# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

# IN AND FOR NEW CASTLE COUNTY

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| **CHRISTIANA MALL, LLC** | ) | |
| | ) | CIVIL ACTION NUMBER |
| Plaintiff | ) | |
| | ) | 09C-09-047-JOH |
| v. | ) | |
| | ) | |
| **HARRY AND DAVID** | ) | |
| | ) | |
| Defendant | ) | |

*Submitted: October 20, 2010*
*Decided: January 31, 2011*

***MEMORANDUM OPINION***

*Upon Motion of Plaintiff Christiana Mall for Summary Judgment -* ***DENIED***

*Upon Motion of Defendant Harry and David for Summary Judgment -*
***GRANTED, In Part, and DENIED, In Part***

***Appearances:***

Jennifer L. Story, Esquire, of Archer & Greiner, P.C., Wilmington, Delaware, Attorney for Christiana Mall, LLC

Chandra J. Williams, Esquire, of Rhodunda & Williams, LLC, Wilmington, Delaware, Attorney for Harry and David

HERLIHY, Judge

Christiana Mall, LLC has sued one of its tenants, Harry and David, Inc., for underpayment of rent. In turn, Harry and David has sued the Mall for overpayment of rent. Each claims the other owes it over $190,000. The whole dispute centers on two matters: Lord and Taylor's exit from Christiana Mall and a provision in these parties' lease which is implicated upon such a happening. In addition to seeking repayment of the claimed overpayment, Harry and David seeks punitive damages.

Each party has moved for summary judgment. The Court finds the lease is unambiguous and that Harry and David's abated rent obligation began when Lord and Taylor vacated the Mall in 2006 and continues until a replacement is found in accordance with the lease provisions. The Court views the dispute as a straightforward contract matter where punitive damages are inappropriate.

***Facts***

Defendant Harry and David is a nationwide corporation selling high-end gourmet food, snacks, fruit, chocolate, and bakery treats through its retail stores.[1] Plaintiff Christiana Mall, LLC ("Christiana") owns the Christiana Mall ("the Mall"), an indoor shopping center with four major department stores and a large variety of small to mid-size retailers.[2] In September 2002, Christiana's corporate predecessor, New Castle Associates, entered into a 120 month commercial lease with Harry and David, an Oregon Corporation,

[1] Harry and David Opening Br. at 2.

[2] *Id.* at 2.

for store premises number 404 (the "leased premises") in the Mall.[3] The lease is scheduled to expire on September 24, 2012.[4] The general lease terms required monthly payment of "Minimum Rent,"[5] and also a "Percentage Rent," which was set at five percent of the store's gross sales, which were submitted by Harry and David to Christiana in both monthly and yearly reports.[6] Harry and David was also responsible for various maintenance and tax charges.[7] Throughout the lease, Christiana never sent out monthly invoices, but instead sent bi-annual reports and periodic reconciliations that reflected standard monthly rent charges Harry and David paid.[8]

As a long-term lease, the contract provided for a variety of situations that could occur within the Mall and how those situations would effect the amount of rent due to Christiana. Harry and David expected to draw a large number of customers from one of the four large department stores in the mall, specifically Lord & Taylor. Lord & Taylor is a chain of high end department stores selling designer clothes, accessories, and home furnishings. The pertinent portion of the lease at issue reads as follows:

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[3] Christiana Mall's Motion, ¶ 1.

[4] Harry and David Opening Br. at 2.

[5] App. To Harry and David's Opening Br. in Supp. of Summ. J., Ex. A-8 (Lease §4.03), A-2 (Fundamental Lease Provisions).

[6] App. to Harry and David's Opening Br. in Supp. of Summ. J., Ex. A-9 (Lease §§4.04(b), 4.06(a), 4.06(b)); A-65-80 (Reconciliation Reports).

[7] Harry and David's Opening Br. in Supp. of Summ. J. at 3.

[8] App. To Harry and David's Opening Br. in Supp. of Summ. J., Ex. A-156.

Section 23.25: CO-TENANCY

> If at any time the Major space currently occupied by Lord & Taylor, or its Replacement, ceases operating or less than seventy-five percent (75%) of tenants which are not Majors are open and operating ("Occupancy Level Condition"), Tenant's Minimum Rent and Additional Rent shall abate and Tenant shall pay monthly, within twenty (20) days after the end of each month, five (5%) percent of its monthly Gross Sales in lieu of Minimum Rent and Additional Rent, but not in excess thereof. If said Occupancy Level Condition remains in effect for more than twelve (12) consecutive months, Tenant may elect to terminate this Lease upon not less than sixty (60) days prior written notice to Landlord. In the event the Occupancy Level Condition ceases to exist or Tenant elects not to terminate the Lease, Tenant shall resume the payment of regular Rent in accordance with the terms of this lease, until it occurs again. For the purposes of this Section only, "Replacement" shall mean a tenant of comparable size, trade name and merchandise mix.[9]

On June 26, 2006 Lord & Taylor closed its Mall location as part of a highly publicized sale of the chain. Although Harry and David's sales at the Mall store "dropped at twice the rate of all other Harry and David stores," it continued to pay Minimum Rent and Additional Rent as usual until July 2008, when a corporate representative noted the absence of Lord & Taylor during a visit to the store.[10] The Lord & Taylor space remained vacant until the recent replacement with a Target store.[11]

When Christiana originally sued Harry and David, it sought payment for non-payment or under payment of rent in an amount over $39,000. But when it filed its motion

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[9] App. To Harry and David's Opening Br. in Supp. of Summ. J., Ex. A-35.

[10] Christiana' Resp. at 12; Harry and David's Reply Br. in Supp. of Summ. J. at 5.

[11] The Parties agree that Target is not a suitable "replacement" under the terms of the lease.

in August 2010, it claimed $199,768.10. This is the difference between what Christiana claims Harry and David's rent obligation under its interpretation of the lease and what Harry and David has been paying under its own lease interpretation. In August 2010, Harry and David in its own motion for summary judgment, claims Christiana owes it $198,228.54 for over payment of rent for the period after Lord & Taylor left but when it continued to pay the higher, non-abated rent, until it starting paying the abated amount.

***Parties' Contentions***

Harry and David argues that §23.25 of the lease is properly interpreted to mean that Christiana was required to notify Harry and David's corporate headquarters in Oregon when Lord & Taylor vacated the Mall, and that its failure to do so constituted a breach of the lease. It also claims that §23.25 provides for the rent abatement to continue until Christiana finds a suitable replacement for Lord & Taylor, or until Harry and David elects to terminate the lease.[12] It claims a current rent credit entitlement of $198,000. Harry and David additionally accuses Christiana of "knowingly and purposefully ignor[ing]" the rent abatement clause, abusing its superior position, and violating the covenant of good faith and fair dealing to such an extent as to allow punitive damages.[13] Harry and David also argues that if the Court interprets §23.25 in favor of Christiana, issues of material fact

[12] Harry and David's Opening Br. in Supp. of Summ. J. at 14-16, Reply Br. at 2.

[13] Harry and David's Opening Br. in Supp. of Summ. J. at 21-22, Reply Br. at 4.

preclude summary judgment. Specifically, it cites Christiana's failure to notify Harry and David's corporate headquarters of Lord & Taylor's departure.[14]

Christiana brought the initial complaint in the underlying litigation. It claims that the lack of notification to Harry and David is at most a billing error that has been credited to Harry and David through twelve months rent reduction, and that Harry and David is now overdue in rent as it improperly continues to pay the abated rate.[15] It argues that §23.25 is properly interpreted to mean that if Lord & Taylor vacated, Harry and David was entitled to an abated rent for only a twelve month period. After twelve months, it could elect to terminate the Lease without penalty, or elect to stay and resume payment of the regular Minimum Rent and Additional Rent.[16] Christiana argues that the §23.25 was likely drafted by Harry and David during its negotiations with its predecessor, New Castle Associates, and therefore should be construed against it. Christiana also contends that there is no language in §23.25 requiring Christiana to notify Harry and David of Lord & Taylor's departure. Christiana claims it is owed a total of $228,125.02 plus interest, late charges, attorney fees, or, alternatively, possession of the premises.[17]

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[14] Harry and David's Resp. at ¶ 9.

[15] Christiana's M. for Summ. J. at 3.

[16] Christiana's M. for Summ. J. at 4.

[17] Chrisitana's Resp. at 14.

### *Applicable Standard*

Summary judgment may only be granted where no genuine issues of material fact remain, and the moving party is entitled to judgment as a matter of law.[18] The party moving for summary judgment has the burden of showing that no genuine issue of material fact remains, and he or she is entitled to judgment as a matter of law.[19] The Court must view the evidence in the light most favorable to the non-moving party.[20] The existence of cross motions for summary judgment does not *per se* establish that there is an absence of factual issues. A party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party.[21] When cross-motions for summary judgment are filed, as here, neither party's motion will be granted if there are any issues of material fact.[22] When considering a motion for summary judgment, the court must examine the present record, all pleadings, affidavits, and discovery.[23] When the issue

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[18] *Windom v. Ungerer*, 903 A.2d 276, 280 (Del. 2006).

[19] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[20] *Brzoska*, 668 A.2d at 1364.

[21] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

[22] *Emmons v. Hartford Underwriters Ins. Co.*, 697 A.2d 742, 745 (Del. 1997).

[23] *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322 (Del. Super. 1973).
(continued…)

before the Court involves the interpretation of a contract, summary judgment is appropriate only if the contract in question is unambiguous.[24]

***Discussion***

Commercial leases are constructed using general contract principles.[25] Under Delaware law, the interpretation of contract language is treated as a question of law.[26] The Court must determine the terms of the contract, and the meaning of those terms agreed upon by parties.[27] Guided by the parties' intentions, the Court should construe a lease to make it fair, customary, "and such that prudent (persons) naturally would execute." [28] Where the meaning of the terms in the lease are clear, such terms are construed according to their ordinary meaning. However, in case of ambiguity, the general rule is to construe the lease against the lessor.[29]

A contract is not rendered ambiguous merely because the parties disagree on the

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[23](…continued)

[24] *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

[25] *Stayton v. Cumberland Eng'g Co., Inc.*, 2008 WL 2582665 at *3 (Del. Super. 2008).

[26] *Emmons*, 697 A.2d at 745.

[27] *O'Brien v. Progressive Northern Ins. Co.*, 785 A.2d 281, 286 (Del. Super. 2001).

[28] *Townley v. Dayon*, 1996 WL 769345 at *3 (Del. Super. 1996).

[29] *Id.* at *3.

proper construction.[30] A contract is only considered ambiguous when the provisions in controversy are reasonably susceptible to different meanings or interpretations.[31] Where no ambiguity exists, the Court must look within the four corners of the contract[32] and interpret its terms according to the ordinary and usual meaning of the words.[33]

The issue presented by the parties' motions revolves around §23.25 of the lease. In full, it reads:

> If at any time the Major space currently occupied by Lord & Taylor, or its Replacement, ceases operating or less than seventy-five percent (75%) of the tenants which are not Majors are open and operating ("Occupancy Level Condition"), Tenants Minimum Rent and Additional Rent shall abate and Tenant shall pay monthly, within twenty (20) days after the end of each month, five (5%) percent of its monthly Gross Sales in lieu of Minimum Rent and Additional Rent, but not in excess thereof, if said Occupancy Level Condition remains in effect for more than twelve (12) consecutive months, Tenant may elect to terminate this Lease upon not less than sixty (60) days prior written notice to Landlord. In the event the Occupancy Level Condition ceases to exist or Tenant elects not to terminate the Lease, Tenant shall resume the payment of regular Rent in accordance with the terms of this Lease, until it occurs again. For the purposes of this Section only, "Replacement" shall mean a tenant of comparable size, trade name and merchandise mix.[34]

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[30] *E. I. DuPont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997).

[31] *O'Brien*, 785 A.2d 288-89.

[32] *Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 547 (Del. Super. 2005).

[33] *Twin City. Fire Ins. Co. v. Delaware Racing Ass'n.,* 840 A.2d 624, 628 (Del. 2003).

[34] Section 23.25.

Both parties have argued that this provision is not ambiguous. Harry and David, however, argues that if the Court finds it to be ambiguous, there are genuine issues of material fact rendering summary judgment inappropriate. Christiana has argued that if it is found ambiguous, the lease should be interpreted against Harry and David since it is likely Harry and David drafted it. Christiana refers to the doctrine *contra proferentuem*.[35] It says Harry and David must have drafted this section even though it has offered no record of any kind to support that statement.

The Court finds the lease to be unambiguous and, therefore, it need not get to the problem of factual issues or contractual interpretation principles when dealing with ambiguous language.

There are but a few operative words in §23.25 which control this unique situation. The situation was triggered by Lord & Taylor's departure and *not* by a reduction in the number of tenants. Most of §23.25 addresses the occupancy level situation, which is not the cause or a cause of this dispute. Once that is understood, the applicable portions of the lease provision are straightforward:

> If at any time the Major space currently occupied by Lord & Taylor, or its Replacement, ceases operating Tenant's Minimum Rent and Additional Rent shall abate and Tenant shall pay monthly, within twenty (20) days after the end of each month, five (5%) percent of its monthly Gross Sales in lieu of Minimum Rent and Additional Rent, but not in excess thereof... For the purposes of this Section only, "Replacement" shall mean a tenant of comparable size, trade name and merchandise mix.

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[35] Christiana's Reply Brief to Harry and David's Summary Judgment Motion, p. 5.

The lease, while unambiguous, is still not the paradigm of clarity or careful draftsmanship. For instance, between the provision regarding Lord & Taylor and the 75% tenant level provision is the word "or." A few words later is the phrase "Occupancy Level Condition" which does not seem to address Lord & Taylor but the number of Mall tenants. The "or" between the Lord & Taylor condition and the occupancy level provision of the below 75% raises a question as to whether the phrase "Occupancy LEVEL Condition" (emphasis added) modifies just the 75% provision or the Lord & Taylor condition, or both. In the final analysis it is of no moment to the Court's decision.

One flaw in the limited lease language quoted above is that there is no equivalent provision to the 75% occupancy provision, if Lord & Taylor is replaced by a tenant which meets the requirements of "Replacement" as defined in the lease. In short, unlike the occupancy provision which provides for resumption of full rent - assuming Harry and David was not terminated, there is no such reverse trigger when a "Replacement" takes Lord & Taylor's space.

Nevertheless, the complete reading of §23.25 does not help Christiana:

> If at any time the Major space currently occupied by Lord & Taylor, or its Replacement, ceases operating… ("Occupancy Level Condition"), Tenant's Minimum Rent and Additional Rent shall abate and Tenant shall pay monthly, within twenty (20) days after the end of each month, five (5%) percent of its monthly Gross Sales in lieu of Minimum Rent and Additional Rent, but not in excess thereof. If said Occupancy Level Condition remains in effect for more than twelve (12) consecutive months, Tenant may elect to terminate this Lease upon not less than sixty (60) days prior written notice to Landlord. In the event the Occupancy Level Condition ceases to exist or

> Tenant elects not to terminate the Lease, Tenant shall resume the payment of regular Rent in accordance with the terms of this Lease, until it occurs again. For the purposes of this Section only, "Replacement" shall mean a tenant of comparable size, trade name and merchandise mix.

This provision means that: (1) if Lord & Taylor vacates, which it did, (2) Harry and David's rent is abated until the "Replacement" provision is satisfied and (3) *after* twelve consecutive months of Lord & Taylor's space being vacant Harry and David has the option, with sixty days notice, to terminate its lease. It has no option to do so prior to those twelve months, but by the same token, after those twelve months it can, if *it* elects, terminate its lease. It is not mandated to do so as Christiana contends.

Harry and David's entitlement to pay abated rent was triggered on June 26, 2006 when Lord & Taylor vacated its store in the Mall. Section 23.25 is unclear if that meant the rent was abated for the last few weeks in June or starting with the rent due for July, 2006. Either Christiana should have notified Harry and David's corporate office in Oregon of Lord & Taylor's departure, or as §23.25 states, the abatement started on its own or June 26th. Absent notice, the lease provision took effect of its own accord.

In short, Christiana owes a refund to Harry and David for the higher, non-abated rent payments it made up until the rent was abated in 2008. In addition, Harry and David's entitlement to pay that abated amount did not terminate in 2007 twelve months after Lord & Taylor vacated the Mall. It continues. On these issues, therefore, that portion of Harry and David's motion is GRANTED, and that portion of Christiana Mall's motion is DENIED.

There are, however, several lingering issues which cannot be resolved on summary judgment and one related to the point at which Harry and David's rental obligation returns to the "normal" amount. The lease provision specifies that only abated rent is due until a "Replacement," meaning a tenant comparable size, trade name and merchandise mix occupies and is open for business at the former Lord & Taylor location. At some point, Target moved into that location. The date it opened is not a matter of record in this litigation. Even more so, whether Target meets the definition of "Replacement" is a factual issue not resolvable on summary judgment although the parties seemed to indicate at oral argument that it did not meet the "Replacement" definition. In addition, "Replacement" is defined as "shall mean" and not "including" which would be a broader definition.

That is one issue which cannot now be resolved. The amount of refund Christiana owes Harry and David for the 2006-2008 overpayment is a sum certain. But beyond that and tied to the above noted issues concerning "Replacement" there may be other damages due, etc. Obviously, these are issues not resolved on summary judgment.

***Punitive Damages***

Harry and David claims it is entitled to punitive damages from Christiana. It seeks those damages because Christiana's alleged "malicious and/or fraudulent actions or

omissions."[36] This assertion is based on two things: one is Christiana's failure to self-adjust the rent to the abated amount as of June 26, 2006 and continuing to collect the higher rent. The second prong is Christiana's failure to notify Harry and David of Lord & Taylor's closing.

As a general rule, a party may not recover punitive damages in a breach of contract action.[37] Punitive damages are only recoverable in two scenarios. First, when the offending conduct leading to the breach of contract action independently amounts to a tort.[38] Second, when the conduct demonstrate ill-will, hatred, or intent to cause injury supporting a finding of malicious or willful conduct.[39] A mere claim of malice due to a breach of contract without a factual basis demonstrating separate tortious or malicious conduct is insufficient to recover punitive damages.[40] Harry and David has asserted no factual basis upon which to base a claim for punitive damages in this case. No evidence in the record suggests that Christiana intentionally disguised the fact of Lord & Taylor's departure from Harry and David. These facts do not demonstrate any sort of separate tort

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[36] Harry and David Counterclaim, paragraph F.

[37] *E. I. DuPont de Nemours & Co. v. Pressman*, 679 A.2d 436, 446 (Del. 1996); *Casson v. Nationwide Ins. Co.*, 455 A.2d 361, 368 (Del. Super. 1982).

[38] *Pressman* at 445.

[39] *Casson* at 368.

[40] *Id.*

or malicious or willful conduct independent from the breach of contract action, and Harry and David's motion for an award of punitive damages is **DENIED**. Christiana Mall's motion for summary judgment on the issue of punitive damages is **GRANTED**.

***Conclusion***

For the reasons stated herein, defendant Harry and David's Motion for Summary Judgment is **GRANTED**, in part, and **DENIED**, in part, and Christiana Mall's Motion for Summary Judgment is **DENIED**. Harry and David shall prepare an Order (Christiana Mall to consent to form only) in conformity with this Court's opinion.

**IT IS SO ORDERED**.

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J.