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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice

TRIAL/IAS, PART 31
NASSAU COUNTY

SHELVIN PLAZA ASSOCIATES, LLC.

Plaintiff.

Sequence No.: 001 & 003
Index No.: 016334/06

- against -

WHEATLEY CAPITAL, INC., LOUIS OTTIMO and THOMAS GIUGLIANO.

Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	**X**
Notice of Cross-Motion and Affidavits Annexed	**X**
Answering Affidavits	**X**
Replying Affidavits	**X**

Motion by plaintiff Shelvin Plaza Associates [Shelvin Plaza] pursuant to CPLR 3212 for partial summary judgment declaring it the owner of certain fixtures, enforcing the personal guarantees of the individual defendants and enjoining defendant Wheatley Capital, Inc. [Wheatley Capital] from removing the subject fixtures from premises located at 600 Old Country Road, Garden City, N.Y. and the cross motion by defendant Wheatley Capital and the individual defendants for summary judgment on their counterclaims and to dismiss the complaint are determined as hereinafter provided.

A prior summary holdover proceeding between the parties was settled by stipulation dated March 21, 2006, pursuant to which Wheatley Capital agreed, *inter alia*, to vacate commercial premises located at 600 Old Country Road, Garden City, New York no later than April 29, 2006, and to pay plaintiff landlord the sum of $30,932.20 in equal monthly payments of $3,866.52 beginning May 1, 2006, and each month thereafter until paid in full. Wheatley Capital consented to the entry of a judgment of possession and a money judgment in the amount of $68,563.41, and the issuance of a warrant of eviction, upon its default in compliance with the stipulation. It is undisputed that Wheatley Capital breached the stipulation and a judgment of possession and money judgment in the amount of $68,563.41, no part of which has been paid, was entered in favor of the landlord on April 25, 2006.

The matter is further complicated by a dispute between the parties regarding defendants' right to remove certain fixtures, including eight interior doors, built-in copper ceiling tiles with lights, closets, an air conditioning unit with outdoor condensers and approximately 26 blinds/window treatments, from the demised premises. As a result of this dispute, and defendant's breach of the settlement stipulation, Shelvin Plaza commenced two actions. In its action against Wheatley Capital plaintiff seeks to enjoin the Wheatley Capital defendants from removing the fixtures from the premises, as well as a declaration of the rights and obligations of the parties pursuant to the lease dated March 18, 1997, as amended, under which Wheatley Capital's assignor, North Pacific Capital Corporation [see assignment and assumption of lease dated January 23, 2002] leased the subject premises. The second action seeks judgment against individual defendants Louis Ottimo and Thomas Giugliano under their personal guarantees for monies due and owing from Wheatley Capital. The actions were consolidated pursuant to a so-ordered stipulation dated May 15, 2007. Defendants have counterclaimed alleging breach of the lease by plaintiff landlord in failing to allow Wheatley Capital to remove its personal property at the end of the lease term resulting in conversion and unjust enrichment for which Wheatley Capital claims it is entitled to recover counsel fees and expenses as well as damages.

With respect to the issue of fixtures, paragraph 3 of the lease provides that:

> "[a]ll fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner in Tenant's behalf shall, upon installation, become the property of Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Owner's right thereto and to have them removed by Tenant, in which event the same shall be removed from the premises by Tenant prior to the expiration of the lease, at Tenant's expense. Nothing in this Article shall be construed to give Owner title to or to prevent Tenant's removal of trade fixtures, moveable office furniture and equipment, but upon removal of any such from the premises or upon removal of other installations as may be required by Owner, Tenant shall immediately and at its expense, repair and restore the premises to the condition existing prior to installation and repair any damage to the demised premises or the building due to such removal. All property permitted or required to be removed, by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or may be removed from the premises by Owner, at Tenant's expense.

In opposition to plaintiff's motion, defendants contend that the instant action has become moot inasmuch as plaintiff successfully prevented defendants from removing the items at issue when it vacated the lease premises by obtaining a temporary restraining order. They maintain

further that, at the very least, a factual issue exists with respect to whether the disputed items of personal property are either fixtures or trade fixtures which precludes summary judgment in favor of either side. Moreover, they argue that the personal guarantees executed by Louis Ottimo, the president of Wheatley Capital and Thomas Giugliano, were discharged by operation of law because the execution of the fourth amendment to the lease constitutes a material change thereto and, in any event, might not be enforceable in light of the defenses and the alleged offsetting claims that Wheatley Capital has against Shelvin.

Turning to the issue of fixtures, the New York Court of Appeals has stated that:

> "[t]here is no inflexible and universal rule by which to determine under all circumstances whether that which was originally personal property has become part of the realty as a result of being affixed (to the property) and used in connection (with it)." People ex rel. Interborough Rapid Transit Co. v. O'Donnel, 202 N.Y. 313, 318 [1911].

The question of whether a chattel has become a fixture is therefore determined on a case by case basis. Under the common law, a fixture is personalty which is: 1) actually annexed to real property or something appurtenant thereto; 2) applied to the use or purpose to which that part of the realty with which it is connected is appropriated, and 3) intended by the parties as a permanent accession to the property. Mastrangelo v. Manning, 17 A.D.3d 326, 327 [2nd Dept. 2005]; South Seas Yacht Club v. Board of Assessors and Bd. of Assessment Review of Nassau County, 136 A.D.2d 537, 538 (2nd Dept. 1988). The intent which is regarded as controlling is not the initial intention at the time the item is acquired, nor the subjective intention of the parties making the attachment but is rather the intention which can be deduced from all the circumstances. Marine Midland Trust Co. of Binghamton v. Ahern, 16 N.Y.S.2d 656, 659 (1939).

Contrary to the general rule that fixtures become part of the realty and pass with it, trade fixtures, on the other hand, remain the personal property of the tenant and are removable by the tenant at the expiration of the lease term. J.K.S.P. Restaurant, Inc. v. Nassau County, 127 A.D.2d 121, 127 (2nd Dept. 1987). Trade fixtures are articles of personal property annexed to or placed upon leased realty by the tenant for the purpose of carrying on its trade or business during the term of the lease. They remain personal property so far as the right of removal is concerned, subject to the limitation that the removal must be accomplished without substantial injury to the premises. *J.K.S.P. Restaurant, Inc. v Nassau County*, *supra* at p. 125.

For reasons of public policy, a tenant may remove trade fixtures prior to the expiration of the lease or before the tenant quits possession unless otherwise agreed to by the parties. Modica v. Capece, 189 A.D.2d 860, 861 [2nd Dept. 1993]. Where the tenant fails to remove the trade fixtures prior to quitting possession of the premises, it is presumed that the tenant has abandoned the property and title to the property passes to the landlord. Lewis v .Ocean Navigation & Pier Co., 125 NY 341, 350 [1891].

Here the court is confronted with a situation in which, although plaintiff obtained a

temporary restraining order, its motion for a preliminary injunction enjoining defendant Wheatley Capital from removing the subject property was denied by order of the Hon. Ira B. Warshawsky dated June 5, 2006, in view of the fact that the defendant vacated the premises without removing such property. Defendant contends, however, that it was prevented from doing so because plaintiff "wrongfully obtained an *ex parte* temporary restraining order preventing [it] from doing so."

While defendant Wheatley Capital clearly had the right pursuant to paragraph 3 of the lease to remove "trade fixtures," movable office furniture and equipment [with a concomitant obligation to repair any damage caused by such removal], the copper ceiling tiles, glass doors, closets, wooden blinds/window treatments and/or air conditioning unit are not, in my view, trade fixtures. Rather, they were installations or improvements made for the purpose of enhancing the space as part of a common decorative scheme, and, in the case of the air conditioning unit with outdoor condensers, to provide a more comfortable environment. These installations, which were not annexed to the leased premises by the tenant for the purpose of carrying on its trade or business, are fixtures which, pursuant to the plain language of the first sentence of paragraph 3 of the lease, are the property of plaintiff and may not be removed from the premises by defendants.

Individual defendants Ottimo and Giugliano do not dispute that they each executed two personal guaranties with respect to the lease herein: the first on March 21, 1997 and the second on January 23, 2002 as well as a reaffirmation of the March 21, 1997 guaranty on January 13, 2000. While the first guaranty relates to the obligations of the original tenant, defendant Wheatley Capital's predecessor, North Pacific Capital Corporation's obligations under the lease, the lease was amended on January 13, 2000; April 21, 2000 and October 31, 2001. On January 23, 2002, the lease was assigned from North Pacific Capital Corporation to Wheatley Capital, at which point defendants Ottimo and Giugliano signed the January 23, 2002 guaranty. Defendants Ottimo, the president of Wheatley Capital, and Giugliano, an officer/director of North Pacific Capital Corporation and long time friend of Mr. Ottimo, contend they are not liable on their respective guaranties on the grounds that the fourth amendment of lease, which occurred on January 30, 2003, constitutes, according to Mr. Ottimo, a material change to the lease sufficient to discharge the individual guarantors of their obligation. Clearly, the North Pacific Capital Corporation guaranty dating back to January 21, 1997, was limited and expired in January 2002. However, after the lease was assigned to, and assumed by, defendant Wheatley Capital, Messrs. Ottimo and Giugliano executed the January 23, 2002 guaranty which unambiguously states, in pertinent part, that:

> the guaranty shall remain and continue in full force and effect as to any renewal, modification, sublet or assignment of this lease and during any period when Tenant is occupying the premises as a "statutory tenant."

It bears noting that Mr. Giugliano testified that he had an ownership interest, through a holding company, in an entity known as EKN Financial Services which occupied space in the premises leased by Wheatley Capital.

Inasmuch as defendant Ottimo signed both the assignment and assumption of lease (January 23, 2002) and the fourth amendment of lease on behalf of Wheatley Capital, and given Mr. Giugliano's history with the lease, neither guarantor was a stranger to the transaction [lease] nor an unsuspecting volunteer. Any suggestion that they were unaware of the ramifications of their guaranties rings hollow. The guarantors' claim that they believed their respective guaranties would expire of their own accord at the end of February 2005 is untenable as is the argument that their respective obligations were discharged by a material change in the lease in the form of the fourth amendment thereto. While a continuing guarantee may be terminated by a guarantor by notice to the obligee revoking his liability for obligations that may be incurred subsequent to the notice (27th Sweet Associates, LLC v. Lehrer, 4 A.D.3d 165, 167 [1st Dept. 2004]), defendants' guaranties contain no provision for cancellation and there is no evidence that the subject guaranties were ever cancelled or terminated. The continuing nature and full ramifications of the guarantors' liability under the guaranties herein, are clearly set forth. The terms of the January 23, 2002, guaranty create an obligation on the part of the guarantors as to:

> "the full performance and observance of all the covenants, conditions and agreements, including but not limited to the payment of Base Rent, any items of additional rent and any arrears thereof, that may remain due unto the said Landlord."

Where, as here, the parties have set down their agreement in a clear complete document, their writing will be enforced according to its terms. This principle is particularly important in the context of real property transactions, where commercial certainty is of paramount concern and where the instrument was negotiated between sophisticated, counseled business people negotiating at arms length. 20 Madison Ave. Leasehold LLC v. Madison Bentley Associates, LLC, 8 N.Y.3d 59, 66 [2006]. As has long been settled, parties are bound by the instruments they sign and may not avoid liability by claiming ignorance of their contents. As has been enunciated time and time again: "the signer of a deed or other instrument, expressive of a jural act is conclusively bound thereby. That his mind never gave assent to the terms expressed is not material . . . If the signer could read the instrument, not to have read it was gross negligence; if he could not read it, not to procure it to be read was equally negligent." Pimpinello v. Swift, 253 N.Y. 159, 162 [1930] (citations omitted).

Accordingly, plaintiff's motion for summary judgment pursuant to CPLR 3212 is granted to the extent that plaintiff is hereby declared the owner of the disputed fixtures installed by defendant Wheatley Capital at the premises herein which are not subject to removal by defendants. Judgment is awarded in plaintiff's favor against defendants Ottimo and Giugliano on their respective guaranties for past due rent, additional rent and use and occupancy due from defendant Wheatley Capital plus applicable interest since April 25, 2006. Plaintiff's request for a permanent injunction is denied. Defendants have failed to raise a factual issue which would require a trial of this matter. The matter of cots, expenses and attorney's fees to which plaintiff is entitled under paragraph 19 of the lease and the guaranty agreement herein shall be set down for an inquest.

The cross motion by defendants Wheatley Capital for summary judgment on its

counterclaims for breach of the lease agreement, conversion and unjust enrichment and to dismiss plaintiff's complaint is denied in view of the decision on the motion in chief.

The matter is hereby set down for a hearing on attorneys fees, costs and expenses before the Calendar Control Part (CCP) on January 15, 2008 at 9:30 a.m. Plaintiff shall file a note of issue on or before December 21, 2007. A copy of this order shall be served upon the County Clerk when the note of issue is filed. Failure to file a note of issue or appear as directed shall be deemed an abandonment of the claim giving rise to the inquest. A copy of this order shall be served upon defendants by December 21, 2007.

Submit judgment on notice.

So Ordered.

A.J.S.C.

Dated: November 19, 2007

ENTERED

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NASSAU COUNTY

COUNTY CLERKS OFFICE