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Expert Analysis

Expediting Recovery of Accelerated Rents From Commercial Lease Guarantor

Your commercial tenant went dark and dropped the keys off before the expiration of the lease, leaving you with back rent on the books and no tenant paying ongoing rent. Distress in the retail leasing sector under pressure by ecommerce is making this an increasingly likely scenario. Against a tenant who is no longer in possession a landlord-tenant summary proceeding is not an option to recover the back rent, and never could get future rent. But with an effective rent acceleration clause and good guy guaranty, there is a little-used legal procedure that could allow the landlord to quickly pursue the guarantor for lost back and future rents: a motion for summary judgment in lieu of complaint.

An ordinary lawsuit has procedures that could delay judgment for several months to a year or more. But New York law (CPLR 3213) provides that, when an action is based

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upon “an instrument for the payment of money only” or upon a judgment, the plaintiff may serve a summons and a notice of motion for summary judgment with supporting papers instead of a complaint. The defendant must ordinarily submit answering papers on the motion within 20 to 40 days after the summons and motion is served depending upon how service was made and whether the plaintiff wants an opportunity to reply.

This procedure skips the pleading stage and avoids a trial by proceeding directly to a motion for summary judgment, but the action must qualify as one based on an instrument for the payment of money only or on a judgment. Suing a guarantor on the money judgment for the tenant’s

rent arrears ordinarily qualifies. But does a lease guaranty qualify as “an instrument for the payment of money only” so as to avail the owner of the expedited procedure to recover additional breach of lease damages such as accelerated future rents?

Several years ago, a well-respected New York jurist said the answer was “yes”. In *Ludlow 168 v. Lau*,¹ the Manhattan Supreme Court granted the landlord’s motion for summary judgment in lieu of complaint and awarded the landlord a money judgment against the commercial lease guarantor in an amount equal to the \$12,730.80 Civil Court judgment for rent arrears awarded against the commercial tenant in a prior summary non-payment proceeding, plus \$653,777.67 based on a rent acceleration clause for future rent payments due under the seven-and-a-half-year remainder of the 10-year lease term.

In *Ludlow*, the court held that, in addition to the Civil Court judgment which was clearly subject to the expedited motion-action procedure, the lease guaranty and lease

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acceleration clause also qualified for expedited treatment as “an instrument for the payment of money only.”

The rent acceleration clause provided that if the tenant defaulted on any covenants and the lease was terminated because of such breach, then the landlord had the right to judgment on and collection of the tenant’s obligation to make a single payment to the landlord of a sum equal to the total of all rent and additional rent reserved for the remainder of the lease term.

The guaranty provided that the guarantor promised to perform all of the tenant’s obligations under the lease, including the payment of rent and of the reasonable costs for the collection or enforcement of the tenant’s obligations under the lease, and guaranteed the payment, performance and observance of all of the tenant’s obligations under the lease.

Though the guaranty in *Ludlow* contained a “good guy” clause extinguishing the guarantor’s liability for future rent, the court held that the tenant failed to meet at least one of the two conditions to invoke that limitation of liability because the tenant was not current on its rent obligations as of the date that possession was surrendered. Given the guarantor’s admission that the tenant was not then current on its rent, and that it still owed the two months’ rent awarded by the judgment in the summary proceeding, the court found that the guarantor

had failed to raise a triable issue of fact regarding his continuing liability under the guaranty.

In 2014, the Court of Appeals appeared to limit enforceability of rent acceleration clauses when it allowed a tenant to defend against an accelerated rent claim on the grounds that it could constitute an unenforceable penalty. In *172 Van Duzer Realty v. Globe Alumni Student Assistance Association*, 24 N.Y.3d 528 (2014), the court found that an acceleration clause which permits

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the landlord to obtain all future rent due in one lump sum, undiscounted to present-day value, and also enjoy uninterrupted possession of the property, provides the landlord with more than the compensation attendant to the losses flowing from the breach—even though such compensation is the recognized purpose of a liquidated damages provision.

However, in May 2017, the Appellate Division, First Department, reaffirmed that a landlord may nevertheless recover such accelerated rents from a commercial lease guarantor

under the expedited procedure of a motion for summary judgment in lieu of complaint, holding in *Royal Equities Operating v. Rubin*, 150 A.D.3d 617 (1st Dept. 2017) that guarantors’ liability can be greater than that of the tenant because the lease and guaranties are separate contracts and the latter are enforceable without qualification or reservation.

If your commercial lease has a rent acceleration clause and guaranty, consider the expedited procedure of a motion for summary judgment in lieu of complaint. If the court determines that the owner’s documents do not satisfy the legal criteria for this expedited procedure and denies the motion, the rule allows the court to deem the parties’ moving and answering papers as the complaint and answer, respectively, or the court may order the filing of pleadings. In either event, the time spent on the expedited procedure would give the owner an early look at the guarantor’s case and a roadmap to making a summary judgment motion in the action that will better satisfy the court.

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1. Index No. 116479/2009 (Supreme Court, New York County) (Gische, J.), n.o.r., Decision and Order dated Sept. 29, 2010, and entered Oct. 4, 2010. Two years later, in October 2012, Justice Gische was elevated to the Appellate Division, First Department.