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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

ORIGINAL

EMIL WEBER,

Plaintiff,

-vs-

VIRGINIA BOAS,

Defendant

DECISION

Index No. 73770

2012

Lacy, Katzen, LLP
John W. Wells, Esq., of Counsel
Attorneys for Plaintiff

Pheterson Spatorico Neilans, LLP
Derrick A. Spatorico, Esq., of Counsel
Attorneys for Defendant

The Plaintiff Emil Weber has moved for an order granting partial summary judgment against the Defendant as to the issues of the formation and breach of a contract between the parties, for an order dismissing the Defendant's Counterclaim as well as her first, third and seventh affirmative defenses, and for an order directing that the matter proceed to trial on the issue of damages only. The Defendant Virginia Boas has opposed the motion in its entirety and has filed a cross-motion for an order granting the Defendant summary judgment and dismissing the Plaintiff's Complaint, together with an application for sanctions.

This action arises from a lease of farm land by the Defendant to the

Plaintiff in Walworth, New York. The Plaintiff seeks an award of money damages from the Defendant, based upon the alleged breach of the contract by the Defendant. The Defendant has counterclaimed for money damages, maintaining that the Plaintiff utilized "aggressive and nontraditional farming techniques" which damaged the leased land.

(Parenthetically, the Court notes that counsel for both parties have exchanged comments of a personal nature alleging improprieties in each other's conduct in the preparation and submission of their respective moving papers. The Court has chosen to ignore these remarks by both attorneys, as irrelevant to the determination of these legal issues.)

By Farm Land Lease dated January 15, 2000, Mr. Weber leased "approximately 120 acres of farmland...for the year 2000-2005" in the Town of Walworth, New York from the Defendant. Mr. Weber farmed the land under this lease during the years 2000, 2001, 2002, 2003, 2004 and 2005, in return for which he paid Ms. Boas the annual sum of $2,540.00 in each of those years.

On January 12, 2006, the parties entered into a second Farm Land Lease. The lease states that the term is "2006-2011" and included approximately 136 acres of land. Mr. Weber agreed to pay Ms. Boas the sum of $3,050.00 annually. The amount of acreage was subsequently

reduced to 126 acres per a handwritten note on the lease, and the payment was reduced to $2,430.00.

(It should be noted here that the one-page form utilized for both the first and second lease is identical, except for the names, date and numbers, which were handwritten. Neither party was represented by an attorney.)

On February 1, 2011, the Defendant signed a Lease Agreement with Russell J. McGonegal, Jr. The Lease covered approximately 87 acres, and the amount of rent is not stated. The acreage which is the subject of the McGonagal lease is alleged to have been part of the farm land covered by the second lease between the Plaintiff and the Defendant.

In January 2011, Mr. Weber allegedly presented a third lease to Ms. Boas. That lease encompassed approximately 81 acres of farmland, and rent was to be paid in the amount of $2,430.00 per year. The term of the Lease was set forth as "2011-2016". The lease was signed by the Plaintiff but not by the Defendant.

The Plaintiff commenced the instant action, setting forth causes of action for breach of contract and unjust enrichment. The Plaintiff seeks damages in excess of $30,000.00. The Defendant initially filed an Answer, containing nine Affirmative Defenses. The Defendant subsequently filed an Amended Answer (although not so denominated), containing seven

Affirmative Defenses and setting forth one Counter-claim against the Plaintiff, for an unspecified amount of damages. A Reply was filed by the Plaintiff. Extensive discovery has taken place, including depositions and the exchange of multiple sets of interrogatories.

The Defendant maintains that the Plaintiff's Complaint should be dismissed, based on her contention that no breach of contract has occurred. The stated term of the 2006 lease agreement was clear and unambiguous, in that the numbers "2006-2011" in the agreement plainly indicate that the term of the lease extended from January 12, 2006 to January 12, 2011, not January 12, 2006 through the end of January 2011, as argued by the Plaintiff. Therefore, she contends, since the agreement expired by its terms on January 12, 2011, there is no basis for the Plaintiff's assertion that she breached the terms of the lease by renting the land to a third party.

In the alternative, should the Court conclude that the language in the lease is ambiguous regarding the duration, the Defendant maintains that the ambiguity should be construed against the Plaintiff as author of the agreement. Moreover, should the Court choose to exercise its discretion in allowing the admission of extrinsic evidence in order to resolve the ambiguity, the Defendant urges the Court to consider the fact that the Plaintiff prepared and offered the third lease agreement to the Defendant,

which provided that the lease shall run from "2011 - 2016". The Defendant maintains that the Plaintiff would have had no need to submit such a lease for her approval at the beginning of 2011, had he really believed that the second lease extended through 2011.

However, the Plaintiff also requests the Court to consider extrinsic evidence in resolving any ambiguity in the term of the second lease. Specifically, Mr. Weber emphasizes the fact that, pursuant to the first lease in which the term was set forth as "2000-2005", he farmed the subject land for six harvest seasons, and that the Defendant accepted the annual payment for each of those six seasons without comment. Since the second lease is written in the same format (i.e., "2006-2011"), the Plaintiff argues that the contract provision should be determined by evidence of past performance. In *Coliseum Towns Assoc. V County of Nassau*, 2AD3d 562 (2nd Dept, 2003), the appellate court held that "the practical interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling, influence" (emphasis added). Here, the Plaintiff maintains that, since the past performance of the first lease encompassed six growing seasons, this extrinsic evidence should be used to resolve any ambiguity in the language of the second lease.

Since both parties have argued that extrinsic evidence should be considered by the Court in support of their respective positions, the Court finds that there are material issues of fact, and therefore, neither party is entitled to summary judgment.

The Plaintiff has also moved to dismiss certain affirmative defenses as set forth in the Defendant's Answer: The Court holds as follows:

1) The First Affirmative Defense alleges that the Plaintiff's Complaint fails to state a cause of action against the Defendant. The Court finds the Plaintiff has made a prima facie showing of the making of a contract and of an alleged breach by the Defendant; therefore the First Affirmative Defense is dismissed;

2) The Third Affirmative Defense states that there is a lack of privity between the Plaintiff and the Defendant and therefore, the Plaintiff's claims against the Defendant are barred. This Court has previously ruled that there are issues of fact regarding the date of the termination of the second lease; therefore, the Third Affirmative Defense is not dismissed, since the issue of privity will be resolved by the determination of those factual issues;

3) The Seventh Affirmative Defense (mislabeled Sixth Affirmative Defense in the Answer) alleges that the lease states that the Plaintiff agrees "not to hold the landowner responsible in any way"; however, the Court

agrees with the Plaintiff that this language is quoted out of context and does not constitute a blanket release of the Plaintiff's rights - it is clearly intended to address the Plaintiff's sole responsibility for his actions in the carrying out of the actual farming business; the Seventh Affirmative Defense is therefore dismissed.

Finally, the Court must address the Plaintiff's motion to dismiss the Counterclaim set forth in the Defendant's Answer. The Plaintiff maintains that the Defendant has failed to offer proof in admissible form that she has sustained damages to her land as a result of the Plaintiff's use of "aggressive and non-traditional farming practices." The fact that the Defendant has not actually expended any funds for repairs is not necessarily determinative of the merits of her claim. However, her allegations regarding the Plaintiff's actions are not supported by any documentation, and her deposition testimony regarding the nature of the alleged damages is speculative. In response to the Plaintiff's motion, she had not come forward with any expert reports or repair estimates. The only allegation by the Defendant regarding the amount of damages is set forth in the Interrogatories, in which she offers a generalized statement that the damages are less than $10,000.00.

Therefore, the Court grants the Plaintiff's motion to dismiss the

Defendant's Counterclaim.

All applications for the imposition of sanctions are hereby denied.

In summary, the Plaintiff's motion for partial summary judgment on the issues of the formation and breach of a contract is denied. The Plaintiff's motion to dismiss the Defendant's Counterclaim is granted. The Plaintiff's motion to dismiss the Defendant's first and seventh affirmative defenses is granted. The Plaintiff's motion to dismiss the third affirmative defense is denied. Finally, the Defendant's motion for summary judgment dismissing the Complaint is denied.

Counsel for the Plaintiff is directed to submit a proposed Order to the Court, on notice to counsel for the Defendant.

Dated: January 14, 2014
Lyons, New York

Honorable Dennis M. Kehoe
Acting Supreme Court Justice