

**Lake Success Shopping Ctr., LLC v L & L Drugs  
of Nassau, Inc.**

2007 NY Slip Op 33216(U)

October 3, 2007

Supreme Court, Nassau County

Docket Number: 6108-07/

Judge: Daniel R. Palmieri

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*Sum*

**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**Present:**

**HON. DANIEL PALMIERI  
Acting Justice Supreme Court**

-----x  
**LAKE SUCCESS SHOPPING CENTER, LLC,**

**Plaintiff,**

**-against-**

**L & L DRUGS OF NASSAU, INC. & KENNETH  
LEFFERTS,**

**Defendants.**

-----x

**TRIAL TERM PART: 50**

**INDEX NO.: 06108/07**

**MOTION DATE: 7-30-07**

**SUBMIT DATE: 9-24-07**

**SEQ. NUMBER - 001**

**The following papers have been read on this motion:**

- Notice of Motion, dated 7-12-07.....1**
- Affidavit in Opposition, dated 9-10-07.....2**
- Reply Affirmation, dated 9-20-07.....3**

This motion for summary judgment by the plaintiff is granted to the extent that it is granted partial summary judgment on the issue of defendants' liability for rent, additional rent and attorneys' fees and costs, and the case shall proceed on the issue of damages. Counsel are to report for a Preliminary Conference in the basement area of the courthouse on Wednesday, October 24, 2007, at 9:30 a.m.

This is an action on a commercial lease of premises in a shopping center on Union Turnpike in New Hyde Park, New York. The lease was entered into between plaintiff as

landlord and defendant L & L Drugs of Nassau, Inc. ("L & L") as tenant in 2002, with a termination date in 2013. The tenant was to run a retail drug store business at the premises. Tenant's president, defendant Kenneth Lefferts, signed a separate personal guarantee of L & L's obligations under the lease, such guarantee expiring in 2009. Two modifications to the lease, not directly relevant to the issues raised on this motion, were made in 2002 and 2004.

In 2006 the tenant defaulted in paying rent and the plaintiff, as petitioner, began a summary holdover proceeding in the District Court, Nassau County. On March 31, 2006, the parties entered into a stipulation, which lies at the heart of the current motion. Under its terms, the tenant was forgiven certain rent and additional rent arrears, the latter of which included attorney's fees, totaling \$211,166.66. The tenant was also permitted to retain possession of the premises until January 8, 2007.

In exchange for these concessions by the landlord plaintiff, the tenant agreed to monthly use and occupancy charges under a payment schedule set forth in the stipulation, which payments were to end in January, when the tenant was to vacate, as indicated above. The tenant also agreed to waive all defenses to the District Court proceeding, and confessed judgment for possession of the premises by the plaintiff and issuance of a warrant of eviction, stayed only until January 8, 2007.

If there were any uncured defaults in payment under the stipulation, a money judgment could be entered by the plaintiff for the full amount of the arrears, and the judgment of possession and warrant of eviction could be immediately executed, with all

rights of appeal concerning the same waived. If the petitioner/plaintiff brought any action or proceeding to enforce the terms of the stipulation, the respondent/defendant was liable for costs and expenses incurred in connection therewith, including reasonable attorneys' fees.

In addition, paragraph "7" of the stipulation provides as follows:

Upon full and timely compliance with all its obligations hereunder including the timely payment of all sums due hereunder and the vacatur of the premises on or before January 8, 2007 Respondent shall be released from all further obligation under the Lease and the Personal Guaranty thereof shall be cancelled and terminated and of no further force or effect.

Finally, the stipulation concludes with a merger clause reciting that it constituted "the entire agreement between the parties and shall not be amended or modified except in a writing signed by the parties or their respective attorneys to this action." The stipulation was fully executed by the parties and their attorneys. Defendant Kenneth Lefferts signed for the defendant tenant L & L.

In its moving papers, the plaintiff presents copies of the documents described above, and the affidavit of Norman L. Peck, a member of the plaintiff limited liability company. In addition to presenting the documents, he recites the history of the defaults leading to the commencement of the District Court proceeding and the stipulation. He explains why the January 8, 2007 date appears therein as the date by which the defendant was to vacate the premises. He states that this was intended to give the defendant the opportunity to stay during the period it had referred to as its busiest season, which ran from the commencement of the school year until after the winter holiday season. Peck further states that the defendant continued to operate its business at the premises beyond

the January 8, 2007 deadline, which is asserted as a violation of the stipulation. No claim is made that the tenant failed to make any of the use and occupancy payments. Finally, he avers that the plaintiff has been unsuccessful in finding another tenant for the demised premises, and that L & L remains liable under the lease.

Based upon the foregoing, the Court finds that the plaintiff has made out its *prima facie* showing that is entitled to judgment as a matter of law on the causes of action alleged in the complaint. They are for rent and additional rent accruing under the lease, asserted against L & L as tenant and Lefferts as guarantor (first cause of action), and against both for costs and legal fees called for in the stipulation (second cause of action). The burden thus shifts to the defendant to demonstrate that issues of fact exist meriting a trial. CPLR 3212 (b); *see GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). This the defendant has failed to do.

By way of affidavit, Kenneth Lefferts opposes the motion by claiming 1) that defendants have had no opportunity to conduct discovery regarding the plaintiff's alleged damages; 2) that the plaintiff is seeking an "improper remedy" in that the plaintiff can no longer seek to enforce a lease which had been terminated by plaintiff's act in bringing a holdover proceeding, and under the terms of the stipulation, in which a confession of judgment was given and "use and occupancy" charges were established (as opposed to rent); 3) that because it paid all these charges the sole remedy available was to execute the warrant of eviction, which was done; 4) that, at minimum, the stipulation is ambiguous, and an issue of fact thus exists as to whether the lease terminated and thus foreclosed any further recovery by the plaintiff thereunder; and 5) that discussions were ongoing between

the plaintiff and the defendants regarding an extension of the January 8, 2007 deadline, which continued past that date, even though the plaintiff ultimately declined to offer such an extension.

It is well established that in construing a lease or a stipulation such as the one referred to above the same rules that govern the interpretation of all contracts apply.

*Tantleff v Truscelli*, 110 AD2d 240 (2d Dept. 1985), *affd* 69 NY2d 769 (1987).

Therefore, as with any agreement, a primary rule to be followed here is that when the terms of the key documents are clear and unambiguous, the intent of the parties must be found within the four corners of the agreement, and a court may not insert or excise terms under the guise of construction. *Matter of Matco-Norca, Inc.*, 22 AD3d 495 (2d Dept. 2005). No valid interpretation can leave one of the contract's provisions substantially without force. *Albanese v Consolidated Rail Corp.*, 245 AD2d 475 (2d Dept. 1997); *Tantleff v Truscelli, supra*. Rather, a court is to arrive at a construction which will give a fair meaning to all of the language employed, consistent with the "reasonable expectations" of the parties. *Id.*, at 244-245, quoting *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397 (1977). Under these rules the Court finds the stipulation to be clear, and this must lead to summary judgment on liability in the plaintiff's favor.

Initially, there is no merit to the defendants' claim that what is sought in this lawsuit – damages available under the lease – are no longer available to the plaintiff landlord. The fact that the plaintiff commenced the summary proceeding and then entered into the stipulation described above, resolving that proceeding, does not mean that the defendants were freed from any further obligation under the lease. This is so because the stipulation did not clearly and unambiguously express either an intent to modify the

lease, or a waiver of the tenant's obligations under that lease. *Shelvin Plaza Assoc., LLC v Lew Leiberbaum Holdings Co., Inc.*, 18 AD3d 730 (2d Dept. 2005), citing and quoting *Jacoby & Meyers v Crispi*, 205 AD2d 312 (1<sup>st</sup> Dept. 1994). Indeed, the defendant tenant in *Shelvin* made the very same argument made here, in an essentially identical procedural context – that is, that the lease was terminated under a stipulation resolving a summary proceeding – which was unequivocally rejected by the Appellate Division.

Further, paragraph “7” makes it clear that the conditions for the tenant's relief from any further obligation under the lease, and Leffert's release from his personal guaranty, were dependent upon the fulfilment of two conditions: payment of all sums due under the stipulation, *and* vacatur of the premises on or before January 8, 2007. It is undisputed that the latter did not occur, and thus the obligations under the lease remained. This may lead to what may seem a harsh result, but the Court cannot ignore this clear language, which would require it to excise the second condition, and/or leave that condition with substantially no force. *Matter of Matco-Norca, Inc., supra*; *Tantleff v Truscelli, supra*. It also should be noted that the price paid by the tenant in the event of a default is consistent with the very valuable consideration given by the plaintiff/landlord – namely, the right to remain in business at the premises for several months, which included the holiday season.

Finally, any discussions that may have occurred regarding an extension of the period to vacate must fail in the face of the merger clause (*see* General Obligations Law § 15-301[1]) and defendants' admission that, in any event, no extension was agreed to, which amounts to clear proof that there was no mutual departure from the written agreement. *See, Irving O. Farber, PLLC v Kamalian*, 16 AD3d 506 (2d Dept. 2005).

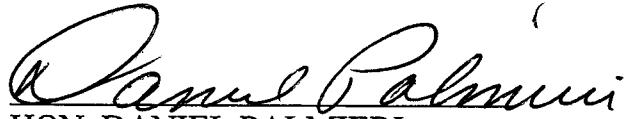
In view of the foregoing, summary judgment on liability under the stipulation, lease and the personal guaranty must be granted. The case will proceed on damages only. In that regard, the Court does not agree with the plaintiff that a simple inquest is appropriate, as there has been no default by the defendants. They are thus entitled to reasonable discovery on the damages allegedly sustained as a result of their breach of the stipulation and the lease.

The Court notes that the electronic records of the Clerk indicate that a Preliminary Conference was held on July 17, 2007, but in view of the unchallenged statement by the defendant Lefferts that this never occurred, such a conference is directed here.

This shall constitute the Decision and Order of this Court

ENTER

DATED: October 3, 2007

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

**TO: Rosenberg Calica & Birney, LLP**  
**By: William J. Birney, Esq.**  
**Attorneys for Plaintiff**  
**100 Garden City Plaza-Suite 408**  
**Garden City, NY 11530**

**Richman & Levine, P.C.**  
**Attorneys for Defendants**  
**666 Old Country Road**  
**Garden City, NY 11530**

**ENTERED**

**OCT 09 2007**

**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**