At a Motion Term of the Supreme Court of the State of New York, held in and for the County of Onondaga on November 28, 2007.

PRESENT: HON. DONALD A. GREENWOOD
Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONONDAGA

PYRAMID WALDEN COMPANY, L.P.,

Plaintiff,

v.

THE BUFFALO UNIT, LLC d/b/a/ NO FEAR and FELTON WELLER,

Defendants.

DECISION AND ORDER ON MOTION

Index No.: 2004-3388
RJI No.: 33-06-3768

APPEARANCES: **J. MICHAEL NAUGHTON, ESQ., OF YOUNG, SUMMER, LLC**
For Plaintiff

JOSHUA KIMERLING, ESQ., OF CUDDY & FEDER, LLP
For Defendants

The plaintiff, Pyramid Walden Company, L.P., moves for summary judgment or in the alternative partial summary judgment on its complaint against the defendants The Buffalo Unit, LLC d/b/a No Fear and Felton Weller. At the same time the plaintiff had moved to sever a third-party action between the defendants and No Fear, Inc. and Mark Simo. The motion to sever was granted by this Court on December 11, 2006. The defendants have cross-moved for summary judgment to dismiss the first and fifth causes of action on the grounds that the defendants surrendered the premises and said surrender was accepted by the plaintiff and, in the alternative,

that the lease contains an unenforceable penalty provision.

This action arises from an alleged breach by the defendants of a shopping center lease dated July 13, 2004, regarding 2,233 square feet of space in the Walden Galleria Shopping Center in the Town of Cheektowaga, Erie County, New York. The defendant Weller executed a Guaranty of Lease and the complaint alleges that the defendants defaulted with respect to the rent payment obligations under the lease. The first and fifth causes of action in the complaint seek the net present value of future rents under the lease against the respective defendants in the amount of $1,087,328.68. The second and fourth causes of action seek past rent in the amount of $42,963.44, and the third and sixth causes of action seek attorney's fees under the lease against each respective defendant incurred by plaintiff in enforcing its rights under the subject lease and guaranty. The defendants have cross-moved for summary judgment dismissing the first and fifth causes of action with respect to the damages for net present value.

The following facts are not in dispute. Pursuant to the subject lease, plaintiff leased to defendant Buffalo Unit a commercial premises known as Store J-203 on the upper level of the Walden Galleria. The lease term was for ten years and the defendant Buffalo Unit commenced occupancy in or about December of 2003. On July 3, 2003, defendant Weller executed a guaranty of the lease wherein he agreed to guarantee the obligations of the defendant under the lease not to exceed "an amount equal to 150% of the highest amount of fixed Annual Minimum Rent, Percentage Rent, plus Additional Rent payable by tenant to landlord under the lease for any lease year during the term of the lease." The lease year is defined at twelve consecutive calendar months commencing on the first day of January. *See, §3.10* of the lease. The defendants failed to make the requisite rent payments and on February 9, 2004 plaintiff sent the defendants a notice of default. On March 3, 2004 defendant Weller met with James Soos, a

representative of the plaintiff, concerning an outstanding balance owed by the defendants to the general contractor Lamparelli Construction and the completion of a lien waiver upon satisfaction of the debt. A memorandum completed by Soos as a result of the meeting indicates that the two discussed the outstanding past due balance of rent in the amount of $42,961.22 and a cash allowance owed to the defendants in the amount of $41,666.67 pursuant to section 23.24 of the lease. The memorandum further indicated that outstanding balance of $1,294.55 was due and that Soos would redraft a letter agreement to reflect a cash payment owed to Feller of $10,286.82, which "would be paid after receiving the rent check from No Fear corporate and a clean lien waiver" from Lamparelli Construction. While the memorandum stated that defendant Felton advised that "No Fear Corporate [1] had taken over the stores as of March 1, 2004 and they would be paying the rent going forward", there was nothing contained therein indicating that the defendants were being relieved of their obligations under the lease. Soos then drafted and signed a letter agreement dated March 3, 2004, which set forth the outstanding rental obligation and indicated that upon receipt of lien waivers that the plaintiff agreed to apply the cash allowance to the defendant towards the balance due and that an outstanding balance and that $1,294.55 would remain due from defendants. Thereafter, a waiver of lien was executed by the contractor. Another letter agreement of the same date drafted by Soos indicated Soos' acknowledgment that "No Fear Corporate will be paying March rent". Absent from that agreement as well was any statement from the plaintiff that defendants were relieved of their contractual obligations. A notice of lease termination dated March 11, 2004 was then sent by plaintiff to the defendants. On March 25, 2004 a representative of plaintiff, Richard Johnson, sent a notice to previous third-party defendants No Fear, Inc. and Mark Simo with respect to the outstanding rental balances. Thereafter on May 3, 2004 the plaintiff commenced a summary proceeding to recover possession

of the premises in Cheektowaga Town Court. On May 20, 2004 the defendants entered into a stipulation with the plaintiff in the summary proceeding, agreeing to the entry of an order and judgment awarding the plaintiff possession of the premises as of May 15, 2004, with defendants reserving any defenses with respect to any claims for outstanding rent.

Plaintiff's First and Fifth Causes of Action for Net Present Value of Future Rents

Section 15.02(c) of the lease provides as follows:

> If this Lease is terminated as aforesaid, Tenant nevertheless covenants and agrees notwithstanding any entry or re-entry by Landlord whether by summary proceedings, termination or otherwise to pay and be liable for on the days originally fixed herein for the payment thereof, amounts equal to the several installments of Fixed Annual Minimum Rent, Percentage Rent and Additional Rent reserved as they would, under the terms of the Lease, become due if this Lease has not been terminated or if Landlord ha not entered or re-entered as aforesaid, and whether the Premises is relet or remains vacant in whole or in part or for a period of less than the remainder of the term, and for the whole thereof. In the event the Premises be relet by Landlord, Tenant shall be entitled to a credit (but not in excess of the Fixed Annual Minimum Rent, Percentage Rent and Additional Rent reserved under the terms of this Lease) in the net amount of rent received by a landlord in reletting the premises after deduction of all expenses and cost incurred or payed as aforesaid in reletting the premises and collecting the rent in connection therewith. At any time after the termination of the Lease, in lieu of collecting any monthly deficiencies, or any further monthly deficiencies, aforesaid, Landlord shall, at Landlord's option, be entitled to recover from Tenant, in addition to any other relief, such a sum as at the time of such termination represents the amount of the then present value of the total Fixed Annual Minimum Rent, Percentage Rent and Additional Rent and other benefits which would have accrued to the Landlord under this lease for the remainder of the lease term as if the Lease had been fully complied with by the Tenant, less any monthly deficiencies for such period previously paid to landlord by Tenant. Suit or suits for the recovery of the deficiency or damages referred to in this subsection 1502(c) or for any installment or installments of Fixed Annual Minimum Rent, Percentage Rent or Additional Rent hereunder, or for a sum equal to any such installment or installments may be brought by landlord all at once or from time to time at Landlords election and nothing in this lease shall be deemed to require Landlord to await the date whereon this Lease or the term hereof would have naturally expired had there been no such default by Tenant or no such termination.

Section 15.02.

The law is well settled that where a party moving for summary judgment has demonstrated its entitlement, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action. *See, Zuckerman v. City of New York*, 49 NY2d 557 (1980). The defendants in cross-moving for summary judgment on these causes of action have alleged here that they are not liable under this lease provision because they surrendered the premises and the plaintiff by its conduct accepted same.[2] A surrender by operation of law occurs where the parties to a lease both do some act inconsistent with the landlord/tenant relationship that indicates their intent to deem the lease terminated. *See, Riverside Research Institute v. KMGA, Inc*., 68 NY2d 689 (1986). The required elements of abandonment are: 1) a cancellation or surrender of the lease in fact; 2) a relinquishment of the premises by the tenant; and 3) an acceptance of the abandonment and resumption of possession by the landlord. *See, Ball v. Ball*, 137 Misc. 693 (1930); *see also, 74A NY Jur2d Landlord and Tenant §853 (2006)*. The surrender of a lease by operation of law results from acts that imply mutual consent "independent of the express intention of a party that their acts shall have that effect". *74A NY Jur Landlord and Tenant §851*. No such surrender occurred here. There is no evidence in the record indicating that the plaintiff in any way released the defendants from their rental obligations, and there is no evidence that the obligations under the lease were assigned to the previous third-party defendants. Section 17.01 of the lease provides that:

> Any attempt at...assignment...subletting...or other transfer herein that is prohibited without landlord's prior consent shall be void and confer no rights upon any third-party.

Section 17.01(a).

Subsection (b) further provides that:

> No permitted assignment made shall be effective until there are delivered to landlord (i) an agreement in recordable form executed by tenant and the proposed assignee wherein such assignee assumes due performance of the obligations of tenants part to be performed under this lease to the end of the term hereof and (ii) a written consent to such assignment by the holder of any fee or lease hold mortgage effecting the premises to which this lease is then subject and such consent shall have been obtained and delivered to landlord if so required by the terms of such mortgage or by collateral documents securing the same obligations as are secured by such mortgage.

Section 17.01(b).

Subsection (c) further provides:

> Tenant shall not be released by any assignment or sublease but shall continue to be fully responsible for the due performance of tenant's obligations hereunder in the same manner and to the same extent as if no such assignment or sublease has been made.

Section 17.01(c).

In addition, section 23.16 of the subject lease provides:

> This lease contains and embraces the entire agreement between the parties hereto with respect to the matters contained herein and it or any part of it may not be changed, altered, modified...or extended orally or by any agreement between the parties unless such agreement is in writing and signed by the parties hereto...and tenant hereby expressly waives any and all claims or defenses by tenant against the enforcement of this lease which are based upon allegations or representations...understandings or agreement by landlord or landlord's representatives that are not contained in the express terms of this lease.

Section 23.16.

Where there is no ambiguity in a contract it is the responsibility of the Court to interpret its language. *See, W.W. Associates v. Giancontieri*, 77 NY2d 157 (1990); *see also, Harford Associates & Indemnity Co. v. Wesolowski*, 33 NY2d 169 (1973). The record is devoid of any evidence that the requirements under the lease were met for an assignment or for a modification

of the lease terms. As such, no surrender and acceptance occurred here as a matter of law and the defendant's motion for summary judgment dismissing the first and fifth causes of action on this ground is denied.

The defendants have additionally moved for summary judgment to dismiss the causes of action on the ground that section 15.02 (c) is an unenforceable penalty provision. "Whether a contractual provision in a lease represents an unenforceable liquidation of damages or an unenforceable penalty is a question of law given due consideration to the nature of the contract and the circumstances." *Bates Advertising USA, Inc. v. 498 7th LLC*, 7 NY3d 115 (2006), *quoting JMD Holding Corp. v. Congress Fin. Corp*., 4 NY3d 373 (2005). The party challenging the clause "must demonstrate either that the damages flowing from the failure to complete on time the items of work called for by the lease were readily ascertainable at the time...[the parties] entered into their [lease] or that [the rent abatement] is conspicuously disproportionate to these foreseeable losses." *Id, citing JMD, supra*. In the present case, the amount of "future rents" could not be readily determined at the beginning of the lease for a number of reasons. The parties did not know if a replacement tenant would be found for the space if the lease was terminated and if one was found, how much rent the replacement tenant would pay. It was also unknown whether a replacement tenant would continue to pay the rent for the remaining term of the defendants' lease. As such, this provision with respect to future rents is enforceable. *See, Truck Rent-A-Center v. Puritan Farms 2nd, Inc*., 41 NY2d 420 (1977). Nor is the amount of liquidated damages here conspicuously disproportionate to the foreseeable loss. The lease simply requires payment of rent with a discount for the present value of the funds**.** The foreseeable loss from the defendants' breach of the lease is that the space would remain vacant and that the plaintiff would receive no income from the space for the remainder of the lease term.

As such, the plaintiff's motion for summary judgment against the respective defendants on the first and fifth causes of action is granted with respect to liability. The amount of damages, however, is an issue of fact inasmuch as section 1502(c) provides for a credit to the defendants with respect to payments made on the lease to determine the amount of rent, if any, paid by the previous third-party defendants here and any future tenants.[3]

Plaintiff's Claim for past Rents and Expenses and Attorney's Fees Pursuant to its Second, Third, Fourth and Sixth Causes of Action

The plaintiff claims that it is entitled to $42,963.44 for past due rent and expenses until the time of the termination on March 11, 2004, pursuant to sections 15.02(b) and 23.24 of the lease. The defendants contend that they are entitled to a credit with respect to the past due rent pursuant to the lease pursuant to section 23.24 regarding the cash allowance and that said credit was acknowledged by the plaintiffs.

Section 15.02(b) of the lease, states in pertinent part:

> In case of any such termination, reentry or dispossession by summary proceedings or otherwise, the rents and all other charges required to be paid up to the time of such termination, re-entry or dispossession, shall be paid by Tenant, and tenant also shall pay to Landlord all expenses which Landlord may then or thereafter incur for legal expenses, attorneys' fees, brokerage commissions and all other costs paid or incurred by Landlord as the result of such termination, re-entry or dispossession and for restoring the Premises to good order and condition and for altering and otherwise preparing the same for reletting and for reletting thereof. Landlord may, at any time and from time to time, relet the Premises, whole or in part, for any rental then obtainable either in its own name or as agent of Tenant, for a term which, at Landlord's option, may be for the remainder of the then current term of this lease or for any longer or shorter period.
>
> *Section 1502(b).*

Section 23.24 provides that the tenant is not entitled to such a credit or rent abatement of the last installment of the tenant allowance if the tenant is in default (under subsection (a)), the tenant has not submitted lien waivers in a form satisfactory to the landlord (subsection (a)(iii) or the lease is terminated (subsection (b)).

In the memorandum of plaintiff's representative, Soos, dated March 3, 2004, Soos acknowledges his anticipation of receipt of a "clean" lien waiver from contractor Lamparelli Construction and said lien waiver was, in fact, received and acknowledged in plaintiff's March 26, 2004 memorandum. The March 3, 2004 memo further indicates that Soos specifically represented to defendant Feller that the past due balance of $42,961.22 would be discounted by the cash allowance of $41,666.67 and that an outstanding balance of $1,294.55 would remain. This was further represented in a letter agreement drafted and signed by Soos of the same date. These documents are relied upon by the defendants. However, the record is clear that two months after the execution of these memoranda, the summary proceeding was commenced and the lease was clearly terminated, based upon the defendants' default, negating the defendants' entitlement to the credit. In addition, the record is again devoid of the modification of the terms of the lease as is discussed above. As such, the plaintiff is entitled to summary judgment on the second and fourth causes of action against defendants Buffalo Unit and Weller respectively.

With regard to the plaintiff's third and sixth causes of action against the respective defendant for attorney's fees, the defendants have offered no material opposition thereto. There is no dispute that the defendants vacated this subject premises in March of 2004 and the language of section 15.02(b) with respect to the plaintiff's entitlement to attorney's fees is clear. S*ee, W.W. Associates, supra*. As such, the plaintiff's motion for summary judgment on its third

and sixth causes of action for attorney's fees is granted. The Court will determine the appropriate award of attorneys' fees based upon submission by plaintiff's counsel.

NOW, therefore, for the foregoing reasons, it is hereby

ORDERED, that the plaintiff's motion for summary judgment on its first and fifth causes of action for net present value of future rents is granted with respect to liability, and it is further

ORDERED, that the plaintiff's motion for summary judgment on the first and fifth causes of action for net present value of future rents with respect to damages is denied, and it is further

ORDERED, that the defendants' cross-motion for summary judgment dismissing the plaintiff's first and fifth causes of action is denied, and it is further

ORDERED, that the plaintiff's motion for summary judgment on its second and fourth causes of action for past rents in the amount of $42,963.44 is granted, and it is further

ORDERED, that the plaintiff's motion for summary judgment on its third and sixth causes of action for attorney's fees is granted in an amount to be determined by the Court.

ENTER

Dated: February 1, 2007
Syracuse, New York

DONALD A. GREENWOOD
Supreme Court Justice

[1] One of the previous third-party defendants in this action.

[2] Although the plaintiff has argued that the Court could not consider the defendant's contentions since they constituted "unpleaded defenses", a court may take into account an unpleaded defense raised in opposition to a summary judgment motion. *See, Adirondack Park Agency v. Ton-Da-Lay Associates*, 61 AD2d 107 (3d Dept. 1978); *see also, Rizzi v. Sussman*, 9 AD2d 961 (2d Dept. 1959).

[3] The plaintiff in its supplemental response to combine discovery demands produce agreements between the plaintiff and Mid-Kay Beauty with respect to Mid-Kay Beauty's occupancy of the subject

space. Also provides was documentation that the plaintiff had received $172,000.00 in license fees from Mid-Kay Beauty through July of 2006.