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SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

BARLEEN, LLC and D.L. HART AND CO., INC.,

Plaintiff,

INDEX NO.: 012666/2006
MOTION DATE: 09/19/2008
MOTION SEQUENCE: 002 and 003

-against-

S&K CONVENIENCE, INC., RICHARD DUBI, KAREN DUBI, PASQUALE PERROTTA and SUSAN PERROTTA,

Defendants.

The following papers read on this motion:

Notice of Motion	1
Affirmation in Support of Motion for Partial Summary Judgment of Harold J. Levy & Exhibits Annexed	2
Memorandum of Law in Support of Defendants' Motion for Partial Summary Judgment on Damages	3
Defendants' 19-a Statement of Undisputed Facts	4
Notice of Cross-Motion, Affidavit & Exhibits Annexed	5
Memorandum of Law in Opposition to Motion for Summary Judgment and in Support of Cross-Motion	6
Plaintiffs' Response to Defendants' 19-a Statement of Undisputed Facts	7
Affirmation in Support of Motion for Partial Summary Judgment of Harold J. Levy & Exhibit Annexed	8
Reply Memorandum of Law in Further Support of Defendants' Motion for Partial Summary Judgment on Damages, and in Opposition to Plaintiffs' Cross-Motion	9

This motion by defendants for an order, pursuant to CPLR § 3212, granting partial summary judgment on damages, and for sanctions pursuant to 22 NYCRR 130-1.1, and the cross-motion by plaintiff for an order imposing sanctions pursuant to 22 NYCRR 130-1.1, are determined as follows.

Although the motions sub judice have been denominated sequence #2 and sequence #3 by the Clerk of the Court, the parties to this action and the money over which they fight, have been in differing permutations of litigation for a long time and familiarity with the facts is presumed. It is sufficient to state for purposes of this decision and order that the issue here is the balance due on a breached written four year commercial lease for a gas station with a convenience store, and liquidated damages for breach of the contract to buy gasoline, (characterized as additional rent).

The legal foundation for this motion, brought on the eve of trial, is that defendants surrendered the premises at a certain date and plaintiffs took action which is inconsistent with defendants' lease. See Brock Enterprises v Dunham's Bay Boat Company, Inc., 292 A.D.2d 681 (3d Dept)(when both parties do an act inconsistent with a tenant's lease it operates as a "surrender by operation of law.") Therefore, their rent obligation is terminated under the theory that "[o]nce a commercial tenant surrenders the premises prior to the end of the lease term, settled law prevents a landlord from recovering rent from that [sic] accrues after the landlord relets the premises to a new tenant, unless the landlord provides prior notice to, and obtainable [sic] consent of the existing tenant. See, e.g. Holy Properties Limited, L.P. v Kenneth Cole Productions Inc., 87 N.Y.2d 130, 133-34 (1995)," Defendants' Memo of Law, p. 2.

It is an awkward, and somewhat misleading, summary of that court's holding. It blurs the distinction between evacuating the leasehold and a legal surrender. A more simple statement is if the landlord acts as if the tenant is no longer the tenant, the tenant does not have to pay the balance of rent due on the lease. Although the principle can be simply stated it is not so simple to apply; if landlord is barred from collecting rent after tenant's actual or implied date of surrender, how is a surrender identified?

See Riverside Research Institute Inc. v KMGA, Inc., 68 N.Y.2d 689, 692 (1986)(whether a surrender by operation of law has occurred is almost always a matter of fact.)

The trial is set down for November 5, 2008, at 9:30 A.M. As it develops, the premises was relet on or about June 1, 2007, and overlaped defendants' four year lease until May 31, 2008. Neither party disputes that when the premises is relet by the landlord for the tenant's benefit, the rent received will be an offset or release of what is due. But, seemingly as a last ditch effort before trial to escape paying damages to the unrelenting landlord, defendant is not satisfied with what might be perceived as good news, but rather seeks to persuade the court that it legally surrendered the premises before it was relet, or in the alternative, that the reletting for a term beyond that remaining on the lease is a surrender of the lease by operation of law. 4400 Equities v Dhinsa, 52 A.D.3d 654 (2d Dept 2008). The result would be to exempt defendant from certain rent arrears since a surrender is inconsistent with the landlord tenant relationship, 87 N.Y.2d 130, 133-34, and allows the inference that the landlord rented the premises for his own account. Id.

It could, but that is not what happened in this case. There is no evidence that the lease terminated and the terms of the lease provide otherwise. And, there is a paucity of facts in the 4400 Equities case for the court to rely upon it as authority that a new lease for longer duration than a defaulted lease operates as a surrender by operation of law.

Assuming for purposes of this motion only that defendants' burden to show a surrender when the premises were relet, or earlier, has been met sufficiently to shift the burden to the landlord, Zuckerman v City of New York, 49 N.Y.2d 557, 562, the facts that were omitted by defendants are sufficient to disprove any surrender by the tenant. All of defendants' actions in opposing the default noticed by plaintiff, their argument that the Lease and Purchase Agreement were an unenforceable "Tying" arrangement, their reluctance to evacuate, their maintenance of the premises after quitting, to say nothing of their prolonged litigation and the need of plaintiff to

commence this action recover on defendants' leasehold obligations, negate any argument that plaintiff accepted a peaceful return and surrender of possession of the premises from defendant. Brock Enterprises v Dunham's Bay Boat Company, Inc. 292 A.D.2d 681 (3d Dept 2002).

The Lease itself provides that a surrender can only occur if the Landlord consents in writing, including the delivery of keys. Lease section 13.07. Defendants defaulted on the agreement to purchase minimum gallonage at a specified rate and that deficiency triggered a default on the Lease. Section 13.03 of the Lease declares that upon defendants quitting of the premises - which did occur after the L&T action was commenced - that they would remain liable for all rents and other charges. Coupled with section 13.07 stated above, to the view of the court, it is harsh business although within our policy of freedom to contract. Unnecessary to the situation is the dose of sanctimony added by the landlord.

In their motion defendant devotes some argument to persuading that plaintiff is not entitled to recover legal fees in the trial to come shortly. Unfortunately, the court must resort to technicalities at this point to render the decision. It is the law that when moving for summary judgment the relevant record accrued with the pleadings are to be submitted for the assistance of the court. CPLR 3212(b). Defendants' failure to adhere to the rule renders their claim that "plaintiffs cannot recover their legal fees incurred in the landlord tenant proceeding or the prior supreme court proceeding and must reimburse defendants for the fees they incurred" too obscure to consider. No information is provided as to why attorney fees were reserved to this action by the District Court, although there is authority in the contract that Landlord is liable for attorney fees in recovering possession. Section 13.09

Finally, it is by now old law that moving for imposition of sanctions can in it self be frivolous conduct, Tercjak v Tercjak, 48 A.D.3d 773 (2d Dept 2008), and that is what has happened here. Nothing done by plaintiff, to the view of this court, has been dilatory, delaying, harassing, without merit or without hope of reversing existing law.

The District Court proceeding was not dismissed on a motion made in October of 2005, and that court required the parties to go to trial. At the same time a notice of appeal of this court's denial of a Yellowstone injunction was pending, although never perfected. On the basis of the foregoing, it is

ORDERED that defendants' motion for partial summary on damages including attorney fees is denied; and it is further

ORDERED that plaintiff's motion for sanctions is denied.

On its own motion the court holds that defendants application for sanctions imposed against plaintiff for frivolous conduct is frivolous conduct as it has no merit and is brought for no apparent reason other than to harass; and it is

ORDERED that defendant shall pay to the Lawyers' Fund for Client Protection of the State of New York, 119 Washington Avenue, Albany, New York 12210, the sum of $600.00 within five (5) business days of receipt of this order, with proof of payment filed with the court.

Dated: October 2, 2008

J.S.C.