STATE OF NEW YORK
SUPREME COURT COUNTY OF MONROE

AMYELL DEVELOPMENT CORP.,

Plaintiff, DECISION AND ORDER

v.

Index #2005/01087

IKON OFFICE SOLUTIONS, INC. and
COMPUTER EDUCATIONS SERVICES CORP.,

Defendant.

On these cross-motions for summary judgment the question is whether there has been a surrender or acceptance of the original lease between Amyell and Ikon by operation of law, because there was no express surrender, but only an assignment of the lease by Ikon to CESC and subsequently a separate agreement between Amyell, the landlord, and CESC. Whether summary judgment can be granted to one, or the other, party depends in part upon the operation of certain presumptions in the law created by the events which, as they appear on this record, are generally undisputed. Riverside Research Inst. v. KMGA, Inc., 68 N.Y.2d 689 (1986); Brock Enterprises LTD v. Dunham's Bay Boat Company, Inc., 292 A.D.2d 681, 682 (3d Dept. 2002)(whether a surrender by operation of law occurred is a determination to be made on the facts, but where "the pertinent facts are not disputed, the determination is made as a matter of law").

The assignment by Ikon of the lease to CESC, said to be with

the consent of plaintiff, "did not serve as a release of defendant's liability for rent under the lease." Iorio v. Superior Sound, Inc., 49 A.D.2d 1008 (4th Dept. 1975). See Halbe v. Adams, 172 App. Div. 186, 189 (1st Dept. 1916)("neither the consent of a landlord to the assignment of a lease, nor the acceptance of rent from an assignee from the original tenant, releases the latter from his covenant to pay the rent"). "Something more than this must be shown. It must appear, in addition thereto, that there was an express agreement by which the lessee was released from his covenant to pay the rent, or facts shown from which such agreement can be implied." Id. 172 App. Div. at 189. See also, Mandel v. Fischer, 205 A.D.2d 375, 376 (1st Dept. 1994); 185 Madison Associates v. Ryan, 175 A.D.2d 461 (1st Dept. 1991)(surrender or acceptance "must either be express or implied from facts other than the lessor's mere consent to the assignment and its acceptance of rent from the assignee"); Goldome v. Bonuch, 112 A.D.2d 1025, 1026 (2d Dept. 1985). Ikon pretty much concedes that it was not "completely off the hook" by virtue of the assignment itself and that it was liable on the original lease from January 3, 2002, through September 2002.

But Ikon alleges that there is, indeed, "something more" on this record which operated as a surrender and acceptance by operation of law, namely the new agreement between Amyell and the

assignee, CESC. The new agreement between landlord and assignee was entitled "ADDENDUM TO LEASE BETWEEN COMPUTER EDUCATION SERVICES, CORP., TENANT AND AMYELL DEVELOPMENT CORP., LANDLORD DATED DECEMBER 1, 2001." The assignor, Ikon, was not a party to the addendum lease and claims without contradiction that it had no contemporaneous knowledge of the new agreement and that it did not consent to the new agreement, thereby (in Ikon's opinion) releasing it on the original lease by operation of law. Ikon alleges, again without contradiction of the supporting facts (none could be mounted on this record), that the new agreement between landlord and assignee is wholly different from and inconsistent with the terms of Ikon's original lease with Amyell, in that it (1) increased the term of the rental by one year, (2) increased the square footage of the leasehold estate, which perforce increased CESC's liability for taxes, utilities and maintenance, (3) provided for over $100,000 in improvements to the leasehold estate, which were advanced by landlord and to be paid by CESC under a loan agreement providing for an 8% interest on the unpaid balance, and (4) added a new beneficiary/recipient of rent and loan payments, Elliott H. Press, individually, with whom Ikon had no prior contractual privity or obligation (he was the president of Ikon). From October 2002 through September 2004, when CESC defaulted under the addendum by failing to pay rent, the assignee, CESC, paid Amyell/Elliott H. Press directly

and Ikon was kept out of the loop with respect to invoices and the like.

With the execution of a separate agreement between the landlord and assignee, however, the presumptions in the law concerning surrender and acceptance change.

> There is an implication of intention to surrender an existing lease upon the giving of a second lease, for the reason that the lessor cannot legally execute a second lease of the same premises during the term of a first lease; and when the lessee accepts the second lease unexplained, he admits the power of the lessor which he cannot legally have without a surrender of the first. The presumption of law is, therefore, that a surrender has been made.

Coe v. Hobby, 72 N.Y. 141, 146 (1878). This is not, of course, a conclusive presumption, as Amyell emphasizes on these cross-motions. While "a new agreement is made between the landlord and the assignee, whereby the assignee is given the duration of the term and assumes the obligations of the original lease, it is generally considered that this creates a surrender by operation of law[,] . . . this does not foreclose the matter." Brill v. Friedhoff, 184 App. Div. 673, 676 (1st Dept. 1918), aff'd, 229 N.Y. 547 (1920).

On the other hand, the cases hold that, where there is "a mere modification of the original lease," and "the documentary evidence makes it entirely clear that no new lease . . . was intended," Brill v. Friedhoff, 184 App. Div. at 676, 677, the

presumption of surrender by operation of law "will not be implied against the intent of the parties, as manifested by their acts; and when such intention cannot be presumed, without doing violence to common sense, the presumption will not be supported." Coe v. Hobby, 72 N.Y. at 146. Thus in both Coe v. Hobby, supra, and Brill v. Friedhoff, supra, the courts found only a modification of the original lease effected by granting a concession/reduction in the rent to the assignee and a modification of the lease term to make it easier for the assignee to terminate the lease. Indeed, in Brill v. Friedhoff, the new agreement between landlord and assignee contained a provision specifically preserving to the landlord the right to hold liable the estate of the original guarantor for "any and all liability that might arise out of the afore described lease as modified." Brill v. Friedhoff, 184 App. Div. at 675. In Coe v. Hobby, it was simply observed that it would be "preposterous to say that a reduction of the rent is a surrender of an existing lease, and the granting of a new one" when "there was no dealing with the [leasehold] estate by the lessor incompatible with the lease, and no new letting of the premises by parol or otherwise." Coe v. Hobby, 72 N.Y. at 148.

That brings us to the case upon which Ikon places principal reliance, Mid Valley Associates, LLC v. Footlocker Specialty, Inc., 28 A.D.3d 206 (1st Dept. 2006), and the terms of the

addendum lease between the landlord and the assignee, CESC. In Mid Valley Associates, it was held that there was a surrender by operation of law, and a release of the original tenant, when the landlord not only "accept[ed] rent from it directly," but in "granting it an additional renewal not included in the lease, . . . [the landlord] releas[ed] the original tenant, by operation of law, from its obligation to pay rent." Id. 28 A.D.3d 206. The trial court in that case had observed that the landlord "began collecting rent directly from . . . [the assignee], and . . . deal[t] exclusively with . . . [the assignee] as the tenant," in addition to "negotiat[ing] a new agreement which included a material change in the Lease in providing for a third option to renew the Lease for an additional five year term, with a 15% increase in rent from the previous term." Justice Madden's decision of April 12, 2005, at p.12. Furthermore, it was found that "this new agreement was made without providing notice to defendant or obtaining defendant's consent, and there is no evidence indicating that defendant agreed to be held liable for the obligations under this new agreement." Id. at 13. Accordingly, it was held that the new agreement between landlord and assignee "cause[d] a surrender of the Lease and [served] to release defendant from its obligations thereunder." Id.

The situation here is virtually identical. First, the addendum lease is stated to be exclusively between CESC as

"TENANT" and Amyell as "LANDLORD." To be sure, the addendum refers to the original lease, but it extends that lease for one additional year and obligates CESC "to lease 3,900 square feet of additional space at the same rate and under the same terms as stated in the Lease currently in effect." Over $100,000 of additional improvements were contemplated, and the addendum makes "changes to the plans and specifications for construction within the Premises." Ikon asserts without contradiction that it did not know of the addendum, did not consent to it, and that it did not agree to the substantial additional liabilities placed upon the tenant by the addendum, all factors which led the trial court in Mid Valley Associates to find a surrender by operation of law, a finding affirmed by the First Department. See also, Schnabel v. Vaughn, 258 Iowa 839 (1966).

Amyell seeks to avoid this result by reference to the fact that Ikon did not consent to the new lease. But this objection would have been equally present in Mid Valley Associates, and yet a surrender by operation of law was held to have taken place. Nor was the consent of the original tenant thought an important consideration in Gray v. Kaufman Dairy & Ice-Cream Co., 162 N.Y. 388 (1900) in which the tenant (who had offered surrender but was rebuffed by the landlord) simply ignored the landlord's subsequent efforts to have it pay the deficiency between the new tenant's rent and its own. Nor was the consent of the original

tenant held to preclude surrender and acceptance in Centurian Development LTD v. Kenford Company, Inc., 60 A.D.2d 96 (4th Dept. 1977), in which "the landlord "re-let larger and different premises from those leased to defendant without notice to defendant, for a new term which exceeded the tenant's original term and by an agreement which obligated extensive repairs and modifications to the premises." Id. 60 A.D.2d at 98.

Ikon also seeks to avoid this result by reference to the parol evidence rule, reasoning that the merger clause in the original lease prevented any termination of that lease except by the execution of a new writing between Amyell and Ikon. This objection ignores the rule that, for this limited purpose, surrender and acceptance by operation of law is an exception to the parol evidence rule, if the new lease is valid and enforceable. Schieffelin v. Carpenter, 15 Wend. 400 (1836); Smith v. Niver, 2 Barb. 180 (Sup. Ct. N.Y. Co. 1848)("true rule seems to be that a new lease of the premises, whether by parol or not, if valid, will operate in law as a surrender of the former lease"). See also, 4 Herbert T. Tiffany & Basil Jones, Tiffany on Real Property §962 (1975)("the fact that the new lease is oral is immaterial if an oral lease is sufficient to create the interest intended to be created")(citing Coe v. Hobby, supra; Schieffelin v. Carpenter, supra, 15 Wend. 400). I have considered the other evidence proffered by Amyell in its motion

papers, but find that the unambiguous provisions of the addendum creating a surrender and acceptance by operation of law are not thereby impeached, especially by the pre-addendum acknowledgment by Ikon that it was not "off the hook" by virtue of the assignment itself. Amyell's other evidence, whether admissible or not, tends to show the landlord's refusal of the original tenant's surrender, a matter held not significant in Gottlieb v. Taco Bell, Corp., 871 F.Supp. 147, 153 (E.D.N.Y. 1994)("an outward refusal to accept repudiation of the lease does not bar a finding that the subsequent conduct of the parties creates an acceptance by operation of law"). To the same effect is Gray, 162 N.Y. at 395 ("The tenant asked the landlord to take the same off his hands. This the landlord declined to do." -- but later relet the premises effecting an acceptance of surrender); Milton R. Friedman & Patrick A. Randolph, Jr., Friedman on Leases §16:3.3 ("fact that landlord disclaims any intention to release tenant is immaterial"). Summary judgment is granted to Ikon, and denied to Amyell.

Submit order. If the pleadings call for a declaration instead of dismissal, draft accordingly.

SO ORDERED.

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KENNETH R. FISHER
JUSTICE SUPREME COURT

DATED: December 13, 2006
Rochester, New York