

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

2020 NY Slip Op 30691(U)

February 28, 2020

Supreme Court, New York County

Docket Number: 651762/2012

Judge: Barry Ostrager

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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: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM**

*Justice*

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INDEX NO. 651762/2012

GETTY PROPERTIES CORP. and GETTYMART INC.,  
Plaintiffs,

MOTION DATE N/A

MOTION SEQ. NO. 036

- v -

GETTY PETROLEUM MARKETING INC., 1314 SEDGWICK  
AVE. LLC, 262-12 HILLSIDE AVE. LLC A/K/A 262-12  
HILLSIDE AVE LLC, 1224 ROUTE 22 LLC, 310 BAY  
SHORE ROAD LLC, 751 WHITE PLAINS ROAD LLC, 1245  
NEPPERHAM AVE. LLC, 26-27 COLLEGE POINT  
BOULEVARD #2 LLC, 2 MONTAUK HIGHWAY LLC, 1714  
NEW YORK AVE. LLC, 292 RAILROAD AVE., LLC, 600  
WHITE PLAINS ROAD LLC, 286 ASHBURTON AVE., LLC,  
857 RT. 6 MAHOPAC LLC, 49-25 VAN DAM STREET LLC  
A/K/A 49-25 VANDAM STREET LLC, 31-05 QUEENS  
BLVD. LLC A/K/A 31-05 QUEENS BLVD LLC, 69 BK  
STREET LLC A/K/A 69 BK STREET, LLC, 67 QUAKER  
RIDGE ROAD LLC, ONE PLEASANTVILLE ROAD LLC, 894  
ROUTE 109, LLC, 185 EAST LINCOLN AVENUE LLC,  
ROBERT G. DEL GADIO and FRANK MASCOLO,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 036) 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1360, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1386, 1387, 1388, 1389, 1390

were read on this motion to/for JUDGMENT - MONEY.

**OSTRAGER, BARRY R., J.S.C.:**

Upon the foregoing documents, the motion by plaintiffs Getty Properties Corp. and Gettymart Inc. to hold defendant Robert G. Del Gadio personally liable for all amounts of use and occupancy ("U&O") due under the judgment entered on August 2, 2012 in favor of plaintiffs against 15 defendant limited liability companies ("Judgment I", NYSCEF Doc. No. 1347) is granted to the extent provided herein. This highly contentious and vigorously litigated case has spanned a period of 8 years, during which time multiple motions were heard by three trial court

judges and multiple appeals were heard and decided by the Appellate Division, First Department. While this decision resolves the sole remaining issue pending before this Court, defense counsel indicated at oral argument on the motion that this decision will unfortunately not put an end to the disagreements between the parties (NYSCEF Doc. No. 1391).

The underlying facts and procedural history have been detailed in various prior decisions and will only be summarized here. Pursuant to a Master Lease dated November 2, 2000 between plaintiff Getty Properties Corp. as Landlord and defendant Getty Petroleum Marketing Inc. (“GPMI”) as Tenant, the Landlord leased approximately 800 properties to the Tenant (NYSCEF Doc. No. 442). The Tenant then subleased the sites to the various limited liability companies named as defendants here (the “LLCs”) (see NYSCEF Doc. No. 443). Defendant Del Gadio executed a personal guarantee in connection with most of the subleases (NYSCEF Doc. No. 1357).

As some point in 2011, the Tenant GPMI stopped paying rent and filed for bankruptcy. The Bankruptcy Court terminated the Master Lease and the subleases and all tenancies at the sites (NYSCEF Doc. No. 444). The Landlord then commenced this action on May 22, 2012 to recover possession of the sites, to recover use and occupancy, and to recover damages against Del Gadio for breach of the Guarantee. Following various proceedings before Justice Melvin Schweitzer, a judgment was entered in favor of the plaintiffs in this action against the various defendant LLCs for use and occupancy (“Judgment I”, NYSCEF Doc. No. 1347). The Appellate Division affirmed except with respect to one of the sites and modified the judgment accordingly. 106 AD3d 429 (1st Dep’t 2013).

For purposes of this motion and decision, defense counsel stated in his opposition papers, and the parties agreed on the record, that the amount due and owing on Judgment I against the

LLCs as of November 18, 2019 is \$172,552.88. The sole issue in dispute is whether plaintiffs are entitled to enter a judgment against Del Gadio personally for that amount based on the above-referenced Guarantee. That broadly worded Guarantee states in relevant part that:

In consideration of the Lessor's agreement to enter into the Lease Agreement set forth above with the Lessee and for other good and valuable consideration, the undersigned, who is a manager of the Lessee but is undertaking this guarantee in his personal capacity, does hereby promise and guarantee Lessor full performance by the Lessee of all the terms and conditions of the Lease Agreement, any riders, addenda, exhibits, schedules, modifications, extensions, renewals or amendments thereto, and guarantees the payment to the Lessor of all sums due to the Lessor as rent by virtue of the aforesaid Lease Agreement up to the date that Lessee surrenders possession of the Premises to Lessor. If any sums of money are not paid to the Lessor when due, or if any other default exists, the undersigned shall immediately pay such sums to the Lessor on first written demand and/or cure such default and the Lessor shall be released from any obligation to give notice to or make demand upon, or to pursue any remedy against, the Lessee. It is understood that this shall be a continuing guarantee and shall cover all obligations and indebtedness which the Lessee now has or may incur in the future but limited to all such obligations and indebtedness of Lessor up to the date the Lessee surrenders possession of the Premises to Lessor.... For the avoidance of doubt, notwithstanding any limitation of this guarantee as set out above, it is understood and agreed that this guarantee shall not terminate upon Lessee's relinquishment of the Premises.

In their request in this motion for a money judgment against Del Gadio as Guarantor, plaintiffs rely on the June 13, 2013 decision of Justice Schweitzer granting plaintiffs' motion for summary judgment on all claims, including a breach of guarantee claim (NYSCEF Doc. No. 477). There, Justice Schweitzer expressly found (at p 7) that "Del Gadio [is] liable for the amounts due under the subleases and Guarantees of Subleases, which have not been paid to plaintiffs by the LLCs ..." The Appellate Division affirmed that order, stating that "the motion court properly granted summary judgment to plaintiffs in light of this Court's resolution of the issues on a prior appeal ... To the extent that some of defendants' claims were not resolved on the prior appeal, the motion court properly rejected them." 115 AD3d 616 (2014) (citations omitted). Based on this holding, Judgment II for additional U&O was ultimately entered in 2016

against the LLCs and Del Gadio, jointly and severally (NYSCEF Doc. No. 1348). The Appellate Division unanimously affirmed Judgment II against the LLC and the Guarantor, jointly and severally. 150 AD3d 541, 542 (2017). Plaintiffs therefore argue that the Appellate Division decisions read together compel a finding here that Del Gadio is liable along with the LLCs for the U&O award that is the foundation of Judgment I.

Defendant Del Gadio asserts various arguments in opposition, none of which are persuasive. Defendant does not dispute that the Appellate Division affirmed holdings that Del Gadio was personally liable for use and occupancy unpaid by the LLCs under the terms of his Guarantee. Instead, he argues that those holdings should not be applied here based on the law of the case doctrine, as the doctrine should not be applied where, as here, the determination was erroneous. Specifically, Del Gadio claims that the Appellate Division in its 2013 was simply deciding that the Guarantee bound Del Gadio to the venue selection clause in the lease and that the decision later incorrectly “morphed” into a finding that the Guarantee rendered Del Gadio liable for use and occupancy.

This Court disagrees. The Appellate Division did not so limit its decision and stated instead that Del Gadio “guaranteed full performance of the lease by the relevant LLC defendant.” 106 AD3d at 430. Further, the 2013 decision affirmed Judgment I for use and occupancy against the LLCs, and the 2014 decision affirmed the finding by Justice Schweitzer holding Del Gadio liable for amounts due under the subleases. 115 AD3d 616. Thus, both the trial court and the Appellate Division addressed the issue of Del Gadio’s personal liability for use and occupancy, with Del Gadio having been heard at every step of the proceedings, thereby forming a proper basis for application of the law of the case doctrine.

Similarly without merit is Del Gadio’s claim that plaintiff Gettymart, Inc. is not entitled to a judgment in its favor because only plaintiff Getty Properties Corp. was a party to the Guarantee. Judgment I was entered in favor of both plaintiffs in 2012 and, as previously noted, was affirmed. Therefore, consideration of that argument is foreclosed.

Lastly, Del Gadio argues that the Guarantee is limited by its terms to “rent” which is different than use and occupancy. That argument, too, is foreclosed by law of the case based on the decisions discussed above. What is more, the Guarantee (quoted at length above) expressly states that it “shall cover all obligations and indebtedness which the Lessee now has or may incur in the future ... up to the date the Lessee surrenders possession of the Premises to Lessor.” The U&O at issue pre-dates a formal surrender and acceptance of possession and is covered under the terms of the Guarantee.

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted to the extent of holding defendant Robert G. Del Gadio liable to plaintiffs Getty Properties Corp and Gettymart Inc. for the sum of \$172,552.58 plus interest at the statutory rate of 9% per annum from November 19, 2019, and the Clerk is directed to enter judgment accordingly based on plaintiffs’ e filing of a Proposed Judgment.

2/28/2020  
DATE

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	