

**Fifty E. Forty Second Co., LLC v 21st Century Offs.  
Inc.**

2018 NY Slip Op 32933(U)

November 20, 2018

Supreme Court, New York County

Docket Number: 154107/2018

Judge: Carmen Victoria St. George

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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 - - PART 34

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FIFTY EAST FORTY SECOND COMPANY, LLC,

Plaintiff,

Index No.: 154107/2018

Motion Sequence No.: 001

- against -

DECISION/ORDER  
and JUDGMENT

21ST CENTURY OFFICES INC., JONATHAN  
ROBBINS,

Defendants.

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**ST. GEORGE, CARMEN VICTORIA, J.S.C.:**

This action seeks rent, additional rent and damages against the tenant (21st Century) and the guarantor of the tenant’s lease (Robbins) with plaintiff (50 East), the landlord. The parties entered into the lease on January 19, 2010 and they extended the lease term to January 31, 2020 pursuant to a November 2, 2016 letter agreement. In addition to monthly rent, 21st Century agreed to pay other charges related to, inter alia, real estate taxes, electricity, and – if applicable – late charges. The lease imposes no duty to mitigate by re-renting the premises, though upon

When the parties signed the original lease in 2010, Robbins signed a limited guaranty through which he assumed 21st Century’s monetary liability under the lease. The guaranty provides that Robbins remains liable only until 21st Century vacates the premises, as long as 21st Century notifies 50 East in writing and returns the keys. There is no such limitation on 21st Century’s liability.

21st Century defaulted on the lease and vacated the building around January 2018. According to plaintiff, 21st Century did not provide written notice or authorization. Following this, plaintiff commenced this action through a complaint dated May 2, 2018. Currently, plaintiff moves

to amend the pleadings so that it includes all money due under the lease through the motion date. In addition, plaintiff seeks summary judgment on the pleadings as amended, against both defendants, for a total of \$354,519.56 in addition to attorney's fees.

Defendants oppose the motion, except for that portion which seeks to amend the complaint. They argue that triable issues of fact remain regarding whether 21st Century vacated without giving notice. They state that defendants spoke to a representative of plaintiff and told her that 21st Century was vacating the premises. Defendants state that the representative, Billie Jean Hamel, assured them they did not have to provide formal notice. Moreover, they argue, there may be other related issues which will become clear upon discovery. In addition, they raise as an affirmative defense that plaintiff has failed to mitigate damages. They contend, as well, that they do not have to pay rent if and when plaintiff re-lets the premises.

After consideration, the Court grants the motion to amend without opposition. In addition, it grants summary judgment on the amount set forth in the amended complaint -- \$354,519.56, and it refers this matter to a referee to determine reasonable attorney's fees. In this, the Court finds the decision of Justice Nancy Bannon in *Five East Forty Second Co. LLC v Affinity, LLC* (Sup Ct, NY County, October 20, 2014, Bannon, J.) persuasive, particularly as it involved the same plaintiff and the same lease provisions. There, too, the defendants indicated that they had provided notice of their intent to vacate the premises – in this case, by letter rather than phone call. In addition, as here, the defendants returned the keys to the rented property. Despite this, Justice Bannon found that the defendants had not provided sufficient notice. The lease, she noted, clearly and unambiguously stated that the landlord had to provide written consent to the tenant to end the lease early. As such, the Court held, “absent such written consent [the tenant] remains liable for the rent for the entire lease term, that handing the keys to an employee is not an effective surrender, and

that there can be no waiver of these terms except in writing” (*id.*, at p 4). Defendants in the *Affinity* action further improperly relied on parol evidence outside of the four corners of the lease to demonstrate acceptance of surrender and termination of the lease (*id.* at p 5). Similarly, in the action before this Court, the terms of the guaranty are sufficient to bind the guarantor, and the statements of Billie Jean Hamel – statements which she denies having made – do not alter defendants’ obligations under the contract. Further, as the lease was not properly terminated, the guarantor is not relieved of his obligation to pay for rent that post-dates 21st Century’s departure from the building.

Finally, in response to defendants’ argument that plaintiff is not entitled to collect damages from them once it re-lets the premises, plaintiff informed the Court and defendants that, as of the argument date for this motion, October 30, 2018, the premises remained vacant. The Court grants judgment on the complaint to the extent of referring the matter to a referee to determine the amount of rent to on the date of the hearing. Continuing liability shall be assessed on an ongoing basis as set forth below.<sup>1</sup>

Accordingly, it is

ORDERED that the motion to amend is granted with no opposition, and the complaint is amended to the extent of setting forth ultimate damages of \$354,519.56; and it is further

ORDERED that the motion for summary judgment is granted, and the Clerk is directed to enter judgment on behalf of plaintiff and against defendants in the amount due under the lease as

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<sup>1</sup> The Court notes that plaintiff does not respond to defendants’ argument that their obligations cease if plaintiff re-rents the premises.

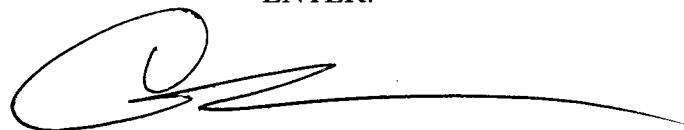
of the date of entry, and thereafter accruing on a monthly basis from the date of entry until the earlier of January 31, 2020 or the date the premises is re-let; and it is further

ORDERED that the matters of attorney's fees and rent currently due are referred to a Special Referee to hear and report either with recommendations, or to hear and determine, if the plaintiff so stipulates in writing; and it is further

ORDERED that counsel for plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, with a completed Special Referee Information Sheet, upon the Special Referee Clerk in the Motion Support Office to arrange a date for the reference to a Special Referee, who shall determine the issue of reasonable attorney's fees and the amount currently due in rent and additional rent.

Dated: 11/20/2018

ENTER:



CARMEN VICTORIA ST. GEORGE, J.S.C.  
**HON. CARMEN VICTORIA ST. GEORGE**  
J.S.C.