SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS J.S.C. PART 7
Justice

Index Number : 650473/2017
14TH STREET OWNER LLC
vs
WESTSIDE DONUT 6TH AVE.
Sequence Number : 001
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits NYSCEF DOC. No(s). 15-45
Answering Affidavits — Exhibits _____ No(s). 47-60
Replying Affidavits _____ No(s). 61-62

Upon the foregoing papers, it is ordered that this motion is resolved per the attached long-form order of 3/1/19.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 3/1/19

HON. GERALD LEBOVITS, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART

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14th STREET OWNER LLC,

Plaintiff,

Index No.: 650473/2017

-against-

DECISION AND ORDER

WESTSIDE DONUT 6th AVE. VENTURES LLC, WESTSIDE DONUT 544 VENTURES LLC, RICHARD GREENSTEIN, and HOWARD NOVICK,

Defendants.

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Gerald Lebovits, J.:

In this action for nonpayment of rent under a commercial lease, plaintiff 14th Street Owner LLC (14th Street) moves, pursuant to CPLR 3025 (c), to amend its complaint, pursuant to CPLR 3212, granting partial summary judgment in its favor on several causes of action against defendant Westside Donut 6th Ave Ventures LLC (Westside 6th) and defendant Westside Donut 544 Ventures LLC (Westside 544), and to quash the subpoenas served upon non-parties Gary Barnett and Dov Hertz. Defendants Richard Greenstein (Greenstein) and Howard Novick (Novick) cross-move for summary judgment.

Background

14th Street is the owner of the building located at 536 Sixth Avenue, New York, New York 10011 (the Building), which includes the second store from the corner (the Premises). Whitestone Plaza Donut Corp. (Whitestone) entered into possession of the Premises pursuant to a Lease, dated September 11, 2000, between Duell LLC, as agent for then-owner 61-69 LLC, and Whitestone, as tenant (the Original Lease). This was a five-year lease, terminating on

December 31, 2006. In November 2006, Duell LLC and Whitestone agreed, among other things, to extend the term of the lease through December 31, 2012. On or about March 11, 2008, by the Second Lease Modification and Extension Agreement (the Second Lease Extension), Duell LLC and Whitestone agreed to extend the lease term through March 31, 2015. On or about October 3, 2008, by an Assignment and Assumption of the Lease Agreement, Whitestone, as tenant, assigned its rights to Westside 6th, which acquired the Dunkin Donuts franchise located at the Premises from Whitestone. By the Third Lease Modification and Extension Agreement of January 28, 2013, Duell LLC and Westside 6th agreed to extend the term of the lease through March 31, 2020 (the Original Lease, the first, second and third lease extensions collectively, the Lease). On or about December 1, 2015, 61-69 LLC sold, transferred and conveyed its entire ownership in and to the Building to 14th Street.

Pursuant to the terms of the Lease, Westside 6th agreed to pay rent as follows: 4/1/2015 – 03/31/2016, $14,809.86 per month, 04/01/2016 – 03/31/2017 $15,550.35 per month, 04/01/2017 – 03/31/2018, $16,327.86 per month, 04/01/2018 – 03/31/2019, $17,144.25 per month, and 04/01/2019 – 03/31/2020, $18,001.46 per month. Defendants Greenstein and Novick were guarantors on the Lease.

Paragraph 5 of the Lease states:

> "This guaranty is limited to obligations accruing prior to (a) Tenant's surrender of possession of the premises to Owner at any time during the term of this lease consisting of (i) delivery of vacant possession, free of all occupancies and tenancies, with all rent and additional rent paid in full to such date; (ii) execution by Tenant and delivery of an instrument of surrender and release; and (iii) delivery of the keys to the premises . . . ."

Plaintiff seeks to recover rent and additional rent due and owing by Westside 6th pursuant to the terms of the Lease. Plaintiff alleges that Westside 6th violated the Lease in June 2016, when it unilaterally, without plaintiff's consent, vacated the leased premises and ceased

paying rent. Additionally, plaintiff seeks to recover these amounts from Westside 544, as the successor entity to Westside 6th under the de facto merger doctrine.[1] According to plaintiff, Westside 544 is the successor entity to Westside 6th, and one that "wholly own[s] and that mirrors the management, employees, assets, and general business operation of Westside 6th to a tee" (Grill affirmation in support of plaintiff's motion, ¶ 2).

14th Street alleges that on or about June 30, 2016, Westside 6th violated the Lease by vacating without 14th Street's consent, prior to the termination of the Lease. Plaintiff seeks all rent due and owing under the Lease to date.

Under the Lease, the termination provision states:

> "The Owner, Duell LLC, and its agents, or its successors or anyone with an ownership or other financial interest in the subject building, or a contract vendee for the subject building, may send the Tenant, or its successors or assigns, a written notice by Certified Mail, Return Receipt Requested, setting forth a date at least, thirty (30) days subsequent to the date of the mailing of such notice, which notice shall advise, the Tenant that the Lease is being terminated as of the said date at least thirty (30) days subsequent to the mailing of the said notice, and that such date shall become the Termination Date of this Lease Agreement as if that were the end of the Term originally specified in the Lease"

(Schepansky affirmation, exhibit A, § 49).

Plaintiff never provided written notice to Westside 6th pursuant to this provision (*see* Grill affirmation, exhibit D at 39-40). On or about June 1, 2016, Westside 6th sent plaintiff a letter stating that it intended to vacate the Premises on June 30, 2016. In the letter, Westside 6th references the September 11, 2000 lease and states that it is surrendering the Premises as of June 30, 2016, or before, and will pay all rent and additional rent due through that date. The letter

[1] 14th Street has also asserted causes of action against defendants for violation of sections 275, 273, 274, 276, and 279 of New York's Debtor and Creditor Law based upon the unlawful conveyance of assets by Westside 6th. Plaintiff is not moving for summary judgment as to those claims at this time and, and as such, these causes of action are not further addressed in the instant motion.

notes that Novick and Greenstein have no further obligations as guarantors, but offers no explanation as to why the tenant is vacating.

Having received no objection to its surrender from plaintiff, Westside 6th Ave vacated the Premises on June 30, 2016, and surrendered possession and delivered the keys to plaintiff by letter dated July 8, 2016.

By letter dated July 15, 2016, plaintiff objected to Greenstein's and Novick's position that they were released from obligations under the guaranty. The letter states that under the Lease provisions, in order to release the Guarantors from their obligations, the delivery of the keys was required by June 30, 2016, the date by when defendants advised they would return the keys. Because the keys were not returned until July 8, 2016, plaintiff found the tendered surrender documents to be null and void.

After some negotiation, counsel for plaintiff sent counsel for Westside 6th a second letter on or about August 19, 2016 enclosing a release made out to Novick and Greenstein releasing them from any liabilities arising under the guaranty and/or the Lease (the Release). This Release states:

> "[t]he parties acknowledge and agree that notwithstanding that [Plaintiff] has agreed to the aforesaid release as and against [Novick and Greenstein] in consideration of payment of the Settlement Amount, nothing herein is intended to, or should be construed as, a release of any kind in favor of [Westside 6th] and [Plaintiff] expressly reserves any and all claims against [Westside 6th]"

(plaintiff's memorandum of law at 10 citing Schepansky affirmation, exhibit K at 2).

Thereafter, Novick and Greenstein closed the Dunkin Donuts at the Premises, and, within days, re-opened it 100 feet down the block at Westside 544. In its motion, plaintiff states: "Westside 55 not only took possession of the Westside 6th assets delineated in the asset purchase

agreement, but it also hired the majority, if not the entirety, of Westside 6th's staff, and took over all of Westside 6th's vendor relationships" (plaintiff's memorandum of law in support at 9).

Since August 1, 2016, Westside 6th has failed to pay, among other amounts, the monthly fixed rent and additional rent. As of March 5, 2018, Westside 6th has failed to pay a total principal amount of $476,788.88 in monthly fixed rent and additional rent under section 44 of the Lease. The Premises have not been leased to a new tenant.

Defendant Greenstein and Novick cross-move for dismissal of the complaint as against them based upon the Release.

Discussion

Plaintiff seeks to amend complaint

Plaintiff seeks to amend its complaint for the sole purpose of updating the amount of the monthly fixed rent and additional rent pursuant to Section 44 of the Lease. This is to reflect the passage of time between the filing of the complaint and the filing of the motion. Plaintiff has annexed a proposed amended complaint in redlined format to reflect the changes from the original complaint. Defendants do not oppose this application.

Pursuant to CPLR 3025 (c), "[t]he court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." In *Kimso Apts., LLC v Gandhi*, 24 NY3d 403 [2014], the Court of Appeals held "[c]ourts are given 'considerable latitude in exercising their discretion [in entertaining motions to amend], which may be upset . . . only for abuse as a matter of law'" (*id.* at 411[citation omitted]). According to the First Department,

> "CPLR 3025 (c) authorizes courts to permit pleadings to be amended before or after judgment to conform them to the evidence upon such terms as may be just. As with a motion pursuant to CPLR 3025 (b), the determination is committed almost entirely to the discretion of the Trial Court. The operative factor

> considered upon a motion to conform pleadings is prejudice to the nonmoving party"

(*Gonfiantini v Zino*, 184 AD2d 368, 369 [1st Dept 1992][internal citation omitted]).

> "Prejudice is more than 'the mere exposure of the [party] to greater liability.' Rather, 'there must be some indication that the [party] has been hindered in the preparation of the [the party's] case or has been prevented from taking some measure in support of [its] position.' The burden of establishing prejudice is on the party opposing the amendment"

(*Kimso Apartments, LLC*, 24 NY3d at 411 [internal citations omitted]).

Because defendants do not oppose this motion, or offer any grounds for a finding of prejudice, the court grants this portion of plaintiff's motion, and directs the amendment of the complaint as requested.

Plaintiff seeks summary judgment on its first cause of action as against Westside 6th [2]

14th Street's first cause of action seeks to recover the aggregate amount of all monthly fixed rent and additional rent pursuant to Section 44 of the Lease due for the period after defendants vacated the Premises, July 1, 2016 through and including March 31, 2018, in the sum of $476,788.88. On this motion, plaintiff argues that the Lease is unambiguous with respect to the payment obligations of Westside 6th under Article I of the original Lease.

Plaintiff argues that the Lease is clear and unambiguous with respect to Westside 6th's payment obligations. The Lease sets forth the applicable monthly fixed rent amounts due from Westside 6th. Specifically, the Lease establishes the monthly rent was $15,550.35 per month for the period of July 2016 through March 2017, and $16,327.86 per month for the period of April 2017 through March 2018.

[2] In its memorandum of law, plaintiff states that its first and second causes of action seek to hold Westside 6th liable pursuant to the terms of the Lease.

Further, the Original Lease under Section 44, "Tax Escalation," sets forth the amounts for additional rent due in connection with real estate taxes. The additional rent payments under the Original Lease were $7,290.97 per month for the period of August 1 through December 31, 2016, $7,143.47 per month for the period of January 1 through June 30, 2017, $8,639.55 per month for the period of July 1 through December 31, 2017, and $8,515.49 per month for the period of January 1 through March 31, 2018. The sum of these monies due and owing, through March 31, 2018, and minus a prior credit of $247.68, is $476, 788.88. According to plaintiff, Westside 6th has not paid this amount, and therefore seeks summary judgment for payment.

In opposition, defendants argue that plaintiff has deliberately kept the Premises vacant. It is defendants' contention that they left the Premises, when they were notified that the building had a new landlord, Extell Corporation, and received information from Asher Schepansky that led them to believe that the Building was going to be torn down. After receiving the letter of attornment from 14th Street, they spoke to Asher Schepansky, an employee of Extell Development Corporation, the managing agent for 14th Street. He began managing the Building in December 2015, when 14th Street bought it. Defendants Novick and Greenstein both testified that Schepansky gave them the impression that the Building was going to be torn down and they would lose the store. During his deposition, Novick testified:

Q: My question was: why did 6th Avenue cease business operation in, I think you said it was June of 2016?
A: After we got that letter [of attornment], we looked up who the new landlord was going to be. At the point, the Extell Corporation's reputation proceeded them. We called – my partner and I called Asher Schepansky and asked – we had introduced ourselves and asked him what the Extell's intention were to that building, and made reference to the fact that there is a termination clause in that lease, a 30-day termination clause. He put a chill down my spine. He said we are developers. My immediate reaction was, we are done . . . they are going to develop that building. They were going to tear it down . . ."

(Grill affirmation, exhibit D at 26-27).

According to defendants, their belief that plaintiff would demolish the building and terminate the Lease, resulted in their invoking the "good guy" guaranties under the Lease, Westside 6th Ave surrendered possession and delivered the keys to plaintiff by letter dated July 8, 2016 and on May 11, 2016, sold all assets for $92,000 to Westside 544. Plaintiff did not object to the surrender until July 15, 2016, one week after receiving the keys. Plaintiff objected because Westside 6th delivered the keys on July 8, 2016 rather than June 30, 2016. In order to resolve this dispute, defendant paid plaintiff $22,841.32 and plaintiff issued the guarantors a release, dated August 18, 2016.

Defendants contend that since that time, plaintiff has deliberately kept the Premises vacant. They rely on the testimony of Schepansky that the Premises have not been re-let, and remain vacant. Schepansky testified:

"Q: What tenant is there –
A: At this time, what tenant is in Dunkin' Donuts space?
Q: Yes.
A: No tenant . . .
Q: What steps if any have you taken to re-lease the Dunkin Donuts property that they vacated?
A: None.
Q: Did ownership direct you not to re-lease that?
A: I believe.
Q: And what store occupies the T-Mobile space?
A: None.
Q: When did they vacate?
A: I'd say about nine months ago, six to nine months ago.
Q: Do you have a broker attempting to lease that space?
A: No.
Q: Why is that?
A: I've been directed by ownership not to re-lease the space.
Q: Who gave you that direction?
A: Either Gary Barnett or Abba Barnett

(Grill affirmation, Exhibit C at 47-49).

Essentially, defendants argue that plaintiff's warehousing of spaces as a part of a redevelopment for plaintiff's own benefit is not consistent with the landlord-tenant relationship, creating a surrender by operation of law as of July 1, 2016. These actions by plaintiff terminated Westside 6th's obligation to pay rent and additional rent thereafter.

Further, defendants argue that plaintiff has failed to establish its rent ledger. Westside 6th contends that it did not receive any tax statement setting forth the Real Estate Tax calculations, nor were any proffered by plaintiff. Additionally, plaintiff's ledger does not account for Westside 6th's security deposit or otherwise substantiate $476,788.88 as the sum due and owing.

In reply, plaintiff argues that defendants unilaterally vacated the Premises, without offering any explanation, and, therefore, this was not a surrender by operation of law. Additionally, in support of this position, plaintiff states that it expressly reserved all of its rights in both its counsel's letter of July 15, 2016 and the August 19, 2016 limited Release that it executed as against Novick and Greenstein. In this regard, plaintiff relies on the language in the Release, attached to its August 19th letter, that reads, in part:

> "The parties acknowledge and agree that notwithstanding that RELEASOR has agreed to the aforesaid release as and against each RELEASEE in consideration of payment of the Settlement Amount, nothing here is intended to, or should be construed as, a release of any kind in favor of WESTSIDE DONUT 6th AVE. VENTURES LLC and Releasor expressly reserves any and all claims against WESTSIDE DONUT 6th AVE. VENTURES LLC"

(Schepansky affirmation, exhibit K at 2).

In his affidavit in support of plaintiff's motion, Schepansky avers that plaintiff never sought to terminate the Lease with 14th Street "pursuant to the provisions of the Lease that permitted plaintiff to unilaterally terminate the Lease prior to the expiration of the lease term.

Under New York law, as distinguished from an express surrender, a lease is surrendered by operation of law "when the parties to a lease both do some act so inconsistent with the

landlord-tenant relationship that it indicates their intent to deem the lease terminated . . . [and can be] inferred from the conduct of the parties" (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691-692 [1986]; *Matter of Wasserman v Ewing*, 270 AD2d 427, 428 [2d Dept 2000]). In *Jimenez v Henderson*, 144 AD3d 469, 470 [1st Dept 2016]), where the landlord's termination letter conditioned the termination of the lease on repayment of unpaid rent and other charge under the lease, the Court found that "[t]he defense of surrender by operation of law is inapplicable here, as landlords consistently reserved their rights to collect the remaining rent from tenant" (*id.* at 470).

The court finds that by the third extension of the Lease, the term of the Lease was set to expire on March 31, 2020. Additionally, under the Lease, pursuant to section 49, the Termination clause, the owner may notify tenant "thirty days subsequent to the date of mailing of such notice, which notice shall advise the Tenant that the Lease is being terminated as of the said date at least thirty (30) days subsequent to the mailing of the said notice, and that such date shall become the Termination Date . . ." (Schepansky aff, exhibit A, § 49). Further, pursuant to section 48, the Demolition or Restoration clause, the owner has the option, "exercisable by written notice given to the Tenant, of cancelling or terminating in the event that the Owner . . . within 18 months after the giving of notice, to demolish or substantially alter the Building . . . provided that the Owner . . . (ii) . . . shall simultaneously with the giving of the aforesaid notice to Tenant also give similar notices to all other Tenants in the Building whose leases give Owner or net lessee such right of termination and who are affected by such demolition . . ." (*id.*, § 48). There are no clauses in the Lease permitting the tenant to unilaterally terminate the Lease.

Based upon the above, the court finds that when Westside 6th vacated the Premises on June 30, 2016, unilaterally and without plaintiff's consent, in contravention of the Lease terms,

they did not surrender by operation of law. Accordingly, under the terms of the Lease and consistent with the terms of the release and the correspondence from plaintiff, Westside 6th continues to owe rent under the Lease.

Plaintiffs are entitled to collect the rent due and owing under the Lease. Westside 6th's conclusory statement that "Plaintiff has failed to substantiate its rent ledger," is too vague to undermine plaintiff's proffered evidence, including the affidavit of Asher Schepansky, supporting the amount alleged to be due and owing for rent. However, defendants additionally posit that plaintiff seeks an amount in rent from which plaintiff has not deducted the security deposit, and, with respect to additional rent, defendants argue that plaintiff did not proffer tax statements setting forth the real estate tax calculation for which plaintiff now seeks additional rent payments from defendants. Further, defendants argue that plaintiff has not accounted in the rent ledger for the payment made by the guarantors in exchange for the release.

The court grants summary judgment to plaintiff as against Westside 6th on the first cause of action, the amount of which will be determined at trial.

Plaintiff seeks summary judgment on its second cause of action

In the second cause of action, plaintiff alleges that Westside 6th is liable for plaintiff's attorney's fees, costs and expenses incurred as a result of Westside 6th's default under the Lease. Under the Original Lease, § 19, the 14th Street is entitled to its attorney's fees from Westside 6th as follows:

> "If Tenant shall default in the observance or performance of any term or covenant on Tenant's part to be observed or performed under or by virtue of any of the provisions of this Lease, then, unless otherwise provided in this Lease, Owner may immediately or at any time thereafter, and without notice, perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including but not limited to attorneys' fees, in instituting, prosecuting or

> defending any actions or proceedings, such sums so paid or obligations incurred, with interest and costs, shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner immediately upon demand or may claimed as additional rent in any summary proceeding or other act or proceeding in which such sums were incurred, or, at Owner's option, if Tenants' Lease term shall have expired at the time of making of such expenditures or incurring of such obligations, such sums shall be recoverable by Owner as damages"

(Schepansky affirmation, exhibit A, § 19).

Defendants argue in opposition that because plaintiff cannot prevail in this action, plaintiff is not entitled to attorney's fees. However, because this court found that defendant Westside 6th is liable on the first cause of action, the court finds that plaintiff is entitled to attorney's fees in an amount to be determined at trial.

Plaintiff seeks summary judgment on its eighth cause of action

Plaintiff's eighth cause of action seeks to hold Westside 544 liable for Westside 6th's default under the Lease. Plaintiff offers facts to establish a de facto merger between these two businesses. Plaintiff alleges that the two individual defendants are the sole members of both Westside 6th and Westside 544. According to the allegations of the eighth cause of action, Westside 544 is the successor to Westside 6th. Plaintiff alleges that after Westside 6th breached the Lease by vacating the Premises, the individual defendants fraudulently transferred Westside 6th's franchise right, employees, stock and inventory, and equipment to Westside 544, without fair and adequate consideration, whereby Westside 544 opened a second Dunkin Donuts 100 feet away. Thus, because these two entities share a commonality of ownership, assets, personnel and goodwill, Westside 544 is responsible for the liabilities of Westside 6th as articulated in this lawsuit.

Defendants argue that Westside 6th received fair consideration for the sale of its assets. According to defendants, Westside 544 paid Westside 6th $92,000 pursuant to the Asset Purchase

Agreement. Of that total, $82,000 was allocated to the franchise agreement. The members of Westside 6th purchased a 20-year franchise term in 2014 at the rate of $4,500 per year, for a sum of $90,000. The $82,000 represents the balance of the franchise term as of the asset sale in 2016.

With respect to the equipment, the equipment was used, and an upgrade or replacement of the equipment was imminent pursuant to the franchise agreement. Thus, according to defendants, the equipment was of little value. Additionally, according to defendants the goodwill was of little value to Westside 6th as the goodwill insures to the benefit of the franchisor. Therefore, $5,000 for the goodwill was an overvaluation.

"As a general rule, a corporation that purchases the assets of another corporation is not responsible for the torts of the seller corporation. However, '[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations'" (*Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158, 158 [1st Dept 2005][citation omitted]). Plaintiff grounds its successor liability claim in at least the first of these exceptions. Plaintiff argues that the sale of Westside 6th should be deemed a de facto merger, because the following factors are present: (1) continuity of ownership, (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction, (3) the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business, and (4) continuity of management, personnel, physical location, assets and general business operation (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). In other words, the question for the court is

whether Westside 544 is a "mere continuation" of Westside 6th (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]).

Plaintiff is able to satisfy the first element of de facto merger, continuity of ownership. According to the closing statement for the sale of the purchase of assets of Dunkin Donuts and assignment of the franchise agreement, the members of the purchaser and the seller are Greenstein and Novick. Further, Novick testified that "[t]here is no dispute that [he] and Mr. Greenstein each equally own 544 and 6th Avenue" (Grill affirmation, exhibit D at 186).

Plaintiff is additionally able to satisfy the second and third elements, "cessation of ordinary business operations and dissolution of the selling corporation as soon as possible after the transaction," and "the buyer's assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller's business."

Defendants challenge plaintiff's use of this doctrine, only with respect to the second element. On this element, defendants argue that the criterion set forth in *Kretzmer* cannot be satisfied where the seller corporation is never dissolved and "remain[s] in existence in a meaningful way since the subject transaction closed" (*Matter of New York City Asbestos Litig.*, 15 AD3d at 257). Defendants argue that Westside 6th remains an active limited liability company, and continued to exist after the asset sale to pay certain expenses.

In opposition to this point, plaintiff argues that even if Westside 6th was never formally dissolved, it remains nothing more than a shell, shorn of its assets, which is a status sufficient to meet the dissolution criteria for a de facto merger. "In de facto merger, unlike mere continuation, 'the dissolution criterion . . . may be satisfied, notwithstanding the selling corporation's continued formal existence, if that entity is shorn of its assets and had become, in essence, a shell," (*Ring v Elizabeth Found. for the Arts*, 136 AD3d 525, 526 [1st Dept

2016][citation omitted]). In support of this position, plaintiff cites to Novick's deposition, in which he testified that Westside 6th ceased to do business in or around June 2016, when it maintained a zero balance, and closed its bank account. Additionally, Novick testified that he did not believe that Westside 6th had any income after 544 commenced business operations, and, further, that "544 acquired all of the assets of 6th Avenue, other than certain equipment that was discarded" (Grill affirmation, exhibit D at 189). Finally, Novick testified that there was never a point in time when 544 and 6th Avenue were both open; 6th Avenue closed before 544 opened.

Additionally, on the second element, Novick testified that there were two or three days that passed between 544 commencing business operations and 6th Avenue ceasing business operations.

As for the third element, New York state decisions applying this test have looked to "whether the buyer assumed the seller's existing contracts, royalty obligations, or outstanding debts" (*see e.g. MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 40 Misc 3d 643, 672 [Sup Ct, NY County 2013]). Plaintiff argues that Westside 544 has assumed the liabilities necessary "for the uninterrupted continuation of the Dunkin Donuts franchise formerly operated by Westside 6th" (plaintiff's memorandum of law in support at 18). Plaintiff contends that these liabilities include the same vendors to acquire goods, the same utilities, the same garbage collector, the same window cleaner and the same uniforms:

> "Q: You testified that most of the employees from 536 had come over to work at 544, right?
> A: Yes.
> Q: Cost of goods, does 544 utilize the same vendors to acquire goods and merchandise that 536 did?
> A: Yes.
> Q: Utilities?
> A: Same.
> Q: Garbage collector?
> A: Same.

Q: Window cleaner?
A: Same.
Q: Uniforms, they wear the same kind of uniforms?
A: Same.
. . .
Q: So other than rent is it fair to say that 544 is essentially paying the same kinds of carrying costs that 536 paid?
MR. SEEMAN; Objection
A: Yes"

(Grill affirmation, exhibit E at 136-137).

Plaintiff notes that Westside 544 assumed the payroll obligations for those employees that moved from Westside 6th and Westside 544 acquired the remaining term under Westside 6th's franchise agreement with Dunkin Brands. In order to satisfy this element, plaintiff also relies on Novick's deposition testimony. According to Novick, 544 acquired the same merchandise from the same vendors as Westside 6th:

"Q: Does 544 use the same vendors that 6th Avenue used?
A: Yes.
All Dunkin Donuts do. All of our Dunkin Donuts do.
Q: Our, meaning the locations that you and Mr. Greenstein co-own together?
A: Yes"

(*id.* at 187).

As for the fourth element, continuity of management, personnel, physical location, assets and general business operation (*Kretzmer*, 24 AD3d at 159), plaintiff asserts that most of the employees from Westside 6th moved over to work at Westside 544:

"Q: Did any of the employees working at 536 go on to work at 544?
A: Yes.
Q: About how many of them?
A: I don't know the exact number but many of them, most of them"

(Grill affirmation, exhibit E at 83).

Further, plaintiff asserts that Westside 544 hired the same management entity utilized by Westside 6th:

"Q: So all 6th Avenue and 55 essentially hired the same management entity?
A: Along with everybody else"

(Grill affirmation, exhibit D at 202).

In addition, plaintiff argues, that although not the same physical location, it is beyond dispute that Westside 6th and Westside 544 "operated just 100 feet or half a block away from each other" (plaintiff's memorandum of law at 19). Moreover, plaintiff points out the continuity of business operation, namely the operation of the Dunkin Donuts franchise, between Westside 6th and Westside 544.

The court finds that plaintiff is able to satisfy all de facto merger factors with respect to the relationship between Westside 6th and Westside 544, and, in opposition, defendants are unable to raise any issues of fact. Thus, rendering Westside 544 a successor of Westside 6th, Westside 544 is liable for the rent and additional rent payments of Westside 6th, under the Lease.

Novick and Greenstein cross move for summary judgment

Based upon the release on the guaranty issued by plaintiff, Novick and Greenstein cross-move to be dismissed from this action. According to defendants, the release unambiguously releases Novick and Greenstein from all claims in this action.

In opposition, plaintiff argues that the release is limited in scope and does not encompass all the claims asserted by plaintiff against defendants in this action. Specifically, plaintiff argues that the release does not act as a bar to its third through seventh causes of action, those seeking relief against the individual defendants for violations of the Debtor and Creditor Law, §§ 275, 273, 274, 276 and 279, based upon the unlawful conveyances of assets from Westside 6th. For example, plaintiff argues that only a general release might have relieved defendants from liability for these claims. Thus, plaintiff argues, the court must address whether the release executed by Greenstein and Novick bar these claims.

The guaranty signed by Novick and Greenstein guaranties "full performance by Westside Donut 6th Ave. Ventures LLC of the lease dated September 11, 2000 . . . This guaranty is joint and several and is applicable to the payment of rent and other money charges, and all of the financial obligations related to the lease" (Schepansky affirmation, exhibit E at 1). Furthermore, the guaranty was limited to the obligations "accruing prior to (a) Tenant's surrender of possession of the premises to Owner at any time during the term of this lease . . . (b) an assignment of the lease with Landlord's prior written consent" (*id.*).

The release in question, attached to the August 18, 2016 Schepansky letter,

"is limited to Releasee's obligations (i) pursuant to the Guaranty, dated October 2, 2008, to guaranty the payment and performance obligations of WESTSIDE DONUT 6th AVE. VENTURES LLC, as tenant under the lease dated September 11, 2000"

The court agrees with plaintiff that the language of the Release does not encompass plaintiff's claims pursuant to the Debtor and Creditor Law, and, therefore, will not grant summary judgment for the two individual defendants.

Finally, plaintiff moves to quash the deposition subpoenas for non-parties Gary Barnett and Dov Hertz, and seeks a protective order therefor. As described in the subpoenas, defendants seek to depose Mr. Barnett and Mr. Hertz because "upon information and belief, [he] is the Chief Executive Officer [or Executive Vice President] of Extell Development Company and therefore [he] possess[es] information regarding the purchase of [the Building containing the Premises] by [Plaintiff], the present fee owner of [said] property" (Grill affirmation, exhibits M and N at 2).

Defendants seek these depositions to investigate the purpose of the Extell's purchase of the Property. It is defendants' contention that Extell purchased the Property to demolish it, raising questions about whether Westside 6th could remain in possession and continue to conduct

its business at the Premises. Specifically, defendants argue that "the facts regarding Extell's plans to redevelop the Premises remain in the exclusive possession of the Plaintiff. Indeed, Asher Schepansky, of Extell, stated that Gary Barnett, and Dov Hertz may know the redevelopment plans for the Premises, and that Mr. Barnett directed Me. [sic] Shepansky [sic] not to re-rent the Premises" (defendants' memorandum in opposition at 9 – 10). However, there is no evidence that plaintiff invoked the demolition or termination clauses in the Lease. Novick himself testified that plaintiff did not provide Westside 6th with any written notification pursuant to either of these clauses in the Lease. Instead, Westside 6th vacated the Premises based upon the belief that when Schepansky stated the new owners were developers, and plaintiff intended to demolish the property. There is, therefore, no basis, other than speculation, for this discovery. The court therefore quashes the subpoenas for these two non-party witnesses.

In accordance with the foregoing, it is

ORDERED that plaintiff 14th Street Owner LLC's motion pursuant to CPLR 3025 (c) (motion sequence 001) is granted and plaintiff is permitted to amend its complaint to conform to the evidence; and it is further

ORDERED that plaintiff 14th Street Owner LLC's motion for summary judgment, pursuant to CPLR 3212, on its first cause of action against defendant Westside Donut 6th Ave. Ventures LLC (motion sequence 001) is granted as to liability only, with damages to be determined during the trial of this matter; and it is further

ORDERED that plaintiff 14th Street Owner LLC's motion for summary judgment, pursuant to CPLR 3212 (motion sequence 001), on its second cause of action for attorney's fees is granted, the amount of which will be determined at trial in this matter; and it is further

ORDERED that plaintiff 14th Street Owner LLC's motion for summary judgment, pursuant to CPLR 3212, on its eighth cause of action as against defendant Westside Donut 544 Ventures LLC (motion sequence 001) is granted, only to the extent of successor liability, with damages to be determined during the trial of this matter; and it is further

ORDERED that plaintiff 14th Street Owner LLC's motion to quash the non-party subpoenas for Gary Barnett and Dov Hertz is granted; and it is further

ORDERED that defendants Richard Greenstein and Howard Novick's cross motion for summary judgment is denied; and it is further

ORDERED that counsel for the parties are directed to appear for a conference in Room 345, at 60 Centre Street, on March 27, 2019, at 10 a.m./~~p.m.~~.

Dated: New York, New York
February , 2019

ENTER:

3/1/19

J.S.C.

HON. GERALD LEBOVITS
J.S.C.