

FASHION BUG #2100 OF BATAVIA, INC.,

Plaintiff,

v.

425 WEST MAIN ASSOCIATES (BATAVIA) LP,

Defendant.

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DECISION AND ORDER

Index # 2004/3103

Plaintiff, Fashion Bug #2100 of Batavia, Inc., has moved pursuant to CPLR §3212 for an order granting summary judgment as follows: (1) declaring the pursuant to paragraph 12.6 of the lease agreement plaintiff is entitled to an abatement of rent on a going forward basis from February 1, 2002; and (2) determining that defendant's failure to abate rent constitutes a breach of contract, entitling plaintiff to money judgment in the amount of \$133,005.48, with interest from February 1, 2002, for the rental time period of February 1, 2002 through August 31, 2004. Defendant, West Main Associates L.P. (incorrectly named in the caption as "425 West Main Associates (Batavia), L.P."), has cross moved pursuant to CPLR §3212 to dismiss plaintiff's complaint and to correct the caption.

Fashion Bug first leased space in the subject plaza in Batavia, New York in 1988. The lease between the parties was for a ten year term, with five-year options to renew. See Lease,

§1.1(h). The lease identified Ames and Fays Drugs and "Major Tenants" and provided that if Ames "or its equivalent" or Fays "or its equivalent" ceased operating at the plaza, Fashion Bug would be able to abate its monthly rental payment for the remainder of the lease term, or until an "equivalent replacement tenant(s) opens for business in the vacated premises...." Lease, §§1.1(p), 12.6. On January 10, 1992, the parties executed a First Amendment Agreement, making certain changes to the original agreement which are not relevant to the issues presently before the court. The First Amendment Agreement did provide that "[e]xcept as hereby expressly amended, all of the terms, covenants and conditions of the Lease shall remain as therein set forth." See First Amendment, §7.

On March 16, 1996, Ames ceased doing business at the plaza, and Fashion Bug began paying reduced rent pursuant to Section 12.6 of the Lease. In June, 1996, the parties executed a Second Amendment to Lease. The Second Amendment recites:

Tenant has exercised its rights under Section 12.6 of the Lease, Co-Tenancy, and pursuant to the provisions thereof, has been paying reduced rent in the amount of \$1,875.00 per month due to the violation of said Section when "Ames" ceased doing business in the Shopping Center on March 16, 1996.

Second Amendment, Second "Whereas" Clause. With respect to the proposed replacement of Ames with Valu/Home Center, the Second Amendment states that Valu/Home Center is "an equivalent replacement tenant." Second Amendment, §1. The Second Amendment

replaces the previous Section 12.6 with the following provision:

Notwithstanding anything contained in this Lease to the contrary, if (a) Valu/Home Center, or (b) Fays Drugs... is not conducting business for any reason... then in that event, Rent and all Other Charges and payments due hereunder (however defined) shall abate until this Lease is terminated as provided herein, or, as the case may be, Valu Home Center, or a single-user equivalent replacement tenant opens (or re-opens) for business in the entire premises designated as Valu Home Center... or Fays Drugs... and during the period of such abatement, Tenant shall pay, annually, in arrears, in lieu of the aforementioned Rent and Other Charges, the greater of (i) \$22,500.00, or (ii) two (2%) percent of Gross Sales as defined in Section 4.3....

Second Amendment, §2. The Second Amendment also provides that "[e]xcept as hereby expressly amended herein, all of the terms, covenants and conditions of the Lease shall remain as therein set forth." Second Amendment, §4. Less than two years after the Second Amendment was executed, Valu Home Center gave up approximately one-fifth of its floor space to Goodwill Industries, which opened a store site there until 2004. Shortly after Goodwill opened, Fashion Bug executed a tenant's estoppel certificate stating that all conditions of the lease were being met and that it did not have any right of set off or credit against the rent due to West Main.

Due to a corporate merger, Fays was replaced by Eckerd Drugs. In January, 2002, however, Eckerd closed its store in the plaza, and its lease expired in March, 2002. On June 1, 2002, Dollar General leased a portion of the former Eckerd store. A month later, the remainder of the former Eckerd store was leased

to Shopper's Choice. Both Dollar General and Shopper's Choice continue to operate in the plaza in the former Eckerd space.

Over a year later, on August 1, 2003, Fashion Bug sent a notice to Main West via certified mail that it was renewing its lease for another five years. On August 5, 2003, Fashion Bug sent a second certified letter, claiming that because Eckerd was not replaced with a "single-user equivalent replacement tenant," it was entitled to a rent abatement. When West Main sent Fashion Bug a three-day notice to quit in October, 2003 for failure to pay the full rental amount, Fashion Bug sent a check for the rent demanded, marking the check "with protest." Fashion Bug commenced this action in March, 2004 seeking a refund of rent over and above the abatement rate based on breach of contract and unjust enrichment, as well as a declaration as to the parties' responsibilities under the lease.

#### Ambiguity

West Main contends that the term "single-user equivalent replacement tenant" used in the Second Amendment is ambiguous. Ambiguities, or claim ambiguities, in contracts have been oft contemplated by the courts of New York. The Court of Appeals has stated:

[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add to c

W.W.W. Associates, Inc. v Giancontieri, 77 N.Y.2d 157, 162 (1990). See also R/S Assoc. v New York Job Development Authority, 98 N.Y.2d 29, 32 (2002). "Whether or not a writing is ambiguous is a question of law to be resolved by the courts." W.W.W. Associates, 77 N.Y.2d at 162. See also Sutton v. East River Savings Bank, 55 N.Y.2d 550, 554 (1982) (stating "the threshold decision of whether a writing is ambiguous is the exclusive province of the court."); Jellinick v. Joseph J. Naples, Assoc., Inc., 296 A.D.2d 75, 78 (4<sup>th</sup> Dept. 2002). Extrinsic and parol evidence may not be introduced to attempt to create an ambiguity in a clear and unambiguous written agreement that "plainly manifests" its intention. See W.W.W. Associates, 77 N.Y.2d at 162-63.

To assist a court in determining whether the agreement is ambiguous, the threshold question "is whether the agreement on its face is reasonably susceptible of more than one interpretation." See Chimart Assoc. v Paul, 66 N.Y.2d 571, 573 (1986). See also Jellinick, 296 A.D.2d at 78; St. Mary v Paul Smith's College of Arts and Sciences, 247 A.D.2d 859 (4<sup>th</sup> Dept. 1998); Lipari v Maines Paper & Food Service, Inc., 245 A.D.2d 1085 (4<sup>th</sup> Dept. 1997); Levey v. A. Leventhal & Sons, Inc., 231 A.D.2d 877 (4<sup>th</sup> Dept. 1996); Arrow Communication Laboratories, Inc. v. Pico Products, Inc., 206 A.D.2d 922 (4<sup>th</sup> Dept 1994). "A party seeking summary judgment has the burden of establishing

that the construction it favors 'is the only construction which can fairly be placed thereon.'" Arrow Commun. 206 A.D.2d at 923, citing Dowdle v. Richards, 2 A.D.2d 486, 489 (4<sup>th</sup> Dept. 1956). See also Lippman v. Despatch Industries, Inc., 8 A.D.3d 1051 (4<sup>th</sup> Dept. 2004); Jellinick, 296 A.D.2d at 78-79. When differing interpretations and construction of the agreement are submitted, and the lack of clarity makes the agreement susceptible to the construction proffered by both the plaintiff and the defendant, then the agreement is ambiguous. See Arrow Commun., 206 A.D.2d at 923. When the Court finds that a contract is ambiguous, the rules governing the interpretation of ambiguous agreements are triggered. See R/S Assoc. 98 N.Y.2d at 33.

In the Second Amendment, the term "single-user equivalent replacement tenant" is unambiguous insofar as there is clarity as to the meaning of "single-user." Moreover, Section 12.6 of the Lease, as amended by the Second Amendment, states that, if a "single-user equivalent replacement tenant" does not "open (or reopen) for business in the entire premises" formerly used by Eckerd, Fashion Bug will be entitled to an abatement of rent. There likewise can be no question that the Second Amendment contemplates that a "single-user" will be required to occupy "the entire premises" formerly occupied by Eckerd to avoid a rent abatement. To this extent, the Second Amendment is unambiguous. Accordingly, it is clear that West Main breached the lease and

its amendments by dividing the space formerly occupied by Eckerd and leasing it to more than just one "single-user."

An ambiguity remains, however, with respect to the word "equivalent" in the term "single-user equivalent replacement tenant." It is clear from Fashion Bug's papers that it does not believe Dollar General or Shopper's Choice are "equivalent" to Eckerd. See Affidavit of J. Graub, ¶25. "Even where... a contract is ambiguous, its interpretation remains the exclusive function of the court unless 'determination of the intent of the parties depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence.'" Village of Hamburg v. Amer. Ref-Fuel Co. of Niagara, L.P., 284 A.D.2d 85, 88 (4<sup>th</sup> Dept. 2001), *citing* Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 172 (1973). Only where a contract is ambiguous will extrinsic evidence be presented to determine the parties' intentions. See Jellinick, 296 A.D.2d at 79; Arrow Commun., 206 A.D.2d at 923. When the language of the agreement makes it susceptible to the construction offered by both parties, then the intent of the parties must be determined by extrinsic evidence outside the four corners of the document. Thus, while the ambiguity in a contract does not always preclude a court from deciding a motion for summary judgment, a question of fact is created that may not be resolved on a motion for summary judgment where extrinsic evidence is introduced. See

County of Albany v. Albany County Indus. Dev. Agency, 218 A.D.2d 435, 440 (3d Dept. 1996); Arrow Commun., 206 A.D.2d at 923. Here, however, West Main insists in its papers and at oral argument that, because Fashion Bug drafted the lease, the term should be interpreted as a matter of law against it and that summary judgment in favor of West Main is, therefore, appropriate. Graff v. Billet, 64 N.Y.2d 899, 902 (1985); Signature Realty, Inc. v. Tallman, 303 A.D.2d 925, 926 (4<sup>th</sup> Dept. 2003). For the reasons stated below, this contention is without merit.

With the exception of conclusory statements from both Fashion Bug and West Main, little was presented about the "equivalence" of Eckerd and Dollar General or Shopper's Choice. See Affidavit of J. Graub, ¶25; Affirmation of P. Abdella, Esq., ¶9; Plaintiff's memo of law, at 19; Affidavit of S. Gordon, ¶¶6, 13, 15(c), 16, 17(a-c). Yet the ambiguity concerning the term equivalent is not material to the determination of breach concerning the unambiguous portions of the term single-user equivalent replacement tenant. The phrase obviously embraces two concepts, single-user and equivalence, breach of any one of which entitles Fashion Bug to summary judgment. Inasmuch as neither of these entities is currently a "single-user" occupying the "entire premises" formerly occupied by Eckerd, whether those entities are equivalent replacement tenants is not necessarily relevant for

purposes of the disposition of this motion. West Main is in breach merely for its breach of the requirement of replacement with a "single-user" occupying the "entire premises." Cf., Matter of Parkview-Gem, Inc., 465 F. Supp. 629, 633 (W.D. Mo.

1979) (single-user "means that the entire leased area . . . was used for one retail operation").<sup>1</sup> Accordingly, Fashion Bug is entitled to summary judgment declaring that defendant is in breach of ¶12.6 of the lease and that, in accordance with the lease, it is entitled to an abatement of rent. Binghamton Plaza, Inc. v. Fashion Bug #2470 of Binghamton, Inc., 242 A.D.2d 822, 823 (3d Dept. 1997) (summary determination appropriate when "the subject provision is neither ambiguous nor susceptible to the interpretation urged by . . . [West Main]").

#### Waiver

West Main alleges that Fashion Bug waived enforcement of Section 12.6, as amended by the Second Amendment, by not strictly enforcing this provision. West Main alleges that Fashion Bug's conduct has been consistent with relinquishing the rights provided in Section 12.6, as amended and inconsistent with an

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<sup>1</sup> The court rejects West Main's position that any part of the language after "single-user" renders the term ambiguous with respect to the question whether multiple tenants might be permitted. The manifest purpose of the phrase, which needs no extrinsic evidence to devine, is to guarantee Fashion Bug an anchor tenant in the plaza. Garden City Shopping Associates v. Fashion Bug, N.Y.L.J. vol. 212, no. 68, p.31 (October 6, 1994) (Sup. Ct. Nassau Co.) See also, below on the effect of the prior estoppel certificate.

intention to enforce those rights. West Main alleges that Fashion Bug's renewal of the lease created a course of conduct that shows an intention to waive Section 12.6.

"A waiver is the voluntary abandonment or relinquishment of a known right." Jefpaul Garage Corp. v. Presbyterian Hosp. in City of New York, 61 N.Y.2d 442, 446 (1984). See also, Town of Hempstead v. incorporated Village of Freeport, 15 A.D.3d 567 (2<sup>nd</sup> Dept. 2005). Waiver is not "lightly presumed." Gilbert Frank Corp. v. Fed. Ins. Co., 70 N.Y.2d 966, 968 (1988). See also Navillus Tile, Inc. v. Turner Const. Co., 2 A.D.3d 209, 211 (1<sup>st</sup> Dept. 2003). Rather, waiver "is essentially a matter of intent which must be proved." Jefpaul, 61 N.Y.2d at 446. Further, waiver must be "unmistakably manifested, and is not to be inferred from a doubtful or equivocal act.'" Ess & Vee Acoustical & Lathing Contractors, Inc. v. Prato Verde, Inc., 268 A.D.2d 332, 332 (1<sup>st</sup> Dept. 2000), citing Orange Steel Erectors, Inc. v. Newburgh Steel, 225 A.D.2d 1010 (3d Dept. 1996). Waiver will be implied:

[w]hen one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby.

Frontier Ins. Co. v. State, 160 Misc.2d 437, 451 (N.Y.Ct.Cl. 1993), *citing* Black's Law Dictionary, 5<sup>th</sup> ed., p.1417.

Here, Eckerd closed in the plaza in January, 2002 and was partially replaced by Dollar General in June, 2002. Shopper's Choice leased the remainder of the premises previously occupied by Eckerd a month later. See Defendant's memo of law, at 2. Fashion Bug paid rent at the normal rate for eighteen months and renewed its lease on August 1, 2003. It was not until August 5, 2003 that Fashion Bug sent a certified letter to West Main asserting that it was entitled to a rent abatement due to West Main's alleged failure to replace Eckerd with a "single-user equivalent replacement tenant." Id. West Main alleges that Fashion Bug's renewal "forms part of a course of conduct which shows an unmistakable intention to forgo the very interpretation of Sec. 12.6 that plaintiff now advances." Defendant's memo of law, at 14. This act, combined with the months of rent paid without any objection or claim for an abatement constitutes a course of conduct according to West Main.

West Main's allegations fail to raise a question of fact on the issue of waiver such as would preclude granting Fashion Bug's motion for summary judgment on the breach of contract claim. Despite the passage of time, there has been no showing that Fashion Bug *intended* to waive the provisions of Section 12.6, as amended in the Second Amendment. Fashion Bug states without

contradiction that it did not know of the changed tenant circumstances except by reference to lower level employees who cannot bind the corporation and that it acted promptly upon discovering the problem. In re Caldor, 217 B.R. 121, 133-34 (S.D.N.Y. 1988). Furthermore, the lease contained in §11.4 a "no waiver" clause which while not dispositive, militates strongly against West Main's argument in these circumstances. Jefpaul Garage Corp., 61 N.Y.2d at 446. Although it is not appropriate to make a summary determination that a waiver has occurred under a lease, In re Calder, 217 B.R. at 133, in this case a summary determination that there was no waiver in these peculiar circumstances is appropriate, especially given the no-waiver clause. Brainerd Mfg. Co. v. Dewey Garden Lanes, Inc., 78 A.D.2d 365, 368 (4<sup>th</sup> Dept. 1981). See also, Jefpaul Garage Corp., 61 N.Y.2d at 446.

For similar reasons, West Main's argument drawn from the voluntary payment doctrine, Dillan v. V-A Columbia Cablevision of Westchester, Inc., 100 N.Y.2d 525 (2003); Gimbel Bros., Inc. v. Block Shopping Centers, Inc., 118 A.D.2d 532 (2d Dept. 1986), is without merit; such payments made under a mistake of fact are not covered by the voluntary payment doctrine, even if the ignorance of true facts was caused by negligence or inadvertence. In re T.R. Aquisition Corp., 309 B.R. 830, 838-39 (S.D. N.Y. 2003); Bank of New York v. Spiro, 267 A.D.2d 339, 340 (2d Dept. 1999);

NHS National Health Services, Inc. v. Kaufman, 250 A.D.2d 528, 529 (1<sup>st</sup> Dept. 1998). West Main raises no issue of fact that it relied to its detriment on the payments.

To the extent West Main seeks to defeat Fashion Bug's motion via the doctrine of equitable estoppel, the defense is without merit. Equitable estoppel:

...precludes a party at law and in equity from denying or asserting the contrary of any material fact which he has induced another to believe and to act on in a particular manner. It "rest upon the word or deed of one party upon which another rightfully relies and so relying changes his position to his injury." Parties are estopped to deny the reality of the state of thing which they have made to appear to exist and upon which other have been made to rely. It does not operate to create things otherwise non-existent; it operates merely to preclude the denial of a right claimed otherwise to have arisen.

Holm v. C.M.P. Sheet Metal, Inc., 89 A.D.2d 229, 234 (4<sup>th</sup> Dept. 1982), citing Triple Cities Constr. Co. v. Maryland Cas. Co., 4 N.Y.2d 443 (1958). A party asserting estoppel must allege "lack of knowledge of the true facts; (2) good faith reliance; and (3) a change of position." Holm, 89 A.D.2d at 234-35. Equitable estoppel does not require a showing that the party to be estopped engaged in deception. See N.Y.2d Jur. Estoppel §10. Rather, estoppel can be based upon careless conduct. Id. Here, West Main was a party to the lease and the amendments and was aware of the "true facts." While West Main may have relied upon Fashion Bug's actions through the eighteen month period, such reliance

was unreasonable. It was not unaware of the lease provision Fashion Bug ultimately sought to enforce, nor was it unaware that it was in breach, nor did it seek an estoppel certificate as it had in the prior situation.<sup>2</sup>

Plaintiff's motion for summary judgment is granted on the first and second causes of action. Plaintiff's motion for summary judgment on the third cause of action is granted in part and denied in part. It is hereby declared that plaintiff is entitled to a rent abatement on a going forward basis from February 1, 2002, and that the failure to abate the rent entitles plaintiff to a judgment in the amount of \$133,005.48 with interest from February 1, 2002, for the rental time period of

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<sup>2</sup>The estoppel certificate, which addressed the prior situation when Valu Home Center gave up 1/5 of its space to Goodwill Industries, cannot be invoked by West Main to address the very different circumstances presented by Eckerd's subsequent cessation of business at the site and its replacement with the current two tenants. Cf., Hammelburger v. Foursome Inn Corp., 54 N.Y.2d 580, 588 (1981) (estoppel certificate relevant only to the extent that it influenced the party otherwise to be charged and "[t]hat means not just reliance upon the existence of the certificate, but on the facts expressed by or implicit in it"). That Fashion Bug executed a certificate in connection with prior tenants in different circumstances cannot estop it from invoking its rights under the lease in response to wholly different tenant circumstances and at a much later time. Pacell Nadell Fine Weinberger & Co. v. Midtown Realty Co., 245 A.D.2d 188, 189 (1<sup>st</sup> Dept. 1997); Won's Eards, Inc. v. Samsondale/Haverstraw Equities, 165 A.D.2d 157, 164 (3d Dept. 1991) (where unlike this case the estoppel certificate was subject to "differing inferences" and thus a question of fact existed). Thus the estoppel certificate invoked by West Main in this case does not raise an issue of fact of waiver or estoppel concerning the current tenant mix. In any event, as stated above, both parties at oral argument insisted on summary determination of this motion.

February 1, 2002, through August 31, 2004. Defendant's cross motion for summary judgment is denied.

SO ORDERED.

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KENNETH R. FISHER  
JUSTICE SUPREME COURT

DATED: June \_\_, 2005  
Rochester, New York