

**622 Third Ave. Co., LLC v Hyatt Leader Ltd**

2023 NY Slip Op 31587(U)

May 4, 2023

Supreme Court, New York County

Docket Number: Index No. 158856/2020

Judge: Verna L. Saunders

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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. VERNA L. SAUNDERS, JSC

PART 36

*Justice*

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INDEX NO. 158856/2020622 THIRD AVENUE COMPANY, LLC,  
Plaintiff,MOTION SEQ. NO. 002

- v -

**DECISION + ORDER ON  
MOTION**

HYATT LEADER LTD, f/k/a R.W. DAVIS & COMPANY,  
Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

SUMMARY JUDGMENT

In this action seeking damages based on a commercial lease relating to the thirty-fourth floor of the building located at 622 Third Avenue, New York, New York 10022 (“premises”), plaintiff moves, pursuant to CPLR 3211(b) and 3212, dismissing all of defendant’s affirmative defenses and granting summary judgment in favor of plaintiff and against defendant in the amount of no less than \$220,504.17, plus interest and costs (NYSCEF Doc. No. 34, *notice of motion*). Defendant opposes the motion and cross-moves, pursuant to CPLR 3212, for summary judgment in its favor and against plaintiff, on the grounds that there was a valid surrender. Upon this court’s review of the relevant statutes and case law, the motion is decided as follows.

On October 21, 2020, plaintiff, the landlord of the premises, commenced this action by summons and complaint against defendant, the tenant, wherein it alleged that, on or about September 23, 2005, the parties entered into a written lease agreement relating to the premises, as amended by a first amendment of lease, dated October 8, 2015, for a term of ten (10) years following commencement of the first amendment of lease (NYSCEF Doc. Nos. 18-19, *lease, and amendment*). Pursuant to the lease, defendant was required to pay rent and additional rent, but defendant allegedly defaulted in said payments beginning in July 2020. By a Rent Demand dated September 17, 2020, plaintiff requested payment of \$44,501.34 in outstanding rent and additional rent and requiring either the total amount due and owing or surrender of possession of the premises (NYSCEF Doc. No. 4, *rent demand*). Defendant allegedly failed to surrender possession of the premises prior to the expiration date of the rent demand and only vacated and surrendered keys along with possession of the premises on or around December 4, 2020, without paying outstanding rent. The complaint seeks damages based on breach of contract. (NYSCEF Doc. No. 1, *summons and complaint*).

Defendant interposed an answer in this action and asserted eight (8) affirmative defenses: (i) failure to state a claim upon which relief can be granted (first affirmative defense); (ii) waiver, estoppel and laches (second affirmative defense); (iii) unclean hands (third affirmative defense); (iv) that plaintiff allegedly has not sustained damages (fourth affirmative defense); (v) failure to mitigate damages (fifth affirmative defense); (vi) surrender (sixth affirmative defense); (vii)

impossibility, impracticability and/or frustration of purpose (seventh affirmative defense); and (viii) reservation of additional defenses (eighth affirmative defense).

In its motion, plaintiff argues that it has established its *prima facie* entitlement to summary judgment on its claim for breach of the subject lease and that each of defendant's affirmative defenses should be stricken as a matter of law (NYSCEF Doc. No. 41, *plaintiff's memorandum of law*). Plaintiff submits the affidavit of Steven M. Cherniak, Chief Operating Officer of Cohen Brothers Realty Corporation, managing agent for plaintiff, who attests that, defendant breached the terms of the lease and that, through June 2021, the sum of \$220,504.17 remains outstanding in rent and additional rent. He further asserts that there are no valid defenses. Cherniak affirms that plaintiff "never consented to a vacatur of the [p]remises without [d]efendant honoring its [l]ease obligations for payment, nor did [p]laintiff ever sign a written agreement of surrender as would be required under the [l]ease which, under the [n]o-[w]aiver [c]lause in Section 32.01 of the [l]ease, precludes purported 'oral agreements' and requires that any changes to the [l]ease be in writing." Cherniak also states that defendant's affirmative defense of impossibility/impracticability/frustration of purpose should be dismissed because defendant was not prevented from operating its business and the COVID-19 pandemic does not give rise to a situation that would excuse defendant's obligation to pay rent under the lease or otherwise warrant an abatement. (NYSCEF Doc. No. 35, *Cherniak's affidavit*).

In opposition to the motion and in support of its cross-motion, defendant argues that it entered into a valid surrender agreement with plaintiff and, thus, that it is entitled to judgment as a matter of law. Specifically, defendant argues that on November 18, 2020, it sent the Surrender Notice to plaintiff as provided for in the rent demand and enclosed therein keys to the premises (NYSCEF Doc. No. 50, *surrender notice*). By letter dated December 2, 2020, plaintiff acknowledged receipt of the defendant's letters enclosing the keys for the premises and stated: "Landlord hereby accepts the tenants' surrender of possession, only, without prejudice to and expressly reserving landlord's right to seek damages arising from the tenants' breach of lease." According to defendant, the parties entered into a valid written surrender agreement: the rent demand, which afforded defendant the option of either paying the total amount due and owing or surrendering possession of the premises to landlord; defendant's letter electing the option of surrender; and plaintiff's letter confirming acceptance of the surrender. Defendant maintains that, nowhere in the rent demand does plaintiff state that it is seeking both surrender of the premises and payment of the total amount due. To the extent plaintiff attempts to argue the rent demand was "without prejudice" to plaintiff's right to seek damages arising from defendant's breach of the lease, defendant argues that this argument should be rejected. Such an argument ignores that the rent demand was the offer and that the November 2020 electing surrender was acceptance of that offer. Therefore, defendant maintains that the December 2021 letter was merely confirmation of that agreement and that plaintiff consented – in writing – to vacatur and surrender of the premises as an alternative to honoring any continuing lease obligations for payment, and that it waived its claim for damages under the rent demand.

Defendant refutes plaintiff's claim in its statement of material facts that defendant has neither vacated nor surrendered the premises. To this point, it references the affidavit of Cherniak, who attests in support of plaintiff's motion for summary judgment that defendant

vacated and surrendered the keys along with possession of the premises on or around December 4, 2020.

Even assuming, *arguendo*, plaintiff met its initial burden, defendant argues that it has proffered ample proof showing the existence of material issues of fact requiring a trial. Aside from the stated surrender, defendant argues that the purpose of the lease was frustrated by the COVID-19 pandemic and governmental orders, which prevented defendant's use and occupancy of the premises. It further argues that plaintiff is not entitled to dismissal of defendant's second (waiver and estoppel), sixth (surrender) and seventh (frustration of purpose) affirmative defenses.

In reply, plaintiff argues that there was no written surrender agreement signed by both parties and, thus, defendant's defense of surrender must be rejected as a matter of law. Furthermore, no agreement of modification as to unpaid rent can be "pieced together" from the exchange between the parties (NYSCEF Doc. No. 55, *affirmation in reply*).

This court notes that, although defendant has filed a sur-reply, plaintiff is not entitled to a sur-reply as of right and, thus, it shall not be considered. (see *584 Broadway, LLC v Untitled World, LLC*, 2022 NY Slip Op 34123[U], \*\*3 [Sup Ct, NY County 2022].)

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 lease may be surrendered by express surrender or surrender by operation of law. "A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated." (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691-692 [1986]; *Ctr. for Specialty Care, Inc. v CSC Acquisition I, LLC*, 187 AD3d 46, 54 [1st Dept 2020].) "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). Furthermore, "[g]enerally, a tenant is relieved of its obligation to pay full rent due under a lease where it surrenders the premises before expiration of the term and the landlord accepts its surrender." (*Spinelli's Pizza, Inc. v G&TI Corp.*, 208 AD3d 420 [1st Dept 2022].) "Therefore, to relieve him of liability for future rents, the tenant bears the burden of proving that the landlord has accepted a surrender." (*Pollack v Ovadia*, 2019 NY Slip Op 31688[U] [Sup Ct, NY County 2019].) "Whether a landlord has accepted a tenant's abandonment so as to result in a surrender depends on the landlord's intent." (*id.*)

Here, upon its review of the affidavit of Cherniak (NYSCEF Doc. No. 35); the relevant lease provisions (NYSCEF Doc. No. 2-3, *lease, and amendment*); and the rent arrears history

(NYSCEF Doc. No. 36), this court finds that plaintiff has established its *prima facie* entitlement to summary judgment on its claim for breach of the lease. Although the burden shifts to defendant to establish the existence of a material issue of fact, defendant has failed to meet this burden. Contrary to defendant's contention, the proof proffered does not establish a valid surrender that would relieve defendant of its obligation to pay rent under the lease. Although defendant argues that the letters between the parties establish a valid surrender agreement, the court is not persuaded. The rent demand fails to establish an agreement between the parties that vacatur of the premises would relieve defendant of their obligations to pay rent under the lease. The rent demand states, in relevant part:

“TAKE FURTHER NOTICE that on or before October 15, 2020, that being at least FOURTEEN (14) days from the date of service of this rent demand, Tenant must either (a) pay the Total Amount Due And Owing or (b) surrender possession of the Premises to the Landlord, in default of which, the Landlord will commence summary proceedings under the statute or an action for ejectment to recover possession of the Premises and to obtain such other relief as permitted by law.” (NYSCEF Doc. No. 49, *rent demand*).

Furthermore, in its surrender notice, dated November 18, 2020, defendant wrote to plaintiff: “[p]lease send me the surrender agreement and I will see that it gets signed and is returned to you.” In response to this request, plaintiff stated: “Landlord hereby *accepts the tenants’ surrender of possession, only, without prejudice to and expressly reserving landlord’s right to seek damages arising from the tenants’ breach of lease.*” (NYSCEF Doc. No. 51, *December 2020 letter*) (emphasis added). The letters exchanged rebut defendant’s position of a surrender and they fail to establish that plaintiff “manifestly intended” that defendant’s surrender of possession of the premises would terminate plaintiff’s rights to recover damages under the lease. In fact, plaintiff’s December 2, 2020 letter makes clear that its acceptance of defendant’s departure from the premises was conditional upon its reservation of such right. Thus, this court rejects defendant’s contention that there was a valid surrender. (see *New WTC Retail Owner LLC v Fal Coffee WTC, LLC*, 2022 NY Slip Op 30238[U], \*\*11 [Sup Ct, NY County 2022]; *Spinelli’s Pizza, Inc. v G&T1 Corp.*, 208 AD3d 420 [1st Dept 2022]; *Ring v Printmaking Workshop, Inc.*, 70 AD3d 480, 480-481 [1st Dept 2010].)

This court notes that defendant only opposes that branch of the motion seeking dismissal of three affirmative defenses: the second (waiver and estoppel), sixth (surrender) and seventh (frustration of purpose) affirmative defenses. The remaining defenses are deemed waived. For the reasons set forth above, the second and sixth affirmative defenses are dismissed. To the extent defendant argues that it has a valid defense premised on frustration of purpose given the impact of the COVID-19 pandemic, similar arguments have been rejected by courts as insufficient to obviate a defendant’s obligation to pay rent. (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]; *N.Y. Park N. Salem Inc. v Vogrug LLC*, 2021 NY Slip Op 32395[U], \*6 [Sup Ct, NY County 2021].) Accordingly, plaintiff’s motion seeking summary judgment is granted.

Based on the foregoing, defendant’s cross-motion for summary judgment is denied. 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, pursuant to CPLR 3212, for summary judgment against defendant is granted; and it is further

**ORDERED** that defendant’s affirmative defenses are dismissed; and it is further

**ORDERED** that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendant in the amount of \$220,504.17 plus interest and costs, as calculated by the Clerk of the Court; and it is further

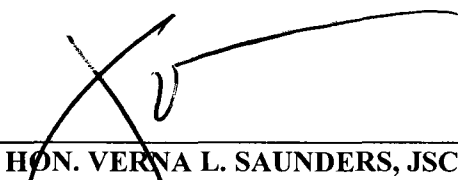
**ORDERED** that defendant’s cross-motion, pursuant to CPLR 3212, is denied; and it is further

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

**ORDERED** that service upon the Clerk of the Court 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/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of this court.

May 4, 2023

  
**HON. VERNA L. SAUNDERS, JSC**

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