

**Avant Guard Props., LLC v New York City Indus.  
Dev. Agency**

2015 NY Slip Op 32099(U)

January 7, 2015

Supreme Court, New York County

Docket Number: 115209/10

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

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1/13/15  
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HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

PRESENT: \_\_\_\_\_  
*Justice*

PART 5

Index Number : 115209/2010  
AVANT GUARD PROPERTIES, LLC  
vs.  
NYC INDUSTRIAL DEVELOPMENT  
SEQUENCE NUMBER : 008  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 08

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

## FILED

JAN 13 2015

NEW YORK  
COUNTY CLERK'S OFFICE

RECEIVED  
JAN 12 2015  
GENERAL CLERK'S OFFICE  
NYS SUPREME COURT - CIVIL

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

Dated: 1-7-15  
JAN - 7 2015

  
HON. KATHRYN FREED, J.S.C.  
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 5

-----X

AVANT GUARD PROPERTIES, LLC,

Plaintiff,

-against-

NEW YORK CITY INDUSTRIAL DEVELOPMENT  
AGENCY,

Defendant.

AVANT GUARD, INC., BARRY BORGAN, PAUL  
ROUHANI, and ZADOK ZVI,

Additional Counterclaim Defendants.

-----X

**KATHRYN E. FREED, J.S.C.**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS  
CONSIDERED IN THE REVIEW OF THIS MOTION:

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED..	1; 2 (Exs. 1-8) 3 (Exs. 1-14); 4 (Exs. 1-4); 5 (Exs. 1-3)
ANSWERING AFFIDAVITS.....	6 (Exs. 1-15) 7 (Exs. A-E)
REPLY AFFIRMATION.....	8 (Ex. 1)
MEMORANDA OF LAW.....	9-11

**FILED**

JAN 13 2015

NEW YORK  
COUNTY CLERKS OFFICE

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE  
MOTION IS AS FOLLOWS:

Defendant/counterclaimant New York City Industrial Development  
Agency ("the Agency") moves for summary judgment dismissing the  
verified complaint and granting judgment on its counterclaims

against plaintiff Avant Guard Properties, LLC (Avant Properties) and additional counterclaim defendants Avant Guard, Inc. (Avant Inc.) (collectively the Avant Companies), Barry Borgen (Borgen), and Zadok Zvi (Zvi)<sup>1</sup>.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **The Parties**

The Agency was created by New York State law for the purpose of providing financial assistance, by means of tax exemptions, to qualifying industrial and commercial projects in order to encourage businesses to move to or remain in New York City. The Avant Companies are in the business of manufacturing, fabricating, and warehousing window guards and other window products. Borgen, Zvi, and Rouhani owned the Avant Companies.

### **The Transaction**

In 1999, the Agency entered into a complex industrial incentive transaction with Avant Properties and its sister company, Avant Inc., to provide financial assistance to incentivize the Avant Companies to purchase and develop a manufacturing and warehousing facility for their window guards and other window

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<sup>1</sup> The Agency was granted a default judgment on October 18, 2012 against additional counterclaim defendant Paul Rouhani. However, Mr. Rouhani passed away prior to the court's decision. In the Agency's moving papers, its counsel states that the Agency is not seeking to substitute Mr. Rouhani's estate in this action or pursue its claims against him.

products in Bushwick, Brooklyn.

In January 1999, the Agency adopted a resolution authorizing this transaction, which included, among other things discussed below, the acquisition of a manufacturing and warehousing facility by the Agency, the lease of a manufacturing and warehousing facility to Avant Properties, and a sublease of a manufacturing and warehousing facility to Avant Inc. (the Resolution). As part of this transaction, in March 1999, the Agency and Avant Properties entered into a lease agreement (the Lease) "for the acquisition, improvement and equipping of a fabrication and manufacturing facility constituting a 'project' within the meaning of the [New York State Industrial Development Agency Act]." Spieler affidavit, Ex. 1, ¶ 4. The "project" consisted "of the acquisition of an approximately 21,300 square [foot] building, an approximately 10,000 square parking lot and an approximately 12,500 square foot contiguous lot and the construction of improvements and renovations thereof to be used for the warehousing, fabrication, and manufacturing of window guards, gates and frames" (the Project). *Id.*, ¶ 5. The subject facility is located at 232 and 248 Varet Street and 237 Cook Street in Brooklyn, New York (the Facility) *Id.*, ¶ 4.

Avant Properties purchased the Facility and then, pursuant to the Lease, it transferred the Facility's title and deed to the Agency. The Agency then leased the Facility back to Avant

Properties, which in turn, entered into a sublease agreement with Avant Inc., which provided for not only the sublease of the Facility, but, also, gave Avant Inc. the responsibility for executing the Project (the Sublease). As part of this exchange, the Avant Companies received a waiver of the New York City mortgage recording tax, certain sales tax exemptions, and reduced real property taxes. The Avant Companies assert that they made payments in lieu of real property taxes (PILOT payments) to the Agency in order to satisfy this grant of tax benefits.

In addition to the Lease and Sublease, a guaranty was executed by Avant Properties, Avant Inc., Borgen, Zvi, and Rouhani, guaranteeing the Avant Companies' performance of their obligations under the Lease and Sublease.

### **The Dispute**

In March 2009, Borgen requested approval for certain construction projects at the Facility to enable it to "go green." In response, the Agency requested certain compliance items, including a "Project Completion Certificate" for the Project, "Subtenant Occupancy Survey," and payment of overdue PILOT payments. Avant Properties allegedly failed to comply with these requests and the Agency never issued approval for the construction.

On October 6, 2009, the Agency sent a Notice of Default informing Avant Properties that it was in breach of the Lease for

failing to make \$19,078.52 in PILOT payments and for improperly subleasing portions of the Facility to entities other than Avant Inc. without Agency consent. In late October 2009, Avant Inc. allegedly requested approval for construction at the Facility. On October 27, 2009, the Agency responded via letter stating that, before it could bring the request before its board of directors, the Avant Companies must pay the \$19,078.52 in PILOT payments owed, complete a "Subtenant Occupancy Application" and an "Internal Background Investigation Questionnaire," and draft a letter describing the scope of the construction and timeline (the October 2009 Letter). The October 2009 Letter also stated that the Agency had become aware that the Avant Companies planned to construct a fitness center at the Facility and such would be an unauthorized use of the Facility. The Agency gave the Avant Companies until December 11, 2009 to cure the defaults and submit the completed construction request or the Agency would exercise its remedies including termination of the Lease.

In November 2009, Avant Properties made the PILOT payments owed. However, it did not provide the other requested information. On November 12, 2009, the Agency conducted an unannounced visit to the Facility and discovered the construction of a fitness center. On December 7, 2009, Borgen acknowledged construction of a fitness center, which he stated would utilize 4,000 square feet on the top floor of the Facility.

On December 17, 2009, the Agency sent a "Notice of Event of Default" and "Lease Termination" to Avant Properties, because it breached the Lease by subletting without the Agency's consent and for the unauthorized construction of a fitness center at the Facility. The Agency informed Avant Properties that the "Events of Default" were "Recapture Events," requiring it to return to the Agency 20% of the public benefits it received. On July 20, 2010, the Agency completed the termination closing on Avant Properties' behalf.

#### **Commencement of the Instant Action**

On November 19, 2010, Avant Properties commenced this proceeding by filing a combined Article 78 petition and an action for damages and declaratory relief. On January 14, 2011, the Agency filed an verified answer and asserted counterclaims for breach of contract against the Avant Companies and Borgen, Zvi, and Rouhani, the individual guarantors. By a so ordered stipulation entered on March 15, 2011, Avant Properties agreed to discontinue the Article 78 proceeding and continue the case solely as a plenary action. The Agency now moves for summary judgment dismissing the complaint and awarding it judgment on its counterclaims.

#### **CONCLUSIONS OF LAW**

On a motion for summary judgment, the movant "must make a

prima facie showing of entitlement to judgment as a matter of law." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008). Once the movant has demonstrated its entitlement to judgment, the burden shifts to the opposing party to produce evidence sufficient to raise an issue of fact warranting a trial. *Id.*

Here, the Agency has made a prima facie showing of its entitlement to judgment. The Agency has presented evidence that Avant Properties breached the Lease by subleasing portions of the Facility without the Agency's consent and by constructing a fitness center at the Facility without authorization. Relying on the unambiguous terms of the Lease and undisputed facts, the Agency has shown that it was within its rights to terminate the Lease and recapture 20% of the public benefits Avant Properties received.

Specifically, the Agency points to section 9.3 (a) of the Lease, which states, in relevant part, "[t]he Lessee shall not at any time ... (ii) sublet the whole or any part of the Facility, except pursuant to the Sublease Agreement, without prior written consent of the Agency... ." However, despite the plain language of this provision, Avant Properties admittedly subleased portions of the Facility to Stealth Architectural Windows, Inc., Demicco Contractors, a contractor for the New York City Department of Design and Construction, Sino Metal & INA Building Shop, LLC, and Rollner Architectural Metals. The Agency contends that it never gave any prior written consent.

The Agency also points to section 1.5 (d) of the Lease, pursuant to which Avant Properties agreed to operate the Facility in accordance with the Lease Agreement, and as an "Approved Facility," meaning a warehouse, manufacturing and distribution facility for use in connection with the business of the warehousing, fabrication, and manufacture of window guards and frames. Further, section 3.1 (b) of the Lease provides that,

"[t]he Lessee hereby unconditionally represents, warrants, covenants and agrees that throughout the term of this Agreement (i) the Facility will be an Approved Facility and a 'project' within the meaning of the Act; (ii) the Lessee will not take action, or suffer or permit any action, if such action would cause the Facility not to be an Approved Facility or a 'project' within the Act; and (iii) the Lessee will not fail to take action, or suffer or permit the failure to take action, if such failure would cause the Facility not to be an Approved Facility or a 'project' within the meaning of the Act."

Although section 4.1 of the Lease provides that Lessee can make certain additions or alterations to the Facility, such additions or alterations cannot change the nature of the Facility so it would not constitute an "Approved Facility." It is undisputed that Avant Properties was constructing a fitness center in a portion of the Facility. A fitness center has no connection with the business of the warehousing, fabrication, and manufacture of window guards and frames.

The Agency has also made a prima facie showing that, by subleasing portions of the Facility without consent, and constructing a fitness center, section 8.5 of the Lease was

triggered, which permits recapture when the Lessee effects a substantial change in the scope and nature of the operations at the Facility or violates section 9.3 by subleasing without prior written consent of the Agency. Therefore, the burden shifted to the Avant Companies, Borgen, and Zvi to produce evidence sufficient to raise an issue of fact warranting a trial.

In regard to the issue of subleasing portions of the Facility to entities other than Avant Inc., the Avant Companies, Borgen, and Zvi have failed to raise an issue of fact. Although the Avant Companies, Borgen, and Zvi argue that one subtenant was a sister company of the Avant Companies, and another tenant was an official department of the City of New York, this is irrelevant and does not raise an issue of fact. Section 9.3 (a) is very clear that Avant Properties was not to sublease the Facility, except in accordance with the Sublease, without the Agency's consent. Even if an official department of the City of New York<sup>2</sup> or a sister company of the Avant Companies, other than Avant Inc., were subtenants, the Agency would still need to give consent. Nevertheless, there were, admittedly, at least two other subtenants whose subleases violated section 9.3 (a) of the Lease.

The argument that these subtenancies did not materially reduce the manufacturing and warehousing footprint is also irrelevant and

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<sup>2</sup> All the evidence presented actually shows that it was Demicco Contractors, a contractor for the New York City Department of Design and Construction, and not that City agency.

does not raise an issue of fact. Again, the Lease is very clear that no subleasing of the Facility was permitted, except in accordance with the Sublease, without the Agency's consent. There is no exception allowing a subtenant so long as it does not materially reduce the manufacturing and warehousing footprint. Avant Properties violated section 9.3 of the Lease.

The Avant Companies, Borgen, and Zvi present the defense of waiver, in that they argue that the Agency waived its rights under section 9.3, because it knew for years about the subtenants, never took action, and continued to accept PILOT payments and Avant Properties' performance under the Lease. While evidence submitted by the Avant Companies, Borgen, and Zvi in fact shows that Avant Properties disclosed its subtenants to the Agency in 2006, 2007, and 2008 through "Occupancy Surveys," the Lease contains two no-waiver clauses. Specifically, section 7.3 of the Lease states that:

"[f]ailure by the Agency to insist upon the strict performance of any of the covenants and agreements herein set forth or to exercise any rights or remedies upon default by the Lessee hereunder shall not be considered or taken as a waiver or relinquishment for the future right to insist upon and to enforce by mandatory injunction, specific performance or other appropriate legal remedy a strict compliance by the Lessee with all the covenants and conditions hereof, or of the rights to exercise any such rights or remedies, if such default by the Lessee be continued or repeated."

Section 7.4 states that "[n]o waiver shall be binding unless it is

in writing and signed by the party making such waiver." These provisions are fatal to the Avant Companies, Borgen, and Zvi's waiver argument.

"Waiver is the voluntary abandonment or relinquishment of a known right." *Excel Graphics Tech., Inc. v CFG/AGSCB 75 Ninth Ave.*, 1 AD3d 65, 69 (1<sup>st</sup> Dept 2003), citing *Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 (1984). "While waiver may be inferred from the acceptance of rent in some circumstances, it may not be inferred, and certainly not as a matter of law, to frustrate the reasonable expectations of the parties embodied in a lease when they have expressly agreed otherwise." *Jefpaul Garage Corp. v Presbyterian Hosp.*, 61 NY2d, *supra* at 446). Here, the Lease contained unambiguous no-waiver and merger clauses. The Agency did not waive any rights by not taking prior action against Avant Properties and by collecting PILOT payments. The Avant Companies, Borgen, and Zvi's arguments in support of their waiver claim are negated by the Lease's express language.

Further, their reliance on *Simon & Son Upholstery v 601 W. Assoc.*, 268 AD2d 359 (1<sup>st</sup> Dept 2000) is misplaced since, in that case, the First Department found that the landlord was actively involved in facilitating the unauthorized use of the space and that active involvement was wholly inconsistent with the express terms of the lease. Here, the Agency had no active involvement with the

unauthorized subtenancies.

The Avant Companies, Borgen, and Zvi also asserts the defense of estoppel. However, their opposition makes no argument as to how this defense applies except to state that a manifest injustice has resulted from the Agency's unilateral termination of the Lease and its claims for damages.

"In order for estoppel to exist, three elements are necessary: (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than and inconsistent with, those which the party subsequently seeks to assert; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; (3) and, in some situations, knowledge, actual or constructive, of the real facts. The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position."

*BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 (1<sup>st</sup> Dept 1985) (internal quotes and citations omitted). Here, the Avant Companies, Borgen, and Zvi have failed to demonstrate these elements. The court notes that the opposition papers also refer to a laches defense, but makes no argument as why or how there was an "unreasonable and inexcusable delay by the [Agency] in undertaking to enforce [its] rights." *Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617 (1<sup>st</sup> Dept 2012) (internal quotation marks and citation omitted). The Avant Companies, Borgen, and Zvi argue that Avant Properties substantially performed its duties under the Lease, and the Agency should not be allowed to just terminate after

many years of a contractual relationship. However, the Lease contains termination provisions, namely sections 7.1 and 7.2, which permit termination of the agreement upon the happening of certain events of default, including a failure to comply with section 9.3. The argument that Avant Properties substantially performed the agreement is without merit. "If the parties have made an event a condition of their agreement, there is no mitigating standard of materiality or substantiality applicable to the non-occurrence of that event." *Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 692 (1995) (internal quotes and citation omitted). The substantial performance rule does not apply here, where the parties have made it clear by the terms of the Lease that only complete performance will satisfy the agreement.

Although it is clear that Avant Properties has breached section 9.3 of the Lease, this Court will nevertheless address whether the Avant Companies, Borgen, and Zvi have raised an issue of fact as to whether the Lease was also breached by constructing a fitness center at the Facility. The Avant Companies, Borgen, and Zvi argue that the space that Avant Properties used for a fitness center was never part of the "Approved Facility" or the Project. Specifically, they point to the "Whereas Clause" of the Lease, which states, in relevant part:

"the Project will consist of the acquisition of an approximately 21,300 square foot building, and approximately 10,000 square [foot] parking lot and an approximately 12,500 square foot contiguous lot and the

construction of improvements and renovations thereof to be used for the warehousing, fabrication and manufacture of window guards, gates, and frames (the Land and all buildings, structures and other improvements now or hereafter located thereon, and all fixtures and appurtenances and additions thereto and substitutions and replacements thereof now or hereafter attached to or contained in or located on the Land and/or buildings and improvements located therein or placed on any part thereof, and attached thereto, which are used or useable in connection with the present or future operation thereof or the activities at any time conducted therein and certain machinery, equipment and other tangible property ..., subject to the terms hereof, are collectively referred to herein as the 'Facility'."

Relying on this provision, the Avant Companies, Borgen, and Zvi argue that the space where the fitness center was constructed was never "used or usable" for the manufacturing or warehousing of window guards, gates, and frames. This Court disagrees.

The Whereas Clause cited clearly states that the approximately 21,300 square foot building, the 10,000 square foot parking lot and 12,500 square foot contiguous lot and the construction of improvements and renovations were to be used for the warehousing, fabrication and manufacture of window guards, gates, and frames. The Whereas Clause goes further to include the land, the buildings, renovations, and improvements, which are used or usable in connection with the operation or activities, in the definition of "Facility." In section 1.1 of the Lease, "Facility" is further defined as the "Facility Realty" (defined Land, parcel of land known by street addresses 232 and 248 Varet and 237 Cook Street, Brooklyn, New York, and the Improvements, all buildings,

structures, foundations, related facilities, fixtures and other improvements existing erected or situated on the Land) and "Facility Equipment."

These definitions make the term "Facility" inclusive of all of the foregoing. It is a very comprehensive definition that does not limit the term "Facility" to used or usable space for the manufacturing or warehousing of window guards, gates, and frames, as the Avant Companies, Borgen, and Zvi suggest. No language in this Whereas Clause gives Avant Properties the right to construct something as part of the "Facility" that is not to be used for the warehousing, fabrication and manufacture of window guards, gates, and frames.

The Avant Companies, Borgen, and Zvi's defenses of waiver, estoppel, laches, and substantial performance have already been addressed, and, for the same reasons stated above, do not apply to this breach.

Finally, the Avant Companies, Borgen, and Zvi have failed to raise an issue of fact in regard to the Agency's right of recapture under section 8.5 of the Lease. First, the Avant Companies, Borgen, and Zvi argue that there is an issue of fact as to whether the Agency has a right to recapture 20% when Avant Properties had completed a "Certification of Completion" in December 1999. However, section 8.5 (a) (ii) clearly provides that when a "recapture event" occurs after substantial completion of the

Project, which will be the date stated on the certificate, the Lessee shall pay the Agency 20% of the benefits if the "recapture event" occurs in the 10<sup>th</sup> year. Thus, the Lease clearly provides the Agency with this right even after the certificate was allegedly filed.

Second, the Avant Companies, Borgen, and Zvi argue that there is an issue of fact as to whether the construction of the fitness center qualifies as a "recapture event," under section 8.5 of the Lease, because it is not clear whether such was a "substantial change in the scope and nature of the operations of the Lessee or Sublessee at the Facility." However, it is hard pressed to argue that converting at least 4,000 square feet of the Facility into a fitness center, serving many fitness clients going in and out of the Facility, did not substantially change the scope and nature of the operations. Even if this raises an issue of fact, the Agency is clearly entitled to recapture under section 8.5 for Avant Properties' breach of section 9.3. Section 8.5 of the Lease clearly permits recapture when the Lessee violates section 9.3 by subleasing without prior written consent of the Agency.

Thus, the Agency's motion for summary judgment on liability for breach of contract is granted, as it is clear that the Agency was well within its right to terminate the Lease and Avant Properties was the party in breach. It is undisputed that, as guarantors, Avant Inc., Borgen, and Zvi are liable for Avant

Properties' breaches.

Since there is a dispute as to the amount of damages, principally the amount of unpaid PILOT payment, the court refers the calculation of all damages to a referee to hear and determine.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the New York City Industrial Development Agency's motion for summary judgment is granted on liability; and it is further,

ORDERED that the issue of the calculation of all damages is referred to a Special Referee to hear and determine; and it is further,

ORDERED that counsel for the New York City Industrial Development Agency shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Rm. 119 at 60 Centre Street), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further,

ORDERED that this constitutes the decision and order of the of  
the Court.

Dated: January 7, 2015

ENTER:



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KATHRYN E. FREED, J.S.C.  
HON. KATHRYN FREED  
JUSTICE OF SUPREME COURT

**FILED**

JAN 13 2015

NEW YORK  
COUNTY CLERKS OFFICE