

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ESRT EMPIRE STATE BUILDING, L.L.C.,	:	Index No. 656145/2016
	:	
Plaintiff,	:	(Lebovits, J.)
	:	Motion Seq. 1
-against-	:	
	:	AFFIDAVIT OF
PACIFICA FOUNDATION, INC.,	:	SHANE O'DONOGHUE IN
	:	REPLY AND IN FURTHER
Defendant.	:	SUPPORT OF MOTION FOR
-----		X
		<u>SUMMARY JUDGMENT</u>

STATE OF NEW YORK)
) ss.:
COUNTY OF SUFFOLK)

SHANE O'DONOGHUE, being duly sworn, deposes and states as follows:

1. I am the Director of Broadcasting for the Empire State Building. In this capacity, I am responsible for overseeing the Empire State Building's broadcasting operations and am authorized to submit this affidavit on behalf of ESRT Empire State Building, L.L.C. ("ESRT").

2. The facts set forth in this affidavit are based on my personal knowledge and my review of the books and records of ESRT.

3. I respectfully submit this affidavit in support of ESRT's motion for: (a) an order pursuant to CPLR 3212 granting summary judgment in favor of ESRT on its Verified Complaint, specifically an order granting summary judgment on ESRT's cause of action for breach of the Lease and License Agreement dated as of June 27, 2005 (the "Agreement") and awarding it damages for unpaid rent and license fees; (b) an order scheduling an inquest to determine the amount of damages to be awarded to ESRT under Articles 6.B, 7 and 21 of the Agreement for legal fees, costs and disbursements incurred by ESRT as a result of the breach of the Agreement by defendant Pacifica Foundation, Inc. ("Defendant" or "Pacifica"); (c) an

order granting summary judgment dismissing the affirmative defenses of Pacifica with prejudice; and (d) for such other and further relief that this Court deems just and proper.

4. It is my understanding that in its opposition to ESRT's motion for summary judgment, Defendant asserts that at a meeting in 2014, ESRT agreed to accept a reduced rent until "the parties negotiated a final resolution". Defendant's assertion is absolutely false and, in any event, irrelevant under the terms of the Agreement.¹ Article 26 of the Agreement specifically provides:

No endorsement on any check, or letter accompanying rent, shall be deemed an accord and satisfaction, and such check may be cashed without prejudice to Landlord. No waiver of any provision of this lease shall be effective, unless such waiver be in writing signed by Landlord. This lease contains the entire agreement between the parties, and no modification thereof shall be binding unless in writing and signed by the party concerned. (emphases added).

(See Affidavit of Rodney Gomes in Support of Motion for Summary Judgment ("Gomes Aff."), Exhibit C, Article 26, page 026.)

5. Not surprisingly, I have been advised that Defendant has not come forward with ~~any such writing in its opposition to ESRT's motion for summary judgment.~~

6. Furthermore, it is my understanding that Defendant's opposition to this motion rests partially on its contention that it is in a "dire" financial situation. Not only is that assertion irrelevant to this dispute, it is obviously untrue because, upon information and belief, Defendant holds five separate FCC licenses whose values range, upon information and belief, from millions of dollars to tens of millions of dollars. In fact, the "Pacifica Financial Recovery and

¹As Defendant acknowledges in the Affidavit of Berthold Reimers in Opposition to Plaintiff's Motion for Summary Judgment, I was present at the meeting with Mr. Reimers in 2014. ESRT never agreed to modify the Agreement and never waived any of its rights under the Agreement at that meeting, or at any other time.

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SUMMARY JUDGMENT**

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