

525 Delaware LLC v Krush, Inc.
2018 NY Slip Op 31727(U)
July 23, 2018
Supreme Court, Kings County
Docket Number: 502590/18
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

525 DELAWARE LLC,

Plaintiff,

-against-

**KRUSH, INC., RAFOUL ABOU HAMRA and
CHOULA FTIHA,**

Defendants.

DECISION / ORDER

**Index No. 502590/18
Motion Seq. No. 1, 2
Date Submitted: 6/21/18
Cal No. 61, 62**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion and defendant's cross motion for summary judgment

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>5-17</u>
Notice of Cross Motion, Affirmation, Affidavits and Exhibits Annexed.....	<u>18-26</u>
Reply Memorandum.....	<u>29</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is an action arising out of a commercial lease for two adjoining offices at 525 Seventh Avenue in Manhattan, between plaintiff landlord 525 Delaware LLC and defendant tenant Krush NY, Inc. sued as Krush, Inc. (the lease is clearly with Krush NY, Inc.). Defendants Rafoul Abou Hamra and Choula Ftihha are guarantors under a "good guy guaranty." Krush failed to pay the rent and additional rent in August 2017. Plaintiff commenced an eviction proceeding that resulted in a stipulation of settlement, whereby it was agreed that Krush would vacate the premises on or before October 31, 2017. Krush vacated on November 3, 2017.

Plaintiff maintains that Krush remains liable for rent and additional rent due under the lease, less monies received as a result of a temporary license of the premises to a "pop-up" tenant from November 29, 2017 to February 28, 2018 (on notice to defendant that plaintiff was granting the license for defendants' benefit [see Exhibit E]), and that, because Krush owed rent at the time Krush vacated the premises, Hamra and Ftiha continue to be liable for rent and additional rent under the guaranty.

In motion seq. # 1, plaintiff moves for partial summary judgment on its First, Second, Fourth and Fifth causes of action, (unpaid rent from Krush to March 31, 2018; unpaid rent to end of lease; unpaid rent from Hamra and Ftiha to March 31, 2018; and unpaid rent from Hamra and Ftiha to end of lease) for unpaid rent from the date of defendant's default to the month of the motion, March 31, 2018, as the premises remain vacant, and for summary judgment on its Third and Sixth causes of action for attorneys' fees, against defendant Krush (Third) and against Hamra and Ftiha (Sixth). In their cross motion, (Motion Seq. #2) defendants move for summary judgment dismissing the complaint in its entirety.

Defendants contend that they are entitled to summary judgment because plaintiff accepted Krush's surrender of the premises and termination of the lease, or, in the alternative, that plaintiff engaged in actions sufficient to establish a termination by operation of law, by accepting the keys and re-letting the premises, and that since Krush has no further obligations to plaintiff, the guarantors Hamra and Ftiha have no liability. In addition, Krush claims they complied with the terms of the guaranty by surrendering the premises.

As the Court of Appeals explained in *Holy Properties Ltd., L.P. v Kenneth Cole*

Prods., Inc. (87 NY2d 130, 133–34 [1995] [internal citations omitted]):

When defendant abandoned these premises prior to expiration of the lease, the landlord had three options: (1) it could do nothing and collect the full rent due under the lease, (2) it could accept the tenant's surrender, reenter the premises and relet them for its own account thereby releasing the tenant from further liability for rent, or (3) 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. Once the tenant abandoned the premises prior to the expiration of the lease, however, the landlord was within its rights under New York law to do nothing and collect the full rent due under the lease.

The stipulation of settlement of the eviction proceeding herein specifically “sever[ed] all monetary claims without prejudice to all defenses, to be asserted in a plenary action.”(Exhibit D). Consequently, vacating the premises pursuant to the stipulation did not terminate Krush's obligations under the lease (*see Ring v Printmaking Workshop, Inc.*, 70 AD3d 480 [1st Dept 2010] [“The record herein, as well as the stipulation itself, does not contain any facts to indicate that the parties manifestly intended the stipulation to constitute a surrender and acceptance of the premises or that it terminated plaintiffs' rights to recover damages under the lease”]), Moreover, article 18 of the lease itself provides for recovery of the rent (as liquidated damages) in such circumstances (*see 80-02 Leasehold, LLC v CM Realty Holdings Corp.*, 123 AD3d 872, 874 [2d Dept 2014] [“while the stipulation terminated the landlord/tenant relationship, the lease provided that the tenant would remain liable for rent after eviction”]). Plaintiff notified defendant herein that it was entering and temporarily reletting the premises for defendant's benefit. Plaintiff, as a landlord of a commercial property, has no duty to mitigate its damages.

The lease herein does not have an acceleration clause. Therefore, plaintiff's

application for partial summary judgment through March 31, 2018 is appropriate. The lease provided that the landlord was permitted to re-enter the premises upon the tenant's default and that the tenant's liability for rent would survive such re-entry (see, *Holy Props. v Cole Prods., supra*; *Lexington Ave. & 42nd St. Corp. v Pepper, supra*). Accordingly, the plaintiff has credited the rent it received from the license to defendant Krush (see *Olim Realty Corp. v Big John's Moving, Inc.*, 250 AD2d 744 [2d Dept 1998]).

With regard to the guarantors, while the "good guy" guaranty limited the guarantors' liability to the period prior to the tenant's vacating and surrendering the premises (see *Russo v Heller*, 80 AD3d 531, 531-532 [1st Dept 2011]; *Preamble Props v Woodard Antiques Corp.*, 293 AD2d 330, 331 [1st Dept 2002]; *L & B 57th Street, Inc. v E.M. Blanchard, Inc.*, 143 F3d 88, 92-93 [2nd Cir 1998]), by its terms, the guaranty was limited in this way only if the tenant had paid all outstanding obligations when it vacated and if the surrender was accepted by the landlord. Since rent and additional rent was due at the time the defendant tenant vacated, the guaranty remains in effect (cf. *LF E. 21 Prop. Co., LLC v Moini*, 127 AD3d 578, 579 [1st Dept 2015] [good guy guarantor's obligation was only until date tenant vacated where tenant was current on its payments on that date, as required by stipulation of settlement]).

Turning to the branch of plaintiff's motion to dismiss the defendants' eight affirmative defenses, the court finds that the affirmative defenses are all without merit. The complaint clearly pleads valid causes of action under the lease and guaranty. Plaintiff has standing as a party to the lease and guaranty. The defenses of waiver, estoppel, equitable estoppel, laches, and unclean hands are unsupported by any factual allegations. The defenses of release and oral modification are barred by article

21 and 25 of the lease, which require all modifications to the lease, and the landlord's acceptance of a surrender, to be in writing. The defense that plaintiff's own negligent acts or omissions caused plaintiff's damages is pleaded without particularity and is inapplicable to a breach of lease and guaranty. Further, the plaintiff had no duty to mitigate damages as a matter of law with respect to the breach of a commercial lease. Finally, as discussed above, the eviction proceeding resulted in a stipulation that severed all monetary claims, to be asserted in a plenary action. As the guarantors were not parties to the eviction proceeding, the stipulation, which makes no reference to them, has no res judicata or collateral estoppel effect on them, and clearly does not bar this plenary action.

Finally, plaintiff is entitled to reasonable attorneys' fees incurred herein, pursuant to Article 19 of the lease, as the prevailing party.

Accordingly, it is

ORDERED that the plaintiff's motion is granted in part and denied in part, in that plaintiff is granted partial summary judgment on its First, Third, Fourth and Sixth causes of action as to liability, and the cross motion denied, and it is further

ORDERED that defendants' eight affirmative defenses are stricken, and it is further

ORDERED that plaintiff's post-motion claims for rent, additional rent and attorneys' fees, which accrue from April 1, 2018 forward, are hereby severed and shall continue, and it is further

ORDERED that the amount of rent and additional rent due to plaintiff through March 31, 2018, as well as plaintiff's reasonable attorneys' fees incurred in connection

with this action, are to be determined by a special referee pursuant to a Referee Referral Order issued simultaneously herewith.

This constitutes the decision and order of the court.

Dated: July 23, 2018

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court