

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-009096

07/20/2017

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

YANKE SCOTTSDALE PROPERTY L L C

AMY MARIE WILKINS

v.

HAVEN OF SCOTTSDALE L L C

JEROME J BROMIEL

UNDER ADVISEMENT RULING

Plaintiff/Counterdefendant Yanke Scottsdale Property, LLLC ("Yanke") owns certain real property (the "Property"). Defendant/Counterclaimant Haven of Scottsdale, LLC ("Haven") leases the Property from Yanke. The parties' lease ("Lease") includes the following provisions:

22 PAYMENTS AND NOTICES

All rents and other sums payable by Tenant to Landlord shall be paid at the address provided below. Any notice to be given or other document to be delivered in person to either party to the other hereunder may be delivered by either party, or may be deposited in the United States Mail, duly registered or certified, with postage prepaid and addressed the party for whom intended, as follows...

** ** *

25 OPTION TO PURCHASE THE REAL PROPERTY

25.1 GRANT OF OPTION

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[Yanke] grants to [Haven] the option to purchase the Premises in accordance with the provisions of this lease, so long as [Haven] has not committed a material default of this lease. [Haven] shall have the right to exercise the option to purchase during the last 6 months of the [Term]. [Haven] shall exercise the option by giving notice ("option notice") to [Yanke] within the option period.

25.2 PURCHASE PRICE DETERMINED BY AGREEMENT OR APPRAISAL

The parties shall have 30 days after [Yanke] receives the option notice in which to agree on the purchase price. If the parties are unable to agree on the purchase price within that period, then within 30 days after the expiration of that period each party, at its respective cost and by giving notice to the other party, shall appoint a qualified real estate appraiser with at least 5 years' full time commercial appraisal experience in the area in which the Premises is located to appraise and set the purchase price of the Premises. If a party does not appoint an appraiser within 30 days after the expiration of that period, the single appraiser shall be the sole appraiser and shall set the purchase price of the Premises.

If two appraisers are appointed by the parties, they shall promptly meet and attempt to set the purchase price of the Premises. If they are unable to agree within 30 days after appointment of the last appraiser to be appointed, they shall elect a third appraiser...

Lease, attached as Exhibit A to Yanke's Statement of Facts in Support of Motion for Partial Summary Judgment ("Yanke's SOF") and attached as Exhibit A to Defendant/Counterclaimant Haven of Scottsdale, LLC's Separate Statement of Facts Pursuant to Rule 56(c)(2) in Support of Motion for Partial Summary Judgment Re: the Appointment of Its Appraiser ("Haven's SOF").

It is undisputed that Haven exercised its option to purchase the Property in the manner prescribed in Section 25.1 of the Lease. *See* Exhibit E to Yanke's SOF. *See also* Plaintiff's Reply in Support of Motion for Partial Summary Judgment at p. 7 (acknowledging that Haven "timely exercise[d] the Option...").

The parties were unable to agree on a purchase price within 30 days of Haven's exercise of the option. On April 18, 2016, a Yanke representative sent an email to a Haven representative stating in part that Yanke "has agreed to your proposal that we exchange existing appraisals, before the actual Appraisal process commences..." Exhibit G to Yanke's SOF; Exhibit E to Haven's SOF. Later that day, the Haven representative replied that "it probably doesn't help to

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exchange appraisals and we should just move forward with the appraisal process as outlined in the lease.” Exhibit G to Yanke’s SOF; Exhibit F to Haven’s SOF. The Haven representative added, however,

We are going to move use [*sic*] the appraisal that we already have in hand. I understand that you are going to get a new appraisal rather than proceed with the one that JP Lamonoco [*sic*] completed, is that still the case? If so, shall we schedule something after you receive back your new appraisal?

Exhibit G to Yanke’s SOF; Exhibit F to Haven’s SOF. Four days later, on April 22, 2016, Yanke’s representative emailed Haven’s representative to let Haven know that Yanke’s appraiser would be visiting the Property the following week. Exhibit G to Haven’s SOF.

Almost a month later, on May 16, 2016, Haven’s representative followed up with Yanke’s representative by email, stating, “Haven of Scottsdale has received its appraisal, are you and your client ready to proceed with the appraiser’s conversation?” Exhibit I to Yanke’s SOF; Exhibit H to Haven’s SOF. Two days later, on May 18th, Yanke’s representative replied in part as follows:

We asked our Appraiser to prepare a New Appraisal, so that our prior Appraisal could, in effect, be updated to the date on which Haven of Scottsdale, LLC exercised its Purchase Option (April 1st). Our Appraiser has not yet completed that new Appraisal, in part, because he has been having a tough time getting up-to-date operating figures for the Project.

In any event, I do not believe it would be helpful to have the Appraisers talk until after our Appraiser has completed his New Appraisal. I will give you an update on the “ETA” for the Completion of that New Appraisal, as soon as that “ETA” has been provided to me.

Exhibit I to Haven’s SOF.

On May 27, 2016, another Yanke representative sent Haven, by certified mail, return receipt requested, a letter with a reference line reading, “Re: Official Appointment of Appraiser Pursuant to Section 25.2 of Scottsdale Nursing & Rehab Center Lease.” Exhibit H to Yanke’s SOF; Exhibit J to Haven’s SOF. The letter states in part,

...[P]ursuant to the provisions of Section 25.2 of the Lease, [Yanke] HEREBY gives notice to Haven of Scottsdale, LLC, that [Yanke] has appointed the

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Valuation & Information Group as [Yanke's] appraiser who will appraise and set the purchase price for the Premises.

As required by said Section 25.2 of the Lease, the Valuation & Information Group is a 'qualified real estate appraiser with at least 5 years full-time commercial appraisal experience in the area in which the Premises are located.

Exhibit H to Yanke's SOF; Exhibit J to Haven's SOF. On June 8, 2016, after having received no comparable letter from Haven, Yanke sent Haven a letter stating that Haven had failed to appoint an appraiser in accordance with the requirements of Section 25.2 of the Lease ("Section 25.2") and that, as a result, the appraisal performed by Yanke's appraiser, Valuation & Information Group ("VIG"), is the sole appraisal and conclusively establishes the purchase price for the Property. Exhibit J to Yanke's SOF.

Asserting that the emails it exchanged with Yanke satisfy Section 25.2, Haven seeks summary judgment on its claim that it "complied in all respects with its obligations under Sections 22 and 25 of the Lease, and has properly appointed its arbitrator" for the purpose of "attempt[ing] to set the purchase price of the Subject Property." Defendant/Counterclaimant Haven of Scottsdale, L.L.C's Motion for Partial Summary Judgment Re: The Appointment of Its Appraiser ("Haven's MSJ") at p. 10.

Yanke asserts that Haven failed to comply with its obligations under Section 25.2. Plaintiff's Motion for Partial Summary Judgment ("Haven's MSJ") at p. 4. In support of its position, Yanke asserts that Section 25.2 required Haven to provide a notice of its appointment of an appraiser containing specific content - - *i.e.*, the identity of the appraiser and confirmation that the appraiser has the requisite five years' commercial appraisal experience - - that Haven failed to provide. *Id.* at pp. 4-5. Yanke therefore seeks summary judgment on its claim that Haven failed to satisfy the requirements of Section 25.2, and therefore that "only Yanke's appraisal would be considered in setting the purchase price of" the Property. *Id.* at p. 5.

The parties agree that the interpretation of the Lease, as with any contract, is a question of law for the Court. *See Andrews v. Blake*, 205 Ariz. 236, 240, 69 P.3d 7, 11 (2003). After considering the filings and arguments of, and authorities cited by, the parties, the Court agrees with Haven that the emails it exchanged with Yanke satisfied the requirements of Section 25.2 by providing "notice" that Haven had selected an appraiser within the time prescribed in Section 25.2. It is undisputed that Yanke was aware, at all relevant times, that Haven had its own appraiser. Yanke representative Tonja Newton admitted as much at her deposition. *See Haven's SOF* at ¶ 38. The May 18th email from Yanke's representative to Haven stating that "it would [not] be helpful to have *the Appraisers* talk until after our Appraiser has completed his New

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Appraisal,” Exhibit I to Haven’s SOF (emphasis added), further demonstrates Yanke’s awareness at the time that each side had its own appraiser.

As Yanke correctly notes, Section 25.2 of the Lease requires that an appraiser have “at least 5 years’ full time commercial appraisal experience.” Nothing in Section 25.2, however, supports Yanke’s contention that the qualifications of the appraiser must appear in the text of the notice required by Section 25.2. Indeed, nothing in Section 25.2 requires that the party even identify its appraiser by name. Although Yanke asserts that the word “appoint” as used in Section 25.2 necessarily implies the identification of the person chosen, the Court does not interpret the word “appoint” so narrowly. The word “appoint” has been held to refer to “[t]he selection of one person from a specified class to discharge certain duties,” *Heisler v. Robbins*, 17 Ariz. 429, 432, 153 P. 771, 771 (1915), *citing* Bouvier’s Law Dictionary, and there can be no doubt in this case that Haven did in fact select an appraiser to discharge certain duties.

Yanke’s suggestion that Haven’s notice was deficient because it “did not set forth the experience” of Haven’s appraiser, Yanke’s MSJ at p. 12, is refuted by the fact that Yanke’s notice of its selection of VIG as its appraiser also fails to set forth VIG’s appraisal experience. *See generally* Exhibit H to Yanke’s SOF. Yanke’s notice states, in a conclusory manner, that VIG “is a ‘qualified real estate appraiser with at least 5 years full-time commercial appraisal experience in the area in which the Premises are located’,” *id.* at p. 2, without actually identifying what VIG’s experience is. Yanke is hardly in a position to fault Haven for failing to “set forth the experience” of its appraiser in its Section 25.2 notice when Yanke didn’t set forth the experience of its appraiser in its own Section 25.2 notice.

Yanke expresses the concern that adopting Haven’s interpretation of Section 25.2 creates the risk that “Haven could have one appraiser meet with Yanke’s appointed appraiser, and then switch appraisers after having obtained Yanke’s appraiser’s confidential valuation and analysis.” Plaintiff’s Reply in Support of Motion for Partial Summary Judgment at p. 2. Yanke’s professed fear that adopting Haven’s interpretation of Section 25.2 would enable Haven to “switch appraisers” to Yanke’s detriment is difficult to credit; couldn’t Yanke protect itself against such an occurrence by simply asking Haven for the name of its appraiser, and then raising an objection later if and when Haven tried to “switch appraisers”? In any event, nothing in Section 25.2 requires a party to identify by name the appraiser it has selected, and the Court cannot rewrite Section 25.2 to add such a requirement in order to allay Yanke’s concerns that Haven might improperly attempt to surreptitiously “switch appraisers.” *See, e.g., Mining Inv. Grp., LLC v. Roberts*, 217 Ariz. 635, 639, 177 P.3d 1207, 1211 (App. 2008) (“It is not within the province of the court to alter, revise, modify, extend, rewrite or remake an agreement...”)(citation, internal quotations, and internal punctuation omitted).

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Section 25.2 requires each party to select a qualified appraiser to participate in the appraisal process, and establishes a 30-day deadline by which each party must notify the other party that it had done so. The obvious purpose of Section 25.2 is to prevent one party from unreasonably delaying the appraisal process to the detriment of the other. Nothing in the language of Section 25.2 required Haven to set forth, in its notice, the name or the credentials of the appraiser it had selected. To accept Yanke's position would be to read "content" requirements into Section 25.2 that are not there. The Court cannot rewrite Section 25.2 to add additional terms. *Roberts*, 217 Ariz. at 639, 177 P.3d at 1211.

The Court therefore finds that Haven is entitled to summary judgment on its claim that it complied with Section 25.2 by giving timely notice of its appointment of an arbitrator.¹

Yanke asserts that it is entitled to "holdover rent" pursuant to Section 18 of the Lease because Haven remains in possession of the Property more than sixty days after the Lease. Yanke's MSJ at pp. 7-8. Arizona law recognizes that "an uncured material breach of contract relieves the non-breaching party from the duty to perform..." *Murphy Farrell Dev., LLLP v. Sourant*, 229 Ariz. 124, 133, 272 P.3d 355, 364 (App. 2012). In light of Haven's pending, and unresolved, counterclaims, the Court finds that genuine issues of material fact as to whether Yanke is in breach of the parties' Lease preclude summary judgment on Yanke's claim for holdover rent.

Accordingly,

IT IS ORDERED granting Defendant/Counterclaimant Haven of Scottsdale, L.L.C.'s Motion for Partial Summary Judgment Re: The Appointment of Its Appraiser.

IT IS FURTHER ORDERED denying Plaintiff's Motion for Partial Summary Judgment.

¹ Yanke challenges the sufficiency of Haven's appraisal, asserting, *inter alia*, that Haven's appraisal is in reality "a business valuation," not "a real property appraisal." Yanke's MSJ at p. 6. The Court's ruling herein makes no determination about the sufficiency of Haven's appraisal, nor does it preclude challenges to the sufficiency of the appraisal or to the qualifications of Haven's appraiser.