SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

PATCHOGUE ASSOCIATES,

TRIAL/IAS, PART 4
NASSAU COUNTY

Plaintiff,

-against-

MOTION SEQ. NO.: 001
MOTION DATE: 4/25/11

SEARS, ROEBUCK AND CO.,

INDEX NO.: 859/11

Defendants.

The following papers having been read on the motion (numbered 1-6):

Notice of Motion.....1
Affidavit in Opposition.....2
Answer.....3
Reply Memorandum of Defendant.....4
Memorandum of Law in Opposition.....5
Reply Affidavit of Marc Rowin.....6

Motion pursuant to CPLR 3212 by the defendant Sears, Roebuck and Co., for partial summary judgment (1) dismissing the first cause of action to the extent that it seeks damages in an amount equal to post-termination rent under the parties' lease; and (2) for a declaration with respect to the second, declaratory judgment/breach of contract cause of action, that there is no liability as a matter of law predicated upon breach of contract.

In March of 1998, Patchogue Associates ["Patchogue"], as landlord, and Sears Roebuck and Co. ["Sears"], as tenant, entered into 20-year, commercial ground lease with respect to an unimproved parcel of land located in Patchogue, New York (Cmplt., ¶¶ 4-5, Exh., "A"). Sears apparently intended to improve the property by constructing a retail tire store on the property, but later abandoned its plans to build on the site (Brittain Aff., ¶¶ 3-4, Exh., "C"). Nevertheless, it continued paying rent until August of 2008, when it ceased all payments (Brittain Aff., ¶¶ 2-4). In response, Patchogue commenced a summary non-payment proceeding in the District Court, Suffolk County (Cmplt., ¶¶ 9-10).

Shortly thereafter, in December of 2008, Sears commenced a related, fraud/rescission action as against Patchogue in the Supreme Court, Suffolk County, although that action was later

dismissed by order dated June 16, 2010 (Order of Grazzillo, J.). Sears has taken a separate appeal from the June 16, 2010 Supreme Court dismissal order, which appeal was scheduled for oral argument on June 7, 2011, but as yet remains undecided.

In late July of 2010, and during the pendency of the summary non-payment proceeding, Sears' vice-president for real estate, James B. Terrell, wrote to Patchogue's counsel advising that, as of the date of his letter (July 30, 2010), the lease was "cancelled." The Terrell letter further advised that "Sears hereby removes from the Premises and relinquishes its interest as tenant in the Premises." (Rowin Aff., Exh "C").

Thereafter, in Patchogue's pending District Court action the parties moved and cross-moved, respectively, for summary judgment. By order dated October 27, 2010, the District Court (Ukeiley, J.), held, in sum, that Sears had permissibly terminated the lease by surrendering the property and relinquishing its rights in the leasehold by virtue of the July 30, 2010 Terrell letter.

Notably, since Sears effectively conceded liability for rents up to July 10, 2010, the Court deemed Patchogue's petition to be amended by construing the relief sought to include rents which had accrued up to and including October of 2010, *i.e.*, rents which accrued after the lease was allegedly terminated in July of 2010 but only up to October of 2010, when the petition was finally before the Court for review and disposition (Order at 2).

In its holding relative to these rents, the Court reasoned that where – as here – the landlord commences a summary proceeding to recover possession of the property, the landlord-tenant relationship will be terminated upon the tenant's surrender of the property (Order at 2). Additionally, the Court observed that since the lease contained neither a rent acceleration nor a so-called rent "survival" clause, Sears was therefore not liable for any rent accruing after the Terrell letter was issued in July 30, 2010. (Order at 2-3). With respect to the manner in which rents were to be paid, paragraph 7 of the lease provides in relevant part that rent shall be payable in equal monthly installments on the first day of each month. (Lease, ¶ 7[a], at 5).

Patchogue has since appealed from the District Court's order, although no ruling has been issued by the Appellate Term (Brittain Aff., ¶¶ 10-11, fn 2).

Thereafter, by summons and complaint dated January 2011, Patchogue commenced the within action – the third to date arising out of the subject lease dispute (Cmplt., ¶ 3). The complaint, which seeks damages of no less than $1.4 million – contains two causes of action, one sounding in breach of contract and a second for a related declaration that: (1) Sears breached the lease by failing to pay rent since August of 2008; and (2) despite the District Court's holding that the lease had been terminated in July of 2010 – and that Sears was therefore not liable for post-termination "rent" – Sears nevertheless remained liable to Patchogue for "damages"

predicated on an independently existing "breach of contract" theory, in a sum essentially equal to the future rental amounts which would otherwise have been due had the lease not been terminated (Cmplt., ¶¶ 2, 15 19-21; 23-25[a], [b]).

With respect to the foregoing theory, the complaint alleges that the "District Court did not rule upon, nor was it fully or conclusively determined, whether Sears remained liable for breach of contract damages" (Cmplt., ¶ 25[c]). Sears has answered, denied the material allegations of the complaint, and interposed a counterclaim for declaratory relief relating to counsel fees, and several affirmative defenses, including defenses based on *res judicata*/collateral estoppel, termination of the lease, and the absence of any viable rent survival clause (Ans.,¶¶ 27-31; Lease, ¶ 29).

Sears now moves for partial summary judgment, relying primarily on the legal theories underlying its third and fourth affirmative defenses; namely, that Patchogue's right to further payment was extinguished as a matter of law once the lease was terminated on July 30, 2010 – as previously held by the District Court – and that the lease itself does not contain a rent survival clause and/or, in any event, does not otherwise authorize the recovery of rents subsequent to termination of the lease (Ans.,¶¶ 29-30).

Where, upon the facts presented here, the landlord-tenant relationship has been severed through the institution of summary proceedings coupled with the surrender of the leasehold, a tenant will generally no longer be liable for rent accruing after the termination has occurred (*Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, 87 NY2d 130, 134-135 [1995]; *International Publications v. Matchabelli, supra*, 260 N.Y. 451, 453-454 *see also*, *Altamuro v Capoccetta*, 212 AD2d 904; *Benderson v. Poss*, 142 AD2d 937, 938; *D & B Enterprises No. 2 v. Cablam Inc.*, 188 Misc.2d 522, 523 [Appellate Term, Second Department 2001]; *Salvia v. Dyer*, ___ Misc.3d ___2008 WL 5004312, at 2 [Supreme Court, Appellate Term 2nd Dept 2008]; 2 Rasch's N.Y. Landlord & Tenant, *Summary Proceedings,* § 23:60 *cf., 4400 Equities, Inc. v. Dhinsa,* 52 AD3d 654, 655; *Gallery at Fulton St., LLC v. Wendnew LLC*, 30 AD3d 221, 222). Stated differently, "[n]o further rent, as such, can accrue * * * [because] the lease is at an end and the relation of landlord and tenant no longer exists" (74A N.Y. Jur. 2d, *Landlord and Tenant*, § 897 *see, Altamuro v Capoccetta*, *supra*, 212 AD2d 904).

Nevertheless, and through contractual provisions generally known as "survival" clauses (*e.g., Lexington Ave. & 42nd Street Corp. v. Pepper*, 221 AD2d 273, 274; *Halpern v. Bargans*, 46 AD2d 657; 74A N.Y. Jur. 2d, *Landlord and Tenant,* §§ 897, 898), "a landlord and tenant may contract for the tenant's continued liability after the termination of the landlord-tenant relationship" (*Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc., supra, at* 134-135; *International Publications v. Matchabelli, supra,* 260 N.Y. 451, 453-454; *Hermitage Co. v. Levine*, 248 N.Y. 333 [1928]; *Rosenfeld v. Aaron*, 248 N.Y. 437 [1928]; *Kottler v. New York*

Bargain House, 242 N.Y. 28, 33 [1926]; *Mann v. Ferdinand Munch Brewery*, 225 N.Y. 189, 194 [1919]). However, "in the absence of such a clause, there is no further liability under a lease after its termination by summary proceedings, premature expiration, or forfeiture" (74A N.Y. Jur. 2d, *Landlord and Tenant*, § 899).

In assessing whether the parties agreed to continue a tenant's liability after termination of the lease, the key is not how the recovery sought may be verbally described or denominated – *i.e.*, whether it is depicted as "rent" or "damages" (*Hines v. Bisgeier*, 244 App. Div. 354, 441 *see, International Publications, Inc. v. Matchabelli*, *supra,* 260 N. Y. at 454 *cf., Kottler v. New York Bargain House*, *supra*); rather, the pertinent consideration is whether, as evidenced by the lease, the parties clearly agreed to confer upon the landlord, a post-termination "right to recover the equivalent of rent by way of damages" (*Hines v. Bisgeier*, *supra see,* 2 Rasch, *supra*, § 23:71; *Howard Stores Corp. v. Robison Rayon Co.,* 36 AD2d 911). Relatedly, survival clauses "are strictly construed, for the courts are reluctant through strained interpretations to impose on a tenant an obligation he has not assumed" (2 Rasch's N.Y. Landlord & Tenant, *Summary Proceedings,* § 23:61, *citing to*, *Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, *supra*, 87 NY2d 130, 133-134; 74A N.Y. Jur. 2d, *Landlord and Tenant,* § 898). Even where a lease contains a survival clause, absent an enforceable acceleration provision, recovery of deficiencies in advance of their actual accrual date will generally be denied (*e.g.*, *Beaumont Offset Corp. v. Zito*, 256 AD2d 372, 373 *see also, Runfola v. Cavagnaro*, 78 AD3d 1035, 1036 *see generally, Long Island R. Co. v. Northville Industries Corp.,* 41 NY2d 455, 466 [1977]; *Maflo Holding Corp. v. S. J. Blume, Inc.,* 308 N.Y. 570, 575-576 [1955]; *McCready v. Lindenborn* 172 N.Y. 400, 406-407 [1902]; *Runfola v. Cavagnaro*, 78 AD3d 1035; *Muss v. Daytop Village, Inc.,* 43 AD2d 945).

With these principles in mind, the Court agrees that further recovery predicated upon the non-payment of the post-termination rents is foreclosed – whether those same amounts are denominated as rents, or alternatively, depicted as contract-based "damages" (*cf.*, *Hines v. Bisgeier*, *supra*).

The District Court, in its prior order, already examined the parties' lease and specifically held that the lease did not contain a survival clause; *i.e,* a clause – as defined by the relevant line of cases cited – providing that if the lease is terminated, such termination "'shall not be deemed to have absolved or discharged the tenant from any liability hereunder.'" (*International Publications v. Matchabelli, supra*, 260 N.Y. at 454)(Sears Reply Brief at 2, fn 1)(*cf., Ross Realty v. V & A Fabricators, Inc.*, 42 AD3d 246).

In any event, Patchogue's attempt to revive and then effectively accelerate its claim for rent accruing up until the end of the lease term, by recasting the amounts sought as contract-based "damages" rather than "rent," is unpersuasive. While Courts have described a tenant's

post-termination liability to a landlord, if any, as a "liability for damages" – as opposed to a rent-based liability (*e.g.*, *International Publications v. Matchabelli, supra,* 260 N.Y. 451, 453-454; *Hermitage Co. v. Levine*, *supra*, 248 N.Y. 333; *Rosenfeld v. Aaron*, *supra*, 248 N.Y. 437; *Kottler v. New York Bargain House*, *supra*; *Ring v. Printmaking Workshop, Inc.*, 70 AD3d 480), these holdings do not stand for the proposition that a landlord can revive an otherwise defective "rent" claim, merely by recasting it – without more – as one grounded on a "damages" or contract-based theory of liability (*cf.*, *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, *supra*, 87 NY2d 130, 133-134; *D & B Enterprises No. 2 v. Cablam Inc.*, *supra*, 188 Misc.2d 522, 523 [Appellate Term, Second Department 2001]; 2 Rasch's N.Y. Landlord & Tenant, *Summary Proceedings,* §§ 23:55, 23:60).

Rather, a contextual synthesis of the relevant cases – as opposed to reliance upon snippets of quoted language – indicates that the key consideration is not the label attached to the recovery sought (*cf.*, *Hines v. Bisgeier*, *supra*, 244 App. Div. at 441) – but rather, whether the parties plainly agreed that the tenant would remain liable for subsequently accruing rent after the landlord-tenant relationship has been extinguished (*Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, *supra*; *International Publications, Inc. v. Matchabelli*, *supra*; *Ring v. Printmaking Workshop, Inc.*, *supra*, 70 AD3d 480, 481; *45 East Fifty-Seventh St. Co. v. Millar*, 214 App. Div. 189, 192). Indeed, virtually all the relevant, leading cases cited by the parties which authorize post-termination damage recoveries, do so because the parties' leases contained clearly framed rent survival clauses (*see generally*, *Holy Properties Ltd., L.P. v. Kenneth Cole Productions, Inc.*, *supra*, 87 NY2d 130, 133-134; *International Publications, Inc. v. Matchabelli*, *supra,* 260 N. Y. at 454; *Hermitage Co. v. Levine*, *supra*, 248 N.Y. 333; *Rosenfeld v. Aaron*, *supra*, 248 N.Y. 437 *see also*, *Ring v. Printmaking Workshop, Inc.*, *supra*, 70 AD3d 480, 481; *West Flatt Associates v. Maggiulli*, *supra cf.*, *Mann v. Ferdinand Munch Brewery*, *supra*, 225 N.Y. 189, 194-195).

Here, and as the District Court already previously found, no such agreement was reached. Specifically, there is no covenant or contractual provision by which the parties clearly agreed that Sears, as tenant, would remain liable to Patchogue for rent or damages subsequent to the formal termination of the parties' landlord-tenant relationship (District Court Order at 2)(*International Publications v. Matchabelli, supra*). Nor is there any specific lease provision which requires Sears to pay rent in advance inasmuch as the governing provision provides that Sears shall pay rent in monthly installments (Lease, ¶ 7)(*cf., In re Ryan's Estate*, 294 N.Y. 85, 95 [1945]).

Moreover, the default and/or cumulative remedy lease provisions on which Patchogue relies, do not constitute "survival" clauses for the purposes of generating a post-termination tenant liability claim (Cmplt., ¶ 18; Lease, ¶ 18[a],[d], at 12-13; ¶ 35, at 18). In general, a cumulative rights provision is intended to preserve available, alternate remedies when a party

initially elects to pursue certain other available remedies, and does not create new rights contrary to the "overall contractual scheme" (*see, In re Enron Corp.*, 302 B.R. 463, 475 [Bankruptcy Court S.D.N.Y. 2003], *aff'd, In re Enron Corp.*, ___F.Supp.2d___, 2005 WL 356985 [S.D.N.Y. 2005]; *Credit Francais Intern., S.A. v. Sociedad Financiera De Comercio, C.A.*, 128 Misc.2d 564, 579-580 [Supreme Court, New York County 1985]; *see also, Beal Sav. Bank v. Sommer*, ____Misc.3d____2005 WL 3487803 at 7 [Supreme Court, New York County 2005], *affd*, 29 AD3d 388, *aff'd*, 8 NY3d 318 [2007]; *cf., Home Loan Investment Bank, F.S.B. v. Goodness and Mercy, Inc.*, ___ F.Supp.2d ___, 2011 WL 1701795 at 9 [E.D.N.Y., 2011]; *Federal Home Loan Mortg. Corp. v. Ambassador Associates, L.P.* ,___ F.Supp.2d ___, 2006 WL 2873641, at 4 [W.D.N.Y. 2006]).

Lastly, the lease default provisions relied on by Patchogue do not state or otherwise establish that the parties expressly agreed that Sears would remain liable for future damage amounts based upon the facts and circumstances presented here.

The Court has considered the plaintiff's remaining contentions and concludes that they are lacking in merit. Accordingly, it is,

ORDERED that the motion pursuant to CPLR 3212 by the defendant Sears, Roebuck and Co., for partial summary judgment dismissing the first cause of action to the extent that it seeks damages in an amount equal to post-termination rent under the parties' lease is **granted**, and it is further,

ORDERED and declared with respect to the second, declaratory judgment/breach of contract cause of action, that there is no liability as a matter of law predicated upon a breach of contract theory of recovery.

This constitutes the Order of the Court.

Dated: July 13, 2011

J.S.C.

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