

**Prince St. Inv. Co., LLC v Alexia Crawford Retail  
Prince St., LLC**

2010 NY Slip Op 30824(U)

April 7, 2010

Supreme Court, NY County

Docket Number: 111965/08

Judge: Jane S. Solomon

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

JANE S. SOLOMON

PART 55

PRESENT:

Index Number : 111965/2008

PRINCE STREET INVESTMENT

vs

ALEXIA CRAWFORD RETAIL PRINCE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE 11/25/09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-4

5-7

8

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is denied by annexed decision & order*

*NB - 5-10-10 conf met at end*

**FILED**

APR 12 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/7/10

*[Signature]*  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 55

-----X  
PRINCE STREET INVESTMENT COMPANY, LLC,  
Plaintiff,

-against-

ALEXIA CRAWFORD RETAIL PRINCE STREET, LLC,  
ALEXIA CRAWFORD and PETER RUBIN,  
Defendants.  
-----X

Index No.  
111965/08

**FILED**  
APR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

**JANE S. SOLOMON, J.:**

In this action, the court is asked to evaluate the conditions under which a lease has terminated in order to discern defendants' liability as lessees and as guarantors. The controversy arises in connection with a lease dated February 2, 1999 made by plaintiff's predecessor, Prince Street Investment Co. (it, and plaintiff, Prince Street Investment Company, LLC, are referred to herein as "Prince Street"), and defendants Peter Rubin<sup>1</sup> and Alexia Crawford, for a term ending January 31, 2004 (the Lease), of a store in plaintiff's building at 199-201 Prince Street, New York, New York (the Premises). Section 86 of the Lease contains the following language:

Notwithstanding anything to the contrary set forth anywhere in this Lease or Rider, the individual(s) executing this Lease as Tenant(s) shall have the one-time absolute right to assign their interest in this Lease to a limited liability company or other entity formed by them for the purpose of the use of the Premises as set forth herein.

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<sup>1</sup>Motion 001 for a default judgment against Rubin was granted by decision entered January 12, 2009.

The Lease also provides, in section 24, that no surrender of the Premises is valid unless Prince Street signed a written agreement.

By their guaranty, also dated February 2, 1999 (Guaranty), Mr. Rubin and Ms. Crawford "personally, absolutely and unconditionally" guaranteed performance by tenant of all terms and conditions of the Lease. They "further agree(d) that th[e] Guaranty shall remain in full force and effect during any renewal, change and/or extension of th[e] Lease and Rider." The Guaranty further provides that

this Guaranty and the obligations of the Guarantors hereunder shall terminate upon (a) the date Tenant surrenders the Premises, pursuant to the terms of the Lease and Rider with thirty (30) days written notice to the Landlord, in broom clean condition together with the keys to the Premises; or (b) the effective date of any assignment of the Lease and Rider, as consented to by Landlord.

The Lease was modified twice. On May 22, 2002, there was a rental-freeze agreement by the original owner and the tenant, identified as "Crawford Creations, Inc." On February 5, 2005, defendant Alexia Crawford Retail Prince Street, LLC, "as successor to Crawford Creations, Inc." (AC Retail), extended the Lease through January 31, 2010.

Each Modification Agreement provides that the parties, inter alia:

acknowledge that this Lease Modification Agreement is an extension and modification of the Lease dated on or about February 1, 1999 between the parties hereto ...

All terms, clauses, covenants and/or agreements contained in the Lease, Riders and/or Schedules thereto and in the Modification Agreement shall continue and survive in full force and effect.

As of January 23, 2008, by Notice of Petition, Prince Street commenced a summary nonpayment proceeding in the Civil Court under Index No.: L&T 53896/08 (the Civil Court Action). Prince Street obtained a judgment of possession, under which a warrant issued and was executed on or about April 14, 2008. Prince Street re-let the Premises as of May 1, 2008. By statement dated May 27, 2008, Prince Street sought a balance due of \$69,955.57. This action followed.

Prince Street now moves for summary judgment on all claims. The complaint seeks: (i) rents due and in arrears, late fees, 2007 and 2008 real estate taxes, added rent, and legal fees added rent; (ii) an account, as stated in the May 27, 2008 bill; (iii) use and enjoyment in that amount; (iv) judgment against the Guarantors; (v) and additional attorneys' fees and other costs incurred in connection with the alleged defaults in payment. After crediting a security deposit but increasing legal fees sought and some "expectation damages," Prince Street now claims that somewhat more than \$65,000 is due.

The Crawford defendants cross-move for summary judgment on the ground that Prince Street accepted a termination of the Lease in February 2008 when, they claim, the Premises was surrendered in broom-clean condition, and keys were delivered.

In addition, Alexia Crawford claims that she no longer is liable on the guaranty, having been excused upon execution of the Lease modifications or, alternatively, upon the alleged surrender, because the guarantee is a "good guy" guarantee with which she complied. Finally, the Crawford defendants contend that Prince Street failed to account for its re-letting of the Premises in its calculation of damages.

With regard to the first cause of action, defendants contend that, in January 2008, AC Retail advised Prince Street that it could no longer pay the rent, and proposed to surrender the Premises. Although a surrender agreement was prepared and offered as of January 29, 2008, it was not executed. Some negotiation ensued with regard to the condition of the Premises for surrender and, as of February 12, 2008, Prince Street indicated that it would schedule a walk-through. According to the testimony of Prince Street's principal, Eugene Cordano, the walk-through occurred within a few days of February 12, 2008, but AC Retail's representatives failed to return the keys to the Premises. Mr. Cordano testifies that he was prevented from showing the Premises because he did not have the keys. On the other hand, Ms. Crawford alleges, with a corroborating affidavit from her employee, that the keys were returned as of February 2008, and there was no required executed surrender agreement. In all events, the plain language of the Lease is that "[n]o

agreement to accept surrender shall be valid unless in writing signed by the Owner." Lease, ¶ 24.

Moreover, the unsigned surrender agreement is evidence that both parties understood that a writing was required, and could not agree on its execution. Indeed, Mr. Cordano testified that Ms. Crawford did not give him the keys to the Premises because "we still did not have the Surrender Agreement executed, and that's why the keys were not forthcoming." Cordano EBT of April 15, 2009, 40:10-12. The lack of signature on the draft surrender agreement means that no enforceable obligation arose. See e.g. *Computerized Med. Imaging Equip. v Disonics Ultrasound*, 303 AD2d 962, 963 (4<sup>th</sup> Dept 2003). As such, Prince Street prevails against the corporate defendant on this ground under the first cause of action.

Plaintiff may not succeed on its second claim for an account stated because the statement apparently is a bill rendered after Prince Street obtained possession and not a statement of a running account. Moreover, on the motion, it seeks a different amount with different components.

Similarly, plaintiff is not entitled to use and occupancy because its claims against defendants are limited to the amounts due under the Lease, namely the first claim on which it has prevailed on this motion.

Defendants argue that Prince Street will make enough

money on its re-lease of the Premises to mitigate the loss from defendants' failure to pay under the Lease. It is black letter law that a commercial landlord has no duty to mitigate. That does not defeat Prince Street's claim under the lease for sums due prior to the reletting. See *Holy Props. Ltd., L.P. v Kenneth Cole Prods.*, 87 NY2d 130, 133-134 (1995).

The remaining issues pertain to the fourth cause of action against Ms. Crawford under the Guaranty. The Guaranty provides that it "shall remain in full force and effect during any renewal, change and/or extension of th[e] Lease and Rider," making it applicable to the modifications made by the corporate tenant, of which Ms. Crawford was the officer or member. See Lease, ¶ 75 ("[t]his Lease may not be modified or amended except in writing, signed by both parties"); see also Lease, ¶ 65 ("this Lease may not be amended, modified or released, or discharges [sic], in whole or in part, except by any instrument in writing signed by the parties hereto, their respective successors or assigns"). Under these clauses, the modifications do not cut off Ms. Crawford's obligations.

Similarly, the making of the first modification by a corporate entity implies that Mr. Rubin and Ms. Crawford assigned their interest to a corporate entity, an event that was contemplated by an earlier referenced provision of the Lease. That expectation explains why the two signatories to the Lease at

its inception also were the guarantors.

The contention that the Guaranty is a "good guy" guaranty is not persuasive. That label contemplates the release of a guarantor when, upon surrender, the provisions of the guaranty, usually, that the rent and other financial obligations are current, and, here, a requirement the Premises be surrendered in conformity with the Lease, circumstances which do not obtain here. See e.g. 33 Real Estate Law Report, *Leases: Advantages of a Good Guy Guaranty*, October 2003.

Accordingly, plaintiff is entitled to judgment as to liability against Ms. Crawford, as it has with Mr. Rubin, on the Guaranty. Finally, as Prince Street has prevailed on its complaint, it is entitled to legal fees. Because the complaint and the post-eviction bill seek different amounts, and legal fees must be fixed in any event, the amount of the judgment must be determined by further proceedings herein.

By virtue of the foregoing, it hereby is

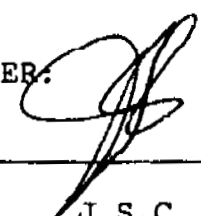
**ORDERED** that the motion of plaintiff Prince Street Investment Company, LLC for summary judgment against defendant Alexia Crawford Retail Prince Street, LLC is granted as to liability on the first and fifth causes of action and it is granted as to liability as to Alexia Crawford on the fourth cause of action and it is otherwise denied; and it further is

**ORDERED** that the cross motion of defendant Alexia

Crawford to dismiss the fourth cause of action is denied; and it further is

**ORDERED** that the parties shall appear for a pre-trial conference in Part 55 on May 10, 2010 at 2 PM to schedule the trial on the damages to which plaintiff is entitled on its prevailing claims here and as against Rubin.

Dated: April 7, 2010

ENTER:   
\_\_\_\_\_  
J.S.C.  
JANE S. SOLOMON

**FILED**  
APR 12 2010  
NEW YORK  
COUNTY CLERK'S OFFICE