

**Popi Landco LLC v Shelter Is. Home & Design,
LLC**

2007 NY Slip Op 30123(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0004019

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-11-06
ADJ. DATE 10-13-06
Mot. Seq. # 001 - MotD

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Upon the following papers numbered 1 to 32 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 21 - 31 ; Replying Affidavits and supporting papers 32 ; Other _____; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion by defendants Shelter Island Home & Design LLC and Erik Floyd for an order granting summary judgment in their favor is determined as follows.

The plaintiff landlord and the defendant Shelter Island Home & Design LLC entered into a five year lease agreement for premises known as 22 Jobs Lane in Southampton. The lease was guaranteed by the defendants Erik Floyd and John J. Crimmins and included a provision granting the defendants the right to terminate the lease. The cancellation provision stated that the defendants "shall have the right to cancel their lease after the 2nd year (December 31, 2002). Cancellation notice must be in writing and received by LANDLORD or TENANT with 4 months notice to cancel. TENANT must pay all lease obligations thru occupancy date". In 2003, the

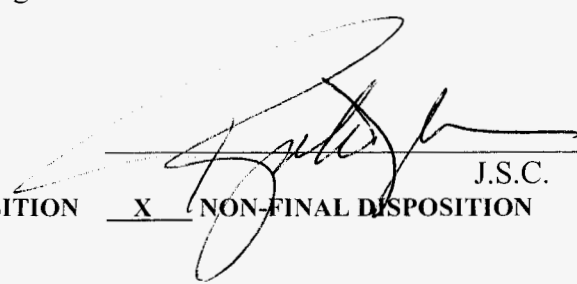
defendants notified the plaintiff of their intention to terminate the lease. In an e-mail dated September 17, 2003, Tina Candela, the plaintiff's controller, responded that "we are in receipt of your notice and agree to accept your surrender effective December 31, 2003. Upon inspection of premise [sic] your security deposit will be refunded to you". On December 15, 2003, the defendants vacated the premises and surrendered the keys to the plaintiff. In February 2004, the plaintiff leased the premises to another tenant. The plaintiff then commenced this action alleging that the defendants breached the lease by failing to pay the rent and additional rent due beginning September 1, 2003. The plaintiff seeks to recover the full rent due for the entire lease term through 2005. The defendants now move for summary judgment asserting that there was a valid surrender of the lease.

A lease may be surrendered by express surrender or surrender by operation of law. An express surrender involves a mutual agreement between the landlord and the tenant that the lease be terminated (*see, Matter of Wasserman v Ewing*, 270 AD2d 427 [2d Dept 2000]). 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 (*see, Riverside Research Inst. v KMG Inc.*, 68 NY2d 689; *Matter of Wasserman v Ewing*, *supra*).

Here, the lease and guaranty specifically granted the defendants the right to terminate the lease which was exercised by the defendants and accepted by the plaintiff effective December 31, 2003. Contrary to the plaintiff's contention, the payment of all lease obligations was not a condition precedent to the termination of the lease. The language of the lease and guaranty does not contain any condition or restriction on the defendants' right to terminate. Thus, the record demonstrates that there was an express surrender of the lease. The defendants are released from liability for further rent after the surrender (*see, Deer Hills Hardware v Conlin Realty Group*, 292 AD2d 565 [2d Dept 2002]; *Altamuro v Capocetta*, 212 AD2d 904 [3d Dept 1995]).

Accordingly, the defendants' motion for summary judgment is granted to the extent that the lease is deemed terminated as of December 31, 2003. However, the defendants remain obligated to make all payments through the occupancy date. The defendants contend that the plaintiff failed to return their security deposit while the plaintiff alleges that the defendants failed to pay all rent due prior to the surrender. Therefore, an issue of fact remains as to what amount, if any, is owed by the defendants through December 2003.

Dated: MAR 05 2007



J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION