

<b>NY 46th LLC v Gerard Addeo, CPA, P.C.</b>
2017 NY Slip Op 32485(U)
November 17, 2017
Supreme Court, New York County
Docket Number: 160796/15
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 63

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NY 46th LLC,

Index No. 160796/15

Plaintiff,

- against -

GERARD ADDEO, CPA, P.C.,  
GERARD ADDEO, CPA, PLLC,  
and GERARD ADDEO,

Defendants.

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**ELLEN M. COIN, J.:**

Plaintiff NY 46th LLC moves (1) pursuant to CPLR 3212, for summary judgment against defendant Gerard Addeo, CPA, P.C. (Addeo PC) on the first cause of action in the complaint in the sum of \$75,177.32, with interest; (2) pursuant to CPLR 3212, for summary judgment against Addeo PC as to liability on the second and third causes of action; (3) pursuant to CPLR 3212, for summary judgment against defendant Gerard Addeo (Addeo) on the fourth cause of action in the sum of \$75,177.32, with interest; (4) pursuant to CPLR 3212, for summary judgment against Addeo as to liability on the fifth and sixth causes of action; (5) to sever the second, third, fifth, and sixth causes of action and directing an inquest to compute the amount due from Addeo P.C. and Addeo; (6) to dismiss defendants' affirmative defenses; (7) pursuant to CPLR 3212, for summary judgment dismissing Addeo PC's counterclaim; and (8) for an award of reasonable attorneys' fees, costs, and disbursements.

### Background

The complaint alleges as follows: Plaintiff is a New York limited liability company (complaint, ¶ 1). Defendant Addeo PC was a New York professional corporation (*id.*, ¶ 2). Defendant Gerard Addeo, CPA, PLLC, (Addeo PLLC) is a New York professional limited liability company (*id.*, ¶ 3). Plaintiff is the ground lessee of the building located at 20 E. 46th Street, New York, New York 10017 (*id.*, ¶ 6). Addeo PC took possession of Suite 1401 at that location (Premises) pursuant to an “Agreement of Lease,” dated October 31, 2008, between plaintiff, as landlord, and Addeo PC, as tenant (Lease) (*id.*, ¶ 7). The Lease provides for a 10-year term, ending on January 31, 2019 (*id.*, ¶ 8). Plaintiff alleges that all three defendants are liable for unpaid rent (under various theories of liability) because Addeo PC vacated the Premises prematurely.

The complaint contains eight causes of action. The first three are against Addeo PC. The first cause of action alleges that, to date, Addeo PC has failed to pay “Minimum Rent” and additional rent for the months May 2015 through and including September 2015, in the aggregate principal amount of \$75,177.32 (*id.*, ¶ 14).

The second cause of action alleges that in April 2015, Addeo PC violated the Lease by vacating the Premises prior to the January 2019 Lease termination date (*id.*, ¶ 18). Allegedly, from October 2015 to January 2019, Minimum Rent reserved for the remainder of the Lease term is \$522,867.36, which is reduced to \$459,389.36, after applying a 4% discount rate (*id.*, ¶¶ 18-22).

The third cause of action alleges that pursuant to the Lease, Addeo PC is liable for plaintiff’s legal fees (*id.*, ¶ 24).

The fourth through seventh causes of action are against Addeo. The fourth through sixth causes of action are based upon Addeo's guaranty (Guaranty) of the obligations of Addeo PC under the Lease. These three causes of action allege that Addeo is liable for the amounts due, as set forth in the first through third causes of action.

The seventh cause of action, to pierce the corporate veil, alleges that Addeo formed Addeo PC on August 15, 2000, and, as its sole shareholder and officer, Addeo exercised complete dominion and control over Addeo PC (*id.*, ¶¶ 44-46). Based on Addeo's alleged failure to respect corporate formalities, and the payment of franchise taxes, on July 29, 2009, a proclamation of the Secretary of State caused the involuntary dissolution of Addeo PC (*id.*, ¶¶ 47-48). Nevertheless, Addeo continued to operate Addeo PC's accounting business from the Premises, and failed to respect Addeo PC's separate legal existence (*id.*, ¶¶ 50-52). To prevent fraud and to achieve equity, plaintiff contends that Addeo is obligated to pay the amounts due set forth in the first through third causes of action.

The eighth cause of action is against Addeo PLLC. Allegedly, Addeo PLLC is the successor to Addeo PC and, thus, is liable for the amounts claimed by plaintiff (*id.*, ¶ 60).

The answer by Addeo contains six affirmative defenses. The joint verified answer by Addeo PC and Addeo PLLC contains six affirmative defenses and one counterclaim for constructive eviction. It alleges that beginning on March 31, 2014, and continuing until the date plaintiff vacated the Premises, heavy rainfall flooded the floor above the Premises, causing extensive flooding. It claims that plaintiff took little to no corrective action to prevent the deterioration of the Premises. The condition substantially interfered with defendants' proper use of the Premises. Defendants were constructively evicted from the Premises, and vacated the Premises on April 22,

2015. Rent paid from March 31, 2014 through April 22, 2015 constitutes at least \$167,537.63.86 (verified answer, ¶¶ 82-86).

In support of the motion, plaintiff argues that it has established its prima facie case for its claims against Addeo P.C. and Addeo under the Lease and Guaranty. Plaintiff seeks to recover rents and other monies that defendants owe it pursuant to the 10-year term Lease, that, it contends, Addeo P.C. violated in April 2015 when it unilaterally, and without plaintiff's consent, vacated the leased premises and ceased paying rent.

As for Addeo's Guaranty, plaintiff argues that although it contains conditions pursuant to which Addeo could extricate himself from certain liabilities, Addeo failed to satisfy these conditions, including the requirement, under Article 36 of the Lease, that plaintiff remove any "wiring and/or cabling," do so in a "good and workmanlike manner," and cap any exposed utility lines at or prior to the expiration or sooner termination of the Lease. Hence, plaintiff contends, under the Guaranty, Addeo remains liable for Addeo PC's payment obligations under the Lease.

Plaintiff also argues that Addeo PC's counterclaim for constructive eviction fails, because it seeks recovery for a period during which Addeo PC remained in possession of the premises. Because, it argues, actual abandonment of the Premises is a fundamental and required element of a constructive eviction claim, Addeo PC's counterclaim is not viable.

In opposition to the motion, defendants claim that plaintiff refused to produce in discovery significant materials directly relevant to the issues raised by the instant motion. They also argue that summary judgment is not warranted because of material issues of fact, such as (1) exactly which wires were to be removed from the Premises; (2) what items were wrongfully left behind in the Premises; (3) whether the alleged failure to clip or uninstall wires was de minimis;

and (4) whether a forfeiture of more than \$500,000 is an unenforceable penalty based on Addeo PC's failure to cut wires installed by, or belonging to, another party.

Defendants also argue that the constructive eviction counterclaim is viable, and that Addeo PC could not relocate immediately after the flooding. Moreover, they assert that plaintiff has refused to disclose information regarding the reletting the Premises.

### Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiff has done so as to Addeo PC's liability on the first three causes of action. Plaintiff submitted a copy of the Lease showing that the Lease term ended in January 2019, and it is undisputed that Addeo PC vacated the Premises in April 2015, and has not satisfied its rental payment obligations under the Lease. “Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages” (*Holy Props. v Cole Prods.*, 87 NY2d 130, 133 [1995]).

Plaintiff is entitled to summary judgment as to liability only on the first two causes of action seeking payment of unpaid rent during the remainder of the Lease term. The first cause of action alleges that to date, Addeo PC has failed to pay Minimum Rent and additional rent for the months May 2015 through and including September 2015, in the aggregate principal amount of \$75,177.32 (complaint, ¶ 14). Plaintiff supports the amount sought with documentary evidence (*see* exhibit J to affidavit of Asher Schepansky [September 19, 2015 itemized statement of

amounts owed]). Defendants do not dispute those calculations or any specific line item, which could entitle plaintiff to summary judgment as to the amount sought (*see e.g. Moon 170 Mercer, Inc. v Vella*, 146 AD3d 537, 538 [1st Dept], *lv denied* 29 NY3d 919 [2017]). The exact amount of damages, however, must await a hearing. When a defendant abandons premises prior to expiration of a lease, the landlord has three options, one of which is that “it could notify the tenant that it was entering and reletting the premises for the tenant’s benefit. If the landlord relets the premises for the benefit of the tenant, the rent collected would be apportioned first to repay the landlord’s expenses in reentering and reletting and then to pay the tenant’s rent obligation” (*Holy Props.*, 87 NY2d at 134).

In this regard, number 24 of defendants’ first document request sought “All documents concerning previous or successor lessees to the Premises, including but not limited to documents concerning requested or actual improvements or demolitions performed to the Premises.” Plaintiff objected on grounds, among others, that “it is overly broad and unduly burdensome,” and seeks information or documents “that are not material and necessary in the prosecution or defense of this action, not relevant to the subject matter involved in this action, and/or not reasonably calculated to lead to the discovery of admissible evidence.” Contrary to this objection, the information is directly relevant to the issue of mitigation of damages. The matter shall be referred to a referee for further proceedings.

Plaintiff is entitled to judgment as to liability on the second cause of action. It alleges that that in April 2015, Addeo PC violated the Lease by unilaterally vacating the Premises prior to the January 2019 Lease termination date (*id.*, ¶ 18). Plaintiff’s request for a hearing to ascertain the exact amount owed is granted. Plaintiff is also entitled to judgment on the third cause of action

which, pursuant to Article 35 of the Lease, entitles it to an award of all reasonable legal fees, costs, and expenses that plaintiff incurred as a result of Addeo PC's breach of the Lease (*id.*, ¶ 24).

Addeo PC raises the defense of constructive eviction. "To establish constructive eviction, a tenant need not prove physical expulsion, but must prove wrongful acts by the landlord that 'substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises'" (*Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 AD3d 167, 172 [1st Dept, 2010], quoting *Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]).

Addeo PC failed to submit evidence demonstrating the existence of a genuine, material issue of fact as to constructive eviction. The record contains evidence that defendants complained of water damage from rain at various times from April 2014 through July 2014 (*see exhibit B to affirmation of David M. Grill, Esq.* [email exchanges and photographs purporting to show damaged areas of the premises]). However, defendants fail to submit affidavit proof supporting their assertion that they vacated the Premises almost one year later because of the water damage, and why they waited so long to vacate the Premises.

Defense counsel states:

"[f]aced with a leak/flooding situation that impedes the contemplated occupancy of business premises, with threats to papers, electrical equipment and the well-being of employees, Addeo PC was effectively rebuffed by Plaintiff's contracted manager, Mr. Schepansky. Without confidence in the security of the premises, an alternative had to be sought. The water damage situation continued through at least July 2014, and the 180-day notice of termination was delivered on October 22, 2014, before winter's rains were to fall"

(Memorandum in Opposition at 11). Absent from the record, however, is an affidavit from defendants offering any evidence to support the claim of constructive eviction. Their attorney's



statement in a legal memorandum is not based on personal knowledge and is insufficient to create an issue of fact as to constructive eviction (*see Katz Park Ave. Corp. v Jagger*, 46 AD3d 186, 190 [1st Dept 2007] [context of residency], *affd* 11 NY3d 314 [2008]).

To be sure, “CPLR 105(u) allows the verified complaint and bill of particulars to be considered as affidavits” (*Sanchez v National R.R. Passenger Corp.*, 21 NY3d 890, 891 [2013]). Here, the joint verified answer of Addeo PC and Addeo PLLC contains three affirmative defenses (out of six affirmative defenses) and one counterclaim pertaining to the allegation of constructive eviction. The counterclaim alleges that beginning on March 31, 2014, and continuing until the date plaintiff vacated the Premises, heavy rainfall flooded the floor above the Premises, causing extensive flooding within the Premises. During that period, plaintiff took little to no corrective action to prevent the deterioration of the Premises. The condition substantially interfered with defendants’ proper use of the Premises. Defendants were constructively evicted from the Premises, and vacated the Premises on April 22, 2015 (verified answer, ¶¶ 82-86).

Even while considering the allegations in the verified answer as part of the opposition papers, nevertheless, defendants fail to demonstrate the existence of a genuine issue of fact as to constructive eviction. To establish constructive eviction, a defendant must “abandon the premises with reasonable promptness” (*M.Y. Realty Corp. v Atlantic First Fin. Corp.*, 19 AD3d 156, 156 [1st Dept 2005]). The record shows that defendants complained of flooding between April 2014 through July 2014, but Addeo PC did not vacate until April 22, 2015. Defense counsel implies that the court should take notice of “how much time it takes for a functioning business to relocate in the midtown market” (Memorandum in Opposition at 2). In addition to being conclusory,

counsel's argument lacks probative value (*Thelen LLP v Omni Contr. Co., Inc.*, 79 AD3d 605, 605 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

The record is devoid of evidence explaining the delay in vacating the Premises (*cf. Incredible Christmas Store-N.Y. v RCPI Trust*, 307 AD2d 816, 817 [1st Dept 2003] [delay in vacating premises not unreasonable as a matter of law because attempts were initially made to resolve the dispute without litigation]). *In S.E. Nichols, Inc. v New Plan Realty Trust* (160 AD2d 251, 252 [1st Dept 1990]), the First Department stated that a delay of four months was not unreasonable as a matter of law, because it involved the abandonment of a department store that had to be performed in an "orderly manner," which may be a lengthy process, and the tenant gave notice that it considered a constructive eviction to have taken place. No such facts or allegations are present here.

Accordingly, the court grants summary judgment dismissing the counterclaim in the joint answer of Addeo PC and Addeo PLLC as well as the related affirmative defenses (fourth, fifth, and sixth).

Plaintiff's request for summary judgment on the fourth through sixth causes of action against Addeo on the basis of his Guaranty is denied.

It is undisputed that the Guaranty permitted Addeo to avoid liability if he satisfied certain conditions. His Guaranty of payment continued "through and including the Surrender Date." Surrender Date is defined in the Guaranty as:

"the date that Tenant shall have performed all of the following: (i) vacated and surrendered the Demised Premises to Landlord free of all subleases, licensees or other occupants, broom clean and otherwise in the condition required for the surrender of the Demised Premises at the end of the Term as set forth in the Lease and paid all Base Rent, additional rent and other charges up to and including the Surrender Date, (ii) delivered the keys to the Demised Premises to Landlord or its managing

agent, (iii) the Tenant shall have given written notice to the Landlord (the 'Tenant's Notice') not less than one hundred eighty (180) days prior to the date upon which the Tenant will be vacating the Premises and the Tenant in fact vacates and surrenders possession of the Premises to the Landlord in accordance herewith and the Lease on the date specified in the Tenant's Notice, time being of the essence, and (iv) Tenant has executed and delivered to Landlord a valid, legally binding and fully enforceable acknowledgment in the form annexed hereto as Exhibit 'A', with such changes as Landlord may reasonably require to ensure that such acknowledgment is valid, legally binding and fully enforceable"

(exhibit B to affidavit of Asher Schepansky [Schepansky aff] at § 1). Thus, Addeo, as guarantor, is liable to the date of Surrender of the Premises. The Premises must be vacated and left "in the condition required for the surrender of the Demised Premises at the end of the Term as set forth in the Lease." Article 36 of the Lease ("SURRENDER OF PREMISES") provides:

"At the expiration or sooner termination of this Lease, subject to the provisions of this Lease, Tenant shall return the Premises to Landlord in as good condition as when Tenant's Initial Alterations were completed, allowing for any and all demising walls installed by Tenant during Tenant's Initial Alterations to remain, (loss or damage caused by ordinary wear and tear, and fire or other casualty insured against by Landlord excepted), in vacant, broom clean condition, free and clear of all tenants, sub-tenants, occupants and rights of any third parties to occupy the Premises, as well as free and clear of all claims, liens and encumbrances, failing which Landlord may restore the Premises to such condition, and Tenant shall pay the cost thereof, upon demand. Tenant may remove any personal property owned by Tenant and *Landlord may require the removal in the Premises of any wiring and/or cabling, and such removal shall be done in a good and workmanlike manner, and any exposed utility lines shall be capped at or prior to the expiration or sooner termination of this Lease.* If Tenant does not remove its personal property at the end of the term, Landlord may elect to remove such items, and Tenant shall promptly reimburse Landlord for any expenses, including storage, related thereto. If Landlord does not elect to store such property, Tenant shall be conclusively presumed to have conveyed the same to Landlord under this Lease as a bill of sale without payment or credit by Landlord to Tenant This Article 36 shall survive the expiration or sooner termination of this Lease)"

(exhibit A to Schepansky aff at 18-19 [emphasis added]). Plaintiff contends that Addeo is liable under the Guaranty because all cables and wiring were not removed.

In support, plaintiff submitted the affidavit of Asher Schepansky, stating that he is employed by Extell Development Company, plaintiff's property manager for the building in which the Premises are located. Schepansky claims that after receiving a notice on October 21, 2014 from Addeo PC, entitled "Tenant's Notice of Intent to Vacate," informing that it intended to vacate the Premises in 180 days from the date of the Notice (April 22, 2015), six months later, on April 14, 2015, plaintiff advised Addeo PC that it did not "accept, approve or acknowledge" Addeo PC's surrender of the Premises, and intends to hold Addeo PC "fully responsible for all of its obligations under the terms of the Lease" (Schepansky aff, ¶¶ 14-16). Plaintiff also advised that Addeo PC is required "to remove any wiring and cabling in accordance with the Lease. Demand is hereby made that all wiring and cabling be removed in a good and workmanlike manner" (*see* exhibit D to Schepansky aff at 3). Schepansky states that on April 20, 2016, counsel for Addeo PC responded to plaintiff's demand for the removal of any wiring and cabling by stating that "all wiring and cabling was installed by [Plaintiff], and [Addeo P.C.] is not responsible for its removal under the relevant terms of the Lease" (*id.*, exhibit E).

Schepansky alleges that Addeo PC did not remove all wiring and cabling from the Premises at or before the time that it vacated the Premises, as demanded by plaintiff (Schepansky aff, ¶ 20). Attached to his affidavit is a photograph purporting to show the wiring and/or cabling that Addeo PC did not remove from the Premises. In response, Addeo acknowledges that he "recognize[s] the subject of the photographs as wiring and cabling that was a part of the preexisting building walls in the Premises . . . ." Plaintiff has not controverted, however, defendants' asser-

tion that they had not installed the wiring. Plaintiff counters that it is inconsequential that defendants may not have installed the wiring because the Lease simply provides that “Landlord may require the removal in the Premises of any wiring and/or cabling.”

This argument is unconvincing. The Guaranty must be read in the context of the Lease “and in a manner that accords the words their fair and reasonable meaning, and achieves a practical interpretation of the expressions of the parties” (*Greenwich Capital Fin. Prods., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010] [internal quotation marks and citation omitted]). A “contract should not be interpreted to produce a result that is absurd, commercially unreasonable or contrary to the reasonable expectations of the parties” (*id.*). A reasonable interpretation of the phrase “Landlord may require the removal in the Premises of any wiring and/or cabling” is that it refers exclusively to wiring and cables installed by the tenant. The Lease could have expressly provided that the tenant must remove all cable and wiring regardless of who installed such equipment, but it does not. Hence, there are issues of fact as to which party installed the equipment left behind, and, consequently, which party was responsible for its removal.

Moreover, pursuant to plaintiff’s interpretation, failure to remove the wires shown in the photograph, which do not appear to be extensive, results in a liability exceeding \$500,000. “[E]quity will often intervene to prevent a substantial forfeiture occasioned by a trivial or technical breach (*Fifty States Mgt. Corp. v Pioneer Auto Parts*, 46 NY2d 573, 576-577 [1979]). “[E]quity abhors forfeitures and courts will examine the sum reserved under an instrument as liquidated damages to insure that it is not disproportionate to the damages actually arising from the breach or designed to coerce the performance of a party (*id.*, at 577).

Plaintiff argues that the substantial performance doctrine is inapplicable because the requirement to remove the wires and cables was an express condition, citing *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 693 [1995]). In *Oppenheimer & Co.*, the Court of Appeals held that “the critical language of paragraph 4(c) of the letter agreement unambiguously establishes an express condition precedent rather than a promise” and there was “no justifiable basis for applying the doctrine of substantial performance” to the facts of that case (*id.* at 692). One reason underlying the Court’s holding was its finding that the plaintiff had “not suffered a forfeiture or conferred a benefit upon defendant.” The matter entailed the loss of a sublease option, and the plaintiff had not claimed that it lost any sums of money by the enforcement of the express condition. Here, there is a risk of forfeiture caused by a relatively trivial breach (*see id.* at 694 [“that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach of a condition to be followed by a forfeiture”]), quoting *Jacob & Youngs v Kent*, 230 NY 239, 241 [1921]).

Furthermore, in *Oppenheimer & Co.*, the Court found that because the parties’ agreement employed the “unmistakable language of condition (‘if,’ ‘unless and until’),” it “unambiguously establishes an express condition precedent rather than a promise” (86 NY2d at 691). Here, in contrast, the operative language of the Lease provides that “Landlord *may require* the removal in the Premises of any wiring and/or cabling” (Lease, Article 36 [emphasis added]).

Accordingly, it is

ORDERED that the motion is granted (1) as to liability as against Gerard Addeo, CPA, P.C. on the first, second, and third causes of action, and (2) dismissing the counterclaim interposed by Gerard Addeo, CPA, P.C., Gerard Addeo, CPA, PLLC and the fourth, fifth, and sixth

affirmative defenses in their answer, all of which are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the issue of the amount of damages on the first, second, and third causes of action is severed and referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R).

Dated: *November 17, 2017*

ENTER:

  
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J.S.C.