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

PRESENT: O. PETER SHERWOOD Justice PART 49

ARKIN KAPLAN RICE LLP, *et al.*,

Plaintiffs,

-against-

HOWARD KAPLAN, *et al.*,

Defendants.

INDEX NO. 652316/2012

MOTION DATE May 21, 2013

MOTION SEQ. NO. 010

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion for partial summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for partial summary judgment is decided in accordance with the accompanying decision and order.

Dated: June 3, 2013

O. PETER SHERWOOD, *J.S.C.*

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 49

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ARKIN KAPLAN RICE LLP, STANLEY S. ARKIN and LISA C. SOLBAKKEN,

Plaintiffs,

-against-

HOWARD KAPLAN, MICHELLE RICE and KAPLAN RICE LLP,

Defendants.

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DECISION AND ORDER
Motion Seq. No.: 010

Index No.: 652316/2012

O. PETER SHERWOOD, J.S.C.:

I. OVERVIEW

This action arises from the dissolution of Arkin Kaplan Rice LLP ("AKR"). The firm was founded in 1968 by Stanley S. Arkin, Esq. ("Arkin") and was known as Arkin Horan. At the time of dissolution, AKR was a twelve-attorney law firm. The AKR partners-in-dissolution are Arkin, Howard Kaplan ("Kaplan"), Michelle Rice ("Rice"), and Lisa C. Solbakken ("Solbakken"). Arkin owns 52.20% of AKR, Kaplan 23.80%, Rice 15.40% and Solbakken 8.60%. There is no written partnership agreement. The former AKR partners, have formed two new firms namely, Kaplan Rice LLP ("KR LLP") and Arkin Solbakken LLP ("AS LLP" or "Arkin Solbakken"). For present purposes and pending a final determination on the merits, the date of dissolution of AKR is May 17, 2012.

On this motion sequence number 010, defendants have moved for partial summary judgment dismissing that portion of plaintiffs' claim (as set forth in the First, Second and Eighth Causes of Action) which seeks to have current and future rent for the premises located at 590 Madison Avenue, 35th floor, in Manhattan (the "Premises"), pursuant to the terms of a sublease ("Sublease") paid out of the AKR partnership-in-dissolution asserts.[1] The Premises was previously occupied by

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[1]In the closely related action for an accounting, *Kaplan v Arkin*, Index No.: 653835/2012, (*"Kaplan Action"*) defendants responded with counterclaims that mirror the plaintiffs' claims in this case. Arkin then filed a motion for partial summary judgment in the *Kaplan Action* on December 19, 2012 (motion sequence number 001). The motion was held in abeyance until the court held a preliminary conference on February 14, 2013. On December 24, 2012, plaintiffs in

AKR and now occupied by AS LLP, its subtenants and affiliated businesses. In effect, Kaplan and Rice are seeking to avoid contributing to future rent out of their individual AKR partnership interests. Plaintiffs oppose the motion and cross move for partial summary judgment declaring that Kaplan and Rice remain jointly and severally liable for all remaining obligations under the Sublease through the expiration date, June 29, 2015.

II. BACKGROUND

The Sublease was executed on August 25, 1999, between Ladenburg Thalmann and Co., Inc., as sublandlord (the "Sublandlord"), and Arkin Schaffer and Kaplan LLP ("ASK"), Arkin, Hyman Schaffer ("Schaffer"), Jeffrey Kaplan, Mark S. Cohen ("Cohen") and Howard J. Kaplan, as Subtenant (the "Subtenant"). 590 Madison Avenue Associates, L.P. is the landlord on the Main Lease. The original Sublease was for a portion of the 35th floor consisting of 13,125 square feet (Kaplan Aff. in Support, Exhibit "5", p. 2). At some point, Jeffrey Kaplan and Cohen withdrew from ASK. ASK is alleged to have continued its business without the firm dissolving, winding-up its affairs or liquidating its assets (Arkin Affirm. in Opp and in Support of X-Mot ¶ 6).

The Sublease was amended twice. The first amendment was executed in August 2002 between the Sublandlord and Arkin Kaplan LLP ("Arkin Kaplan"), as successor in interest to ASK, Arkin, Schaffer, Kaplan, Anthony Coles ("Coles") and Rice for the purpose of adding 3,757 square feet to the space on the 35th floor of the Premises (the "Expansion Space") for a term commencing on October 1, 2002 and expiring on April 1, 2003, and automatically extending for six-month periods until the Subtenant or the Sublandlord gave written notice of its desire to terminate the use of the Expansion Space (Kaplan Aff. Exhibit "6"). The first amendment contained an acknowledgment by the Sublandlord that Jeffrey Kaplan and Cohen had withdrawn as partners of

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the *Kaplan Action* filed a motion pursuant to CPLR 3211 to dismiss all counterclaims except the Ninth for an accounting (motion sequence number 002). In an order filed following the preliminary conference held on February 14, 2013, the court held the motion to dismiss in abeyance to allow the central claims and defenses at issue to be heard on the motion for partial summary judgment that is now ripe for decision in this case. The two open motions in the *Kaplan Action* are decided separate in Decision and Orders filed today.

Arkin Kaplan and were therefore released from any and all obligations under the Sublease and that Rice and Coles had been admitted as partners to Arkin Kaplan.

The second amendment to the Sublease was executed in October 2004, between the Sublandlord and Arkin Kaplan, Arkin, Kaplan, Rice and Sean O'Brien for the purpose of adding all the remaining space on the 35th floor of the Premises and with the Subtenant granting the Sublandlord a license for approximately 1,381 square feet of space which the Sublandlord would occupy until January 31, 2005 with automatic annual renewals from February 1, 2005, unless the license was terminated upon written notice. The second amendment as to the additional space was to expire on June 30, 2010, with the option to extend for a five-year term to June 29, 2015. The second amendment contained an acknowledgment by the Sublandlord that it had been advised that Jeffrey Kaplan had withdrawn as a partner of Arkin Kaplan and was therefore released from any and all obligations under the Sublease and that Rice and Sean O'Brien had been admitted as partners to Arkin Kaplan (Kaplan Aff. Exhibit "7").[2]

In February 2000, the name of the firm, ASK was changed to Arkin Kaplan and Cohen LLP. In October 2002, the name of the firm was changed to Arkin Kaplan. In July 2006, defendant, Rice was elevated from partner to name partner and the name of the firm was changed to AKR. The Certificate of Registration was amended to reflect this name change (Rule 19-a Statement & Counterstatement of Facts, ¶ 3).

On or about May 17, 2012, the AKR Certificate of Registration was amended to change the name of the firm to Arkin Solbakken LLP (Rule 19-a Statement and Counterstatement of Facts ¶ 4). Thereafter, on July 10, 2012, the Certificate of Registration was amended again and the firm name was changed back to AKR (Kaplan Aff. Exhibit "2"). The next day, July 11, 2012, a new Certificate of Registration was filed with the New York State Department of State registering Arkin Solbakken LLP (Kaplan Aff. Exhibit "4").

III. RELEVANT PROVISIONS OF THE SUBLEASE

Section 24 of the Sublease, titled "Miscellaneous" is at the center of the present dispute. It provides as follows:

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[2]No mention is made in the Second Amendment to the Sublease as to partner Anthony Coles and whether he had withdrawn as a partner of Arkin Kaplan.

A. Notwithstanding anything herein to the contrary, upon the admission of any new partner (hereinafter referred to as a "**New Partner**") to the Partnership, such New Partner shall be jointly and severally liable for the performance of Subtenant's obligations under this Sublease without regard to any limitation of liability inherent in the business organization of the Partnership and Subtenant shall deliver confirmation thereof to Sublandlord within ten (10) days of such New Partner's admission to the Partnership.

B. Notwithstanding anything herein contained to the contrary, upon the withdrawal of any partner (other than Stanley S. Arkin) from the Partnership (hereinafter referred to as a "**Withdrawing Partner**"), such Withdrawing Partner shall, upon date of withdrawal from the Partnership (hereinafter referred to as the "**Withdrawal Date**"), be deemed to be released from this Sublease as of the Withdrawal Date and shall have no further rights or obligations under this Sublease from and after the Withdrawal Date.

IV. PARTIES' CONTENTIONS

A. Defendants' Supporting Arguments

Kaplan and Rice contend that they were released from any liability under the Sublease and neither their personal property nor their AKR partnership interests can be used to satisfy Sublease obligations that are incurred after the date of their withdrawal. Defendants maintain that as individual signatories to the Sublease they agreed to subject their personal property and their AKR partnership interests to claims by the Sublandlord only as long as they remained partners with Arkin. They point to Section 24 (B) of the Sublease as the provision encompassing such protection and state that plaintiffs are attempting to rewrite the Sublease to nullify Section 24 (B). Indeed, defendants aver that Arkin acknowledged on several occasions that after the departure of Kaplan and Rice from AKR he would be solely responsible for the rent under the Sublease. Defendants also note that Arkin amended the Certificate of Registration to change AKR's name to AS LLP, continued to occupy the Premises under that firm name, forwarded to AKR's bank the Certificate of Registration reflecting the name change, replaced the AKR firm name on the door of the Premises with the firm name, AS LLP, and attempted to evict defendants by serving them with two notices to quit. Defendants maintain that plaintiffs' conduct indicates that AS LLP was the successor to AKR.

Additionally, defendants argue that AKR, as a non-signatory to the Sublease, has no current obligation for the payment of rent under the privity of estate doctrine, which holds that a partnership occupying premises pursuant to a lease it did not sign, has the obligation to comply with covenants that run with the land (including payment of rent) for the period of time that the partnership occupies the premises. When possession of the premises ceases, so does the obligation on the part of the partnership to pay rent or otherwise comply with the covenants running with the land. Since AKR, which defendants contend is a markedly different law firm from Arkin Kaplan, did not sign the Sublease or its Amendments, its obligation to pay rent ceased when its possession of the Premises ceased.

Defendants assert that under the New York Partnership Law, each time a partner left the firm, the firm dissolved as a matter of law and was reconstituted as a new firm under the same name or a new name. Defendants maintain that no later than May 17, 2012, when Rice and Kaplan left AKR, the firm dissolved as a matter of law and AS LLP then occupied the Premises. Defendants claim that the Sublease must be deemed to have been assigned to AS LLP, and that firm is now responsible for all covenants running with the land, including payment of rent. Defendants claim that this is the result Arkin contracted for when he entered into the Sublease, namely, that he would remain in the Premises with his firm, regardless of the composition of the partners, for the term of the Sublease and ensure that rent was paid.

Defendants also argue that the Sublease provides that Arkin's partners assumed full liability thereunder while in partnership with Arkin, but, in exchange for surrendering the protections afforded by the firm's limited liability status and assuming the full obligations under the Sublease, Arkin's partners were released from such obligations, including the payment of rent, upon withdrawal from the firm.

B. Plaintiffs' Arguments in Opposition and in Support of Cross Motion

Plaintiffs argue that AKR is a party to the Sublease as is reflected in a Sub-Sublease between AKR, Arkin, Rice and Sean O'Brien, as Sub-Sublessors, and Mark Klein and Taurus Asset Management, as Sub-Sublessee, for the sub-sublease of a portion of the Premises. The Sub-Sublessee refers to the Sublease and its Amendments and indicates that the Sub-Sublessors are the Subtenants under the Aug. 25, 1999 Sublease and its amendments. Plaintiffs also submit a copy of

the Landlord's Consent to the Sub-Sublease, signed by Kaplan on behalf of AKR and by Arkin, Kaplan, Rice and Sean O'Brien in their individual capacities. The consent refers to AKR as the successor-in-interest to ASK, as the subtenant under the Sublease and its amendments.

As further support, plaintiffs submit e-mail correspondence between Kaplan and AKR's office manager concerning an extension of the Sublease from 2010 to 2015 and a letter, written on AKR letterhead from AKR's counsel to the General Counsel of the Sublessor, advising that AKR wished to extend the Sublease for a five-year term expiring on June 29, 2015. Accordingly, plaintiffs maintain that as the Sublessee under the Sublease, AKR's contractual obligations under the Sublease continued after the date of dissolution as it had a binding contract obligating it to pay rent to the Sublessee notwithstanding its dissolution.

Plaintiffs next dispute defendants' claim that AKR is released from its obligations under the Sublease as the Sublease must be deemed to have been assigned to AS LLP. Plaintiffs assert that even assuming that Arkin Solbakken was an assignee of the Sublease (which plaintiffs dispute), AKR would still be liable under the lease absent an agreement by the Sublandlord to release AKR. Plaintiffs claim that AS LLP occupies a portion of the Premises simply as one of many subtenants of AKR. Plaintiffs contend that defendants' reliance on various communications by Solbakken to third parties to the effect that AKR had changed its name to AS LLP, that it was the successor entity, and that she and Arkin were the sole partners, is misplaced as such statements were made "in the wake of [Kaplan Rice LLP's] unnoticed launch that left the remaining partners in a panic [and] occurred at a time when Arkin and Solbakken were in the process of desperately seeking to sort out their status, rights and obligations." (Plaintiffs' Memo of Law, p. 17). Plaintiffs extend the same argument with respect to the fact that following AKR's dissolution, the Sublandlord billed Arkin Solbakken for the entire rent due under the Sublease. Plaintiffs submit an email from the Sublandlord's assistant comptroller to Arkin Solbakken's office manger indicating that he had mistakenly invoiced Arkin Solbakken and that all future invoices would be to Arkin Kaplan (Arkin Affirm Exhibit "X").

Plaintiffs also challenge defendants' reading of Section 24 (B) of the Sublease, asserting that the section does not apply to the partnership interests of Kaplan and Rice. Rather, plaintiffs aver that Section 24 addresses solely the personal liability of withdrawing partners and that Section 24 (B),

when it is applicable, only releases the withdrawing partners' personal liability. Plaintiffs contend that defendants' interpretation is simply an effort by defendants to benefit themselves to the detriment of an AKR creditor. Indeed, plaintiffs note that by letters dated June 29, 2012, Kaplan and Rice each advised the Sublandlord that he/she had withdrawn from AKR and that each was released from the obligations of the Sublease pursuant to, *inter alia,* Section 24 (B) of the Sublease and Article 12 of the Second Amendment to the Sublease (*id.* Exhibit "U"). The Sublessor's General Counsel responded that same date rejecting the letters and stating that the Sublessor was aware they continued to occupy the Premises, that as a result of actions they had taken with respect to AKR's banks, they had prevented AKR from paying the required rent, and that the Sublessor intended to hold them fully responsible for their obligations under the Sublease (*id.*). Plaintiffs' assert that defendants' arguments with respect to Section 24 (B) are an "improper effort to make an end-run around their Sublandlord's objection to their claim and their personal liability under the sublease." (Plaintiffs' Memorandum of Law, p. 21)

C. Defendants' Reply

In reply, defendants dispute that Section 24 of the Sublease releases only personal liability of a withdrawing partner. Defendants continue to maintain that the clear and unambiguous language of Section 24 (B) releases a partner from any rights and obligations under the Sublease upon his or her withdrawal. Moreover, notwithstanding any priority of payment of partnership liabilities upon dissolution enunciated in Section 71 of the New York Partnership Law, which mandates that payment of creditors be made from partnership assets first, defendants contend that plaintiffs failed to note the carve out of Section 71, namely, that its provisions apply "subject to any agreement to the contrary." Defendants contend that the Sublease is such an agreement by which the Sublandlord and the individual partners agreed that all partners (except Arkin) would be released from all liabilities and obligations under the Sublease upon his or her withdrawal.

Defendants further note that Section 67 (2) of the Partnership Law also discharges withdrawing partners from existing liabilities to creditors where one or more of the partners in the dissolved firm is continuing the business of the partnership. Defendants contend that Arkin's actions since the dissolution of AKR indicate that he is continuing the business of AKR, just as he had previously continued the business of the other firms preceding AKR.

With respect to AKR's obligations under the Sublease, defendants argue that the issue of whether AKR is in privity of contract with the Sublandlord need not be decided at this time and is not an issue for an accounting. Defendants contend that any contingent liability AKR may have to the Sublandlord does not mature unless and until Arkin and Arkin Solbakken default on the lease and vacate the Premises. Even if such default and vacatur were to occur, defendants contend that ultimately Arkin would still be responsible for the obligations of the Sublease.

Defendants state that AKR's exercise of the option to extend the Sublease to 2015 and subleasing a portion of the Premises are rights AKR enjoyed by virtue of being in privity of estate. Defendants state further that AKR never expressly assumed the Sublease from Arkin Kaplan and note that the Sublessor continued to invoice Arkin Kaplan for rent and required plaintiffs post-dissolution to execute a consent to the Sublease in the name of Arkin Kaplan, as Subtenant. By extension of reasoning, defendants aver that since AKR did not assume the Sublease from Arkin Kaplan, its obligation to pay rent ended once it was dissolved and no longer occupied the Premises.

Lastly, defendants urge the court to reject plaintiffs' claims that their actions indicating that AS LLP was the successor firm to AKR should be excused as the result of panic and desperation following the launch of KR LLP. Defendants contend that plaintiffs cannot claim surprise by defendants' conduct as Arkin, as early as March 30, 2012, informed the Sublandlord that Kaplan and Rice were soon to be his former partners. Moreover, for months prior to Kaplan's and Rice's withdrawal from AKR the parties had been engaged in discussions, including with the aid a mediation, to reconfigure the firm. Thus, plaintiffs' claimed surprise must be deemed to be feigned and their statements regarding Arkin Solbakken's status as successor to AKR deliberate.

IV. DISCUSSION

A. Plaintiffs' Procedural Objections

Plaintiffs' claim that defendants' motion in this case is "procedurally infirm" because defendants erroneously followed the briefing schedule ordered in the *Kaplan Action,* Index No. 653835/2012 must be rejected. Both parties routinely confuse the two cases (*see*, e.g. this courts decision regarding motion sequence number 001 in the *Kaplan Action*, fn. 1 (NYSCEF Doc. No. 40). In fact, court held the related motions in the *Kaplan Action* in abeyance pending this decision. As noted above, those motions are decided today.

Plaintiffs also argue that the motion is "procedurally defective" because under CPLR 3212(a) a party may move for summary judgment "after issue is joined" and no answer to the amended complaint has been filed in this case. In effect, plaintiffs complain merely that the issues being decided on this motion should be addressed in plaintiffs' motion for partial summary judgment in the *Kaplan Action* even though that motion must be denied because it does not address the issue raised in that narrowly drawn complaint which contains only one cause of action (for an accounting).

At prior hearings in this and the *Kaplan Action*, the parties repeatedly sought to have the court resolve on a motion for partial summary judgment the issue of responsibility for payment of rent for the Premises. Accordingly, a schedule for briefing and argument of the motion for partial summary judgment was set. The parties had adequate notice that the matter was being treated as a motion for summary judgment in this case (*see* NYSCEF Doc. No. 237). In view of 3211(c)'s authorization to treat a 3211 motion as one for summary judgment, to say nothing of the fact that the parties have made full use of evidence outside the amended complaint in support of their respective positions on the motion, defendants' failure to label their motion as a motion to dismiss and to seek to have the motion treated as a motion for summary judgment is not fatal (*see* David D. Siegel, Practice Commentary, McKinney's Cons Laws of NY Book 7B, CPLR C3212:12).

B. Standard of Review on Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.,* 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation,* 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines,* 64 NY2d 1092 [1985]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible

form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver,* 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos,* 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

C. Obligations of the Individual Parties Under the Sublease

Initially, it must be recognized that this is a dispute among the partners of AKR, a partnership-in-dissolution. The case concerns the rights and obligations of the former partners of AKR to each other. It is not a dispute between the Sublandlord and the Subtenant. Virtually all of the cases on which the parties rely concerning their respective obligations under the Sublease, involve allege defaults under leases and the rights of the landlord against the tenant. In this case, the Subtenant has not defaulted and the Sublandlord is not a party to the litigation. Nevertheless, liability under the terms of the Sublease, particularly Section 24 thereof, informs the rights of the parties to share in the net assets of the partnership-in-dissolution.

The Sublease is a contract and, therefore, is subject to general principals of contract interpretation. "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP,* 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67; *see W.W.W. Assocs. v Giancontieri,* 77 NY2d 157, 162 [1990]). A contract is ambiguous if it is "reasonably susceptible of more than one interpretation" (*Chimart Assocs. v Paul,* 66 NY2d 570,

573 [1986]). Ambiguity is determined by looking at the four corners of the document, not to outside sources (*see Kass v Kass,* 91 NY2d 554, 566 [1998]). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]). In this regard, "clear contractual language does not become ambiguous simply because the parties to the litigation argue different interpretations" (*Riverside South Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 67 [1st Dept 2008], *affd* 13 NY3d 398 [2009]).

The Court of Appeals has emphasized that the rule requiring that a written agreement be enforced according to its terms has special importance in transactions involving real property (*see Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], quoting *Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995] ["We have . . . emphasized this rule's special import 'in the context of real property transactions, where commercial certainty is a paramount concern, and where . . . the instrument was negotiated between sophisticated, counseled business people negotiating at arm's length"]).

The parties to the Sublease are sophisticated business people who entered into the Sublease Agreement and its two amendments after arm's length negotiations. The intention of the parties may be gathered from the four corners of the Sublease and its amendments and should be enforced according to its terms. The language of the Sublease expressly addresses the obligations of the partners for payment of rent including when such obligations attach and when they are released. Contrary to plaintiffs' arguments, the language of Section 24 (B) is susceptible to only one reasonable interpretation, namely, that Kaplan and Rice were released from any further personal liability under the Sublease as of the date of their withdrawal from AKR. Section 24 (A) which imposes personal liability for Sublease obligations on all partners of the firm does not change that interpretation given the language in Section 24 (B) that it is enforceable "[n]otwithstanding anything herein contained to the contrary." Indeed, the acknowledgments contained in the first and second amendments to the Sublease with respect to discharge from liability of withdrawing partners support such an interpretation.

Under Section 24 (B), Arkin remains liable for rent despite the withdrawal of partners from the firm or re-configuration of the firm in possession after such withdrawal. Having committed

himself as the person to whom the Sublessor could look ultimately for satisfaction of Sublease obligations, he cannot avoid personal liability simply because his consent to such provision may now seem ill advised.

Throughout the term of the Sublease, Arkin conducted himself in accordance with the plain meaning of Section 24 (B). There is nothing in the record to indicate that before this dispute, Arkin sought to hold withdrawing partners liable under the Sublease. As the configuration of the firm changed, the succeeding law firm occupying the Premises seamlessly (until now) assumed the rights and obligations of the prior law firm under the Sublease and the amendments thereto. The same result holds here. Kaplan and Rice are released from personal liability for Sublease obligations, including the payment of rent after vacating the space, and may not be held liable for rent for periods following their departure from the Premises (*see 600 Partners Co. v Berger,* 245 AD2d 140 [1st Dept 1997] [since the defendant partnership did not default on its rent until both of the individual defendants resigned from the firm, such defendants cannot be held liable for such rent, absent an agreement to the contrary]). KR LLP is responsible for use and occupancy of the portion of the Premises it occupied, from the date it was created until the date it surrendered possession. It appears that these rents were paid.

D. AKR's Liability Under the Sublease

Under New York's Partnership Law, dissolution of a partnership occurs by operation of law at the time a single partner, who is a member, withdraws from the partnership (*see* Partnership Law §§ 60, 62; *see also, C.E. Hooper, Inc. v Perlberg, Monness, Williams & Sidel,* 72 AD2d 687, 688 [1st Dept 1979]). Thus, AKR was dissolved at the time Kaplan and Rice withdrew therefrom.

A tenant may, by its actions, assume a lease even absent a written agreement (*see Salvatore R. Beltrone Marital Trust II v Lavelle and Finn, LLP,* 22 AD3d 936 [3d Dept 2005]). Thus, payment of the rent by a tenant in possession creates a presumption of an assignment of the lease (*id.* at 936-937; *see Gateway I Group, Inc. v Park Ave. Physicians, P.C.,* 62 AD3d 141, 148 [2d Dept 2009]). Generally, such an assignee will be liable for covenants that run with the land but only while in privity of estate (*id.*; *Salvatore R. Beltrone Marital Trust II,* 22 AD2d at 937). Once privity of estate is broken by reassignment or surrender of possession, the liability ends unless the assignee expressly agrees to undertake the terms of the lease (*id.*)

AKR is not a party to the Sublease. As the lease amendments show and the invoicing actions of the Sublandlord confirm, Arkin Kaplan occupies that role. AKR obtained the right to possession from the predecessor firm, Arkin Kaplan, as successor in interest to ASK. ASK obtained the right to possession from the Sublessor by virtue of the 1999 Sublease. Arkin Kaplan obtained the right to possession initially by virtue of its successor status.[3] The same may be said of AKR as successor to Arkin Kaplan. However, since AKR never signed the Sublease, its liability ended as of the date of dissolution.

It appears that AS LLP is carrying on the business of AKR by having taken possession of the Premises upon AKR's dissolution, seeking to evict KR LLP, Kaplan and Rice from the Premises, affixing its name to the door of the Premises in place of AKR, seeking to have AKR's malpractice insurance transferred to Arkin Solbakken, using the AKR tax ID number and amending the AKR Certificate of Registration to Arkin Solbakken. In spite of Arkin Solbakken's subsequent actions in seeking to reverse the amended Certificate and, thereafter, filing a new Certificate of Registration for AS LLP, Arkin Solbakken is the entity responsible for the obligations that run with the land by virtue of a presumptive assignment of the Sublease. Accordingly, it is liable for rent due post-dissolution.

In summary, Arkin Solbakken is the successor to AKR. It acquired the right of possession of the Premises upon the dissolution of AKR. Neither Kaplan nor Rice are liable for rent due under the terms of the Sublease. KR LLP is liable for use and occupancy for space they occupied. That rent is owed to Arkin and Arkin Kaplan as Subtenants and Arkin Solbakken as the tenant in possession of the Premises through the date of surrender of possession. AKR is not a party to the Sublease and has no obligation to pay rent to the Sublandlord following its dissolution.

Accordingly, it is hereby

ORDERED that defendants' motion for partial summary judgment is GRANTED to the extent of dismissing the claim with respect to Kaplan and Rice's personal liability, including application of their partnership interest in AKR to the rental obligation, under the Sublease after the date of their withdrawal from AKR, and it is further

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[3]Subsequently, Arkin Kaplan became a party to the Sublease by virtue of two amendments it signed with the Sublandlord.

ORDERED that plaintiffs' cross motion is DENIED in its entirety.

This constitutes the decision and order of the Court.

DATED: June 3, 2013

E N T E R,

O. PETER SHERWOOD
J.S.C.