects Nash's retraction.[17]

Similarly, Mechanic admittedly could not recall details of the DW transaction. Apparently, Mechanic's associate took the lead, attended negotiations, and reported

[17] Miller echoed Nash's reading of Article 24. (NYSCEF 355, Miller tr 222:9-10, 222:16-19.)

back to Mechanic who was busy supervising many lawyers and negotiating many deals simultaneously then and over the 26 years since. (NYSCEF 354, Nash tr at 51:10-19 [Nash testifying that he mostly dealt with Mechanic's associates], 52:6-18 [Nash testifying that he does not recall having discussions with a FF counsel], 159:3-160:9 [Nash not remembering Mechanic being present at negotiations]; NYSCEF 160, FF's Draft of the DW Lease at 2 [cover letter signed on behalf of Mechanic by Matt Leon]; NYSCEF 355, Mechanic tr at 269;10- 21 [Mechanic testifying that some discussions were outside his presence], 299:2-300:16 [Mechanic testifying that Matt Leon signed NYSCEF 160 on his behalf], 306:14-25 [Mechanic testifying that he did not attend the meeting prior to the October 8 draft], 311:2-22 [Mechanic testifying that he does not recall being present at an October 15 meeting].)

Not surprisingly after the passage of 26 years, but there were inconsistencies in Mechanic's testimony too. (NYSCEF 355, Mechanic tr at 305:18-310:17 [Mechanic testified that he had received and reviewed a certain memorandum in the course of the DW Lease negotiations, but he conceded on cross-examination that was not true; it was in actuality an internal memorandum circulated solely among the landlord's representatives, and Mechanic had not received it until discovery in this litigation]; *compare* NYSCEF 355, Mechanic tr at 324:3-22 [Mechanic testified that he recalled an internal FF discussion about the DW Lease rent abatement provision—but this was contradicted by his deposition testimony that he did not recall any such discussion], *with* NYSCEF 145, Mechanic aff ¶ 34 ["I never interpreted either provision to provide for a rent abatement in the absence of a breach or default on the part of the landlord to

provide services."].) Finally, Mechanic testified that when he signed his direct testimony affidavit, he simply "wasn't focused on" it. (NYSCEF 355, Mechanic at 292:4-294:2.)

Mechanic's testimony on the Y2K issue was mistaken. (NYSCEF 355, Mechanic tr at 262:11-18; NYSCEF 360, June 1, 1997 Newsweek.) Y2K was a topic generally in 1997-1998 and specifically in commercial leases negotiations. (NYSCEF 247 Nash aff ¶¶ 10-17; NYSCEF 355, Miller tr at 210:14-21.)

Further, Mechanic relied on and testified that his recollection regarding the DW Lease was refreshed by a recent conversation he had with Lee Feld—who, he testified, acted as DW's advisor in connection with its lease at the Property. (NYSCEF 375, Mechanic aff ¶45.) As was revealed on cross-examination, however, Mechanic's recollection was simply wrong. Feld worked for a different entity and had no involvement in the DW transaction, and Mechanic conceded that he "possibl[y]" was mistaken. (NYSCEF 355, Mechanic tr at 260:24-262:10.) Instead, at trial, Mechanic responded to questions based on his vast experience without distinguishing between 26 years ago and now; he did not testify about the DW transaction. Another problem with Mechanic's testimony is that it is based on his current reading, and not his 1997 reading as exemplified by the following exchange:

> "Q So take a look at 35 and now we're going to be in the world of homonyms. Could you read the first sentence of 35? Just read it out loud.
> A To the contrary, I read tenant's entitlement to a rent abatement in Section 5.4 as clearly being tied to landlord's breach of an obligation under the lease.
> Q So this won't come out in the transcript. You read that as I read, pronounced R-E-E-D, as opposed to I read, pronounced R-E-D. I'm just making that clear for the court 15 reporter.
> A Okay.
> Q There's a difference. One is present tense the way you read it and the other is what you would have done back then and you testified just now that you read it now that way.
> A I do read it that way and I read it that way then.

> Q And you remember that, living recollection –
> A I remember that conversation with Fran Schreiber, yes, I do." (NYSCEF 355, Mechanic tr at 314:9-23, 285:12-286:13, 288:16-289:15; NYSCEF 375, Mechanic aff ¶¶ 26, 34, 42-44.)

While the court appreciates the testimony of both Nash and Mechanic on custom and practice in the New York commercial real estate leasing market, the court prioritizes evidence about the DW transaction over such general testimony. Accordingly, SRZ must show that it adopted DW Lease's Rent Abatement Provision untethered to the Landlord's failure to provide services. That is SRZ must show that its intent differed from DW's intent. DW's intent is not conclusive here because different parties were involved in the SRZ negotiation. It is entirely possible that the attorneys stepping into the SRZ negotiation read the DW Lease differently than how Nomura and DW parties intended. Thus, the court rejects Nash's repeated testimony that SRZ adopted DW's intent—no landlord failure required. While Nash was involved in SRZ's discussions and reviewed drafts, he was not leading the negotiation for SRZ. (NYSCEF 354, Nash tr at 48:24-49:14, 93:23-94:2; NYSCEF 247, Nash aff ¶¶ 29-32.) Accordingly, the court is compelled to continue its analysis.

SRZ Lease Negotiation

For the SRZ transaction, Landlord engaged a different law firm as counsel and continued to use Alexander of ESG as broker. (NYSCEF 244, JSUF ¶ 30.) Since Nash continued to represent the Landlord in other transactions, including the DW transaction, Nash was walled off from negotiations with the Landlord on the SRZ transaction. (NYSCEF 247, Nash aff ¶¶ 23, 25; NYSCEF 244, JSUF ¶ 26.)

SRZ engaged Miller of ESG as broker.[18] (NYSCEF 248, Miller aff ¶ 10.) SRZ engaged Chris Smith of Shearman & Sterling LLP as counsel. (NYSCEF 244, JSUF ¶¶ 27-29; NYSCEF 247, Nash aff ¶ 23; NYSCEF 248, Miller aff ¶¶ 6, 9-10; NYSCEF 249, Waldenberg aff ¶ 9.) Waldenberg led SRZ's search for new space, and thus, took the lead on negotiating with the Landlord. (NYSCEF 247, Nash aff ¶ 21; NYSCEF 249, Waldenberg aff ¶ 6.)

The parties agreed to begin with the DW Lease. (NYSCEF 244, JSUF ¶ 32; NYSCEF 247, Nash tr aff ¶ 28; NYSCEF 249, Waldenberg aff ¶ 11; NYSCEF 354, Nash tr at 45:19-46:5.) Accordingly, the January 28, 1998 draft of the SRZ Lease contained the same version of § 5.4 of the final DW Lease. (*Compare* NYSCEF 256, DW Lease *with* NYSCEF 257, Initial Draft of SRZ Lease.)

Miller commented as follows about § 5.4:

> "It would be nice if the time periods could be shortened and the abatement retroactive to the day of the original condition, but they are probably acceptable, particularly if SRZ has business interruption insurance. SRZ must determine if it wishes to raise this issue since they will clearly say this is a negotiated clause. SRZ should have a right to terminate the lease if the condition continues beyond some time frame." (NYSCEF 258, Miller January 26, 1998 Memo.)

However, it is unclear from this comment whether Miller reads § 5.4 to require Landlord's failure to provide services.

Smith circulated a February 6, 1998 draft of the SRZ Lease, from which he struck the first parenthetical and the modifier language, "Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements, in each case other than as a result of," and thus removed the

[18] Miller testified that he represents tenants only. (NYSCEF 355, Miller ¶¶13-15.)

requirement that the abatement be conditioned on "Landlord's breach of an obligation" from § 5.4. (NYSCEF 153, February 6 Draft Lease at 44 .)[19] Smith's mark up to § 5.4 follows:

> "Notwithstanding anything to the contrary contained in any other provision of this Lease, in the event that (a) Tenant is unable to use the Premises, or any **material** portion thereof ~~consisting of one (1) full floor or more~~, for the ordinary conduct of Tenant's business, due to ~~Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements, in each case other than as a result of~~ Unavoidable Delays ~~or Tenant Delays~~, and such condition continues for a period in excess of ~~ten (10)~~ 5 consecutive days ~~(or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of thirty (30) consecutive days)~~ after Tenant gives a notice to Landlord (the 'Abatement Notice') stating that Tenant's inability to use the Premises or such portion thereof is ~~solely~~ due to such condition, (b) Tenant does not actually use or occupy the Premises or such portion thereof during such period, ~~and (c) such condition has not resulted from the negligence or misconduct of Tenant or any Tenant Party~~, then Fixed Rent, Tenant's Tax Payment and Tenant's Operating Payment shall be abated…." (*Id*. [additions bolded and deletions struck])

Apparently, Landlord rejected Smith's proposed change. (*See* NYSCEF 254, SRZ Lease at 29.) Otherwise, negotiations concerning § 5.4 had to do with space and time.

In an April 1998 memorandum to SRZ relating to the SRZ Lease negotiations, Miller wrote that Landlord had "not accepted" SRZ's proposal that "if Landlord breaches, there should be no grace period before an abatement starts." (NYSCEF 260, Miller April 28, 1998 Memo at 5.) Miller explained his comment "I needed to draw a distinction only because there was the landlord breach and the instance where there is no landlord breach." (NYSCEF 355, Miller tr at 228:1-229:10.) While the court gives great weight to

[19] Admitted into evidence over SRZ's objection. (NYSCEF 354, court tr at 109:15-112:24.)

Miller's testimony, the broker negotiating the SRZ Lease, it is unclear whether Miller's testimony is based on his reading of the provision now, during COVID, or a recollection of how he read the SRZ Lease 26 years earlier. (NYSCEF 248, Miller aff 18 ["My understanding of the Rent Abatement Provision, [is] based on my experience reading and negotiating rent abatement provisions, my reading of the Lease, and my files regarding negotiating the Lease,"]; NYSCEF 355, Miller tr 230:9-11 ["that is my reading of it"], 219:16-17, 219:21-220:14, 226:3-13 [COVID reading].) Rather, Miller's testimony was uneven on this timing point and he turned to his custom and practice which does not address the parties intent in 1998. (NYSCEF 355, Miller tr 209:8-15, 209:25-210:6, 210:10-13, 227:14-19 ["probably all parties felt like.."].) Moreover, if it is a recollection of how he read the provision 26 years ago, it does not appear that it was communicated to the Landlord. (NYSCEF 355, Miller tr 211:7-20; See *LaSalle Bank N.A.*, 424 F3d at 207 n10.) The court finds that Miller's contemporaneous comment needs explanation, it is not as clear on its face as compared to Smith's change, but Miller's explanation is not conclusive here.

The SRZ Lease was executed on May 13, 1998. (NYSCEF 254, SRZ Lease; NYSCEF 244, JSUF ¶ 4.) As compared to the DW Lease, the parties to the SRZ Lease agreed to shorten the grace period for a rent abatement where there is no Unavoidable Delays (i.e., reducing the grace period from ten days to zero days). A comparison of § 5.4 in the DW lease with the SRZ Lease follows:

> [I]n the event that (a) Tenant is unable to use the Premises or any portion thereof consisting of one full floor or more, or any portion thereof consisting of ~~one full floor~~ **750 Rentable Square Feet** or more, for the ordinary conduct of Tenant's business, due to Landlord's breach of an obligation under this Lease to provide services, perform repairs, or comply with Legal Requirements, in each case other than as a result of Unavoidable Delays or Tenant Delays~~, and such condition~~

~~continues for a period in excess of ten (10) consecutive days~~ (or, if Tenant's inability to use the Premises or portion thereof results, in whole or in part, from Unavoidable Delays and such condition continues for a period in excess of ~~thirty~~ **fifteen** (~~30~~15) consecutive ~~days~~ **Business Days**)…" (NYSCEF 361, Redline of §5.4 at 2 [additions bolded, deletions struck].)

Nash explained these changes as follows:

> "Q And you testified earlier that there were only minor changes to the Schulte Section 5.4, but the changes weren't intended to change the meaning in any way, correct? Other than the minor changes about the square footage and number of days, correct?
> A They are far from minor. Those are key elements to the whole notion that you are sharing risks. It's kind of akin to if you took an insurance policy, the number of days that the tenant has to bear with the circumstance before they get relief is, to me, similar to what you might call a deductible in an insurance policy. So a very important component of buying an insurance policy would be to negotiate what that deductible would be. So these are very important provisions. Perhaps the 3 most important provision.
> Q So the provisions about the square footage and the number of days, those are very important --
> A In some ways to me they are more important than the distinction between whether or not a landlord's breach was required. Because from the tenant's perspective, that is essentially irrelevant. The tenant knows it can't use the space, it wants relief, and these are the critical provisions that relate to when that relief will occur." (NYSCEF 354, Nash tr at 91:15-92:11.)

The parties did not change the definitions of "Unavoidable Delays," "Legal Requirements," and "Governmental Authority" and they continued exactly as stated in the DW Lease. (NYSCEF 247, Nash aff ¶ 34; NYSCEF 254, SRZ Lease.) However, in the SRZ Lease, as compared to the DW Lease, "Except as expressly provided herein to the contrary." This was done to ensure that Article 24 and § 5.4 are not in conflict. (NYSCEF 355, Nash tr at 204:9-205:4.)

According to Landlord, the strike out in § 5.4 (~~and such condition continues for a period in excess of ten (10) consecutive days)~~ created the ambiguity as to what language the parenthetical is modifying.

> "In making this change, the parties deleted the entire Pre-Parenthetical Clause regarding the number of days before an abatement could apply, creating an ambiguity as to what the Parenthetical is modifying. With this ambiguity in the Schulte Lease, the Parenthetical could arguably now be read, as Schulte does, as creating a separate trigger for a rent abatement (i.e., where there is Unavoidable Delay even without a Landlord failure to provide services). But this ambiguity did not exist in the DW Lease, and Nash was clear that it was not Schulte's intent to modify the meaning of the Parenthetical in changing the number of days before Schulte's entitlement to a rent abatement kicked in (or any other changes to Section 5.4) [(NYSCEF 354, Nash tr 91:15-94:2.)] That demonstrates that Schulte's reading of Section 5.4 in the Schulte Lease is wrong." (NYSCEF 377, Landlord Findings of Fact ¶¶ 101-102.)

The court rejects Landlord's theory that the ambiguity was created in the SRZ Lease. The ambiguity existed in the DW Lease; it was not born in the SRZ Lease. Had COVID-19 occurred during DW's Lease, and DW's experience and actions were the same as SRZ, the ambiguity would be the same. SRZ's changes to the time and space provisions did not create the problem.

The court also rejects SRZ's attempt to reargue whether § 5.4 is ambiguous or not: the SRZ Lease is ambiguous. *(Schulte Roth & Zabel LLP,* 202 AD3d at 642.) Likewise, the court rejects Landlord's contention that the meanings of "such condition" is conclusive to the Landlord's interpretation. The court agrees with SRZ that the word "such," by definition, has different meanings throughout the provision because it refers to the preceding word or phrase. (Black's Law Dictionary [11th ed. 2019] ["such" means "having just been mentioned."].)

As stated above, the court rejects that SRZ's reliance on Y2K to establish that landlord failure was not contemplated for a rent abatement. Landlord failures would have occurred with Y2K.

While the court agrees with SRZ's statement that

> "[t]here is nothing inherently unreasonable about Landlord bearing the risk of 'Unavoidable Delays.' That risk must be borne by the parties in some way, and there is nothing more unsound or illogical about allocating it to Landlord after 15 days have elapsed than about allocating it to SRZ in its entirety,"

the statement does not speak to SRZ's burden to demonstrate that 1998 intent. Likewise, the court discounts the 2020 readings, interpretations, or understandings of witnesses and others.[20] (See NYSCEF 248, Miller aff ¶ 19; NYSCEF 355, Miller tr at 214:19-215:1, 226:2-13, 229:24-230:19.) While such current interpretations would be helpful to corroborate the 1998 intention, SRZ must first establish the 1998 intention.

SRZ's witnesses to the SRZ negotiation did not establish an intent different from the DW Lease among the new participants to the SRZ transaction. First, SRZ did not request the abatement. (NYSCEF 354, Nash tr at 45:13-46:20.) As discussed above, the court rejects Nash's testimony that SRZ adopted DW's intent. Neither Miller nor Waldenberg testified to their 1998 contemporaneous reading of § 5.4 at the time of the SRZ negotiations. Rather, Miller testified to no specific memory of any discussions or negotiations about § 5.4. (NYSCEF 355, Miller tr at 210:7-13 [testifying that he could only "generally remember that there was a negotiation" but admitting he had no "specific recollection of any particular issues," including § 5.4], 211:16-20 [testifying that he does

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[20] "'Interpretation' and 'construction' are different tasks. To interpret part of a contract merely is to apply the plain meaning of the language in question. To construct part of a contract, however, is to ascertain the meaning of the disputed words or phrases by drawing conclusions with respect to subjects that lie beyond the direct expression of the text. That is, unlike the task of interpretation, the exercise of construction presupposes doubt, obscurity, or ambiguity in the disputed text." (GENERAL RULES OF CONTRACT INTERPRETATION—FOR AMBIGUOUS AGREEMENTS, 4D N.Y. Prac., Com. Litig. in New York State Courts § 96:25 [5th ed.].)

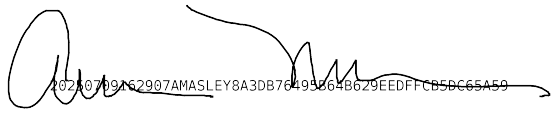
not "remember the specific issues or the dates or specific months or the nature of each specific conversation on it."].)

Waldenberg's recollection was completely dependent on what Nash told him; Waldenberg did not testify as to how he read § 5.4 in 1998 and that he concluded in 1998 that the rent abatement would be triggered regardless of whether Landlord failed to provide services. (NYSCEF 355, Waldenberg tr at 356:24-357:13, 358:9-11; NYSCEF 249, Waldenberg aff ¶ 12 ["Bob Nash confirmed[] that DW had been able to secure from Landlord an unusual rent abatement provision…."]; ¶ 19 ["[SRZ] understood [from Bob Nash's experience on behalf of Landlord with the DW lease]" what Landlord supposedly understood §5.4 to mean].)

Finally, Smith's proposal to modify § 5.4 is fatal to SRZ's position. Under Smith's modified version of § 5.4, the abatement would clearly not be tethered to the Landlord's failure to provide services. If the parties read § 5.4 in 1998 as SRZ contends now, then there would have been no reason for Smith to propose to change § 5.4 in the way that he did.

Accordingly, the court finds that SRZ failed to satisfy its burden at trial to establish that the parties intended to read § 5.4 as SRZ contends, and thus, it is unnecessary for the court to reach the issues of SRZ's ordinary conduct of business and when SRZ returned or could have returned to the Premises, and it is

ORDERED that the case is dismissed.



DATE: **July 9, 2025**

ANDREA MASLEY, JSC

Check One: [x] **Case Disposed** [ ] **Non-Final Disposition**

Check if Appropriate: [ ] **Other (Specify _____)**