

**Captain Lucas, Inc. 8 v Royal Equities Operating,  
LLC**

2019 NY Slip Op 33080(U)

October 15, 2019

Supreme Court, New York County

Docket Number: 655357/2017

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

-----X

CAPTAIN LUCAS, INC.8

Plaintiff,

- v -

ROYAL EQUITIES OPERATING, LLC,

Defendant.

-----X

INDEX NO. 655357/2017

MOTION DATE 08/10/2018

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that defendant's motion for summary judgment is granted and the first and second cause of action of the complaint are dismissed with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

This matter having come on before this court on August 10, 2018, on motion to dismiss, and the plaintiff having been represented in connection therewith by Martin Alan Shell, Esq., and the defendant having been represented in connection therewith by Howard

Grun, Esq., and, pursuant to CPLR 4317, the court having on its own motion determined to consider the appointment of a referee to determine as follows, it is now hereby

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to determine the following individual issue of fact, which is hereby submitted to the JHO/Special Referee for such purpose:

(1) the issue of the reasonable amount of attorneys' fees that defendant incurred in defendant the herein action, which plaintiff is obligated to remit to defendant under the Lease, and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/suptctmanh](http://www.nycourts.gov/suptctmanh) at the "References" link ), shall assign this matter at the initial appearance to an available JHO/Special Referee to determine as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for defendant shall, within 15 days from the date of this Order, submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the "References" link on the court's website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed with the hearing, on the date fixed by the Special Referee Clerk for the initial appearance in the Special Referees Part, subject only to any adjournment that may be authorized by the Special Referees Part in accordance with the Rules of that Part; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

; and it is further

ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform Rules of the Judicial Hearing Officers and the Special Referees (available at the "References" link on the court's website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules).

DECISION

Defendant Royal Equities Operating, LLC (Owner) moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. At oral argument, on April 24, 2018, pursuant to CPLR § 3211(c), this court converted the motion to one for summary judgment.

The first two causes of action alleged in the complaint seek, respectively, a declaratory judgment that an accelerated rental clause, contained in a commercial lease (Lease) between the parties, constitutes a penalty, and is, therefore, unenforceable; and a declaratory judgment that the Lease terminated in May 2016, and that all obligations due and owing under the Lease ceased at that time.

Ruling from the bench at oral argument, this court dismissed the third cause of action, which alleges a breach of contract. In a related action, captioned Royal Equities Operating, LLC v Rubin, 154 AD3d 516 (1st Dept 2017), the Appellate Division, First Department, granted defendant summary judgment in the amount of \$1,740,818.60, plus interest and attorney's fees. Rubin and

Orensten, who are the principals of plaintiff in this action, were guarantors of plaintiff's performance of its obligations under the Lease.

It is undisputed that, in May 2016, defendant/Owner re-let the premises to an entity known as "Breya," and that plaintiff has remained in possession, pursuant to a sublease with Breya. Citing Holy Props. v Cole Prods. (87 NY2D 130, 134 [1995]), plaintiff argues that Owner should be precluded from collecting rent on top of the rent collected from Breya, rent that, the complaint alleges, exceeds the rent provided for in the Lease. However, other than serving the notice described below, Owner has not attempted to collect rent from plaintiff, for any period after Breya took possession of the premises, and there is no indication that Owner ever will do so.

A declaratory judgment may be issued only if the controversy at issue "'involve[s] present, rather than hypothetical, contingent or remote, prejudice to plaintiffs.'" Tomasulo v Village of Freeport, 151 AD3d 1100, 1100 (1st Dept 2017), quoting American Ins. Assn. V Chu, 64 NY2d 379, 382 (1985). Here, any prejudice to plaintiff is not present, but hypothetical. Thus, the first cause of action must be dismissed.

The second cause of action must also be dismissed. The Lease provides that:

"Reference to "termination of this lease" includes expiration or earlier termination of the term of this Lease pursuant to any provisions of this [L]ease or to law . . . . [U]nless expressly otherwise provided in this Lease, any liability for a payment which shall have accrued to or with respect to any period ending at time of termination shall survive the termination of this Lease."

The complaint admits that, as the result of plaintiff's failure to timely to pay the full rent due, in January, February, and March 2016, Owner served a five-day notice, prior to April 28, 2016, accelerating all fixed rent due, pursuant to the Lease, through July 31, 2021, although Owner has not acted to collect such rent from plaintiff. The complaint also recites that Owner re-let the premises to Brea, on May 3, 2016, and that Brea took possession on or about May 15, 2016. Consequently, even if, as plaintiff argues, its obligations under the Lease did not survive the termination of its leasehold, such termination postdated Owner's notice accelerating the rent. Therefore, plaintiff's second cause of action must be dismissed.

It does not follow, however, that Owner is entitled to a declaration that, as a matter of law, plaintiff's liability for the accelerated rent survived the alleged termination of the Lease. Any right that Owner may have to collect the accelerated rent would be subject to a determination that the collection of such rent would not constitute an impermissible penalty. Owner may not simultaneously argue that plaintiff's first cause of action must

be dismissed, because Owner has not sought, and may never seek, to collect the accelerated rent from plaintiff, and prevail on that argument, and then argue that it is entitled to a judgment that it is entitled to that rent as a matter of law.

Finally, paragraph 19 of the Lease provides that, if plaintiff is in default of any of its obligations, under the Lease, and if Owner, in connection thereto, incurs attorney's fees "in instituting, prosecuting or defending any action or proceeding and prevails," Owner will be entitled to collect such sums from plaintiff, and accordingly, defendant is entitled to recover attorneys' fees in defending this action from plaintiff.

10/15/2019

DATE

*Debra A. James*  
DEBRA A. JAMES, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
		<input type="checkbox"/>	DENIED
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	SETTLE ORDER
		<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input checked="" type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

APPLICATION:

CHECK IF APPROPRIATE: