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SCANNED ON 4/21/2005

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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

0603069/2002

MID VALLEY ASSOCIATES, LLC.,

vs

FOOT LOCKER, INC.,

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

FILED
APR 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

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 is decided in accordance with the annexed Memorandum Decision and Order.

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

Dated: April 12, 2005

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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MID VALLEY ASSOCIATES, LLC,

Plaintiff,

Index No.: 603069/02
DECISION/ORDER

-against-

FOOT LOCKER, INC., f/k/a F.W. WOOLWORTH CO.,

Defendant.

----------X

HON. JOAN A. MADDEN, J.S.C.:

In this commercial landlord-tenant dispute, the parties separately move for summary judgment.[1] For the following reasons, defendant's motion is granted, and plaintiff's motion is denied.

BACKGROUND

Plaintiff Mid Valley Associates, LLC ("Mid Valley") is the current owner of a shopping center, located in Newburgh, New York, called the "Mid Valley Discount Mall" ("the Mall"). On November 30, 1990, Mid Valley's predecessor in interest, as landlord (hereafter "the Original Landlord"),[2] and defendant,[3] as tenant, executed a lease for commercial space in the Mall (the Lease). The Lease had a 10-year term, which began on August 7, 1991 and expired on December

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[1]The motions, which bear sequence numbers 002 and 003 respectively, are consolidated for disposition.

[2]Mid Valley's predecessor in interest was a partnership called Mid Valley Discount Mall Associates, LLP. That entity transferred its ownership interest in the Mall to Mid Valley on March 15, 1999.

[3]Defendant Foot Locker, Inc. (Foot Locker) was originally called F.W. Woolworth Co.; however, on June 12, 1998, it changed its name to Venator Group Specialty, Inc., and thereafter changed it again, on November 2, 2001, to Foot Locker.

31, 2001. The Lease contains two options to renew for two five year terms. Section 12.7, regarding assignment and subletting, provides, that:

> (a) Tenant expressly covenants and agrees that it shall not assign...this Lease, nor underlet, or suffer or permit the Leased Premises or any part thereof to be used or occupied by others without the prior written consent of Landlord in each instance. If this Lease is assigned, or if the Lease Premises or any part thereof be underlet or occupied by anybody other than Tenant, Landlord may, after default by Tenant collect rent from the assignee, undertenant or occupant, and no such assignment, underletting, occupancy or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, undertenant or occupant as tenant, or a release of Tenant from further performance by Tenant of the covenants on the part of Tenant herein contained.
>
> ***
>
> (c) (2) No assignment or subletting hereunder, whether or not with Landlord's consent, nor the acceptance of rent by Landlord from any assignee or subtenant, shall release Tenant from any obligations or liabilities under this Lease, and Tenant shall continue to be primarily liable for the performance and observance of all of the terms, covenants and conditions of this Lease. If Tenant's assignee or sublessee defaults under this Lease, Landlord may proceed directly against Tenant without pursuing its remedies against the assignee or sublessee. Consent to one assignment or subletting shall not be deemed a consent to any subsequent assignment or subletting. Landlord may consent to subsequent assignments or modifications of this Lease or subletting upon notice to Tenant and Tenant shall not be relieved of liability under this Lease.

On April 13, 1995, defendant sent the Original Landlord a letter requesting permission to assign the Lease to a subsidiary corporation that defendant had created called Rx Realty Corp. Defendant planned to transfer all of its discount pharmacy business assets to Rx Realty Corp., and thereafter to sell its entire discount pharmacy operation (i.e., Rx Realty Corp.) to Pharmhouse Corp. (Pharmhouse).

Pursuant to a document entitled "Assignment of Lease" with an effective date of April 25, 1995, defendant agreed to "assign[] all of its right, title and interest in and to the Lease and the store premises to Rx [Realty Corp]" and Rx Realty Corp. agreed to "assume[] the Lease and agree[] directly with Landlord and [defendant] to pay, perform and observe all the Tenant's obligations under the Lease accruing from and after the effective date hereof." After entering into the Assignment of Lease agreement, defendant consummated the sale of Rx Realty Corp. to Pharmhouse and entered into an Asset Purchase Agreement under which Pharmhouse acquired all of Rx Realty Corp.'s leases by assignment. Pharmhouse immediately took up occupancy of the commercial premises covered by the Lease.

Neither the Original Landlord nor Mid Valley consented to the assignment of the Lease to Rx Realty or to Pharmhouse. And, the record indicates that the Original Landlord never signed a document providing for its consent to the assignment and releasing defendant from its obligations under the Lease. When Pharmhouse sent a letter with a rent check to the Original Landlord for May rent, the Original Landlord returned it in a letter dated May 1, 1995, stating that "you are not the tenant." Subsequently, by letter dated May 8, 1995, counsel for defendant informed Pharmhouse that it had paid the rent directly to the Original Landlord and indicated that "the location will be a sublease."

Between 1995 and 1999, Pharmhouse remitted rent for the premises to defendant, who thereafter caused its subsidiary RX Realty to forward payment to the Original Landlord, which refused to recognize Rx Realty as its Tenant, or to accept rent from it. Mid Valley acquired the Mall in March of 1999. When it did so, it applied to the Dime Savings Bank to refinance the underlying mortgage on the Mall. As part of Mid Valley's refinance application, the Dime

Savings Bank required all of the Mall's tenants to execute tenant estoppel certificates that stated, among other things, that said tenants had not assigned any portion of their respective leases. Defendant executed two such estoppel certificates, in February and again in August of 1999, and both times stated that it had not assigned, but had rather sublet, the premises at the Mall to Pharmhouse.

On March 15, 1999, an entity called Phar-Mor, Inc. (Phar-Mor) purchased all of Pharmhouse's stock and took over all of Pharmhouse's business, including the use and occupation of the commercial premises at the Mall. After Phar-Mor purchased Pharmhouse stock, it paid rent to defendant directly, and defendant paid Mid Valley. However, in December 1999, Mid Valley began accepting rent directly from Phar-Mor.

On December 20, 2000, a year before the Lease was due to expire, Phar-Mor made a written request to Mid Valley, through its management company to extend the term of the Lease, for the period of January 1, 2002 through December 31, 2006. Mid Valley agreed to grant "the Tenant" a further five-year renewal option, for a term to run from January 1, 2007 through December 31, 2012, as provided in the Lease and an additional five year option for a third renewal term at a rent 15% higher than the previous term, which was not provided for under the Lease. Defendant was not consulted during these negotiations and did not consent to the third renewal term.

On September 24, 2001, both Rx Realty Corp. and Phar-Mor filed for Chapter 11 bankruptcy protection. On November 20, 2001, Phar-Mor sent Mid Valley a letter notifying Mid Valley that it intended to vacate the premises at the Mall, and subsequently did vacate those premises on November 30, 2001. Thereafter, on January 23, 2002, Mid Valley served a rent

demand on defendant, and commenced this action.

Mid Valley's first amended complaint sets forth one cause of action for breach of the Lease, and one cause of action for court costs and attorney's fees. Defendant answered, and now moves for summary judgment to dismiss the complaint. In response, Mid Valley cross-moves for summary judgment on the issue of liability.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. See e.g. Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985); Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher, 299 AD2d 64 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. See e.g. Zuckerman v City of New York, 49 NY2d 557 (1980); Pemberton v New York City Trans. Auth., 304 AD2d 340 (1st Dept 2003). Further, it is well settled that, on a motion for summary judgment, "the construction of an unambiguous contract is a question of law for the court to pass on, and [that] circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where... the intention of the parties can be gathered from the instrument itself ." Maysek & Moran, Inc. v S.G. Warburg & Co., Inc., 284 AD2d 203, 204 (1st Dept 2001)(internal citation omitted).

The threshold issue to be decided concerns whether the Rx Realty was defendant's assignee or sublessee. "'An assignment is a transfer or setting over of property, or of some right or interest therein from one person to another, and unless in some way qualified, it is properly the

transfer of one whole interest in an estate, or chattel, or other thing." In re Stralem, 303 AD2d 120 (2d Dept 2003); McSpadden v. Dawson, 117 AD2d 453, 460. (1st Dept 1986). In contrast to an assignment, a sublease reserves some portion of the interest in the property to the transferor. Id.

In this case, the Assignment of Lease between defendant and Rx Realty, unambiguously assigns, without limitation, all rights and obligations under the Lease to Rx Realty, and thus indicates that there was an assignment and not a sublease. Moreover, Dennis Sheehan, defendant's current Deputy Counsel, testified that Rx Realty became the tenant under the Lease, pursuant to the Assignment of Lease.

Defendant argues, however, that as the Original Landlord (and Mid Valley) did not consent to the assignment, continued to collect rent directly from defendant, and required defendant to perform various obligations in connection with the Lease, that there was no effective assignment. Instead, defendant asserts that there was a sublease agreement.

In support of this position, defendant relies on the affidavit and deposition testimony of its former Associate General Counsel, James Mullin, who maintains that since the Original Landlord refused to consent to the assignment, it never came into existence and there was a verbal sublease agreement between Rx Realty/Pharmhouse to lease the space for one day less than the approximately six and a half years remaining on the Lease. He testified that after the closing of the deal to purchase Rx Realty's assets, defendant and Pharmhouse entered into an agreement to treat the assignment as a sublet. However, Mr. Mullin admitted that he was not present at the time this agreement was allegedly made. Defendant also points to the May 8, 1995, from its counsel informing Pharmhouse that it had paid the rent directly to the Original

Landlord and indicating that "the location will be a sublease."

Defendant also submits draft sublease agreements exchanged between counsel for defendant and Pharmhouse Corp in 1996 and 1997; however, Mr. Mullin acknowledged at his deposition that the draft sublease agreements were never executed since the lawyers could not agree on their terms. Defendant further relies on the estoppel certificates filed with the Dime Savings Bank indicating that the Lease had not been assigned. In addition, defendant argues that Mid Valley should be equitably estopped from denying that its relationship with Phar-Mor was that of landlord and sublessee.

The court finds that based on the record, the arrangement between defendant and Rx Realty constituted an assignment as a matter of law and not a sublease. As a preliminary matter, despite the requirement in the Lease that the Landlord consent to any assignment, the absence of such consent does not render the assignment void.

"[W]hether a non-assignment clause renders a subsequent assignment void or [merely] the breach of a personal covenant not to assign depends upon the expressed intent of the parties, namely whether the language is sufficiently express to bar the assignment." C.U. Annuity Service Corp. v Young, 281 AD2d 292, 292 (1st Dept 2001). Thus, "[i]t has been consistently held that assignments made in contravention of a prohibition clause in a contract are void if the contract contains clear, definite and appropriate language declaring the invalidity of such assignments. Macklowe v 42nd Street Development Corp., 170 AD2d 388, 389 (1st Dept 1991)(citations omitted). In contrast, "where the language employed constitutes merely a personal covenant against assignments, an assignment made in violation of such covenant gives rise only to a claim for damages against the assignor for violation of the covenant." Id. (citations

sublease agreement, but indicate a refusal by the Original Landlord and Mid Valley to consent to the assignment, or to release defendant from its obligations under the Lease. See generally Tuttle, Pendleton & Gelston, Inc. v. Dronart Realty Corp., 90 AD2d 830, 831 (2d Dept 1982)(citations omitted). In addition, the issuance of the estoppel certificates stating that there was no assignment of the Lease does not alter the nature of the arrangement between defendant and Rx Realty.

Next, there is no merit to defendants' argument that Mid Valley should be equitably estopped from denying that its relationship with Rx Realty was that of landlord and sublessee. As the party asserting estoppel, defendant must show: a "(1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position [citations and quotation marks omitted]." Matter of Mendez v Reynolds, 248 AD2d 62, 65 (1st Dept 1998).

With respect to the first of these elements, there can be no dispute that defendant was aware of the assignment since defendant executed the Assignment of Lease. Thus, defendant asserts that it "was clearly never aware of the fact that Plaintiff believed there was an assignment." See Defendant's Reply Memorandum, at 10. Mid Valley's belief as to whether there had been an assignment is irrelevant since a defendant must demonstrate its own lack of knowledge of the true facts. In any event, Mid Valley's belief is besides the point since as, indicated above, the law holds that the assignment between defendant and Rx Realty Corp. was valid irregardless of whether Mid Valley's consented to the assignment or knew about it. In view of these facts, and given that defendant is a sophisticated business entity with access to quality legal advice, the court cannot credit the assertion that defendant was unaware of its

continuing responsibilities as an assignor.

Defendant also has not satisfied the other elements of equitable estoppel - i.e., detrimental reliance and prejudicial change in position Specifically, it cannot be said that defendant a multimillion dollar corporation would continue to pay rent for years on behalf of a division that it had sold since it was uncertain as to whether or not it had any continuing obligations pursuant to a lease that it, itself, had assigned.

As the assignor of the rights under the Lease, defendant remained liable to the Mid Valley following the assignment. 185 Madison Associates v. Ryan, 174 AD2d 461 (1st Dept 1991); Mandel v Fischer, 205 AD2d 375 (1st Dept 1994). New York Business Buildings Corp. v. James McCutcheon & Co., 229 AD 681, 684 (1st Dept 1930), aff'd 134 Misc2d 21 (App Term 1st Dept 1986). At the same time, Rx Realty, as the assignee of the Lease, "steps into the assignor's shoes and acquires whatever rights the latter had." In the Matter of the Estate of Stralem, 303 AD2d at 123 (citations omitted). These rights include the assignee's right to exercise an option to renew provided in the assigned lease. See New York Business Buildings Corp. v. James McCutcheon & Co., 229 AD at 684; 200 Prince Realty v. Greenberg, 129 Misc2d 962 (Civil Ct City of New York 1985), aff'd, 134 Misc2d 21 (App Term 1st Dept 1986).

Moreover, when an assignee extends the term of a lease pursuant to a renewal option, the assignor is generally liable for any failure to pay rent during the renewal period, absent a limitation in the assignment prohibiting the exercise of renewal rights by the assignee. New York Business Buildings Corp. v. James McCutcheon & Co., 229 AD at 684. Here, the Assignment of Lease did not contain any restriction on the assignee's ability to exercise the two renewal options under the Lease.

Defendant argues, however, that Mid Valley and Phar-Mor materially altered the terms of the Lease by granting Phar-Mor an additional option period that was not included in the Lease without its consent, and that as a result a new tenancy relationship was created such that defendant cannot be held liable.

In opposition, Mid Valley asserts that the doctrine of "material alteration" generally arises in the context of suretyship law, and does not apply to assignors, whose liability can only be extinguished by a novation. See In re Euro-Swiss International Corp, 33 BR 872, 889 (Bank S.D. NY 1983).

"Under general contract rules, an obligation may not be altered without the consent of the party who assumed the obligation." Midland Steel Warehouse Corp v. Godinger Silver Art, Ltd., 276 AD2d 341, 343 (1st Dept 2000)(citations and internal quotations omitted). This rule has been applied to release sureties and guarantors of their obligations under various agreements when the agreements are materially altered without their consent. See, Midland Steel Warehouse Corp , supra (holding that "any material or substantial alteration of the terms of a contract, for whose performance a surety is bound, when made without the surety's consent, releases the surety from his or her obligations); Mangold v. Keip, 177 Misc2d 953, 954 (App Term, 1st Dept 1998)(releasing individual guarantors from their obligations under a lease which had been materially changed upon its renewal without the guarantors' consent).

Defendant argues that this rule is equally applicable to assignors since "after an assignment, the lessee is treated in the fashion of a surety or guarantor...[as] the liability of the assignor is secondary vis-a-vis the assignee ". In Re Wingspread Corp., 116 BR 915, 928 (Bank S.D. NY 1990); 500 Fifth Ave, Inc. v. Nielsen, 56 Misc2d 392 (Civ. Ct. NY Co. 1968).

However, it has been held that the suretyship of the tenant- assignor is distinctive insofar as the tenant-assignor remains primarily liable to the landlord, such that upon a default in payment of rent a landlord may seek relief directly from the tenant-assignor. Khezrie v. Greenberg, 2002 WL 1832169 (ED NY 2002); In Re Wingspread Corp., 116 BR at 928. n 14.

In addition, under New York law, to relieve the tenant-assignor of its primary liability under the lease, there must be a release by the landlord or a surrender of the lease. At the same time, however, a release by virtue of a surrender need not be express and may be implied when the landlord enters into a new and different agreement with the assignee. Brill v. Friedhuff, 184 AD 673, 675 (1st Dept 1918), aff'd, 229 NY 547 (1920); see Rausch, 2 New York Landlord & Tenant, Including Summary Proceedings § 26:13. Such a surrender may occur even in the absence of the execution of a new lease, based on the acceptance of the assignee as the tenant as shown by the actions of the landlord. Id.; Ettlinger v. Kruger, 76 Misc2d 540 (App Term 1912), aff'd 158 AD2d 928 (1st Dept 1913); see also 185 Madison Assocs v. Ryan, 174 AD2d at 461. However, the mere consent to the assignment by the Landlord and acceptance of rent from the assignee are not sufficient to release the assignor from liability. Id. In addition, the court must consider whether the conduct of the parties indicates an intent not to surrender the lease. Brill v. Friedhuff, 184 AD at 675-676.

In this case, the record establishes that in December 1999, plaintiff began collecting rent directly from Phar-Mor, and to deal exclusively with Phar-Mor as the tenant. In addition, a year prior to the expiration of the Lease, Phar-Mor and Mid Valley negotiated 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. Moreover,

this new agreement was made without providing notice to defendant[4] 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. Under these circumstances, a new agreement arose between Phar-Mor and Mid Valley, such as to cause a surrender of the Lease and to release defendant from its obligations thereunder.

Accordingly, as defendant was released from liability, defendant is entitled to summary judgment dismissing the complaint.

Conclusion

In view of the above, it is

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

ORDERED that the Clerk is directed to entered judgment dismissing the complaint in its entirety; and it is further

ORDERED that Mid Valley's motion for summary judgment is denied.

DATED: April 12, 2005

J.S.C.

[4]Under 12.7(c)(2) of the Lease, the landlord is required to provide notice to the tenant-assignor in the event the landlord consents to "subsequent assignments or modifications of the Lease."