

IN THE COURT OF CLAIMS OF OHIO

SUMMIT INSURED EQUITY L.P., :
etc. :

Plaintiff : CASE NO. 2001-11413

v. : DECISION

OHIO DEPARTMENT OF PUBLIC : Judge J. Warren Bettis
SAFETY, etc. :

Defendant :

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{¶1} This case was tried to the court on the issues of liability and damages. Plaintiff has asserted claims of breach of contract and unjust enrichment.

{12} In January 1995, the parties entered into a lease agreement whereby defendant agreed to lease office space from plaintiff located at 1214 West Kemper Road in the Forest Park Shopping Center in Cincinnati, Ohio. The addresses of the parties to the lease were listed as follows: Summit Insured Equity, c/o Forest Park Square, P.O. Box 4281, Church Street Station, New York, NY 10261-4281, Lessor; Ohio Department of Public Safety, Bureau of Motor Vehicles, 4300 Kimberly Parkway, P.O. Box 16520, Columbus, Ohio 43266-0020, Lessee. The term of the lease was April 1, 1995, to June 30, 1995, with an automatic two-year renewal at the rate of \$11.30 per square foot per year. Article III of the lease stated the following:

{¶13} "It is agreed that the Lessee is entitled to unlimited two year RENEWALS at the current rate unless Lessor notifies Lessee of intent to adjust rents at least six (6) months prior to

expiration. Such notice must be supported by documentation of increased costs to Lessor. Any rental increase shall be negotiated in good faith. During such renewal, all other terms, covenants and conditions contained in this lease shall continue and be in full force and effect."

{¶4} Article IV of the lease provided that defendant could sublease the premises to any successful bidder who was awarded the contract to operate as a Deputy Registrar's office at the location and/or to the Clerk of Courts for use as a Title Agency. Defendant subleased part of the premises to the Deputy Registrar and part of it to the Hamilton County Clerk of Courts; the remainder of the premises was used as offices for the Bureau of Motor Vehicles (BMV).

{¶5} In October 1995, the parties entered into an addendum to the lease, effective November 1, 1995, for additional office space located at 1232 Kemper Road, Cincinnati, Ohio. Article III of the original lease was amended as follows:

{¶6} "Delete the first sentence of Article III and insert in its place the following: 'It is agreed Lessee is entitled to five (5) two year renewals commencing July 1, 1995, at the current rate unless Lessor notifies Lessee of its intent to adjust rents at least six (6) months prior to the expiration of the then current term of the lease.'"

{¶7} On April 9, 1997, defendant sent a letter to plaintiff wherein defendant exercised its option to renew the lease for an additional term beginning July 1, 1997, at the same annual rate. The letter was signed by Franklin Caltrider, Registrar, and contained the return address as stated in the lease. The letter also included the name and phone number of a contact person,

Patricia Reilley, BMV Facilities Manager, if there were any questions or concerns.

{¶8} On April 14, 1997, Orin Shakerdge, General Counsel for RCC Property Advisors (RCC), plaintiff's property manager, sent defendant a letter at the address that had been provided in defendant's letter, which stated as follows, in relevant part:

{¶9} "Enclosed please find four (4) copies of an Addendum - No. 3 for the above referenced Tenant in the Forest Park Shopping Center ('Center'). We have drafted a new document to clear up any confusion created by Addendum - No. 2.

{¶10} "According to our records, your Lease is scheduled to expire on December 31, 1997 (Despite the Lease documents, our files indicate that a Certificate of Occupancy was signed for Space #9, 1236 West Kemper Road, Cincinnati, Ohio 45240 on January 5, 1996, thereby modifying the term of the Lease so that it is January 1, 1996 - December 31, 1997). This Addendum - No. 3 will extend the term of the Lease another two (2) years to December 31, 1999 and serves as notice that it is our intent to adjust the rents pursuant to Article III of the Lease.

{¶11} "Currently, Lessee is paying \$11.30 P.S.F. on both Space #9 and Space #18 in the Center. We are adjusting the rents to \$12.25 P.S.F. due to the increase in Common Area Maintenance, Real Estate Taxes, Insurance and the cost of living pursuant to the Consumer Price Index (see attached Page 3 for calculations).

{¶12} "If such Addendum is acceptable to you, please sign where indicated, have the documents witnessed by two (2) witnesses and return all four(4) Lease documents to our office (directed to my attention) for final execution by the Landlord."

{¶13} At trial, Shakerdge testified that after he had sent this letter, he received a phone call from an employee of defendant, who

informed him that the term of the lease actually started or was renewed on July 1, 1997, and that since his letter was sent in April 1997, plaintiff had not complied with the provision in the lease, which required six months notice before initiating a rental increase. Shakerdge then spoke to his supervisor, Paul Rutledge, and after discussing the matter, they agreed that the renewal period began on July 1, 1997, and that the next renewal period would begin on July 1, 1999. Plaintiff did not further pursue the proposed rental increase for the 1997-99 period.

{¶14} On June 17, 1998, Gayle Hays, Director of Asset Management for RCC, sent a letter to Paul Kleinberg,¹ Hamilton County Auto Title Department, 1216 West Kemper Road, Cincinnati, Ohio 45240. That letter stated, in part:

{¶15} "Therefore, in accordance with the terms and conditions of your Lease Agreement and subsequent Addendums for space at Forest Park Shopping Center, notice is hereby given that your base rental rate will increase effective January 1, 1999 to: \$13.03 per square foot, \$7,751.07 per month, \$93,012.79 per year

{¶16} "Your monthly billing statement will automatically be adjusted to reflect your new rates and no further documentation will be necessary."

{¶17} This letter appears to have been sent as a "carbon copy" to the Ohio Department of Public Safety, Bureau of Motor Vehicles, at the address contained in the lease. At trial, plaintiff offered a United Parcel Service (UPS) Next Day Air shipping document showing that the letter was sent to Kleinberg; however, no such receipt for the letter to defendant was offered into evidence.

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Hays testified that Kleinberg was the contact person with whom she dealt regarding payment of outstanding utility bills for the leased premises.

{¶18} On August 10, 1998, RCC sent defendant a "six month update" regarding the Forest Park Square Shopping Center. In that correspondence, it stated that, "Tony DeVos has taken over as Director of Operations and Facilities for RCC Property Advisors. Should you have questions or problems, please give Tony a call."

{¶19} On September 23, 1998, Hays sent Kleinberg a "Revised Proposal" wherein the rate increase was stated as: \$13.03 per square foot, \$7,753.93 per month, and \$93,012.79 per year. This letter also appears to have been sent as a carbon copy to defendant. Plaintiff provided a UPS Next Day Air shipping document showing that the letter was sent to Kleinberg but did not provide a similar document reflecting that the letter was sent to defendant.

{¶20} On December 4, 1998, Lynda Baker, Lease Administrator for RCC, sent a letter to defendant at the address as stated in the lease, wherein she explained that effective January 1, 1999, RCC would be using coupons for rental payments instead of sending monthly statements.

{¶21} On March 31, 1999, Franklin Caltrider sent a letter to DeVos wherein Caltrider stated, as follows:

{¶22} "The current term of the referenced lease expires June 30, 1999. As provided in Article III, the Bureau of Motor Vehicles, as Lessee, does hereby exercise its option to renew for an additional term beginning July 1, 1999, and ending June 30, 2001, at an annual rate of \$80,693.30 for the entire demised premises (\$27,120.00 annually for the Bureau of Motor Vehicles, \$20,114.00 annually for the Deputy Registrar, and \$33,459.30 annually for the Clerk of Court - Title Office)." These amounts were based on \$11.30 per square foot. This letter also included the name and phone number of Jeanie Kelly of the Facility Management Section as a contact person.

{¶23} On October 4, 1999, Shakerdge sent a letter addressed to Caltrider wherein Shakerdge stated that pursuant to an audit conducted by RCC, RCC had discovered that defendant was not paying the correct amount of rent. This letter referenced the September 23, 1998, letter sent to Paul Kleinberg notifying him of the increased rent. This letter also stated the following:

{¶24} "On March 31, 1999, we received a letter from you indicating that Tenant was exercising its second Renewal Option for a 2-year period beginning July 1, 1999 and expiring on June 30, 2001 at an annual rate of \$80,693.30. This amount is in error as Landlord properly notified Tenant of the rental increase 9 months prior to the expiration of the term (the first rental increase in four years). Through September 30, 1999, Tenant has an outstanding balance of \$173.65 for Space 9 and \$872.41 for Space 18 (see attached Reconciliation Reports, Aging Reports and Occupant Ledgers for both spaces). Please remit this amount upon receipt of this letter (make your check payable to Forest Park Shopping Center and mail it to this office) and have your Real Estate and Accounting Departments make the proper adjustments to your rental amounts for both spaces."

{¶25} On May 15, 2000, Hays sent a letter to Jeannie Kelly wherein Hays stated that defendant owed an outstanding balance, that the balance was a result of the rental increase that was effective January 1, 1999, and that defendant had been properly notified of the increase, contrary to defendant's contention.

{¶26} Jeanie Kelly testified that she was not aware of any attempts to impose a rental increase in June or September 1998; that she was not aware in September 1998 that defendant had received a letter regarding a rental increase; and that she had checked defendant's files and did not find the letter.

{¶27} On September 22, 2000, Hays sent a letter to defendant at the address stated in the lease, to the Registrar, Bureau of Motor Vehicles at the address provided by Caltrider's most recent letter, and to Jeanie Kelly at the address listed on the lease. All copies of the letter were sent via UPS Overnight mail and certified mail.

This letter stated that the lease would be up for renewal for another two-year period effective July 1, 2001, and requested a new rental rate of \$13.38 per square foot from July 1, 2001, through June 30, 2003.

{¶28} On June 28, 2001, Caltrider sent a letter to plaintiff wherein Caltrider stated that defendant exercised its option to renew the lease for an additional term beginning July 1, 2001, ending June 30, 2003, at an annual rate of \$95,546.58 to comply with the proposed rate of \$13.38 per square foot. Mark Atkeson, the facilities management commander for defendant at the time, testified that a typical rent increase for defendant was anywhere from zero to six percent, and that he agreed to an 18 percent increase in 2001 to account for any disparity that may have occurred in the 1999-2001 lease.

{¶29} Plaintiff contends that it complied with the notice provisions in the lease when it notified defendant of a proposed rental increase in September 1998, and that as a result, defendant owes plaintiff \$25,310. Alternatively, plaintiff argues that if this court finds that the good faith negotiation provision of the lease was not complied with, plaintiff would be entitled to a 110 percent increase in rent. Plaintiff additionally asserts a claim of unjust enrichment. Defendant denies all of plaintiff's claims.

{¶30} As a general rule, the goal of the court in construing written contracts is to arrive at the intent of the parties, which is presumed to be stated in the document itself. See *Foster*

Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth., 78 Ohio St.3d 353, 1997-Ohio-202; *Graham v. Drydock Coal Co.*, 76 Ohio St.3d 311, 1996-Ohio-393. Where the terms of a contract are clear and unambiguous, the court cannot find different intent from that expressed in the contract. *E.S. Preston Assoc., Inc. v. Preston* (1986), 24 Ohio St.3d 7.

{¶31} Based upon the evidence presented at trial, the court finds that the language in Article III of the lease is clear and unambiguous. The court further finds that plaintiff failed to properly serve defendant with the June 17 or September 23, 1998, letters. From the face of the documents, it is clear that they were served on Paul Kleinberg, a Hamilton County employee. Although plaintiff asserts that the documents were served on defendant, the fact that there is no receipt for them, that the documents are not contained in defendant's files, and that there was no direct response from defendant regarding the letters support defendant's contention that it never received them. In addition, plaintiff had previously attempted to initiate a rate increase in April 1997, via a letter sent to the address in the lease, and defendant responded to that request. Defendant's letter of March 31, 1999, shows that defendant did not acknowledge any rental increase proposed by plaintiff. The court finds that Shakerdge's testimony regarding his assumption that the figures in the March 31, 1999, letter were erroneous is simply not credible. In this case, the evidence shows that no rental increase was ever agreed to for the 1999-2001 term. Plaintiff has failed to prove by a preponderance of the evidence that it complied with the required six months notice provision of the lease before increasing defendant's rent for the 1999-2001 term.

{¶32} Plaintiff alternatively argues that defendant was in a "holdover" lease and that the rent should increase 110 percent.

Article XIV of the lease pertains to a holdover option, which would occur if the lease expired and defendant remained in occupancy. In that situation, defendant's occupancy would be regarded as a month-to-month tenancy, except that the rent would increase 110 percent.

However, this same provision requires that defendant give plaintiff written notice 30 days before the lease expired to take advantage of the holdover provision. Defendant did not notify plaintiff that it intended to use the holdover provision; to the contrary, it notified plaintiff that it intended to renew the lease at the same rate. Therefore, plaintiff has failed to prove by a preponderance of the evidence that defendant was in a month-to-month tenancy at any time during the lease.

{¶33} Plaintiff also asserts a claim for unjust enrichment. "In the absence of fraud or bad faith, a person is not entitled to compensation on the ground of unjust enrichment if he received from the other that which it was agreed between them the other should give in return." *S & M Constructors, Inc. v. City of Columbus* (1982), 70 Ohio St.2d 69, 71, quoting *Ullmann v. May* (1947), 147 Ohio St. 468. The court finds that defendant's March 31, 1999, letter renewing the lease at a rate of \$11.30 per square foot complied with the renewal requirements in the lease and constituted a renewal at that rate for the 1999-2001 term. In addition, "*** an action for the recovery of money as a debt or as damages is essentially an action at law and cannot be converted into a suit in equity ***. *** [W]here an adequate remedy is afforded at law equity may not be resorted to." *Complete Bldg. Show Co. v. Albertson* (1918), 99 Ohio St. 11, 15-16. Therefore, plaintiff's claim for unjust enrichment must also fail.

{¶34} In the final analysis, the court finds that plaintiff has failed to prove any of its claims by a preponderance of the evidence. Judgment is rendered in favor of defendant.

{¶35} This case was tried to the court on the issues of liability and damages. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendant. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

J. WARREN BETTIS
Judge

Entry cc:

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HTS/cmd
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