

*2006 NY Slip Op 50904U, *; 12 Misc. 3d 1155A, **;
819 N.Y.S.2d 211, ***; 2006 N.Y. Misc. LEXIS 1202*

[*1] New York City Economic Development Corporation, Petitioner-Landlord,
against Harborside Mini Storage, Inc., aka Harborside Self Storage Corp.,
Respondent-Tenant, "XYZ Corp.", Respondents-Undertenants.

78755/05

CIVIL COURT OF THE CITY OF NEW YORK, KINGS COUNTY

2006 NY Slip Op 50904U; 12 Misc. 3d 1155A; 819 N.Y.S.2d 211; 2006 N.Y. Misc.
LEXIS 1202

May 18, 2006, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE
PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Later proceeding at [New York City Economic Dev. Corp. v. Harborside Mini Stor., Inc., 12 Misc. 3d 1160A, 819 N.Y.S.2d 211, 2006 N.Y. Misc. LEXIS 1270 \(N.Y. Civ. Ct., May 24, 2006\)](#)

DISPOSITION: Judgment of possession awarded to Petitioner.

CORE TERMS: lease, sublease, tenancy, tenant, renewal lease, month-to-month, landlord, estoppel, rent, non-payment, effective, sublessor, monthly, occupancy, expired, attornment, sublessee, surrender, expenditures, repair, effectiveness, duration, subtenant, notice of termination, electricity, expiration, waterfront, signature, long-term, estopped

HEADNOTES: [****1155A**] [*****211**] Landlord and Tenant--Eviction--Stay.

COUNSEL: Petitioner appeared by Leon I. Behar, Esq. and Susan Kuznicki, Esq. of Leon I. Behar, P.C.;

Respondent appeared by Darren **Oved**, Esq. and Thomas Freedman, Esq. of **Oved and Oved** LLP.

JUDGES: Jack M. Battaglia, J.

OPINION BY: Jack M. Battaglia

OPINION:

Jack M. Battaglia, J.

This commercial holdover proceeding is the latest stage of a long and complex transactional and litigation history. The central dispute between the parties is the status of Respondent's tenancy that is, whether Respondent occupies the premises pursuant to an unexpired lease or, as Petitioner contends, as a month-to-month

tenant whose tenancy has expired pursuant to notice of termination. Respondent maintains that it occupies the premises as an assignee of a sublease between a related corporation, U.S. Movers, Inc., and Harborside Management Corp., the former lessee of Petitioner's lessor, the City New York. Petitioner contends that the lease between Harborside Management and the City had expired before the sublease was executed, and that a replacement/renewal lease never became effective, so that neither Harborside Management, U.S. Movers, nor Respondent had or have any rights under or from it.

Transactional/Litigation History

The subject premises is a building designated variously as "Unit G" or "Building 56", located at the Bush Terminal Industrial Complex on the Brooklyn waterfront. A Lease between the City of New York/Department of Ports, International Trade & Commerce, owner of Bush Terminal, and MASTAS, a joint venture comprised of Harborside Management Corporation and Poseidon Development Company, Inc., gave MASTAS possession of a number of buildings at [*2] Bush Terminal, including the subject premises. The City/MASTAS Lease, which was assigned by Agreement dated April 1, 1994 to Harborside Management and will be referred to as the "Master Lease", was effective March 1, 1989 and expired by its terms on February 28, 1999.

Prior to the expiration of the Master Lease, the City and Harborside Management negotiated the terms of a replacement/renewal lease, reflected in a Lease between the City of New York/Department of Business Services and Harborside Management Corporation. This Lease, which will be referred to as the "Renewal Lease", states an effective date of October 1, 1997 and an expiration date of September 30, 2009. The Renewal Lease was signed on behalf of Harborside Management on March 9, 2000 by Dominick Massa, its president and apparent principal, but was not signed on behalf of the City, except for approval "as to form" by the Acting Corporation Counsel. The Renewal Lease was, however, approved by the City Planning Commission, the Brooklyn Borough President, and the appropriate Community/Borough Board.

Subsequent to the expiration of the Master Lease, and also subsequent to the various approvals of the Renewal Lease, but prior to the execution of the Renewal Lease by Harborside Management, a Lease dated June 30, 1999 was entered into between "Ministorage at Harborside" and U.S. Movers, Inc. with respect to the subject premises. This lease, which will be referred to as the "Sublease", states an effective date of July 1, 1999 and an expiration date of December 31, 2008. The Sublease provides in Article 7: "The Landlord...leases the premises from the City of New York and/or the Economic Development Agency of New York City. This lease is subject to all of the terms, conditions, modifications, extensions, renewals of same". Despite the names of the parties to the Sublease, it is clear from the evidence at trial that all interested understood the parties to be Harborside Management and Respondent. (*See, for example*, Testimony of Steven Lazarus, February 28, 2006, T. at 205; letter dated October 18, 2004 from Patricia Arenas, on behalf of Petitioner, to Respondent.)

In early 2001, the City purported to terminate Harborside Management's tenancy at Bush Terminal, including the subject premises, and Harborside Management challenged the termination in an action instituted in Supreme Court, Kings County against the City and Petitioner, among others. (Index No. 10130 / 01.) That action was settled by a Stipulation of Settlement, which will be referred to as the "Surrender Stipulation", and which explicitly recognized, and failed to resolve, a

dispute between Harborside Management and the defendants in that action as to the effectiveness of the Renewal Lease. (See Surrender Stipulation, Respondent's Exhibit B, fifth recital.) In the Surrender Stipulation, Harborside Management agreed to vacate and "surrender" its entire interest in Bush Terminal to the City, and to provide the City with the "rent rolls" and "all leases and/or subleases and/or any other related written agreements concerning the occupancy of any portion" of Bush Terminal. (See *id.*, PP 1, 3, 5.) Respondent was identified on the rent rolls, and a copy of its Sublease was provided.

Pursuant to a Lease dated as of December 1, 2002 between the City of New York/Department of Small Business Services and New York City Economic Development Corporation, the portions of Bush Terminal covered by the Master Lease were in effect [*3] transferred to Petitioner. The new Lease, which will be referred to as "Petitioner's Lease", will not expire until November 30, 2052. In a letter dated November 21, 2002, signed on behalf of both Harborside Management and the City, Respondent was advised that, effective November 30, 2002, Harborside Management would "surrender all its rights and interests in the Bush Industrial Terminal", and that, effective December 1, 2002, Petitioner would "manage the property on behalf of the City." The letter further directed Respondent to "make all payments of monthly use and occupancy to the City." (See Petitioner's Exhibit 5.)

It should be noted that Petitioner's involvement with Bush Terminal, including the portions covered by the Master Lease and Sublease, did not begin with Petitioner's Lease with the City. Prior to December 2002, Petitioner served as lease administrator for the portions of Bush Terminal covered by the Master Lease and Sublease, apparently pursuant to a written contract or contracts not offered as evidence at trial. The November 21, 2002 letter to Respondent suggests a continuation of that role, whereas Petitioner's Lease, of course, is something different. There is no dispute between the parties that a landlord/tenant relationship exists between them, although they clearly dispute its terms.

In early 2004, Petitioner instituted a summary non-payment proceeding against Respondent in this Court (L & T Index No. 57010/04). That proceeding was settled by a Stipulation, Consent Order and Final Judgment, which will be referred to as the "Non-Payment Stipulation". The Stipulation in several places refers to Respondent as a "monthly tenant" and its possession of the premises as a "monthly tenancy". (See Non-Payment Stipulation, Petitioner's Exhibit 3, first recital, footnote 1, P12.) On the other hand, the Non-Payment Stipulation refers to "base rent", "additional rent" and an "existing obligation[]" to pay "electricity usage charges", that would ordinarily be found only in a written lease. (See *id.* PP 3, 5, 11.) Also, the arrears were to be paid in 42 monthly installments, beginning June 1, 2004. (See *id.*, P10.)

With a Thirty (30) Day Notice of Termination dated May 17, 2005, Petitioner purported to terminate Respondent's month-to-month tenancy pursuant to [Real Property Law § 232-a](#), effective June 30, 2005. Respondent has not vacated, and Petitioner commenced this proceeding. Both parties moved for summary judgment, and to the extent that the motions addressed the status of Respondent's tenancy, they both were denied. (See Amended Decision and Order dated December 7, 2005.)

Trial was held on January 4 through January 6 and February 27 through March 1. Eight witnesses testified: Nina Aber, Vice President of Petitioner; Michael Burack, an employee of Turner Construction Company, which provided management services to Petitioner at Bush Terminal; Robert Dejongh, an employee of Turner Construction;

Carmine Giordano, an employee of Petitioner; Steven Lazarus, Senior Vice President of Petitioner; Diane Nieves, an employee of Harborside Management, and later of Turner Construction; Eyal Eli Noach, Respondent's President; and Freddie Soto, an employee of Harborside Management, and later of Turner Construction. These witnesses testified with respect to Petitioner's claims for possession and for payment of rent, use and occupancy, and electricity charges, and with respect to [*4] Respondent's claims for actual and constructive eviction.

Possession of the Premises

Petitioner's claim for possession, resting as it does on its contention that Respondent holds the premises as a month-to month tenant, is based essentially on the absence of a fully-executed lease between the City and Harborside Management, the absence of any lease between Respondent and either the City or Petitioner, and certain provisions of the Non-Payment Stipulation. Although acknowledging Respondent's lawful possession of the premises until expiration of a thirty-day notice of termination, and a landlord/tenant relationship between them, at least on a month-to-month tenancy, Petitioner has failed to satisfactorily articulate a persuasive legal foundation for its conclusions.

Relying on principles of judicial estoppel and judicial admission, Petitioner argues from the provisions of the Non-Payment Stipulation, in which Respondent is referred to as a "monthly tenant" and its possession pursuant to a "monthly tenancy", that "Respondent Has Already Acknowledged That They Are Month To Month Tenants." (See Petitioner's Post-Trial Memorandum of Law, at 22-28.) To the extent that Petitioner argues that such principles lead conclusively to the conclusion that Respondent holds possession as a month-to-month tenant, the argument was rejected on Petitioner's motion for summary judgment, and is rejected here.

"The doctrine of judicial estoppel precludes a party who assumes a certain position in a prior legal proceeding and secures a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." ([Warnecke v Warnecke](#), 12 A.D.3d 502, 503, 784 N.Y.S.2d 631 [2d Dept 2004] [internal quotation marks and citations omitted].) A "so ordered" stipulation may, in appropriate circumstances, be given similar effect. (See [Manhattan Ave. Development Corp. v Meit](#), 224 A.D.2d 191, 192, 637 N.Y.S.2d 134 [1st Dept 1996].)

Contrary to Petitioner's assertion (see Petitioner's Post-Trial Memorandum, at 25), the Non-Payment Stipulation nowhere states that it is "so ordered", and it contains neither the signature nor the initials of any judge. Although a judgment issued, under these circumstances it was merely a ministerial act. (See [Martinez v Jacobson](#), 253 A.D.2d 521, 522, 677 N.Y.S.2d 161 [2d Dept 1998].) Moreover, Petitioner still does not explain how any position taken by Respondent in the Stipulation inured to Respondent's benefit, so that either Petitioner's or the Court's interests would be prejudiced by now allowing Respondent to assert a right to possession under the Sublease.

At most, the statements of fact in the Non-Payment Stipulation (and any allegations in Respondent's answer in that proceeding) would constitute informal judicial admissions that would be evidence admissible against Respondent, but would not be conclusive in this proceeding. (See [Morgenthau & Latham v Bank of New York Company, Inc.](#), 305 A.D.2d 74, 78-79, 760 N.Y.S.2d 438 [1st Dept 2003]; [People v](#)

[Foy, 212 A.D.2d 446, 447, 622 N.Y.S.2d 937 \[1st Dept 1995\]](#); [Rosmor Realty Corp. v Caviness, 187 Misc. 888, 66 N.Y.S.2d 588 \[Bronx Mun Ct 1946\]](#).) The probative value of the admissions is **[*5]** undermined by their collateral nature in light of the terms and conditions of the Stipulation as a whole, and the ambiguity introduced by those terms and conditions.

References in the Non-Payment Stipulation to "base rent", "additional rent" and "existing obligation[] to timely pay...electricity usage charges" must have genesis in some writing, such as the Sublease Respondent is attempting to enforce, or some other agreement between the parties. But Petitioner fails to describe or provide evidence of any such agreement, and appears to disclaim that any exists. Despite the Court's urging on several occasions, Petitioner fails to explain how it can apparently enforce the terms of the Sublease without acknowledging its stated duration.

Petitioner's remaining arguments relate to the proposition that "The New York City Charter Authorizes Only the Commissioner of [the Department of Small Business Services] To Enter Leases for Waterfront Property." (See Petitioner's Post-Trial Memorandum, at 29-36.) These arguments rest upon the undisputed facts that neither the Renewal Lease between the City and Harborside Management, nor the Sublease or any other writing to which Respondent is a party, contains the signature of the Commissioner, supported by the limited applicability of estoppel principles against the City. But Petitioner cites no authority for the proposition that the Commissioner's signature on a lease is the only manner in which the Charter permits waterfront property to be leased, nor does it cite any authority that limits the applicability of estoppel principles against Petitioner.

Even assuming, however, that the City Charter precludes the effectiveness and enforceability of the Renewal Lease and the Sublease a more general proposition than that advanced by Petitioner and one that will be examined below, Petitioner does not explain how the result is a month-to-month tenancy for Respondent, nevermind a month-to-month tenancy on the terms and conditions of the Sublease except for its duration.

Petitioner contends that "upon [its] billing the [subtenants of Harborside Management] use and occupancy, and monthly electricity charges, which were thereafter paid by occupants, a month to month tenancy was created by the conduct of the parties and by operation of law, upon Petitioner's acceptance of Respondent's monthly payments, as there was no existing lease agreement between the parties", and that "Petitioner's . . . acceptance of rent checks from Respondent was sufficient to create a month to month tenancy." (Petitioner's Post-Trial Memorandum of Law, at 11, 23.) Petitioner cites only one authority for these propositions, the First Department's decision in [International Business Machines Corp. v Joseph Stevens & Co., L.P. \(300 A.D.2d 222, 754 N.Y.S.2d 233 \[1st Dept 2002\]](#).)

There the court stated, also without citation of authority, that a sublessor's "receipt and retention of [a sublessee's] rent check was properly found to constitute acceptance' of rent sufficient to create a month-to-month tenancy." (See [id., at 223](#).) The statement was made, however, in the context of the sublessee's contention that "a month-to-month tenancy was created **[*6]** by reason of [the sublessor's] acceptance of rent subsequent to the expiration of the sublease." (See [id., at 222](#); see also [Real Property Law § 232-c](#).) But here, Petitioner has not explained how a sublease exists between the parties, or any landlord/tenant

relationship, and there is no evidence that any sublease to which Respondent is a party has expired. Indeed, we are here because the Sublease to which Respondent and Harborside Management are parties has not, by its terms, expired.

The Court concludes, nonetheless, that the New York City Charter precludes the effectiveness and enforceability of the Renewal Lease and the Sublease, and that, in part by reason of the operation of law, and in part by reason of the conduct of the parties, Respondent's possession of the premises is pursuant to a month-to-month tenancy, although not necessarily on the terms and conditions of the Sublease.

[Section 384 of the New York City Charter](#) states that "no real property of the city may be sold, leased, exchanged or otherwise disposed of except with the approval of the mayor and as may be provided by law unless such power is expressly vested by law in another agency." [Section 1301](#) of the Charter gives the Commissioner of the Department of Small Business Services "the power and duty to exercise the functions of the city relating to . . . public markets, wharf property, waterfront property and airports within the city of New York including . . . to lease, pursuant to [sections \[197-c and 197-d\]](#), any wharf property belonging to the city for . . . commercial, industrial, residential or recreational purposes." ([New York City Charter, § 1301 \[2\] \[g\]](#); see also [Siegmond Strauss, Inc. v Strategic Development Concepts, Inc.](#), 10 Misc.3d 1067A, 814 N.Y.S.2d 565, 2006 NY Slip Op 50008U, * ____ [Sup Ct, New York County].)

Charter [§ 197-c](#) requires that the "lease (other than the lease of office space) . . . of the real property of the city" be subject to a "uniform land use review procedure" ([New York City Charter § 197-c \[a\] \[10\]](#)), and Charter [§ 197-d](#) provides for City Council review, under specified circumstances, of decisions by the City Planning Commission to approve a lease ([New York City Charter § 197-d \[b\]](#).) Petitioner concedes that the Renewal Lease traversed these requirements for review and approval. (See Petitioner's Post-Trial Memorandum of Law, at 30-31.)

There was no direct evidence, however, that the Commissioner of the Department of Small Businesses Services, or anyone delegated to exercise the Commissioner's power, ever approved the Renewal Lease. There was no evidence that the Renewal Lease was ever executed by or on behalf of the Commissioner, and no other writing is in evidence that could constitute its approval. Mr. Lazarus testified that he has never seen a fully-executed Renewal Lease, and, given his position and responsibilities with Petitioner, he would have seen it. (Testimony of Steven Lazarus, March 1, 2006, T. at 56.) Moreover, Petitioner's General Counsel wrote to Harborside Management on June 12, 2000, "advis[ing] that the City will not enter into any new lease for...the premises at this time." (See Respondent's Exhibit C.)

The only writing that might be interpreted as evidencing the effectiveness of the Renewal **[*7]** Lease is a May 27, 1999 letter from Petitioner to Harborside Management concerning the City's execution of "recognition, nondisturbance and attornment agreements" with Harborside Management's subtenants at Bush Terminal, "conditional upon the sublease complying with the terms of the lease" between the City and Harborside Management. (Respondent's Exhibit D.) Even assuming that the letter would otherwise be sufficient to constitute an approval of the Renewal Lease, there was no evidence that Petitioner had actual authority to bind the City or the Department of Small Business Services, and apparent authority is not sufficient. (See [New Street Ice Co., Inc. v New York City Department of Business Services](#), 4 A.D.3d 191, 191, 772 N.Y.S.2d 272 [1st Dept 2004]; see also

[Genesco Entertainment, a Division of Lymutt Industries, Inc. v Koch, 593 F. Supp. 743, 749-50 \[SDNY 1984\].](#))

Respondent attempts to rely on an affidavit submitted by Dominick Massa in the Supreme Court action instituted by Harborside Management in 2002, supported by the testimony of Steven Lazarus that confirms some of the details of the affidavit, to establish that the City and Harborside Management performed in accordance with the terms and conditions of the Renewal Lease. Mr. Massa is deceased, and Respondent contends that the affidavit is admissible under a "residual exception" to the hearsay rule. (See Respondent's Post-Trial Memorandum Concerning Possession, at 14-15, n. 8.) But any so-called "residual exception" to the hearsay rule would not apply to the statements in the Massa affidavit, because those statements were not contrary to Massa's pecuniary or penal interests, and Massa was not present in court, then or now, subject to cross-examination. (See [Nucci v Proper, 95 N.Y.2d 597, 603-03, 744 N.E.2d 128, 721 N.Y.S.2d 593 \[2001\]](#); [Letendre v Hartford Accident & Indemnity Co., 21 N.Y.2d 518, 524-25, 236 N.E.2d 467, 289 N.Y.S.2d 183 \[1968\]](#).)

Even assuming, however, the admissibility of the Massa affidavit, confirmed by the evidence that the City and Harborside Management acted as if the Renewal Lease had become effective, there is insufficient evidence to support a conclusion that the Renewal Lease was in effect when the Sublease would have become effective between Harborside Management and Respondent, nor can the extensive caselaw on ratification, estoppel, and attornment relied upon by Respondent (see Respondent's Post-Trial Memorandum Concerning Possession, at 24-38) establish the Commissioner's approval of either the Renewal Lease or the Sublease. Those cases address transactions between private parties, unencumbered by the requirements of the City Charter, and in any event do not describe a "substitute sublessor" scenario as occurred here.

The "mode of . . . exercise of municipal power" specified in the New York City Charter "must be strictly complied with". (See [Paerdegat Boat and Racquet Club, Inc. v Zarrelli, 83 A.D.2d 444, 451-52, 445 N.Y.S.2d 162 \[2d Dept 1981\]](#) [Hopkins, J., concurring in part and dissenting in part], *rev'd on opinion of Hopkins, J., 57 N.Y.2d 966, 968, 443 N.E.2d 477, 457 N.Y.S.2d 229 [1982]*.) A lease or other contract that does not comply with Charter requirements is "invalid and unenforceable." (See [Infrastructure Management Systems, LLC v County of Nassau, 2 A.D.3d 784, 786, 770 N.Y.S.2d 119 \[2d Dept 2003\]](#); see also [Miller v City of New York, 15 N.Y.2d 34, 36-37, 203 N.E.2d 478, 255 N.Y.S.2d 78 \[1964\]](#); [Seif v City of Long Beach, 286 N.Y. 382, 387-88, 36 N.E.2d 630 \[1941\]](#); [McDonald v City of New York, 68 N.Y. 23, 27-29 \[1876\]](#); [Sutton Area Community, Inc. v City of New York, 196 A.D.2d 793, 794-95, 602 N.Y.S.2d 828 \[1st Dept 1993\]](#), *mod* [83 N.Y.2d 825, 828, 633 N.E.2d 1098, 611 N.Y.S.2d 494 \[1994\]](#); [Ark Bryant Park Corp. v Bryant Park Restoration Corp., 285 A.D.2d 143, 152, 730 N.Y.S.2d 48 \[3d \[*8\] Dept 2001\]](#).)

When a lease or other contract does not comply with Charter requirements, it cannot be rendered effective and enforceable as a contract implied in fact (see [McDonald v City of New York, 68 N.Y. at 28](#); see [Infrastructure Management Systems, LLC v County of Nassau, 2 A.D.3d at 786](#); see also [Parsa v State of New York, 64 N.Y.2d 143, 147, 474 N.E.2d 235, 485 N.Y.S.2d 27 \[1984\]](#)), or by estoppel principles (see [Seif v City of Long Beach, 286 N.Y. at 387-88](#); see also [Granada Buildings, Inc. v City of Kingston, 58 N.Y.2d 705, 708, 444 N.E.2d 1325, 458 N.Y.S.2d 906 \[1982\]](#); [Henry Modell & Co., Inc. v City of New York, 159 A.D.2d 354, 354-56, 552 N.Y.S.2d 632 \[1st Dept 1990\]](#); [Genesco Entertainment, a Division of Lymutt Industries, Inc. v](#)

[Koch, 593 F. Supp. at 753-54](#)).

Principles of ratification as applied to leases address infirmities in the authority of the agent, such as the lack of the written authorization required by the Statute of Frauds. (See [General Obligations Law § 5-703 \[2\]](#); [Holm v C.M.P. Sheet Metal, Inc., 89 A.D.2d 229, 232-33, 455 N.Y.S.2d 429 \[4th Dept 1982\]](#); [30 Carmine LLC v Depierro, 7 Misc. 3d 836, 848-48, 791 N.Y.S.2d 383 \[Civ Ct, New York County 2005\]](#).) The problem here is not that the Renewal Lease was signed or otherwise approved by someone without the authority to do so, but that it was not signed, or shown to have been approved (other than as to form), by anyone. For this purpose, the principles of ratification are sufficiently similar to those of estoppel (see [Holm v C.M.P. Sheet Metal, Inc., 89 A.D.2d at 232-33](#)), that they cannot render either the Renewal Lease or the Sublease effective and enforceable against the City. Similarly, attornment to the City cannot "reinstate" or "recogni[ze] . . . as being valid" a lease that does not comply with the City Charter. (See [W.S. 23 Realty Corp. v City of New York, 106 Misc. 2d 271, 274, 431 N.Y.S.2d 272 \[Sup Ct, Nassau County 1980\]](#).)

"To refuse to encumber property with a long-term lease . . . is a matter of business judgment." ([Marine Park Boats, Inc. v Halberg, 58 Misc. 2d 938, 941, 297 N.Y.S.2d 236 \[Sup Ct, Kings County\]](#), *aff'd* [33 A.D.2d 732, 306 N.Y.S.2d 656 \[2d Dept 1969\]](#).) For courts to effectively control the exercise of the City's judgment as to the disposition of valuable waterfront property would undermine the separation of powers. (See [E.F.S. Ventures Corp. v Foster, 71 N.Y.2d 359, 371, 520 N.E.2d 1345, 526 N.Y.S.2d 56 \[1988\]](#).)

Since the Renewal Lease never became effective, the Master Lease expired by its terms on February 28, 1999, and, with the continued payment and acceptance of rent, Harborside Management became a month-to-month tenant of the City. ([Real Property Law § 232-c](#).) With exceptions not shown to be warranted here (see [Rossinski Realty Co., Inc. v Farrell, 135 A.D.2d 465, 467-68, 522 N.Y.S.2d 558 \[1st Dept 1987\]](#); [Transit Drive-In Theater, Inc. v Outdoor Theatre Caterers, Inc., 53 A.D.2d 1009, 1009, 386 N.Y.S.2d 482 \[4th Dept 1976\]](#)), under these circumstances the month-to-month tenancy continues on the terms of the expired lease (see [City of New York v Pennninglwavia Railroad Co., 37 N.Y.2d 298, 300-01, 333 N.E.2d 361, 372 N.Y.S.2d 56 \[1975\]](#); [State Farm Fire and Casualty Co. v Finnstone, 9 A.D.3d 812, 813, 780 N.Y.S.2d 820 \[3d Dept 2004\]](#); [Lakeside Plaza, Inc. v Impala Press, 237 A.D.2d 334, 334, 654 N.Y.S.2d 811 \[2d Dept 1997\]](#).) Indeed, the Master Lease so provided. (See Section 25.01; see also [Allied Builders v Banjoku, 6 Misc. 3d 130A, 800 N.Y.S.2d 341, 2005 NY Slip Op 50075U*1-*2 \[App Term, 2d Dept\]](#).)

When Harborside Management and Respondent subsequently entered into the Sublease, [***9**] Respondent became a month-to-month tenant of Harborside Management. A "sub-tenant's rights are measured by those of his immediate landlord, the original tenant." ([Ashton Holding Co. v Levitt, 191 A.D. 91, 93, 180 N.Y.S. 700 \[1st Dept 1920\]](#) [*quoting* [Bruder v Geisler, 47 Misc. 370, 94 N.Y.S. 2 \[App Term 1905\]](#)].) Provisions of an underlying lease that are binding on a sublessor as a holdover tenant are also binding on the sublessee. (See [Visken v Oriole Realty Corp., 305 A.D.2d 493, 494, 759 N.Y.S.2d 523 \[2d Dept 2003\]](#).) "A subtenant is always bound by the terms of the underlying lease, which is the source of its rights." ([Mann Theatres Corp. of California v Mid-Island Shopping Plaza Co., 94 A.D.2d 466, 471, 464 N.Y.S.2d 793 \[2d Dept 1983\]](#), *aff'd* [62 N.Y.2d 930, 468 N.E.2d 51, 479 N.Y.S.2d 213 \[1984\]](#).)

The Surrender Stipulation, of course, changed these relationships. Petitioner doesn't address how. Respondent cites cases in which, upon the sublessor's surrender, subtenants have been deemed direct tenants of the owner on the terms and conditions of the sublease. But in those cases the terms and conditions of the sublease were within the power of the sublessor to agree to. (See [Eten v Luyster](#), 60 N.Y. 252, 259 [1875]; [Ocean Grille, Inc. v Pell](#), 226 A.D.2d 603, 604-05, 641 N.Y.S.2d 373 [2d Dept 1996]; [Benderson v Computer Task Group, Inc.](#), 216 A.D.2d 922, 923, 629 N.Y.S.2d 559 [4th Dept 1995]; [Ashton Holding Co. v Levitt](#), 191 A.D. at 93-94; [Duane Reade v IG Second Generation Partners, L.P.](#), 184 Misc. 2d 674, 678, 708 N.Y.S.2d 273 [Sup Ct, NY County 2000].)

Whatever the respective rights and obligations between Respondent and Harborside Management, or the respective rights and obligations between an owner and sublessee who are private parties after surrender of the underlying lease, the relationship between Respondent and the City after Harborside Management's surrender of its interests must, in the first instance at least, be determined by the Master Lease. That was the only lease approved in accordance with the City Charter. At this point, therefore, Respondent would have been deemed a month-to-month tenant of the City.

Neither the Surrender Stipulation nor the November 21, 2002 letter advising Respondent of the surrender expressly contemplated that the City would be executing a lease with Petitioner covering Respondent's premises. The security that was held by Harborside Management was transferred to the City (see Surrender Stipulation, Respondent's Exhibit B, P6), and "rents and additional rents" from Harborside's sublessees were apportioned between the City and Harborside Management (*see id.*, P9.) The letter stated that Petitioner "would manage the property on behalf of the City." (See Letter dated November 31, 2002 from Harborside Management and the City to Respondent, Petitioner's Exhibit 5.)

The parties, nonetheless, have proceeded on the basis of a landlord/tenant relationship between them. Petitioner, again, makes no explanation. Respondent argues the doctrine of attornment. (See Respondent's Post-Trial Memorandum Concerning Possession, at 30-38.) "An attornment has been defined as the act of a tenant putting a person in the place of another as his landlord' . . . When a tenant attorns to a new landlord, the tenant continues to hold upon the same terms as he held with his former landlord." ([Ripple's of Clearview, Inc. v Le Havre Associates](#), 88 A.D.2d 120, 121, 452 N.Y.S.2d 447 [2d Dept 1982] [*quoting Austin v Ahearne*, 61 N.Y. 6, 15 (1874)].) [***10**]

Respondent cites no case in which the attornment doctrine has been applied to create a landlord/tenant relationship between a sublessee, like Respondent, and a "substitute sublessor", like Petitioner. At least in this case, with both parties recognizing the landlord/tenant relationship, and the absence of any express agreement between them, the doctrine provides a convenient explanation. The real question, however, concerns the terms and conditions of that relationship, particularly, for present purposes, its duration. Unless there is some other basis for finding the contrary, the "same terms as [Respondent] held with [its] former landlord" (*see id.*), the City, would include a month-to-month tenancy.

It might be that Petitioner and Respondent had an implied agreement in fact that their landlord/tenant relationship should proceed on all of the terms and conditions of the Sublease between Respondent and Harborside Management, but even

Respondent does not contend that. It does contend, however, that estoppel principles should lead to the same result. The doctrine of equitable estoppel "precludes a party at law and in equity from denying or asserting the contrary of any material fact which he has induced another to believe and to act on in a particular manner." ([Holm v C.M.P. Sheet Metal, Inc., 89 A.D.2d 229 at 234.](#))

"New York's rather restrictive view of estoppel requires three elements on the part of the party estopped: (1) conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intent that such conduct (representation) will be acted upon; and (3) knowledge, actual or constructive, of the true facts . . . The elements pertaining to the party asserting estoppel are (1) lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position . . . These are commonly termed the elements of detrimental reliance."

([Id., at 234-35](#); see also [Werking v Amity Estates, Inc., 2 N.Y.2d 43, 53, 137 N.E.2d 321, 155 N.Y.S.2d 633 \[1956\]](#))

Petitioner does not contend that its subleases, permitted by its Lease with the City (see Petitioner's Lease, Petitioner's Exhibit 1, Section 10.2), must also comply with City Charter requirements, or that it, like the City, is immune to the application of equitable principles. None of the arguments advanced by Petitioner or authorities cited would preclude a finding that Petitioner is estopped from terminating Respondent's tenancy during the stated duration of the Sublease, so long as Petitioner continues to have the right under its Lease to possession of the premises.

In considering Respondent's evidence of estoppel, a distinction should be made between Petitioner's conduct prior to December 1, 2002, when it managed the City's interests at Bush Terminal, and its conduct subsequent to that date as lessee of the premises. Although Petitioner's knowledge of material facts, whenever obtained, and its conduct as lessee and sublessor, would be relevant to the elements of estoppel, its conduct as representative of the City would not.

Respondent's position is based upon substantial expenditures it made for improvements to the premises, as well as for continuing repairs during the period of its occupancy, in the absence of any notice from the City or Petitioner that its occupancy might be ended. Mr. Noach testified **[*11]** repeatedly without contradiction that he was never told by anyone on behalf of the City, Petitioner, or Turner Construction, that its Sublease was ineffective or unenforceable, or that either Harborside Management or Respondent was only a month-to-month tenant, nor was he ever told, until receipt of the notice of termination, that his tenancy would be ended. Mr. Lazarus confirmed that, prior to the notice of termination, Petitioner never informed Respondent that it wanted the premises vacant.

There was evidence that the City, at least, was provided a copy of the Sublease at the time of an "audit" in 2001, and there is no dispute that Petitioner was provided a copy when it took over from Harborside Management in December 2002. Mr. Noach testified, also without contradiction, that, whenever there was an issue about necessary repairs on the premises (except for the elevator), he was told by Petitioner or other representatives of the City that under the Sublease, characterized as a "net lease", the repairs were Respondent's responsibility. Petitioner also directly

enforced the Sublease provision that required Respondent to maintain specified insurance coverage on the premises (see Letter dated October 18, 2004 from Petitioner to Respondent, Respondent's Exhibit H.)

There is no evidence, however, that anyone on behalf of the City or Petitioner (as opposed to Harborside Management) ever gave Respondent any assurance of a long-term tenancy. The strongest evidence of any statement that might have given Respondent such an expectation came from Mr. Lazarus. He testified that, at a time when Respondent was in arrears in the payment of rent, in response to a request by Mr. Noach for a lease, he said: "You owe us money, you know, let's see if you can stay in good standing for a year and maybe we would talk about something in the future." (See Testimony of Steven Lazarus, February 28, 2006, T. at 216.)

Against this backdrop, we have Mr. Noach's uncontradicted testimony that Respondent has invested approximately one million dollars in the premises. Building 56 was built in 1914, and is divided into seven floors with a basement. As its name suggests, Respondent uses the building for a self-storage business. When Respondent took over the building, it was in very bad condition, filled with debris, and without electric service in most of the building. Respondent constructed over 800 separate storage units, refurbished the common areas, and re-wired for electric throughout the building. Mr. Noach testified that the removal of the debris cost \$ 50,000.00; an air-conditioning unit was installed for \$ 60,000.00; \$ 62,000.00 was spent to repair the roof, and \$ 11,000.00 for drains. Materials alone cost \$ 200,000.00, including over 3,000 pieces of sheet rock and 15,000 metal tracks. These expenditures were made primarily between the period 1999-2002.

Petitioner points out, appropriately, that none of Mr. Noach's testimony concerning improvements is supported by any documentation. (See Petitioner's Post-Trial Memorandum of Law, at 14.) But the testimony of a knowledgeable witness, unaccompanied and unsupported by documents, can even support an award for substantial damages. (See [*D'Angelo v State of New York*, 39 N.Y.2d 781, 782, 350 N.E.2d 615, 385 N.Y.S.2d 284 \[1976\]](#); [*Merchants Bank of New York v Dajoy Diamonds, Inc.*, 5 A.D.3d 167, 167, 772 N.Y.S.2d 521 \[1st Dept 2004\]](#); [*Electronic Services International, Inc. v Silvers*, 284 A.D.2d 367, 368, 726 N.Y.S.2d 441 \[*12\] \[2d Dept 2001\]](#); [*Aniero Concrete Co. v New York City Construction Authority*, 2003 U.S. Dist LEXIS 7536, *18-*19 \[SDNY\]](#).) Such testimony, particularly when uncontradicted, can certainly support a factual finding, for purposes of equitable consideration, that substantial funds were expended.

Although there was some disagreement as to whether any representative of Petitioner was present during a 2001 "audit" of the premises, during which the City's representatives spent three days on the premises, there was no dispute that Petitioner's representatives were on site every other month. There can be little doubt that the City and Petitioner were aware of the improvements that were being made to Building 56. Indeed, after the audit, Respondent received orders to make certain corrections, including to stairways and exit lights.

In addition, as noted previously, the City and Petitioner have consistently taken the position that Respondent held the premises on a "net lease" basis, and was required to make any necessary repairs, except as to the elevator. Respondent presented no evidence as to the dimensions or frequency of such expenditures.

The Court cannot conclude on this record that Petitioner is estopped from denying

the full effectiveness and enforceability of the Sublease for its stated duration. Respondent's expenditures for improvements were made primarily, if not entirely, prior to Petitioner's stepping in as landlord in December 2002. During that early period, the City and Petitioner were certainly aware of the improvements, but the most that can be said of their respective roles in Respondent's decision to make the improvements is that they failed to advise Respondent of the dispute concerning the status of Harborside Management's tenancy and its potential consequences for Respondent's possession of the premises. But during that period, as Mr. Noach testified, he received assurances from Dominick Massa that its tenancy had been approved by the City, and was not at risk. While the City's and Petitioner's silence may have added credibility to those assurances, it seems quite clear that, if Respondent relied on anyone, it was Massa. There was nothing, moreover, that would have prevented Respondent from seeking clarification as to its status before making any substantial expenditures.

After Petitioner became "substitute sublessor", little changed, except that there is no evidence of substantial expenditures in reliance on Petitioner's silence. No doubt Petitioner has asserted rights provided by the Sublease, but there is no evidence that Respondent ever questioned it. Nor there is anything inherently inconsistent between the "net lease" and other provisions enforced, and a tenancy on a month-to-month basis, as unusual as that might be as a business matter. And, although the references in the 2004 Non-Payment Stipulation to a monthly tenancy are not conclusive on the issue, nor can they be ignored.

It appears that both Petitioner and Respondent were quite content, for their own reasons in their respective interests, to leave undefined the nature and status of their relationship. That is not a sufficient foundation for estoppel. [*13]

Having concluded that Petitioner may terminate Respondent's month-to-month tenancy does not require, however, that Petitioner be given immediate possession of the premises. The Civil Court has the power to stay the issuance or execution of a warrant of eviction. (See [MacLeod v Shapiro](#), 20 A.D.2d 424, 427, 247 N.Y.S.2d 423 [1st Dept 1964]; [City of New York v Falcone](#), 160 Misc. 2d 234, 235, 612 N.Y.S.2d 745 [App Term, 2d Dept 1994]; [Eskandar Corp. v Velis](#), 110 Misc. 2d 193, 194, 438 N.Y.S.2d 180 [App Term, 1st Dept 1981]; [TKU-Queens Corp., Inc. v Mabel Food Corp.](#), 90 Misc. 2d 48, 50-51, 393 N.Y.S.2d 272 [Civ Ct, Queens County 1977]; [Fulton Redevelopment Co. v Kendall](#), 68 Misc. 2d 813, 814, 327 N.Y.S.2d 956 [Sup Ct, Westchester County 1971]; [Canigiani v Deptula](#), 59 Misc. 2d 401, 403-04, 299 N.Y.S.2d 234 [Dist Ct, Nassau County 1969]; [Pepsi-Cola Metropolitan Bottling Co. v Miller](#), 50 Misc. 2d 40, 42, 269 N.Y.S.2d 471 [Civ Ct, Bronx County 1966]; see also [Mennella v Lopez-Torres](#), 91 N.Y.2d 474, 479, 695 N.E.2d 703, 672 N.Y.S.2d 834 [1998]; [467 42nd Street, Inc. v Decker](#), 186 Misc. 2d 439, 440, 719 N.Y.S.2d 798 [App Term, 2d Dept 2000].)

"Stays granted should not be for an eternity. Judicial power should not be so abused." ([MacLeod v Shapiro](#), 20 A.D.2d at 426.) A stay of execution of six months from judgment might be appropriate (see [64 B Venture v American Realty Co.](#), 179 A.D.2d 374, 375, 579 N.Y.S.2d 1 [1st Dept 1992]), but a "potential stay . . . for in excess of six months" might not (see [Eskandar Corp. v Velis](#), 110 Misc. 2d at 195.) Appellate Term for this judicial district has approved a stay in a commercial case of eight months from the date of entry of the judgment. (See [City of New York v Falcone](#), 160 Misc. 2d at 236.) Where the stay is based upon the tenant's need for time to find suitable alternative premises, there must be a showing that the tenant

"has made due and reasonable efforts to secure a similar place to live." (See [Diaz v Jones](#), 81 Misc. 2d 603, 604, 694 N.Y.S.2d 611 [Civ Ct, Bronx County 1999].) And the tenant may be required to pay use and occupation as a condition of the stay. (See [TKU-Queens Corp., Inc. v Mabel Food Corp.](#), 90 Misc. 2d at 51; [Canigiani v Deptula](#), 59 Misc. 2d at 404.)

In this case, Petitioner was equally responsible with Respondent for the uncertainties surrounding Respondent's tenancy. Indeed, as late as the non-payment proceeding, while including references to a monthly tenancy in the settlement document, Petitioner through Mr. Lazarus was suggesting the possibility of a long-term relationship, and reinforcing that suggestion with a 42-month payment schedule for the arrears. (See Non-Payment Stipulation, Petitioner's Exhibit 3, P10.) One can only assume that Petitioner sought to encourage, at least for a while, full and continued payment of the arrears.

In light of the history of their relationship, including the substantial amount expended by Respondent for capital improvements and continued payments for repairs, and recognizing that Respondent, again with Petitioner's knowledge, has contracted with both individuals and businesses to provide storage space for property of presumed value, a hearing is appropriate to determine when a warrant should issue and for how long its execution shall be stayed. (See [City of New York v Falcone](#), 160 Misc. 2d at 235.)

The Court will address Petitioner's claim for use and occupancy, Respondent's counterclaims for damages for actual and constructive eviction, and related matters in a separate opinion. **[*14]**

Judgment of possession is awarded to Petitioner. The parties shall appear for a hearing before this Court on July 5, 2006, 9:30 a.m., Room 1203. The Court has determined that a stay of the issuance of a warrant of eviction to that date is appropriate.

May 18, 2006