

## **Trends in Real Estate Litigation, Part 2: Good Guy Guaranties**

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*In this second article in her four-part series examining how litigation can shape the evolution of best practices in the real estate industry, Adrienne Koch discusses a common feature of many commercial lease transactions: the so-called “good guy guaranty.”*

This article is the second in a four-part series that examines how litigation—and, more specifically, its results—can shape the evolution of best practices in the real estate industry. As noted in [the first article](#) (which discussed some of the hazards of statutes of limitations), because of the case law’s influence on the way business is conducted, the ripples of a dispute can extend far beyond the facts of any single case.

This second article will focus on a common feature of many commercial lease transactions: the so-called “good guy guaranty.” Recent case law counsels a fresh look at how such guaranties are drafted. Here’s why.

### **Good Guy Guaranties**

First, some background. A “good guy guaranty” is unique to commercial leasing, and is often used where the tenant is a single-purpose entity. The guarantor agrees to be liable for the monetary obligations of the tenant (such as the payment of rent, taxes, and other charges) for as long as the tenant actually remains in the premises. If the tenant defaults on any of those obligations but stays in possession, the guarantor must answer for them. But that liability continues only until the tenant vacates the premises—even if, under the terms of the lease itself, the tenant’s liability may continue to accrue thereafter.

The point of this kind of guaranty is to reward good behavior: if a tenant that becomes unable to pay rent actually relinquishes the premises at that point (and pays all monetary obligations due through the date it vacates), then the landlord has been compensated for the actual use of the premises and can now rent them to another tenant.

In exchange for this, the guarantor (but not the tenant) is let off the hook for any monetary obligation that may continue to accrue. Since the guarantor is often the deeper pocket in situations where this kind of guaranty is used (and indeed, by its very nature, the guaranty is triggered only when the tenant ceases to meet its monetary obligations—which often means it lacks the wherewithal to do so), this relief from liability is a meaningful part of the bargain.

### **Recent Case Law**

The description above sets forth the common understanding of how a good guy guaranty operates. But recent case law has highlighted an anomaly in the way some of these guaranties are drafted in relation to the leases to which they relate—and that anomaly can lead to mischief.

The problem arises when (a) the guaranty specifies that the guarantor's obligations terminate upon the tenant's "surrender" of the premises without defining that term; and (b) the underlying lease contains specific prerequisites for a valid "surrender."

If, for example, the lease provides that no "surrender" is effective unless the landlord accepts it in writing, a good guy guaranty that provides that it survives until "surrender" of the premises without separately defining that term could be read to mean that the guarantor remains liable unless and until the landlord accepts the surrender in writing.

This, in turn, would mean that the tenant cannot relieve the guarantor of liability by simply vacating the premises, returning the keys, and paying all sums then due—as many parties might assume a good guy guaranty will always accomplish. Instead, unless the landlord agrees in writing, the guarantor remains on the hook.

The First Department held exactly this in *122 East 42nd Street, LLC v. Scharf*, 211 A.D.3d 517 (1st Dept. 2022), and *Empire LLC v. Shaparov*, 192 A.D.3d 417 (1st Dept. 2021)—ruling in each of those cases that the lease's specifications for how a "surrender" must be accomplished were imported into the associated good guy guaranty by virtue of its use of the term "surrender." The Court of Appeals will address this issue in the coming months: last fall, it granted leave to appeal in *122 East 42nd Street*. See 40 N.Y.3d 903 (2023).

Meanwhile, at least one lower court has opined (without citing *122 East 42nd Street* or *Empire*) that to import a lease's requirement of landlord acceptance "make[s] no sense at all" because it would obviate "the whole point of a good guy guaranty," which "is to cut off the guarantor's liability once all rent is paid and the premises are turned over in whatever condition has been agreed." *213 West 23rd Street LLC v. Crunch Holdings LLC*, 2024 WL 1329817, \*3 (Sup. Ct. N.Y. Co. Mar. 28, 2024).

A requirement that the landlord accept surrender in order to terminate the guarantor's liability would allow the landlord to, "in effect, unilaterally veto the use of the good guy guaranty." *Id.* Perhaps the Court of Appeals will agree.

On the other hand, it is easy enough to craft a good guy guaranty in a way that makes clear that the elements that must be satisfied before the guarantor is relieved of liability are entirely in the tenant's hands. For example, in *Daval 37 Assocs. LLC v. Alamoda Fascination LLC*, the guaranty specified that the guarantor's liability would continue through "the date Tenant and any party claiming under Tenant vacate the entire Demised Premises, the delivery of the keys therefor and, at Landlord's option, the execution by Tenant and delivery of an instrument of surrender and release." 2021 WL 143477, \*1 (Sup. Ct. N.Y. Co. Jan. 15, 2021) (emphasis added). The court rejected—as "just nonsense"—the landlord's argument that it could prevent the guarantor from being relieved of liability by simply refusing to accept the keys: as long as the tenant delivered them (and actually vacated the premises), the criteria for termination of the guaranty were met. *Id.* at \*2.

Similarly, in *469 Columbus Retail LLC v. Biscuits & Bath Cos.*, the guaranty used the term “surrender” but specifically defined it to mean the tenant vacating the premises, leaving them “in the condition required by the Lease upon the expiration thereof,” delivering the keys, and executing a written statement confirming that it had “surrendered possession.” 2020 WL 3408476, \*2 (Sup. Ct. N.Y. Co. Jun. 18, 2020). The court held that because the tenant “undisputedly vacated the premises on November 26, 2012, paid both rent and taxes up to the date of surrender, returned the keys, and gave plaintiff a written surrender letter,” the guarantor was relieved of liability. *Id.*

These cases illustrate how careful drafting can eliminate any possibility that a good guy guaranty might be read in a way that gives the landlord the “veto” power that resulted in *122 East 42nd Street* and *Empire*. The key is to pay close attention to terms: the good guy guaranty should either avoid using a term like “surrender” (which may have a specified meaning in the underlying lease) or—as in *469 Columbus*—give the term a definition that is specific to the guaranty.

### **Going Forward**

Of course, the Court of Appeals (where briefing in *122 East 42nd Street* is complete, but oral argument has not yet been heard) might ultimately agree with those who maintain that termination of liability when the tenant vacates the premises, returns the keys, and pays all sums then due is the essence of a good guy guaranty—such that, even if the underlying lease expressly provides that no “surrender” is valid unless the landlord accepts it in writing, that requirement impacts only the tenant’s ongoing liability and cannot reasonably be imported into the guaranty. That result would certainly make it easier to ensure that the liability of good guy guarantors will not extend beyond the time they may have intended.

But it may be months before the Court of Appeals issues a ruling. In the meantime, parties and their counsel must be mindful of the current case law. In a good guy guaranty, the use of any term that has a specific meaning in the underlying lease—particularly one that requires some kind of action by the landlord—remains risky. Parties (and their counsel) can obviate that risk by paying close attention to the relationship between the language of the good guy guaranty and the terminology used in the lease it secures.

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