

**200 CPS Retail Holdings LLC v 305 Fitness Studio  
58th St LLC**

2023 NY Slip Op 33964(U)

November 6, 2023

Supreme Court, New York County

Docket Number: Index No. 650844/2022

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 14

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200 CPS RETAIL HOLDINGS LLC,

Plaintiff,

- v -

305 FITNESS STUDIO 58TH ST LLC, 305 FITNESS, INC.

Defendant.

INDEX NO. 650844/2022

MOTION DATE 10/18/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

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HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for DISMISS.

Defendants’ pre-answer motion to dismiss portions of plaintiff’s first cause of action is denied.

**Background**

In this breach of lease case, plaintiff, a landlord, seeks to recover unpaid rent from defendants 305 Fitness Studio 58th St LLC (the tenant) and 305 Fitness, Inc., the guarantor. Plaintiff and the tenant entered a 10-year lease in February 2018, and the tenant operated a fitness studio on the premises. In May 2020, according to the tenant, the COVID-19 pandemic forced it to shut down the gym which caused it to default on rent payments. Plaintiff contends that in September 2021, it notified defendants of the arrears owed and demanded payment in one month.

Several months later, in December 2021, the tenant vacated the premises while still owing rent. According to plaintiff, the parties attempted to negotiate a surrender agreement, but this agreement was never completed.

From January 2022 until March 2022, plaintiff rented the premises to another tenant on a month-to-month license agreement. According to defendants, plaintiff received \$60,000 for this short-term rental, none of which was credited to the tenant's account. Plaintiff insists that defendants defaulted under the lease and guaranty and then commenced this case to recover the remaining rent from defendants (through 2028) after the substitute tenant left the premises.

Defendants now move to dismiss portions of plaintiff's first cause of action for arrears. Defendants seek to cut off their liability so they do not owe any rent from January 2022 through the end of the lease. Defendants contend that they surrendered the premises in December 2021, after which the new tenant took over the premises on a month-to-month basis. According to defendants, surrendering the premises terminates their obligation to pay rent as plaintiff never credited the rent paid by the new tenant to defendants' account. Defendants maintain that the failure to credit any rent to the rent ledger suggests that there was a surrender by operation of law.

In opposition, plaintiff contends that a surrender by operation of law is a factual finding that cannot be decided on a motion to dismiss. Moreover, plaintiff argues that it exercised its rights under the lease to re-enter the premises, take possession, and mitigate its damages after its tenant left. Plaintiff asserts that it did not have to credit the rent collected because it constitutes the damages plaintiff suffered as a result of the breach of lease. While attempting to negotiate a surrender, plaintiff reiterated that it reserved all of its rights under the lease. Finally, plaintiff maintains that a surrender does not limit defendants' liability.

In reply, defendants contend that a surrender by operation of law can be determined on a motion to dismiss, as they provided documentary evidence of the surrender. Additionally, defendants argue that the lease gave plaintiff the option to terminate the lease or relet the premises, but because the payments received were not applied to the tenant's account, plaintiff elected to terminate the lease. Furthermore, defendants contend that plaintiff's letter reserving its rights under the lease did not notify the tenant that plaintiff would re-enter and re-let the premises, violating the requirements of a letter meant to preserve a landlord's contractual rights. Finally, defendants assert that a surrender by operation of law precludes any post-surrender liability.

### Discussion

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). “At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted]).

“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, 691-2, [1986]). “Whether a surrender by operation of law has occurred is a determination to be made on the facts.” (*id.* at

692). Moreover, “a surrender by operation of law is inferred from the parties' conduct, where not only must the tenant abandon the premises, but the landlord must accept the premises as a surrender,” (*Ford Coyle Props., Inc. v 3029 Ave. V Realty, LLC*, 63 AD3d 782, 782, 881 NYS2d 146 [2d Dept 2009] [internal quotations and citations omitted]). Most importantly, “[t]he mere retention of keys to the premises by the landlord after the tenant has returned them does not alone constitute a surrender by operation of law” (*id.*).

Defendants' motion is denied. No dispositive evidence was submitted to show that a surrender agreement was entered into before, or even after, the tenant vacated. And the caselaw cited above is clear that a surrender by operation of law is typically made on the facts and not on a motion to dismiss.

The fact is that the lease allowed the plaintiff to enter and re-let the premises and specifically provides that doing so is *not necessarily a termination of the lease or acceptance of a surrender* (see NYSCEF Doc. No. 78, § 21.02[a]). However, defendants were correct to point out that the lease also provides that the landlord cannot “double dip” – that is, money received from a subsequent tenant has to be credited (*id.*). In fact, the lease sets forth a process of how payments from a new tenant should be applied:

“Upon reletting, rentals received by Landlord from such reletting shall be applied first to the payment of any indebtedness other than Minimum Annual Rent due hereunder from Tenant; second to the payment of any costs and expenses of such reletting, including brokerage fees, reasonable attorneys' fees and costs of alterations and repairs; third to the payment of the most current Minimum Annual Rent owed at that time; and the residual, if any, shall be held by Landlord and applied in payment of future Minimum Annual Rent as the same may become due and payable hereunder from Tenant” (*id.*)

At this stage of the litigation, discovery is clearly required to explore how the rent received by plaintiff from the temporary tenant was applied. This includes, but is not limited to, possible expenses incurred by plaintiff for cleaning up the premises, preparing it for re-letting

and a broker's fee. It may be that defendants are ultimately entitled to some credit (or possibly the full amount of rent received from the temporary tenant). But such a determination is premature before the answer to the amended complaint has even been filed.

Of course, to be clear, the Court has no interest in permitting plaintiff to double dip (to recover the full amount due under the lease and to keep the rent from the month-to-month tenant). But it is simply too early to find that is what plaintiff did here. And, according to the plain provisions of the lease, plaintiff was allowed to rent to someone else without it being automatically deemed a surrender. How the rent received by plaintiff from the new and temporary tenant should be viewed is a determination better suited for a summary judgment motion or potentially at a trial.


Accordingly, it is hereby

ORDERED that defendants' motion to dismiss any part of plaintiff's first cause of action is denied and they shall answer the amended complaint pursuant to the CPLR.

Next conference: December 5, 2023 at 11:00 a.m.

By November 28, 2023, the parties shall upload 1) a stipulation about discovery signed by all parties, 2) a stipulation of partial agreement that identifies the areas in dispute or 3) letters explaining why no agreement about discovery could be reached. The Court will then assess whether a conference is necessary (i.e., if the parties agree, then an in-person conference may not be required).

If nothing is uploaded by November 28, 2023, the Court will adjourn the conference or may order a note of issue be filed.

<u>11/6/2023</u> DATE					 ARLENE P. BLUTH, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE