At an IAS Term, Part 39 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 21st day of May 2007.

P R E S E N T:

HON. GLORIA M. DABIRI,

Justice.

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4400 EQUITIES INC.,

Plaintiff,

- against -

Index No. 28937/98

GURMIT SINGH DHINSA a/k/a GURMEET SINGH DHINSA,

Defendant.

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The following papers numbered 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross-Motion and Affidavits (Affirmations) Annexed	1-2, 3-4
Opposing Affidavits (Affirmations)	5, 6, 7
Reply Affidavits (Affirmations)	8, 9, 10
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, plaintiff, 4400 Equities, Inc., moves for an order, pursuant to CPLR 3212, granting it summary judgment in the amount of $3,265,961.07 with interest from February 1, 1998. Defendant, Gurmit Singh Dhinsa a/k/a Gurmeet Singh Dhinsa, cross-moves for an order vacating a default judgment entered against defendant, in accord with a consent order dated August 3, 2005, which provided for vacatur of the default judgment upon

the completion of discovery.

This action arises from a 15-year commercial lease agreement entered into between plaintiff (lessor) and defendant (lessee,) on September 8, 1989, for property located at 470 Vanderbilt Avenue, in Staten Island. The lease provides, in relevant part, that:

> "23. . . . (c) [The] TENANT shall remain liable for all of its obligations under this lease, despite the LANDLORD's reentry, and the landlord may rerent or use the leased property as agent for TENANT, if LANDLORD so elects. TENANT waives any legal requirement for notice of intention to reenter and further waives its rights of redemption."

Upon signing, the lease was assigned by defendant, Gurmit Dhinsa, to 470 Vanderbilt Ave. Inc. The corporate assignee thereafter utilized the property as a service station for the following eight years. According to the comptroller of the corporate assignee, Suman Khanna, in May 1998 defendant notified the principal of plaintiff, Steven Steigelfest, that the corporate assignee intended to surrender the property at the end of July 1998, to which Steigelfest "did not object." Defendant asserts that he made rental and real estate tax payments to Steigelfest for June and July 1998 and arranged for the surrender of the property on July 30, 1998. On the same day, plaintiff entered into a new, 20-year, lease with another entity, S.I. Vanderbilt, Inc.

On August 18, 1998, plaintiff commenced the instant action by summons and notice, alleging "[b]reach of leases (sic) for real property" and stating that defendant's failure to appear would result in a default judgment in the amount of $650,000.00 with interest from

July 3, 1998. Defendant did not respond to the summons within thirty days and plaintiff's motion for a default judgment was granted by order dated July 1, 1999. On January 27, 2000, following an inquest before a Judicial Hearing Officer, plaintiff entered a default judgment with the county clerk in the amount of $165,443.34.

On July 20, 2005, defendant brought on an order to show cause seeking to vacate the default judgment on the ground of improper service. The order to show cause, which was opposed by plaintiff, was resolved by a consent order dated August 3, 2005. The consent order provides, *inter alia*, that defendant is subject to the jurisdiction of the court and that the January 27, 2000 default judgment "is hereby vacated effective upon completion of discovery as set forth below in paragraph 5." Plaintiff was stayed from enforcement of the judgment entered on default pending completion of discovery. Plaintiff, thereafter, served a complaint alleging that defendant "breached the lease by vacating the premises and leaving unpaid rents, additional rents, damages and destruction to the premises," and requesting damages in the amount of $650,000.00.

It is not in dispute that discovery now has been completed. Under the terms of the consent order the default judgment, therefore, is deemed vacated. Accordingly, defendant's cross-motion is granted, and the clerk of the court is directed to vacate the default judgment entered on January 27, 2000.

Turning to plaintiff's motion for summary judgment, it is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement

to judgment as a matter of law tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*id.*). The proof submitted to the court should be scrutinized carefully in the light most favorable to the party opposing the motion (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

A landlord under a commercial lease agreement is under no obligation or duty to relet, or attempt to relet, an abandoned premise in order to minimize damages (*Holy Properties Ltd., L.P. v Kenneth Cole Productions*, 87 NY2d 130, 133 [1995]). In such instances, where a tenant surrenders the property prior to expiration of the lease term, the landlord has three options: (1) do nothing and collect the full rent due under the lease, (2) accept the tenant's surrender, reenter the premises and relet for the landlord's own account, thereby releasing the tenant from further liability for rent or (3) notify the tenant that the landlord is entering and reletting the premises for the tenant's benefit (*id.* at 133-134). "If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation" (*id.* at 134 [citations omitted]; *Underhill v Collins*, 132 NY 269, 271-272 [1892]).

A surrender by operation of law occurs when both parties to a lease do some act so inconsistent with the landlord-tenant relationship that it evinces their intent to terminate the

lease (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691-692 [1986]).[1] "If the landlord takes possession of such premises so surrendered and relets [to another], he will be deemed to have accepted a surrender unless there are facts rebutting this inference," (*Underhill*, 132 NY at 271), such as an agreement allowing that such reletting might be made *(Gray v Kaufman Dairy & Ice Cream Co.*, 162 NY 388 [1900]).

Whether a surrender by operation of law has occurred is a determination to be made on the facts of the case (*Riverside Research Inst.*, 68 NY2d at 692). In the instant matter, the plaintiff was expressly advised of the defendant's plan to vacate the property at the end of July 1998, well in advance of the lease's expiration. The defendant made a final rental payment for July 1998, by off-setting payment with the $7,000.00 security deposit held by the plaintiff and providing the balance in separate checks. On July 30, 1998, the defendant vacated the property and "turned over possession to the plaintiff." On the same day, the plaintiff entered into a 20-year lease agreement for the subject property with S.I. Vanderbilt, Inc. commencing August 1, 1998.[2] Further, the plaintiff's principal, Steven Steigelfest, testified that after defendant vacated the premises, he made substantial repairs to the subject property in furtherance of reletting. Thus, the parties evinced their intentions to terminate the lease and the landlord-tenant relationship (*Riverside Research Inst.*, 68 NY2d at 692).

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[1]Gen. Oblig. Law §5-703[1] requires that an expressed surrender which involves a lease that has more than a year to run, be in writing and subscribed by the tenant.

[2]The new lease provided that delivery of the premises was subject to "the LANDLORD securing a surrender of possession of the premises from the TENANT presently operating the gasoline facility and will deliver possession of the premises vacant to the TENANT concurrently with the effective date of this lease."

The creation of the lease between S.I. Vanderbilt, Inc. and the plaintiff, in the plaintiff's own name, was so incompatible with the existing lease, that a surrender by operation of law must be implied (*Gray*, 162 NY at 394-395). Although the landlord, under the terms of the lease, was provided with the option of reletting as an agent for the defendant, there is no evidence that the plaintiff exercised this option. Accordingly, there is insufficient reason to deviate from the general rule of law (*id.*).

Acceptance of the tenant's surrender, by the landlord, would generally release the tenant from further liability to pay rent under the terms of the lease (*see Deer Hills Hardware, Inc. v Conlin Realty Corp.*, 292 AD2d 565 [2002]). However, parties are free to contract otherwise, and if the lease provides that the tenant shall be liable for rent, even after termination of the landlord-tenant relationship, such provision is enforceable (*Holy Properties Ltd., L.P.*, 87 NY2d at 134; *International Publs. v Matchabelli*, 260 NY 451, 454 [1933]; *see Gallery at Fulton St., LLC v Wendnew LLC*, 2006 NY Slip Op 4773, 2 [2006]; *Lexington Ave. & 42nd St. Corp. v Pepper*, 221 AD2d 273, 274 [1995]). The defendant's lease agreement provides that he shall remain liable for all of his obligations under the lease, despite the landlord's reentry. The defendant has proffered no argument or evidence as to why such provision should not be enforced (*Holy Properties Ltd., L.P.*, 87 NY2d at 134; *Olim Realty Corp. v Big John's Moving, Inc.*, 250 AD2d 744 [1998]; *Underhill*, 132 NY at 17).

Following the surrender, the plaintiff could have left the premises vacant during the

unexpired term of the lease (*Underhill*, 132 NY at 271; *Holy Properties Ltd., L.P.*, 87 NY2d at 133-134). However, the plaintiff opted to reenter the premises and relet, thereby minimizing its damages, to the defendant's benefit. As the defendant's liability survived the termination of the lease, he remains liable for losses, if any, sustained by the plaintiff as a result of the surrender, for the balance of the lease's term (*Lexington Ave. & 42nd St. Corp.*, 221 AD2d at 274; *Olim Realty Corp. v Big John's Moving, Inc.*, 250 AD2d 744, 744 [1998]).

However, the plaintiff has not tendered competent evidence demonstrating its entitlement to $3,265,961.07 in damages as a result of the defendant's breach (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]; *Alvarez*, 68 NY2d at 324). Issues of fact remain as to all aspects of damages sought by the plaintiff, including what arrears, if any, were owed by defendant at the time of the surrender.

Furthermore, as raised by the defendant, the plaintiff's complaint does not allege a claim for late fees as a theory of recovery, but rather, seeks damages only for "unpaid rent, additional rents, damages and destruction to the premises." Late charges were not raised in the plaintiff's 1998 or 2005 complaints, nor were they included in the plaintiff's original default judgment, granted after inquest on January 20, 2000. The plaintiff first raises a claim for late charges in its August 30, 2006 motion for summary judgment. The defendant contends that the plaintiff is not entitled to "late fees" because the pleadings fail to seek such relief and the imposition of late fees is inconsistent with the plaintiff's termination of the lease.

Leave to amend should be freely granted where, as here, a plaintiff seeks to amend a complaint merely to add a new theory of recovery, without alleging new or different transactions (CPLR 3025[b]; *Sample v Levada*, 8 AD3d 465, 468 [2004] [citations omitted]) and the defendant fails to raise any prejudice due to the proposed amendment (*Bobrowsky v Lexus*, 215 AD2d 424 [1995]). In such instances, although the plaintiff has not petitioned for leave to amend its complaint to include a claim for late charges, the court may, *sua sponte*, deem the complaint amended to conform to the evidence presented on the motion (*Dinizio & Cook, Inc. v Duck Cr. Mar. at Three Mile Harbor, Ltd.*, 32 AD3d 989 [2006]; *Werner v Katal Country Club*, 234 AD2d 659, 661 [1996]; *Murray v New York*, 43 NY2d 400, 405 [1977]; *Cave v Kollar*, 2 AD3d 386, 388 [2003]; CPLR 3025[c]).

However "leave should be denied if the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit [*see Tarantini v Russo Realty Corp.*, 273 AD2d 458, 712 N.Y.S.2d 358 [2000]; *Alejandro v Riportella*, 250 AD2d 556, 672 NYS2d 412 (1998)]" (*AYW Networks, Inc. v Teleport Communs. Group, Inc.*, 309 AD2d 724, 725 [2003]; *Leszczynski v Kelly & McGlynn*, 281 AD2d 519, 520 [2001]). Here, the plaintiff's complaint alleges a claim for breach of the lease. "[I]n the absence of a provision that points with reasonable clearness to a different construction, liability for damages resulting from a reletting is single and entire, not multiple and several . . . The tenant when ejected ceases to be a tenant. What he covenants to pay is the damage, not the rent" *(Hermitage Co. v Levine*, 248 NY 333, 338 [1928]). Thus, as a result of the termination of the lease, the plaintiff is not

entitled to recover "late fees" which flow from the defendant's failure to timely pay monthly installments of the annual rent, but rather, is entitled to recover contract damages from the breach of the lease and the contracted annual rent for the remainder of the lease term, less income earned through the reletting (*see Ross Realty v V&A Fabricators, Inc.*, ___ AD3d ___, 2007 WL 1439548 [2nd Dept.]; *The Markektplace v Smith*, 181 Misc2d 440 [1999]).

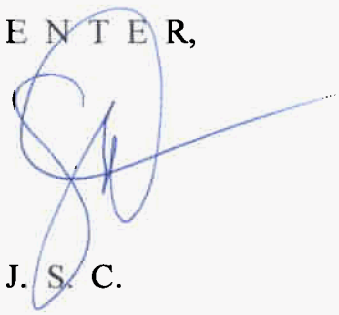
Contrary to defendant's contention, the lease was not void *ab initio* merely because plaintiff did not have record title to the property when the lease was entered into. A tenant, while in possession under such lease, cannot dispute his landlord's title and thus the lease is in effect and continues until disaffirmed by the true landlord, creating a voidable rather than void lease (*see Tilyou v Reynolds*, 108 NY 558 [1888]). Further, where a lease was originally invalid for want of title in the lessor, and a subsequent purchaser accepts attornment from the lessee under the invalid lease, with knowledge of the terms and conditions of the lease, the subsequent purchaser validates the lease (*see Austin v Ahearne*, 61 NY 6 [1874]; *Holm v C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 232 [1982]; *Anderson v Connor*, 43 Misc 384 [1904]). Accordingly, it is

ORDERED, that defendant's cross-motion is granted and the clerk of the court is directed to vacate the default judgment entered on January 27, 2000; and is further

ORDERED, that plaintiff's motion for summary judgment is granted only as to liability and otherwise denied; and upon filing of a Notice of Issue and payment of the appropriate fee, the matter shall be referred to a Judicial Hearing Officer for an assessment

of damages in accordance with the determination of the court herein.

E N T E R,



J. S. C.