IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

SAUL HOLDINGS LIMITED PARTNERSHIP, et al.	:	
Plaintiff	:	Case No.: 293777-V
v.	:	The Honorable Durke G. Thompson
RAQUEL SALES, INC. and BAREFEET ENTERPRISES, INC.	:	
Defendants	:	

MEMORANDUM OPINION

Plaintiffs, Saul Holdings Limited Partnership ("Saul") and Briggs Chaney Plaza, LLC ("Briggs Chaney") (hereinafter collectively referred to as "Plaintiffs"), bring this breach of lease action against Defendant, Raquel Sales, Inc. ("RSI") and breach of guaranty action against Defendant Barefeet Enterprises, Inc. ("BFI") (hereinafter collectively referred to as "Defendants") seeking damages for unpaid rent and accelerated rent under the leases.

The matter came before this Court on March 30, 2009 for trial. After the taking of evidence and argument, this Court took the matter under advisement to better examine the issues that were presented by this case, namely, whether the accelerated rent provisions of the leases are permitted under Georgia and Maryland law.

BACKGROUND

The DeKalb Lease

On or about January 23, 2006, Saul and RSI entered into a ten (10) year Shopping Center Retail Lease (hereinafter referred to as the "DeKalb Lease") for 9,171 square feet of space in the South DeKalb Plaza Shopping Center located at 2732 Candler Road, Decatur, Georgia

(hereinafter referred to as "DeKalb Premises"). Under the terms of the DeKalb Lease, RSI was required to make minimum monthly rental payments as well as additional monthly rental payments for common area maintenance, commercial fees, taxes and other miscellaneous charges. The minimum monthly rental payments were $6,878.25 and were to increase each year of the lease term to an amount equal to one hundred two percent (102%) of the amount of minimum rental payments for the preceding lease year. On or about August 1, 2007, RSI abandoned the DeKalb Premises and has failed to pay rent and all other fees due under the lease since October 2007.

At or about the same time RSI entered into the DeKalb Lease, BFI executed a Guaranty to the lease agreement (hereinafter referred to as "DeKalb Lease Guaranty") wherein BFI agreed to guaranty RSI's performance under the lease which, including payment of any and all liabilities included thereunder.

On April 9, 2009, Saul entered into a new lease for the DeKalb Premises with Balmoral Holdings, Inc. t/a Dress Code (hereinafter referred to as the "Dress Code Lease"). The lease is for a term of five years and requires Dress Code to begin making rental payments immediately. Said rental payments will result in a deficiency between the Dress Code Lease and the DeKalb Lease.

Briggs Chaney Lease

On or about January 23, 2006, RSI also entered into a ten (10) year Shopping Center Retail Lease with Briggs Chaney (hereinafter to referred to as the "Briggs Chaney Lease") for 7,020 square feet of space in the Briggs Chaney Shopping Center located at 13827-13829 Outlet Drive, Silver Spring, Maryland (hereinafter referred to as "Briggs Chaney Premises"). Under the

terms of the Briggs Chaney Lease, RSI was required to make minimum monthly rental payments as well as additional monthly rental payments for common area maintenance, commercial fees, taxes and other miscellaneous charges. The minimum monthly rental payments were $8,775.00 and were to increase each year of the lease term to an amount equal to one hundred two percent (102%) of the amount of minimum rental payments for the preceding lease year. RSI ceased paying rent in October 2008 and abandoned the Briggs Chaney Premises in January of 2009. RSI has since tendered the November 2008 rent payment to Briggs Chaney.

BFI executed a Guaranty to the Briggs Chaney Lease (hereinafter referred to as "Briggs Chaney Lease Guaranty") similar to the DeKalb Lease Guaranty,on or about January 23, 2006, wherein BFI agreed to guaranty RSI's performance under the lease, including payment of any and all liabilities arising from said lease.

Accelerated Rent Provisions

Pursuant to §29(c) of both the DeKalb Lease and the Briggs Chaney Lease the landlord, upon default, may seek "Liquidated Damages" amounting to the sum of minimum monthly rent (at the time of default), plus the average monthly percentage rent for the two years preceding the default, plus additional rent calculated at the amount paid before the default, multiplied by the number of months remaining in the lease term and discounted to present value at a rate of six percent (6%). The provision requires the landlord to credit the tenant any rent received as a result of the re-letting of the Premises at the end of the original lease term.

QUESTIONS POSED

With regard to the DeKalb lease, this Court must determine whether Georgia law permits the accelerated rent provision of the lease as a valid liquidated damage clause or whether it fails as a penalty.

The determination to be made by this Court with regard to the Briggs Chaney lease is whether the remedy of acceleration of rent is a proper remedy for breach of a commercial lease under Maryland law. Unlike Georgia courts, Maryland courts have not addressed this issue heretofore and this Court must determine whether Maryland law permits the acceleration of rent as enforceable liquidated damages upon breach of a commercial lease or whether such a remedy constitutes a penalty.

The Court must also determine guarantor liability and reasonable attorneys' fees.

DISCUSSION AND ANALYSIS

Generally, when a tenant defaults on its lease and the landlord repossesses the premises, the lease obligations are terminated and the tenant is discharged of any responsibility for rent accruing after the landlord resumes possession. Parties to a lease, however, may elect to include a provision in the lease which clearly and unequivocally expresses the parties' intentions to hold the tenant responsible for after-accrued rent. See *Zazanis v. Gold Coast Mall*, 63 Md. App. 364, 370 (1985); *See also, Nobles v. Jiffy Market Food Store Corporation*, 260 Ga. App. 18, 20 (2003).

The DeKalb Lease

Although a tenant is generally not responsible for rent after the termination of a lease agreement, Georgia courts have found that the parties to a lease may contract otherwise,

provided that the lease contains a clear expression of the parties' intent to hold the tenant responsible for after accruing rent, less any amounts received from re-letting the premises. *Jiffy, supra, citing Peterson v. P.C. Towers, L.P.*, 206 Ga. App. 591 (1992). The Georgia Court of Appeals has held that such accelerated rent provisions are enforceable liquidated damage clauses if the injury caused by the breach is difficult or impossible to accurately estimate, the parties intended to provide for damages rather than a penalty, and the sum stipulated is a reasonable pre-estimate of probable loss. *Peterson v. P.C. Towers, L.P.*, 206 Ga.App. 591, 593 (1992). If these requirements are not met, the provision fails as a penalty. *Jiffy, supra, citing Peterson* at 592. Defendants contend that §29(c) of the DeKalb Lease does not meet the requirements set forth by the Georgia Court of Appeals to qualify as a valid liquidated damages provision and therefore must fail as a penalty. Plaintiff argues that §29(c) alleviates any concern expressed by the Court of Appeals in *Peterson* and the provision is an enforceable liquidated damages clause. This Court finds that the damages provided for in §29(c) are too uncertain and speculative and the provision thus fails as a penalty for the reasons cited below.

To qualify as an enforceable liquidated damages provision, the sum sought as accelerated rent must be a reasonable estimate of actual damages. *Peterson* at 592. In analyzing an accelerated rent provision, the measure of damages is the difference between what the tenant would have to pay in rent for the balance of the term and the fair rental value of the premises for the balance of the term. *Id.* In *Peterson*, the accelerated rent provision allowed the landlord to terminate the lease, evict the tenant, and collect rent reduced to present value which would have been payable to the end of the lease term. *Id.* at 593. The Georgia Court found that the provision was an unenforceable penalty because it awarded the landlord both present possession of the

premises and the lump sum award of future rent without accounting for the future rental value and the likelihood of re-letting the premises. *Id.* The *Peterson* court stated that the reduction of rent to the present value is a factor tending to establish that the accelerated rent sum is a reasonable estimate of probable loss, however, without accounting for the future rental value and likelihood of re-letting, both possession of the premises and the lump sum award of future rent provided landlord with a payment potentially bearing no reasonable relation to actual damages. *Peterson* at 594. Here, §29(c) reduces the lump sum payment to present value, but does not account for the future probability of re-letting of the premises. In addition, the DeKalb Lease does not require Saul to mitigate its damages upon RSI's default. Saul is thus awarded present possession of the premises and a lump sum award of future rent for the remaining lease term, approximately seven (7) years or eighty four (84) payments. It is difficult to infer, based on such a long lease period, whether such damages bear any relation to actual damages and it is for this reason that this Court finds the damages provided for in §29(c) to be too speculative and uncertain.

Here, Saul contends that the new Dress Code Lease for the DeKalb Premises satisfies the Georgia Court of Appeal's concerns articulated in *Peterson* regarding the future probability of re-letting the premises. This may be true for the five years that comprise the Dress Code Lease, but two years of the DeKalb Lease still remain after the Dress Code Lease expires. Plaintiff contends that a two year time period for accelerated rent has been upheld by the Georgia Court of Appeals. The Georgia Court of Appeals has found that claims for accelerated rent for a relatively brief period of time, including a two year period and a four and a half year period, do not involve the same amount of uncertainty and speculation that made the acceleration clause

unenforceable in *Peterson* and other cases of its kind. *See, Rucker v. Wynn*, 212 Ga. App. 69, 71 (1994); *Hardin v. Macon Mall*, 169 Ga. App. 793 (1984); *American Medical Transport Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464 (1998). Those cases are, however, factually distinguishable from the case at bar. In *Hardin*, the court awarded "lost rent" to the landlord for a two year period following the tenant's default during which the landlord could not find a new tenant. *Hardin v. Macon Mall*, 169 Ga. App. 793 (1984). The Georgia court granted judgment in favor of the landlord only *after* the two years had passed and the landlord was able to show actual damages arising from the tenant's default. *Id.* In *Rucker*, the landlord was able to re-let the premises for the remaining four and a half year term immediately following the tenant's default. *Rucker v. Wynn*, 212 Ga. App. 69, 71 (1994). The *Rucker* court held the tenant liable under the lease for accruing rent less amounts collected on re-rental only after the landlord had re-let the premises. *Id.* In *American Medical*, the remaining lease period was a mere twelve (12) months. *American Medical Transport Group, Inc. v. Glo-An, Inc.*, 235 Ga. App. 464 (1998). By the time the Georgia court reached its decision in that case and awarded the landlord after-accrued rent for the twelve month period, the original lease term had expired and the premises had not been re-let. *Id.* In this case, unlike those cited by the Plaintiffs, Saul has secured a new lease for all but two years of the remaining lease term. There remains two years *following* the expiration of the new tenant's lease for which Plaintiffs seek accelerated rent, a period five years in the future. The two year period for which the Plaintiffs seek acceleration of rent is five years in the future and is too distant to bear any reasonable relation to actual damages suffered by Saul as a result of RSI's default. If this Court were to allow acceleration of the rent for that two year period, the effect would be that which the *Peterson* court sought to avoid – Saul would be given

both present possession of the premises and a lump sum payment of rent without accounting for the likelihood of re-letting the premises. See, *Peterson, supra. See also, Jiffy, supra.*

This Court declines not only to award accelerated rent for the two year period following the Dress Code Lease, but declines as well to award *any* damages for that time period. That period is too far in the future to be certain and would result in an undue burden on both parties, but especially the Defendants who would have to carry that amount as a liability for the next five years without any guarantee that the damages would ever have to be paid. Commerce, of which both of these parties are a part, requires certainty and there is no certainty as to these damages which Defendants may or may not have to pay. In addition, five years is more than adequate time for the Plaintiffs to mitigate their potential damages using commercially reasonable efforts. This Court finds that the damages provided for in §29(c) of the DeKalb Lease fail to account for the future re-letting of the premises and are too uncertain and speculative to qualify §29(c) as an enforceable liquidated damages provision. This Court finds Defendants liable to Saul for any back rent, plus any deficiency in rent resulting from the Dress Code Lease, less the judgment awarded in Georgia. This Court invalidates Article 14 of the DeKalb Lease (the Failure to Operate provision) for the reasons stated on the record. Attorney's fees will be addressed below.

The Briggs Chaney Lease

Maryland law provides an exception to the general rule that lease obligations, including payment of rent, are generally extinguished when the landlord evicts a tenant and takes possession of the premises, allowing parties to a lease agreement to impose liability for rent, damages or deficiency arising in the case of re-letting. *See, Zazanis, supra, citing McArthur v.*

Rostek, 483 P.2d 1351, 1352 (Colo. App. 1971). Maryland courts, unlike Georgia courts, have not answered the question of whether accelerated rent provisions are permitted under such an exception. Most jurisdictions frame their analysis of such accelerated rent provisions in the context of whether they constitute liquidated damages or fail as a penalty. *See, Peterson v. P. C. Towers*, 206 Ga. App. 591 (1992); *Aurora Bus. Park Assocs., L.P. v. Michael Albert, Inc.*, 548 N.W.2d 153 (1996); *Teachers' Retirement Sys. of Illinois v. American Title Guar. Corp.*, 38 Va. Cir. 316 (1996). This Court will do the same.

The question presented by §29(c) of the Briggs Chaney Lease is whether Maryland law permits such an accelerated rent provision as a valid liquidated damages clause in a commercial lease or whether it fails as a penalty. The Maryland Court of Appeals has defined liquidated damages as a "specific sum of money…expressly stipulated by the parties to a…contract as the amount of damages to be recovered by either party for a breach of the agreement by the other." *Traylor v. Grafton*, 273 Md. 649, 661 (1975), *citing, Massachusetts Indem. Life Ins. Co. v. Dresser*, 269 Md. 364, 368 (1973). Liquidated damages clauses have been held to be enforceable where the sum agreed upon is a reasonable forecast of the just and fair compensation for the harm that would result by a breach of the contract and the resultant injury is difficult to estimate accurately or actual damages could not be easily ascertained. *Id.* at 662. Maryland courts will enforce a liquidated damages provision if it provides a fair estimate of potential damages at the time the parties entered into the contract and the damages were incapable of estimation at the time of contracting. *Id, citing Massachusetts Indem. Life Ins. Co. v. Dresser, supra; Goldman v. Connecticut Gen. Life Ins. Co.*, 251 Md. 575, 582, 248 A. 2d 154, 158 (1968); *Hammaker v. Schleigh*, 157 Md. 652, 667, 147 A. 790, 796 (1929); *Mt. Airy Milling*

Co. v. Runkles, supra; Willson v. Mayor & C.C. of Balto., 83 Md. 203, 34 A. 774 (1896). Where, however, the agreed upon damages are grossly excessive and out of all proportion to the damages that might reasonably have been expected to result from a breach, the courts will find that the provision is an unenforceable penalty. *Id.* This Court finds that reasonable damages resulting from the breach of a lease a mere ten months into the ten year lease term, is difficult, if not impossible to estimate, thus satisfying the second requirement of an enforceable liquidated damages provision. This is particularly true where, as here, a portion of the rent is based on a percentage of the tenant's gross sales each month. *See*, §5 of the Briggs Chaney Lease. This Court, however, does not believe that the Briggs Chaney Lease provides a "fair estimate of potential damages" and finds that the agreed upon damages are disproportionate to the damages that might have reasonably been expected to result from RSI's default.

Briggs Chaney argues that Article 29(c) of the Briggs Chaney Lease provides a reasonable estimate of potential damages because it calculates the monthly rent at the amount due at the time of default rather than upon the increased amounts due in future months under the Lease and reduces the rent to present value. Despite this, there still remains the fact that §29(c) provides for payment of rent for an approximately seven year period while also awarding possession of the premises to Briggs Chaney, an amount this Court finds to be an unfair estimate of actual damages.

Plaintiff further argues that the lease alleviates any concern this Court may have about awarding a lump sum payment of future rent for the balance of the lease term through the requirement under Maryland law that Briggs Chaney mitigate its damages upon RSI's default. *See, Circuit City Stores, Inc. v. Rockville Pike Joint Venture Ltd. Partnership,* 376 Md. 331

(2003), *citing*, *Sergeant Co. v. Pickett*, 285 Md. 186, 203 (1979) (where the Court found that when one party breaches a contract, the other party is required by the "avoidable consequences" rule of damages to make all reasonable efforts to minimize the loss sustained from the breach."). The accelerated rent provision here, however, is contrary to Maryland law requiring mitigation of damages. *Id* at 355. Under this provision, there is no incentive for Briggs Chaney to re-let the premises and thus mitigate its damages. Rather than use reasonable efforts to find a new tenant, Briggs Chaney can rely on the judgment of this Court providing rent payments for the remainder of the lease term while retaining possession of the premises. As a result, this Court finds that the accelerated lump sum payment of rent was not a fair estimate of the potential damages and further finds that Article 29(c) is an unenforceable penalty.

Based on the testimony presented at trial and the record herein, this Court finds that Briggs Chaney has established reasonable efforts in finding a new tenant for the Briggs Chaney Premises. For that reason, this Court awards Briggs Chaney all unpaid rent resulting from the time period that it has been unable to find a new tenant. This Court, however, refuses to award Plaintiff damages amounting to a lump sum payment of rent for the remainder of the lease term. This amount would result in a sum grossly excessive and out of all proportion to the damages that could reasonably have been expected to result from RSI's breach.

Guarantor Liability

Pursuant to the DeKalb Lease Guaranty, if a default occurred within 18 months of the lease commencement date, BFI's maximum liability was capped at twenty-four (24) months' minimum rent, annual operating costs, real estate taxes and any other sums payable under the lease, plus attorney's fees. Here, the lease commencement date was on or about February 1,

2006 and RSI abandoned the DeKalb Premises on or about August 1, 2007. Accordingly, this Court finds that BFI is liable to Plaintiffs for twenty-four (24) months' minimum rent and other costs under the lease that were assessed during the second year of the lease, plus reasonable attorneys' fees. Any percentage rent paid by the tenant during this period is to be deducted from the total amount of BFI's liability under the DeKalb Lease.

Pursuant to the Briggs Chaney Lease Guaranty, BFI's maximum personal liability was capped at the minimum rent, annual operating costs, real estate taxes and any other sums payable under the Briggs Chaney Lease for one (1) year following RSI's default, plus attorneys' fees. Here, RSI ceased paying rent under the Lease on or about October 2008. This Court finds that BFI is liable to Plaintiffs for rent and other costs due under the lease, plus attorney's fees for the period beginning October 1, 2008 and ending October 1, 2009.

Attorney's Fees

As part of the proceedings, Plaintiffs claim attorney's fees. This claim arises from §29(c) of both Leases wherein RSI agreed to pay Plaintiffs all expenses incurred for the recovery of rent or any other amount due under the provisions of the leases, including attorney's fees incurred as a result of RSI's failure to perform under the leases. In Maryland, attorney's fees should be proven with reasonable certainty and under the standards ordinarily applicable for proof of contractual damages. *Wells Fargo Bank Minn., N.A. v. Diamond Point Plaza, L.P.*, 171 Md. App. 70, 107-108 (2006). Maryland courts consider a variety of factors including, but not limited to, those factors enumerated in Maryland Rule of Professional Conduct 1.5:

1. the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

2. the likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer;

3. the fee customarily charged in the locality for similar legal services;

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee was fixed or contingent.

Id. (quoting *Maxima Corp. v. 6933 Arlington Dev. Ltd. P'ship*, 100 Md. App. 441, 453-55 (1994)). The trial court is generally given broad discretion when determining attorney's fees as it is able to observe the prevailing attorney's work and has a greater understanding of the litigation. See *Am. Ins. Co. v. El Paso Pipe and Supply Co.*, 478 F.2d 1185, 1195 (10th Cir. 1992). In *Diamond Point*, the Maryland Court of Appeals stated that a line by line analysis of time records does not need to be performed although the party claiming fees is required to provide billing and time records. *Diamond Point Limited Partnership, et al., supra,* at 760. Here, Plaintiffs claim attorney's fees and costs totaling $22,820.49 for services performed for Briggs Chaney and Saul including legal expenses, discovery, trial preparation and other expenses associated with efforts undertaken by Plaintiffs' attorneys to recover rent due under the leases. Plaintiffs presented at trial a detailed and complete accounting of the hours spent and costs incurred as a result of Defendant's default. The Court will note that an award of $22,820.49 in attorney's fees and costs is less than one percent (1%) of the damages claimed in Plaintiffs' complaint which were over three million dollars. In light of that fact and after review of

Plaintiffs' attorney's affidavit and the record herein, this Court finds the fees expended and reported to be completely disclosed, fair and reasonable for the services provided and appropriate for the service provider in time and rate.

CONCLUSION

It is clear from the record that the parties in this case entered into a commercial lease wherein they agreed to damages upon default by the tenant. It is equally clear there was a breach of both leases. The question for the Court is whether the accelerated rent provision found in §29(c) of both leases is permitted under the law of the State in which the premises are located, in this case, Georgia and Maryland.

In the DeKalb Lease, the damages agreed upon in §29(c) of the lease are not permitted by Georgia law without accounting for the future probability of re-letting the premises. The accelerated rent provision of the DeKalb Lease did not provide for that future probability and instead awarded a lump sum payment of a rent discounted to present value for a period of approximately seven years, plus possession of the premises. Saul was able to re-let the DeKalb Premises to Dress Code for five years and damages for that period are now a reasonable, if not exact, estimate of damages that resulted from RSI's breach and Saul is entitled to any deficiency resulting from the re-letting of the premises. The two year period remaining in the DeKalb Lease following expiration of the Dress Code Lease is too far in the future to account for the probability of re-letting the premises and results in damages that are too speculative and uncertain. For all the reasons stated above, this Court finds that §29(c) of the DeKalb Lease fails as a penalty.

With regard to the Briggs Chaney Lease, the requirement of Briggs Chaney to mitigate its damages does not remedy the concerns this Court has with §29(c)'s award to Briggs Chaney upon RSI's default, of a present lump sum award of future rental payments for the approximately seven years remaining on the lease as well as present possession of the premises. Not only does such an award disincentivize Briggs Chaney from mitigating its damages, the length of the remaining lease term is far too long for the calculation of damages to be a fair estimate of reasonable damages resulting from RSI's default. This Court finds that §29(c) of the Briggs Chaney Lease is not an enforceable liquidated damages provision and therefore fails as a penalty. RSI is found liable only for those damages resulting from Briggs Chaney's inability to re-let the premises despite commercially reasonable efforts.

Counsel for the Plaintiffs is directed to submit an Order consistent with this Court's opinion within fifteen (15) days of the date contained herein.

_____ _____

DATE

DURKE G. THOMPSON, JUDGE
Circuit Court for Montgomery
County, Maryland