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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : **DONNA M. MILLS**   PART ___58___
                              Justice

REAL ESTATE ALTERNATIVES PORTFOLIO 4MR,
LLC,   INDEX NO.   106845/11

                          Plaintiff,   MOTION DATE _____

                 -v-   MOTION SEQ. NO. _004_

D.B. COMPUTER INVESTMENTS, ~~INC~~
d/b/a DATA RECOVERY CORP. and DMITRY
BELKIN,   MOTION CAL NO. _____
                          Defendants.

FILED
JUN 18 2013
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to _____ were read on this motion to/for reargument.

                                                   PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....   1

Answering Affidavits- Exhibits _____   2

Replying Affidavits _____   3

CROSS-MOTION: _____ YES ✓ NO

Defendants D.B. Computer Investments, Inc. and Dmitry Belkin seek an Order

pursuant to CPLR § 2221 to reargue this Court's prior order dated November 14, 2012

which granted plaintiff's motion for summary judgment against defendants in the

amount of $24,920.56 plus interest from May 4, 2012 at the rate of 9% interest. The

Court further found defendants' liable on plaintiff's third cause of action in regards to

attorney's fees.

"A motion for reargument, addressed to the discretion of the court, is designed to

afford a party an opportunity to establish that the court overlooked or misapprehended

the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (Foley v Roche, 68 AD2d 558 [1st Dept. 1979]).

In the instant matter, in support of their motion to reargue, defendants, inter alia, argue that this Court erred in treating both the defendants as one, instead of looking at the facts presented that the two documents signed, the lease and the personal guarantee signed by Dimitry Belkin had different terms and provided for different remedies. In light of this Court's failure to address the distinction between the lease and the personal guaranty in the May 4, 2012 decision, defendants' motion to reargue is granted. However, after considering the plaintiff's arguments, the Court adheres to its original findings of fact and conclusions of law which granted the plaintiff's motion for summary judgment.

In the underlying action, it is undisputed that the defendants took possession of the subject premises in or around October, 31, 2008 and vacated said premises in or around October, 2010. The terms of the lease was for five years, commencing on December 1, 2008 and expiring on November 30, 2013. Pursuant to the terms of the lease, D.B. Computer was, inter alia, required to pay base rent in the amount of $2,008.50 each month to plaintiff as and for the rental of the premises for the period from December 1, 2009 through November 30, 2010. As of June 2010, plaintiff claims that there was a rental balance of $200.00. D.B. Computer purportedly then failed to make the payment of any rent at all for the months of July, 2010 through October, 2010, when D.B. Computer vacated the premises.

On May 4, 2011, plaintiff transferred ownership of the premises, and now seeks rent due through May 4th 2011 in the amount of $22, 655.06 plus late charges and legal fees. This Court finds that the plaintiff, has met its prima facie burden of demonstrating an entitlement to summary judgment on its causes of action against

defendant D.B. Computer. The provisions of the within lease expressly provide that D.B. Computer shall remain liable for the rent through the termination of the lease. The lease also provided that the tenant must pay any rent through the unexpired term of the lease. Here, the plaintiff established in the underlying motion papers, that the leased premises had not been re-rented. Therefore defendants remained liable to plaintiff for the full amount due through May, 2011 when ownership was transferred.

In opposition to summary judgment, defendant D.B. Computer's argument that it was constructively evicted by the plaintiff's failure to make appropriate repairs was not raised in the underlying motion. Advancing a new theory to prevent liability is improper on a motion to reargue (DeSoignies v Cornasesk House Tenants' Corp., 21 AD3d 715 [1st Dept 2005]).

Defendant Dmitry Belkin, who as President of D.B. Computer executed a 'Good Guy' guaranty personally guaranteeing payment of rent and performance of a lease entered into between plaintiff, as landlord, and D.B. Computer as tenant. The guaranty clearly stated that the guarantor shall not be liable upon voluntarily, or pursuant to a court order or judgment, physically vacating and surrendering legal possession of the premises to the landlord. It is undisputed that D.B. Computer vacated the premises in October, 2010, however, there is no proof establishing that D.B. Computer surrendered legal possession of the premises pursuant to the lease, which would limitd defendant Dmitry Belkin's exposure pursuant to the guaranty that he signed as President of D.B. Computer.

"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 [citations omitted]).Thus, when a tenant abandons possession and the landlord thereafter utilizes the premises in a manner inconsistent with the

abandoning tenant's rights under the lease, such as, for example, by reletting the premises or using it for its own benefit, a surrender will be inferred (see, Stahl Assoc. Co. v Mapes, 111 AD2d 626, 628; Centurian Dev. v Kenford Co., 60 AD2d 96, 100). Significantly, the landlord's reletting of the premises and the tenant's return of the keys are demonstrative of the parties' intent to terminate the lease (see, e.g., Bay Plaza Estates v New York Univ., 257 AD2d 472, 473; NHS Natl. Health Servs. v Kaufman, 250 AD2d 528, 529; David Present Co. v Tamasauskas, 210 App Div 786, 787). "Whether a surrender by operation of law has occurred is a determination to be made on the facts" (Riverside Research Inst. v KMGA, Inc., supra at 692), and where, as here, the pertinent facts are not disputed, the determination is made as a matter of law (see, e.g., NHS Natl. Health Servs. v Kaufman, supra; Aderans & Alfieri v Rudes, 136 AD2d 519). Here, plaintiff established that the premises were not relet for the period that they are seeking rent. Moreover, plaintiff alleged in its moving papers for summary judgment that the keys to the premises were never returned, garbage was scattered throughout the premises and alterations were not removed by D.B. Computer in accordance with the terms of the lease. Since this Court finds that no surrender occurred, plaintiff is entitled to enforce the provisions of the guaranty signed by defendant Dmitry Belkin.

Accordingly, it is

ORDERED that the defendants' motion to reargue is granted; and it is further

ORDERED that, upon reargument, the plaintiff's motion for summary judgment against defendants D.B. Computer Investments, Inc. and Dmitry Belkin is granted on the first and second causes of action in the sum of $24,920.56 plus interest from May 4, 2011 at the rate of 9 percent per annum, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

action for counsel fees and the issue of the amount of a judgment to be entered thereon shall be determined at a hearing to be held on _____ 6/25 _____, 2013 at 10³⁰ _____AM at 111 Centre Street, Room 574, New York, NY.

Dated: _____ 6/13/13 _____

DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION _____ ✓ NON-FINAL DISPOSITION

FILED

JUN 1 8 2013

COUNTY CLERK'S OFFICE
NEW YORK