

**JJ 201 LLC v Blatt**

2016 NY Slip Op 30820(U)

May 2, 2016

Supreme Court, New York County

Docket Number: 155612/15

Judge: Manuel J. Mendez

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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

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

JJ 201 LLC,  
Plaintiff

INDEX NO. 155612/15

MOTION DATE 04-27-2016

- v -

SEARLE BLATT and ALICE NYC 1051, INC., a.k.a  
ALICENYC 1051, INC., d/b/a "ALICE NYC" and ALICE'S  
FRIENDS, INC., f/k/a TIEGERMAN GROUP, INC., d/b/a  
"ALICE NYC", and ALICE BLATT,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 5 were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answering Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-2	_____
3-4	_____
5	_____

Cross-Motion:      Yes      X No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment is granted, plaintiff is granted judgment on liability against defendants SEARLE BLATT and ALICE NYC 1051, INC., a/k/a ALICENYC 1051, INC., d/b/a "ALICE NYC" jointly and severally.

Plaintiff brings this action to recover from the defendants for damages for the breach of a commercial Sub-lease agreement and " Guarantee." Plaintiff alleges that the defendant Alice NYC 1051, Inc.,( Herein "Tenant"), entered into a written Sub-lease agreement dated August 8, 2013 for premises located at 201 East 62<sup>nd</sup>. Street New York, N.Y. The Sub-lease was for a period of 13 years expiring on December 30, 2026. Defendant Searle Blatt ( herein "Guarantor"), signed a " Limited Guarantee", guaranteeing payment on the lease for its entire term.

The Sub-lease is subject to the provisions of the Lease between 201 East 62<sup>nd</sup>. Apartment Corporation, as Landlord and JJ 201 LLC, as tenant ( see Exhibit A, Sublease Paragraph 7). The relevant provisions of the lease is Paragraph 16.4(b) which gives the Landlord the right to install scaffolding or a sidewalk bridge at the premises. It states: "In the event that scaffolding or a sidewalk bridge or shed is erected, Landlord agrees to expeditiously perform all work which required such bridge or scaffolding and to install temporary signs for tenant or any subtenant at Landlord cost and expense...." ( See Exhibit B, Lease).

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

The Guarantee provides in Paragraph 3 what steps sub-tenant needs to take in order to surrender the premises and cause a discharge of the guarantor. It states: "notwithstanding anything contained herein, provided tenant gives owner not less than three (3) months prior written notice of its intention on a date certain ( possession date) accompanied by (1) a bank check equal to the unamortized sum of \$80,000, which sum shall be amortized in equal monthly installments over the term of the sublease, and (2) a duly executed acknowledged surrender Declaration in the form annexed hereto as Exhibit (A) to (a) deliver Possession of the premises to owner in the condition required at the termination of the sublease and (b) otherwise comply with the provisions of subparagraphs (i), (ii) and (iii) below, upon (i) delivery of possession of the premises and all keys to owner on or before the possession Date, in the condition required at the termination of the Sublease, (ii) the receipt by owner of all unpaid rent which shall have accrued under the terms of the sublease at any time up to and including such delivery of possession... and (iii) the full performance of all other obligations of tenant which shall have accrued under the sublease at any time up to and including such delivery of possession, in each case without being subject to cancellation, rescission, avoidance under any bankruptcy, insolvency or other statutes or decisions of any court, all of the obligations of guarantor hereunder with respect to the obligations under paragraphs 4 and 5 below shall thereupon terminate and expire."( See Exhibit C, Guarantee).

Tenant did not provide Plaintiff with the requisite Notice of Surrender of the Premises and abandoned the premises on April 27, 2015. Plaintiff did not accept Tenant's surrender as it was not done in accordance with Paragraph 3 of the Guarantee in that tenant did not give the requisite notice, and did not pay all unpaid rent that had accrued. Tenant says that it was forced to leave the premises because it was constructively evicted when landlord wrongfully erected a scaffold in front of the premises that negatively impacted their business.

Plaintiff moves for summary judgment against Tenant and Guarantor. In support of its motion Plaintiff annexes the affidavits of Steven Brauser ( its manager) and Burton Wallack, president of Wallack management Company, Inc., the building's managing agent. Defendants oppose the motion alleging that they are not in default because discovery has not been completed and Tenant was constructively evicted by the erection of the scaffold.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp.,77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

**"A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms, without reference to extrinsic materials outside the four corners of the document"**(*Goldman v. White Plains Center for Nursing Care, LLC*, 11 N.Y.3d 173, 896 N.E.2d 662, 867 N.Y.S.2d 27 [2008]). **"An agreement is unambiguous when its words have a definite and precise meaning, unattended by danger of misconception in the purport of the contract itself, and concerning which there is no reasonable basis for a difference of opinion"**( *Vintage LLC, v. Laws Const. Corp.*, 13 N.Y.3d 847, 920 N.E.2d 342, 892 N.Y.S.2d 286 [2009]). **"The Construction of a plain contract is for the court. The intention of the parties is found in the language used to express such intention. If the court finds as a matter of law that the contract is unambiguous, evidence of the intention and acts of the parties plays no part in the decision of the case. Plain and unambiguous words, undisputed facts, leave no question of construction except for the court. The conduct of the parties may fix a meaning to words of doubtful import. It may not change the terms of a contract."**(*Nau v. Vulcan Rail & Construction Co.*, 286 N.Y.188, 36 N.E.2d 106, 50 U.S.P.Q. 484 [1941]).

Generally a surrender of the lease and acceptance thereof by the landlord releases the tenant from further liability for rent ( see *Deer Hills Hardware, Inc., v. Conlin Realty Corp.*, 292 A.D.2d 565, 739 N.Y.S.2d 597 [2<sup>nd</sup>. Dept. 2002]). As a result of the surrender Tenant may be relieved of further liability for rent and for payment to plaintiff for any of the damages it claims. However, when the contract between the parties is unambiguous as to how a surrender is to take place, and the tenant does not comply with the terms of the contract with respect to the surrender, That failure of the tenant to comply with the terms of the contract results in the tenant and guarantor not being discharged from liability under the contract by the surrender of the premises.

Constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. ( *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 256 N.E.2d 707, 308 N.Y.S.2d 649[1970]). However, when installation by landlord of a temporary scaffold or sidewalk bridge is authorized by the lease, such installation is not a wrongful act by the landlord, thereby negating tenant's and guarantor's claims of constructive eviction ( see *Carlyle, LLC v. Beekman Garage, LLC*, 133 A.D.3d510, 19 N.Y.S.3d 520 [1<sup>st</sup>. Dept. 2015]).

Plaintiff has made a prima facie case for Summary Judgment, defendants have failed to raise an issue of fact.

Accordingly , it is ORDERED that plaintiff's motion for summary judgment is granted, and it is further

ORDERED, that plaintiff is awarded judgment on liability against defendants SEARLE BLATT and ALICE NYC 1051, INC., a/k/a ALICENYC 1051, INC., d/b/a "ALICE NYC", jointly and severally, and it is further

**ORDERED**, that an assessment of damages against these defendants is to take place at the time of trial of this action, and it is further


**ORDERED**, that defendants' SEARLE BLATT and ALICE NYC 1051, INC., a/k/a ALICENYC 1051, INC., d/b/a "ALICE NYC" affirmative defenses are dismissed, and it is further

**ORDERED**, that the parties appear at IAS Part 13 located at 71 Thomas Street, Room 210, New York, N.Y. 10013, for a discovery conference on June 29, 2016 at 9:30 A.M.

**ENTER:**

**MANUEL J. MENDEZ**  
J.S.C.

Dated: May 2, 2016

  
\_\_\_\_\_  
Manuel J. Mendez  
J.S.C.

Check one:    **FINAL DISPOSITION**     **NON-FINAL DISPOSITION**

Check if appropriate:     **DO NOT POST**                       **REFERENCE**