

**24 St. Marks Owners, LLC v Sunstar Global Foods,
Inc.**

2008 NY Slip Op 31683(U)

June 16, 2008

Supreme Court, New York County

Docket Number: 0102358/2007

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART _____

Justice _____

Index Number : 102358/2007
24 ST. MARKS OWNERS
 VS.
SUNSTAR GLOBAL FOODS
 SEQUENCE NUMBER : # 001
 AMEND (ANSWER)

INDEX NO. 10235807
 MOTION DATE _____
 MOTION SEQ. NO. #001
 MOTION CAL. NO. _____

read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

*status conf 7/17/08 @ 9:30 am
80 Centre St Pt. 10*

FILED

JUN 18 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 16 2008

Jp
JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate DO NOT POST REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
24 St. Marks Owners, LLC

Plaintiff,

-against-

Sunstar Global Foods, Inc. and
Tadao Yoshida,
Defendants.

-----X

DECISION/ ORDER
Index No.: 102358/07
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

| Papers | Numbered |
|--|-----------------|
| Defs' n/m (summary j/m and amend) w/TY affid, JZM affirm, exhs . . . | 1 |
| Pltf's x/m (summary j/m) w/JM affid, exhs | 2 |
| Defs' opp and reply w/JZM affirm, TY affid, exh | 3 |

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff 24 St. Marks Owners' LLC ("landlord") to recover unpaid rent, additional rent and damages from defendant Sunstar Global Foods, Inc. ("tenant") and Tadao Yoshida, its sole shareholder. Mr. Yoshida signed a personal guaranty dated August 28, 1996 ("guaranty") guaranteeing the tenant's obligations under a commercial lease.

Defendants now move for summary judgment dismissing the complaint. They also seek permission to serve an amended complaint to assert 4 new counterclaims. They already asserted a counterclaim for damages arising from an alleged constructive eviction. Plaintiff has cross moved for summary judgment and it opposes defendants' motion to amend their answer.

To the extent that defendants also seek summary judgment on their proposed counter claims their motion must be denied at the outset as premature. There can be no summary judgment until issue is joined. CPLR 3212. Here, the counterclaims have not yet been permitted. Thus, no answer was due and no issue can be joined.

The court's decision and order is as follows:

Legal arguments

Many of the salient facts underlying the parties' dispute are not in dispute, but the parties are sharply divided on a number of legal issues, including whether a personal guaranty signed by Mr. Yoshida ("guarantor") expired.

It is undisputed that tenant entered into a commercial lease for a store with plaintiff, the landlord and owner of the premises located at 24 St. Marks Place, New York, New York. The defendants operated a restaurant at that location for a number of years, starting in 1976. That lease was renewed or extended over the years, with the most recent renewal in 1996. That renewal lease, dated August 28, 1996 commenced September 1, 1996 and ended August 31, 2006 (the "1996 lease"). The 1996 lease contained a renewal option which if not timely exercised, expired by its terms. The date to exercise that renewal option was September 1, 2005. It is undisputed that the tenant did not exercise that option.

The parties entered into negotiations to extend the 1996 lease during the last year of the lease, but were unsuccessful. Mr. Yoshida has provided his sworn affidavit that he thought the parties had reached an "oral agreement" of lease which was then reduced to writing. According to Mr. Yoshida, the tenant signed the lease, but plaintiff refused to countersign it and return it. Although no copy of this document is provided,

both sides agree that no renewal lease was ever achieved, and the 1976 lease expired by its terms on August 31, 2006.

After the lease expired, the tenant did not move out, but remained in occupancy. According to Mr. Yoshida, however, the tenant began making repairs to correct a problem at the premises that had created leaks or flooding. Mr. Yoshida contends further that the restaurant was not open, but closed while these repairs were being made. These assertions are offered in support of their defense and counterclaim for constructive eviction. Plaintiff's property manager, Mr. Moran, who does not directly address this claim, but landlord's position is that even if repairs were needed, under the lease they were the tenant's obligations and therefore these claims neither state a viable defense nor actionable counterclaim.

There is no dispute that the tenant made payments of \$10,028 each month for the months of September and October 2006, which the landlord accepted and cashed. The rent had been \$9,550 under the prior lease. In November 2006, however, the tenant made a payment of \$9,166.67 and another payment of \$14,500. Mr. Yoshida contends this reflects the rent that the parties had finally agreed to (\$11,000 a month) less a rent credit of \$1,833 per month for the first 12 months of the new, yet unsigned, lease. The larger check was for a security deposit. Defendants contend, and the landlord does not deny, that the security deposit under the expired lease (\$18,500) has not been returned, but the landlord contends this has been applied to the tenant's arrears.

Both sides agree that the tenant has surrendered the premises, although plaintiff contends it did so improperly, leaving debris, dangling wires, equipment, torn up floors,

and other conditions. This is supported by the affidavit of the property manager, Mr. Moran. He also states the tenant removed a wall and left an exposed steel beam. Thus, it is plaintiff's contention that this conditions and failure to leave the premises "broom clean," are violations of Article 58 of the 1976 lease that had already expired, but nonetheless controlled the relationship among the parties.

Aside from the disagreement over whether the tenant was constructively evicted (as defendants claim), the parties have a further disagree over whether the tenant actually vacated the premises in November 2006 or February 2007. Plaintiff contends the vacatur was in February 2007, but the tenant did not pay rent for December 2006, January 2007 or February 2007. Plaintiff provides an undated letter with a photocopy of the tenant's keys as proof the tenant surrendered in February 2007. The tenant concedes the letter was sent February 5, 2007, but contends it only "confirmed" the prior surrender of the premises in November 2006, therefore it does not owe rent or late charges for those three months.

Defendants argue that the guaranty Mr. Yoshida signed expired when the underlying lease expired at the end of August 2006. They also argue that the guaranty is limited to "amendment, modification, extension or renewal" of the lease and therefore does not extend to the month-to-month tenancy starting in September 2006 and ending (according to defendants) in November 2006. The defendants characterize the guaranty as a "good guy guaranty," allowing the guarantor to limit its legal responsibility for unpaid rent and additional rent to the time the tenant remains in occupancy.

Plaintiff contends this is not a "good guy guaranty" at all, and that in any event it did not expire on August 31, 2006 but was effective and enforceable until the tenant

surrendered the premises, even if they remained as month-to-month tenants. Plaintiff also contend that the defendants owe, but failed to pay water charges of \$6,448.03 for an undisclosed period of time. In addition to late fees, the lease also allows plaintiff to recover its expenses, including reasonable legal fees, incurred in connection with enforcement of the lease.

The guaranty is a four (4) page document. It identifies Mr. Yoshida as an officer and shareholder of the corporate tenant and recites that the guaranty is to "induce [the] Owner to enter into the Amendment [the 1996 lease] . . ." and that the landlord is unwilling to enter in the 1996 lease "unless Guarantor executes and delivers this Guaranty." It provides in relevant part as follows:

"(i) Guarantor unconditionally guarantees the complete and timely performance of each and every obligation had by Tenant under the Lease, as amended (including, without limitation, the due and punctual payment of all Base Rent and/or any Additional Rent due and payable under the Lease) through the date on which the Tenant under the Lease and all subtenants and other occupants of the Demised Premises vacate, and give possession to Owner of the Demised Premises, whether as a result of default, voluntary surrender or for any other reason. This Guaranty shall cover increased Base Rent as amended, and/or any subtenants or other occupants of the Demised Premises who shall remain or holdover in possession after the expiration of the term of the Lease, as amended. This Guaranty is an absolute, unconditional guaranty of payment and not of collectibility . . . Guarantor acknowledges and agrees that the security deposit given by Tenant in connection with the Lease shall be applied, at Owner's absolute and sole discretion and option, to pay any sums due from Tenant under the lease, as amended, if any, which are not the subject of Guarantor's obligation under this Guaranty which may become due before or after the period of time for which Guarantor is liable to make payment hereunder and that, as a result thereof, the sums held by Owner as security deposit under the Lease shall not serve to reduce Guarantor's total obligation under this Guaranty."

* * *

“(iii) The obligations of Guarantor under this Guaranty shall be absolute and unconditional, shall not be subject to any counterclaims, set-off, deduction or defense based upon any claim Guarantor may have against Owner and shall remain in full force and effect without regard to, and shall not be released, discharged or terminated or in any way affected by, any circumstances or condition (whether or not the Guarantor shall have any notice of the thereof), including, without limitation: (a) any amendment, modification, extension or renewal of the Lease (except that the liability of Guarantor shall be deemed to apply to the Lease as so amended, modified extended or renewed) . . .”

Defendants also seek permission to serve an amended answer. They propose adding the following new counterclaims: wrongful retention of security deposit (2nd counterclaim), failure to countersign the lease sent to the landlord and failure to return the additional security deposit (3rd counterclaim), damages for failure to enter into a lease (4th counterclaim), and breach of the implied covenant to negotiate in good faith. Plaintiffs oppose the motion, arguing these counterclaims have no facts to support them and therefore fail to state a cause of action, or are futile claims.

Discussion

When a tenant holds over beyond the expiration term of its lease, and the landlord accepts rent payments thereafter, a month to month tenancy is created in the amount of the payments made and accepted. N.Y. Real Property Law § 232-c; Joyous Holdings, Inc. v. Volkswagen of Oneonta, Inc., 128 AD2d 1002 (3rd Dept 1987). Here, no renewal lease was achieved by the parties, but the tenant remained in the premises paying rent each month, that the landlord accepted, thereby creating a month to month tenancy. Elite Gold, Inc. v. TT Jewelry Outlet Corp. 31 AD3d 338 (1st Dept 2006). Implicitly, this is on the same terms, and subject to the same covenants as those

contained in the lease that expired. City of New York v. Pennsylvania Railroad Company, 37 NY2d 298, 300 (1975).

Although defendants urge the court to consider that the payment and acceptance of increased¹ rent following the expiration of the lease established a completely new rental relationship between the landlord and the tenant, this argument misconstrues the guaranty at issue. While a guarantor should not be bound beyond the express terms of its guaranty, the guaranty that Mr. Yoshida signed is "absolute and unconditional." 665-75 Eleventh Avenue Realty Corp. v. Schlanger, 265 AD2d 270 (1st Dept 1999). He guaranteed the tenant's obligations under the lease until the tenant vacated the premises and surrendered possession back to the owner. *Compare: Elite Gold, Inc. v. TT Jewelry Outlet Corp.*, *supra* (guaranty only applied to "any renewal, change or extension of the lease.")

The guaranty explicitly encompasses post lease expiration issues, including the occupancy of subtenants, and "other occupants" who "remain or holdover in possession after the expiration" of the lease. *Compare: 665-75 Eleventh Avenue Realty Corp. v. Schlanger, supra* (the guarantor's obligation was only as to "any renewal, change or extension of the lease.") Therefore, the guaranty did not lapse when the lease expired on August 31, 2006, but continued and was effective until the tenant surrendered possession of premises to the landlord.

There is, however, a factual dispute when the premises were surrendered.

According to the defendants they "vacated" the premises when the problems

¹ Coincidentally, increased rent paid and accepted is the same as the increases in rent in September 1999, September 2002 and September 2005 under the expired lease (*i.e.* 5%).

with the leaks arose, however these are the same statements made in connection with their constructive eviction counterclaim. It would appear that the tenants did not surrender the premises because they were making repairs with the intention to reopen the restaurant, but there is an issue of fact of whether the defendants were constructively evicted. See, for example: M.Y. Realty Corp. v. Atlantic First Financial Corp., 19 A.D.3d 156 (1st Dept 2005) (conditions alleged, but not reason for the vacatur).

There is the further factual issue about when the defendants surrendered the premises to the landlord. On the one hand the defendants contend they surrendered the premises in November 2006, but there is the February 2007 letter they sent to the landlord with the key. Neither side has proved the date on which the tenant surrendered possession, as a matter of law, therefore their respective motions for summary judgment on these issues is denied.

Nonetheless, the court decides that the guaranty did not expire on August 31, 2006, as defendants contend, for the reasons that addressed. Consequently, to the extent each side moves for summary judgment on the issue of whether the claims against the guarantor should be dismissed, the defendants' motion is denied but the plaintiff's motion is granted. If proved, the guarantor is responsible for any obligations that the tenant is responsible for in connection with its occupancy of the premises.

The court has considered other arguments by each side about whether the guaranty is a "good guy" guaranty. A good guy guaranty extinguishes the guarantor's liability for a tenant's obligations in the event the tenant vacates before the end of the lease term. Zevnik, Horton, Guibord, McGovern, Palmer & Fognani, LLP v. Sheraton

Holding Corp., 304 A.D.2d 455 (1st Dept 2003). Therefore, even if this is a "good guy" guaranty, this argument is unhelpful to the guarantor. Plaintiffs have proved that after the lease expired, the tenants remained in possession for some period of time, notwithstanding the collateral dispute about the date on which the tenants vacated.

Nor has either side proved its entitlement to summary judgment on the water charges or the alleged property damages claims. Plaintiff has failed to provide any proof of the water charges, such as a bill. There is no information how they were calculated or for what period of time. Defendants deny incurring any water charges, based upon their claims that they were out of business for some time. Therefore, there is a factual dispute not only when and whether these charges were incurred, but also as to the amount. The issue of whether the tenant damaged the premises is linked to the larger claim by them that they were repairing conditions that had caused leaks and flooding in the restaurant. Since the issue of whether these were repairs, or damages cannot be decided unless the constructive eviction claims are tried, neither party is entitled to summary judgment on these claims.

Motion to amend answer to asset new counterclaims

Generally, "[i]n the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit . . ." Morris v. Queens Long Island Medical Group, P.C., 49 A.D.3d 827, 828 (2nd Dept 2008) (*internal citations omitted*). If the proposed amendment alleges facts that are not actionable, then leave to amend must be denied. Rappaport v. VV Publishing Corp., 223 AD2d 515, 516 (1st Dept 1996).

The defendants previously asserted constructive eviction as a defense and counterclaim in their answer. Neither side has moved for summary judgment with respect to that counterclaim and it is reiterated in the proposed amended answer. That counterclaim will be allowed.

The court will also allow the proposed counterclaims based upon setoffs and/or credit for monies paid as security deposits, notwithstanding plaintiff's argument that the lease does not allow the guarantor to assert such claims. They appear to be allowable claims by the tenant.

The court has considered the other proposed counterclaims based upon claims that the plaintiffs failed to contract with the defendants and did not negotiate in good faith. Examining the facts alleged by defendant in the most favorable light, however, although the parties endeavored to reach a contract, they never did. An agreement to agree, in which a material term is left for future negotiations, is unenforceable. Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher, 52 N.Y.2d 105 (1981); Transit Management, LLC v. Watson Industries, Inc., 23 A.D.3d 1152 (4th Dept 2005). Furthermore, a contract is a private matter, and unless mandated by law, a party will not be ordered to enter into a contract. (1981). Therefore, the 1st, 2nd and 3rd counterclaims are allowed, but not the 4th and 5th counterclaims as they fail to set forth a cause of action. Defendants may serve the proposed amended answer with the permitted counterclaims within Ten (10) Days hereof.

As already addressed by the court earlier in this decision, defendants' motion for summary judgment on their proposed counterclaims is denied.

Conclusion

Defendant's motion for summary judgment, dismissing the complaint against them is denied in its entirety. Defendants' motion for permission to serve an amended answer with new counterclaims is partially granted, as indicated. Defendants' motion for summary judgment on its proposed counterclaims (that have been allowed) is denied as premature.

Plaintiffs' cross motion for summary judgment is granted only to the extent that it has proved that the terms and covenants of the expired lease continued beyond its expiration date and they regulate the disputes at bar. Plaintiffs have also proved that the guaranty did not expire when the lease expired, but continued until the corporate defendant surrendered the premises. Therefore, the plaintiff has proved that the guarantor is responsible for the tenant's obligations under the lease. However, there are issues of fact that have to be decided at trial, and therefore plaintiffs' motion for summary judgment is otherwise denied.

This case will appear on the Part 10 calendar on July 17, 2008 at 9:30 a.m. for a status conference and to set a discovery schedule.

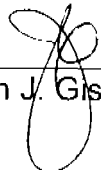
Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
June 16, 2008

So Ordered:

FILED
JUN 18 2008
COUNTY CLERK'S OFFICE
NEW YORK



Hon. Judith J. Gische, JSC