SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SHLOMO S. HAGLER** **PART** **17**

Justice

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101-115 WEST 116TH STREET CORP. a/k/a 101-115 WEST 116 ST. CORP.,

Plaintiff,

- v -

CONSULATE GENERAL OF THE REPUBLIC OF SENEGAL,

Defendant.

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INDEX NO. 154994/2020

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 25, 26, 27, 28, 30, 31, 35, 36

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 29, 32, 33, 34

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

Motion sequence nos. 001 and 002 are consolidated for disposition.

This action arises out of an alleged breach of a commercial lease. In motion sequence no. 001, plaintiff 101-115 West 116th Street Corp a/k/a 101-115 West 116 St. Corp. moves, pursuant to CPLR 3212, for summary judgment against defendant Consulate General of the Republic of Senegal. In motion sequence no. 002, defendant moves separately for summary judgment dismissing the complaint.

Background Information and Procedural History

Pursuant to a written lease dated May 15, 2014 (the Lease), plaintiff, as owner, leased a portion of the second floor (the Premises) of a building located at 101-115 West 116th Street, New York, New York to defendant, as tenant, for a five-year term commencing January 1, 2015 through December 31, 2019 (NYSCEF Doc No. 10, Mitchell Mekles [Mekles] aff, exhibit A at

1). Article 43 in a rider to the Lease provided for payment of fixed annual rent (Fixed Annual Rent) at "$15,000.00 per month for the first year of the lease with an annual CPI or 3% increase, whichever is greater, compounded, each and every year thereafter for the duration of the lease" (*id.* at 7). Defendant agreed to pay as additional rent "[a]ll payments other than Fixed Rent"[1] (Additional Rent) (*id.* [Article 44]), such as water and sewer charges (*id.* at 6 [Article 28]); a pro rata share of the real estate taxes for the building (*id.* at 7 [Article 45]); and common area maintenance charges (*id.* at 9 [Article 55]). Article 31 required defendant to deposit $45,000 as security, and if it defaulted on its Lease obligations, allowed plaintiff to "use, apply or retain the whole or any part of the security … to the extent required for the payment of any rent and additional rent or any other sum as to which Tenant is in default or for any sum which Owner may expend or may be required to expend by reason of Tenant's default" (*id.* at 5). Article 52, titled "HOLDING OVER," provides that in the event defendant held over in the Premises:

> "such holding over shall not be deemed to extend the term or renew the lease, but such holding over thereafter shall continue upon the covenants and conditions herein set forth except that the charge for use and occupancy of such holding over for each calendar month or part thereof (even if such part shall be a small fraction of a calendar month) shall be the sum of:
>
> (a) 1/12 of the highest Fixed Rent provided for in this lease, times 2.5, plus
> (b) 1/12 of the net increase, if any, in annual fixed rental due solely to increases in the cost of the value of electric service furnished to the premises in effect on the last day of the term of the lease (if applicable), plus
> (c) 1/12 of all other items of annual additional rental, which annual additional rental would have been payable pursuant to this lease had this lease not expired, plus
> (d) those other items of additional rent (not annual additional rent) which would have been payable monthly pursuant to this lease, had this lease not expired, which total sum Tenant agrees to pay Owner promptly upon demand, in full, without set-off deduction … The

[1] The Lease defines "Fixed Annual Rent" as above, but not "Fixed Rent."

> aforesaid provisions of this Article shall survive the expiration or sooner termination of this lease"

(*id.*). If defendant failed to timely pay an installment of Fixed Annual Rent, Additional Rent or other sum, Article 63 allowed plaintiff to assess "a late charge of five ($.05) cents for each dollar overdue ... at the time of payment of the delinquent sum then interest at the rate of 18% per annum ... from and after the date" (*id.* at 11). Article 3 required defendant to restore the Premises at the end of the Lease term to the condition existing prior to its occupancy (*id.* at 1 [Article 3]). Article 19 allows plaintiff to recover its attorneys' fees as follows:

> "If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the terms or provisions in any article of this lease, then, unless otherwise provided elsewhere in this lease, Owner may immediately or at any time thereafter and without notice perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorney's fees, in instituting, prosecuting or defending any actions or proceeding, such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within five (5) days of rendition of any bill or statement to Tenant therefore, and if Tenant's lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages"

(*id.* at 4). The guaranty language in Article 76 reads, in pertinent part:

> "Elhaeji Sidy Niang and The Country of Senegal (The Guarantors) hereby unconditionally guarantees [*sic*] the full and timely payment of and the performance and observance of all obligations of Tenant under the Lease which shall exist or arise during the Tenant's use or occupancy of the premises requiring any notice to them of nonpayment or nonperformance, or proof, or notice of demand to hold them responsible under this guaranty, all of which they hereby expressly waive"

(*id.* at 12-13). The notice clause in Article 27 states, in part:

> "Except as otherwise in this lease provided, a bill, statement, notice or communication which owner may desire or be required to give to Tenant, shall be deemed sufficiently given or rendered if, in writing, delivered to Tenant personally or sent by registered or certified mail addressed to Tenant at the building of which the demised premises form a part or at the last known residence address or business address of Tenant or left at any of the aforesaid premises addressed to Tenant, and the time of the rendition of such bill or statement and of the giving of such notice or communication shall be deemed to be the time when the same is delivered to Tenant, mailed, or left at the premises as herein provided"

(*id.* at 5). Last, Article 56, titled "SUBMISSION TO JURISDICTION, ETC.," partially states:

> "This lease shall be deemed to have been made in New York County, New York, and shall be construed with the laws of the State of New York. All actions or proceedings relating, directly or indirectly, to this lease shall be litigated only in courts located within the City of New York. Tenant, any guarantor of the performance of its obligations hereunder ('Guarantor') and their successors and assigns hereby subject themselves to the jurisdiction of any state or federal court located within such county, waive the personal service of any process upon them in any action or proceeding herein and consent that such process be served by certified or registered mail, return receipt requested, directed to the Tenant and any successor at the address set forth in the instrument of guaranty and to any assignee at the address set forth in the instrument of assignment. Such service shall be deemed made two days after such process is so mailed"

(*id.* at 10). Vice Consul Amadou Gassama executed the Lease for defendant (*id.* at 7).

On June 4 and September 16, 2019, plaintiff's president, Mekles, wrote to Elhadji Amadou Ndao (Ndao), Consul General of the Republic of Senegal, to advise that there was no renewal option in the Lease and that defendant should plan on vacating the Premises in December (NYSCEF Doc No. 12, Mekles aff, exhibit D at 1-2). On November 12, 2019, Mekles wrote to Amadou Bâ, Senegal's Minister of Foreign Affairs, to advise that defendant was obligated to vacate the Premises (*id.* at 3). Mekles offered Bâ a 10-year lease in another building for less rent, but defendant did not respond (NYSCEF Doc No. 8, Mekles aff, ¶ 20).

Plaintiff alleges defendant remained in possession of the Premises after the Lease expired through March 2020 without plaintiff's written consent (NYSCEF Doc No. 17, Mekles aff, Ex H, ¶¶ 17-18). By letter on January 23, 2020, Mekles informed Ndao that $77,979.33 in rent and additional rent from November 2019 to January 2020 was due and $22,105.08 was due as February rent (NYSCEF Doc No. 15, Mekles aff, exhibit F at 1). Mekles wrote that if those sums were not paid, plaintiff would begin charging defendant holdover rent from January (*id.*). Mekles offered to waive the rent due for February if defendant agreed to lease space at 238 West 116th Street (*id.*). Defendant failed to respond (NYSCEF Doc No. 8, ¶ 23). In another January 23, 2020 letter, Mekles reminded Ndao of defendant's obligation to restore the Premises under Article 3 of the Lease (NYSCEF Doc No. 15 at 2). On February 3, 2020, Mekles informed defendant that $157,987.47 was due for charges dating back to October 2019 plus holdover rent for January and February 2020 (NYSCEF Doc No. 16, Mekles aff, exhibit G).

After defendant failed to pay those sums, plaintiff commenced this action by filing a summons and complaint asserting two causes of action for (1) breach of the Lease and (2) recovery of attorneys' fees. Defendant interposed an answer with nine affirmative defenses, including lack of personal jurisdiction (second affirmative defense), lack of subject matter jurisdiction (third affirmative defense) and diplomatic immunity (fourth affirmative defense).

The Parties' Contentions

Plaintiff now moves for summary judgment and for a money judgment of $363,362.75, excluding its legal fees. In support of the motion, plaintiff proffers the Lease, an affidavit from Mekles, a summary of the delinquent charges and correspondence between the parties.

Defendant moves separately for summary judgment dismissing the complaint arguing that the court lacks both subject matter and personal jurisdiction under Article 31 of the Vienna

Convention on Diplomatic Relations (the Vienna Convention) (23 UST 3227), the Diplomatic Relationship Act (22 USC 254a *et seq.*), the Foreign Sovereign Immunity Act (FSIA) (28 USC 1602 *et seq.*) and 28 USC 1351. Defendant also challenges whether any sums are due. It relies on an affidavit from Ndao.

Discussion

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

As a preliminary matter, plaintiff objects to defendant's submission of a lengthy memorandum of law that exceeds 30 pages without prior leave of court as required under Uniform Rule 14 (b) of the Rules of the Justices, New York County, Supreme Court, Civil Branch. Despite the apparent violation of this rule, and in the absence of substantial prejudice to plaintiff, the court shall waive defendant's compliance with this rule in this instance.

A. The Foreign Sovereign Immunities Act

The FSIA " 'provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country' " (*OBB Personenverkehr AG v Sachs*, 577 US 27, 30 [2015] [citation omitted]), and describes the framework for determining when a court may exercise jurisdiction

over a foreign state (*Republic of Argentina v Weltover, Inc.*, 504 US 607, 610 [1992]). A foreign state is " 'presumptively immune from the jurisdiction of United States courts' unless one of the [FSIA's] express exceptions to sovereign immunity applies" (*OBB Personenverkehr AG*, 577 US at 31 [citation omitted]; *see also* 28 USC 1604 ["Subject to existing international agreements to which the United States is a party at the time of enactment of this Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter"]). Where an enumerated exception applies, the court has subject matter jurisdiction over the foreign state and, provided service of process comports with the service methods laid out in the FSIA, the court has personal jurisdiction over the foreign state, as well (*Verdlinden B.V. v Central Bank of Nigeria*, 461 US 480, 485 n 5 [1983]. Although 28 USC 1330 vests federal district courts with original jurisdiction over claims involving a foreign state, "the FSIA 'clearly contemplates' that suits against foreign sovereigns 'may be brought in either federal or state courts' " (*Hyundai Corp. v Republic of Iraq*, 20 AD3d 56, 61 [1st Dept 2005], *lv dismissed* 5 NY3d 783 [2005], *appeal withdrawn* 6 NY3d 808 [2006], quoting *Verdlinden B.V.*, 461 US at 489; *see also* 28 USC 1605). In determining whether a foreign state is entitled to sovereign immunity, federal and state courts must assess the foreign state's claim of immunity in conformity with the FSIA (28 USC 1602).

1. Whether Defendant Is a Proper Party

Defendant contends that plaintiff has sued the wrong party because the Consulate General of the Republic of Senegal is not a cognizable legal entity, and that the Permanent Mission of the Republic of Senegal (the Mission) is the proper party. Defendant also claims that it should be considered a diplomatic agent of a foreign government, and as such, it is entitled to diplomatic immunity under the Vienna Convention and the Diplomatic Relationship Act. Defendant further

submits federal courts have original jurisdiction on all civil cases involving members of a diplomatic mission under 28 USC 1351.

Plaintiff counters that the court has jurisdiction because defendant qualifies as a foreign state under 28 USC 1603 (b).

The FSIA defines a "foreign state" to mean "a political subdivision" or an "agency or instrumentality of a foreign state" (28 USC 1603 [a]). An "agency or instrumentality of a foreign state" includes an entity:

> "(1) which is a separate legal person, corporate or otherwise, and
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USCS § 1332(c) and (e)] nor created under the laws of any third country"

(28 USC 1603 [b]).

Defendant's contention that a consulate general is not an entity cognizable under law is unpersuasive. Defendant fails to offer any caselaw to support this proposition, instead choosing to rely on the definition for "consulate general" from the Merriam-Webster.com Dictionary (Merriam-Webster.com Dictionary, consulate general [https://www.merriam-webster.com/dictionary/consulate%20general]; NYSCEF Doc No. 36, oral argument tr at 23), which is insufficient. In any event, a consulate "falls within the definition of a foreign state because it is 'a separate legal person' that is 'an organ of a foreign state or political subdivision thereof' and that is 'neither a citizen of a state of the United States ... nor created under the laws of a third country' " (*Gerritsen v De La Madrid Hurtado*, 819 F2d 1511, 1517 [9th Cir 1987], quoting 28 USC 1603 [b]; *see also Nwoke v Consulate of Nigeria*, 729 Fed Appx 478, 479 [7th Cir 2018], *cert denied* 139 S Ct 1172 [2019] [lawsuit against the Consulate of Nigeria for a

breach of contract considered a suit against a foreign state]; *Joseph v Office of Consulate Gen. of Nigeria*, 830 F2d 1018, 1021 [9th Cir 1987], *cert denied* 485 US 905 [1988] [Consulate General of Nigeria is a foreign state]; *Lovati v Bolivarian Republic of Venezuela*, 2020 WL 6647423, *2, 2020 US Dist LEXIS 211458, *4 [SD NY, Nov. 11, 2020, No. 19-CV-4793 (ALC)] [stating that a consulate constitutes an agency or instrumentality of a foreign state]; *Bardales v Consulate Gen. of Peru in N.Y.*, 490 F Supp 3d 696, 701 [SD NY 2020] [Consulate General of Peru is a foreign state]; *Saunders Real Estate Corp. v Consulate Gen. of Greece*, 1995 WL 598964, *1, 1995 US Dist LEXIS 14893, *2 [D Ma, Aug. 11, 1995, No. 94-11951 [Consulate General of Greece is a foreign state]). Since defendant is a foreign state under the FSIA, defendant has failed to establish that it is not a cognizable legal entity or the wrong party to this action.

Defendant's contention that it is a diplomatic agent entitled to immunity under the Vienna Convention is equally unpersuasive. The Vienna Convention "provides immunity to consular officials for actions which are performed in the exercise of the officials' consular functions" (*Joseph*, 830 F2d at 1021). Plaintiff has not named the Consul, Vice Consul or any other consular official as a defendant. Thus, neither the Vienna Convention nor 28 USC 1351 have any application here.[2] Similarly, defendant has not established that the Republic of Senegal is a nonparty to the Vienna Convention such that the Diplomatic Relationship Act applies (*see* 22 USC 254b ["With respect to a nonparty to the Vienna Convention, the mission, the members of the mission, their families, and diplomatic couriers shall enjoy the privileges and immunities specified in the Vienna Convention"]). Defendant's motion insofar as it seeks dismissal on the ground that plaintiff has sued the wrong party is denied.

[2] 28 USC 1351 provides that district courts shall have original jurisdiction of all civil actions against consuls, vice consuls, members of a mission or members of their families.

2. Whether Defendant Waived Its Sovereign Immunity

Plaintiff argues that under the waiver exception in 28 USC 1605 (a) (1), defendant waived its immunity by consenting to jurisdiction in New York. Defendant does not expressly address this argument. Instead, defendant asserts that the Premises, which was leased for the purpose of a diplomatic mission, is "specifically excluded in the definition of immovable property" (NYSCEF Doc No. 24, defendant's mem at law at 4).

Once a defendant demonstrates prima facie that it is a foreign state, the plaintiff must show that one of the statutory exceptions to immunity applies (*Virtual Countries, Inc. v Republic of S. Africa*, 300 F3d 230, 241 [2d Cir 2022]). The foreign state bears the ultimate burden of persuasion on the issue of immunity (*id.*). As explained above, defendant is a foreign state for purposes of the FSIA. Relevant herein are three of the FSIA's enumerated exceptions for waiver, commercial activity, and immovable property.[3] 28 USC 1605 (a) states, in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case –
>
> (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;
>
> ...

[3] The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose" (28 USC 1603 [d]).

> (4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue."

" 'The waiver exception is narrowly construed' such that waiver under the FSIA must be unambiguous and unmistakable in order to be effective" (*Jacubovich v State of Israel*, 816 Fed Appx 505, 507 [2d Cir 2020], quoting *Joseph*, 830 F2d at 1022). An explicit waiver may be found where the foreign state expressly foregoes its sovereign immunity (*see Wye Oak Tech., Inc. v Republic of Iraq*, 24 F4th 686, 691 [DC Cir 2022]; *Proyecfin de Venezuela, S.A. v Banco Industrial de Venezuela, S.A.*, 760 F2d 390, 393-394 [2d Cir 1985]). By contrast, an implicit waiver may be found "where a foreign state has agreed that the law of a particular country should govern a contract" (*Shapiro v Republic of Bolivia*, 930 F2d 1013, 1017 [2d Cir 1991]).

Applying these principles here, plaintiff has established that defendant implicitly waived its sovereign immunity (*Architectural Ingenieria Siglo XXI, LLC v Dominican Republic*, 788 F 3d 1329, 1342 [11th Cir 2015] [agreement contained explicit and implicit waivers stating that Florida law governed disputes]; *Eckert Intl., Inc. v Government of the Sovereign Democratic Republic of Fiji*, 32 F3d 77, 80 [4th Cir 1994] [reasoning that the Republic of Fiji impliedly waived immunity where the contract's choice of law provision dictated that Virginia law controlled]; *Joseph*, 830 F2d at 1023 [concluding that the Consulate General of Nigeria had implicitly waived immunity based on a lease provision which contemplated adjudication of landlord/tenant disputes in a court within the United States]). Here, Article 56 unambiguously states that the Lease shall be construed under New York law and that all actions or proceedings arising out of the Lease shall be litigated only in state or federal courts located within the City of New York. This language illustrates defendant's intent, by implication, to subject any dispute

arising out of the Lease to adjudication in accordance with New York law in courts within the United States.

Plaintiff also refers briefly to the commercial activity exception in 28 USC 1605 (a) (2). Whether the commercial activity exception applies turns, in part, on whether the foreign state "acts in the manner of a private player within the market" (*Petersen Energía Inversora S.A.U. v Argentine Republic*, 895 F3d 194, 205 [2d Cir 2018], *cert denied* 139 S Ct 2741 [2019] [internal quotation marks and citation omitted]; *see generally Republic of Argentina*, 504 US at 614). There must be a significant nexus between the plaintiff's claim and defendant's commercial activity in the United States (*Pablo Star Ltd. v Welsh Govt.*, 378 F Supp 3d 300, 308 [SD NY 2019], *affd* 961 F3d 555 [2d Cir 2020], *cert denied* 141 S Ct 1069 [2021]). Leasing property within New York, as is the case here, constitutes commercial activity under the FSIA (*Joseph*, 830 F2d at 1024).

Finally, assuming defendant argues that the immovable property exception in 28 USC 1605 (a) (4) is inapplicable, the "[immovable property] exception focuses ... broadly on 'rights in' property" (*Permanent Mission of India to the United Nations v City of New York*, 551 US 193, 198 [2007]). A dispute over unpaid rent falls outside the scope of the immovable property exception (*Fagot Rodriguez v Republic of Costa Rica*, 297 F3d 1, 13 [1st Cir 2002] [reasoning that a dispute over the non-payment of rent "is, first and foremost, a contract dispute"]). However, as decided above, the waiver and commercial activity exceptions apply. Accordingly, defendant's motion for summary judgment based upon lack of subject matter jurisdiction is denied.

3. Whether Service of Process Was Proper

Defendant argues that plaintiff failed to comply with the service requirements in the FSIA because service of the summons and complaint was not accompanied by a notice of suit or a translation of the documents into the Mission's official language.

Plaintiff asserts that it satisfied 28 USC 1608 (a) (1) by following the special arrangement for service detailed in Article 56 of the Lease. Plaintiff also asserts that defendant explicitly waived the defense of personal jurisdiction in New York.

Defendant, in reply, contends that Article 56 refers to service at an address listed in a guaranty, but there is no guaranty. As a result, it claims that plaintiff could not have properly served defendant with process pursuant to a special arrangement.

The FSIA describes four methods for service of process upon a foreign state,[4] set out in hierarchical order (*Republic of Sudan v Harrison*, 139 S Ct 1048, 1054 [2019]), as follows:

> "(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:
>
> (1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or
> (2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or
> (3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or
> (4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt,

[4] The parties agree that 28 USC 1608 (a) controls service of process in this action.

> to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.
> As used in this subsection, a 'notice of suit' shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation"

(28 USC 1608 [a]). Service of process under 28 USC 1608 (a) must be strictly complied with (*Kumar v Republic of Sudan*, 880 F3d 144, 154 [4th Cir 2018]).

A contract provision that outlines specific procedures for service of process constitutes a special arrangement under 28 USC 1608 (a) (1) (*see Matter of Arbitration Between Trans Chemical Ltd. v China Natl. Mach. Import & Export Corp.*, 978 F Supp 266, 299 [SD Tex 1997], *affd* 161 F3d 314 [5th Cir 1998]; *Copelo Capital, Inc. v General Consul of Bolivia*, 940 F Supp 93, 95 [SD NY 1996]). In addition, an "all encompassing" notice provision in a written agreement "usually qualifies as a 'special arrangement for service' " (*Orange Middle E. & Africa v Republic of Equatorial Guinea* (2016 WL 2894857, *4, 2016 US Dist LEXIS 65147, *8 [D DC, May 18, 2016, No. 15-cv-849 (RMC)]). The "all encompassing" provision need not specifically refer to service of process to qualify as a special arrangement (*see Matter of Arbitration Between Space Sys./ Loral, Inc. v Yuzhnoye Design Office*, 164 F Supp 2d 397, 402 [SD NY 2001] [reasoning that service of process "falls within the category of "all notices and communications between the parties"]; *International Rd. Fedn. v Embassy of the Democratic Republic of the Congo*, 131 F Supp 2d 248, 251 [D DC 2001] [same]). "But when a notice provision is confined to the contract or agreement at issue, it does not qualify as a special arrangement for service" (*Orange Middle E. & Africa* 2016 WL 2894857, *4, 2016 US Dist LEXIS 65147, *8).

Article 27 in the Lease provides that plaintiff shall furnish notices in writing either delivered personally or sent by registered or certified mail to defendant at the Premises or at its last known residence or business address. Although the provision does include the word "all," it does not limit the types of notices to only those required under the Lease. Thus, it appears that Article 27 is an "all encompassing" provision and a special arrangement of the type described in *Matter of Arbitration Between Space Sys./Loral, Inc.* Article 27, however, also includes the phrase "[e]xcept as otherwise in this lease provided." Unlike Article 27, Article 56 provides that service of process shall be made "by certified or registered mail, return receipt requested, directed to the Tenant and any successor at the address set forth in the instrument of guaranty."[5] Defendant insists that there is no guaranty, but it ignores the Article 76 language describing a guaranty. Because the guaranty appears to form part of the Lease, service of process by certified mail, return receipt requested, to defendant at the address for the Premises under Article 27 (NYSCEF Doc No. 3) was proper. Plaintiff also served additional notice upon defendant at its last known business address in accordance with Article 27 (*id.*).

Lovati, cited by defendant, is distinguishable. In that action, the special arrangement in the parties' contract stated that service of process must be made upon the Consul General or any official of the Consulate of Venezuela at a specific address (2020 WL 6647423, *3, 2020 US Dist LEXIS 211458, * 7). When the Consul was recalled and the Consulate closed, plaintiffs moved for a court order permitting alternative service at a different address (*id.*). The court determined that such service was not permissible under 28 USC 1608 (a), although service by

[5] Plaintiff argues that defendant waived personal jurisdiction, but Article 56 does not expressly waive the FSIA's service requirements (*see Stahl 3 Dag, LLC v Permanent Mission of Chile to United Nations*, 9 Misc 3d 946, 947-948 [Civ Ct, NY County 2005] [finding that the defendant waived the service requirements where the lease specifically mentioned "rights of immunity and service of process provisions under the Foreign Sovereign Immunities Act of 1976"]).

court order was permissible under 28 USC 1608 (b) (2020 WL 6647423, *3, 2020 US Dist LEXIS 211458, *8). Since plaintiffs failed to strictly adhere to 28 USC 1608 (a), the court concluded that service was improper (2020 WL 6647423, *3, 2020 US Dist LEXIS 211458, *9). By contrast here, plaintiff served defendant with the summons and complaint via the method and at the address provided for in the special arrangement described in Article 56.[6] Separate service of a notice of suit under 28 USC 1608 (a), as defendant suggests, was not required. Accordingly, defendant's motion for summary judgment based upon improper service under the FSIA is denied.

B. Pleading Deficiencies under CPLR 3013

Under CPLR 3013, "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

Defendant argues the complaint is deficient under CPLR 3013 because it fails to delineate how plaintiff calculated its damages. The argument lacks merit. A lease is a contract (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 510 n [1979]). As such, a cause of action for breach of contract requires the plaintiff to plead the existence of a valid, enforceable contract, the plaintiff's performance, the defendant's breach and resulting damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). The complaint herein adequately apprises defendant of the transactions and occurrences at issue, and defendant has not

[6] Plaintiff also appears to have personally served defendant by delivering the summons and complaint to "Jane Doe" on July 28, 2020 at 179 East 116th Street, New York, New York and mailing the papers to that same address the next day (NYSCEF Doc No. 4). Such service does not comport with 28 USC 1608 (a), but as noted above, plaintiff had already sent the summons and complaint by certified mail, return receipt requested, to the address in the Lease.

proffered any caselaw to bolster its contention that plaintiff must plead with specificity how it calculated its damages. Thus, defendant's motion seeking dismissal under CPLR 3013 is denied.

C. The Security Deposit

General Obligations Law § 7-103 (1) governs security deposits made in connection with renting real property and prohibits a landlord from commingling a tenant's security deposit with its own funds. A violation of General Obligations Law § 7-103 (1) precludes a landlord from using the deposit to offset a tenant's debts (*Audthan LLC v Nick & Duke, LLC*, 211 AD3d 419, 421-422 [1st Dept 2022]).

Defendant appears to move for a return of its security deposit based on Ndao's averment, made "upon information and belief," that plaintiff commingled the security deposit with its own funds (NYSCEF Doc No. 22, Ndao aff, ¶ 43). An allegation made upon information and belief, however, is insufficient to satisfy defendant's evidentiary burden on summary judgment, especially in the absence of any admissible evidence in support (*see Life Sourcing Co., Ltd. v Shoez, Inc.*, 179 AD3d 439, 439 [1st Dept 2020]). Moreover, defendant did not plead a counterclaim alleging a violation of General Obligations Law § 7-103 in its answer. Rather, defendant pleaded as a fifth affirmative defense that it is entitled to a setoff (NYSCEF Doc No. 5, ¶¶ 38-42). Defendant's argument more accurately addresses plaintiff's quantum of damages, if any, as opposed to its liability. Defendant's motion seeking a return of its deposit is denied.

D. Breach of the Lease

On the first cause of action for breach of the Lease, Mekles avers that defendant ceased paying rent after October 2019 and held over and remained in possession of the Premises without plaintiff's written consent through March 2020 (NYSCEF Doc No. 8, ¶¶ 6-8). After accounting for annual increases in the amount required as security (NYSCEF Doc No. 10 at 12 [Article 72]),

plaintiff currently holds $50,647.92 for defendant (NYSCEF Doc No. 8, ¶ 12). Mekles avers that $363,362.75, inclusive of late fees and interest as of October 31, 2020 but excluding plaintiff's legal fees, is due as follows:

Item	Amount
Unpaid rent under Articles 43 and 63	$39,083.31
Unpaid holdover use and occupancy, late fees and interest under Articles 52 and 63	$152,104.15
Unpaid real estate taxes with interest under Articles 45 and 63	$33,927.83
Unpaid water, sewer and elevator charges under Articles 28 and 55	$9,747.45
Restoring the condition of the Premises under Article 3	$128,500

(NYSCEF Doc No. 8, ¶ 15).

Defendant contends that it has paid all rent and additional rent. On this point, Ndao attests that he monitors all rent payments made by the Mission and that all rent has been paid (NYSCEF Doc No. 22, ¶¶ 2 and 14). Ndao challenges the amount plaintiff now claims is due because the Mission specifically earmarked all payments as rent (*id.*, ¶¶ 10-11). He asserts, upon information and belief, that plaintiff wrongfully applied those earmarked payments to items other than rent (*id.*, ¶ 12). Ndao also attests that there are no known outstanding real estate taxes or water, sewer and elevator charges, and that defendant never received a proper bill or calculation for the amounts now allegedly due (*id.*, ¶¶ 23-24). Regarding the claimed holdover use and occupancy, Ndao avers that he spoke to Mekles, who assured him defendant could remain in possession of the Premises without paying holdover rent (*id.*, ¶ 26). Ndao claims that defendant vacated the Premises in February, not March, 2020 (*id.*, ¶ 25).

Defendant also challenges whether plaintiff may collect late fees or holdover rent. Defendant argues that the late fee provision in the Lease, which awards plaintiff 5% on any

overdue sum, and the holdover provision, which allows plaintiff to collect 250% over the last rent, impose unenforceable, unconscionable penalties.

Plaintiff, in reply, maintains that defendant agreed to pay holdover use and occupancy at two and one-half times the "Fixed Rent," and that, in this commercial setting, the holdover rate was reasonably anticipated to be greater than and proportional to the rental rate for the duration of the holdover. Plaintiff also maintains that the late fee provision is enforceable.

1. Fixed Annual Rent and Additional Rent

Plaintiff has met its prima facie burden on the issue of defendant's liability through the submission of Mekles's affidavit describing defendant's failure to pay Fixed Annual Rent and Additional Rent (*see Harlington Realty Co., LLC v Lawrence Plumbing Supply Inc.*, 201 AD3d 435, 436 [1st Dept 2022]). Plaintiff, though, has not adequately demonstrated the amount of those damages. It submits a table summarizing the amounts due (NYSCEF Doc No. 11, Mekles aff, exhibit B), but there is no indication of who prepared it or when it was prepared. Nor has plaintiff tendered any documents, such as bills or invoices for water, sewer or elevator service, to support some of the claimed amounts (*see Deutsche Bank Natl. Trust Co. v Kirschenbaum*, 187 AD3d 569, 569 [1st Dept 2020] ["because the books and records themselves were not submitted to the court, the affiant's assertions are inadmissible hearsay"]). Additionally, plaintiff does not appear to have taken the amount of defendant's security deposit into consideration.

Defendant fails to raise a triable issue of fact that it does not owe any Fixed Annual Rent or Additional Rent. Defendant argues that the Mission has paid all rent due, but plaintiff applied defendant's payments to items other than rent. Defendant specifically refers to funds issued under check no. 24480 (NYSCEF Doc No. 32, Ndao aff, ¶ 34), but defendant has not tendered a copy of that check, or any other documentary evidence, to support the argument that the funds

had been misapplied (*see Deutsche Bank Natl. Trust Co*, 187 AD3d at 569). Defendant's other arguments appear to address the amount of plaintiff's damages, as opposed to defendant's liability. For instance, defendant claims plaintiff failed to credit it for electric service for 2019 (NYSCEF Doc No. 32, ¶ 35). Whether defendant was properly credited, however, does not negate plaintiff's assertion that it has not been paid Fixed Annual Rent or Additional Rent. Defendant also complains that its share of the real estate taxes was not properly billed (NYSCEF Doc No. 22, ¶ 23), but plaintiff informed defendant if its share by letter on July 1, 2019 (NYSCEF Doc No. 14 at 1). Defendant has not submitted any evidence of having paid that amount in full. Accordingly, plaintiff's motion insofar as it seeks unpaid Fixed Annual Rent and Additional Rent is granted only as to defendant's liability.

2. Late Fees and Interest

It is well settled that "a liquidated damage provision is an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement" (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 424 [1977]). "[A] contractual provision imposes an unenforceable 'penalty' when it requires, in the event of a breach, the payment of a sum that is grossly disproportionate to any reasonable estimate of actual damages" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 37 NY3d 552, 563 [2021]). A late fee provision in a lease allowing a party to collect a fee that is "unreasonable and confiscatory in nature … [is] unenforceable" (*Sandra's Jewel Box, Inc. v 401 Hotel*, 273 AD2d 1, 3 [1st Dept 2000] [late fee clause in a lease imposing a 365% per annum penalty was contrary to Penal Law § 190.40]). Whether a late fee represents an unenforceable penalty is a matter for the court to determine (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 379 [2005]). The burden rests with the party seeking to avoid payment to establish that the amount

sought is disproportionate to the opposing party's foreseeable losses and is a penalty (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc*, 36 NY3d 69, 75 [2020]).

Countrary to defendant's assertion, the late fee provision is not unenforceable as a matter of public policy where, as here, the Lease involves two sophisticated parties in a commercial setting (*K.I.D.E. Assoc. v Garage Estates Co.*, 280 AD2d 251, 254 [1st Dept 2001]). Article 63 allows plaintiff to recover a late fee equal to five cents for every dollar of Fixed Annual Rent, Additional Rent or any other sum due, or five percent of the total dollar amount, for the first month, then interest at 18% per annum thereafter. This charge is not the type of penalty where the amount sought by plaintiff is grossly disproportionate to the amount past due (*see Trustees of Columbia Univ. in the City of N.Y*, 36 NY3d at 76 [damages at 7 ½ times the amount the plaintiff would have received but for the defendant's breach considered an unenforceable penalty]). The late fee provision also does not charge interest in excess of 25% per annum for criminal usury (*see ESRT 501 Seventh Ave. v Regine, Ltd.*, 206 AD3d 448, 449 [1st Dept 2022] [monthly 5% charge on outstanding arrears unenforceable as against public policy]). Thus, plaintiff is entitled to recover late fees and interest on the unpaid amounts.

3. Holdover Use and Occupancy

Plaintiff has met its prima facie burden on the issue of defendant's liability as to holdover use and occupancy under Article 52 through the submission of Mekles's affidavit that defendant held over in the Premises through March 2020 without paying use and occupancy.

Defendant concedes that it owes plaintiff rent for January and February 2020, subject to an offset (NYSCEF Doc No. 36 at 42). Defendant, though, claims that use and occupancy charged at a rate of 250% is an unenforceable penalty.

As explained above, defendant bears the burden of demonstrating that the holdover provision imposes an unenforceable penalty (*JMD Holding Corp.*, 4 NY3d at 380). Defendant has not met its burden. First, courts have regularly enforced clauses between two sophisticated entities, such as plaintiff and defendant, that charge a tenant holdover rent at two to three times the amount of base rent (*see Victoria's Secret Stores, LLC v Herald Sq. Owner LLC*, 211 AD3d 657, 657 [1st Dept 2022] [holdover rent at three times the monthly rent enforceable]; *Glaze Teriyaki LLC v MacArthur Props., LLC*, 206 AD3d 513, 513 [1st Dept 2022] [holdover rent set at 200% of base rent enforceable]). Second, defendant made no effort to show that the amount of use and occupancy sought by plaintiff is grossly disproportionate to plaintiff's damages (*see Seymour v Hovnanian*, 211 AD3d 549, 553-554 [1st Dept 2022] [rejecting the argument that a liquidated damages provision in a license agreement, which allowed for an assessment of $1,000 per day, was unenforceable where the defendants conceded that the plaintiffs' daily rent was $200 per day]). Similarly, defendant has not shown that plaintiff's damages were readily ascertainable at the time the Lease was executed (*see Addressing Sys. & Prods., Inc. v Friedman*, 59 AD3d 359, 359 [1st Dept 2009] ["[p]laintiffs did not present sufficient evidence from which it could be gleaned what amount of damages due to violations would be typical, or average, to establish with reasonable certainty what losses for a breach or breaches would have been foreseeable at the outset of the agreement"]; *Carlyle, LLC v Quik Park Beekman II, LLC*, 59 Misc 3d 35, 37 [App Term, 1st Dept 2018] [stating that the tenant failed to establish that the landlord's damages could have been anticipated when the lease was executed or that the fixed amount was grossly disproportionate to the landlord's loss]).

Nevertheless, plaintiff has not established the amount of its damages. Article 52 (a) of the Lease defines use and occupancy as "1/12 of the highest Fixed Rent provided for in this

lease, times 2.5" but, as stated earlier, the Lease does not define the term "Fixed Rent." Plaintiff assumes that "Fixed Rent" must mean "Fixed Annual Rent," and urges the court to adopt this interpretation and calculate use and occupancy as one-twelfth of the Fixed Annual Rent multiplied by 2.5 (NYSCEF Doc No. 36 at 20). However, it is unclear if that is the case because the balance of Article 52 refers to "annual fixed rental" and "annual additional rental." As such, one-twelfth of "Fixed Rent" could mean one-twelfth the "Fixed Annual Rent," one-twelfth the monthly rent or one-twelfth of some other amount. Plaintiff, as the drafter of the Lease, was plainly aware of the distinction because it included "annual" in discussing rent and additional rent elsewhere in the Lease. Because the term "Fixed Rent" is reasonably susceptible of more than one meaning (*see New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006], *rearg denied* 2006 NY App Div LEXIS 11351 [1st Dept 2006]), Article 52 is ambiguous (*Blume v Jacobwitz*, — AD3d —, 2023 NY Slip Op 00025, *1 [1st Dept 2023] [denying summary judgment where the agreement was ambiguous as to its terms]). Furthermore, Mekles attests that defendant remained in possession through March 2020, but Ndao attests that defendant vacated the Premises in February. Neither party has furnished the court with any information as to the actual date defendant vacated the Premises. Accordingly, plaintiff's motion insofar as it seeks unpaid holdover use and occupancy is granted only as to defendant's liability.

4. Costs to Restore the Premises

Plaintiff has not satisfied its prima facie burden that defendant breached Article 3 of the Lease. Plaintiff has failed to produce any documentary or testimonial evidence of the condition of the Premises at the time the parties executed the Lease in 2015 and its condition at the time defendant vacated the Premises five years later.

Moreover, plaintiff's damages, i.e. its costs to restore the Premises to its pre-Lease condition, are entirely speculative. Mekles avers that approximately $128,500 is due (NYSCEF Doc No. 8, ¶ 15), but does not submit any documentary evidence in support. Mekles also avers that plaintiff has leased the Premises to a new tenant but "was unable to secure a rent that equaled the amount that Defendant had been paying under the Lease" due to the condition of the Premises (NYSCEF Doc No. 31, Mekles aff, ¶¶ 5-6). Mekles claims that the difference in rent between the first three years of the Lease and the three-year lease with plaintiff's new tenant is $169,799.50 (*id.*, ¶ 12). Plaintiff, though, is not entitled to recover this difference (*Solow Mgmt. Corp. v Hochman*, 191 AD2d 250, 251 [1st Dept 1993], *lv dismissed* 82 NY2d 802 [1993] [stating that the landlord may only recover the reasonable costs of restoring the premises to the condition stipulated in the parties' lease as opposed to lost rental income]). Likewise, Mekles's averment that "[t]he contractor paid by the new tenant informed me that the new tenant paid her approximately $200,000 in connection with restoration and refurbishing work on the premises" constitutes inadmissible hearsay (*see Choudhury v City of New York*, 106 AD3d 523, 523 [1st Dept 2013]). Accordingly, plaintiff's motion for summary judgment on the issue of whether defendant breached Article 3 of the Lease is denied.

5. Attorneys' Fees

Article 19 of the Lease provides for the reimbursement of plaintiff's reasonable attorneys' fees and costs in prosecuting this action. The clause is enforceable *(see Eujoy Realty Corp. v Van Wagner Communications, LLC*, 22 NY3d 413, 419 n 2 [2013] [discussing an identical Article 19]). While a landlord may recover its legal fees as part of its contract damages, provided that a breach of the lease has been proven, the landlord may not seek reimbursement of its legal fees as a separate, independent cause of action (*Pier 59 Studios L.P. v Chelsea Piers*

L.P., 27 AD3d 217, 217 [1st Dept 2006]). Thus, plaintiff's second cause of action cannot stand as an independent claim, although plaintiff is entitled to recoup its reasonable legal fees. Defendant did not address whether plaintiff may recover its legal fees in its papers. Therefore, to the extent plaintiff seeks reimbursements of its legal fees, that determination shall be made at trial or other disposition of the first cause of action.

The court has considered the other arguments raised by the parties in support of or in opposition to the respective motions and finds them unavailing.

Accordingly, it is

ORDERED that the motion of plaintiff 101-115 West 116th Street Corp a/k/a 101-115 West 116 St. Corp. for summary judgment (motion sequence no. 001) is granted to the extent of granting plaintiff summary judgment on the issue of defendant Consulate General of the Republic of Senegal's liability on so much of the first cause of action on the unpaid "Fixed Annual Rent," "Additional Rent" and holdover "use and occupancy," as those phrases are defined in the parties' Lease, together with contractual late fees and interest as provided for in the Lease, and on the issue of reimbursement of plaintiff's reasonable attorneys' fees, and the balance of the motion is otherwise denied; and it is further

ORDERED that the amount of reasonable attorneys' fees to be recovered by plaintiff 101-115 West 116th Street Corp a/k/a 101-115 West 116 St. Corp. from defendant Consulate General of the Republic of Senegal shall be determined at the time of trial or other disposition of this action; and it is further

ORDERED that the motion of defendant Consulate General of the Republic of Senegal for summary judgment dismissing the complaint (motion sequence no. 002) is denied.

2/27/2023
DATE

SHLOMO S. HAGLER, 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