

No. 20-CI-002709

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
BUSINESS COURT DOCKET
JUDGE ANGELA MCCORMICK BISIG

SRP, LLC

PLAINTIFF

vs.

ORDER REGARDING
CROSS-MOTIONS FOR SUMMARY JUDGMENT

OFF BROADWAY SHOES, INC.

DEFENDANT

* * * * *

This matter is before the Court on two Motions. The first is a Motion for Summary Judgment filed by Plaintiff SRP, LLC (“SRP”) on January 20, 2021. Defendant Off Broadway Shoes, Inc. (“Off Broadway”) filed a Response on February 16, 2021. SRP filed a Reply on February 26, 2021. The second is a Motion for Summary Judgment filed by Off Broadway on January 20, 2021. SRP filed a Response on February 16, 2021. Off Broadway filed a Reply on February 26, 2021.

The matter now stands submitted. The Court, having considered the written memoranda, record in the case, and being otherwise sufficiently advised, rules as follows.

BACKGROUND

This is a commercial real estate case. Plaintiff SRP owns a commercial shopping center known as Shelbyville Road Plaza. Defendant Off Broadway has leased commercial retail space at the shopping center from SRP since December 2003 pursuant to the terms of a Master Lease. The Lease generally requires Off Broadway to pay a “Minimum Rent” in the amount of \$30,916.67 per month, as well as an “Additional Rent” covering common area maintenance

expenses, insurance, and taxes. SRP may provide written notice of non-payment of rent to Off Broadway, who then must pay the rent within ten days or be in default under the Lease.

In 2010 the Parties executed a "Second Amendment" to the Lease providing that under certain conditions Off Broadway may pay a "Substitute Rent" of 5% of gross sales in lieu of the Minimum Rent normally due under the Lease. More particularly, the Second Amendment states in relevant part that for the period from April 2014 through March 2019 (the "First Renewal Option Term"),

[p]rovided Tenant is not then in material default of any material term or provision of the Lease beyond any applicable notice and cure period, Tenant shall have the right to pay Substitute Rent and terminate the Lease upon twelve (12) months written notice to Landlord if, during any twelve (12) consecutive month period ending on or after March 31, 2015 (the "First Renewal Option Measuring Period"), Tenant's Gross Sales for the First Renewal Option Measuring Period do not exceed Three Million Eight Hundred Thousand and 00/100 Dollars (\$3,800,000.00). Tenant's ongoing right to pay Substitute Rent accrues the first day following the end of the First Renewal Option Measuring Period. After Tenant pays Substitute Rent for twelve (12) consecutive months during the First Renewal Option Term, Landlord shall have the right to terminate the Lease upon ninety (90) days written notice to Tenant. Tenant shall have the right to rescind Landlord's termination notice by written notice to Landlord, within thirty (30) days of receipt of Landlord's notice, that Tenant shall return to full rent.

The Second Amendment provides similar conditions for payment of Substitute Rent for the period from April 2019 through March 2024 (the "Second Renewal Option Term"), except that under the Second Renewal Option Term "Tenant shall have the right to pay Substitute Rent and terminate the Lease upon sixty (60) days written notice" rather than upon twelve months written notice, and only if gross sales are below \$4,100,000.00 rather than \$3,800,000.00.

Off Broadway paid SRP full Minimum Rent and Additional Rent through March 31, 2020. However, on April 1, 2020 Off Broadway informed SRP in writing that due to the

COVID-19 pandemic and the resulting closure of Off Broadway's stores, it would be withholding payment of any rent beginning that day. The following day, SRP notified Off Broadway of its failure to pay rent and stated Off Broadway would be in default should it fail to pay rent in full by April 13, 2020.

On April 8, 2020, Off Broadway responded to SRP and indicated that it intended to pay Substitute Rent as of April 1, 2020 because its gross sales for the preceding twelve months were beneath the \$4,100,000.00 threshold. Off Broadway provided proof to SRP of its gross sales during the relevant period, and SRP does not dispute that the sales were below the \$4,100,000.00 threshold. On April 13, 2020 SRP informed Off Broadway that payment of Substitute Rent was inappropriate and that the Minimum Rent amount should be paid instead. In the months since, Off Broadway has made only the Substitute Rent and Additional Rent payments to Off Broadway.

On April 21, 2020, Off Broadway informed SRP that its gross sales had also fallen below the applicable Substitute Rent threshold of \$3,800,000.00 for the period of March 2019 to March 2020. Off Broadway had paid Minimum Rent rather than Substitute Rent during that period, though it contends it did so unknowingly. Off Broadway asserts that it was entitled to pay only Substitute Rent for this period and SRP has refused to refund what Off Broadway contends is its resulting overpayment of rent.

SRP filed this Action on April 28, 2020 stating a claim that Off Broadway breached the Lease by failing to pay Minimum Rent. SRP therefore seeks to terminate the Lease and to recover the rent amounts it contends are due and owing. Off Broadway has filed a Counterclaim seeking a declaratory judgment that it is entitled to pay Substitute Rent beginning April 1, 2020. Off Broadway also seeks a refund of the alleged overpayments in rent for the period March 2019

to March 2020. Both parties now move for summary judgment in their favor both as to SRP's Complaint and as to Off Broadway's Counterclaim.

1. *SRP's Argument*

SRP argues it is undisputed Off Broadway failed to pay the full Minimum Rent due for each month since April 2020, and that Off Broadway is not entitled to pay Substitute Rent in lieu of Minimum Rent for a number of reasons. First, SRP asserts that Off Broadway may only invoke the Substitute Rent provisions if it is not in material default. SRP maintains Off Broadway was in default however when it failed to cure its non-payment of the April 2020 Minimum Rent within ten days of SRP's written notice of non-payment, *i.e.* by April 13, 2020. SRP further contends Off Broadway has remained in default since that time because it continues to pay only Substitute Rent rather than Minimum Rent.

Second, SRP also argues Off Broadway could not invoke the Substitute Rent provision because it did not provide sixty days written notice as required by the Second Amendment. SRP points out that the Second Amendment uses "and" rather than "or" in providing that Off Broadway has the "right to pay Substitute Rent and terminate the Lease upon sixty (60) days written notice." SRP further maintains such written notice allows for resolution of disputes as to whether the gross sales threshold is satisfied, assists SRP's future planning, prevents unexpected retroactive reduced rent payments, and makes a clear record in the event SRP decides to exercise its right to terminate the Lease after twelve months of Substitute Rent payments.

SRP also argues it is entitled to summary judgment as to Off Broadway's Counterclaim. SRP contends Off Broadway was not entitled to pay Substitute Rent during the period from March 2019 to March 2020. First, SRP contends Off Broadway did not provide the required notice to invoke Substitute Rent for the period beginning March 2019. Second, SRP asserts that

allowing Off Broadway to pay Substitute Rent all the way back to March 2019 is inconsistent with SRP's right to terminate the Lease after twelve months of Substitute Rent payments.

Finally, SRP also maintains Off Broadway waived any right it may have had to pay Substitute Rent by failing to timely exercise that right and by purposefully paying Minimum Rent rather than Substitute Rent from March 2019 through March 2020.

2. *Off Broadway's Argument*

Off Broadway argues that its right to pay Substitute Rent is triggered when its gross sales fall below the applicable threshold, and that such right is not contingent upon it providing SRP with sixty days written notice. Off Broadway contends the sixty-day notice provision applies only to an election by Off Broadway to terminate the Lease, and that nowhere does the Second Amendment explicitly state such notice is required prior to payment of Substitute Rent. Off Broadway asserts the notice provision also cannot reasonably be construed to apply to Substitute Rent because under the language of the Second Amendment its right to pay such rent accrues on the first day following the measuring period. Off Broadway further points out that other provisions of the Lease allowing for payment of Substitute Rent, such as where SRP undertakes construction or violates Off Broadway's exclusivity rights, include no notice requirement.

Off Broadway also notes that the Second Amendment provisions relating to earlier periods during the leasing relationship reference a twelve-month notice requirement, and that such requirement is reduced to sixty days for the last term of the lease period. Off Broadway argues this further supports a finding that the notice period applies only to termination, as a twelve-month notice period for Substitute Rent would be an absurd result.

Off Broadway therefore argues it is entitled to pay Substitute Rent for the period beginning April 2020 and to recoup rent paid above the Substitute Rent amount for the period

March 2019 to March 2020. Off Broadway also maintains there is no evidence to support a finding that it waived its right to pay Substitute Rent by knowingly surrendering or relinquishing that right. Alternatively, Off Broadway argues that even if the sixty-day notice period is applicable, it gave such notice on April 8, 2020 and is therefore entitled to pay Substitute Rent at the latest beginning June 7, 2020.

Off Broadway further argues it was not in default and therefore was entitled to exercise its Substitute Rent rights. Off Broadway maintains SRP never sent it any notice of default providing an opportunity to cure as required by the Lease. Off Broadway also asserts its payment of Substitute Rent was not a default because it was in fact entitled to pay Substitute Rent.

OPINION

1. *Summary Judgment Standard*

Civil Procedure Rule 56.03 authorizes summary judgment “if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56.03. The Court must view the record “in a light most favorable to the party opposing the motion, and all doubts are to be resolved in his favor.”

Steevest, Inc. v. Scansteel Serv. Ctr., Inc., 807 S.W.2d 476, 480 (Ky. 1991).

Summary judgment is proper when “it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant.” Paintsville Hosp. Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985) (quoting Roberson v. Lampton, 516 S.W.2d 838, 840 (Ky. 1974)). The term “impossible” is used in a practical sense and not in an absolute sense. Perkins v. Hausladen, 828 S.W.2d 652 (Ky. 1992).

When considering a motion for summary judgment, the “focus [of the court] should be on what is of record rather than what might be presented at trial.” Welch v. Am. Publ'g Co. of Kentucky, 3 S.W.3d 724, 730 (Ky. 1999). “The party opposing summary judgment cannot rely on their own claims or arguments without significant evidence in order to prevent a summary judgment.” Hallahan v. The Courier-Journal, 138 S.W.3d 699, 705 (Ky. App. 2004). The non-movant cannot defeat a properly supported summary judgment motion “without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial.” Steelvest, 807 S.W.2d at 482. Even if a trial court believes the party opposing the motion for summary judgment may not succeed at trial, “it should not render a summary judgment if there is any issue of material fact.” Id. This is because it is the court’s duty to examine the evidence, “not to decide any issue of fact, but to discover if a real issue exists.” Id.

2. *Analysis*

The construction and interpretation of a contract are questions of law for the Court. Stowe v. Realco Limited Liability Co., 551 S.W.3d 462, 465 (Ky. App. 2018). In construing a contract, the primary object of the Court “is to effectuate the intentions of the parties.” Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384 (Ky. App. 2002). Where the contract is unambiguous, it will be “enforced strictly according to its terms,” and by assigning the contract language “its ordinary meaning without resort to extrinsic evidence.” Stowe, 551 S.W.3d at 465-66.

Here, the Court first finds that Off Broadway was not in material default beyond any applicable notice and cure period on April 8, 2020 and therefore could invoke the Substitute Rent provision at that time. The provision states Off Broadway may invoke Substitute Rent if it is “not *then* in material default of any material term or provision of the Lease *beyond any*

applicable notice and cure period.” (emphasis added). SRP contends Off Broadway was in default when it failed to pay Minimum Rent on April 1, 2020. However, Off Broadway had a ten-day notice period in which to cure any such non-payment that began to run when SRP sent notice of non-payment on April 2, 2020. Off Broadway invoked its Substitute Rent rights on April 8, 2020, before the April 13, 2020 expiration of the applicable notice and cure period for a failure to pay rent. Accordingly, because Off Broadway was not “in material default . . . beyond [the] applicable notice and cure period” on April 8, 2020, the material default term of the Substitute Rent provision did not bar Off Broadway from invoking its Substitute Rent rights.

However, the Court further finds that under the plain language of the Second Amendment, Off Broadway was required to provide sixty days notice of its intention to pay Substitute Rent. The Second Amendment unambiguously states that “Tenant shall have the right to pay Substitute Rent and terminate the Lease *upon sixty (60) days written notice to Landlord.*” (emphasis added). The term uses a conjunctive “and” rather than a disjunctive “or,” and contains no comma or other language or grammatical indicator that the notice requirement applies only to termination. And while the right to Substitute Rent may accrue on the first day after the measuring period, the Second Amendment nonetheless also unambiguously imposes a sixty-day notice requirement upon the payment of Substitute Rent. The Court therefore concludes the plain and ordinary meaning of the term is that Off Broadway must provide sixty days notice of its intention to pay Substitute Rent.

Here, there is no dispute that Off Broadway provided such notice on April 8, 2020, and that Off Broadway’s gross sales satisfied the threshold for payment of Substitute Rent. As noted above, the Court also finds that the material default term did not prohibit Off Broadway from invoking its Substitute Rent rights on April 8, 2020. Accordingly, the Court concludes that Off

Broadway was entitled to pay Substitute Rent sixty days following its April 8, 2020 notice, *i.e.* as of June 7, 2020, but not before.

Finally, the Court finds that Off Broadway waived any right it may have had to pay Substitute Rent from March 2019 through February 2020. A party may waive a contractual right where it elects “to forego an advantage which the party at his option might have demanded or insisted upon.” Conseco Finance Servicing Corp. v. Wilder, 47 S.W.3d 335, 344 (Ky. App. 2001). Here, there is no dispute that Off Broadway did not invoke its right to begin paying Substitute Rent as of March 2019 until April 21, 2020, and that it instead paid Minimum Rent during the entire period from March 2019 through March 2020. As such, there is also no dispute that Off Broadway elected to forego any right it may have had to pay Substitute Rent from March 2019 through February 2020 and therefore waived that right.¹

In sum, the Court finds that while the material default term did not bar Off Broadway from invoking its right to pay Substitute Rent, Off Broadway was required to give sixty days notice in order to invoke that right. As such, Off Broadway is not entitled to pay Substitute Rent beginning April 1, 2020, but rather only from sixty days after its April 8, 2020 notice, *i.e.* from June 7, 2020. The Court further finds that Off Broadway waived any right it may have had to pay Substitute Rent from March 2019 through February 2020. Accordingly, SRP’s Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART, and Off Broadway’s Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART as set forth below.

¹ Although the Parties vigorously debate whether waiver must be proven by clear and convincing evidence or merely by a preponderance of the evidence, the Court need not resolve that dispute as the evidence here satisfies either burden.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff SRP, LLC’s Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**, and Defendant Off Broadway Shoes, Inc.’s Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**.

As to SRP’s Complaint, SRP is **GRANTED** summary judgment against Off Broadway Shoes, Inc. for the difference between Minimum Rent due from April 1, 2020 through and including June 6, 2020 and any Substitute Rent actually paid by Off Broadway for that period of time. Summary judgment in SRP’s favor is **DENIED** as to the remainder of its Complaint, and summary judgment in Off Broadway’s favor is **GRANTED** as to the remainder of SRP’s Complaint, which remainder is **DISMISSED WITH PREJUDICE**.

As to Off Broadway’s Counterclaim, Off Broadway is **GRANTED** summary judgment against SRP to the extent it seeks a declaration that it is entitled to pay Substitute Rent in lieu of Minimum Rent beginning June 7, 2020. Summary judgment in Off Broadway’s favor is **DENIED** as to the remainder of its Counterclaim, and summary judgment in SRP’s favor is **GRANTED** as to the remainder of Off Broadway’s Counterclaim, which remainder is **DISMISSED WITH PREJUDICE**.

This is a final and appealable Order and there is no just cause for delay in its entry or execution.

IT IS SO ORDERED this ____ day of _____



JUDGE ANGELA MCCORMICK BISIG
DIVISION TEN (10)
JEFFERSON CIRCUIT COURT

cc: Adam T. Goebel
Andrew T. Hagerman
Gregory S. Berman
Jordan M. White