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SHELVIN PLAZA ASSOCIATES v. LEW LIEBERBAUM HOLDING CO., INC., et al.,
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SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 23 NASSAU COUNTY

PRESENT:
HONORABLE LEONARD B. AUSTIN
Justice

Motion R/D: 4-21-03
Submission Date: 6-18-03
Motion Sequence No.: 001,002/MOT D

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SHELVIN PLAZA ASSOCIATES,
Plaintiff,

COUNSEL FOR PLAINTIFF
Stephan Garber, Esq.
600 Old Country Road
Garden City, New York 11530

- against -

LEW LIEBERBAUM HOLDINGS CO., INC., MARK I. LEW a/k/a MARK LEV, and LEONARD A. NEUHAUS,
Defendants.

COUNSEL FOR DEFENDANTS
Isaac M. Zucker, Esq.
6901 Jericho Turnpike - Suite 200
Syosset, New York 11791

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ORDER

The following papers were read on Plaintiff's motion for summary judgment and Defendants' cross-motion for summary judgment and to dismiss for failure to prosecute:

Notice of Motion dated March 31, 2003;
Affidavit of Vincent Polemeni sworn to on March 31, 2003;
Notice of Cross-motion dated May 15, 2003;
Affidavit of Mark Lev sworn to on May 15, 2003;
Affirmation of Marci S. Zinn, Esq. dated May 15, 2003;
Defendant's Memorandum of Law;
Affirmation of Stephan Garber, Esq. dated June 5, 2003;
Affirmation of Marci S. Zinn, Esq. dated June 17, 2003.

Plaintiff moves for summary judgment pursuant to CPLR 3212(a) on its first cause of action. Plaintiff also informally requests leave to amend the caption to show

that it is now a limited liability company, Shelvin Plaza Associates, LLC and to amend the complaint to increase the damages sought in the first cause of action from $576,076.00 to $716,893.72.

Defendants cross-move for summary judgment pursuant to CPLR 3212 dismissing the complaint in its entirety or, in the alternative, pursuant to CPLR 3216(a) and/or 3404 for dismissal of the complaint based upon Plaintiff's unreasonable neglect, delay and failure to prosecute this action.

BACKGROUND

Plaintiff is the landlord of the corporate Defendant, Lew Lieberbaum Holding Co., Inc. ("Holding Co."), a holding company for Lew Lieberbaum & Co., pursuant to an eight year lease dated April 19th 1994. Holding Co. went out of business and vacated the premises in 1998. The individual Defendants Mark Lev ("Lev") and Leonard Neuhaus ("Neuhaus") were principals of Holding Co.

The complaint herein alleges three causes of action on the following theories of recovery: (1) breach of the lease; (2) pierce the corporate veil and hold the individual Defendants liable for the damages owed by the corporate Defendant/tenant; and (3) attorneys' fees pursuant to the lease. Defendants deny the essential allegations of the complaint and, on their cross-motion, seek dismissal of the complaint on two grounds; to wit: Plaintiff's alleged consent to termination of the lease by means of a Stipulation of Settlement dated October 12, 1998; and failure to prosecute. As the

cross-motion seeks dismissal of the complaint in its entirety, the Court will address the cross-motion first.

DISCUSSION

A. Defendants' Cross-motion

1. *First Cause of Action*

The Stipulation of Settlement ("the Stipulation") (Cross-moving papers, Exhibit D) settled a summary non-payment proceeding commenced by Plaintiff against Holding Co. in the First District Court of Nassau County. Pursuant to the Stipulation, Holding Co. consented to a judgment of possession in favor of the Plaintiff with a warrant of eviction stayed until October 23, 1998 as well as the entry of judgment against it in the amount of $73,237.02 (the rent due through October 31, 1998). The Stipulation further provides that it contains the "entire understanding" of the parties.

Defendants first characterize the Stipulation as an accord and satisfaction of all claims between them, past and future. However, because the Stipulation does not refer to any claims other than the rent due through October 31, 1998, the Stipulation is not a clear expression of intent to modify the lease. Therefore, it is not an accord and satisfaction of the Plaintiff's claim for future rent due under the lease. See, Jacoby & Meyers v. Crispi, 205 A.D. 2d 312 (1st Dept. 1994). Defendants' reliance on Ianelli v. North River Ins. Co., 119 A.D. 2d 317 (2nd Dept. 1986), *lv. app. den.*, 69 N.Y. 2d 606 (1987) is misplaced inasmuch as a general release was given in addition to the stipulation of settlement.

Defendants next argue that the Stipulation and the issuance of the warrant of eviction thereunder terminated the lease as a matter of law. Although an eviction terminates the landlord/tenant relationship, the parties to a lease are not foreclosed from contracting that the tenant shall remain liable for rent after eviction. Holy Properties, Ltd., L.P. v. Kenneth Cole Productions, Inc., 87 N.Y. 2d 130, 134 (1995).

Here, paragraph 18 of the subject lease provides, in pertinent part, that upon "dispossess by summary proceedings" the tenant shall pay to the landlord as liquidated damages "any deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the demised premises for each month of the period which would otherwise have constituted the balance of the term of this lease." Such a survival clause is valid and enforceable. Holy Properties, Ltd., L.P. v. Kenneth Cole Productions, Inc., *supra*; Lexington Ave & 42nd St. Corp. v. Pepper, 221 A.D. 2d 273, 274 (1st Dept. 1995); and Halpern v. Bargans, 46 A.D. 2d 657 (2nd Dept. 1974). Consequently, the issuance of the warrant of eviction herein did not operate to absolve the tenant of its continued responsibility for the payment of liquidated damages to the Plaintiff for the balance of the term of the lease.

Nor has there been a surrender by operation of law involving conduct inconsistent with the landlord/tenant relationship (Wasserman v. Ewing, 270 A.D. 2d 427 [2nd Dept. 2000]), such as would release the tenant from further liability for rent thereunder. No showing has been made that the Plaintiff's conduct indicated its intent

to use the premises for its own benefit. See, Deer Hills Hardware, Inc .v. Conlin Realty Corp., 292 A.D. 2d 565 (2nd Dept. 2002); and Altamuro v. Capoccetta, 212 A.D. 2d 904, 905 (3rd Dept.), *lv. app. den.* 85 N.Y. 2d 808 (1995). Remodeling and reletting the premises do not demonstrate intent to use the premises for the Plaintiff's benefit, especially here where paragraph 18 of the subject lease allows such reletting (see, Dresses for Less, Inc v. Lenroth Realty Co Inc, 260 A.D.2d 220, 221 [1st Dept. 1999]) and adds to the tenant's liquidated damages certain expenses incurred in connection with reletting. As the facts of the eviction and reletting are not disputed, this Court may determine, as a matter of law, that no surrender occurred here. See, Brock Ent. Ltd. v. Dunham's Bay Boat Co. Inc., 292 A.D. 2d 681 (3rd Dept. 2002).

Based on the foregoing, all of Defendants' arguments for summary judgment dismissing the first cause of action are rejected and the request for dismissal must be denied.

2. *Second Cause of Action*

As to the second cause of action to pierce the corporate veil, Plaintiff alleges that the individual Defendants dominated and controlled Holding Co to the extent that the company was a mere alter ego of the individuals (Complaint ¶¶ 15 and 19). With regard to the element of fraud, Plaintiff alleges that the individual Defendants used the property of the corporate Defendant as if it was their own (Complaint ¶ 17) and failed to "comply with the standard corporate formalities required of a corporation"(Complaint ¶ 16). While it is perfectly legal to incorporate for the express purpose of limiting the

personal liability of the corporate owners (Morris v. New York State Dept. of Taxation & Finance, 82 N.Y. 2d 135, 140 [1993]), the corporate formalities must be observed. See, gen'lly, M&A Oasis Inc. v. MTM Assocs., LP, __A.D. 2d __, 2003 WL 21983803 (1st Dept. 2003). On this record, there has been no showing that Holding Co. observed any corporate formalities whatsoever. Indeed, there are allegations that corporate accounts were used to pay for personal expenses, including flowers, jewelry, cigars, music, books, travel and dining expenses, pet expenses, and cell phone and car leases expenses for Lev's wife, to name a few.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. See, Alvarez v. Prospect Hosp., 68 N.Y. 2d 320, 324 (1986); and Winegrad v New York Univ. Med. Ctr., 64 N.Y. 2d 851, 853 (1985). The failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Ayotte v. Gerasio, 81 N.Y. 2d 1062 (1993). On this record, Lev's conclusory rejection of the claim to pierce the corporate veil as part of Plaintiff's plan to "get even" simply does not suffice to make a *prima facie* showing. For this reason, Defendants' motion for summary judgment dismissing the second cause of action must be denied.

3. *Third Cause of Action*

Defendants do not address the third cause of action for attorney's fees separately, so neither will this Court. Summary judgment dismissing the third cause of

action must be summarily denied.

4. *Failure to Prosecute*

Plaintiff's failure to prosecute this action for years is troublesome. However, CPLR 3404 does not apply to pre-note of issue cases. Gendus v. Sheraton/Atlantic City West, 302 A.D. 2d 427 (2nd Dept. 2003); and Lopez v. Imperial Delivery Serv., 282 A.D. 2d 190 (2nd Dept 200l), *lv. app. dism.* 96 N.Y. 2d 937 (2001). Furthermore, relief pursuant to CPLR 3216 is unavailable because a 90-day notice was never served by Defendants. Gendus v. Sheraton/Atlantic City West, *supra*. Under these circumstances, dismissal of the complaint on the basis of these statutory provisions must be denied.

B. Plaintiff's Motion

There is no dispute that Holding Co was evicted and that Plaintiff relet the premises to three new tenants. As discussed above, the survival clause in paragraph 18 of the lease entitles the Plaintiff to any deficiency in rent for the term of the subject lease. According to paragraph 18, Plaintiff is also entitled to "such expenses as Owner may incur in connection with re-letting, such as legal expenses, reasonable attorney's fees, brokerage, advertising and for keeping the demised premises in good order or for preparing the same for reletting." On the basis of this lease language, Plaintiff seeks a judgment in the amount of $716,893.72 which is comprised of the elements of lost rent in the amount of $188,720.16, tenant improvements in the amount of $391,852 and brokerage commissions in the amount of $136,321.56.

At this juncture, the Court notes that although leave to amend pleadings should be freely granted pursuant to CPLR 3025(b), it is incumbent on the movant to make some evidentiary showing that the claim can be supported. The court must examine the underlying merit of the proposed amendment. To do otherwise would be wasteful of judicial resources. Morgan v. Prospect Park Assoc. Holdings, 251 A.D. 2d 306 (2nd Dept. 1998).

Here, Plaintiff has submitted some evidence of its expenses incurred in connection with renovations to suites listed as 502, 505 and 510, while the suites covered by the subject lease are 502, 504 and 518. Furthermore, Defendants attack the tenant improvement costs as extravagant cosmetic decorations not contemplated by the lease, including such opulent items as acoustical ceilings, cabinetry and woodwork, doors and brass hardware and cherry framed vision panels. They further deride the brokerage commissions as suspect and contrived, because the commissions are for entities owned or controlled by Plaintiff's principal. Moreover, the commission agreements indicate that the commissions were incurred in connection with suites 516, 505 and 500.

On the basis of the plain language of the lease, the Court finds that Plaintiff is entitled to recover its expenses incurred in connection with the reletting, as provided in paragraph 18 of the lease. Consequently, summary judgment solely on the issue of liability against Defendant Holding Co. on the first cause of action should be granted.

The standard by which such reletting expenses are to be measured is not expressly set forth in the lease. As every contract contains an implied covenant of good faith and fair dealing (See, e.g., Dalton v. Educational Testing Serv., 87 N.Y. 2d 384, 389 [1995]; 1-10 Indus. Assoc. LLC v. Trim Corp. Of America, 297 A.D. 2d 630, 631 [2nd Dept. 2002]), this Court holds that the reletting expenses to which Plaintiff is entitled must be governed by this standard. In short, the expenses Plaintiff incurred in good faith and fairness in its reletting of the premises must be demonstrated on the hearing to assess damages.

Since the parties vigorously dispute the fairness of the damages alleged, summary judgment on the damages to be awarded on the first cause of action is not appropriate and this matter shall be set down for an immediate trial. CPLR 3212 (c). Furthermore, leave to amend the complaint to increase the damages sought is denied at this time as the merit of the requested damages is unclear, with leave to renew at trial. CPLR 3025 (c).

Finally, Plaintiff's informal request for leave to amend the caption is granted to the extent that Plaintiff shall be identified in the caption henceforth as "Shelvin Plaza Associates LLC f/k/a Shelvin Plaza Associates" in order to prevent any confusion.

Accordingly, it is,

ORDERED, that Plaintiff's motion for summary judgment against Holding Co on the first cause of action in the complaint is **granted** solely as to liability and shall be set down for an immediate trial as to damages, and it is further,

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ORDERED, that Plaintiff's informal request for leave to amend the first cause of action to seek damages of $716,893.72 is **denied** with leave to renew at trial, if appropriate; and it is further,

ORDERED, that Plaintiff's informal request for leave to amend the caption of this action is **granted** to the extent that Plaintiff shall henceforth be identified in the caption identifying Plaintiff as : *Shelvin Plaza Associates LLC f/k/a Shelvin Plaza Associates* and the County Clerk is directed to amend its records consistent herein upon being served with a copy of this Order with Notice of Entry; and it is further,

ORDERED, that Defendants' cross-motion for judgment dismissing the complaint in its entirety pursuant to CPLR 3212, 3216 and/or 3404 is **denied**, and it is further,

ORDERED, that counsel are directed to appear for a conference on October 17, 2003 at 9:30 a.m. for the purpose of scheduling the trial on Plaintiff's damages pursuant to its first cause of action and scheduling discovery on the second and third cause of action.

This constitutes the decision and Order of the Court.

Hon. LEONARD B AUSTIN, J.S.C.

Dated: Mineola, N.Y.
September 16, 2003

ENTERED

SEP 23 2003

NASSAU COUNTY
COUNTY CLERK'S OFFICE