SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

*** FILED ***
09/04/2002

08/30/2002

CLERK OF THE COURT
FORM V000A

HONORABLE ROBERT L. GOTTSFIELD

M. Johnson
Deputy

CV 2000-018039

FILED: _____

CARPORTS ETC

WILLIAM F HYDER

v.

EDWARD NASSER, et al.

CLAIR W LANE

MINUTE ENTRY

This matter having been under advisement, the Court now Finds, Determines and Orders as follows:

1. Plaintiff, as lessee and defendants as lessor, entered into three successive form leases of the same property, 15001 South Power Road in an unincorporated area south of Mesa, in order for plaintiff to display and sell its steel products, which leases are as follows:

(a) Lease No. 1, dated April 4, 1999, beginning April 1, 1999 and terminating April 1, 2000 at $1,000 month. No sums were actually paid on this lease as the parties agreed plaintiff would do some construction on defendants' property in lieu of the monthly rental. The lease had an option to renew for 12 months.

(b) Lease No. 2, dated November 1, 1999, beginning November 1, 1999 and ending May 1, 2000 at $500 a month. The parties renegotiated Lease No. 1 so defendants could have some funds paid each month. The lease had an option to renew for 24 months.

(c) Lease No. 3, dated February 15, 2000, beginning May 1, 2000 and terminating May 1, 2002, at $1,000 a month

for the first year and $1,500 for the second year. The lease had an option to renew for 36 months at $1,500 a month.

2. Paragraph 11 of each lease provided for liability insurance insuring both lessor and lessee. While this paragraph was left blank in Leases Nos. 1 and 2, the paragraph provided for a $1,000,000 policy in Lease No. 3. This last lease was prepared by Derek Martin, an officer of plaintiff who testified he filled in the amount on his own knowing that plaintiff had an umbrella policy of $2,000,000, evidence of which policy was substantiated at the trial. There was no request by the lessor to fill in said paragraph and the lessor would have signed the lease without such a provision, having done so in connection with each prior lease.
3. Paragraph 14 of each lease concerned the lessor's Remedies on default and request to cure. Leases Nos. 1 and 2 provided for a 30-day notice of default and period of cure to be provided by the lessor to the lessee. Derek Martin testified he neglected to fill in paragraph 14 on Lease No. 3.
4. The Court finds and the parties agree that each successive lease replaced the others so that Lease No. 3 is the operative lease in the case at bar.
5. The Court finds that the parties intended Lease No. 3 to also have a 30-day notice of default and right to cure for the benefit of the lessee. This lease is reformed/ amended to conform to the evidence.
6. The Court further finds that Exhibit 6 entitled "Notice of Default and Termination of Lease" did not constitute a proper notice to cure; that defendant Ed Nasser's actions in terminating Lease No. 3 on September 15, 2000 and refusing to accept a late rental payment as well as his refusal to change his mind on two separate occasions shortly thereafter, constituted an improper anticipatory breach of Lease No. 3 subjecting defendants to damages because he did not first give a 30-day notice to cure. The Court finds that Christy Martin, wife of Derek

Martin personally presented a check to Ed Nasser for the late rental payment on September 15, 2000 and that Mr. Nasser improperly refused to accept the same and advised the lease was terminated. Exhibit 6, dated "September 30, 2000", the purported notice of default and demand to cure, did not give notice to plaintiff that defendants would accept a cure within the 30-day period, and instead constituted, as expressly stated therein, a "demand for return of the leased premises by no later that October 31, 2000" failing which "you will be held responsible for all damages incurred…."

7. The Court further finds, as demonstrated by Exhibit 7, that plaintiff consistently paid its rent late, and that notwithstanding paragraph 19 of the lease (no failure to enforce a term is a waiver in the future) such conduct on lessor's part would require a notice to lessee that rental payments must in the future be made on time [Lease No. 3, paragraph 14 as reformed; see also Cottonwood (132 Ariz. 228, 232)].
8. The Court further finds that plaintiff has made no claim for damages for the use of buildings C or D or of any matter dealing with the boutique which Derek Martin and his wife Christy planned to open but never did, also on defendants' property. Plaintiff is claiming damages solely for the breach of Lease No. 3 concerning the "Mare Motel" located at building B.
9. The parties agree and the Court finds that plaintiff constructed building C, known as the "fish fry" for defendants as well as performed other construction/ improvement projects on defendants' property. Plaintiff installed building B initially (the "Mare Motel" consisting of open covered canopy with steel poles stuck in the ground) and then when Mr. Merrill had enclosed building B and departed the property, expanded building B to its present size of over 1100 square feet (with refrigeration, water and electricity in part provided by Mr. Merrill). The Court now turns to the award of

damages for the improper anticipatory breach of lease no. 3 by defendants concerning building B.

10. The Court first notes that no damage has occurred to plaintiff by defendant Ed Nasser failing to disclose that defendant TFF/Tatum Farm Fresh, Inc., an Arizona corporation, actually owned the subject premises. The parties agreed at the inception of this hearing that the subject realty was owned by the corporation at the time of the execution of the three leases. A judgment is being entered against defendants Nasser as well as TFF, jointly and severally, as Ed Nasser at all times acted as an agent of the corporation and he (and his wife, as a member of an marital community) is liable to plaintiff as an agent of an undisclosed principal.
11. In view of the skill and experience of plaintiff's principals in construction and commercial leasing and because of Mr. Nasser's advice to them about problems with zoning, the Court finds that plaintiff knew or should have known that the property in question was not properly zoned for what was being constructed and that because thereof plaintiff's lease might be terminated by the County prior to plaintiff's lease termination date.
12. The Court finds plaintiff's damages to be $21,500.00. Plaintiff has proven by a preponderance of the evidence that the fair market value of the lease at the time of the improper termination thereof by the defendants was the sum of $2,000 a month (i.e. that defendants' landlord or the plaintiff-tenant under a sublease, would receive $2,000 a month from a willing tenant of that part of the premises of building B that plaintiff was not going to use); that the cost to plaintiff of building B under lease no. 3 was $1,000 a month, except for June-August 2002 when the rental payment was $1,500 a month. Consequently plaintiff's damages if it had been allowed to stay in the premises and permitted to sublease by the defendant was $1,000 for 20 months and $500 for three months or $21,500 during the period October 1, 2000 through August 2002; that plaintiff

under the circumstances should only be able to recover damages for the period October 1, 2000 (the testimony revealed plaintiff apparently stayed in the premises through September 2000) through August 2002. It was in August 2002 when all operations at the premises ceased and all tenants left because of County action that there was improper zoning to support the present buildings and activities at the site.

13. It is a proper measure of damages where the lessor breaches a commercial lease for the lessee to receive the additional costs of substituted premises [Rogers (163 Ariz. 462, 465); Coury Bros. Ranches (103 Ariz. 515, 523)]. A proper measure of damages is also the loss of anticipated business profits resulting from a landlord's breach if the parties contemplated the property would be used for such purposes [Rogers (163 Ariz. 462, 465); Thomas (163 Ariz. 159, 168)]. In the present case lease no. 3 provides at paragraph 6, that prior written consent of the lessor is required to sublease any portion of building B. Thus subleasing by plaintiff was anticipated and provided for. The lessor's permission, it is expressly stated, "shall not be unreasonably withheld", which states the law generally. This means that refusal, if there is one by the lessor, must be objectively sensible and of some significance. [Zoslow (147 Ariz. 612, 615); Magna Inv. (137 Ariz. 247, 249)(overruled solely an issue of attorney's fees in forcible entry and detainer cases DVM (137 Ariz. 466)]. An unreasonable withholding of consent subjects the lessor to damages [Campbell (148 Ariz. 432, 437-8); Magna, Inv., supra)]. In this case under all the circumstances to reimburse plaintiff the benefit of its bargain, it is a proper measure of damages to determine the fair market value of the lease to plaintiff on the date the landlord improperly terminated the lease and this includes the reasonable rent the tenant could obtain on a sublease of the premises. Here plaintiff had already posted a sign for

a subtenant when it realized it was not going to use the majority of the new space it had created in building B by enlarging building B. The landlord's improper termination deprived plaintiff of that rental income from a sublease and the Court cannot assume the landlord could have a reasonable basis for refusing a sublease. Because of the landlord's improper actions the Court assumes a proper sublease would have gone forward. The Court notes that a tenant was found for building B by the landlord and moved in the minute plaintiff was removed from the premises. The Court declines to assess against plaintiff the money problems suffered by the tenant Duran or the previous financial problems of the "barbecue man" Mr. Merrill. Moreover the Court finds that, as in Campbell and Magna Inv., the landlord's termination of lease No. 3 in this case was for purposes of getting increased income from building B, and not because of plaintiff's late payment of rent or for any other purpose defendant Ed Nasser set forth in Exhibit 6.

14. The Court rejects defendants' contention that plaintiff and its representatives had turned over building B (i.e. the original Mare Motel) to defendants prior to defendants' improper termination of building B.

15. The Court declines to award plaintiff any amounts for rents paid ($8,500) by plaintiff during the period of November 1, 1999-August 2000 as it is undisputed plaintiff had the use of all the premises contemplated by lease no. 3 during the overwhelming majority of time including displays and signs advertising plaintiff's business and the Court finds the actions of the "barbecue man" (as approved by the lessor) did not sufficiently detract from the use of the lease premises. But even if there was an improper diminution of use of the leased premises wrongfully approved by the lessor, plaintiff waived the same when it accepted Mr. Merrill's enclosure of building B and added amenities (water, electricity) and began to expand building B for its own

purposes. The Court declines to award plaintiff the additional amounts requested for materials invested in building B ($9,628.46-incurred during the period February 16, 2000-September 11, 2000), labor of Derek Martin and plaintiff's employees ($3,500), amount of extra slab ($1,140) and the original cost of the Mare Motel ($2,796) which became the expanded and enclosed building B. These items were necessary to be expended in order to complete building B and obtain a sublease, the value of which constitutes plaintiff's damages. To award such amounts would constitute in the Court's view, a double recovery. Moreover all parties understood that any addition and improvements to the premises (including the expansion of building B) would become the property of the lessor. Thus the landlord is not being unjustly enriched once the landlord is assessed damages for improper termination of lease no. 3 and its fair market value.

16. Finally plaintiff is entitled as the prevailing party, under paragraph 18 of lease no. 3, its attorney's fees and costs to be submitted by affidavit and statement of costs.