COURT OF CHANCERY
OF THE
STATE OF DELAWARE

JOHN W. NOBLE
VICE CHANCELLOR

417 SOUTH STATE STREET
DOVER, DELAWARE 19901
TELEPHONE: (302) 739-4397
FACSIMILE: (302) 739-6179

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Stephen W. Spence, Esquire
Phillips, Goldman & Spence, P.A.
1509 Coastal Highway
Dewey Beach, DE 19971

Scott G. Wilcox, Esquire
Bayard, P.A.
222 Delaware Avenue, Suite 900
P.O. Box 25130
Wilmington, DE 19899-5130

Re: D GYMS, L.L.C. v. Robino-Bay Court Plaza, LLC
C.A. No. 3649-VCN
Date Submitted: October 30, 2008

Dear Counsel:

A shopping center landlord and a tenant dispute the signage to which the tenant is entitled by force of their lease agreement. The landlord relocated the pylon holding the tenant's sign and proposed to reduce the size of its sign. The tenant does not object to the relocation, but it challenges the right of the landlord to allow it less signage area. Indeed, the tenant now seeks an order of specific performance that would require the landlord to install a sign equal in size to the tenant's initial sign.

In this post-trial letter opinion, the Court sets forth its findings of fact and conclusions of law and determines that the lease agreement assures the tenant of the right to a sign of the size that it now seeks and that specific performance of that right is appropriate.

I. BACKGROUND

Plaintiff D GYMS, L.L.C. ("D GYMS"), a Delaware limited liability company, owns the Gold's Gym franchise in the Bay Court Plaza Shopping Center (the "Plaza" or the "Shopping Center") in Dover, Delaware. Defendant Robino-Bay Court Plaza, LLC ("RBC") owns the Plaza. On December 13, 2002, D GYMS entered into a fifteen-year lease (the "Lease Agreement")[1] with RBC for space 18 at the Plaza.

The parties included in the Lease Agreement a provision allowing D GYMS to advertise its business by installing signage atop the Plaza's shopping center pylon sign (the "Southern pylon"). That provision, Article 12.2 of the Lease Agreement, provides in relevant part:

> Tenant is hereby granted the right to install permanent signage at Tenant's sole expense *on the southern pylon sign at the top of the pylon in the highest available spot for signage which shall not be less than 80 square feet as shown on Exhibit C-3 attached hereto. Landlord shall not*

[1] The Lease Agreement, which appears as JX A, refers to the Plaintiff as D GYM, LLC.

> *redesign or reconfigure such pylon during the term in any manner without Tenant's prior written consent.* During the term of the Lease, the placement of the Tenant's sign shall always be the first sign at the top of the pylon as is shown on the Exhibit attached hereto as Exhibit C-3. Landlord shall use reasonable efforts to enable Tenant to install signage on all pylon signs on the Property.[2]

Exhibit C-3, attached to the Lease Agreement and expressly referenced in Article 12.2, is a graphic representation, created by Talley Anchor Sign Company, of the proposed D GYMS' signage for the southern pylon. The representation illustrates the two sides of the Southern pylon. D GYMS' signage is shown atop each side of the pylon, above the signage of the other Plaza tenants. Each side of D GYMS' sign, on both sides of the pylon, is 80 square feet.[3]

In November of 2006, as RBC sought refinancing for the Shopping Center, D GYMS and RBC negotiated additional signage on a second pylon on the Shopping Center property, the Northern pylon. In addition to meeting its obligation to use "reasonable efforts" to secure D GYMS signage on any second pylon—as required by Article 12.2 of the Lease Agreement—providing D GYMS space on the Northern

[2] Lease Agmt., Art. 12.2 (emphasis added).
[3] Tr. at 41 (stipulating that original sign was 4′ x 20′ on each side).

pylon helped RBC secure D GYMS' execution of an Estoppel Certificate,[4] required as part of RBC's refinancing effort. As a result of the negotiation, D GYMS obtained prominent placement of its sign on the Northern pylon by using the execution of the Estoppel Certificate as leverage.[5]

The following year, on November 27, 2007, RBC removed the Southern pylon on which D GYMS' original sign, as depicted in the Lease Agreement, was displayed. A newly opened restaurant partially obstructed the Southern pylon, and RBC decided the pylon should be relocated. RBC sought and received a zoning variance from the City of Dover to move the Southern pylon to an unobstructed area of the property. D GYMS was not notified in advance of the removal and relocation.[6]

D GYMS quickly became aware of the project when the sign was removed. Immediately following the removal of the Southern pylon, D GYMS informed RBC

[4] In 2006, RBC's refinancing efforts required Plaza tenants execute a Subordination Non-Disturbance and Attornment Agreement along with a Tenant Estoppel Certificate. *Id.* at 84.

[5] No view is expressed as to the propriety of conditioning execution of the Estoppel Certificate on additional signage.

[6] RBC argues that all tenants were notified of the variance application and its plans. Def.'s Pre-trial Answering Br. at 2. This fact was not proven through trial testimony; in addition, RBC submitted no documentation in support of this contention. However, a D GYMS representative testified that it received no notice. Tr. at 7-8. The Court finds that RBC did not provide notice of the proposed relocation of the Southern pylon or of its plans to alter the signage layout.

that the removal without prior written notice constituted a breach of Article 12.2 of the Lease Agreement. D GYMS requested that RBC cure the breach by reinstalling its sign. Several months and several letters later,[7] RBC agreed to place a D GYMS' sign atop the Southern pylon in its new location. It has not done so.

D GYMS does not quarrel with the Southern pylon's new location. However, when the Southern pylon was relocated it was also redesigned. RBC claims the redesign was necessary in order to accommodate all of the Plaza's tenants' signage. As a result of the redesign, area allocated to D GYMS' sign was reduced. Instead of the original two-sided 80 square foot sign depicted in the Lease Agreement the new space can only accommodate 60 square feet per side.[8]

RBC justifies the size reduction in two ways. First, RBC contends that D GYMS is entitled to only 80 square feet of signage in total on the Southern pylon. This smaller sign would satisfy the Lease Agreement because it provides a total of 120 square feet of sign exposure: 60 square feet on each side. Second, invoking a "share and share alike" philosophy, RBC argues that the negotiated accommodation of D GYMS on the Northern pylon came at the expense of the other tenants, and

[7] *See* JX D.
[8] Tr. at 109.

D GYMS should reciprocate by reducing its signage size on the Southern pylon. D GYMS disagrees on both scores.

D GYMS argues that the Lease Agreement provided for an 80 square foot sign on the Southern pylon facing two directions, as represented by Exhibit C-3. In addition, the relocation and redesign of the Southern pylon without D GYMS' written approval constitutes an additional breach of the lease. D GYMS seeks specific enforcement of the lease provisions governing its right to signage on the Southern pylon.[9] RBC opposes an order of specific performance, arguing that D GYMS' reading of the lease is incorrect, and only a total of 80 square feet of signage, combining both faces of the Southern pylon, are required. Alternatively, RBC argues that requiring it to reconfigure the current version of the Southern pylon to expand D GYMS' signage area would work an undue hardship sufficient to justify denial of a specific performance remedy. With RBC's acknowledgement that some signage is required, and its willingness to erect a sign of 60 square feet on each side, the Court will address this dispute as between the smaller and larger signs.

[9] Compl. ¶ 13. The Complaint also included a breach of contract claim concerning water damage allegedly the result of RBC's failure to repair a roof leak in a timely manner. That claim was settled before trial. RBC seeks to recover its attorneys' fees incurred in defending that portion of the suit. *See infra* Part II.C.

D GYMS also seeks an award of reasonable attorneys' fees and expenses, incurred in bringing this action. In making this request, it points to Article 19.9 of the Lease Agreement and its provision for the award of fees in the event either party is forced to file litigation as a result of a default of any lease covenant. RBC partially opposes the award of fees. Although RBC concedes that the cost of this action respecting the Southern pylon would be subject to reimbursement if D GYMS is successful, it argues that any fees associated with D GYMS' second, and now settled, claim concerning a roof leak are not subject to reimbursement, pursuant to Article 15.1 of the Lease Agreement. To the contrary, RBC contends that it is entitled to reimbursement of its own attorneys' fees incurred in defense of that claim.

II. ANALYSIS

A. *Interpretation of the Lease Agreement*

The necessary initial inquiry is a question of contract interpretation because the parties disagree as to the very meaning of Article 12.2 of the Lease Agreement and its obligations concerning the size of D GYMS' signage rights on the Southern pylon. Both parties agree that Article 12.2 governs their respective rights in this controversy.

The starting point of contract construction is a determination whether a provision is ambiguous, i.e. reasonably subject to more than one interpretation.[10] Toward that end, contract language "is not rendered ambiguous simply because the parties in litigation differ concerning its meaning."[11] Nor is it rendered ambiguous because the parties "do not agree upon its proper construction."[12] A contract is ambiguous "only when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[13] Delaware adheres to the "objective" theory of contracts, meaning a contract's construction should be that which would be understood by an objective reasonable third party.[14] Thus, "[c]ontract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language."[15]

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[10] *Cantera v. Marriott Senior Living Servs., Inc.*, 1999 WL 118823, at *4 (Del. Ch. Feb. 18, 1999).
[11] *City Investing Co. Liquidating Trust v. Cont'l Cas. Co.,* 624 A.2d 1191, 1198 (Del. 1993); *accord Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.,* 616 A.2d 1192, 1196 (Del. 1992).
[12] *Rhone-Poulenc.,* 616 A.2d at 1196.
[13] *Id.*
[14] *Cantera*, 1999 WL 118823, at *4.
[15] *Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997).

The six-word phrase "not less than 80 square feet" found in Article 12.2 of the Lease Agreement, when read in strict isolation, may support RBC's position that D GYMS is owed no more than 80 square feet of total signage. However, that phrase cannot be read in strict isolation. It must be viewed in light of its entire sentence, within the entire Article 12.2, in light of the entire lease. In other words, the Lease Agreement must be construed as a whole,[16] and any construction which would render a provision of the Lease Agreement meaningless should be avoided.[17]

After reading Article 12.2 as a whole, including the express reference to Exhibit C-3, a reasonable third party could arrive at no conclusion other than that the parties intended Exhibit C-3 to represent, visually and precisely, the signage area to which they had agreed. There can be no disagreement that Exhibit C-3 depicts a two-sided sign, with 80 square feet of signage area on each side. Article 12.2, and the

[16] *NW Nat'l Ins. Co. v. Esmark, Inc.*, 672 A.2d 41, 43 (Del. 1996). "[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan." *E. I. du Pont de Nemours and Co., Inc., v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

[17] *Seabreak Homeowners Ass'n, Inc. v. Gresser*, 517 A.2d 263, 269 (Del. Ch. 1986), *aff'd*, 538 A.2d 1113 (Del. 1988) (TABLE); *Hudson v. D&V Mason Contractors, Inc.*, 252 A.2d 166, 169 (Del. Super. 1969) (citing 3 CORBIN ON CONTRACTS § 549 (1960)) ("Use of the phrase 'as herein provided' calls special attention to the cardinal rule that one paragraph in a contract, cannot be read in isolation, but must be read within the context of the entire instrument.").

Lease Agreement generally with respect to signage, cannot be found ambiguous,[18] and the Court finds that its plain and obvious meaning requires RBC to provide D GYMS a two-sided sign, with 80 square feet of signage on each side, atop the Southern pylon. There can be no doubt that this result reflects the parties' intention.[19] In sum, the redesign of the Southern pylon to accommodate signage of less than 80 square feet on each side was a material breach of the Lease Agreement.[20]

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[18] Even without Exhibit C-3, but assuming the language in Article 12.2 to be ambiguous, the result would likely be the same. The sign constructed following execution of the Lease Agreement would constitute the strongest available extrinsic evidence on the meaning of Article 12.2. *See Board of Educ. of Appoquinimink School Dist. v. Appoquinimink Educ. Ass'n*, 1999 WL 826492, at *8 (Del. Ch. Oct. 6, 1999) (citing REST. (SECOND) OF CONTRACTS § 202 cmt. g (1981) ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning.")). That sign, as erected, had 80 square feet of D GYMS' signage on each side. Tr. at 41.

[19] Exhibit C-3 is an integral part of the Lease Agreement. Article 1.3 of the Lease Agreement clearly provides that "[t]his Lease includes and incorporates the Exhibits listed in the Table of Contents." Lease Agmt., Art. 1.3. Exhibit C-3 is included in the table of contents. This provision must also be given effect and any interpretation of the Lease Agreement must therefore include the attached exhibits. Again, the alternative analysis likely arrives at the same result. Even if Exhibit C-3 could not be found a part of the Lease Agreement, but rather a separate document executed at the same time, the doctrine of incorporation by reference would likely demand that any interpretation of the Lease Agreement include Exhibit C-3. *Brastor Mercantile, Ltd. v. Central Citrus S/A*, 1989 WL 70971, at *4 (Del. Super. June 6, 1989) ("Where a contract is executed which refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties.").

[20] In light of this conclusion, it is not necessary to determine whether any failure to give notice required by the Lease Agreement constituted an additional breach.

B. *The Remedy of Specific Performance and Undue Hardship*

RBC next contends that, even if contractually obligated to provide 80 square feet of signage on each side of the Southern pylon, it would be inequitable to order the remedy of specific enforcement of the contractual provision because that remedy would work an undue hardship. RBC argues that reconfiguring the Southern pylon to accommodate additional signage space for D GYMS would cost between $5,000 and $6,000.[21] RBC argues that this expense presents an undue hardship justifying the denial of a specific performance remedy. A "reasonable" remedy, according to RBC, would simply be to deny D GYMS any remedy.[22] RBC argues that the currently allocated signage space would provide D GYMS (and its customers) adequate "notice and visibility," thereby accomplishing the core purpose of the sign.[23] RBC's opposition to a specific performance remedy fails for several reasons.

[21] Tr. at 78. RBC argued in closing that third party signage on the now reconfigured Southern pylon would be adversely affected by a specific performance remedy. *Id.* at 142. Impact on third parties is a factor to be considered when evaluating the efficacy of equitable remedies. However, RBC presented no evidence as to the hardship third parties would suffer as a result of a specific performance remedy.
[22] *Id.* at 131-32.
[23] *Id.* at 138.

First, D GYMS has made a sufficient showing of the lack of adequate remedy at law to support the remedy of specific performance. Moreover, RBC has made no attempt to show that damages would be either adequate or quantifiable.[24] Quantifying how much business would be lost from a size reduction of the signage atop the Southern pylon is inherently difficult, and likely impossible.[25] The Court is satisfied that there is no adequate remedy at law for D GYMS' injury.

Second, RBC's suggestion of what amount of signage is "reasonable" has no place in the Court's analysis. The proposed D GYMS sign atop the Southern pylon constitutes a material breach of the Lease Agreement, and would deprive D GYMS of the benefits it bargained for. Such violation demands a remedy. To find otherwise would allow RBC unilaterally to deny D GYMS its rights under their agreement. It would be odd indeed to allow a party in breach to measure what level of performance constitutes "reasonable" compliance and thereby deny the opposing party any relief.

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[24] "Equity will interpose its injunctive process against violations of contract where such violations cause irreparable injury to the complaining party, or where it is difficult or impossible to measure the damages that would be caused by the breach but will not attempt to interfere where no such injury is shown." *Barcroft Co. v. Bd. of Pub. Works of Town of Lewes*, 1980 WL 81867, at * 3 (Del. Ch. Mar. 11, 1980).

[25] D GYMS has shown that material commercial harm would result from a reduction in the size of its sign. Tr. at 33-34, 57, 61-63. This evidence was not rebutted.

Finally, RBC has failed to show a sufficient hardship to justify a denial of a specific performance remedy. While RBC is correct that the equitable remedy ordering specific performance of a contract will generally not be granted where it will visit an undue hardship on the opposing party, the remedy will not be denied when the hardship is the result of the "defendant's own acts or is clearly foreseeable."[26] Here, RBC's hardship is entirely of its own making. It is clear that RBC made an affirmative decision to reduce the area allocated to D GYMS' signage atop the Southern pylon. It did so unilaterally. The hardship RBC now complains of is the cost of reallocating advertising area on the pylon to accommodate an appropriate D GYMS sign. The cost of reconfiguring the present sign to accommodate the required larger sign and the cost of a new, properly-sized replacement sign, along with the cost of installation,[27] are all the result of RBC's actions, were clearly foreseeable, and are fairly attributable to RBC. RBC made an affirmative decision to reduce the area allocated to the D GYMS' sign when the Southern pylon was relocated. Had RBC provided the agreed upon area (or simply relocated the original Southern pylon sign rather than opting to redesign it) then these costs (not to mention

[26] *Craft Builders, Inc. v. Ellis D. Taylor, Inc.*, 254 A.2d 233, 234 (Del. 1969).
[27] Tr. at 78.

this action) would have been avoided. In summary, the entire hardship of which RBC complains is of its own making and was foreseeable. RBC therefore cannot rely upon those hardships as justification for the denial of a specific performance remedy.

Moreover, the $5,000 or $6,000 expense RBC faces as a result of an order of specific performance, when compared with the value of the remedy to D GYMS is insufficient to demonstrate an undue hardship. The showing required for the equitable defense of undue hardship is more than minor expense. The party must show that an order of specific performance would be "oppressive or unconscionable,"[28] or "result in great injustice"[29] before the remedy will be denied. It cannot be said that the expense RBC presents meets that standard, especially in light of the fact that no D GYMS sign presently appears on the Southern Pylon.

In sum, well-established principles counsel in favor of D GYMS and an order of specific performance.[30] However, the application of such principles can sometimes obscure the straight-forward, common sense, approach that here leads to

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[28] 25 WILLISTON ON CONTRACTS § 67:19 (4th ed. 2008) (citing *Matter of ENSTAR Corp.*, 604 A.2d 404 (Del. 1992)).
[29] *Id.*
[30] Entitlement to specific performance has been demonstrated by clear and convincing evidence. *See, e.g.*, *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14, 52 (Del. Ch. 2001).

the same result. RBC contractually promised to provide a sign of a certain size for the duration of the lease. RBC initially honored that promise. However, RBC unilaterally tore down the promised sign and has yet to replace it. Thus, RBC broke its promise. Justice requires RBC to honor its promise. RBC's complaint that it is too expensive to honor that promise now that it has been broken cannot compel a different result.

C. *Attorneys' Fees*

D GYMS also seeks an award of reasonable attorneys' fees and expenses, incurred in bringing this action. Article 19.9 of the Lease Agreement provides that if a party:

> shall incur fees and expenses in connection with the enforcement of any provision of this Lease, including court costs and reasonable attorneys' fees, then such fees and expenses shall, if said non-defaulting party shall prevail in litigation, be immediately reimbursed by the defaulting party on demand.[31]

RBC does not contest the applicability of this provision to the present action and concedes that litigation expenses incurred in enforcing the provisions of the Lease

[31] Lease Agmt., Art. 19.9.

Agreement regarding the Southern pylon should be reimbursed.[32] Contractual fee shifting provisions are allowable, and none of the policy concerns that caution against their enforcement attend this dispute.[33] D GYMS' action regarding the Southern pylon is successful, and RBC must pay these expenses in accordance with Article 19.9.

However, those expenses must be segregated from any incurred in the presentation of a second, now settled, claim by D GYMS against RBC alleging damages from a roof leak at the Plaza. Article 19.9 of the Lease Agreement requires that, before D GYMS is allowed reimbursement of litigation related expenses, RBC default in the performance of a lease covenant and D GYMS prevail in litigation.[34] Because claims regarding the roof leak were settled between the parties before trial there was no showing that the alleged leak constituted a default under the Lease Agreement. Moreover, D GYMS cannot be said to have prevailed in litigation regarding that claim. Expenses incurred in the pursuit of this claim are not subject to reimbursement.

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[32] Def.'s Pre-trial Answering Br. at 6.
[33] *See Weichert Co. of Pa. v. Young*, 2007 WL 4372823, at *6 (Del. Ch. Dec. 7, 2007).
[34] Lease Agmt., Art. 19.9.

Finally, RBC seeks reimbursement from D GYMS for litigation costs associated with defending the now settled claim concerning the alleged roof leak. It relies upon Article 15.2 which provides in relevant part:

> . . . Tenant shall indemnify and hold Landlord harmless from and/ against all costs, damages, claims, liabilities and expenses (including attorney's fees) suffered by or claimed against Landlord, directly or indirectly, based on, arising out of or resulting from (i) use, occupancy, repair or maintenance of the Premise or the business conducted therein, . . .[35]

The parties dispute the propriety of an award under this provision, but they have not fully presented their contentions. At trial, D GYMS requested the opportunity to submit a short letter concerning the issue following RBC's presentation of fee amounts.[36] RBC was unable to submit those amounts at trial, and has requested to do so in writing.[37] Because neither party has submitted documentation or briefing on the issue, the Court will defer consideration of this claim.

III. CONCLUSION

Accordingly, D GYMS has earned the right to an order of specific performance of the lease agreement and the installation of appropriate signage. It also is entitled to

[35] *Id.* Art. 15.2.
[36] Tr. at 126-27.
[37] *Id.* at 120.

recover its attorneys' fees and expenses incurred in obtaining that relief.[38] Counsel are requested to confer and to submit an implementing form of order.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[38] D GYMS is not entitled to any award regarding its roof leak claim. RBC's claim for attorneys' fees has not been resolved.