

**80-02 Leasehold v CM Realty Holdings Corp.**

2012 NY Slip Op 33786(U)

June 26, 2012

Supreme Court, Nassau County

Docket Number: 17691/11

Judge: Stephen A. Bucaria

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SHORT FORM ORDER

**ORIGINAL**

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

80-02 LEASEHOLD,

Plaintiff,

-against-

CM REALTY HOLDINGS CORP. a/k/a  
CM REALTY HOLDING CORP., GOTHAM  
ASSET LOCATORS FUND, INC.,  
GOTHAM ASSET LOCATORS, INC., GALF  
HOLDINGS, LLC, MARK SCHEINER,  
SIMON AUERBACHER, "JOHN DOE" and  
"JANE DOE" 1-10,

Defendants.

TRIAL/IAS, PART 1  
NASSAU COUNTY

INDEX No. 17691/11

MOTION DATE: May 10, 2012

Motion Sequence # 001, 002

The following papers read on this motion:

- Amended Notice of Motion..... X
- Cross-Motion..... X
- Affirmation in Opposition..... XXX
- Affirmation in Further Support..... X
- Reply Affirmation/Affidavit..... XXX
- Sur-Reply Affidavit..... X
- Memorandum of Law..... XXXX
- Reply Memorandum of Law..... XX
- Sur-Reply Memorandum of Law..... X

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Motion by plaintiff 80-02 Leasehold LLC for partial summary judgment is **granted** in part and **denied** in part. Cross-motion by defendant Simon Auerbacher for summary judgment dismissing plaintiff's amended and supplemental complaint, to the extent asserted against him, is **denied**.

A review of the action's procedural history and that of the parties will serve to put the applications *sub judice* in proper perspective.

The litigation at bar emanates from the alleged breach of a commercial lease between 80-02 Leasehold Company, LP, plaintiff's predecessor in interest, as landlord, and CM Realty Holdings Corp. (hereinafter "CM Realty"), as tenant.

In response to the alleged breach, plaintiff adopted a two-pronged approach. Initially, it brought a landlord/tenant proceeding in Civil Court of the City of New York which culminated in issuance of a warrant for CM Realty's eviction and the entry of a money judgment against it in the sum of \$48,788.90, representing all rent and additional rent due through January 31, 2010. Thereafter, it initiated the instant action in New York County.

The underlying Summons with Notice, filed in the Office of the New York County Clerk on February 11, 2010, in pertinent part, declares: "The nature of this action is for use and occupancy pursuant to RPL § 220 for premises located at 82-02 Kew Gardens Road, Suite 702, Kew Gardens, New York 11415", and prays solely for a "money judgment for unpaid rent for March 2009 through February 2010, unpaid electric charges for March 2009 through February 2010, and other charges in the total amount of \$54,477.57."

Defendants, CM Realty, Gotham Asset Locators Fund, Inc. (hereinafter Gotham Fund), Gotham Asset Locators, Inc. (hereinafter Gotham Locators) and Scheiner collectively appeared by Notice of Appearance dated February 18, 2010. Plaintiff then served a complaint. The court notes, while the subject pleading is dated March 16, 2010, its purported verification by plaintiff's building manager (cf., CPLR 3020 [d] [1]), Stefania Parisi, was executed several days prior thereto. The appearing defendants interposed an Answer on March 22, 2010.

A Supplemental Summons, adding GALF Holdings, LLC (hereinafter GALF) as a party defendant, and an Amended and Supplemental Complaint, substantially expanding

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the nature of the relief sought, each dated March 26, 2010, followed joinder of issue. The anomalous verification referenced above was also used for the Amended and Supplemental Complaint.

Plaintiff's Supplemental Summons and Amended and Supplemental Complaint were not filed with the New York County Clerk until May 11, 2010, although they had already been served. (see, CPLR 305; see also, Alexander, Practice Commentaries, Mc Kinney's Cons. Laws of N.Y., Book 7B, C305:2) In any event, defendants CM Realty, Gotham Fund, Gotham Locators, GALF and Scheiner collectively joined issue thereon.

Co-defendant Auerbacher appeared in the action and interposed an Answer to the Amended and Supplemental Complaint on or about March 31, 2010 and May 14, 2010, respectively. A Demand to Change Venue appears to have been served contemporaneously with the Auerbacher Answer. Upon plaintiff's failure to acquiesce, Auerbacher, by Notice of Motion dated June 11, 2010, moved to compel the litigation's transfer to this County, contending that venue selected *ab initio* was improper. The plaintiff opposed the relief sought, and, by Notice of Cross-motion dated July 1, 2010, sought summary judgment on several of its causes of action.

By Decision and Order (one paper) dated November 25, 2011, Supreme Court, New York (Braun, J.) granted the primary motion, directed a transfer of the papers on file in the New York County action to Nassau County and denied plaintiff's cross-motion without prejudice to its renewal upon the completion of the transfer process.

In lieu of renewal, plaintiff, charting a variant procedural course, elected to serve and file a document entitled: "AMENDED NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT." Oddly, plaintiff had not previously served a Notice of Motion (in contradistinction to a Notice of Cross-motion) and had no application then on the Court's motion calendar. Thus, there was no motion with which to connect its Amended Notice of Motion.

Moreover, while the referenced document contains a recital, *inter alia*, of the supportive papers, plaintiff chose not to annex same (cf., CPLR 2214 [c]; CPLR 3212 [b]) and implores the Court to retrieve and utilize the papers served in connection with its New York County cross-motion. (see, generally, Sheedy v Pataki, 236 AD2d 92, 97, lv den 91 NY2d 805). In light of the procedural anomalies with which its papers are suffused, plaintiff's insistence that the Auerbacher cross-motion be rejected, as procedurally

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wanting, is perplexing to say the least. In an effort to conserve limited judicial and natural resources, and in view of the action's tortuous procedural history and the nature of the relief sought by the respective movants, each relying on CPLR 3212, the Court believes it appropriate to consider the Record in its entirety and begins its substantive analysis of the applications at bar with a review of the plaintiff's Amended and Supplemental Complaint.

The subject pleading asserts six (6) causes of action.

The first is directed against Gotham Fund, Gotham Locators, GALF, Scheiner and Aurbacher and concerns unpaid base rent and additional rent in the sum of \$48,788.90 asserted to be due through January of 2010, as memorialized by stipulation in the referenced landlord/tenant proceeding initiated by plaintiff's predecessor in interest against its tenant, defendant CM Realty.

The second cause of action is directed against CM Realty and is directed toward the recovery of base rent and additional rent from February 2010 through the end of the lease term in December 2011 in the sum of \$133,394.78, together with an undetermined sum for taxes.

The third cause is directed against defendants Gotham Fund, Gotham Locators and GALF for base rent and additional rent under plaintiff's lease with its tenant, CM Realty. It covers the month of February 2010 and prays for the recovery of \$5,688.67.

The fourth cause of action is similar to the second, but is directed not against its tenant, but rather against Gotham Fund, Gotham Locators, GALF, Scheiner and Aurbacher.

The fifth cause covers the same rental period and prays for the same award as plaintiff's third cause of action. It is directed against Gotham Fund, Gotham Locators, GALF, Scheiner and Aurbacher.

The sixth cause of action is directed toward the recovery of counsel fees under a provision of its lease and is asserted against each of the defendants.

Plaintiff's prayer for relief under CPLR 3212 encompasses all but its second cause of action.

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The underlying lease dated July 20, 2004 was for a term of seven (7) years and three (3) months. Defendant Auerbacher, in the stated capacity as CM Realty's Secretary, executed the subject lease on behalf of the corporate tenant. The lease term, however, did not begin at execution, Rather, its commencement date was deferred to allow for the preparation of the space, a suite on the seventh floor of premises known and designated as 80-02 Kew Gardens Road, Kew Gardens, New York.

By correspondence dated August 30, 2004, the property manager afforded notice that the contemplated renovations were substantially completed and that the lease term would begin on September 1, 2004. Defendant Auerbacher, now as CM's President, countersigned the subject correspondence, expressly agreeing and consenting thereto.

Plaintiff's claims against the various defendants rest on disparate legal theories. Its claims against Scheiner and Auerbacher are premised on their status as officers of defendant, CM Realty, a New York corporation, and the execution in July of 2004 of the lease and resultant assumption of new obligations at a time when it was merely authorized to wind down its affairs, due to its dissolution by proclamation and annulment of authority effective more than one (1) year prior thereto. Plaintiff also characterizes the individual defendants as "the real parties in interest."

Plaintiff's claims against Gotham Fund, Gotham Locators and GALF are rooted in *quantum meruit* and predicated upon their occupancy of the subject leasehold and the payment of rent. They, too, are characterized as "the real parties in interest." The claim against CM Realty is premised on the underlying lease.

Focusing, initially, on plaintiff's claims against the individual defendants, the Court notes that the Records of the New York State Department of State, Division of Corporations list Mark Scheiner as the Chairman or Chief Executive Office of CM Realty, a status he does not dispute.

Auerbacher's equivocation as to his status with CM Realty (compare ¶ 14 of the affidavit of 2/12/12 with ¶ 13 of the affidavit of 7/21/10) cannot be reconciled with, and is insufficient to rebut, the manner in which he signed both the underlying lease and subsequent commencement date agreement. Similarly, his assertion that the date appearing on the lease (7/20/04) may not be the date of its execution is disingenuous in light of the confirmation appearing within the countersigned commencement date agreement.

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"Pursuant to Tax Law § 203-a, the Secretary of State may dissolve a corporation by proclamation for the nonpayment of franchise taxes. Upon dissolution, the corporation's legal existence terminates (see Lorisa Capital Corp. v Gallo, 119 AD2d 99, 109)." (Moran Enterprises, Inc. v Hurst, 66 AD3d 972, 975)

"Dissolved corporations have neither de facto nor de jure existence and '[a]n individual who enters into a contract on behalf of a corporation that has neither de facto nor de jure status is individually obligated on that contract' (Commonwealth Tit. Ins. Co. v 535 W. 162nd St. Equities, Inc., 5 Misc 3d 1017[A], citing Tax Law § 203-a; Business Corporation Law § 1005; Brandes Meat Corp. v Cromer, 146 AD2d 666; Lorisa Capital Corp. v Gallo, 119 AD2d 99; Imero Fiorentino Assoc. v Green, 85 AD2d 419; Puro Filter Corp. of Am. v Trembley, 266 App Div 750)." (Lodato v Greyhawk North America, L.L.C., 10 Misc. 3d 418, 421, affd 39 AD3d 496).

Personal liability, in that context, is not limited to the signatory, alone, but extends to the officers of the defunct corporation. (see, Keystone Mechanical Corp. v Conde, 309 AD2d 627 [1<sup>st</sup> Dept.]

Thus, absent a viable defense, defendants Auerbacher and Scheiner have personal exposure. In this regard, the Court notes Auerbacher's contention that he was unaware of the CM Realty's dissolution.

"[A]n individual who has 'no actual knowledge of the dissolution' (Bedford Hills Supply v Hubert, 251 AD2d 438), and thus has not 'fraudulently represented the corporate status' of the dissolved entity, will not be held personally liable for the obligations undertaken by the entity while it was dissolved (Bedford Hills Supply v Hubert, 251 AD2d 438, id.)." (Lodato v Greyhawk North America, LLC, 39 AD3d 496, 497 [emphasis supplied]).

As the Court "does not weigh the credibility of the affiants unless untruths are clearly apparent" (French v Cliff's Place Ltd., 125AD2d 292, 293 [emphasis supplied]), Auerbacher's protestations of ignorance may suffice to raise a material triable factual issue and forestall a summary determination. However, the probative force and persuasive quality of such representation, in light of the affiant's equivocation regarding his relationship to CM Realty, should not be considered dispositive at this stage of the litigation, even in the absence of proof to the contrary. (see, PJI 1:22)

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Based on the foregoing, plaintiff's prayer for summary judgment on its first cause of action, insofar as asserted against Auerbacher, is **denied**.

That Scheiner was keenly aware of CM Realty's corporate status is evident from a perusal of his opposing affidavit of July 21, 2010, in which he avers as follows:

"In or about March 31, 2004 Gotham [Fund] was formed. In or about June 2004 Gotham [Fund] began looking for office space, and inquired about certain vacant office space at 80-02 Kew Gardens Road, Kew Gardens, New York. The plaintiff herein, as the landlord of the [subject] property, refused to enter into a lease with Gotham [Fund] in June 2004, because at the time, [it] had no assets to secure the lease. It was fully disclosed to the plaintiff in June 2004, that defendant [CM Realty] was an inactive company that was winding down its affairs, and still had certain assets. Upon this clear disclosure to the plaintiff, the plaintiff insisted that the lease dated June 20, 2004 \*\*\* be put into the name of [CM Realty] and not Gotham [Fund]."

Scheiner's exculpatory effort is unavailing, as his averments suffer from a paucity of detail. Notably, he fails to identify to whom and by whom such "clear disclosure" was made and/or delineate with specificity when it is asserted to have occurred. It is unclear, in any event, why such disclosure would have been made to the plaintiff herein, inasmuch as the plaintiff is the landlord's successor in interest. Tellingly, no documentary proof has been submitted to corroborate the affiant's representation.

In any event, the bald, conclusory, self-serving *ipse dixit* raises no material triable factual issue and is insufficient to withstand plaintiff's prima facie demonstration of entitlement to summary judgment on its first cause of action, insofar as asserted against him. (see, ACF Hillside, LLC v Lambrakis, 95 AD3d 794; Titan Communications, Inc. v Diamond Phone Card, Inc., 94 AD3d 740).

Based on the foregoing, plaintiff's prayer for summary judgment on its first cause of action, insofar as asserted against defendant Scheiner, is **granted**.

The same legal principles apply with equal vigor to plaintiff's third through sixth causes of action.

Plaintiff's third through fifth causes of action are directed toward the recovery of rent and additional rent for the period commencing February 2010 through the end of the lease term in December of 2011, and its sixth prays for an award of counsel fees.

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"Under § 749(3) of the New York Real Property Actions and Proceedings Law (McKinney's 1979) ('NYRPAPL'), the issuance of a warrant of eviction is the judicial act which cancels the lease agreement and annuls the relation of landlord and tenant." (*In re 3220 Erie Blvd. East, Inc.*, 121 B.R. 684, 687 [Bkrcty. N.D.N.Y.]; see also, *Rocar Realty Northeast, Inc. v Jefferson Valley Mall Limited Partnership*, 38 AD3d 744, 747).

"Although an eviction terminates the landlord-tenant relationship, the parties to a lease are not foreclosed from agreeing that the tenant will remain liable for the rent after eviction (see, *International Publs. v Matchabelli*, 260 NY 451, 454; *Mann v Munch Brewery*, 225 NY 189, 194; *Hall v Gould*, 13 NY 127, 133-134)." (*Holy Properties Limited, L. P. v Kenneth Cole Productions, Inc.*, 87 NY2d 130, 134; see also, *International Publications, Inc. v Matchabelli*, 260 NY 451, 454).

Thus, RPAPL § 749(3) will afford no succor to the individual defendants, as the underlying lease requires the payment of rent notwithstanding the termination of the lease.

Moreover, the lease provides that the landlord is entitled to counsel fees in any legal action brought against the tenant for breach of the latter's obligation to pay rent.

Inasmuch as the tenant would be contractually obligated to the plaintiff for rent and additional rent through the balance of the lease term, together with reasonable counsel fees, as a species of contract damages, (see, *Holy Properties Limited, L. P. v Kenneth Cole Productions, Inc.*, *supra*; *International Publications, Inc. v Matchabelli*, *supra*); inasmuch as defendant Scheiner is individually obligated on that contract for the tenant's obligations (see, *Lodato v Greyhawk North America, LLC*, *supra*; *Keystone Mechanical Corp. v Conde*, *supra*) Scheiner's liability to the plaintiff on its third through sixth causes cannot be gainsaid.

Based on the foregoing, plaintiff's motion for summary judgment against defendant Scheiner is **granted** to the extent of liability on plaintiff's third through sixth causes of action.

As noted, defendant Auerbacher's liability to the plaintiff, stands and falls with his awareness of CM Realty's dissolution. Auerbacher's denial on point precludes a summary finding against him on any of plaintiff's claims. Accordingly, plaintiff's motion for summary judgment as against defendant Auerbacher is **denied**.

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By parity of reasoning, Auerbacher's cross-motion for summary judgment dismissing plaintiff's complaint, insofar as asserted against him, is also denied.

Whether liability may be imposed against Gotham Fund, Gotham Locators and/or GALF under any of plaintiff's causes of action cannot be resolved on this Record and turns on when each surrendered possession of the leasehold.

"[T]he absence of privity of contract is not a bar to a cause of action to recover damages for use and occupancy (see, 19 W. 45th St. Realty Co. v Doram Elec. Corp., 233 AD2d 184; Ministers, Elders & Deacons of Refm. Prot. Dutch Church v 198 Broadway, 152 Misc 2d 936, 942). The obligation to pay for use and occupancy does not arise from an underlying contract between the landlord and the occupant (see, Ministers, Elders & Deacons of Refm. Prot. Dutch Church v 198 Broadway, supra). Rather, an occupant's duty to pay the landlord for its use and occupancy of the premises is predicated upon the theory of quantum meruit, and is 'imposed by law for the purpose of bringing about justice without reference to the intention of the parties' ( Rand Prods. Co. v Mintz, 72 Misc 2d 621, quoting 1 Williston, Contracts § 3A, at 13 [3d ed])." (Eighteen Associates, L. L.C. v Nanjim Leasing Corp., 257 AD2d 559, 559 - 560).

Moreover, "[w]here a party other than the lessee is shown to be in possession of the leased premises and is paying rent, a presumption arises that the lease has been assigned to that party (see Mann v Munch Brewery, 225 NY 189, 193; Gateway I Group, Inc. v Park Ave. Physicians, P.C., 62 AD3d 141, 147; Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP, 13 AD3d 869, 870)." (Bush v Mechanicville Warehouse Corporation, 79 AD3d 1327, 1330 [3d Dept.]).

Documentary proof demonstrates that Gotham Fund, Gotham Locators and GALF, at various times during the tenure of the lease term, occupied the leasehold and made various payments to plaintiff's predecessor in interest. Occupancy may be reasonably inferred not only from the various payments made, but also from the use of the leasehold's address which appears on the face of each of the checks issued.

Although the subject defendants may be deemed to have assumed CM Realty's lease and a concomitant responsibility for the payment of rent during periods of occupancy, it does not follow that the subject defendants are exposed to liability for any period subsequent to the surrender of the leasehold.

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In this regard the Court notes "an assignee will only be liable for covenants that run with the land while in privity of estate (see Hart v Socony-Vacuum Oil Co., 291 NY 13, 16; Mann v Munch Brewery, 225 NY at 195; Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP, 22 AD3d at 937; Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP, 13 AD3d at 870). Once privity of estate is broken by reassignment or surrender of possession, the liability on the covenants that run with the land ends, and there can be no claim for post-eviction rent unless there was an express agreement to undertake the terms of the lease (see Hart v Socony-Vacuum Oil Co., 291 NY at 16; Mann v Ferdinand Munch Brewery, 225 NY at 195; Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP, 22 AD3d at 937; Salvatore R. Beltrone Marital Trust II v Lavelle & Finn, LLP, 13 AD3d at 870-871; Modica v Capece, 189 AD2d 860)." (Gateway I Group, Inc. v Park Avenue Physicians, P.C., 62 AD3d 141, 148 [emphasis supplied]).

The date on which each surrendered possession is not addressed in the Record. Moreover, the Court finds plaintiff's characterization of the defendants, other than CM Realty, as "real parties in interest" is not determinative of their liability. Consequently, plaintiff's prayers for summary judgment, as against Gotham Fund, Gotham Locators and GALF, are denied.

Lastly, plaintiff's prayer for summary judgment on its sixth cause of action, insofar as directed against its tenant, CM Realty, is granted with the amount to be determined at trial on the issue of damages. (see, Holy Properties Limited, L. P. v Kenneth Cole Productions, Inc., *supra*; see also, Rep A8 LLC v Aventura Technologies, Inc., 68 AD3d 1037).

So ordered.

Dated 26 June 12

Stephen J. Swartz

J.S.C.

ENTERED

JUN 28 2012

NASSAU COUNTY  
COUNTY CLERK'S OFFICE