At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 26 day of July, 2021.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

267 DEVELOPMENT, LLC,
Plaintiff,
- against -

BROOKLYN BABIES AND TODDLERS, LLC, and MARY ANN O'NEIL,
Defendants.

Index No.: 510160/2020

Motion Seq. # 3

DECISION & ORDER

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	PAPERS NUMBERED
Plaintiff's Notice of Motion	1
Plaintiff's Affirmation in Support & Exhibits	2
Plaintiff's Memo of Law	3
Defendant's Affirmation in Opposition & Exhibits	4
Plaintiff's Reply Affirmation	5

Upon the foregoing papers, Plaintiff, 267 DEVELOPMENT LLC, (267) moves this Court for an Order pursuant to CPLR § 2221 (d) to reargue their prior motion for summary judgment:

1) on their 1st and 2nd causes of action against the Tenant, Brooklyn Babies and Toddlers, LLC ("BB");
2) against BB and co-Defendant, Mary Ann O'Neil, the guarantor, on their 3rd cause of action for attorneys' fees and appointing a Special Referee to decide the amount;
3) denying BB's motion to dismiss Plaintiff's 4th and 5th causes of action and upon reinstating said causes of action, as against the guarantor only, grant summary judgment with damages to be determined by a Special Referee; and,
4) dismissing BB's affirmative defenses and the counterclaim included in their answer.

Plaintiff seeks re-argument and contends that this Court, in its Decision and Order dated and entered March 15th and 19th, respectively, misapplied the newly enacted New York City

Administrative Code § 22-1005. This legislation was enacted in response to the Covid-19 pandemic and imposes a moratorium from March 7, 2020 to March 31, 2021 on Landlords' claims against Guarantors of commercial leases. This Court denied Plaintiff's claims as against Mary Ann O'Neil, the Guarantor on the lease signed by co-Defendant, BB. However, upon this review the Court finds that it misapplied NYC Admin. Code § 22-1005. Plaintiff's claims against the Guarantor were only for the months not covered by the moratorium. Upon review of the law and the submissions presented, this Court finds that Plaintiff is correct and that only claims for arrears that occurred during the covered period are barred by the new law. ***UD 31st Street, LLC v Cast Iron Korean BBQ 2 Inc., 2021 NY Slip. Op. 30803 (U)(S. Ct., NY Cnty); Churchill 809 Madison, LLC v VL Delights LLC, 2021 WL 775688 (S. Ct., NY Cnty); . UD 31st Street, LLC v Korean BBQ, 2021 WL 917358 (Sup. Ct., NY Cnty); 77 Retail Holdings v Kirschenbaum, 2021 WL 917361 (Sup. Ct., NY Cnty).*** Therefore, it was error to strike Plaintiff's 4th and 5th causes of action. Moreover, since Plaintiff only sought arrears from the Guarantor for dates outside of the moratorium; there was no violation of ***NYC Admin. Code § 22-902 (a) (11) (14)***. Therefore, BB's counterclaim against Plaintiff for commercial tenant harassment, is without merit.

Courts have consistently held that the essential principle of contract interpretation is that agreements are construed in accord with the parties' intent. ***Greenfield v Phillies Records, Inc., 98 NY2d 562, 569 (2002)***. The doctrine of definiteness means that a court cannot enforce a contract unless it can determine what the parties agreed to do. ***Williams v Town of Carmel, 175 AD3d 550, 551 (2d Dept 2019).*** However, a contract should not be read so as to render any term, phrase, or provision meaningless or superfluous. ***God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc., LLP, 6 N.Y.3d 371, 374 (2006).***

The meaning of a contract is ordinarily a question of law, but when a term or clause is ambiguous and the determination of the parties' intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact. ***County of Nassau v Tech. Ins. Co., Inc., 174 AD3d 847, 849 (2d Dept 2019).*** In the instant action the subject lease contains a force majeure clause defined as follows:

"..... any and all causes beyond the reasonable control of Landlord or Tenant, as the case may be, including delays caused by the other party hereto or other tenants, Legal Requirements and other forms of governmental restrictions, regulations or controls ..... but shall not include lack of funds or financial inability to perform". ***§ 26.04 of the lease agreement.***

Plaintiff contends that even if the mandated shut down of BB's business due to Covid-19 does meet the criteria of force majeure, the lease never mentions that withholding rent is a proscribed remedy. Further, according to Plaintiff, while the force majeure clause may constitute a valid defense to the instant action, this clause does not operate to void BB's obligation to pay rent pursuant to the lease agreement. Keeping these rules of interpretation in mind, the question presents itself: why was the force majeure clause included in the lease if there is no remedy? Since we must assume that the force majeure provision was not include superfluously or without import, there is a triable issue of fact as to whether the force majeure clause was intended as a complete defense under the circumstances of this case. Plaintiff is therefore not entitled to an Order granting summary judgment on its claims against BB. ***Bouchard Transp. Co., Inc. v New York Islanders Hockey Club, LP, 40 AD3d 897, 898 (2d Dept 2007).***

Plaintiff's Motion for re-argument is therefore granted andupon re-argument this Court finds that it misapplied the newly enacted ***NYC Administrative Code § 22-1005*** and ***NYC Admin.***

Code § 22-902 (a) (11) (14). The parties' remaining contentions are without merit. Accordingly, it is

ORDERED that this Court's Decision and Order dated March 15, 2021 is hereby vacated; and it is

ORDERED that Defendant's motion dismissing Plaintiff's 4th and 5th causes of action and granting summary judgment on its counter-claim is denied in its entirety; and it is

ORDERED that Plaintiff's motion for summary judgment dismissing BB's counter-claim is granted to the extent that summary judgment on the 4th and 5th causes of action is granted and a Special Referee is directed to determine the amount of arrears owed by the Guarantor; and it is

ORDERED that BB's counter-claim is hereby dismissed; and it is

ORDERED that the portion of Plaintiff's motion that sought summary judgment against BB is denied as questions of fact exist.

This is the Decision and Order of the Court.

ENTER,

LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN