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

PRESENT: Rosalyn Richter Justice PART 24

NY Service Program for Older People Inc

- v -

117 West 58 LLC

INDEX NO. 601832-02

MOTION DATE

MOTION SEQ. NO. 03

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 9/8/03

HON. ROSALYN RICHTER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 24

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NEW YORK SERVICE PROGRAM FOR OLDER PEOPLE,

Plaintiff,

-against-

117 WEST 72nd STREET LLC,

Defendant.

..... x

DECISION, ORDER AND JUDGMENT
Index No. 601832/02
Motion Sequence No. 3

ROSALYN RICHTER, **J.S.C.:**

In this commercial lease dispute, plaintiff New York Service Program for Older People ("the tenant") contends that defendant 117 West 72nd Street LLC ("the landlord") refused to return the tenant's security deposit and first month's rent upon termination of the lease. The tenant's causes of action include breach of contract, unjust enrichment and tortious interference with business relations. The landlord counterclaims for breach of contract alleging that the tenant abandoned the leasehold and seeks damages allegedly suffered by the landlord as a result of the breach. In this motion and cross-motion, both parties move for *summary* judgment.

The relevant facts are not in dispute. Sometime in 2000, the tenant contacted broker Nicholas Poshkus ("the broker") and **asked** him *to* **search** for new **office space** on its behalf. The broker subsequently located a space acceptable to the tenant in a building located at 111-117 West 72nd Street in Manhattan. On April 9, 2001, the tenant and the landlord entered into a ten-year lease for the entire third floor of that building ("the premises"). Upon execution of the lease, the tenant paid the landlord a total of $49,000 consisting of a payment of **$12,250** for the first month's rent **and a** security deposit in the amount of $36,750. Pursuant to the lease, the tenant's rental obligation was

scheduled to commence when the landlord gave the tenant notice of the substantial completion of certain construction work in the leased premises. The landlord then commenced construction and architectural work in preparation for the tenant's arrival.

Before the landlord gave notice that the work was substantially completed, the tenant informed the landlord, by letter dated July 19,2001, that it would be financially unable to afford the rental payments for the lease. In the letter, the tenant indicated that it wished to surrender the lease or if that could not be done, it wished to find a subtenant, which was a right the tenant possessed under the terms of the lease. In a letter dated August 8,2001, the landlord informed the tenant that it would allow the tenant to surrender the lease only upon payment of thirteen months rent and that if the tenant did not wish to pay that amount, it could seek to assign the lease pursuant to the terms of the lease. The landlord's letter reminded the tenant that it was unequivocally bound by the lease and that the tenant would remain responsible for the lease obligations until a surrender agreement was fully executed and delivered.

The tenant declined the landlord's surrender offer and instead sought to locate a potential assignee by contacting the broker and instructing him to search for a suitable party. The broker identified one potential subtenant who was rejected by the landlord for undisclosed reasons. The broker then found Machold Rare Violin, Ltd. ("Machold") and submitted information about Machold to the landlord. The cover page of the broker's fax to the landlord indicated that the attached information related to the "proposed subtenant for [the tenant]".[1] Thereafter, the landlord and

[1] The landlord maintains in its reply affirmation that the tenant never submitted the name of a potential subtenant or assignee to the landlord. However, the landlord's complaint acknowledges that "[the tenant] made an overture to [Machold]". Further, the landlord does not deny that it received the above fax or that the broker submitted Machold's name on behalf of the tenant. (continued...)

Machold dealt directly with each other regarding the possibility of Machold occupying the premises.

On September 21, 2001, the landlord and Machold entered into a new lease for the premises conditioned upon the execution and delivery by the landlord and the tenant of a Termination and Surrender Agreement ("surrender agreement"). On September 25, 2001, the landlord told the tenant that it had entered into the Machold lease and sent the tenant a draft surrender agreement. The landlord informed the tenant that the agreement needed to be executed the very next day.[2] That same day, the tenant signed and returned to the landlord the draft agreement with certain handwritten modifications which deleted the provisions stating that the landlord was entitled to retain the tenant's security deposit and the first month's rent. The next day, the tenant sent the landlord a signed typed version of the modified draft agreement, as well as a signed unilateral surrender agreement containing language substantially similar to the modified draft agreement.

All of the agreements signed by the tenant and sent to the landlord stated the tenant's position that it was entitled to the return of its security deposit and first month's rent. For that reason, the landlord refused to signed any of the agreements. The landlord and Machold then entered into an agreement deleting the provision of the Machold lease which required the execution of a surrender agreement between the landlord and the tenant. Several months later, the landlord completed renovations of the premises and notified Machold that the commencement date of its lease would

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'(...continued)
Moreover, the landlord's representative specifically acknowledged that Machold was identified as a proposed subtenant for the tenant (Nicholson Deposition, p. **61).** Although it may be true that the tenant never ***directly*** informed the landlord about Machold, there is no dispute that the tenant was involved in the broker's identifying Machold as a potential subtenant.

[2] Presumably, the reason for the haste was a provision in the Machold lease that the lease would be null and void if the surrender agreement was not executed and delivered within five days.

be December 15,2001. Machold subsequently took possession of the premises.

In its motion for *summary* judgment, the landlord maintains that through the July 19,2001 letter, the tenant committed an anticipatory beach of the lease and subsequently abandoned its tenancy? The landlord seeks $66,000 in damages representing the legal, brokerage and construction costs incurred in procuring the Machold tenancy, as well as $61,250 in lost rent covering the five month period between the date the lease between the parties was executed and the date the Machold lease was signed. In its cross-motion, the tenant, on the other hand, maintains that it committed no breach of the lease and that the landlord, through its actions and by operation of law, ended the tenancy. As such, the tenant contends that it is entitled to the return of its security deposit and the first month's rent.

"The doctrine of anticipatory breach is applicable to bilateral contracts which contemplate some future performance by the nonbreaching party." *American List Corporation v. U.S. News and World Report, Inc., 75* N.Y.2d 38, 44 (1989). The doctrine provides that when a party wrongfully repudiates a contract before the time for its performance arrives, the nonrepudiating party may immediately claim damages for a total breach and is relieved fiom performing any future obligations. *Computer Possibilities Unlimited, Inc. v. Mobil Oil Corporation,* 301 A.D.2d *70* (1st Dept. 2002). In order to constitute an anticipatory breach, the breaching party must indicate an "unequivocal intent to forego performance of [its] obligations under [the] contract." *Rachmani Corporation v. 9 East 96th Street Apartment Corporation,* 211 A.D.2d 262, 266 (1st Dept. 1995). Thus, before the anticipated breach may be the subject of legal action, there must be a "definite and final

[3] There is no dispute that there was no actual breach of the lease because the tenant's rental obligations had not yet commenced when the July 19 letter was sent.

communicationof the intentionto forego performance." *Rachmani Corporation v. 9 East 96th Street Apartment Corporation*, 211 A.D.2d at **267;** *accord Canali U.S.A., Inc. v. Solow Building Company, L.L.C.*, 292 A.D.2d 170 (1st Dept. 2002).

Applying these principles, the Court concludes that the tenant did not commit an anticipatory breach of the lease. Although it is true that the July 19 letter stated that the tenant would not be able to financially afford the rental payments for the lease, it did not contain a "definite and final communication" of the tenant's intention to forego its obligations under the lease. To the contrary, the letter indicated that the tenant was fully aware of its lease obligations. First, the tenant asked for the landlord's permission to surrender the lease. If that could not be done, the tenant stated that it would seek a sub-tenant, which was a right expressly allowed the tenant under the lease. Thus, rather than unequivocally repudiating the lease, the tenant's July 19 letter indicated its intention to honor its lease obligations by subleasing the premises. *See Canali U.S.A., Inc. v. Solow Building Co., L.L.C.*, 292 A.D.2d at170 (tenant "gave no indication of an intent to forego its [lease] obligations, let alone the sort of 'definite and final communication' necessary to justify a claim of anticipatory breach" especially in light of tenant's "letters to the landlord [which] manifested a desire to perform").

Furthermore, the landlord's August 8, 2001 reply to the tenant made clear that the landlord did not consider the tenant's July 19 letter to be an anticipatory breach. In that letter, the landlord acknowledged that the tenant had the right to assign the lease, and specifically indicated that the tenant would be responsible for the payment of any brokerage commissions associated with the assignment. Following that letter, the tenant took steps to comply with its lease obligations. It contacted the broker and instructed him to search for a suitable assignee. The broker subsequently

identified Machold and informed the landlord that it had located a proposed subtenant for the tenant.[4] However, rather than allow the tenant to complete negotiations with Machold, the landlord opted instead to deal directly with Machold. By doing so and ultimately entering into a lease with Machold, the landlord never gave the tenant the chance to comply with its lease obligations by finding a suitable subtenant.[5]

The landlord's reliance on *150/160 Associates v. Mojo-Stumer Architects, Inc., P.C.*, 174 A.D.2d 658 (2d Dept. 1991), is misplaced. In that case, the landlord and the tenant executed a ten year commercial lease. After the lease was executed but before the commencement date, the tenant told the landlord that it would not be taking possession of the premises. After the landlord notified the tenant that it would be held responsible for all damages occasioned by its withdrawal, the landlord and another tenant executed a new lease. The Second Department concluded that under the facts of the case, the tenant had committed an anticipatory breach of the lease. The facts of the case before this Court are entirely different. In *150/160 Associates*, the tenant told the landlord that it would not be taking possession of the premises. In contrast, the tenant here did not make such an unequivocal repudiation. Rather, the tenant here simply stated that it could not afford the rental payments, and requested the landlord to allow the lease to be surrendered or sublet. Notably, the tenant in *150/160 Associates* never stated its intention to find a subtenant or otherwise comply with

[4] The broker also identified another potential subtenant, prior to Machold, who was rejected by the landlord.

[5] The landlord argues that the tenant had over two months to locate a suitable subtenant, yet failed to do so. However, nothing in the lease requires the tenant to obtain a subtenant within any particular time frame. Of course, had the lease commenced without the tenant having found a subtenant, the tenant would have been obligated to pay rent. However, the parties never reached that point because the landlord opted instead to deal directly with Machold and enter into a new lease.

its lease obligations. Thus, *150/160* ***Associates*** is distinguishable.

The landlord also argues that the tenant failed to comply with the various conditions and requirements set forth in the lease for assignments. It is true that the tenant was required to follow certain procedures and obtain the landlord's consent before assigning the premises. However, those requirements are irrelevant because the landlord never gave the tenant the opportunity to comply with them. Had the landlord not entered into the Machold lease, the tenant could well have met all of the lease requirements and entered into a sublease with Machold, or any other suitable subtenant. The landlord also maintains that the tenant could not have assigned the lease to Machold because Machold required different lease provisions necessitating an entirely new lease. However, if that were true, the tenant still could have located another subtenant who was amenable to the subject lease. Having not given the tenant the opportunity to locate an acceptable subtenant, the landlord cannot now complain that the tenant failed to follow the necessary procedures.

Finally, the landlord argues that the tenant's course of conduct, culminating in its unilateral surrender agreement, establishes that the tenant abandoned its tenancy. The landlord's argument, however, ignores the fact that the tenant's surrender of the premises was a result of the landlord's request for a surrender so that it could relet the premises to Machold. **As** noted, on September 21, 2001, the landlord and Machold entered into a new lease for the premises conditioned upon the execution of a surrender agreement. On September 25, 2001, the landlord sent the tenant a draft termination agreement and told the tenant that it needed to be executed the very next day. Thus, the fact that the tenant signed the surrender agreement was a justified response to the landlord's demands related to the Machold lease. In sum, because the evidence establishes that the tenant did not commit an anticipatory breach of the lease or otherwise abandon the tenancy, the Court denies the landlord's

motion for summary judgment on its counterclaim and grants the tenant's cross-motion dismissing the counterclaim.

The tenant's cross-motion also seeks summary judgment in its favor on the breach of contract claim seeking the return of the security deposit and first month's rent. With regard to the first month's rent, the lease plainly provides that the lease term commences when the landlord provides the tenant with notice of substantial completion of the construction work. It is undisputed that the landlord neither completed the construction nor provided the requisite notice. Thus, because the lease term never commenced, the tenant's obligation to pay rent never began. The landlord argues, however, that it is entitled to retain the first month's rent to cover the damages it sustained as a result of the tenant's breach. But since the Court has found that no breach occurred, the tenant is entitled to the return of the first month's rent.

Similarly, the tenant is entitled to return of its security deposit. Paragraph 32 of the lease provides that if the tenant fully and faithfully complies with the terms of the lease, the security shall be returned to the tenant.[6] Because the tenant committed no breach of the lease and was not otherwise in default of its lease obligations, it has fully complied with the lease terms. Thus, the tenant is entitled to *summary* judgment on its breach of contract claim seeking return of its security deposit and first month's rent.[7]

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[6] The lease states that the security deposit is to be returned "after the date fixed as the end of the Lease." Normally, a tenant must await the original expiration date of the lease before claiming a return of the security deposit. However, where, as here, a lease is prematurely ended without any fault of a tenant, the tenant need not await the original expiration date before being entitled to return of its security deposit. **74A** N.Y. Jur. 2d ***Landlord & Tenant*** **§ 657 (1999).**

[7] The tenant's causes of action for unjust enrichment and tortious interference are pleaded as alternatives to the breach of contract claim and seek relief only in the event the Court rejects the (continued...)

The fact that the landlord never expressly accepted any of the tenant's surrender agreements does not require a contrary result because the lease was surrendered by operation of law. "A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated." *Riverside Research Institute v. KMGA, Inc.*, 68 N.Y.2d 689, 691-92 (1986); *accord Bay Plaza Estates, Inc. v. New York University*, 257 A.D.2d 472 (1st Dept. 1999). A surrender by operation of law need not be express, but may be inferred from the conduct of the parties. *Precision Dynamics Corporation v. Retailers Representative, Inc.*, 120 Misc.2d 180 (Civ. Ct. N.Y. Co. 1983).

At the time the Machold lease was entered into, the tenant still maintained its leasehold interests in the premises because it had not committed any breach, actual or anticipatory. Indeed, the landlord explicitly recognized the tenant's continued interest in the premises because it initially conditioned the Machold lease upon the tenant's surrender of its interest. Thus, the landlord's negotiating with and subsequently reletting the premises to Machold was wholly inconsistent with the tenant's lease interests. Such conduct, coupled with the tenant's executing the surrender agreements, evidences the parties' intent to deem the lease terminated and thus constitutes a surrender by operation of law. *See Brock Enterprises, Ltd. v. Dunham's Bay Boat Company, Inc.*, 292 A.D.2d 681 (3d Dept. 2002)(inferring surrender where tenant abandoned possession of the premises and the landlord relet the premises); *NHS National Health Services, Inc. v. Kaufman*, 250 A.D.2d 528 (1st Dept. 1998)("[t]he conduct of both parties, to wit, plaintiff vacating, and the landlord

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[7](...continued)
contract claim. **Because the** Court **grants summary judgment** in favor of the tenant on the contract claim, the Court dismisses the remaining causes of action as academic.

releting, the premises, established a surrender of the subject space by operation of law").'

The Court is mindful that the landlord may have incurred unnecessary expenses as a result of the circumstances surrounding this failed tenancy. Upon receiving the tenant's July 19, 2001 letter, the landlord could have chosen to complete the construction work so as to trigger the commencement of the lease and the tenant's rental obligations thereunder. Instead, the landlord, through no fault of the tenant, made a business decision to end this tenancy by taking it upon itself to locate a new tenant and enter into a new lease. Having made that choice, the landlord cannot now be heard to complain. Accordingly, it is

ORDERED that defendant's motion for summary judgment dismissing plaintiffs complaint is denied; and it is further

ORDERED that defendant's motion for summary judgment on its counterclaim is denied; and it is further

ORDERED that plaintiffs cross-motion for *summary* judgment dismissing defendant's counterclaim is granted, and the counterclaim is dismissed; and it is further

ORDERED that plaintiffs cross-motion for summary judgment on its first cause of action alleging breach of contract is granted; and it is further

ORDERED that plaintiffs second and third causes of action alleging unjust enrichment and tortious interference are dismissed as academic; and it is further

ORDERED that plaintiff shall recover from defendant the sum of $49,000, with interest at

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[8] The landlord argues that even if its conduct is deemed to be a surrender by operation of law, the tenant would only be relieved of future liability and not fiom liability for obligations that accrued before the surrender. Although that is true, the tenant did not accrue any past liabilities because the lease term never commenced and because the tenant never committed a breach.

the rate of 9% per annum from the date of September 26, 2001,[9] until the date of entry of judgment, as calculated by the clerk, and thereafter at the statutory rate, together with costs and disbursements as taxed by the clerk; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision, order and judgment of the Court.

Justice Rosalyn Richter

September 8, 2003

[9] The date for accrual of interest on the judgment is September **26, 2001,** when the Machold lease was entered into.