

**West 45 APF LLC v Take Time to Travel, Inc.**

2012 NY Slip Op 30657(U)

March 11, 2012

Supreme Court, New York County

Docket Number: 116926/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

West 45 APF LLC

Plaintiff (s).

INDEX NO.

116926/09

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

Take home to Travel, Inc  
and Anil Patel

Defendant (s).

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, the court's decision on this (these) motion (s) is/as follows:

Motion (s) decided in accordance with  
the accompanying memorandum decision

**FILED**

MAR 19 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 3/14/12

Hon. Judith J. Gische, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SETTLE/SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

WEST 45 APF LLC,

Plaintiff,

-against-

TAKE TIME TO TRAVEL, INC. and  
ANIL PATEL,

Defendants.

DECISION/ ORDER

Index No.: 116926/09

Seq. No.: 002

PRESENT:

Hon. Judith J. Gische  
J.S.C

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

**FILED**

MAR 19 2012 Numbered

Papers

Pltf n/m (RR) w/MIR affirm, exhs ..... 1

NEW YORK  
COUNTY CLERK'S OFFICE

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action, by Plaintiff West 45 APF LLC ("plaintiff" or "West"), to recover damages accrued under a commercial lease agreement, that the Defendants Take Time To Travel, Inc. ("TTTT") entered into, and that defendant and Anil Patel ("Patel") personally guaranteed (collectively referred to as "defendants"). For reasons fully addressed in the Court's prior order dated October 5, 2011 ("prior order") the Court granted partial summary judgment against defendants on the issue of liability, but denied summary judgment on the issue of damages. Defendant Patel opposed the motion for summary judgment.

Plaintiff now moves to reargue the prior order on the basis that the Court erred in stating that no admissible evidence was provided to establish the date that the leased premises were re-let, concluding that this fact was set forth only in counsel's attorney

affirmation. Plaintiff argues that, contrary to the Courts conclusion, the underlying motion was supported by the reply affidavit of Regina Taylor ("Taylor reply affidavit"), the asset manager of the holding and management company of West. Although there is proof of service, defendants have failed to appear or otherwise respond to this present motion to reargue.

A motion for leave to reargue pursuant to CPLR § 2221 is addressed to the Court's discretion (Foley v. Roche, 68 A.D.2d 558 [1st Dept. 1979]). It may be granted on a showing that the Court overlooked or misapprehended the facts or the law (Williams P. Pahl Equip. Corp. v. Kassis, 182 A.D.2d 22 [1st Dept. 1992]). At bar, the Court incorrectly stated that plaintiff failed to support its underlying motion by a person with knowledge of the facts (Regina Taylor). The Court, therefore, grants reargument.<sup>1</sup> For the reasons set forth below, the Court adheres to its decision on the issues of liability, but, otherwise, has revised its conclusions on the issue of damages.

The reader is presumed to be familiar with the prior order which is incorporated by reference herein. Plaintiff seeks rent and additional rent arrears from defendant TTTT, pursuant to the terms of a lease, for the period of time of November 2009 through November 1, 2010. Plaintiff seeks the same from defendant Patel, pursuant to a guarantee, for the period of time of November 2009 through February 2010. In his opposition Patel claimed that plaintiff may have mitigated its damages by re-letting the Premises, thereby reducing any damages owed. Patel also disputed certain of plaintiff's methods of computation used to reach the amounts sought from defendants under the

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<sup>1</sup> Plaintiff did not provide the Court with a copy of Patel's opposition papers, filed in the underlying motion. The Court however, obtained the underlying file from the Clerk's office and disregards this technical deficiency in plaintiff's papers.

lease and guarantee. In its prior order, the Court denied, without prejudice to renew, plaintiff's motion to amend the complaint. The Court also dismissed defendant's first and second affirmative defenses, but denied the dismissal of the third affirmative defense, that the complaint does not properly compute the amount due to the landlord. Finally, the Court granted summary judgment as to liability only against TTTT and Patel, and directed further discovery on the issue of damages.

In light of the Taylor affidavit, the prior order is modified as follows:

CPLR § 3212: Take Time To Travel, Inc.

Here, the parties do not dispute that TTTT breached the terms of the commercial lease by unilaterally vacating the premises on November 30, 2009, even though the original lease term between West and TTTT was to have expired May 31, 2012. The Taylor Affidavit establishes that the premises were re-let in January 1, 2011. Plaintiff claims that it is not seeking any damages incurred after November 2010, which is before the premises were re-let. Therefore, plaintiff claims that the issue of any rent or additional rent that it may have collected from the new tenant are not relevant, because it is not seeking rents from plaintiff for overlapping periods.

In Patel's original opposition papers, he does not dispute the calculation of outstanding rent in the amount of \$117,333.10. He only proffers the theory that the premises may have been re-let in time for mitigation of damages to apply. Ms. Taylor's affidavit proves that Patel's argument is unavailing. Based on the foregoing, the Court now also grants summary judgment to plaintiff, in the amount of \$117,333.10.

CPLR § 3212: Anil Patel

It is undisputed, that pursuant to the terms of the guarantee, Patel is personally

liable for TTTT's breach of the lease. Article C. ¶ 1. of the Guarantee contains the following language:

"Principal guarantees to Landlord the payments and performance of Tenant's obligations under an in accordance with the Lease, including, without limitation, the payment of fixed and additional rent (the "Obligations"). This is a guarantee of payment and not only of collection. Guarantor's liability pursuant to this guarantee shall be limited to the sum of Obligations which accrue up to the date that is the last to occur of: (a) Tenant vacating the Demised Premises; (b) Tenant removing its property from the Demised Premises; (c) Tenant delivering the keys to the Landlord and surrendering the Demised Premises; (d) the expiration of three (3) full calendar months after the date that Tenant has given Landlord written notice that it will surrender possession of the Demised Premises. Landlord may, at its option, proceed against Principal and Tenant, jointly and severally, or Landlord may proceed against Principal under this Agreement without commencing any suit or proceeding of any kind against Tenant, or without having obtained any judgment against Tenant. (Taylor Affid., Exhibit "H").

The parties do not dispute that under the Guarantee Patel is liable for three months of rent from the date TTTT vacated the premises. Since TTTT vacated as of November 30, 2009, Patel claims that he is only personally liable for rent and additional rent incurred for the period of December 1, 2009 through February 28, 2010, which he calculates to total at \$28,658.67. The terms of the guarantee state that Patel is liable for "the sum of obligations which accrue" within the relevant period. Pursuant to the calculations proffered in the Taylor Reply Affidavit, the Court finds that Patel is personally liable for the following amounts:

<b>Rent</b> \$6,886.18 (x 4 - November, December, January, February)	<b>\$26,744.72</b>
<b>Electricity</b> \$1,136.76 (x 4 - November, December, January, February)	<b>\$4,547.04</b>
<b>Water</b> \$25 (x 4 - November, December, January, February)	<b>\$100.00</b>
<b>Improvements</b> (Incurred sporadically over 2009)	<b>\$2,400.00</b>
<b>Elevator access</b> (undisputed)	<b>\$640.00</b>
<b>1.5% monthly late fee</b> (November, December, January, February)	<b>\$1,253.69</b>

<b>\$10 daily late fee (x 120 days)</b>	<b>\$1,200.00</b>
<b>Legal fees (incurred from breach to filing of law suit)</b>	<b><u>\$8,011.07</u></b>
<b>Total</b>	<b>\$44,896.52</b>

Based on the foregoing, the Court now grants summary judgment against Patel, in the amount of \$44,896.52.

**CPLR § 3025: Leave to Amend the Complaint**

Although plaintiff requests to conform the pleadings to the evidence under CPLR § 3025 (b), the Court grants the motion pursuant to CPLR § 3025 (c). "Leave to conform a pleading to the proof pursuant to CPLR 3025 (c) should be freely granted absent prejudice or surprise resulting from the delay." Rodriguez v. Panjo, 81 A.D.3d 805 (2d Dept. 2011). Here, plaintiff requests leave to amend the complaint to conform the evidence presented on this motion to include all sums due and owing under TTTT's lease with defendant through the date of judgment, inclusive. As defendants have not submitted any opposition to this portion of the motion, plaintiff's motion to conform the pleadings to the proof is granted.

**CPLR § 3212(b): Affirmative Defenses**

In light of the findings made on reargument, the Court now grants dismissal of the third affirmative defense, that the complaint does not properly compute the amount due to the landlord. Plaintiff has provided both sworn affidavits from a person with personal knowledge and papers documenting the amounts outstanding and due, thus the Court finds Patel's arguments unavailing.

**Attorney's Fees**

The plaintiff has requested that the Court set this matter for a hearing on additional counsel fees incurred in this matter on or after November 2010. Since this motion has

been submitted on default, the Court, therefore, refers this issue to a Special Referee to hear and determine. Plaintiff is hereby directed to serve a copy of this decision and order upon the Office of the Special Referee so that this reference may be placed on the calendar.

### **CONCLUSION**

*For the foregoing reasons, It is hereby:*

**ORDERED** that the motion for re-argument is granted , and It is further

**ORDERED** that upon re-argument, plaintiff, WEST 45 APF LLC's, motion for summary judgment against defendants, TAKE TIME TO TRAVEL, INC. is modified to grant the motion for summary judgment in the amount of ONE HUNDRED SEVENTEEN THOUSAND THREE HUNDRED THIRTY THREE DOLLARS AND TEN CENTS (\$117,333.10) and that the clerk shall enter a money judgment in favor of plaintiff together with the costs and disbursements of this action as taxed by the clerk of the Court and plaintiff shall have execution thereof; and It is further

**ORDERED** that upon re-argument, plaintiff, WEST 45 APF LLC's, motion for summary judgment against defendant, ANIL PATEL, is modified to grant the motion for summary judgment in the amount of FORTY FOUR THOUSAND EIGHT HUNDRED NINETY SIX DOLLARS AND FIFTY TWO CENTS (\$44,896.52) and that the clerk shall enter a money judgment in favor of plaintiff together with the costs and disbursements of this action as taxed by the clerk of the Court and plaintiff shall have execution thereof; and it is further

**ORDERED** that upon re-argument, plaintiff, WEST 45 APF LLC's, motion to conform the pleadings to the evidence is granted; and it is further



**ORDERED** that upon re-argument, plaintiff, WEST 45 APF LLC's, motion to dismiss defendants, TAKE TIME TO TRAVEL, INC. and ANIL PATEL's, affirmative defenses is granted as to the third affirmative defenses; and it is further


**ORDERED** that upon re-argument, the issue of plaintiff WEST 45 APF LLC, reasonable attorneys' fees is granted to the extent of referring the matter to a Special Referee to hear and determine. Plaintiff shall serve a copy of this decision and order on the on the Office of the Special Referee so that this matter may be placed on the calendar; and it is further

**ORDERED** that any relief not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the Court.

Dated: New York, New York  
March 11, 2012

So Ordered:

  
HON. JUDITH J. GISCHE, J.S.C.

**FILED**

MAR 19 2012

NEW YORK  
COUNTY CLERK'S OFFICE