

584 Broadway, LLC v Untitled World, LLC
2022 NY Slip Op 34123(U)
December 2, 2022
Supreme Court, New York County
Docket Number: Index No. 656156/2020
Judge: Verna L. Saunders
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. VERNAL SAUNDERS, JSC PART 36

Justice

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INDEX NO. 656156/2020

584 BROADWAY, LLC,

Plaintiff,

MOTION SEQ. NO. 001

- v -

UNTITLED WORLD, LLC, MARIE THERESE CARNEY, and
UNTITLED WORLDWIDE, LLC,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for

SUMMARY JUDGMENT

Plaintiff commenced this action against defendants UNTITLED WORLD, LLC (“Untitled World”), MARIE THERESE CARNEY (“Carney”), and UNTITLED WORLDWIDE, LLC (“Untitled”) to recover, *inter alia*, rent and additional rent owed pursuant to a six-year lease agreement entered into between plaintiff 584 BROADWAY, LLC, as landlord, and Untitled, as tenant, relating to Suite 901 of the building located at 584 Broadway, New York, New York (“premises”). The subject lease commenced on September 1, 2017 and was set to expire on August 31, 2023. However, plaintiff asserts that Untitled vacated the premises on June 1, 2020. In November 2020, plaintiff commenced this action by summons and complaint against defendants to recover \$216,979.87 in rent and additional rent through November 30, 2020, as well as, any amounts accrued after November 30, 2020, until the expiration date of the lease. It sought said amount from Carney pursuant to a good guy guaranty, dated July 20, 2017. (NYSCEF Doc. No. 10, *guaranty*). Plaintiff also seeks costs, disbursements and attorney’s fees. (NYSCEF Doc. Nos. 3, *amended complaint*; 9, *lease*).

Issue was joined by defendants in this action, who raised several affirmative defenses, including force majeure, Act of God doctrine, and frustration of purpose, premised on the COVID-19 pandemic and associated government shutdowns (NYSCEF Doc. No. 6, *answer*).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting summary judgment against Untitled and Carney (hereinafter, “defendants”) on its first, second, fourth and fifth causes of action in the amount of \$322,192.36, on the ground that there are no triable issues of fact as to defendants’ failure to pay minimum rent and additional rent through March 31, 2021. Plaintiff also seeks to dismiss defendants’ affirmative defenses as having no basis in law or fact. (NYSCEF Doc. No. 7, *notice of motion*). Plaintiff discontinues the action as against Untitled World and withdraws its third and sixth causes of action seeking attorney’s fees (NYSCEF Doc. Nos. 7, *notice of motion*; 8 ¶ 46, *Marvin’s affidavit*). Annexed to its moving papers, plaintiff submits, *inter alia*, the subject lease (NYSCEF Doc. No. 9, *lease*); the guaranty (NYSCEF Doc.

No. 10, *guaranty*); a rent ledger from November 6, 2019 through March 1, 2021, representing an outstanding balance of \$324,592.36 (NYSCEF Doc. No. 11, *ledger*); electric bills (NYSCEF Doc. No. 14, *electric bills*); and property tax bills for the subject property (NYSCEF Doc. No. 15, *real property tax bills*). Moreover, plaintiff furnishes the affidavit of Steven Marvin (“Marvin”), executive managing director of Olmstead Properties, Inc. (“Olmstead”), plaintiff’s managing agent, who affirms that, as reflected in the ledger, defendants owe a total balance of \$324,592.35 but that plaintiff is willing to reduce that amount by \$2,400.00, corresponding to legal fee charges in the ledger, for a balance of \$322,192.36 in rent and additional rent through March 31, 2021 (NYSCEF Doc. No. 8, *Marvin’s affidavit*).

Plaintiff argues, in relevant part, that it is entitled to summary judgment against defendants for outstanding rent and additional rent, pursuant to both the lease and the guaranty. As for the affirmative defenses, plaintiff contends that the “pandemic-related” affirmative defenses raised by defendants are insufficient to bar summary judgment in its favor and that the remaining “boilerplate” defenses, lacking in factual specificity and consisting solely of bare legal conclusions, should also be dismissed (NYSCEF Doc. No. 16, *memorandum of law*).

Defendants oppose plaintiff’s motion and cross-move for an order, granting them summary judgment against plaintiff on its first, second, fourth and fifth causes of action, on the basis that no material issues of fact exist that tenant effectuated a valid surrender of the premises by operation of law; denying plaintiff’s request to strike their affirmative defenses; and granting them permission to amend their answer to include a counterclaim for the return of the security deposit and to add additional affirmative defenses. (NYSCEF Doc. No. 19, *notice of cross-motion*). They argue that “dismissal of the [d]efendants pandemic related defenses without further discovery is premature and the [p]laintiff’s argument fails to meet the burden for dismissal of affirmative defenses.” (NYSCEF Doc. No. 20, *Vlahadamis’ affirmation*).

Defendants submit, *inter alia*, the affidavits of Carney (NYSCEF Doc. No. 21, *Carney’s affidavit*); Richard Silver (“Silver”), the chief financial officer of Untitled (NYSCEF Doc. No. 22, *Silver’s affidavit*); Ashley Bermudez (“Bermudez”), chief executive officer of Untitled (NYSCEF Doc. No. 23, *Bermudez’s affidavit*); Cheri Anderson (“Anderson”), managing partner of creative services at Untitled (NYSCEF Doc. No. 24, *Anderson’s affidavit*), who affirm, in relevant part that, on or about May 15, 2020, in light of the COVID-19 global pandemic, Untitled contacted Olmstead, indicating that it was surrendering the premises and lease by the end of the month. Olmstead representatives communicated with Anderson and Bermudez to effectuate the surrender and physical move out of Untitled from the premises. Silver asserts that, on May 21, 2020, he informed Marvin that Untitled would not be able to meet its rental obligations and that it had no money to pay the rental arrears. Silver also affirms that he reached an oral agreement with Marvin that the rental arrears for April and May 2020, in the amount of \$51,413.66, due at the time of Untitled’s surrender, would be deducted from the security deposit, pursuant to ¶ 32 of the lease, and that the remaining balance would be returned to Untitled after surrender of the premises. However, on May 28, 2020, Guy Mauro from Olmstead sent an email to Anderson stating, “Cheri, please sign the enclosed form and return”. The form, entitled “Tenant Move Out & Surrender of Keys Form” (“surrender form”), stated that, “[p]ursuant to the terms of your lease [a]greement, Owner hereby accepts the surrender of the premises, without prejudice and/or

releasing you from any and all obligations under the terms of the [l]ease [a]greement.” Silver asserts that, insofar as this clause was in direct contravention to the oral agreement reached between Silver and Marvin, he never authorized Anderson to sign the surrender form. Defendants annex an unsigned surrender form, dated May 28, 2020 (NYSCEF Doc. No. 29, *unsigned surrender form and email exchange*). Defendants further argue that at no time did plaintiff indicate that it was not accepting the legal surrender of the premises. Untitled vacated the premises on June 1, 2020. Accordingly, defendants maintain that surrender by operation of law precludes summary judgment in plaintiff’s favor and supports the entry of judgment in defendants’ favor.

In reply and in opposition to defendants’ cross motion, plaintiff asserts that the lease prohibits oral termination of the lease and argues that there was never any agreement between the parties regarding Untitled’s surrender or termination of the lease. (NYSCEF Doc. No. 38, *plaintiff’s memorandum of law in opposition to defendant’s cross motion*). Marvin submits an affidavit wherein he denies an oral agreement regarding Untitled’s surrender or termination of the lease, and he states that the lease explicitly bars any oral attempts to surrender or terminate the lease (NYSCEF Doc. No. 34, *Marvin’s affidavit*). Plaintiff also counters defendants’ suggestion that Untitled never signed the surrender form. Attached to his affidavit, Marvin furnishes the surrender form signed by Anderson, dated May 28, 2020. (NYSCEF Doc. No. 35, *surrender form*). Furthermore, addressing the cross motion, plaintiff argues that the counterclaim lacks merit because nothing in the lease requires plaintiff to apply the security deposit to amounts that came due after Untitled vacated the premises and that the three proposed affirmative defenses are equally lacking in merit.

Defendants submit additional affidavits in response to plaintiff’s reply and opposition to the cross motion. However, defendants’ sur-reply, which is not provided for in the CPLR as of right, shall not be considered when disposing of the instant motion.

In a motion for summary judgment, the movant bears the initial burden of presenting affirmative evidence of its *prima facie* entitlement to summary judgment, producing sufficient evidence to demonstrate the absence of any material issue of fact. (see *Sandoval v Leake & Watts Servs., Inc.*, 192 AD3d 91, 101 [1st Dept 2020]; *Reif v Nagy*, 175 AD3d 107, 124-125 [1st Dept 2019]; *Cole v Homes for the Homeless Inst., Inc.*, 93 AD3d 593, 594 [1st Dept 2012].) “Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution.” (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003].)

A tenant is generally relieved of its obligation to pay full rent due under a lease where it surrenders the premises before the lease expires and the landlord accepts surrender. (see *Spinelli’s Pizza, Inc. v G&T1 Corp.*, 208 AD3d 420 [1st Dept 2022].) “A surrender by operation of law occurs when a landlord takes actions so inconsistent with the landlord-tenant relationship that a legal surrender can be inferred.” (see *Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC*, 187 AD3d 46 [1st Dept 2020], citing *Riverside Research Inst. v KMGMA, Inc.*, 68 NY2d 689, 691-692 [1986].) “As distinguished from an express surrender, a surrender by operation of

law is inferred from the conduct of the parties.” (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d at 692).

Here, upon this court’s review of plaintiff’s submissions, to wit, the subject lease, the guaranty, the ledger and bills, and Marvin’s affidavit, this court finds that plaintiff has established its *prima facie* entitlement to summary judgment on its first, second, fourth and fifth causes of action, on liability. Although the burden shifts to defendants to establish the existence of triable issues of fact, they fail to meet this burden. To the extent defendants argue that an issue of fact remains as to whether there was a surrender by operation of law that absolves them of liability, that argument is unavailing. (see *Spinelli's Pizza, Inc. v G&T1 Corp.*, 208 AD3d 420, 421 [1st Dept 2022]; *Connaught Tower Corp. v Nagar*, 59 AD3d 218 [1st Dept 2009]; compare *Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 692 [1986].) Notwithstanding Silver’s representation of an oral agreement regarding surrender, ¶ 21 of the lease agreement states that all understandings and agreements made between the parties are merged into the lease, and that it is the complete express agreement between the parties for which “any executory agreement hereafter made shall be ineffective to change, modify, discharge or effect an abandonment of it” unless it is “in writing and signed by the party against whom enforcement of the change...is sought.” No such agreement memorializing the alleged oral agreement is presented to the court. In fact, the signed surrender form supports a finding that Untitled agreed to vacate the premises with the understanding that tenant remained liable for any outstanding rent and additional rent. Additionally, ¶ 84 of the lease provides, rather explicitly, that the “tenant’s obligation to pay [r]ent and all other obligations . . . shall survive (i) the vacating or surrendering of the [p]remises by [t]enant and (ii) [l]andlord’s entry of the [p]remises in accordance with this [l]ease or at law.” (NYSCEF Doc. No. 9, *lease*).

Pursuant to the guaranty, Carney agreed to “[g]uarantee to [l]andlord . . . the full and timely payment, of all [m]inimum [r]ent, [e]lectric [c]harges, [w]ater [c]harges, [s]prinkler [c]harges, [r]ubbish [c]harges, [m]echanics [l]iens and [r]eal [e]state [t]axes due and payable by [t]enant under the [l]ease . . . from the [l]ease [c]ommencement [d]ate through and including the date that [t]enant and its assigns and sublessees (and any other occupants), if any, shall have completely performed *all* of the following: (i) vacated and surrendered the entire [d]emised [p]remises to the [l]andlord vacant and free of any and all occupants and tenants; (ii) delivered the keys to the [d]emised [p]remises to [l]andlord; and (iii) paid to [l]andlord all outstanding [o]bligations.” (NYSCEF Doc. No. 27, *guaranty* [emphasis added]). Insofar as Carney failed to satisfy *all* requirements set forth in the guaranty, to wit, the tenant’s payment of all outstanding obligations to landlord, Carney remains liable for any outstanding rent and additional rent.

Defendants affirmative defenses, relying on the global COVID-19 pandemic, are rejected as lacking in merit and are hereby dismissed (see *Gap, Inc. v 170 Broadway Retail Owner*, 195 AD3d 575 [1st Dept 2021]; *Center for Specialty Care, Inc. v CSC Acquisition I, LLC*, 185 AD3d 34 [1st Dept 2020]; *558 Seventh Ave. Corp. v Times Sq. Photo Inc.*, 194 AD3d 561 [1st Dept 2021] [finding that reduced revenues did not frustrate the purpose of the lease]; *N.Y. Park N. Salem Inc. v Vogrug LLC*, 2021 NY Slip Op 32395[U], *6 [Sup Ct, NY County 2021, Love, J.]

Turning to the cross-motion to amend, not only does the proposed amendment fail to comport with CPLR 3025(b), requiring that the proposed amended pleading "clearly show [] the changes or additions to be made to the pleading" but, upon further review and given the findings above, the proposed counterclaims and defenses are patently devoid of merit. Thus, the cross-motion is denied in its entirety. All remaining arguments have been considered and are either without merit or need not be addressed given the findings above. It is hereby

ORDERED that plaintiff's motion is granted, only as to liability, and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants MARIE THERESE CARNEY and UNTITLED WORLDWIDE, LLC, jointly and severally, on the first, second, fourth and fifth causes of action; and it is further

ORDERED that this matter be transferred to a special referee for the determination of damages; and it is further

ORDERED that this action is hereby discontinued as against defendant UNTITLED WORLD, LLC; and it is further

ORDERED that plaintiff withdraws its third and sixth causes of action seeking attorney's fees; and it is further

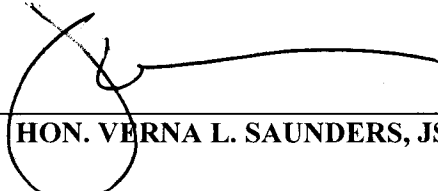
ORDERED that defendants' cross-motion is denied in its entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants, as well as, upon the Clerk of the Court (60 Centre Street, Room 141 B), who shall enter judgment accordingly; and it is further

ORDERED that counsel for plaintiff shall, within twenty (20) days after this decision and order is uploaded to NYSCEF, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the General Clerk's Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that service upon the Clerk of the Court and the General Clerk's Office shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/suptmanh).

December 2, 2022


HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
		<input checked="" type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	OTHER