SUPREME COURT : COUNTY OF ERIE

SCARP PROPERTY ASSOCIATES LLC

Plaintiff

MEMORANDUM DECISION

vs.

TEMPLE-INLAND INC., and TIN, INC. D/B/A TEMPLE-INLAND,

Defendants.

Index No. 6093/2005

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES:

LAW OFFICES OF RALPH LORIGO
Attorneys for Plaintiffs
Ralph C. Lorigo, Esq., of Counsel
Frank J. Jacobson, Esq., of Counsel

DAMON & MOREY, LLP
Attorneys for Defendants
Franklin W. Heller, Esq., of Counsel

CURRAN, J.

Plaintiff seeks in this action to recover past due rent for the lease and/or use and occupancy of warehouse space in the City of Buffalo. Before the Court are the motion of Defendants Temple-Inland, Inc. and TIN, Inc. d/b/a Temple-Inland, for summary judgment on all causes of action in the Complaint, and a cross motion by Plaintiff for leave to serve an Amended Complaint.

INTRODUCTION

In 1994, Plaintiff's predecessor in interest, Aerospace Industrial Center, executed a lease with Color-Box, Inc. (Color-Box), a wholly owned subsidiary of Chesapeake Corporation, a manufacturer of corrugated boxes. The lease was for approximately 63,000 square feet of warehouse space located at 500 Elk Street (hereinafter "the premises"). The term of the lease ran for five years commencing on July 1, 1994 and terminating on June 30, 1999, with a first year annualized rental rate of $1.20 per square foot and an annualized rental rate for the second through fifth years of $1.38 per square foot (*see* Chapin Affid., Exhibit A [hereinafter "Original Lease"] ¶¶ 1-3).

Paragraph 15 of the Original Lease provided for the lessee to "have the option to renew the lease for an additional two terms of sixty (60) months commencing at the expiration of the initial lease term." That paragraph further provided in pertinent part:

> All of the terms and conditions of the lease shall apply during the renewal term except that the yearly rent for the 1st renewal term shall be at a rate of $1.52 for [sic] 6th & 7th years, $1.66 for 8th & 9th years and $1.80 for the 10th year. The second renewal term rates are as follows: $1.93 for 11th & 12th years and $2.07 for 13th, 14th and 15th years.
>
> . . . .The option shall be exercised by written notice given to Lessor not less than ninety (90) days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

(Original Lease ¶15). The Original Lease also provided that it could be modified only by a writing signed by both parties (Original Lease ¶17).

On March 19, 1997, the premises were sold by Aerospace to Plaintiff, Scarp Property Associates, LLC (hereinafter "Scarp" or "Plaintiff") (*see* Verified Complaint ¶ 24; Chapin Affid. ¶ 8). Scarp assumed all rights and obligations as landlord under the Original Lease (*see* Taylor Affid. ¶ 10). Thereafter, Temple-Inland Inc. and TIN, Inc. d/b/a/ Temple-Inland (hereinafter "Defendants") and their predecessors-in-interest occupied the premises from late 1997 through April 30, 2005, and generally paid rent according to the schedule laid out in paragraph 15 of the Original Lease (*see* attached Appendix). However, Defendants contend that neither they nor their predecessors exercised any options to renew under the Original Lease. Rather, Defendants contend that, after the termination of the Original Lease on June 30, 1999, no subsequent lease of the premises was ever agreed to, and that any occupancy "by anyone" of the premises after that date was as a month-to-month tenant (Heller 1st Affid., Exhibit B, ¶ 33 [Fourth Affirmative Defense]).

On March 29, 2005, Defendants sent a notice of intent to vacate the premises one month later. Defendants allege that they could properly terminate their tenancy on thirty (30) days notice, and they owe no further rent. On that basis, they have moved for summary judgment dismissing the complaint in its entirety. Plaintiff, on the other hand, alleges that rent is owed to it under various theories, including pursuant to an alleged renewal of the "10-year option to renew" (Taylor Affid. ¶ 8). Plaintiff also seeks leave to serve an Amended Complaint.

FACTUAL BACKGROUND

In November 1997, the original tenant Color-Box vacated the premises (*see* Taylor Affid., Exhibit C).[1] Plaintiff's principal, Richard Taylor, relies upon a copy of a letter received by his company, Austin Air Systems, on December 22, 1997, from Chesapeake Packaging Co., informing Austin that Color-Box had closed its Buffalo Division, and that Chesapeake Packaging was relocating to the vacated Color-Box plant at 100 Bud Mil Drive in Buffalo (*see id*.). Mr. Taylor asserts that Chesapeake Packaging thereafter assumed the liabilities of Color-Box under the Original Lease (*see* Taylor Affid. ¶ 13 & Exhibit C).

Defendants deny this; they admit only that, after Color-Box vacated the premises, Chesapeake Packaging moved into the premises because it needed warehouse space in Buffalo, and "as an accommodation to Color-Box and with the consent of Scarp, . . . began paying Scarp the monthly rent owed by Color-Box pursuant to the [Original] Lease" (Chapin Affid. ¶ 12). Because the rent was paid in accordance with the Original Lease for its initial term, this debate for purposes of the pending motions is academic.

The Original Lease was due to terminate on June 30, 1999. The deadline by which to exercise the renewal option under Paragraph 15 of the Original Lease was ninety (90) days before this expiration date.

---

[1] As of December 31, 1997, Color-Box merged into Chesapeake Display and Packaging Co. and ceased to exist (*see* Heller Affid., sworn to on January 12, 2007, Exhibit D ¶3 & Exhibit A). Chesapeake Display and Packaging and former Defendant Chesapeake Packaging Co. were both subsidiaries of Chesapeake Corporation (*see* Heller Affid., Exhibit C ¶ 3).

Chesapeake Display & Packaging North America and its subsidiary, Color-Box, faxed Mr. Taylor a letter dated June 16, 1999, that stated in pertinent part:

> As we discussed on the telephone, we are requesting an **extension** of our lease dated 4/28/94 . . . . we would like to extend . . . to 9/30/99. The current rate (through 6/30/99) is $1.38 per square feet, and the new rate will be $1.52 per square feet. If this is [sic] arrangement is acceptable, please sign a copy of this letter and fax back to me.

(Taylor Affid., Exhibit D [emphasis supplied]). This letter was not signed or returned by Plaintiff. It also is undisputed that no written notice was sent exercising the option to renew before the 90-day deadline set forth in the Original Lease.

At that point, Scarp agreed to an oral month-to-month lease with the tenant pending the negotiation of a new lease (*see* Taylor Affid., Exhibits C-D). In a letter dated June 21, 1999, from one of Mr. Taylor's companies to Chesapeake Corp. in Richmond, Indiana, Taylor's agent purported to confirm a conversation with the tenant's agent wherein it was allegedly agreed that "during the interim period prior to a new lease, the monthly lease rate will be .20 a square foot", but that this rate would be rolled back to $1.52 per square foot annually if a lease for two years or longer was executed; further, the excess paid over $1.52 per square foot would be applied towards future rents (Taylor Affid., Exhibit E).

From July 1999 through November 1999, Scarp sent monthly Statements to the party occupying the premises, Chesapeake Packaging, for rent in the amount of $16,800 per month based on the annualized rate of $2.40 per square foot (*see* Chapin Affid. ¶ 16 & Exhibit E). The uncontradicted evidence indicates that those Statements – and all other statements sent by Scarp to the occupants – were paid (*see* Chapin Affid. ¶ 17 & Exhibit E [Statements and

Checks]). For example, the July Statement from Plaintiff to Chesapeake Packaging states "July Rent . . . 84,000 sq[2]@ 20 ¢ sq ft . . . Due 7-1-99" (Chapin Affid. Exhibit E). A chart detailing the Statements sent and rent paid by Defendants appears in the Appendix to this Decision.

Thereafter, according to Scarp, in November 1999, Defendants' predecessors in interest orally agreed to exercise the ten (10) year renewal option, purportedly pursuant to paragraph 15 of the Original Lease, and began paying the rent as stated therein, less credits due for the rent "overpaid" during July through November 1999 (*see* Taylor Affid. ¶¶17-18). Defendant appears to portray this arrangement as an inadvertent overcharge by Plaintiff which was subsequently corrected by Plaintiff, albeit by having the tenant pay the amounts required under the Original Lease for the "1st renewal term" (Original Lease ¶ 15).

It is undisputed that through June 2001, the rentals paid by the tenant were very nearly as if the tenant were subject to the "1st renewal term" under the Original Lease for the "6th and 7th" years of the lease, under which the tenant would have been charged $10,640 per month ($1.52 per square foot annualized for 84,000 square feet) (*see* Appendix).

Meanwhile, in May 2001, Chesapeake Corp. sold its wholly owned subsidiary Chesapeake Packaging (the tenant at the time) to Inland Paperboard and Packaging, Inc., a wholly-owned subsidiary of Defendant Temple Inland, Inc. (*see* Heller Affid., Exhibit C, ¶¶3-4 & Exhibit A;[3] *accord* Taylor Affid., Exhibit F). Chesapeake Packaging then changed its name

---

[2] There is no explanation in the record regarding the increase in the square footage from the Original Lease to this arrangement. The parties do not dispute it and it is therefore not an issue for the Court.

[3] Exhibit C to the Heller Affidavit is an affidavit of Paula K. Lear, Corporate Attorney for Temple-Inland, which had been submitted before Justice Fahey in the instant action in support

to InPeake Packaging Inc. (InPeake) (*see* Heller Affid., Exhibit A to Exhibit C ¶4; Taylor Affid., Exhibit F).

In July 2001, Plaintiff began to invoice InPeake as if under the Original Lease for the eighth (8th) and ninth (9th) years of the "1st renewal term" ($1.66 per square foot annually or $11,620 per month) (*see* Chapin Affid. Exhibit E [Statement 6/27/01, "New Rate 8th year @ 1.66 sq'"]). That rental was billed and paid for by the occupant from July 2001 through January 2003, with certain insignificant exceptions (*see* Chapin Affid., Exhibit E and Appendix). In December 2001, InPeake, the occupant at the time, merged into Inland Paperboard and ceased to exist as a separate entity (*see* Heller Affid., Exhibit C ¶ 5 & Exhibit B).[4]

According to the Statements and other written evidence submitted by Defendants, the rent was scaled back when Plaintiff took back the use of a portion of the space, after which the rent continued at the Original Lease annualized rate of $1.66 per square foot for 73,080 square feet or $10,109.40 monthly from February 2003 through June 2003 with certain adjustments (*see* Chapin Affid. Exhibit E). From July 2003 through June 2004, Inland was

---

of a motion to dismiss by former Defendants Chesapeake Packaging, Inland Paperboard and InPeake Packaging, Inc. Exhibit D is an affidavit by Michael D. Beverly, Associated General Counsel for former Defendant Chesapeake Corp., submitted before Justice Fahey in the instant action in support of a motion to dismiss by Chesapeake Corp. and Color-Box. A court may take judicial notice of its own records, and here they are properly authenticated by attorney Heller (*see Bracken v Axelrod*, 93 AD2d 913, 914-915 [3rd Dept 1983], *lv denied* 59 NY2d 606 [1983]).

[4] However, the checks to pay the rent came from InPeake until August 2002 (*see* Chapin Affid., Exhibit E). Beginning in September 2002, the checks came from Inland (*see id*.).

billed and paid as specified under the Original Lease for the tenth (10^{th}) year, $1.80 per square foot annualized for 73,080 square feet, or $10,962 monthly with certain adjustments (*see id*. and Appendix).

On December 17, 2003, Temple-Inland sent to Dana Burt of Austin Air, one of Plaintiff's related companies, a letter enclosing copies of a proposed lease for the premises between Plaintiff and Inland Paperboard (*see* Chapin Affid., Exhibit C [hereinafter the "2003 Proposed Lease"]). The letter stated in part:

> Please ask the appropriate person(s) to review the Lease and if the Lease terms are agreeable please have the appropriate party sign for [Plaintiff] in the space provided on each of the three original copies.
> Please keep two signed original copies for your files and return one signed original copy to me.

(*id*.).

With respect to the 2003 Proposed Lease, Plaintiff's principal Richard Taylor stated in his affidavit:

> At the time that I was contacted by Inland Paperboard . . ., they were already obligated under The [Original] Lease through June 2009; as such, I saw no reason to modify the terms of The [Original] Lease as proposed, and as such, did not sign the lease proposed by Inland Paperboard . . ..

(Taylor Affid. ¶ 23). Apparently, Mr. Taylor failed to communicate those thoughts to Temple-Inland and/or Inland Paperboard, as Temple-Inland wrote to him again in March 2004, reminding him that it had sent a Proposed Lease to him in December 2003 for his "review and comments:"

> I have not heard from you or your representative concerning the proposed Lease, therefore, Inland assumes some of its terms must have been objectionable to Scarp Property.

> Please forward to me at your earliest convenience a Lease that you would be willing to execute. Until Inland receives such an offer, it will continue its month-to-month lease arrangement and Inland's Lease offer of December 17, 2003 is rescinded.

(Chapin Affid., Exhibit D). Defendants have asserted that Plaintiff made no response to the March 18, 2004 letter (*see* Chapin Affid. ¶ 56). There also was no 90-day written notice sent by the tenant exercising the option to renew for the "second renewal term" as referred to in the Original Lease (Original Lease ¶ 15). Such a notice would have been due ninety (90) days before June 30, 2004.

In what would have been the eleventh (11th) year of the lease (2004-2005) if extended, Plaintiff billed the occupant $11,753.70 per month, an annualized rate of $1.93 per square foot, as required by the Original Lease (with some offsets; *see* Chapin Affid., Exhibit A, ¶ 15 & Exhibit E; *see also* Appendix). Defendants paid this amount for July of 2004 and thereafter.

In December 2004, Inland Paperboard, the current occupant, merged into Temple-Inland Forest Products Corporation (TIFPC), a wholly owned subsidiary of Defendant Temple -Inland, and Inland Paperboard ceased to exist independently; on the same date, TIFPC changed its name to TIN Inc. (the other remaining Defendant) (*see* Lear Affid. ¶¶6-7 & Exhibits C-D, attached to Heller 1st Affid. at Exhibit C). Defendant TIN admits that it became the occupant of the premises (*see* Chapin Affid. ¶ 37).

On March 29, 2005, TIN sent Plaintiff a notice of intent to vacate the premises on April 30, 2005 (*see* Chapin Affid.¶ ¶ 38 & 57 & Exhibit B). TIN paid less rent for April due

to Plaintiff having a security deposit that was placed by Color-Box, in the amount of $7,273.75 (*see* Chapin Affid. ¶ 39 & Exhibit E). The notice of intent letter refers to a "month-to-month" lease (*see id*. Exhibit B). Defendants vacated the premises as of April 30, 2005.

PROCEDURAL HISTORY

The Verified Complaint, filed June 30, 2005 by Plaintiff's prior counsel and verified by Dana Antosh, Vice President of Plaintiff, contains four causes of action. In 2005 and 2006, five former Defendants were dismissed from the case: Color-Box, Inc; Chesapeake Corp., Chesapeake Packaging Co., Inland Paperboard and Packaging, Inc and InPeake Packaging, Inc. (*see* Heller Affid., sworn to on Jan. 12, 2007, ¶¶ 6&8). Only two Defendants remain: Temple-Inland Inc. and TIN Inc. d/b/a Temple-Inland (*see* Heller Affid., Exhibit B).[5]

In the spring of 2007, Defendants moved for summary judgment dismissing the Complaint, and Plaintiff both opposed the motion and cross-moved for leave to serve an Amended Complaint based upon the alleged ten-year renewal option agreement (*see* Taylor Affid., Exhibit I). At oral argument, the Court requested that the parties submit supplemental memoranda, if they chose. After the papers were fully submitted, decision was reserved.

---

[5] Upon motion, Judge Fahey dismissed the complaint as against Chesapeake Packaging Co., Inland Paperboard and Packaging, Inc and Inpeake Packaging by order granted on October 17, 2005, because all had ceased to exist as entities and merged into what became TIN, Inc.(*see* Heller Affid., Exhibit C ¶¶3-7). Upon a second motion, all claims against Color-Box and Chesapeake Corp. were dismissed by order granted February 3, 2006. Color Box had merged into Chesapeake Display and Packaging (a different company from Chesapeake Packaging), which was a subsidiary of Chesapeake Corp. Chesapeake Corp was dismissed as a Defendant, because it simply owned the stock of Color-Box and denied any liability for its obligations; and, further, it had sold Chesapeake Packaging to Inland Paperboard in May 2001 (*see* Heller Affid. Exhibit D).

DISCUSSION

A. Standards for Motion for Summary Judgment; Accompanied by Cross Motion to Amend

As held by the Court of Appeals, "the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Further, "[f]ailure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez*, 68 NY2d at 324). However, once the proponent has made such a showing, the opponent "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact" in order to avoid the entry of judgment against it (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, the procedure is made more complex by Plaintiff's service of a cross motion for leave to serve an Amended Complaint pursuant to CPLR 3025(b), brought after the completion of discovery but prior to the filing of a Note of Issue and Statement of Readiness. Where a motion for leave to serve an amended pleading is brought after the service of a motion for summary judgment by an opponent, courts generally consider the motions serially (*see. e.g. Deep v Boies*, 16 Misc3d 1121 (A), [Sup Ct Albany County Aug. 9, 2007] [Platkin, J.]; *Monga v Security Mut Life Ins. Co of New York,* 2002 WL 31777872 [Sup Ct Monroe Co. Oct. 10, 2002]). Thus, the Court will consider the motion for summary judgment first.

B. <u>First Cause of Action in Original Complaint</u>

The first cause of action relies upon the 2003 Proposed Lease sent by Inland Paperboard to Plaintiff, and seeks damages for failure to pay rent under it from May 1, 2005 through its termination on December 31, 2006 (*see* Verified Complaint ¶ ¶ 34-42 & Exhibit A). Defendants contend that the first cause of action must be dismissed because, as Plaintiff admits, it never executed or delivered the 2003 Proposed Lease (General Obligations Law § 5-703(a); *see, Beck v New York News, Inc*,. 92 AD2d 823, 824-825 [1st Dept], *affd for reasons stated* 61 NY2d 620 [1983]).

Plaintiff admits that its prior attorneys mistakenly sued under the 2003 Proposed Lease. Although Plaintiff's Vice President verified the Complaint, Richard Taylor, its President, blames the mistake on prior counsel. Taylor claims that he did not review the Complaint, filed in 2005, until after January 2007, and that the Complaint was filed while he was out of the country (*see* Taylor Affid. ¶¶46-57). The facts now alleged by Taylor are that, when he received the Proposed 2003 Lease from InPeake, he ignored it, because he already had a lease for the property, in the form of the exercise of an alleged ten-year renewal option under the Original Lease (*see* Taylor Affid. ¶ 23). Thus, Taylor asserts, Plaintiff requires leave to serve an Amended Complaint in order to correct the mistake by prior counsel.

In other words, Plaintiff is abandoning the first cause of action in its Complaint. Because Plaintiff claims that it sued upon the 2003 Proposed Lease by mistake, the Court grants Defendants' motion for summary judgment dismissing the first cause of action in the original Complaint for breach of contract, with prejudice.

C. Second and Third Causes of Action in Original Complaint

The second cause of action is based upon an alleged oral agreement by various Defendants to pay an annualized rate of $2.40 per square foot for the premises between July 1, 1999 and December 31, 2003 (at which time the 2003 Proposed Lease allegedly took effect), and their failure to pay that amount in full (*see* Verified Complaint ¶¶43-50). The third cause of action alleges that, should Defendants assert that the 2003 Proposed Lease was never in effect, Plaintiff is owed damages based upon an alleged oral agreement to pay $2.40 per square foot annually, minus the rent actually paid, between July 1, 1999 through April 30, 2005 (*see id*. ¶ 51-53).

Defendants contend that they and their predecessors in interest were month-to-month tenants of Plaintiff from July 1999 through April 2005, and either party could have terminated the tenancy at any time upon thirty (30) days written notice (*see* Real Property Law § 232-b). Alternatively, Defendants contend, their tenancy could be construed as a tenancy at will (*see* Letter Brief, dated June 8, 2007 at 3-4).

Plaintiff responds that the claim Defendants were month-to-month tenants is "simply ludicrous" and that Defendants "want all of the benefits of a long term lease (lower rent) without any of the obligations (long term-liability)" (Taylor Affid. ¶ 42). Plaintiff asserts that, were the Court to rule that Defendants were on a month-to-month tenancy from July 1999, then the Court would have to determine that the rate should have been $2.40 per square foot annually (*see id*. ¶ 43).

Plaintiff's varied theories are unsustainable for a number of reasons. First, Defendant has established through its evidentiary submissions that there was no agreement to pay $2.40 per square foot annually on a permanent basis. Rather, at most, even accepting Plaintiff's best case scenario, the parties agreed to a temporary arrangement whereby the annualized rental rate was at $2.40 per square foot pending either an "extension" of the Original Lease (Taylor Affid. Ex. D) or the execution of a "new lease" (*id*). Exhibit D to Taylor's Affidavit further reflects that the tenant was "balking" at the annualized rental rate of $2.40 per square foot. All of the evidence before the Court establishes that the purported understanding relied upon by Plaintiff for Defendants to pay an annualized rental rate of $2.40 per square foot was a temporary stopgap measure to be supplanted with a written lease or to be ended through the tenant's departure from the premises.

Secondly, the purported agreement to pay annualized rental at $2.40 per square foot was never recorded in any writing executed by the tenant and is therefore unenforceable as a matter of law (*see* General Obligations Law § 5-703[2]; *Geraci v Jenrette*, 41 NY2d 660, 666 [1977]; *Herman & Beinin v Greenhaus*, 258 AD2d 260, 261 [1st Dept 1999]).

Furthermore, as to the second cause of action, because it is premised in part on the eventual execution of the 2003 Proposed Lease, and because as set forth above the 2003 Proposed Lease is ineffectual, the second cause of action must logically fall as well.

For all of these reasons, the motion for summary judgment is granted as to the second and third causes of action.

D. Fourth Cause of Action in Original Complaint

In its final cause of action, the original Complaint alleges Plaintiff's theory as premised on unjust enrichment. Plaintiff claims that Defendants and/or their predecessors-in-interest have been unjustly enriched by paying less than $2.40 per square foot on an annual basis for the premises. This cause of action is identical to the one set forth in the third cause of action in the proposed Amended Complaint.

While the original Complaint does not rely upon any enforceable written agreement (i.e., the 2003 Proposed Lease), it is clear from the Taylor Affidavit submitted in support of the motion to serve an Amended Complaint that Plaintiff is basing its current position on the continuation and enforceability of the Original Lease. Moreover, as discussed below, because the issue with respect to the Original Lease is not whether it is valid and enforceable but whether it was capable of being renewed for a ten-year period, there is no circumstance under which Plaintiff would be relying solely upon a quasi-contract theory such as unjust enrichment. Under these circumstances, summary judgment is appropriate dismissing this cause of action for unjust enrichment because there is a written contract (i.e., the Original Lease) which details the terms and conditions of the relationship between the parties, including as to the means by which that lease is renewed for additional terms and the dates on which such terms expire (*see, Fortune Limousine Service, Inc. v Nextel Communications*, 35 AD3d 350, 353 [2d Dept 2006], *lv denied* 8 NY3d 816 [2007]). Further, as discussed above concerning the second and third causes of action of the original Complaint, there was no meeting of the minds as to an annualized rental rate of $2.40 per square foot for more than a temporary period of a few months. Thus, even if there was no valid and enforceable agreement precluding a quasi-

contract theory such as unjust enrichment (*see, e.g., First Frontier Pro Rodeo Circuit Finals, LLC v PRCA First Frontier Circuit*, 291 AD2d 645, 646 [3d Dept 2002]), the failure of Plaintiff to raise any triable issue of fact concerning the meeting of the minds to pay $2.40 per square foot on an annualized basis also requires summary judgment dismissing this cause of action (*see, e.g., I.G. Second Generation Partners, LP v Reade*, 17 AD3d 206, 208-209 [1st Dept 2005]).

For all of these reasons, the fourth cause of action in the original Complaint is dismissed as well.

E. Motion to Amend

1. Proposed First Cause of Action

Pursuant to CPLR 3025 (b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court. . .. Leave shall be freely given upon such terms as may be just". However, "[liberality does not . . . require courts to permit futile amendments" (*Twitchell v Town of Pittsford*, 78 AD2d 586 [4th Dept 1980]).

The first cause of action in the Proposed Amended Complaint asserts that Defendants exercised a ten-year option to renew the Original Lease. Plaintiff contends that it agreed in November 1999 to permit Chesapeake Packaging to exercise a ten-year option allegedly provided for in paragraph 15 of the Original Lease (*see* Proposed Amended Complaint ¶¶18-27). Because Defendants have not paid any rent since April 30, 2005, Plaintiff

alleges that Defendants owe $530,667.50 in rent (*see* Taylor Affid. ¶¶31-32). Plaintiff also contends that there is at least a question of fact whether Defendants are direct successors in interest to the Original Lease (*see* Plaintiff's Reply Memorandum).

Defendants contend that there was no right to a ten-year renewal under the Original Lease, but rather only two separate terms of five years each. In addition, Defendants contend that, in light of the fact that Chesapeake Packaging had no legal relationship with either Color-Box or Chesapeake Display Co., it had no legal standing to exercise any option to renew the Original Lease, a right exclusive to the "Lessee" under the lease – i.e., Color Box or Chesapeake Display Co., as its successor (*see* Letter Brief, dated June 8, 2007 at 2). According to Defendants, because Color-Box merged into Chesapeake Display Co. in 1997, Chesapeake Display Co. became liable for the lease obligations (*see Cargo Partner AG v Albatrans Inc,* 352 F3d 41, 45 [2d Cir 2003]). Because that entity was never a party to this action, Defendants argue there is no remedy against any Defendant. Finally, Defendants assert that any exercise of the option had to have been in writing, under the terms of the Original Lease, and no such writing has been submitted in evidence.

Initially, Defendants' contention that they and their direct predecessors in interest had no rights under the Original Lease is directly contradicted by their behavior in applying the security deposit given to Plaintiff's predecessor under the Original Lease to cover Defendants' last month's rent in April, 2005 (*see* Chapin Affid. ¶ 39). Nevertheless, the Court finds it unnecessary to reach the issue whether Defendants had any rights to assume under the Original Lease, which clearly would raise an issue of fact for trial. Rather, the Court concludes

as discussed below that Defendants have established their entitlement to judgment as a matter of law dismissing this action because the Original Lease was never renewed for the "second renewal term" (Original Lease ¶ 15).

Defendants have established by proof in admissible form that there was no option for a single, ten-year renewal term under the Original Lease but, rather, two terms of five years each. That proof consists of the clear terms of the Original Lease itself. "[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms" (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). "Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*id.*) Although a different rule governs a contract that is ambiguous, "[t]he proper inquiry in determining whether a contract is ambiguous is whether the agreement on its face is reasonably susceptible of more than one interpretation" (*St. Mary v Paul Smith's College of Arts and Sciences*, 247 AD2d 859 [4th Dept 1998] [internal quotation marks omitted]).

Here, paragraph 15 of the Original Lease is reasonably susceptible of only one interpretation. That paragraph provides that the lessee "shall have the option to renew the lease for an additional **two** terms of sixty (60) months". The Lease further states that all of its terms will continue "during the **renewal term** except that the yearly rent for the **1st renewal term** shall be at a rate . . . [and] . . . **[t]he second renewal term** rates are. . .". The lease later references the "**renewal periods**" (Original Lease ¶ 15 [emphasis added]). All of this language clearly indicates that there were two separate options, each for an additional term of five years

and each separately exercisable. It also is undisputed on this record that neither Defendants nor any of their predecessors-in-interest executed any writing modifying the Original Lease and binding them to a renewal term of ten (10) years.

Plaintiff emphasizes the understanding purportedly reached in November of 1999 whereby the parties agreed to extend the Original Lease pursuant to its terms. Defendants counter that written notice of any such renewal never occurred and that any such renewal was untimely. Additionally, any modification of those requirements were not in writing as required by paragraph 17 of the Original Lease (*see, e.g., Ancorp National Svces., Inc. v Port Auth. of New York*, 50 AD2d 790, 791 [1st Dept 1975] *affd* 41 NY2d 821 [1977]). Thus, according to Defendants, any such renewal would be unenforceable as in violation of the Statute of Frauds. However, this is not fatal to Plaintiff's position because there is no requirement that the exercise of an option, as opposed to creation of an option to lease real property, satisfy the Statute of Frauds (*see Genrich v Holiday Lady Fitness Center Inc.*, 216 AD2d 897 [4th Dept 1995]).

Plaintiff also asserts that the notice requirements in the Original Lease for the renewal term were clearly waivable and were waived in this case (*see* Jacobson Affid. ¶ 52). Plaintiff relies not only on waiver to avoid the Statute of Frauds but also on partial performance and estoppel (*see, e.g. 310 South Broadway Corp. v Barrier Gas Svce.*, 224 AD2d 409, 410 [2d Dept 1996]). Plaintiff points out that it allowed Defendants and/or their predecessors-in-interest to remain on the premises under the terms of the Original Lease after November of 1999 in exchange for a reduction in the month-to-month rental of $2.40 per square foot annually. Plaintiff's inaction as manifested by not evicting the Defendants, and by its action in

reducing the rent, both of which appear to be directly referable to an extension of the Original Lease for the "1st renewal term," may well suffice to avoid the Statute of Frauds (*see, e.g., Messner Vetere Berger, et al. v Aegis Group, PLC*, 93 NY2d 229, 235-236 [1999]). However, even if Plaintiff established by estoppel or other proof in admissible form that Defendants or their predecessors had exercised an option to renew, it would have been only for the "1st renewal term" and would have expired in five years i.e., on June 30, 2004. The proof pertaining to any renewal exercised in 1999 does not apply to the analysis of whether Defendant exercised its right to renew for the "second renewal term."

Defendants have met their burden of establishing that they did not renew for the "second renewal term" by submitting in evidence a letter to Mr. Taylor dated March 18, 2004, which Plaintiff does not deny receiving. This letter was sent after Temple-Inland forwarded the 2003 Proposed Lease (*see* Chapin Affid., Exhibits C & D). The letter stated that Temple-Inland had sent the proposed Lease in December 2003 and that it assumed that some of the terms must have been objectionable to Plaintiff, because no reply had been received. The letter further asked that Mr. Taylor forward to Temple Inland "at your earliest convenience a Lease that you would be willing to execute." Significantly, the letter also stated:

> Until Inland receives such an offer, it will continue its month-to-month lease arrangement ....

(*see* Chapin Affid., Exhibit D).

The Court determines that, as a matter of law, Plaintiff could not have reasonably relied upon Defendants remaining on the premises after June of 2004 as an exercise of the "second renewal term" because the letters from Defendants are directly to the contrary

(*see, e.g., Holm v C.M.P. Sheet Metal*, 89 AD2d 229, 235 [4th Dept 1982]; *see generally New York Telephone Co. v Jamestown Telephone Co.*, 282 NY 365, 371-372 [1940]). Plaintiff cannot contest this conclusion because its only argument is that the right to renew was exercised in 1999 for a ten-year renewal term, a position this Court has rejected.

Finally, Defendants remained on the premises after June 30, 2004, when the "1st renewal term" expired. In July of 2004, Plaintiff billed Defendants and Defendants paid at the same rate as June of 2004 ($10,962.00 for 73,800 square feet at an annualized rate of $1.80 per square foot; see Appendix). In August of 2004 through April of 2005 (when Defendants vacated pursuant to notice), Defendants were billed and paid at the increased rate for the "11th" year of the Original Lease, as though the lease had been renewed for the "second renewal term." However, as Defendants correctly point out, no such renewal in fact occurred as set forth in the Original Lease and Defendants' statements to Plaintiff in December of 2003 and March of 2004 belie any reliance by Plaintiffs upon a waiver or estoppel theory. Moreover, Real Property Law § 232-c negates any argument by Plaintiff that the Original Lease was renewed by conduct or that the arrangement between the parties after June of 2004 was anything other than a month-to-month tenancy.

Simply put, Plaintiff took the risk of relying solely upon the construction of the Original Lease as providing for a ten-year renewal term, a construction this Court concludes is fully contradicted by the clear language of that document. Without any other writings to protect its economic interests, Plaintiff's first cause of action is without merit. Thus, leave to serve an Amended Complaint containing that cause of action is denied.

2. Second Proposed Cause of Action

Comparing the Original Complaint with the proposed Amended Complaint, the second and third causes of action in the Complaint are virtually identical to the second cause of action in the proposed Amended Complaint.[6] Thus, the merits of the second proposed cause of action have been dealt with already. For the reasons discussed at length above, there is no basis in law or fact for Plaintiff to recover the difference between $2.40 per square foot rental it initially sought upon expiration of the Original Lease, and the rentals it billed for and received payment of from July 1999 through April 2005.

3. Proposed Third and Fourth Causes of Action

The proposed third cause of action, like the fourth cause of action in the Original Complaint, is based an unjust enrichment. As discussed above, Defendants are entitled to summary judgment on that cause of action.

---

[6] The second cause of action in the Complaint alleges that Defendants and their predecessors agreed with Plaintiff to pay an annualized rate of $2.40 per square foot for the premises between July 1, 1999 through December 31, 2003, but unilaterally reduced the rate in breach of that agreement: Plaintiff seeks damages for unpaid rent at the annualized rate of $2.40 per square foot less the rent actually paid from July 1, 1999 until December 31, 2003. The third cause of action, similarly, alleges that, should Defendants assert that the 2003 Proposed Lease was not in effect at the time they vacated the premises, Plaintiff is owed damages of $2.40 per square foot, minus the amount actually paid by Defendant from July 1, 1999 until April 30, 2005. The second cause of action in the proposed Amended Complaint asserts that, in the event that Defendants deny they exercised a ten-year option under the Original Lease, they should then be liable for a monthly rate of $2.40 per square foot – for the entire tenancy from July 1999 through April 30, 2005.

Thus, the motion for summary judgment is granted in its entirety, and the cross motion for leave to serve an Amended Complaint is denied in its entirety.

Defendants to submit Order on notice to Plaintiff.

DATED: Buffalo, New York
February 14, 2008

_____

HON. JOHN M. CURRAN, J.S.C.