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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 5
NASSAU COUNTY

FORD COYLE PROPERTIES, INC.,

Plaintiff(s),

-against-

3029 AVENUE V. REALTY, LLC and
RONY CHAITLIN,

Defendant(s).

MOTION DATE: 12-10-08
INDEX No.: 18434/06
MOTION SEQUENCE NO: 1

CAL. NO.: 2008N3040

The following papers read on this motion:

Notice of Motion/ Order to Show Cause..........	1-4
Answering Affidavits...........................	5,6
Replying Affidavits............................	7-9a
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendants for an order pursuant to CPLR 3212(a) granting defendants summary judgment in their favor dismissing the defendants' complaint is denied.

Pursuant to a commercial lease between the plaintiff and the defendants 3029 Avenue V. Realty, LLC (hereinafter "the Company") and Rony Chatelain, s/h/a/ Chaitlin (hereinafter "Chatelain") or collectively the defendants, the Company leased from the plaintiff the premises known as 3029 Avenue V, Brooklyn, New York to be used as a medical office. The Lease was for a term of five years commencing on March 1, 2004 and ending on February 28, 2009. Pursuant to ¶ 56 of the Lease Rider, the Company was responsible for annual rental charges of $60,000.00 or $5,000.00 per month, which were not subject to change during the term of the Lease. In addition to the rent, the Company was also responsible for other charges related to use of the premises, including, among other things: (i) the Company's proportionate share of increased real estate taxes for the entire building (¶ 41 of the Rider); (ii) the plaintiff's increased cost of fire and liability insurance for the

entire building (¶ 51 of the Rider); and (iii) the plaintiff's water usage (¶ 59 of the Rider). Defendants allege the company never conducted any business from the leasehold as the Company was not adequately capitalized because Chatelain's two partners defaulted on their promised capital contributions. Chatelain surrendered the keys to the premises to Leonard Weingarten ("Weingarten"), the plaintiff's President, on or about September 4, 2004. Chatelain alleges that the plaintiff accepted the keys and re-possession of the premises in full satisfaction of the Company's financial obligations under the Lease. The plaintiff and defendant signed a handwritten note dated September 9, 2004, acknowledging receipt of the keys. Commencing in December 2005 the plaintiff began advertising to re-let the premises. The plaintiffs entered into a commercial lease agreement with MZM Dental Group, PLLC, dated April 1, 2006. On May 18, 2006, Chatelain received, via certified mail, a letter from the plaintiff, dated May 4, 2006, stating that as the guarantor of the Lease he was responsible for paying to the plaintiff the sum of $184,213.98, which included rental payments for the entire term of the Lease, as well as additional rent for insurance, real estate taxes, utilities and the like. Prior to receiving the Demand Letter, the defendants contend the plaintiff had not served Chatelain with any demand for payment since the Surrender Date, nor had Chatelain had any contact with the plaintiff.

The defendants argue that the actions of the plaintiff in accepting the keys to the leasehold, taken together with its re-letting of the leasehold, and the failure for at least 20 months to demand from the defendants rent or other charges the landlord was entitled to bill the defendants, demonstrate a surrender of the leasehold by operation of law, precluding the plaintiff from asserting a claim for continued lease obligations.

Paragraph 18 of the lease provides that in case of a default by the tenant and re-entry, the "owner may re-let the premises or any part or parts thereof, either in the name of the owner or otherwise, for a term or terms. . . at Owner's option. . . . The failure of Owner to re-let the premises or any part thereof shall not release or affect Tenant's liability for damages."

Paragraph 24 of the lease provides there can be no acceptance of a surrender of the premises unless in writing signed by the owner. Defendants proffer no proof that the landlord agreed to the express surrender of the lease.

In opposition to the within motion the plaintiff asserts that

when the defendant surrendered the keys, there were no discussions regarding the release of either party from the terms of the lease. The plaintiff never sought full control of the premises for its own benefit. The premises was not used to store anything for the plaintiff's benefit. Plaintiff contends it did not conduct any business in the premises and protected the premises by paying insurance together with the utility bills until the premises were re-rented for the benefit of the tenant in order to mitigate damages.

The plaintiff further argues that it did whatever was reasonable and necessary to protect the premises. Moreover, the plaintiff asserts by accepting the keys the plaintiff never intended to release the defendants from their obligations under the lease, but rather, to re-rent the premises for the account of the tenant, since the sooner the premises could be rented meant the less time the defendants would be responsible for payment of rent, taxes, insurance and other charges.

A landlord's mere retention of keys returned by a tenant who leaves the leased premises does not establish an acceptance, or a surrender of the lease by operation of law unless accompanied by additional evidence reflecting an intent by both parties to terminate the lease (*Thomas v Nelson*, 69 N.Y. 118, 121; 2 Dolan, Rasch's Landlord and Tenant-Summary Proceedings § 26:20, at 296-297 [4th ed]).

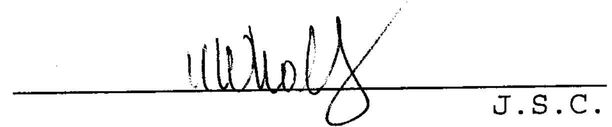
In *Holy Properties Ltd., P.L. v Kenneth Cole Products* (87 NY2d 130, 133) the Court of Appeals stated:

> 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 (internal citations omitted).

Paragraph 19 of the lease provides that if the tenant defaults, the owner may immediately, or at any time thereafter, and without notice to the tenant perform the obligations of the tenant thereunder. Issues of fact preclude the tenants from meeting their burden of proof establishing conduct on the part of the landlord that demonstrates its surrender of the premises by operation of law (*See Levitt v Zindler*, 136 App. Div. 695; compare *cf. Brock Enters v Dunham's Bay Boat Co.*, 292 AD2d 681, 682-683; *see also Olim Realty Corporation v Big John's Moving, Inc.*, 250 AD2d 744).

Dated: JAN 12 2009



J.S.C.

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JAN 15 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE