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| Empire LLC v Sharapov |
| 2020 NY Slip Op 30210(U) |
| January 31, 2020 |
| Supreme Court, New York County |
| Docket Number: 151039/2018 |
| Judge: Kathryn E. Freed |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X INDEX NO. 151039/2018
EMPIRE LLC, MOTION SEQ. NO. 002

Plaintiff,

- v -

DECISION AND ORDER

ZAKHAR SHARAPOV,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for REARGUMENT/RECONSIDERATION.

In this action seeking damages for breach of a commercial lease, plaintiff Empire LLC (“Empire”) moves, pursuant to CPLR 2221 (d), to reargue its underlying motion (motion sequence 001), which sought, *inter alia*, to amend the complaint to conform the pleadings to the proof as well as for summary judgment on its complaint against defendant Zakhar Sharapov (“Sharapov”) (Docs. 24-39). Upon reargument, Empire seeks to recover damages incurred from April 1, 2018 through and including November 30, 2018, reflecting the period from the date of tenant’s eviction until the reletting of the premises (Doc. 25). Sharapov opposes the motion (Docs. 41-42). After oral argument and a review of the parties’ papers and the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL HISTORY:

The underlying facts of this matter are set forth in detail in the order of this Court entered November 9, 2018 (“the 11/9/18 order”), which held, *inter alia*, that Sharapov did not have an obligation, pursuant to the guaranty, to pay rent, additional rent or other charges incurred by tenant after March 20, 2018, the date of its eviction (Doc. 23). Additional relevant facts are set forth below.

Empire, as landlord, entered into a commercial lease with nonparty O & D Studio Inc. (“the tenant”) for a term of five years, commencing on October 1, 2015 and ending on September 30, 2020 (Doc. 28 at 3). Pursuant to a limited guaranty (“the guaranty”), Sharapov personally guaranteed the tenant’s obligations under the lease (Doc. 28 at 4). In November 2017, Empire commenced a nonpayment proceeding in the Civil Court of the City of New York, New York County against the tenant (Doc. 35). By order dated February 15, 2018, the Civil Court granted Empire a judgment of possession and money judgment totaling \$22,378.36, representing monies owed pursuant to the lease through December 31, 2017 (Doc. 35). In a judgment entered March 12, 2018, the Civil Court also awarded Empire \$7,329.81 in legal fees (Doc. 35). The tenant was lawfully evicted from the premises on March 20, 2018 (Docs. 23, 34).

In February 2018, Empire commenced this action by filing a summons and complaint against Sharapov, as guarantor of the lease, seeking damages for unpaid rent and additional rent, late fees, interest, and unreimbursed attorneys’ fees in the amount of \$42,673.87 through the time that the action was commenced, “to be adjusted upward through the judgment date of this action” (Doc. 28). Empire then moved to amend the complaint to reflect that it was owed an amount totaling \$246,547.13, which included rent, additional rent, late fees, and interest through the end of the lease period (Doc. 23). In the underlying motion, Empire submitted an affidavit of one of

its members, who averred, *inter alia*, that Sharapov was required to pay damages for the period beyond the date of eviction because the tenant vacated the premises “mid-lease without [Empire’s] written authorization” (Doc. 23 at 4). However, in the 11/9/18 order, this Court deemed this contention disingenuous, reasoning that “[Empire] commenced an action in Civil Court to evict tenant and thus obviously had actual knowledge tenant was evicted on March 20, 2018” (Doc. 23 at 4). This Court allowed Empire to amend the complaint, but only insofar as Empire could recover for rent, additional rent, late fees, and interest accruing from January 1, 2018, the period after the months accounted for in the Civil Court judgment, through March 31, 2018, the date of the tenant’s eviction, plus statutory interest, costs, fees and disbursements (Doc. 23 at 4-5). This Court also awarded Empire attorneys’ fees to be determined by a Special Referee (Doc. 23 at 5). The premises were re-rented to a new tenant on December 1, 2018 (Doc. 37 at 6).

Empire now moves for reargument of its motion to amend the complaint to conform the pleadings to the proof and for summary judgment, arguing, *inter alia*, that this Court “ended the period of recovery at the point of the underlying tenant’s eviction, under the mistaken assumption – neither raised nor argued – that eviction is the equivalent of a tenant’s surrender of possession” (quotations omitted) (Doc. 37 at 7). Empire contends that “surrender” is an affirmative defense that must be established and that, since defendant failed to raise it in its answer and also failed to oppose the underlying motion, this Court “misapprehended and overlooked . . . the significance (or lack thereof) and implication of tenant’s eviction and/or vacating of the premises” (Doc. 37 at 8). Moreover, Empire maintains that there is no writing signed by Sharapov to suggest that a surrender occurred and that it is thus undisputed that the tenant was evicted (Doc. 37 at 13). Empire further claims that a nonpayment proceeding is distinct from a holdover proceeding in that a

nonpayment proceeding such as this acknowledges the continuation of the tenancy and seeks to enforce its terms (Doc. 37 at 14).

Moreover, Empire contends that, upon reargument, “no reason remains to refer the base dollar amounts to a Special Referee (other than attorneys’ fees), and [that] the Court should grant [it] summary judgment in the amount of \$83,521.34 (the amount adjusted to November 30, 2018 . . .), plus statutory interest, costs, fees, and disbursements” and to set a hearing only for “plaintiff’s legal fees, including, but not limited to the filing of the instant motion” (Doc. 37 at 16).¹

In opposition, Sharapov concedes that “[Empire] evicted [the] Tenant” but claims that “[the] Tenant abided by said eviction by *surrendering* the [p]roperty on March 20, 201[8]” (Doc. 41 at 4) (emphasis added). Therefore, Sharapov maintains that, “as Guarantor, [he] is liable [only] for unpaid rent and incurred costs and fees in the amount of \$42,673.87, which was the amount owed up until the [t]enant vacated the [p]roperty” (Doc. 41 at 4). Sharapov attempts to distinguish this case from *Empire, LLC v Armin A. Meizlik Co., Inc., et al., Index Number 160102/2017*, arguing that, in the case at bar, “[b]oth parties obviously consented to [the eviction]” (Doc. 41).

LEGAL CONCLUSIONS:

“A motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision” (*William P. Pahl*

¹ In support of its motion, Empire submits the affidavit of Sebi Ademoski, the bookkeeper for the subject building (Doc. 26). In his affidavit, Ademoski concludes that, since the premises were re-rented to a new tenant effective December 1, 2018, Sharapov owes Empire “the sum of \$83,521.34 representing the pre-eviction base rent and additional rent and post eviction damages . . . owned by [t]enant to [Empire]” through November 30, 2018 (Doc. 26 at 7-8).

Equip. Corp. v Kassis, 182 AD2d 22, 27 [1992] [internal quotation marks and citation omitted], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992]; *see* CPLR 2221 [d] [2]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). It is well settled that “[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted” (*Matter of Setters v Al Props. & Devs. (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citation omitted]).

Empire’s motion to reargue is granted. This Court erred in concluding that Sharapov did not have a continuing obligation to pay unpaid rent, additional rent, or other charges incurred after the date of the tenant’s eviction on March 20, 2018, reasoning that that the tenant’s eviction was equivalent to a surrender (Doc. 23) (*compare* 274 *Madison Co., LLC v Tru Legacy Partners*, 2019 NY Slip Op 31666[U], 2019 WL 2451377, *2-3 [Sup Ct, NY County 2019]; *Empire, LLC v Armin A. Meizlik Co., Inc.*, 2019 NY Slip Op 30012 [U], 2019 WL 103711, *4-5 [Sup Ct, NY County 2019]; *Broadway 36th Realty, LLC v London*, 29 Misc 3d 1238[A], *5 [Sup Ct, NY County 2010]).

“A guaranty of a tenant's obligations under a lease must be strictly interpreted in order to assure its consistency with the lease terms to which the guarantor actually consented” (*404 Park Partners, L.P. v Lerner*, 75 AD3d 481, 482 [1st Dept 2010]; *see Broadway 36th Realty, LLC v London*, 29 Misc 3d at *4-5).

Here, the limited guaranty provides, in relevant part, that upon:

“(a) vacat[ing] and surrender[ing] the demised premises to Owner free of all subleases or licenses and in a broom condition and *as otherwise required by the lease* and (b) having notified Owner or Managing Agents in writing and (c) delivered the keys to the demised premises to the Owner or its Managing Agent, “[g]uarantor shall not be liable under th[e] guarantee to pay rent, additional rent or other charges or payments accruing under the lease after the date of said *surrender* and shall be released from all obligations under the lease and th[e] Guaranty” (Doc. 32) (emphasis added).

The limited guaranty thus provides that Sharapov would be absolved of liability of his obligations under the guarantee only upon, *inter alia*, a valid surrender, which this Court found had occurred here. The decision in *274 Madison Co., LLC v Tru Legacy Partners, supra*, is particularly instructive and supports this Court’s reasoning for granting reargument. In that case, which involved an identical guaranty, this Court (Kalish, J.) held that the language “as otherwise required by the lease” incorporated by reference the provisions of the lease that pertained to surrender (*274 Madison Co., LLC v Tru Legacy Partners*, 2019 NY Slip Op 31666[U] at *3). The lease in *274 Madison Co., LLC v Tru Legacy Partners, supra*, also contained a provision identical to that in the subject lease which provided that any surrender by the tenant required that it be accepted by the landlord and memorialized in writing (*id.*)² Since there was no writing prior to the eviction that established a surrender by the tenant, Justice Kalish reasoned that there was no “valid surrender under the lease that would limit [the] [g]uarantor’s liability under the guaranty” and that the guarantor was thus liable for damages from the date of eviction until the end of the lease period (*id.*).

This Court inadvertently concluded that the March 2018 eviction was tantamount to a surrender and that Empire was barred from recovering damages beyond the eviction date. A “nonpayment dispossess proceeding” does not, alone, “evidence[] a surrender of the demised premises operating to release [a] defendant from continuing liability under the lease” (*Lexington Ave. & 42nd Street Corp. v Pepper*, 221 AD2d 273, 243 [1st Dept 1995]; *see 99 Realty Co. v Eikenberry*, 242 AD2d 215, 216 [1st Dept 1997]; *Brusco v Soclof*, 24 Misc 3d 128[A], *1 [Sup Ct, App Term 2009]). Moreover, the “burden of proving a surrender rests upon the party seeking to

² In this case, Article 25 of the subject lease specifically provides that acceptance of a surrender would not be effective unless it is in writing and signed by the landlord (Doc. 14).

establish it or relying upon such surrender” (*Sam & Mary Housing Corp. v Jo/Sal Market Corp.*, 121 Misc 2d 434 [Sup Ct, Queens County 1983]; *see Wilson v Raput LLC*, 60 Misc 3d 1213[A], *2 [Civ Ct, NY County 2018]). Since Sharapov did not raise surrender as a defense in his answer and failed to oppose the underlying motion, this Court should not have concluded that Empire was precluded from recovering for the entirety of the lease due to “surrender” (*see Empire, LLC v Armin A. Meizlik Co., Inc.*, 2019 WL 103711, 2019 NY Slip Op 30012 [U] at *4-5; *Broadway 36 Realty, LLC v London*, 29 Misc 3d 1238[A] at *5).

Given the foregoing, Empire is entitled to recover rent, additional rent, late fees, and interest incurred beyond the eviction date until November 30, 2018, the date immediately preceding the reletting of the apartment, because the lease clearly provides at Article 17 that:

“[i]n case of any such default, re-entry, expiration and or dispossession by summary proceedings or otherwise, (a) the rent and additional rent, shall become due thereupon and be paid up to the time of such re-entry, dispossession and/or expiration, (b) Owner may re-let the demised premises or any part or parts thereof, either in the name of Owner or otherwise, for a term or terms, which may at Owner’s option may be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concessions or free rent or charge a higher rental than that in this lease, (c) Tenant or the legal representatives of Tenant shall also pay Landlord as liquidated damages for the failure of Tenant to observe and perform said Tenant’s covenants herein contained, any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease. The failure of Owner to re-let the demised premises or any part or parts thereof shall not release or affect the Tenant’s liability for damages” (Doc. 14, Section 17) (emphasis added).

“Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from contracting as they please . . . [and] [i]f the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable” (*Holy Prop. Ltd., L.P. v Cole Prods.*, 87 NY2d 130, 134 [1995]; *see Gallery at Fulton Street, LLC v Wendnew LLC*, 30 AD3d 221, 222 [1st Dept 2006]). Insofar as the tenant agreed to be liable for the entire lease following a summary

proceeding, Sharapov is similarly responsible for these obligations under the terms of the guaranty (see *Brusco v Soclof*, 24 Misc 3d 128[A] at *1) [since the underlying lease contained an enforceable survival clause providing that the tenant would remain liable for any rent or additional rent reserved for the balance of the lease term, the guarantor remained liable for unpaid rents which accrued after the tenant's eviction up to the effective date of the reletting of the demised commercial premises]; *274 Madison Co., LLC v Tru Legacy Partners*, 2019 NY Slip Op 31666[U] at *3).

This Court finds no reason to disturb that branch of the 11/9/18 order referring this matter to a Special Referee to ascertain damages, but now directs the Special Referee to calculate the total amount owed to Empire from January 1, 2018 through November 30, 2018.

The remaining arguments are either without merit or need not be addressed given the findings above.

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

ORDERED that this Court grants plaintiff's motion for reargument of that branch of plaintiff's motion seeking to amend the complaint to conform the pleadings to the proof and that branch seeking summary judgment for recovery against defendant Zakhar Sharapov for unpaid rent and additional rent, late fees, and interest accruing after the tenant's March 20, 2018 eviction; and it is further

ORDERED that, upon reargument, that branch of the motion by plaintiff seeking to amend the complaint to conform the pleadings to the proof is granted to the extent that the complaint is deemed amended to include a claim against defendant Zakhar Sharapov for unpaid rent and additional rent, late fees, and interest accruing from January 1, 2018 until November 30, 2018; and it is further

ORDERED that, upon reargument, plaintiff's motion for summary judgment is granted to the extent that he is entitled to recover from defendant Zakhar Sharapov unpaid rent and additional rent, late fees, and interest from January 1, 2018 until November 30, 2018, plus statutory interests, costs, fees and disbursements; and it is further

ORDERED that the calculation of damages owed by defendant to plaintiff for the unpaid rent and additional rent, late fees, and interest from January 1, 2018 until November 30, 2018, as well as reasonable attorneys' fees owed to plaintiff by defendant, is hereby referred to a Special Referee to hear and report or, if the parties so agree, to hear and determine; and it is further

ORDERED that, within 20 days of the date hereof, plaintiff's attorney is to serve this decision and order, with notice of entry, on counsel for defendant; and it is further

ORDERED that this matter is referred to the Special Referee Clerk (Room 119 M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this Court at www.nycourts.gov/supctmanh at the "Local Rules" link), shall assign the issue to an available Special Referee as specified above; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this decision and order with notice of entry, together with a completed Information Sheet (which can be accessed at <http://www.nycourts.gov/courts/ljd/supctmanh/SR-JHO/SRP-InfoSheet.pdf>) containing all the information called for therein, on the Special Referee Clerk by fax (212-401-9186) or email spref@courts.state.ny.us, and, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referee's Part; and it is further

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



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| <u>1/31/2020</u> DATE | | | <u>KATHRYN E. FREED, J.S.C.</u> |
| CHECK ONE: | <input checked="" type="checkbox"/> CASE DISPOSED | <input type="checkbox"/> DENIED | <input type="checkbox"/> NON-FINAL DISPOSITION |
| | <input checked="" type="checkbox"/> GRANTED | | <input type="checkbox"/> GRANTED IN PART |
| APPLICATION: | <input type="checkbox"/> SETTLE ORDER | | <input type="checkbox"/> OTHER |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN | | <input type="checkbox"/> FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> REFERENCE |