

1995 Cam LLC v West Side Advisors, LLC

2023 NY Slip Op 31359(U)

April 25, 2023

Supreme Court, New York County

Docket Number: Index No. 159492/2021

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

-----X

1995 CAM LLC,

Plaintiff,

- v -

WEST SIDE ADVISORS, LLC, GARY LIEBERMAN

Defendant.

-----X

INDEX NO. 159492/2021

MOTION DATE 10/12/2022

MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 74, 75, 76, 77, 79

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

Upon the foregoing documents, and after oral argument, which took place on January 31, 2023, where David Rosenbaum, Esq. appeared for Plaintiff 1995 Cam LLC (“Landlord”) and Thomas Lambert, Esq. appeared for Defendants West Side Advisors (“Tenant”) and Gary Lieberman (“Guarantor”) (collectively “Defendants”), Landlord’s motion for leave to reargue/reconsider is granted, and upon reconsideration, Landlord is granted the remainder of post-vacatur rents it sought in the underlying motion for summary judgment, as well as an award of attorneys’ fees.

For the sake of brevity, see the Court’s prior Decision and Order dated August 16, 2022 (NYSCEF Doc. 49). However, the Court adds the following pertinent background summarizing its prior August 16, 2022 Decision and Order, as well as important facts which have come to be since the Court’s prior Decision and Order. In its Decision and Order, the Court afforded Landlord a variety of requested relief. Specifically, Landlord’s motion to amend its Complaint to conform to the evidence was granted. The Court denied Defendants’ motion to dismiss based on an argument that it properly surrendered the premises and that New York City Admin Code § 22-

1005 (the “Guaranty Law”) rendered the guaranty unenforceable. The Court denied Tenant’s motion to dismiss Landlord’s causes of action seeking pre-vacatur arrears, post-vacatur arrears, enforcement of the executed guaranty, and attorneys’ fees.

The Court granted summary judgment to Landlord on the issue of pre-vacatur arrears. The Court likewise granted summary judgment to Landlord finding that the executed guaranty was enforceable. The Court also found that Landlord is entitled to attorneys’ fees. The Court denied Landlord’s entitlement to late fees since the late fee provision is unenforceable. Finally, the Court denied, without prejudice, summary judgment as to post-vacatur arrears, because paragraph 18 of the Lease contained a clause which stated that Landlord shall use commercially reasonable efforts to re-let the premises, and there had not yet been any exchange of discovery regarding what efforts the Landlord had taken to re-let the premises. The Court also found that paragraph 18 was not a proper acceleration clause.

As represented at oral argument, whether paragraph 18 is a proper acceleration clause is not necessarily germane, as the remainder of the rent became due as of February 1, 2023, and Landlord has been unable to find a new tenant for the premises. While in its motion papers the Landlord asserts re-argument is appropriate based on the proper reading of paragraph 18, as mentioned by Mr. Rosenbaum at oral argument, that argument is for all intents and purposes moot. Because of the passage of time, whether Landlord was entitled to accelerated damages for post-vacatur arrears based on a reading of paragraph 18 of the Lease no longer matters because the lease term has ended. At this juncture, Landlord is entitled to the post-vacatur arrears, whether accelerated or not. Thus, while the instant motion was styled as one for re-argument/reconsideration, it can similarly be styled as one for renewal.

Pursuant to CPLR § 2221(d)(2), leave to reargue shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion. Pursuant to CPLR § 2221(e)(2), a motion for leave to renew shall be based upon new facts not offered on the prior motion that would change the prior determination. Whether to grant leave to renew or reargue is in the discretion of the Court (*Bank of America, N.A. v Filho*, 203 AD3d 594 [1st Dept 2022]; *Fulton Market Retail Fish Inc. v Todtman, Nachamie, Spizz & Johns, P.C.*, 158 AD3d 502 [1st Dept 2018]). The Court finds that there are grounds to grant leave to reargue and leave to renew, as set forth below.

Leave to renew is appropriate given new facts, which were not present in the earlier motion for summary judgment – namely that the lease term has now ended. Leave to reargue is appropriate because the Court overlooked the operation of the “and/or” language which granted Landlord the option to either use commercial reasonable efforts or to simply collect the rent as it becomes due despite Tenant’s defaults.

Indeed, the Court of Appeals, in a decision cited to by this Court in its original Decision and Order (*see Holy Properties Limited, L.P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130 [1995]) dealt explicitly with the issue at the case at bar. The Court of Appeals stated that when a tenant abandons the premises prior to the expiration of the lease, a landlord could do nothing and collect the full rent due under the lease, could accept the tenant’s surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or could notify tenant that it was entering and reletting the premises for tenant’s benefit (*id.* at 696). While Defendants argues that this Court should adhere to its prior Decision and Order finding that Landlord obligated itself to use reasonable efforts to relet the premises, the Court disagrees. Defendants cite *Purchase Prods, Inc. v Fifth Ave. Partners, L.P.*, 2011 NY Slip. Op. 33899 (Sup.

Ct. NY Co. 2011), but, crucially, the lease clause which was analyzed in that decision did not have the following language which is contained in the lease at bar:

“Tenant or the legal representatives of Tenant shall also pay Owner 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 premises or any part or parts thereof shall not release or affect Tenant’s liability for damages.”

The Court agrees that pursuant to the “and/or” language between clauses (b) and (c) of paragraph 18 of the Lease, Landlord was provided the option of using commercial reasonable efforts to relet the premises or the option to do nothing and allow its damages to accrue. Therefore, summary judgment should not have been denied as to post-vacatur damages for amounts that had become due as of the date of the Court’s decision.

The Court also finds, as mentioned at oral argument that renewal is appropriate based on the passage of time and expiration of the lease term. As the lease term has ended, Landlord is entitled to the full amount of post-vacatur rents. All post-vacatur rent became due on February 1, 2023. In support of the instant motion, Landlord also provided the Court with evidence of its efforts to relet the premises (NYSCEF Docs. 66 and 71).

Therefore, based on renewal and reargument, Landlord is entitled to the post-vacatur damages it originally sought in its underlying motion for summary judgment. Because Landlord has prevailed in enforcing the terms of the Lease for both pre- and post-vacatur damages, the Court will also entertain at this time an application for attorneys’ fees from Landlord.

Accordingly, it is hereby,

ORDERED that Landlord 1995 Cam LLC’s motion for re-argument/reconsideration is granted, and it is further,

ORDERED that upon reargument/renewal, the Court's prior Amended Decision and Order dated September 1, 2022 (NYSCEF Doc. 55) is superseded and amended by this Decision and Order only to the extent as set forth below; and it is further

ORDERED that Landlord 1995 Cam LLC's motion for summary judgment on its second cause of action holding Defendants West Side Advisors and Gary Lieberman jointly and severally liable for post-vacatur damages in the amount of \$778,532.27¹ is granted and the Clerk of the Court is directed to enter judgment accordingly, plus statutory interest from August 16, 2022 (the date of the Court's original Decision and Order) through entry of judgment, as calculated by the Clerk of the Court, together with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that pursuant to the terms of the lease, the guaranty, and Landlord 1995 Cam LLC's fourth cause of action, Landlord 1995 Cam LLC is entitled to an award of attorneys' fees against Defendants West Side Advisors and Gary Lieberman jointly and severally. On or before May 16, 2023, counsel for 1995 Cam LLC shall submit, via NYSCEF and e-mail to SFC-Part33-Clerk@nycourts.gov, an affirmation of services along with accompanying invoices and time entries in support of its application for attorneys' fees. Thereafter, on or before May 24, 2023, counsel for Defendants shall submit opposition, if any, to 1995 Cam LLC's application for attorneys' fees via NYSCEF and by e-mail to SFC-Part33-Clerk@nycourts.gov. On or before May 31, 2023, counsel for 1995 Cam LLC shall submit a reply to any opposition, and upload said reply to NYSCEF and e-mail same to [---

¹ Pursuant to the affidavit of Aron Weber \(NYSCEF Doc. 74\) Landlord seeks \\$796,874.49 in post-vacatur damages. However, in its prior Decision and Order, the Court found the late fees sought unenforceable, since it amounts to 25% annual interest. Landlord has not moved to re-argue the Court's finding that the late fees are unenforceable. Therefore, the late fees sought, which total \\$18,342.22 have been subtracted from the total amount sought of \\$796,874.49, meaning Landlord is entitled to an award of \\$778,532.27 representing post-vacatur base date rent, electrical charges, and gas meter charges.](mailto:SFC-Part33-</p></div><div data-bbox=)

Clerk@nycourts.gov. The Court requests courtesy copies of all filings to be delivered to the Part Clerk in Room 442, 60 Centre Street, New York, New York; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff 1995 Cam LLC shall serve a copy of this Decision and Order, with notice of entry, on all other parties to this action.

This constitutes the Decision and Order of the Court.

4/25/2023
DATE

Mary V Rosado JSC
HON. MARY V. ROSADO, J.S.C.

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