

Voice Rd. Plaza LLC v Autobuy NY, LLC

2024 NY Slip Op 34408(U)

December 11, 2024

Supreme Court, New York County

Docket Number: Index No. 652759/2020

Judge: Louis L. Nock

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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. LOUIS L. NOCK PART 38M

Justice

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INDEX NO. 652759/2020

VOICE ROAD PLAZA LLC,

Plaintiff,

MOTION DATE 07/18/2023

MOTION SEQ. NO. 002

- v -

AUTOBUY NY, LLC, and MARK MAIDA,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion for JUDGMENT - SUMMARY.

LOUIS L. NOCK, J.S.C.

In this commercial landlord-tenant action, nonparty 260 Voice Road LLC (“260 Voice Road”) moves to be substituted for plaintiff Voice Road Plaza LLC (“Voice Road”) pursuant to CPLR 1018 and 1021, and Real Property Law § 223. In the event the court grants substitution, 260 Voice Road moves for summary judgment against defendants. Upon the foregoing documents, the motion is granted to the extent set forth below, for the reasons set forth in the moving and reply papers (NYSCEF Doc. Nos. 53-55, 73, 83-84) and the exhibits attached thereto, in which the court concurs, as summarized herein.

“The grantee of leased real property . . . has the same remedies, by entry, action or otherwise, for the nonperformance of any agreement contained in the assigned lease for the recovery of rent, for the doing of any waste, or for other cause of forfeiture as his grantor or lessor had” (Real Property Law § 223). “Upon any transfer of interest, the action may be continued by or against the original parties unless the court directs the person to whom the

interest is transferred to be substituted or joined in the action” (CPLR 1018). When, as here, the landlord of the leased premises sells the property to a new landlord, substitution of the new landlord is appropriate (*GHH Assoc. LLC v Trenchant Funds*, 228 AD3d 503, 503 [1st Dept 2024]). Voice Road transferred the premise to 260 Voice Road on December 29, 2021 (Balducci aff., NYSCEF Doc. No. 55, ¶¶ 2-4).

Defendants conceded at oral argument that substitution is generally granted for a successor in interest (transcript of proceedings, NYSCEF Doc. No. 90 at 8), but argues that either Voice Road or 260 Voice Road waited too long to seek substitution, prejudicing defendants’ ability to seek discovery regarding 260 Voice Road’s efforts to re-let the premises. However, defendants have failed to show any prejudice. Liability under the lease does not turn on the information that defendants claim is outstanding (*Peters v City of New York Health and Hosps. Corp.*, 48 AD3d 329 [1st Dept 2008] [“a motion to substitute a party after a lengthy delay should be granted absent a showing of prejudice by the defendant”]). Accordingly, the motion to substitute is granted.

Having addressed substitution, the court now turns to summary judgment. Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, “the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial” (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). “[I]t is insufficient to merely

set forth averments of factual or legal conclusions” (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Here, plaintiff has established prima facie entitlement to summary judgment against defendant Autobuy NY LLC (“tenant”) by submission of “the existence of the lease . . . the tenant's failure to pay the rent, the amount of the underpayment, and the calculation of the amounts due under the lease (*Thor Gallery at S. Dekalb, LLC v Reliance Mediaworks (USA) Inc.*, 143 AD3d 498 [1st Dept 2016]). Plaintiff has also established prima facie entitlement to summary judgment against defendant Mark Maida (“Maida”), by submission of the executed guarantee and proof of defendants’ failure to pay sums owed thereunder (*Gard Entertainment, Inc. v Country in New York, LLC*, 96 AD3d 683, 683 [1st Dept 2012] [“Here, plaintiff established its entitlement to summary judgment as against Block by demonstrating proof of the guarantee he made in connection with a note executed by Country and his failure to make payments called for by its terms”]).

In opposition to the motion, defendants make several arguments. First, defendants argue that tenant had the right to terminate the lease pursuant to the lease and Maida’s guaranty. In this regard, the lease provides that tenant vacating the premises early is a default, except as provided under the terms of Maida’s guaranty (lease, NYSCEF Doc. No. 56, § 7.01). The guaranty in turn provides that Maida would guaranty “the full, prompt, and complete payment of all rent and

additional rent due under the Lease, without reference to any acceleration of rent, through and including the Vacate Date” (guaranty, NYSCEF Doc. No. 57 at 45). The Vacate Date “is the date that Tenant, after giving Landlord at least two (2) months' notice of its intention to vacate the Premises, surrenders the Premises to Landlord broom clean and vacant, and free of all occupants, and delivers to Landlord a key to the Premises” (*id.* at 46). The parties differ as to the meaning of the phrase “without reference to any acceleration of rent” regarding whether or not Maida is liable for the accelerated balance of the rent. 260 Voice Road proposes that the court should read the phrase to mean that the Maida is liable whether or not any item of outstanding rent has been accelerated. The court finds this reading to be strained in light of the general principles of guaranty law and the purposes of a “Good Guy Guaranty” such as Maida’s.

“A guaranty is to be interpreted in the strictest manner” (*White Rose Food v Saleh*, 99 NY2d 589, 591 [2003]). “[T]he terms of the guarantee . . . are to be strictly construed in favor of the private guarantor” (*Levine v Segal*, 256 AD2d 199, 200 [1st Dept 1998]). Where a court interprets a good guy guaranty, it should be mindful of the purpose of such guarantees, which “are commonly understood to apply to obligations which accrue prior to the surrender of the lease premises” (*Russo v Heller*, 80 AD3d 531, 532 [1st Dept 2011]). In keeping with these principles, the court finds that plaintiff’s proposed reading would impose liability on Maida for the entire balance of the rent when the clear meaning of the phrase used is to exclude accelerated rent from consideration of Maida’s liability, rendering the phrase, in effect, surplusage (*Nomura Home Equity Loan, Inc., Series 2006-FM2, by HSBC Bank USA, N.A. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 581 [2017] [“a contract must be construed in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect [internal quotation marks and citations omitted]). Further, the court does not consider the

phrase to be ambiguous. To quote another canon of contract interpretation, “provisions in a contract are not ambiguous merely because the parties interpret them differently” (*Mount Vernon Fire Ins. Co. v Creative Hous. Ltd.*, 88 NY2d 347, 352 [1996]).

260 Voice Road argues that even if defendants’ interpretation is correct, the guaranty should not be limited because tenant failed to comply with the conditions precedent in the guaranty, namely that tenant failed to give at least two months’ notice of its intent to vacate and failed to surrender the key to the premises (guaranty, NYSCEF Doc. No. 57 at 46). In this regard, Ian Deutsch, owner of the managing agent for both Voice Road and 260 Voice Road, avers that on April 1, 2020, Voice Road’s principal went to the premises and discovered that tenant had vacated (Deutsch aff., NYSCEF Doc. No. 54, ¶¶ 6-7; Deutsch reply aff., NYSCEF Doc. No. 84, ¶ 7). Aaron Berg, a former employee of tenant, avers that he believes he left a message for Deutsch stating that tenant would be ceasing operations in March 2020 (Berg aff., NYSCEF Doc. No. 79, ¶ 9). However, he previously testified at deposition that he could not recall if he had left a message for Deutsch (Berg EBT tr, NYSCEF Doc. No. 85 at 23-24). To the extent his affidavit contradicts his sworn testimony, it cannot raise an issue of fact (*Gallagher v Crotty*, 226 AD3d 426, 428 [1st Dept 2024]). In any case, the affidavit is at best equivocal about whether a message was left, and impermissibly relies on speculation in opposition to summary judgment (e.g. *Delgado v New York City Hous. Auth.*, 51 AD3d 570, 571 [1st Dept 2008]). Where, as here, tenant abandoned the premises and Voice Road terminated the lease, tenant remained liable for all obligations under the lease through the original term (lease, NYSCEF Doc. No. 56, § 22.01). As set for the above, however, Maida’s liability is limited to rent that accrued in the ordinary course without consideration of any accelerated rent.

Defendants' remaining arguments regarding liability are unpersuasive. Defendants' third affirmative defense states that defendants were "prevented from timely performing under the Lease due to COVID-19 and the public health crisis which ordered all businesses to be closed in March 2020" (answer, NYSCEF Doc. No. 5, ¶ 28). As the Appellate Division, First Department has now definitively stated, "the pandemic cannot serve to excuse a party's lease obligations on the grounds of frustration of purpose or impossibility" (*Fives 160th, LLC v Zhao*, 204 AD3d 439, 440 [1st Dept 2022]). Moreover, the lease provides that an interruption of business caused by, inter alia, "restrictive governmental laws or regulation," does not excuse tenant from "prompt payment of fixed minimum rent, percentage rent, additional rent or any other payments required by the terms of this Lease" (lease, NYSCEF Doc. No. 56, § 28.05). Thus, the parties expressly foresaw that this situation might occur and guarded against it (*Kel Kim Corp. v Central Mkts.*, 70 NY2d 900, 902 [1987]).

Defendants claim that the acceleration of the rent and termination of the lease were in violation of a moratorium on evictions established by the Governor's office (9 NYCRR 8.202.8). Executive Order 202.8, issued on March 20, 2024, provides that for 90 days, "[t]here shall be no enforcement of either an eviction of any tenant residential or commercial, or a foreclosure of any residential or commercial property" (*id.*). By its terms, the order references enforcement of evictions and foreclosures only. As this court has previously stated when confronted with this issue, the Executive Order does not "place[] any restraint on issuance of judgments declaring the possessory rights attaching to leased property" (*Hill v Andrews*, 2020 NY Slip Op 34289[U], *8 [Sup Ct, New York County 2020] [analyzing Executive Order 202.66, which continued the restriction set up by Executive Order 202.8]). Here, Voice Road did not seek to enforce a judgment of eviction, and indeed had not even obtained such a judgment.

Finally, defendants challenge 260 Voice Road's calculation of the property tax additional rent through the original end date of the lease in 2028 because 260 Voice Road has provided evidence for property taxes assessed through May 2020. The lease provides that the amount of the property tax additional rent is "set by Owner" and revised yearly to more closely reflect tenant's proportionate share of the property taxes (lease, NYSCEF Doc. No. 56, § 5.01). However, the lease also provides that the landlord's obligation to revise tenant's required payments survives termination of the lease (*id.*). Without evidence of the actual tax bills for the subsequent years following termination, plaintiff has not established prima facie entitlement to summary judgment on the property tax additional rent. This issue shall therefore be severed and set down for further proceedings.

Accordingly, it is hereby

ORDERED that so much of 260 Voice Road LLC's motion to substitute itself for plaintiff Voice Road Plaza LLC is granted, and that 260 Voice Road LLC, be substituted as plaintiff in the above-entitled action in the place and stead of the plaintiff, Voice Road Plaza LLC, without prejudice to any proceedings heretofore had herein; and it is further

ORDERED that all papers, pleadings, and proceedings in the above-entitled action be amended by substituting the name of 260 Voice Road LLC, as plaintiff in the place and stead of Voice Road Plaza LLC, without prejudice to the proceedings heretofore had herein; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to amend their records to reflect such change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that so much of 260 Voice Road LLC's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of 260 Voice Road LLC and against defendants on the first and third causes of action as follows; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of 260 Voice Road LLC and against defendant Autobuy NY, LLC in the amount of \$749,223.92, with interest thereon at the statutory rate from March 1, 2020, as calculated by the Clerk; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of 260 Voice Road LLC and against defendant Mark Maida in the amount of \$17,949.14, with interest thereon at the statutory rate from March 1, 2020, as calculated by the Clerk. Defendant Autobuy NY, LLC shall be jointly and severally liable for this amount; and it is further

ORDERED that the first cause of action, save for the amount of property tax additional rent, and the third cause of action, are severed and the balance of the claims are continued; and it is further

ORDERED that defendants are liable to 260 Voice Road LLC on the second and fourth causes of action for the amount of 260 Voice Road LLC's and Voice Road Plaza LLC's reasonable attorneys' fees (lease, NYSCEF Doc. No. 56, § 22.04; guaranty, NYSCEF Doc. No. 57 at 45-46). The issue of the amount of a judgment to be entered thereon shall be determined at a further hearing to be held before the undersigned; and it is further

ORDERED that the action shall continue as to the first, second, and fourth causes of action; and it is further

ORDERED that counsel are directed to appear for the said hearing on January 28, 2025, at 10:00 AM, at the Courthouse, 111 Centre Street, Room 1166, New York, New York.

This constitutes the decision and order of the court.

<u>12/11/2024</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE