**CIT Lending Servs. Corp. v 654 Broadway Partners LLC**

2011 NY Slip Op 34339(U)

February 23, 2011

Supreme Court, New York County

Docket Number: 112833/09

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 35

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CIT LENDING SERVICES CORPORATION,

Plaintiff, Index No. 112833/09

-against-

654 BROADWAY PARTNERS LLC, KYLE RANSFORD, TREVOR STAHELSKI, GRUBB & ELLIS NEW YORK, INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK CITY DEPARTMENT OF FINANCE, AND JOHN DOE # 1 THROUGH JOHN DOE # 10,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.,

MEMORANDUM DECISION

In this mortgage foreclosure action, plaintiff CIT Lending Services ("CIT") moves (i) to impose a trust and compel defendants 654 Broadway Partners LLC ("654 Broadway"), Kyle Ransford ("Ransford"), and Trevor Stahelski ("Stahelski") (collectively, "defendants"), to turn over certain prepaid rents, plus interest accrued thereon, from Shoe Mania XI LLC, as successor in interest to Shoe Mania XI Corp. ("Shoe Mania"), to receiver David Gold ("Receiver"), and (ii) for leave to amend the First Amended Complaint pursuant to CPLR 3025 to add Shoe Mania as a "John Doe" defendant.[1]

*Factual Background*[2]

In June 2008, 654 Broadway, as lessor, and Shoe Mania, as lessee, entered into a lease

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[1] CIT submits a Second Amended Verified Complaint naming Shoe Mania as a defendant (Exh. K).

[2] The Factual Background is taken from the plaintiff's motion papers.

[* 2]

(the "Shoe Mania Lease"), which provides that in "the event that the Tenant is unable to exercise the ROFOR [right of first refusal to purchase the retail space] as set forth in section 88 . . . Landlord shall refund to Tenant the sum of $425,000.00 [of the $500,000 Security Deposit] with all interest accrued, and thereafter the Security Deposit shall be $75,000.00 for the remainder of the Term, or at Tenant's option, such sum shall be applied to rent until extinguished. (¶ 75(B)). Shoe Mania provided to defendants a $500,000 Security Deposit.

On October 9, 2009, this Court appointed the Receiver for the benefit of CIT for all the rents and profits now due and to become due during the pendency of this action (the "Receiver Order") and issuing out of the Premises. The Receiver Order provides that the Receiver "is directed to demand, collect and receive from the tenants of said premises or others liable therefor, all the rents thereof now due and unpaid, and hereafter to become due . . . ."

When the Receiver learned that Shoe Mania provided the defendants with $500,000 as a Security Deposit, the Receiver requested that defendants turn over Shoe Mania's Security Deposit. Defendants claimed they did not have the money demanded, as the money had already been spent to improve the Premises.

CIT then moved to hold defendants in contempt of the Receiver Order. On December 14, 2009, this Court held a hearing on CIT's contempt motion (the "December 2009 Hearing"), at which time, Shoe Mania's owner, Mark Cohen ("Cohen"), testified that the contemplated sale of the commercial space at the Premises (or ROFOR) never occurred, and that Shoe Mania had previously requested that $425,000 of the Security Deposit be returned to it. However, despite this request, the $425,000 was never returned to Shoe Mania. Finally, Cohen testified that his expectation going forward was that the Security Deposit would be applied as "either offsetting

[* 3]

the rent or eventually trying to make a deal for it to be a deposit towards the condo sale." Thus, this Court ordered that defendants turn over all the prepaid rents and security deposits for the tenants at the premises, and that Ransford and Stahelski turn over $75,000 to the Receiver representing the "Security Deposit" for Shoe Mania. As to the remaining portion of the $425,000 "Security Deposit," the Court stated that "based on the testimony of Mr. Cohen, he is equivocal as to whether Shoe Mania wants a refund or wants to go forward with the purchase deal. Therefore, the court does not find, at this juncture, that defendants are required to attorn the $425,000 to the Receiver. . . ." (December 14, 2009 Order, page 2 of 3).

Thereafter, Shoe Mania demanded that the Receiver apply the $425,000 as prepaid rent until the sum is extinguished (the "Shoe Mania Letter"). After receipt of the Shoe Mania Letter, the Receiver requested defendants to remit the $425,000, that they are required to be holding on behalf of Shoe Mania as prepaid rent, so it may be applied to the rent owed by Shoe Mania. Defendants refused to turn over the $425,000.

Thus, CIT moved to compel defendants to turn over the $425,000 to the Receiver as prepaid rent (the "Turnover Motion"). In opposition, Cohen attested that he sent the Shoe Mania Letter to the Receiver to protect his rights and that he still wished to pursue the purchase of the Premises. On April 27, 2010, the Court denied the Turnover Motion because Shoe Mania remained equivocal as to whether it wanted the $425,000 treated as prepaid rent or as a deposit toward a purchase (the "April 27, 2010 Order"). The Court also ordered that "until such time that there . . . is a decision that the $425,000, attributable to Shoe Mania should be applied to rent due and/or past due, this Court is constrained to take no action."

Then, the Receiver brought an eviction proceeding against Shoe Mania in the Civil Court

of the City of New York (the "Landlord Tenant Court"). At the eviction proceeding hearing, and in the papers filed by Shoe Mania in support of its motion for summary judgment therein, Shoe Mania argued that pursuant to the Shoe Mania Letter, it elected to treat the $425,000 as prepaid rent. Accordingly, in light of Shoe Mania's admission that the $425,000 is prepaid rent, the Landlord Tenant Court dismissed the eviction proceeding and ordered that "the sum of $425,000 shall be applied as prepaid rent to pay off all arrears to date and future rent, as defined by the lease, until extinguished."[3]

In support of its motion, CIT argues that the Landlord Tenant Court has now made a decision that the "sum of $425,000 shall be applied as prepaid rent to pay off all arrears to date and future rent, as defined by the lease, until extinguished." Shoe Mania has not paid any base or additional rent under the Shoe Mania Lease since the Receiver was appointed in October 2009, except the November 2009 base rent. Since the Landlord Tenant Court has ordered that the $425,000 be treated as prepaid rent, and since the Receiver Order requires the Receiver "to demand, collect and receive from the tenants of said premises or others liable therefor, all the rents thereof now due and unpaid, and hereafter to become due," defendants should be compelled to turn over the $425,000 in prepaid rent to the Receiver.

At the December 2009 Hearing, and in the Court's December 14, 2009 Order (the "December 14, 2009 Order"), the Court held that the prepaid rents of other tenants of the premises, David Sandberg ("Sandberg"), must be turned over to the Receiver by defendants. Therefore, consistent with the Court's previous ruling requiring defendants to turn over prepaid

[3] In referring to a letter dated December 31, 2009, the Landlord Tenant Court stated that "respondent elected to apply the monies as prepaid rent until extinguished."

[* 5]

rent, since the Landlord Tenant Court has now ordered that the $425,000 he treated as prepaid rent, the defendants should be ordered to turn those funds, and any interest thereon, over to the Receiver so it may be applied to Shoe Mania's rent.

In addition to the Shoe Mania Lease, defendants are required under General Obligations Law ("GOL") § 7-103(1) to hold any prepaid rent in trust for Shoe Mania, until such time as the rent becomes due and owing. Where a lessor has prepaid rent, those funds remain the asset of the lessee and are to be held in trust by the lessor until such time as the rent becomes due and owing. Shoe Mania provided defendants with a security deposit of $500,000 with the contractual understanding that if the ROFOR did not go through, which it did not, Shoe Mania was entitled to a refund of $425,000 of the Security Deposit, or that Shoe Mania could request that the $425,000 be treated as prepaid rent until the sum was extinguished. Shoe Mania requested that its $425,000 be treated as prepaid rent. The Landlord Tenant Court found that the $425,000 is prepaid rent. Since Shoe Mania's $425,000 of prepaid rent must be held in trust for Shoe Mania, and never became an asset of defendants, a trust must be imposed on defendants' assets for the $425,000 until these funds are turned over to the Receiver, pursuant to the Receiver Order, so the funds may be applied by the Receiver to Shoe Mania's past due rent and rent going forward on a month-by-month basis.

CIT further argues that Ransford and Stahelski are each individually liable for the $425,000 due, plus interest thereon, pursuant to Section 1.2(A)(vii) of the Guaranty of Recourse Obligations (the "Guaranty"). Since the Landlord Tenant Court has ordered that the $425,000 is to be applied as prepaid rent, and since Ransford and Stahelski have expressly guaranteed the payment of such prepaid rents plus interest thereon, they are each individually required to turn

[* 6]

over such funds to the Receiver pursuant to the terms of the Receiver Order.

CIT should also be granted leave to amend its First Amended Complaint to add Shoe Mania as a "John Doe" defendant pursuant to CPLR 3025(b). CIT wants to ensure that all parties to the prepaid rent issue (*i.e.*, CIT, defendants, and Shoe Mania) are named parties in this action so as to avoid Shoe Mania taking inconsistent positions in this Court from those taken in the Landlord Tenant Court, where it was a party. CIT also seeks leave to amend to add Shoe Mania as a defendant so that CIT can foreclose on Shoe Mania's tenancy. Finally, defendants cannot demonstrate any prejudice from CIT's proposed amendment, as the amendment will not affect their rights. Summary judgment as to defendants' liability has already been determined by the Court and the addition of Shoe Mania as a party does not affect defendants' liability under the note and/or mortgage.

In opposition, defendants argue that nothing has changed since the last time this court denied CIT's application, as the Landlord Tenant Court Order has no precedential effect on this court, and is legally irrelevant. New York City Civil Court Act § 1808 unequivocally states that "a judgment obtained [in Civil Court] shall not be deemed an adjudication of any fact at issue or found therein in any other action or court . . . ." The determination as to any issue of fact by the Civil Court cannot disrupt prior factual findings in an action before the Supreme Court. CIT has no more right to control the disposition of these funds than they did when they brought the unsuccessful motion in December 2009 and its second motion in February 2010. This Court's Orders issued on December 14, 2009 and April 27, 2010 still prohibit the Receiver from collecting the $425,000 Security Deposit.

CIT's citation to the unsworn letter sent by Shoe Mania to the Receiver on December 31,

[* 7]

2009 as evidence of Shoe Mania's intention to abandon the proposed purchase of the Demised Premises completely ignores the fact that such letter was already considered (and rejected) by this Court when CIT's second motion was denied. This Court should find, as it has twice before, that the Security Deposit cannot be considered pre-paid rent for the Receiver to collect on this record.

On December 14, 2009, this Court determined that the Security Deposit was not to be considered "prepaid rent" and that as a result, the Receiver was not entitled to collect these funds from defendants. The Court based this determination on the fact that Cohen testified that he was still interested in purchasing the premises, and held that based on Cohen's testimony, he is equivocal as to whether Shoe Mania wants a refund or wants to go forward with the purchase deal. Moreover, this Court made the same determination with respect to CIT's second motion, when, the Court entered it on April 27, 2010 Order. The Court found that defendants were not required to turn over the Security Deposit to the Receiver, holding that Cohen's affidavit of March 10, 2010 reiterated his intention to move forward with the purchase. Cohen stated that Shoe Mania still would like to pursue the purchase of the premises at an agreed upon price with Owner-arranged financing, and apply the balance remaining from the $425,000 towards the purchase price at the closing for the condominium unit if the condominium plan is declared effective. Based on Cohen's testimony, the Court determined that he intended to move forward with the purchase and that, therefore, the Security Deposit could not be considered prepaid rent.

Defendants further argue that CIT lacks standing to bring the motion. Caselaw holds that the proper party is the Receiver, not CIT, and CIT cites no cases which suggest otherwise. GOL § 7-103, by its clear terms, does not govern down-payments like the Security Deposit, but instead only applies to rents and security, and even then only in limited circumstances. The Security

[* 8]

Deposit is neither rent nor security, prepaid or otherwise, and therefore neither CIT nor the Receiver, has a claim to it. And, as there has been no foreclosure sale in the instant action, the Guaranty is not applicable, and Ransford and Stahelski are not individually required to turn over the Security Deposit to the Receiver, as CIT suggests.

CIT's request to amend the complaint for a second time to add Shoe Mania as a "John Doe" defendant, should similarly be denied. CIT seeks to add Shoe Mania at a late point in these proceedings, and fails to proffer a reasonable excuse for its delay.

In reply, CIT argues that defendants cannot escape the fact that the Landlord Tenant Court found, based on the admissions of Shoe Mania, that the $425,000 that defendants are currently holding on Shoe Mania's behalf is prepaid rent. Since a finding has been made that the $425,000 is prepaid rent, defendants should be compelled to turn over the prepaid rent to the Receiver pursuant to the Receiver Order, GOL § 7-103, and the Guaranty. Defendants' argument that it is not obligated to turn over prepaid rent to the Receiver is contrary to this Court's December 14, 2009 Order, where defendants were ordered to turn over tenant Sandberg's prepaid rent of $55,500 to the Receiver pursuant to GOL § 7-103.

Likewise, while defendants argue that CIT's motion for leave to amend should be denied because it is untimely, defendants do not identify how they would be prejudiced by an amendment.

The Landlord Tenant Court Order complies with this Court's previous order calling for a decision that the $425,000 should be applied as prepaid rent. Since the Landlord Tenant Court has made "a decision that the $425,000, attributable to Shoe Mania should be applied to rent due and/or past due," defendants' argument that "nothing has changed" since CIT' s previous motion

[* 9]

to compel is false and should be disregarded by the Court. Defendants' argument that the Landlord Tenant Court Order is "legally irrelevant" is misleading as it relies on a distorted version of the facts in this matter. Defendants ignore this Court's mandate in the April 27, 2010 Order that it would not decide the prepaid rent issue until there "is a decision that the $425,000, attributable to Shoe Mania should be applied to rent due and/or past due." The Landlord Tenant Court (after this Court declined to hear the Receiver's eviction proceeding on jurisdictional grounds) has made such a decision and, in accordance with the April 27, 2010 Order, this Court can now "take action."

Moreover, the New York City Civil Court Act § 1808 provides that "[a] judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court . . . ." The "article" referred to in section 1808 is Article 18, which is entitled "Small Claims." New York City Civil Court Act § 1801 defines "Small claims as "any cause of action for money not in excess of five thousand dollars . . . ." The Landlord Tenant Court action against Shoe Mania was not a "small claims" action. Even if the New York City Civil Court Act § 1808 applied to the Landlord Tenant Court Order, the Act concerns whether a judgment obtained in New York City Civil Court will have *res judicata* effect on an action in New York Supreme Court, and since the Landlord Tenant Court action involved separate parties and separate causes of action from the case at bar, the doctrine of *res judicata* and. consequently, New York City Civil Court Act § 1808, have no bearing on the motion.

This Court's previous orders do not prohibit the Receiver from collecting the prepaid rent. Defendants ignore that the April 27, 2010 Order was made without prejudice to bring a later motion to compel and that the Court would expressly consider a later motion once "[a] decision

[is made] that the $425,000, attributable to Shoe Mania should be applied to rent due and/or past due." Likewise, the Court's December 14, 2009 Order does not preclude the Receiver from collecting the Shoe Mania prepaid rent. The December 14, 2009 Order establishes that CIT is entitled to seek the turnover of prepaid rent on the Receiver's behalf as the Court ordered that the prepaid rents of another tenant, Sandberg, were required to be turned over to the Receiver. The Court should not allow Shoe Mania to occupy the property rent free, and allow defendants' to pocket Shoe Mania's prepaid rent in violation of GOL § 7-103, which makes it illegal to convert prepaid rent.

Also, CIT has standing to bring the motion. The Order appointing the Receiver expressly provides that "the said Receiver or any party hereto may at any time, on proper notice to all parties who have appeared in this action, apply to the Court for an order . . . to enable such Receiver to properly and faithfully perform his/her duties." (Receiver Order, p. 5). Since CIT is a party to this action, and since an order compelling defendants to turn over the prepaid rent to the Receiver is an order which will enable the Receiver to carry out his duties, CIT has standing to bring the motion pursuant to the express terms of the Receiver Order.

Moreover, CIT previously brought such a motion and, in the December 14, 2009 Order, this Court directed defendants to turn over Sandberg's prepaid rent and various security deposits in the aggregate sum of $130,500 to the Receiver. The caselaw cited by defendants for the proposition that the $425,000 is neither prepaid rent nor a security and, therefore, GOL § 7-103 does not apply, is distinguishable.

And, the Court has already found that Ransford and Stahelski are obligated to turn over prepaid rents to the Receiver. In the December 14, 2009 Order, this Court ruled that defendants

were required to turn over the prepaid rent of tenant Sandberg to the Receiver.

Moreover, defendants' argument that leave to amend should be denied because discovery has already been completed in this matter is not dispositive. Very little discovery was conducted by the parties and defendants cannot reasonably argue that they would have proceeded with discovery any differently had Shoe Mania been a party. In addition, defendants' argument against the turnover of Shoe Mania's prepaid rent, i.e., that the status and Shoe Mania's desired treatment of the funds is still equivocal, only furthers the need to add Shoe Mania as a party to this action. Adding Shoe Mania to this action will prevent Shoe Mania from playing this Court and Landlord Tenant Court off one another, thereby permitting Shoe Mania to remain in the property rent free.

*Discussion*

*Turnover of $425,000 to Receiver*

At the outset, the Court finds that CIT has standing to bring to this Court' attention the Landlord Tenant Court's Order in an effort to resolve an issue left unresolved on a motion previously brought by CIT (*see Cadlerock Joint Venture, L.P. v Board of Managers of Parkchester South Condominium, Inc.*, 289 AD2d 1, 733 NYS2d 413 [1st Dept 2001] (holding that mortgagee was entitled to demand, during pendency of a foreclosure action, that tenant turn rent over to it, where mortgagee's motion for such relief was timely made)). The case cited by defendants for the mere proposition that "the right of a receiver to compel attornment and collect rent in the context of a foreclosure proceeding is well established" (*Bank of Tokyo Trust Co. v. Urban Food Malls Ltd.*, 229 AD2d 14 [1st Dept 1996]), does not indicate that CIT lacks standing to seek the relief herein. Further, the Order appointing the Receiver expressly provides that "the said Receiver *or any party hereto* may at any time, on proper notice to all parties who have

appeared in this action, apply to the Court for an order . . . to enable such Receiver to properly and faithfully perform his/her duties." Therefore, CIT, a party to this action, has standing to bring this motion before the Court.

GOL § 7-103(1) provides that:

> Whenever money shall be deposited or advanced on a contract . . . for the use or rental of real property as security for performance of the contract or agreement or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same.

By Order dated April 27, 2010, this Court denied CIT's application to turn over the $425,000 to the Receiver on the ground that Cohen was equivocal as to whether he wanted to treat the $425,000 as prepaid rent or as a deposit toward the purchase of the subject premises. The Court expressly stated, "until such time there . . . is a decision that the $425,000, attributable to Shoe Mania should be applied to rent due and/or past due, this Court is constrained to take no action." No appeal was taken from this order or motion to reargue or renew was made by any party.

Thereafter, the Landlord Tenant Court in a proceeding against Shoe Mania found that Cohen elected to treat the $425,000 as prepaid rent. No appeal or motion to renew or reargue the Landlord Tenant Court's order was made.

In light of the Landlord Tenant Court's proceeding and finding, this Court determines that there has been a decision by Shoe Mania that the $425,000 is to be applied as prepaid rent to pay off all rent due and/or past due. As such, the Court determines that the $425,000 shall be turned over to the Receiver in accordance with this Court's previous orders, none of which have been

appealed or subject to any motion to renew or reargue.

Defendants' reliance on the New York City Civil Court Act § 1808 for its contention that the Landlord Tenant Court is irrelevant to this issue lacks merit. The New York City Civil Court Act § 1808 provides that "[a] judgment obtained under this article shall not be deemed an adjudication of any fact at issue or found therein in any other action or court . . . ." and the "article" referred to in such section is entitled "Small Claims." The New York City Civil Court Act § 1801 defines "Small claims as "any cause of action for money not in excess of five thousand dollars . . . ." Clearly, the Landlord Tenant Court action against Shoe Mania was not a "small claims" action. The cases cited by defendants are factually distinguishable, as they involved determinations by the Small Claims Court (*cf. Katzab v Chaudhry*, 48 AD3d 428 [2d Dept 2008] ("error to accord the action between the plaintiff Sofia Katzab and the defendant in Small Claims Court *res judicata* effect and to dismiss the complaint on that basis); *Molska v Garfield*, 2 AD3d 510 [2d Dept 2003] ("defendant was not barred from litigating the issue of liability since the language of UJCA 1808 expressly provides that a small claims judgment is not res judicata with respect to the adjudication of any fact at issue or found therein")). Therefore, contrary to defendants' contention, the New York City Civil Court Act § 1808 does not bar this Court from relying on the Landlord Tenant Court decision and findings therein. That this Court did not rely on the December 31, 2009 letter cited by the Landlord Tenant Court does not preclude this Court from now relying on the finding of fact made by the Landlord Tenant Court that Cohen has elected to treat the $425,000 as prepaid rent.

Additionally, contrary to defendants' contention, this Court never made a finding that Cohen intended to move forward with the purchase. As indicated in this Court's April 27, 2010

Order, Cohen was "equivocal" as to how Shoe Mania wanted to treat the $425,000.

Since Shoe Mania requested that the $425,000 be treated as prepaid rent, leading the Landlord Tenant Court to find that the $425,000 is prepaid rent, defendants are obligated, under GOL § 7-103, to hold the funds in trust and to turn them over to the Receiver. Under GOL § 7-103, "any rent paid by a tenant in advance remains the tenant's property, held by the landlord as a trustee, until applied to the rent when it accrues" (*Eujoy Realty Corp. v Van Wagner Communications, LLC*, 73 AD3d 546, 901 NYS2d 227 [1st Dept 2010]). The case cited by defendants, *Patriot Nat'l Bank v Amadeus B LLC* (29 Misc 3d 1217(A) [Sup. Ct., New York County 2010]) is factually distinguishable.

Therefore, the branch of CIT's motion for an order imposing a trust and compel defendants to turn over certain prepaid rents, plus interest accrued thereon, from Shoe Mania to the Receiver is granted.

*Individual Liability Against Ransford and Stahelski*

The Guaranteed Obligations under section 1.2(A)(vii) of the Guaranty, include the payment of any damage, liability or claim or obligation arising out of the payment of:

> Any security deposits, advance deposits or other deposits collected with respect to the Property by or on behalf of Borrower which are not delivered to Agent upon a foreclosure of the Property or action in lieu thereof (except to the extent any such security deposits were (a) applied or held in accordance with the terms and conditions of any of the Leases or Contracts prior to the occurrence of the Event of Default that gave rise to such foreclosure or action in lieu thereof, or (b) not delivered to Agent because they were already held by Agent or any Lender or any respective affiliate of agent thereof); *or any collection by Borrower or any of its Affiliates of rents more than one month in advance*; or any execution or modification of any leases, or receipt of monies, by Borrower or any of its Affiliates, in violation of any of the Loan Documents.
> (emphasis added).

The Court's December 14, 2009 Order previously held that Ransford and Stahelski are

obligated to turn over prepaid rents to the Receiver. Specifically, the Court held that defendants were required to turn over the prepaid rent of Sandberg to the Receiver.

Since the Guaranty provides that Ransford and Stahelski are individually liable for the damages arising out of the outstanding rents, and since this Court has already found that they are obligated to turn over Sandberg's prepaid rent to the Receiver, Ransford and Stahelski shall hold the funds in trust and immediately turn such funds over to the Receiver pursuant to the terms of the Receiver Order.

*Leave to Amend*

The branch of CIT's motion for leave to amend the First Amended Complaint to add Shoe Mania as a "John Doe" defendant is granted. It is well settled that leave to amend an answer pursuant to CLR § 3025(b) should be freely granted provided there is no prejudice to the nonmoving party (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]; *Murray v City of New York*, 51 Ad3d 502 [1st Dept 2008]; *Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]). "Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay" (*Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 [1st Dept 2003]). However, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side, the very elements of the laches doctrine" (*Edenwald Contracting Co. v New York*, 60 NY2d 957, 959 [1983]).

"[A] motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgement" (*Zaid*

*Theatre Corp. v Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

The party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

The record supports CIT's application to add Shoe Mania, a tenant at the subject premises, as a defendant in this foreclosure action. Although CIT's application is late, there has been no showing of any prejudice to Shoe Mania or defendants herein. It is noted that defendants' liability has already been determined by the Court. Therefore, defendants' contention that CIT's request for leave to amend its First Amended Complaint is untimely does not warrant denial of the motion. Indeed, the record and the Landlord Tenant Court proceeding demonstrate the potential for Shoe Mania to take inconsistent positions and its presence in this action is necessary in order for CIT to obtain a complete, binding determination against all parties with an interest in the subject premises.

[* 17]

*Conclusion*

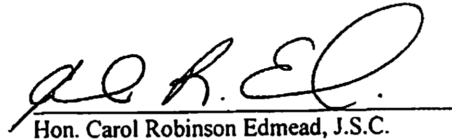
Based on the foregoing, it is hereby

ORDERED that the motion by plaintiff CIT Lending Services (i) to impose a trust and compel defendants 654 Broadway Partners LLC, Kyle Ransford, and Trevor Stahelski, to turn over certain prepaid rents, plus interest accrued thereon, from Shoe Mania XI LLC, as successor in interest to Shoe Mania XI Corp., to receiver David Gold, and (ii) for leave to amend the First Amended Complaint pursuant to CPLR 3025 to add Shoe Mania as a "John Doe" defendant, is granted, and the Second Amended Verified Complaint is deemed served; and it is further

ORDERED that said defendants shall turn over the $425,000, representing the prepaid rent from Shoe Mania, plus interest accrued thereon to receiver David Gold within seven (7) days of the date of this Order, and such funds shall be placed in an interest-bearing account, and shall not be used for any purpose related to the operation of the subject property except to the extent permitted by law.

This constitutes the decision and order of the Court.

Dated: February 23, 2011



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**