

**Branic Int'l. Realty Corp. v 103 Broadway Corp.**

2010 NY Slip Op 31847(U)

July 15, 2010

Supreme Court, New York County

Docket Number: 108031/2009

Judge: Joan A. Madden

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

PRESENT: How Joan A. Madden  
Index Number : 108031/2009  
BRANIC INT'L REALTY CORP.

PART 11

vs  
103 BROADWAY CORP.  
Sequence Number : 001  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE 3-4-10  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion <sup>+ cross motion</sup> to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the answered Memorandum Decision & Order

**FILED**  
JUL 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: July 15, 2010

\_\_\_\_\_  
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 11

-----x Index No. 108031/2009

BRANIC INTERNATIONAL REALTY CORP.,  
Petitioner,

-against-

103 BROADWAY CORP. and SEBASTIAN ROZARIO,  
Respondent.

**FILED**  
JUL 22 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

-----x  
**Joan A. Madden, J.**

Plaintiff Branic International Realty Corp. (“Branic”) moves for an order (1) granting it summary judgment as to liability (a) on the first cause of action against 103 Broadway Corp. (“Broadway Corp.”) for unpaid rent due under a lease agreement, and against Sebastian Rozario (“Rozario”) as guarantor of Broadway Corp.’s obligations under the lease agreement, (b) on the second cause of action for attorneys’ fees, and (2) setting the matter down for an inquest to determine the amount of damages due. Rozario and Broadway Corp. (together “Broadway Group”) oppose the motion, and cross-move for summary judgment dismissing the complaint and severing the counterclaims. For the reasons set forth below, Branic’s motion is granted, and Broadway Group’s cross-motion is denied.

Background

In 2007, Broadway Corp., pursuant to a written lease (the “Lease”), rented 216 West 103rd Street, East Store, New York, New York (the “Premises”) from Branic for a five-year term, beginning January 2008 and ending in December 2012. Rozario, who is the former president of Broadway Corp., entered into a Guaranty Agreement (the “Guaranty”) guaranteeing the obligations under the Lease. Specifically, under Section 1(a) of the Guaranty, Rozario “unconditionally guarantees to the Landlord...the full and

punctual performance and observance, by the Tenant, of all terms, covenants and conditions in said Lease contained on Tenant's part to be kept, performed and observed."

In February 2009, Broadway Corp. vacated the Premises and stopped paying rent, and has not paid rent since that time. The Premises has been relet since Broadway Corp. vacated it. On April 21, 2009, Broadway Corp. returned the keys to the Premises to Branich with a signed letter stating that the keys were being returned.

Branich commenced this action on June 5, 2009. Defendants answered the complaint and asserted affirmative defenses alleging that (1) Branich is demanding rent acceleration and that the Lease does not have an acceleration clause, (2) the terms of the lease with respect to assigning and subletting are unconscionable and in violation of Broadway Corp's statutory rights under New York Real Property Law (RPL) § 235(c), (3) Branich has "unclean hands" as it rejected potential tenants based on their ethnicity, raising a triable issue of fact and estopping Branich from asserting its claim, (4) Branich has unclean hands because the "Hotel Marrakesh," which is owned by Branich and located in the same building as the Premises, is an illegal hotel, and (5) Broadway Corp. surrendered the Premises by sending Branich the keys to the property and that Branich then retook possession.

Broadway Group also asserts the following four counterclaims: (1) that Branich's unfettered right to reject prospective sublessees or assignees is in violation of RPL § 235(c) and that it should be considered void as against public policy, (2) that the rejection of credit worthy substitute tenants for the Premises is a tortious wrong and that damages should be determined upon trial, (3) that the rejection of substitute tenants was discriminatory and racially motivated, and (4) Branich retook possession of the Premises and began exercising control over it thereby surrendering claims to rents and charges.

Branic now moves for summary judgment as to liability for the amounts of base rent and additional rent allegedly due and owing under the Lease plus interest and attorneys fees,<sup>1</sup> less the \$6,000 security deposit paid by Broadway Corp.<sup>2</sup> In support of its motion, Branic submits a copy of the Lease, the Guaranty and an affidavit from Fried. According to Fried, Broadway Corp. is liable to Branic based on its breach on various provisions of the Lease in ceasing to pay rent in February 2009 before its term was to expire at the end of December 2012. Specifically, Fried cites Paragraph 40.01 which requires timely payment of the rent. Since the rents have not been paid, Fried asserts that under Paragraph 40.03 Branic is also entitled to late fees.<sup>3</sup> (Fried Affidavit, 5).

Fried also contends that contrary to defendants' affirmative defense and related counterclaim, the Premise was never surrendered, pointing out that Paragraph 24 of the

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<sup>1</sup>The Claim for attorneys' fees is based on Paragraph 19 of the Lease, which provides that:

if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to reasonable attorney's fees, in instituting, prosecuting or defending any actions or proceeding, and prevails in any such action or proceeding, such sums so paid or obligations incurred and costs shall be deemed additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefore....

<sup>2</sup> See Paragraph 31, which states the owner has the right to retain the \$6,000 security deposit and "use, apply or retain the whole...to the extent required for the payment of any rent ...or any other sum as to which Tenant is in default..."

<sup>3</sup> Under Paragraph 40.03 if the Tenant fails

"to pay any installment or payment of [rent]...within ten (10) days after same shall become due and payable pursuant to the terms of this Lease then Tenant shall be required to pay as Additional Rent a monthly late charge equal to \$.06 for each \$1.00 which remains so unpaid multiplied by the number of months or part of any months it remains unpaid from the date due."

Lease states that “[n]o act or thing done by Owner or Owner’s agents during the term... shall be deemed an acceptance of a surrender of the demised premises and no agreement to accept such surrender shall be valid unless in writing signed by owner... and the delivery of keys to any such agent or employee shall not operate as a termination of the [L]ease or surrender of the demised [P]remises.”

Fried also states that Broadway Corp.’s affirmative defense and counterclaim based on unclean hands in connection with its refusal to permit the assignment or sublease of the Premises is without merit and contrary to the Lease. Specifically, Fried relies on Paragraph 43.1 which provides that “[n]either this Lease nor any part hereof, nor the interest of Tenant hereunder... shall, by operation of law or otherwise, be assigned... or otherwise transferred by Tenant.... Any assignment, sublease, mortgage, pledge, encumbrance or transfer in contravention of this Paragraph 43 shall be void.” he also points to Paragraph, 84.12 which provides that “whenever Owner’s consent or approval is expressly or impliedly required by any provision of this Lease, the consent or approval may be granted or withheld arbitrarily in Owner’s sole and absolute discretion unless otherwise specifically stated in such provision.”

Broadway Group opposes the motion based on its affirmative defenses and counterclaims. Broadway Group also cross-moves for summary judgment dismissing the complaint against them in its entirety because Branich’s demand for accelerated “base rent” for the full term of the Lease is not authorized by the Lease or the Guaranty and Branich fails to state an adequate claim. Broadway Group also moves to sever the counterclaims and allow them to proceed separately.

In support of its position, Broadway Group submits the affidavit of Rozario. According to Rozario, Broadway Group relinquished the Premises by delivering the keys

and attaches a letter from Broadway Corp dated April 21, 2009 relinquishing position of the Premises. Rozario states that immediately afterwards Branick padlocked the Premises and installed a “for rent” sign in the front window. (Rozario Affidavit, ¶ 6). In support of this position, he attaches photographs of the Premises depicting the padlocked gates and the “for rent” sign. He also states that there “has been no communication from [Branick] following the surrender of the Demised Premises.”

Rozario states that before Broadway Corp relinquished the Premises, he has introduced two prospective tenants to Branick’s president, Hank Fried (“Fried”), and that Fried indicated to him that he rejected the prospective tenants on the basis of their ethnicity. (Id., ¶ 8). Rozario states that both prospective tenants were “veteran operators of stores in New York City similar to the business carried on in the [Premises].” (Id.)

#### Discussion

On a motion for summary judgment, the proponent “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case....” Winegrad v. New York Univ. Med. Center, 64 NY2d 851, 852 [1985]. Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986].

Here, Branick has set forth sufficient documentary and other evidence to demonstrate that the Lease and Guaranty are enforceable as against Broadway Corp. and Rozario, respectively, that Broadway Corp. breached the Lease by vacating the Premises and that the underlying debt owed for unpaid rent and other obligations is due and owing under the Lease and pursuant to the Guaranty. Thus, the burden shifts to Broadway

Group to assert a defense or counterclaim sufficient to raise a triable issue of fact. As set forth below, Broadway Group has not met this burden.

#### Rent Acceleration

Broadway Group argues that summary judgment should be denied and the action dismissed as the complaint seeks recovery for rent that has not yet accrued even though there is no acceleration clause in the Lease. Broadway Group is correct that when, as here, a lease does not have an acceleration clause, future rents cannot be recovered in advance of their accrual. See Long Island R. Co. v. Northville Indus. Corp., 41 NY2d 455, 465 [1977]. However, Branic does not have to wait until the Lease term expires to bring an action to recover rent that has accrued. See Paragraph 84.10 of the Lease (allowing “suits for recovery of rents and other amounts and damages set forth [to] be brought by [the] Owner...and nothing in this Lease will be deemed to require Owner to await the date on which the Term of this Lease expires.”); see also, Beaumont Offset Corp v. Zito, 256 AD2d 372 [2d Dep’t 1998] (holding that when a lease has no acceleration clause the landlord can seek amounts due and owing at the time of filing his claims). As this motion seeks summary judgment only as to the amounts of unpaid rent that have accrued, the lack of an acceleration clause in the Lease does not warrant the denial of the summary judgment motion or the dismissal of the complaint.

Broadway Group next contends that Paragraph 84.12 of the Lease is unconscionable since it gives Branic unfettered discretion to deny subletting or

assignment and thus should not be enforced under RPL § 235(c),<sup>4</sup> which allows the court to refuse enforcement of any lease or lease clause found to be unconscionable.

This argument is unavailing.<sup>5</sup> The doctrine of unconscionability has little place in commercial settings, such as the instant one. See Gillman v. Chase Manhattan Bank, N.A., 135 AD2d 488, 491 [2d Dep't 1987], aff'd, 73 NY2d 1 [1988] (finding that the “doctrine of unconscionability has little applicability in the commercial setting because it is presumed that businessmen deal at arm’s length with relative equality of bargaining power”); See also Paragraph 84.11 of the Lease (stating that the “[L]ease had been prepared by Owner and reviewed by Tenant and its professional advisors.”).

Moreover, a determination of unconscionability generally requires a showing of procedural and substantive unconscionability, i.e., that there was an absence of meaningful choice on the part of one of the parties, and that there are contract terms that are unreasonably favorable to the other party. See Gillman, 135 AD2d at 492. Here, such a showing cannot be made since Broadway Group was under no obligation to enter into the Lease and the provision in question arose out of negotiations between commercial entities. Furthermore, it has not been shown that Broadway Group lacked sufficient choice of retail locations and would have been unable to rent a commercial space in a different location with more amenable lease provisions. See generally, Equit. Lbr. Corp.

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4 RPL § 235(c) provides that: “[i]f the court as a matter of law finds a lease or any clause of the lease to have been unconscionable at the time it was made the court may refuse to enforce the lease, or it may enforce the remainder of the lease without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.”

5 Broadway Group also incorrectly argues, based on Rowe v. Great Atlantic & Pac. Tea Co., Inc., 46 NY2d 62, 69 [1978], that covenants seeking to limit assignment of leases are disfavored by the courts. Although there may be policy implications regarding the under utilization of land, as the Rowe discusses, this analysis was applied to reject an implied covenant disallowing an assignment, not an express lease provision like the one at issue in the instant case.

v. IPA Land Development Corp. 38 NY2d 516, 523 [1976](finding that where there is no evidence of adhesion or absence of choice and both parties are commercial entities there is no unconscionability); compare Jones v. Star Credit Corp., 59 Misc.2d 189 [NY Sup. Ct. Special Term 1969] (finding unconscionability where there was a large disparity in value obtained and price paid, the seller knowingly took advantage of the buyer, and gross inequality of bargaining power precluded any meaningful choice).

For similar reasons, it cannot be said that the Guaranty is unenforceable on the grounds of unconscionability. See Chrysler Credit Corp. v. Kosal, 132 AD2d 686 [1st Dep't 1987] (finding a guaranty agreement negotiated by business people in a commercial setting gives rise to the presumption of the lack of unconscionability); Puntillo Assocs. v. Land, 222 AD2d 425, 426 [2d Dep't 1995] (rejecting guarantor's defense of unconscionability where guarantor failed to submit "any proof that the personal guaranty signed by him or the underlying lease was unconscionable and against public policy"). Accordingly, Broadway Group's affirmative defense and counterclaim related to unconscionability are without merit.

#### Unclean Hands

Broadway Group also maintains that Branick denied prospective tenants the right to rent the Premises based on their race and ethnicity and based on these allegations asserts the defense of unclean hands. Notably, however, Broadway Group offers no evidence other than a single sentence in Rozario's affidavit in support of its contention that the prospective tenants were veteran operators or that Branick's refusal to accept them as tenants was in anyway discriminatory. See Marinelli v. Shifrin, 260 AD2d 227, 29 [1st Dep't 1999] (holding that "the mere assertion of a counter claim unsupported by proof of its merit will not defeat summary judgment on an otherwise meritorious

claim”) (quoting Two Clinton Sq. Corp. v. Gorin Stores, 51 AD2d 643, 644 [4th Dep’t 1976]).

Furthermore, as indicated in Fried’s affidavit, Paragraph 43.1 of the Lease, confers a strict prohibition against assignments and subletting. In addition, to the extent that the Lease could be read as permitting assignments or subletting, under Paragraph 84.12, Branich has “sole and absolute discretion” to grant or withhold “arbitrarily” consent to assign or sublease the Premises. This provision is clear on its face and therefore Branich was within its right to deny assignment or sublease to the prospective tenants. See R/S Assoc. v. New York Job Dev. Auth., 98 NY2d 29, 32 [2002] (reaffirming that where contract language is “clear, unequivocal and unambiguous” it should be interpreted to give effect to the language); Reiss v. Fin. Performance Corp., 97 NY2d 195, 198 [2001] (noting that when “parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.”).

Additionally, under New York law, Branich had no obligation to accept replacement tenants to mitigate damages or to relet the premises after a commercial tenant vacates the subject property. See Holy Properties Ltd., L.P., v. Kenneth Cole Prods., Inc., 87 NY2d 130, 133 [1995] (holding that “[o]nce the lease is executed, the lessee’s obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages.”); 2 Rasch, New York Landlord and Tenant § 26:22 [3d ed 1988]. Thus, Branich was under no obligation to mitigate any damages incurred as a result of Broadway Corp vacating the Premises by reletting the Premises to prospective tenants that Broadway Group put forward.

Broadway Group also claims that Branic has unclean hands because the “Hotel Marrakesh,” which is owned by Branic and located in the same building as the Premises, is an illegal hotel. However, this argument was raised for the first time in defendants’ reply papers and, therefore, is not properly before the court. See Azzopardi v. Am. Blower Corp., 192 AD2d 453 [1st Dep’t 1993]. In any event, this argument fails because it is unrelated to Broadway Group’s liability and its failure to pay rent or abide by the Lease. See Weiss v. Mayflower Doughnut Corp., 1 NY2d 310, 316 [1956] (stating that the “doctrine of unclean hands is only available when the conduct relied on is directly related to the subject matter in litigation and the party seeking to invoke the doctrine was injured by such conduct.”).

In the view of the above the affirmative defenses and counterclaims regarding Branic’s unclean hands are dismissed.

#### Surrender

Broadway Group argues that because it surrendered the Lease when it returned the keys on April 14, 2009, Branic was obligated to either accept its surrender, reenter the Premises and relet it for its own account thereby releasing the Broadway Corp. from further liability for rent, or to notify the Broadway Corp. that it was entering and reletting the Premises for the Broadway Corp’s benefit. Holy Properties., 87 NY2d at 133-34.

However, this argument fails as the Premises was never surrendered. Evidence that Branic received the keys, locked the Premises and posted a “for rent” sign in the window, does not raise a triable issue of fact as to whether it accepted surrender of the Premises. Paragraph 24 of the Lease states that “[n]o act or thing done by Owner or Owner’s agents during the term...shall be deemed an acceptance of a surrender of the demised premises and no agreement to accept such surrender shall be valid unless in

writing signed by owner...and the delivery of keys to any such agent or employee shall not operate as a termination of the [L]ease or surrender of the demised [P]remises.” No such agreement was ever signed and therefore the return of the keys in the absence of an express agreement is not the equivalent of surrender. See Hudson Towers Housing Co., Inc. v. VIP Yacht Cruises, Inc., 63 AD3d 413, 413 [1st Dep’t 2009] (finding summary judgment is appropriate when a lease provision requires surrender of a lease to be supported by a written agreement and none exists); Connaught Tower Corp. v. Nagar, 59 AD3d 218 [1st Dep’t 2009] (ruling that delivery of the keys and a “purported written acceptance of the keys on behalf of plaintiff landlord, could not operate as a surrender of the premises, where the lease specified that the delivery of keys to any agent or employee of plaintiff could not operate as a termination of the lease or surrender of the premises.”).

Next, Branic’s actions do not meet the threshold for surrender by operation of law. Unlike an express surrender, “a surrender by operation of law is inferred from the conduct of the parties,” indicating a mutual understanding that the lease would end prior to the expiration of the lease term. Riverside Research Institute v. KMGMA, Inc., 68 N.Y.2d 689 (1986).

Here, Broadway Corp provides no evidence of conduct from which it could be inferred that there was a mutual understanding that Branic would excuse Broadway Corp. from its obligation to pay rent and additional rent until the end of its lease term, or that Branic intended to terminate the Lease for its own benefit. See Forty Four Eighteen Joint Venture v. Rare Medium, Inc., 18 AD3d 237 [1<sup>st</sup> Dep’t 2005] (rejecting Tenant’s claim that the landlord accepted surrender of the lease when such claim was unsupported by evidence that the landlord acted in a manner inconsistent with the landlord-tenant relationship); J.A.B. Madison Holdings LLC v. Levy & Boonshoft, PC, 2009 WL

765038, 2009 NY Slip Op. 50501(U) [2009] (holding that there can be no surrender by operation of law in the absence of evidence of conduct by landlord evincing an intent to terminate its lease with the Tenant). compare Deer Hills Hardware, Inc. v. Conklin Realty Corp., 292 AD2d 565 [2d Dep't 2002] (surrender occurred by operation of law where the tenant abandoned the premises during the lease term and the landlord's conduct indicated an intent to terminate the lease and use the property for his own benefit).

In view of the above, Broadway Group's defense and related counterclaim that the Premises was surrendered are without merit.

#### Liability under the Guaranty

"On a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor's failure to perform under the guarantee." City of New York v. Clarose Cinema Corp., 256 AD2d 69, 71 [1st Dep't 1998]; see also Kensington House Co. v. Oram, 293 AD2d 304 [1st Dep't 2002].

Here, Branich has set forth sufficient documentary evidence to demonstrate that the Guaranty executed by Rozario was absolute and unconditional and that there had been a failure to perform under the Guaranty. Under Section 1(a) of the Guaranty, Rozario "unconditionally guarantees to the Landlord...the full and punctual performance and observance, by the Tenant, of all terms, covenants and conditions in said Lease contained on Tenant's part to be kept, performed and observed." Further, it states that "[i]n any action or proceeding to enforce any of the terms, covenants and conditions of this [G]uaranty and/or Lease, the Landlord shall be entitled to recover from the Guarantor any attorney's fees costs, and expenses incurred herein" as well as any unpaid

rent or fees. Therefore Branich is entitled to summary judgment against Rozario for the any money owed Branich under the lease for any sum put down upon inquest against Broadway Corp.

Attorney's Fees

Finally, Branich is entitled to recover reasonable attorney's fees, expenses and costs incurred in prosecuting this action under the terms of the Lease and the Guaranty.

Conclusion

Accordingly, it is

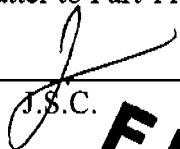
ORDERED that summary judgment is granted against defendants as to liability on the first cause of action relating to the unpaid accrued base rent and additional rent; and it is further

ORDERED that summary judgment is granted as to liability against defendants on the second cause of action for attorneys' fees, costs and expenses of prosecuting this action; and it is further

ORDERED that defendants' affirmative defenses and counterclaims are dismissed and stricken; and it is further

ORDERED that on or before August 13, 2010 Branich should file with the Clerk of the Trial Support Office (room 158), a note of issue and statement of readiness and shall pay any appropriate fees and said Clerk shall assign this matter to Part 11 for trial.

Dated: July 15, 2010

  
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J.S.C.  
**FILED**  
JUL 22 2010  
NEW YORK  
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