

**Madison Ave. Leasehold LLC v Madison Bentley
Assoc. LLC**

2005 NY Slip Op 30005(U)

January 4, 2005

Supreme Court, New York County

Docket Number: 0600192/2004

Judge: Sherry Klein Heitler

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

PRESENT: Sherry Klein Heitler
Justice

PART 30

0600192/2004

INDEX NO. 600192/04

MADISON AVENUE LEASEHOLD, LLC

MOTION DATE _____

vs
MADISON BENTLY ASSOCIATES,
LLC

MOTION SEQ. NO. (01)

MOTION CAL. NO. _____

SEQ 1

_____ 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

is decided in accordance with the
memorandum decision dated 1-4-05

FILED

JAN 10 2005

**NEW YORK
COUNTY CLERK'S OFFICE**

Dated: 1-4-05

Sherry Klein Heitler
SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 30**

-----X
MADISON AVENUE LEASEHOLD LLC,

Plaintiff,

-against-

MADISON BENTLEY ASSOCIATES LLC, ARTHUR
MILLER and BRIAN MILLER,

Defendants.

-----X
SHERRY KLEIN HEITLER, J.:

Index No. 600192/04

DECISION & ORDER

Plaintiff Madison Avenue Leasehold LLC (“Madison Ave.”) moves, pursuant to C.P.L.R. §3025(b), for an order granting leave to serve and file a proposed amended complaint in the above-captioned matter. Defendants Arthur Miller and Brian Miller cross-move, pursuant to C.P.L.R. §3212, for summary judgment as to those portions of the original complaint which seek the imposition of liability against the individual defendants under a certain Limited Guaranty.

This action is based upon an alleged breach of a commercial lease agreement between plaintiff/landlord and defendant Madison Bentley Associates LLC (“Madison Bentley”).

On March 29, 2000, Manhattan Motors Cars Madison LLC (“MMC”) entered into a written agreement with Sage Realty Corporation, an agent for plaintiff Madison Ave., to lease a portion of the ground floor and basement of 437 Madison Avenue, New York. Simultaneously with the execution of the lease, defendants Arthur Miller and Brian Miller (collectively, “the individual guarantors”) signed a Limited Guaranty that pledged MMC’s timely payment of all rents and full performance of all covenants, terms, conditions, and agreements during the first three years of the lease. The Limited Guaranty further provided:

Landlord hereby agrees that in the event Tenant shall not have been in monetary default under the Lease at any time during the first three (3) years of the term of the Lease, this Guaranty and Guarantor's obligations hereunder shall cease and terminate upon the third (3rd) anniversary of the Commencement Date.

On May 8, 2000, Rolls-Royce and Bentley Motor Cars Inc. ("Rolls-Royce") signed an agreement to subsidize MMC during the first three years of its lease with Madison Ave. MMC then assigned all of its right, title and interest in the lease to defendant Madison Bentley. Madison Bentley took occupancy of the leased premises on June 15, 2000. The leased property was utilized as an automobile showroom for Rolls-Royce and Bentley automobiles and executive offices in connection therewith.

On August 28, 2003, Madison Bentley informed plaintiff that the partial rent subsidy from Rolls-Royce would terminate on September 30, 2003 and that, without a rent concession from plaintiff, coupled with some modifications of the stated terms of the lease, Madison Bentley would terminate its lease agreement. Madison Bentley subsequently vacated the premises on September 29, 2003.

Plaintiff served Madison Bentley with a seven-day Notice to Cure on October 2, 2003, then filed a petition for holdover with the Civil Court on October 21, 2003, seeking recovery of the unpaid October rent. On January 26, 2004, plaintiff filed a complaint against defendants in this court. Thereafter, on May 20, 2004, plaintiff filed the instant motion to amend the complaint to clarify and expand its allegations of personal liability on the part of defendants Arthur Miller and Brian Miller.

At issue is whether Madison Bentley defaulted during the first three years of its lease, such that the individual guarantors remain personally liable for Madison Bentley's alleged default in October 2003.

Paragraph 40 of the lease provides that "fixed rent shall be payable in equal monthly installments in advance on the first day of each calendar month, without notice or demand. . .".

Paragraph 14 of the lease defines "default" as the tenant's failure to "fulfil[l] any of the covenants of this lease including the covenants for the payment of rent or additional rent."

Plaintiff contends that Madison Bentley's failure to pay its rent on the first day of each month constituted multiple monetary defaults under the lease. Therefore, plaintiff asserts, the condition precedent which would have relieved the individual guarantors' personal liability under the Limited Guaranty was not fulfilled, and the individual guarantors remain liable for the alleged breach of the lease agreement by Madison Bentley.

The individual guarantors, however, contend that the condition releasing them from personal liability was, in fact, fulfilled, because Madison Bentley was not in arrears in its rent when it vacated the premises, and plaintiff had never served Madison Bentley with a Notice to Cure or a Notice of Default during the first three years of the lease, *i.e.*, from the commencement of the lease on June 15, 2000 to June 15, 2003. Additionally, the individual guarantors note that, with the exception of one payment (September 2001), "rent was always paid by the twentieth (20th) day of the month, and on twenty-three (23) occasions was paid by the tenth (10th) day of the month." The individual guarantors assert that plaintiff's repeated acceptance of "late" rental payments constituted a waiver of Madison Bentley's alleged default under the lease.

“When rent is accepted with knowledge of particular conduct which is claimed to be a default, the acceptance of such rent constitutes a waiver by the landlord of the default.” Atkin’s Waste Materials, Inc. v. May, 34 N.Y.2d 422, 427 (1974). “The acceptance of the rent is in effect an election by the landlord to continue the relationship of landlord and tenant. . . . The lease is to be given a reasonable construction in light of that which the parties intended and that which was sought to be achieved by the parties.” Id. (holding that continued acceptance of rent despite alleged defaults under the lease did not constitute a default sufficient to vitiate plaintiff’s right to exercise its option to renew the lease).

Here, plaintiff accepted rental payments from Madison Bentley without protest, despite the fact that they were not tendered on the first day of the month as provided for in the lease. Under these circumstances, the default, if any, was *de minimis*. See Denice v. Lin-Ed Enter., 1 Misc.3d 903A, 2003 N.Y. Misc. LEXIS1589, **1, **6-**7 (Civ. Ct. Richmond Cty. 2003).

Moreover, “[a] lease, like any other contract, is to be interpreted in light of the purposes sought to be attained by the parties.” Farrell Lines, Inc. v. New York, 30 N.Y. 2d 76, 82 (1972). Here, the plain intent of the Limited Guaranty was to effectuate its end after three years – the same time period for which Madison Bentley was receiving a rent subsidy from Rolls-Royce. The only condition precedent that was required to be met for termination of the individual guarantors’ personal liability was a lack of default on the part of Madison Bentley. Here, plaintiff never gave Madison Bentley notice that its failure to pay rent on the first of the month would be deemed a default under the lease, and Madison Bentley was not given an opportunity to cure any such default in the future, as provided for in the lease. “[W]here under a lease in which payment of the rent is required upon a day certain the parties by a course of conduct extending

for years have acquiesced in a method by which the rent is to be paid, the provision for payment in the original contract is so far waived as to prevent a claim that a failure to pay upon the day named is a breach of the condition until the lessee has notice of the fact that such a custom will not in the future be continued and payment is required upon the day named in the contract.”

Montant v. Moore, 135 A.D. 334, 341 (1st Dept. 1909).

Under the terms of the Limited Guaranty, only defaults which took place within the first three years of the lease would suffice to undo the Limited Guaranty’s provision alleviating the individual guarantors of their personal liability for Madison Bentley’s lease. However, plaintiff did not seek a cure of any such breach at the time of its occurrence, choosing instead to deem Madison Bentley in breach of the lease *after* the three-year term of the Limited Guaranty had presumably expired. Madison Bentley was thus given no opportunity to cure any such breach.

“The propriety of an opportunity to cure a breach of a substantial obligation of a tenancy appears to this Court to be in keeping with the strong preference of avoiding forfeitures of leases. . . . Particularly in the circumstances herein, where it is undisputed that a course of conduct developed over the last several years whereby late payments were routinely accepted, [plaintiff’s] change in position warrants a notice to [defendants] and an opportunity for a concomitant change in practice for [defendants].” 326-330 East 35th St. Assoc. v. Sofizade, 2001 N.Y. Misc. LEXIS 1026, **1, **11-**12) (Civ. Ct. N.Y. Cty. 2001). A course of conduct had developed between plaintiff and Madison Bentley such that payment of the rent was accepted on dates other than the first day of the month. While plaintiff may have been entitled to seek termination of its landlord-tenant relationship with Madison Bentley based on alleged defaults during the first three years of the lease, it declined to do so, or to permit Madison Bentley to avoid any such negative

consequences through cure of the alleged defaults. Under these circumstances, the court finds that plaintiff has waived any alleged defaults which occurred through Madison Bentley's adherence to its unchallenged payment practices during the first three years of its lease.

Additionally, the court has reviewed plaintiff's proposed amended complaint and finds that it contains no new allegations which would alter the court's determination that summary judgment should be granted in favor of the individual guarantors. Rather, the proposed amended complaint merely amplifies plaintiff's allegations of personal liability on the part of the individual guarantors, as distinct from the corporate tenant – a position the court has found unwarranted under the circumstances presented herein.

Accordingly, it is hereby

ORDERED that plaintiff Madison Avenue Leasehold LLC's motion to amend its complaint is denied as moot; and it is further

ORDERED that the cross-motion of defendants Arthur Miller and Brian Miller for summary judgment dismissing those portions of the complaint which assert their individual liability for breach of the lease between Madison Avenue Leasehold LLC and Madison Bentley Associates LLC is hereby granted.

This shall constitute the decision and order of the court.

DATED: January 7, 2005

FILED

JAN 10 2005

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COUNTY CLERK'S OFFICE**


SHERRY KLEIN HEITLER
J.S.C.