

**Getty Props. Corp. v Getty Petroleum Mktg. Inc.**

2015 NY Slip Op 32524(U)

May 14, 2015

Supreme Court, New York County

Docket Number: 651762/2012

Judge: Anil C. Singh

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ANIL C. SINGH
Justice

PART 45

GETTY PROPERTIES CORP., et al.

INDEX NO. 651762/12

MOTION DATE

MOTION SEQ. NO. 025

GETTY PETROLEUM MARKETING INC., et al.

The following papers, numbered 1 to 3, were read on this motion tofor REJECT/CONFIRM REFERRED REPORT

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1
Answering Affidavits — Exhibits No(s). 2
Replying Affidavits No(s). 3

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum opinion.

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

Dated: 5/14/15

Anil C. Singh, J.S.C.
ANIL C. SINGH

- 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: PART 45

-----X

GETTY PROPERTIES CORP., and  
GETTYMART, INC.,  
Plaintiffs,

DECISION AND  
ORDER

-against-

Index No.  
651762/12

GETTY PETROLEUM MARKETING INC., et al.,  
Defendants.

-----X

HON. ANIL C. SINGH, J.:

Plaintiffs move pursuant to CPLR 4403 and 22 NYCRR 202.44(a) for an order: a) rejecting the report of Special Referee Ira Gammerman entered on July 24, 2014, to the extent the referee denied plaintiffs the right to seek attorneys' fees; and b) confirming the referee's report to the extent it awarded landlord use and occupancy. Defendants oppose the motion.

Background

Plaintiffs Getty Properties Corp., and Gettymart Inc. (collectively, "the landlord") commenced the instant action against defendants, a group of limited liability companies (the LLCs) that are sublessees of gasoline station sites leased from the landlord's immediate lessee Getty Petroleum Marketing Inc. ("GPMI"), as part of approximately 800 such sites leased from the landlord pursuant to a

Consolidated, Amended and Restated Master Lease dated November 2, 2000, as amended (the “master lease”).

On April 30, 2012, after the LLCs’ master lease and subleases were terminated, and after GPMI filed for bankruptcy, the LLCs were ordered by the Bankruptcy Court to vacate the sites. When the LLCs failed to turn over possession of the sites to the landlord, the landlord initiated this action seeking: a) to have them ejected; and b) monetary damages for the LLCs’ use and occupancy of the sites.

At the commencement of this action on June 11, 2012, landlord moved by order to show cause to obtain an order requiring the LLCs to pay landlord use and occupancy damages *pendente lite*, without prejudice to seek a higher amount arising out of the LLCs’ leasing of the sites from GPMI. On June 11, 2012, the court issued a temporary restraining order requiring the LLCs to place into court the monies that they had collected or were to collect from the operators by June 12, 2012 (the TRO). On July 2, 2012, at a hearing, counsel for the LLCs, Robert G. Del Gadio, challenged the amount of use and occupancy that was to be paid into court, and the court directed that the amount of \$434,233.80 for use and occupancy be paid into court by July 3, 2012.

When the LLCs failed to comply with the court’s July 2, 2012 use-and-

occupancy order, landlord sought to enforce the use-and-occupancy order and, at hearings on July 26, 2012, and August 2, 2012, the court granted landlord's request for a preliminary injunction giving landlord possession and a money damages award. The court issued an order and judgment directing the LLCs to pay landlord the sum of \$434,233.80. At the July 26, 2012 hearing, however, the court permitted the LLCs to seek an offset against the \$434,233.80 judgment which, if granted, would be a separate judgment in their favor reducing the amount of the judgment the court granted landlord, and the court issued a supplemental order to that effect. The LLCs appealed and (with one minor exception related to one of the LLCs not relevant here) the court's order and judgment was affirmed by the Appellate Division, First Department (the "AD order").

Subsequently, the landlord and LLCs filed a motion and cross-motion seeking various relief. Specifically, the landlord cross-moved for an order: a) granting summary judgment on liability on each of its five causes of action asserted in the complaint; and b) setting the matter down for a hearing on the amount of landlord's damages.

Justice Melvin Schweitzer issued a memorandum opinion dated June 13, 2013, stating in pertinent part as follows:

Landlord is entitled to summary judgment on its second cause of

action for U&O as a matter of law because the Appellate Division affirmed the U&O Order. Specifically, the Appellate Division held that:

“The lack of privity of contract between the LLC defendants (the subtenants) and plaintiffs (the over-landlords) does not prevent the court from ordering the LLC defendants to pay use and occupancy to plaintiffs.... Nor is such an order prevented by the LLCs defendants’ not being in possession of the subject premises (they had sub-subleased the properties to the operators of the gas stations), because their subleases with GPMI provide ‘[i]n the event of ... [sub-]sub-letting, or other transfer, ... Lessee [the relevant LLC defendant] shall continue to remain jointly and severally liable with its transferee to Lessor [GPMI] for the performance of all of Lessees’ obligations for the remainder of the Term” (brackets and ellipses in original). AD Order, pp. 2-3.

Accordingly, the LLCs are liable for U&O. The issue now becomes how much is due. The amounts awarded in the U&O Order were based upon the last month’s rents that GPMI was paying to Landlord before termination of the Master Lease. Such relief was expressly “without prejudice” to Landlord’s seeking higher amounts from the LLCs.

Landlord argues that the amount of U&O damages awarded should be increased based upon the terms of the subleases, pointing out that each of the subleases expressly provides that, if the LLC holds over after the expiration or termination of the subtenancy, that it is liable for “two (2) times the previous month’s rent.” Accordingly, Landlord may be entitled to a higher amount and the court directs that there be a hearing before a referee to determine the amount due during the holdover period for each of the sites.

(Memorandum Opinion dated June 13, 2013).

By order and judgment dated July 23, 2013, the court referred the matter to a special referee to hear and report with respect to plaintiffs' claims for expenses, including attorneys' fees and all damages.

The court's award of attorneys' fees was affirmed by the Appellate Division by decision and order entered March 27, 2014.

Subsequently, the parties appeared for a hearing before Special Referee Ira Gammerman. The Referee declined to award any attorneys' fees, stating that, in his judgment, Justice Schweitzer had not stated any basis for an award of attorneys' fees.

Regarding the issue of use and occupancy, the Special Referee recommended an award of use and occupancy but declined to decide whether the clause in the subleases providing for use and occupancy at two times the rent was an enforceable liquidated damages provision or an unenforceable penalty. Referee Gammerman stated that it was a legal issue, so his report states that "Judge Schweitzer ... decides whether or not it should be doubled" (Transcript of Hearing Before Referee Gammerman dated June 25, 2014, p. 31, lines 13-15).

On August 8, 2014, plaintiffs filed the instant motion for an order rejecting the report of the Referee to the extent the Referee denied plaintiffs the right to seek attorneys' fees, and confirming the report to the extent the Referee awarded

use and occupancy to landlord. Plaintiffs are seeking double use and occupancy in their motion to confirm the Referee's report.

Justice Schweitzer issued a memorandum opinion dated August 20, 2014, stating that attorneys' fees "are rightfully due to the plaintiffs" and explaining the basis for such an award under specific enumerated sections of the master lease and subleases. The Court issued a renewed reference and resubmitted the matter to Referee Gammerman to compute attorneys' fees. The hearing on attorneys' fees was held recently. Accordingly, this decision addresses only the issue of double use and occupancy.

Defendants assert that the clause in the subject subleases providing for use and occupancy at two times the rent in the event of a holdover is not an enforceable liquidated damages provision. Instead, defendants contend that the liquidated damages clause is an unenforceable penalty. Counsel argues that a liquidated damages provision is enforceable only if, at the time of contracting, the damages arising from a breach are difficult to ascertain and if the amount liquidated is a reasonable measure of the anticipated probable harm.

In their papers opposing the motion to confirm the referee's report, defendants fail to acknowledge or address the substantial body of precedent upholding liquidated damages for rental holdovers in multiples of the monthly rent

(see, for example, White Plains Plaza Realty, LLC v. Town Sports International, LLC 79 A.D.3d 1025 [2d Dept., 2010] (holdover liquidated damages at twice the lease rent upheld); Thirty-Third Equities Company LLC v. Americo Group, Inc., 294 A.D.2d 222 [1<sup>st</sup> Dept., 2002] (holdover liquidated damages at two-and-one-half the lease rent upheld); Federal Realty Limited Partnership v. Choices Women's Medical Center, Inc., 289 A.D.2d 439 [2d Dept., 2001] (holdover liquidated damages at three times the lease rent upheld); Tenber Assoc. v. Bloomberg L.P., 51 A.D.3d 573 [1<sup>st</sup> Dept., 2008] (holdover liquidated damages at twice the lease rent upheld); 319 Fifth Avenue Realty v. 319 Smile Corp., 21 Misc.3d 139(A) [App. Term., 2008] (holdover damages at twice the lease rent upheld); and Wells Fargo Northwest N.A. v. US Airways, Inc., 33 Misc.3d 1231(A) [Sup. Ct., N.Y. Cty., 2011] (holdover damages at twice the lease rent upheld)).

The above cases consistently and unambiguously hold that where, as here, a provision in a commercial lease agreement provides for use and occupancy at two times the rent in the event of a holdover, such a provision is not a penalty or unreasonable.

Defendants rely on three cases in support of their contention that the liquidated damage clause should not be enforced: Bui v. Industrial Enterprises of

America, Inc., 41 A.D.3d 238 [1<sup>st</sup> Dept., 2007]; Pyramid Centres & Co. v. Kinney Shoe Corp., 244 A.D.2d 625 [3d Dept., 1997]; and Biggio v. Puche, 2013 NY Slip Op. 31919[U] [Sup. Ct., N.Y. County, 2013].

In Bui, the First Department held that the provision in a promissory note calling for payment of \$2,000 a day should defendant fail to pay a judgment in a timely fashion was an unenforceable penalty.

Unlike Bui, the instant matter does not involve a promissory note. Further, it is unclear whether Bui was a landlord-tenant dispute. Accordingly, it is readily distinguishable.

In Pyramid Centres, plaintiffs' predecessor in interest, as landlord, and defendant, as tenant, entered into a lease agreement, wherein defendant leased commercial space in a shopping center for a term of 20 years. Under the terms of the lease, defendant agreed to pay a fixed minimum rent of \$24,750 per lease year, in equal monthly installments of \$2,062.50. Defendant further agreed to pay, as percentage rent, a sum equal to 6% of defendant's gross receipts in excess of \$412,500 per lease year. The tenant decided to close its store, but it continued to pay the monthly rent of \$2,062.50.

A default provision in the lease provided that if defendant vacated the premises, it still remained liable to pay rent for the remainder of the lease period.

Additionally, a provision in the lease governed the tenant's obligation to operate its business in the leased premises during the full term of the lease and specifically provided that: "In the event [defendant] ceases operation prior to the termination date of this lease, landlord shall have the option to seek specific performance of the operating covenant ... or to require [defendant] to pay as liquidated damages and not as a penalty the sum equal to the greater of the average annual percentage rent paid by [defendant] during the expired portion of the term or double the fixed minimum rent for the remainder or unexpired portion of the term."

Plaintiff commenced an action in the Supreme Court of Saratoga County seeking to collect liquidated damages from the tenant in the amount of double the fixed minimum rent.

The trial court dismissed plaintiff's breach of contract action in its entirety, finding that the liquidated damages provision was an unreasonable penalty, disproportionate to any subsequent loss suffered by plaintiff.

The Third Department modified the trial court, holding that plaintiff was not entitled to recover liquidated damages under the lease, but that plaintiff could recover actual damages. The Court wrote, "In our view, this [liquidated damages] provision was intended to coerce defendant's performance rather than compensate plaintiffs for defendant's breach" (Pyramid Centres, 244 A.D.2d at 627).

The decision of the Third Department in Pyramid Centres is at odds with the approach of the First and Second Departments. In short, we believe the First and Second Departments present the better approach.

Finally, in the Biggio case, a landlord commenced an action against tenants alleging breach of a residential sublease by failing to pay rent.

Biggio is distinguishable in fundamental respects. First, the lease was residential, not commercial. Second, Biggio is a nonpayment action, not a holdover action.

CPLR 4403 provides that this Court has the power to confirm, in whole or in part, the report of a referee to report.

A referee's report is not binding, but is intended "merely to inform the conscience of the court" (Matter of Gehr v. Board of Education of City of Yonkers, 304 N.Y. 436, 440 [1952] (internal quotation marks and citation omitted)). However, "[i]t is well settled that a special referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (RC 27<sup>th</sup> Avenue Realty Corporation v. New York City Housing Authority, 305 A.D.2d 135, 135 [1<sup>st</sup> Dep't 2003; see also Namer v. 152-54-56 W. 15<sup>th</sup> St Realty Corp., 108 A.D.2d 705, 706 [1<sup>st</sup> Dept., 1985]; Spodek v. Feibusch, 5 A.D.3d 903, 903 [2d Dept., 2008]; Sichel v. Polak, 36 A.D.3d 416 [1<sup>st</sup> Dept.,

2007]; Kardanis v. Velis, 90 A.D.2d 727 [1<sup>st</sup> Dept., 1982]).

The branch of the motion to reject the report of the Special Referee regarding the attorneys' fee issue is denied as moot based on the renewed reference by Justice Schweitzer dated August 20, 2014.

For the reasons stated above, the branch of the motion to confirm the report of the Special Referee is granted, and the landlord is awarded double use and occupancy.

Settle judgment on notice.

Date: May 14, 2015  
New York, New York



---

Anil C. Singh