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Law Currents
An informational newsletter from
Richard A. Klass, Esq.

"I tell the landlady I got a job, I'm gonna pay the rent. She said, 'yeah?' I said, 'oh yeah.'"

— George Thorogood
"One Bourbon, One Scotch, One Beer"

The landlady rented the storefront space to an interior decorating firm. This commercial tenant signed a lease to rent the store and an individual provided a personal guarantee of the lease.

Unfortunately, the tenant defaulted in the rent payments, forcing the landlady to commence an eviction proceeding in the Civil Court. In resolving the landlord-tenant proceeding, the parties signed a stipulation staying the execution of the Warrant of Eviction provided that the tenant became current on its rent. Unsurprisingly, the tenant failed to pay its rent and got evicted from the store by the City Marshal.

The landlady came to **Richard A. Klass**, *Your Court Street Lawyer*, to sue the former tenant for rent arrears as well as to sue the individual on his personal guarantee of the lease. In the Supreme Court case brought to collect the rent arrears, the landlady brought a motion for summary judgment before the court (meaning that no trial was needed; the case could be decided on the law alone). Her burden of proving the rent arrears was established by introducing a copy of the lease agreement, which allowed her to recover (a) past due rent, (b) eviction costs, and (c) the differential between the rent owed by the former tenant through the end of the original lease term and the rent now being paid by the new tenant for the storefront space. *See, H.L. Realty LLC v. Edwards*, 131 AD3d 573 [2 Dept. 2015]; *Preferred Capital v. PBK, Inc.*, 309 AD2d 1168 [4 Dept. 2003].

Surrender, but no forgiveness!

It is common in landlord-tenant cases for a tenant to surrender possession of its rented space and give the keys back to the landlord in exchange for the landlord's promise to forgive the rent owed. Many times, it is more valuable to a landlord to have its space back sooner to re-let to a new, paying tenant than to fight with a deadbeat tenant in court.

Here, the tenant incredibly claimed in its defense to the rent arrears collection case that the landlady's attorney made an oral agreement with him to forgive the rent owed, and any further liability, in exchange for the surrender of the store. This disputed and unproven claim was refuted by the landlady based upon two lease provisions: (1) that all of the landlady's rights were reserved in the event of "re-entry, expiration and/or dispossession by summary proceedings or otherwise;" and (2) that any amendments, changes, or discharges of the lease had to be contained in a signed writing. Thus, the supposed oral agreement with the attorney was unenforceable. *See, Aris Industries, Inc. v. 1411 Trizechahn-Swig, LLC*, 294 AD2d 107 [1 Dept. 2002].

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Personal guarantee was binding

The individual who provided the personal guarantee of the lease, who was also a defendant, claimed in his defense that the copy of the personal guarantee submitted by the landlady in support of her summary judgment motion may not have been the same one that he signed. The court held that the guarantor could not claim this defense because of a strong litigation tactic – the "Notice to Admit."

In the course of the litigation, a copy of the personal guarantee was served upon the guarantor's attorney with a document referred to as a Notice to Admit. The Notice to Admit requires the person served to sign a sworn affidavit either admitting or denying the allegation made in it (in this case, the allegation that the guarantee was a true and accurate copy of the original). In response to the Notice to Admit, the defendant's attorney provided an unsworn response signed only by himself and not the defendant. Accordingly, the court deemed the defendant to have failed to properly respond to the Notice to Admit, and effectively admitted the genuineness of the document. See, *Rosenfeld v. Vorsanger*, 5 AD3d 462 [2 Dept. 2004].

Transfer into a Trust doesn't bar proceeding

From the time that the original lease agreement was entered into until the collection action was brought, the landlady did some estate planning. She transferred the building from herself to a revocable trust and her daughter as tenants-in-common. The tenant tried to use this fact to its advantage, claiming that the plaintiff didn't have "standing" to sue for the rent arrears.

In dismissing this defense, the court held that the fact that the original landlady was not currently the sole owner of the building did not destroy her standing to bring the case, since a tenant-in-common has standing to seek rent arrears in a non-payment proceeding (*Caprer v. Nussbaum*, 36 AD3d 176 [2 Dept. 2007]) and the tenant did not question the authority of the plaintiff to act as landlord under the lease (*Matter of G.N. Associates v.Griffen*, 178 AD2d 747 [3 Dept. 1991]).

In granting the plaintiff's summary judgment motion, the Judge held that the defenses and proposed counterclaims of the defendants should be properly dismissed. *Sardell v. Décor by R&J, Inc. and Freddy Halfon*, Sup. Ct., Kings Co. Index No. 503234/2012, 11/16/2015.

— by Richard A. Klass, Esq.

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2015

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