

<b>MJ Martin &amp; Son, Inc. v Real Steal Value Stores, LLC</b>
2022 NY Slip Op 32317(U)
January 18, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30641/2018
Judge: Laura G. Douglas
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX  
PART 6

Index No. 30641/2018

\_\_\_\_\_  
MJ MARTIN AND SON, INC.,

Plaintiff,

**DECISION/ORDER**

-against-

**Present:**  
**Hon. Laura G. Douglas**  
**J.S.C.**

REAL STEAL VALUE STORES, LLC and  
USHA PROPPER,

Defendants.  
\_\_\_\_\_

Recitation, as required by Rule 2219(a) of the C.P.L.R., of the papers considered in the review of this motion for summary judgment and to dismiss affirmative defenses and counterclaims (seq. no. 3):

<u>Papers</u>	<u>Numbered</u>
<b>Plaintiff’s Notice of Motion, Affirmation of Michael B. Doyle, Esq. dated March 5, 2021 in Support of Motion, Affidavit of Robert Johnson dated January 27, 2021 in Support of Motion, and Exhibits (“1” through “3” and “A” and “B”).....</b>	<b>1</b>
<b>Memorandum of Law by Danielle Rosenberg, Esq. dated March 17, 2021 in Opposition to Motion and Exhibits (“A” through “F”).....</b>	<b>2</b>
<b>Affidavit of Usha Propper dated March 17, 2021 in Opposition to Motion and Exhibits (“A” through “E”).....</b>	<b>3</b>
<b>Affirmation of Danielle Rosenberg, Esq. dated March 18, 2021 in Opposition to Motion.....</b>	<b>4</b>

*Upon the foregoing papers and after due deliberation, the Decision/Order on this motion is as follows:*

The plaintiff (“M.J. Martin”) seeks summary judgment in the amount of \$703,852.85 plus 9% interest from March 2015, as well as an order dismissing the defendants’ affirmative defenses and counterclaims. The motion is granted solely as order below and is denied in all other respects.

M.J. Martin’s claims stem from a lease agreement between the parties for certain commercial

property. The undisputed lease agreement names M.J. Martin as the landlord, defendant Real Steal Value Stores, LLC (“Value Stores”) as the tenant, and defendant Usha Propper (“Propper”) as the guarantor. In an agreement dated October 16, 2013, Propper personally guaranteed Value Stores performance under the lease, including payment of all sums due thereunder. It appears that Propper was Value Stores operator. The lease provided for a fixed monthly rent on a graduated schedule and additional rent in the form of late fees, real estate taxes, and utilities. The lease also included a provision making Value Stores and Propper liable for legal fees incurred in the event of their default under the lease. M.J. Martin alleges that the defendants vacated the premises owing rent and additional charges due pursuant to the lease and guaranty agreements beginning in April 2014.

M.J. Martin claims that Value Stores has not paid the correct rent since April 2014, vacated the premises, and failed to pay rent beginning on January 1, 2017. M.J. Martin admits that it re-rented the premises from time to time since then. In support, M.J. Martin submits an affidavit from Robert Johnson (“Johnson”), its president. Johnson avers that the underlying lease was dated October 15, 2013 and ran through 2023 and that Propper vacated the premises as of March 18, 2015 via a letter, without his consent and owing \$111,803.96. He applied the security deposit to the arrears, leaving a balance due of \$60,803.96 and continued to send bills for same. Johnson provides a rent history and his affidavit sets forth the arrears calculation, including \$319,781.25 in rent collected from new tenants re-letting during the term of the original lease. Johnson notes that the lease allows for late charges of \$250.00 per month, as well as legal fees.

In addition, the plaintiff submits the letter from Propper to Johnson dated March 18, 2015, which Propper does not disavow. In pertinent part, Propper’s letter states as follows:

“As towards the money you state I owe you, I thought that would have been deducted out of my security. I will pay you whatever it is that I owe you, however I do not have it right at this moment. If you think I owe you, I will make it my business to ring your doorbell and give you whatever it is you claim I owe you whenever I have it in the future.”

“It has gotten to the point that I do not know how to approach you even to give you back your keys. I certainly do feel ashamed.”

Finally, M.J. Martin notes that Propper admitted at her deposition that Johnson did not waive his claims for all of the rent against her (*see* Propper deposition transcript, p. 64, ll. 18-21 ).

In opposition to the motion, Propper concedes that the lease commenced on October 15, 2013

for a 10-year period, with a base rent of \$17,000.00 per month, rising periodically after year two. She submits an affidavit stating that the rent was \$19,261.00 and subsequently increased to \$20,187.00, but disputes M.J. Martin's claim that Value Stores owed \$60,803.96 in rent when it vacated the premises. Propper notes that M.J. Martin has not indicated which months of rent were outstanding at that time. She avers that she gave written notice of the intention to vacate the premises as early as March 18, 2015. She states that she had spoken to M.J. Martin as early as December 2014 to inform it that they could no longer remain due to financial hardships faced by the business. Propper contends that M.J. Martin accepted the keys when she returned them in March and never made any demand for rent prior to commencing this lawsuit, some four years after they vacated the store. Propper claims that the lease obligate M.J. Martin to mitigate its losses. She notes that Johnson's affidavit concedes that the subsequent tenants to which M.J. Martin leased the premises paid substantially less in rent than she had been paying.

Propper admits that the business "did not succeed at all" and that she "ran out of funds to continue investing". She admits to speaking to the landlord in December and giving him the keys to the premises in March, stating that he was "okay with everything at the time" and that she "did not owe him anything further at the time of vacating". Propper assumed that the vacating was supported by M.J. Martin, who would apply the security deposit to offset rent arrears and she would owe nothing. Propper admits that there is no written agreement setting forth this arrangement. Finally, Propper argues that any liability would be for a one-year period, not the four-year period sought by M.J. Martin.

Here, the defendants have admitted that they vacated the premises prior to lease end. They do not set forth any breach by the landlord amounting to a constructive eviction or otherwise. Propper does not dispute that she guaranteed the lease on behalf of Value Stores. The plaintiff's action was commenced within the six-year statute of limitations for a breach of contract claim.

Propper has not submitted sufficient evidence that M. J. Martin acquiesced to the surrender of the lease (*see Gottlieb v. Newton*, 253 AD2d 383 [1<sup>st</sup> Dept 1998] (allegation that landlord verbally agreed to a surrender by which he would accept tender of the premises in return for a release of monies owed insufficient to preclude summary judgment)). There is no express agreement whereby M.J. Martin waived its contractual rights (*see Ring v. The Printmaking Workshop, Inc.*, 70 AD3d 480 [1<sup>st</sup> Dept 2010]). In *Ring*, even a stipulation and court order did not contain any facts to indicate that

the parties manifestly intended the stipulation to constitute a surrender and acceptance of the premises or that it terminated plaintiffs' rights to recover damages under the lease. The Court required "clear and unambiguous waiver by plaintiffs of their rights to recover under the terms of the lease, regardless of the termination of the landlord-tenant relationship itself". Simply turning in the keys to the premises is insufficient (*see Rubin v. Dondysh*, 153 Misc2d 657 [App Term S Ct 2<sup>nd</sup> Dept 1991]). Here, Propper's own letter suggests that M.J. Martin insisted on enforcing the lease's payment terms. The letter clearly shows that Value Stores abandoned the premises, thereby defaulting under the lease.

For these reasons, M.J. Martin is entitled to judgment and dismissal of all of the defendants' affirmative defenses and counterclaims, except for the sixth affirmative defense set forth in their answer. Any disputes regarding the amounts of rent collected by M.J. Martin in mitigation after Value Stores vacated the premises and/or monies actually paid by the defendants under the lease are issues related to damages, which does not preclude summary judgment and can be addressed at a trial on damages (*see Center for Specialty Care, Inc. v. CSC Acquisition I, LLC*, 187 AD3d 46 [1<sup>st</sup> Dept 2020]). Since the amounts in dispute are uncertain, an inquest for the assessment of damages is appropriate.

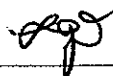
Accordingly, it is hereby

ORDERED that the plaintiff is granted summary judgment against the defendants, jointly and severally, with the amount of said judgment to be determined at an inquest for the assessment of damages to be scheduled following the plaintiff's filing of a note of issue in accordance with 22 NYCRR and payment of any related fees.

The foregoing constitutes the Decision and Order of this Court.

DATED: January 18, 2022

Bronx, New York



HON. LAURA G. DOUGLAS

J.S.C.