

**32-42 Broadway LLC v Panam Mtge. & Fin. Servs.,  
Inc.**

2011 NY Slip Op 31019(U)

March 30, 2011

Supreme Court, New York County

Docket Number: 111407/2009

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

32-42 BROADWAY LLC,

Plaintiff,

- against -

PANAM MORTGAGE & FINANCIAL SERVICES, INC.,

Defendant.

INDEX NO. 111407/2008

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

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

The following papers, numbered 1 to 2, were read on this motion by plaintiff for summary judgment, pursuant to CPLR 3212.

**FILED** PAPERS NUMBERED

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

1

Answering Affidavits — Exhibits (Memo)

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2

Replying Affidavits (Reply Memo)

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Cross-Motion:  Yes  No

This is an action by plaintiff 32-42 Broadway LLC ("plaintiff") to recover unpaid rent arrears allegedly owed by defendant Panam Mortgage & Financial Services, Inc. ("defendant") under a commercial lease. Defendant vacated the leased premises prior to the expiration of the lease term, and plaintiff now seeks to recover the unpaid rents for the months that the premises remained vacant until a new tenant took possession. Discovery has not been completed and the Note of Issue has not been filed. Before the Court is plaintiff's motion for summary judgment, pursuant to CPLR 3212, seeking judgment against defendant in the amount of \$115,055.37, plus interest, fees, costs and disbursements. Plaintiff has responded in opposition to the motion.

BACKGROUND

On September 3, 2004, defendant entered into a commercial lease with plaintiff for premises located at 42 Broadway, Suite 1727-35, New York, New York, for use as office space

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for its mortgage brokerage business. The lease was for a term of 10 years and 5 months.

Section 14.05 of the lease provided for damages in the event of termination, as follows:

"In the event of a termination of this Lease, Tenant shall pay to Landlord as damages, sums equal to the aggregate Gross Rent which would have been payable by Tenant had this Lease not terminated, payable upon the due dates therefor specified herein until the Expiration Date, provided, however, that if Landlord shall relet all or any part of the Premises for all or any part of the period commencing on the day following the date of such termination and ending on the Expiration Date, Landlord shall credit Tenant with the net rents received by Landlord from such reletting . . . It being understood that any such reletting may be for a period equal to or shorter or longer than said period and that Landlord shall have no obligation to so relet the Premises. . . ." (Not. of Mot., Ex. 1).

Section 14.10 of the lease also provided for an award of attorney's fees, costs and disbursements in the event an action was brought to enforce the lease (*id.*).

In support of its summary judgment motion, plaintiff submits, *inter alia*, an affidavit of its managing agent, Aron Weber ("Weber"); a copy of the lease; and its rental ledger for the dates August 13, 2007 through January 31, 2009. According to Weber's affidavit, defendant vacated the premises on December 17, 2007, and the premises remained empty until a new tenant took possession on January 20, 2009. Defendant failed to pay rent for the months of February 2008 through January 2009, and Weber alleges that after application of the security deposit, defendant's account remains in arrears totaling \$115,055.37. No payment towards this balance has been received by plaintiff despite demands for payment. On August 11, 2009, plaintiff commenced the present action to recover the unpaid rent arrears, plus interest, attorney's fees, costs and disbursements.

Defendant does not dispute that it vacated the premises prior to the expiration of the lease term, or that it failed to pay rent for the months of February 2008 through January 2009. Rather, in opposition to summary judgment, defendant submits an affidavit of its President, Balram Kakkar ("Kakkar"), alleging that defendant was relieved of its obligation to pay the rents

because it "surrendered the lease" in December 2007, and that plaintiff "accepted such surrender." Kakkar asserts that the surrender and acceptance are established because in September 2007, defendant notified plaintiff that it would be required to exit the lease due to the economic meltdown of the mortgage industry; from September 2007 to December 2007, plaintiff entered the leased premises and showed it to prospective tenants on several different occasions; and in December 2007, defendant paid \$913.30 as a move-out fee and plaintiff accepted the only copy of the keys available to defendant. Kakkar also claims that the acts leading up to the alleged surrender caused defendant to believe that plaintiff would continue to mitigate any damages after the surrender, and that defendant would have hired a real estate broker to search for new tenants had it been informed that plaintiff had ceased mitigating damages.

At around the time that the lease was executed, defendant applied for Downtown Tax Revitalization Credit ("Tax Credit") with the City of New York ("the City"). The Tax Credit, which is valid for 60 months, is applied towards plaintiff's real estate taxes and then passed on to defendant once it is approved. Kakkar submits printouts from the City indicating that plaintiff's application was approved in August 2005, with a tax benefit effective retroactively from March 1, 2005 to February 28, 2010, in the amount of \$55,013.52. Kakkar claims that defendant has received a credit of \$22,458.25 from plaintiff, leaving a balance of \$32,555.27 that should be credited. Kakkar further believes that plaintiff has leased the premises to a new tenant for a more favorable rate, and that any surplus in rent should be applied to any amounts owed to plaintiff during the time period that plaintiff attempted to mitigate its damages but was unable to do so.

#### DISCUSSION

Plaintiff argues that it is entitled to recover the unpaid rent arrears for the months of February 2008 through January 2009, as a matter of law, because it has established defendant's

default and, pursuant to *Holy Properties Ltd., L.P. v Kenneth Cole Prod., Inc.*, 87 NY2d 130 [1995], and its progeny, it had no legal duty to mitigate its damages when defendant vacated the premises prior to the expiration of the lease term. Plaintiff seeks judgment in the amount of \$115,055.37, plus interest, fees, costs and disbursements.

Defendant maintains that summary judgment is inappropriate because there are triable issues of fact regarding whether plaintiff was required to mitigate its damages upon its purported acceptance of the surrender of the lease. Defendant argues that the parties' acts leading up to the actual surrender of the premises in December 2007, coupled with plaintiff's initial efforts to relet the premises in September 2007, establish plaintiff's acceptance of the surrender. Defendant also challenges the amount of damages claimed by plaintiff, and argues that plaintiff has failed to give proper credit for \$32,555.27 in tax abatement it received from the City as a result of defendant's application for the Tax Credit. Defendant additionally argues that summary judgment should be denied so that discovery may be conducted as to the terms of plaintiff's new lease.

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v Aji Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81

[2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 (b).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

The Court finds that plaintiff has set forth sufficient evidence to prima facie establish that there was a binding lease agreement; that defendant breached the lease by abandoning the premises and failing to pay rent for the months of February 2008 through January 2009; that unpaid rent arrears and attorney's fees, costs and disbursements are owed to plaintiff under the terms of the lease; and that defendant has not paid the amounts due (see *J.A.B. Madison Holdings LLC v Levy & Boonshoft, P.C.*, 2009 WL 785038, at \*3 [NY Sup Ct NY County 2009]). The burden thus shifts to defendant to assert a defense to the enforcement of the terms of the lease that is sufficient to raise a triable issue of fact (see *id.*).

It is well established that, under New York law, a landlord has no duty to mitigate damages by reletting leased premises upon a tenant's default (see *Holy Properties*, 87 NY2d at 133 [holding that once "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"]; *85 John St. Partnership v Kaye Ins. Assoc., L.P.*, 261 AD2d 104, 105 [1st Dept 1999]; *11 Park Place Assoc. v Barnes*, 202 AD2d 292, 293 [1st Dept 1994]). Therefore, in *Holy Properties*, the court ruled:

"When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the

tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) it could notify the tenant that it was entering and reletting the premises for the tenant's benefit. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord's expenses in reentering and reletting and then to pay the tenant's rent obligation. Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease" (*Holy Properties*, 87 NY2d at 133-34 [citations omitted]).

Defendant, while conceding that plaintiff did not have a duty to mitigate its damages if defendant abandoned the premises without providing any notice to plaintiff, argues that plaintiff did have a duty to mitigate here because the circumstances surrounding its vacating of the premises establish that plaintiff *accepted* a surrender of the lease. Since defendant makes no claim that an express surrender occurred, its argument is essentially a claim that there was a surrender by operation of law.

A surrender by operation of law, as distinguished from an express surrender, "occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated" (*Riverside Research Inst. v. KMGA, Inc.*, 68 NY2d 689, 692 [1986]; see also *Bay Plaza Estates, Inc. v. New York Univ.*, 257 AD2d 472, 473 [1st Dept. 1999]). A surrender by operation of law is inferred from the conduct of the parties, "where not only must the tenant abandon the premises, but the landlord must accept the premises as a surrender. The mere retention of keys to the premises by the landlord after the tenant has returned them does not alone constitute a surrender by operation of law" (*Ford Coyle Prop., Inc. v. 3029 Avenue V Realty, LLC*, 63 AD3d 782, 782 [2d Dept. 2009] [citation omitted]). "Whether a surrender by operation of law has occurred is a determination to be made on the facts" (*Riverside*, 68 NY2d at 692). Where the pertinent facts are not disputed, however, the determination is made as a matter of law (see *Brock Enter. Ltd. v. Dunham's Bay Boat Co., Inc.*, 292 AD2d 681, 682 [3d Dept. 2002]).

The Court finds that defendant has failed to raise a triable issue of fact on the issue of whether a surrender by operation of law occurred, thus relieving defendant of its obligation to pay the unpaid rent arrears for the months of February 2008 through January 2009 (see *Connaught Tower Corp. v Nagar*, 59 AD3d 218, 218 [1st Dept 2009]; *Forty Four Eighteen Joint Venture v Rare Medium, Inc.*, 18 AD3d 237, 238 [1st Dept 2005]). Although defendant presents evidence that it provided prior notice of its intent to vacate, and that plaintiff accepted the keys and a move-out fee and showed the premises to prospective tenants prior to the date of surrender, the Court finds this evidence, on the present record, insufficient to raise material questions of fact as to whether plaintiff accepted the surrender so as to relieve defendant of its obligation to pay rent until the new tenant took possession on January 20, 2009 (see *Branic Intl Realty Corp. v 103 Broadway Corp.*, 2010 WL 2964360 [Sup Ct NY County 2010] [tenant provided no evidence of conduct from which it could be inferred that there was a "mutual understanding" that landlord would excuse tenant from its obligation to pay rent and additional rent until the end of its lease term, or that landlord intended to terminate lease for its own benefit]; *J.A.B.*, 2009 WL 765038, at \*3-4 [same]). Moreover, this case is distinguishable from *Riverside*, 68 NY2d at 692, where the facts supported an inference that a surrender by operation of law occurred where the tenant, acting in response to the landlord's request, gave advance written notice that it was about to vacate the premises pursuant to an earlier "understanding" and the landlord thereafter physically assisted the defendant in departing and billed the defendant for nominal damages sustained in move. Here, the actions of plaintiff and defendant were not so inconsistent with the landlord-tenant relationship as to indicate their intent to deem the lease terminated in December 2007.

Defendant has, however, raised questions of fact regarding the amount of damages to be awarded to plaintiff. Defendant has submitted documentation indicating that it should receive a credit for the amount of tax abatement received pursuant to its application for the Tax Credit.

Defendant also requests discovery to determine whether it is entitled to a credit under the terms of the new lease for the premises. Therefore, since there remain issues of fact regarding the amount of damages to be awarded, summary judgment is granted on the issue of liability only. This matter shall be referred to a Special Referee to hear and report with recommendations on the amount of damages to be awarded to plaintiff for the unpaid rent arrears for the months of February 2008 through January 2009, as well as to hold an inquest to determine reasonable attorney's fees, costs and disbursements.

For these reasons and upon the foregoing papers, it is,

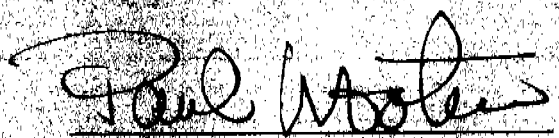
ORDERED that plaintiff's motion for summary judgment is granted on the issue of liability; and it is further,

ORDERED that the issue of plaintiff's damages, which shall include unpaid rent arrears for the months of February 2008 through January 2009, plus attorney's fees, costs and disbursements, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the damages issue; and it is further,

ORDERED that not later than May 6, 2011, plaintiff shall serve a copy of this Order with Notice of Entry on the Special Referee Clerk in the Motion Support Office at 60 Centre Street, Room 119, to arrange a date for the reference to a Special Referee.

This constitutes the Decision and Order of the Court.

Dated: March 30, 2011



Paul Wooten J.S.C.

**FILED**

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