STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

R & W RIVERVIEW, LIMITED, LLC,
Plaintiff,

v.

Case No. 18-165881-CB
Hon. James M. Alexander

FAMILY DOLLAR STORES OF MICHIGAN, and
FAMILY DOLLAR STORES, INC,
Defendants.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants' Motion for Summary Disposition. According to the Complaint, Plaintiff is Defendants' former landlord. Defendants leased a commercial premises located in Saginaw, Michigan from Plaintiff. The parties entered into their first lease in 1990. Since then, there have been a number of modifications and extensions. The lease at issue expired on December 31, 2017. On December 27, 2017, there was a casualty loss caused by a frozen pipe. The frozen pipe was caused by Defendants' failure to regulate the heat in the premises. Plaintiff alleges that Defendants are liable for damage due to the casualty because of their negligence in maintaining the premise. Plaintiff further argues that although the lease expired, Defendants' failed to turn over possession for seven months. On these general allegations, Plaintiff's seeks to recover unpaid rent and damage to the leased premises.

Defendants now move for summary disposition under MCR 2.116(C)(10). MCR 2.116(C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).[1]

1 In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue

In support of its motion, Defendants attach: (1) the 1992 Lease Agreement; (2) Defendants' 6/26/2017 termination letter; (3) Bonnie Reinberg's deposition transcript; (4) Plaintiff's 2/2/2018 letter to Defendants; (5) the Chubb Group of Insurance Companies settlement summary; (6) the Complaint; (7) a key log; (8) R&W receivables 1/1/2017-7/20/2018; (9) the affidavit of Lisa Milton; (10) Friedman contract; and (11) Forensic Engineering Report.

Defendants first argue that the controlling lease contains a mutual waiver of claims for damages covered by insurance. The damage resulting from the frozen pipe was characterized by Plaintiff as a casualty. Plaintiff did submit a claim to their insurance provider, Chubb. Plaintiff was issued a check for $160,542.67 for repair costs for damage that was found to be related to the incident. Further, Plaintiff was paid an addition $6,600.00 for lost business income related to its inability to lease the adjacent premises.[2] As such, Defendants argue that Plaintiff is not entitled to damages that were otherwise recoverable under the terms of the lease.

In response, Plaintiff argues that it is not seeking damages that were covered by insurance; rather it is seeking damages not covered by insurance related to the casualty loss. Further, Plaintiff is seeking damages as a result of Defendants' failure to maintain the premises, damage for Defendants' failure to return the premises to its original state, damage for Defendants' failure to surrender possession, and their inability to rent the adjoining premises. Plaintiff argues that summary disposition is inappropriate as each of these claims are dependent on issues of fact.

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of material fact. *Maiden, 461 Mich* at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* at 120.

2 There is evidence that the adjacent premises was leased to another tenant. Sherry Mayfield from Chubb Insurance Group spoke with the lessee who indicated that he "cancelled for his personal financial reasons." Further, he indicated that he "did not terminate the lease due to the water loss, but rather cancelled as his personal financial situation did not allow him to expand." (Reply Exhibit E).

In support of its position, Plaintiff attaches: (1) affidavit of Bonnie Reinberg; (2) Universal Air invoice; (3) 1/31/8 Universal Air letter; (4)Forensic Engineering Report; (5) email string re: Family Dollar Store #2154; (6) 1/2/8 letter to Tenant; (7) 1/12/18 letter to Schoenheit; (8) invoices, estimates, and proposals from various companies; (9) photo of thermostat; (10) key log; (11) 1/20/18 email from Lisa Milton; (12) Riverview Plaza 2016 Taxes and Operating Expenses; (13) Riverview Plaza 2017 Taxes and Operating Expenses; (14) 5/2/18 Customer Open Balance ledger; (15) Evidence of Commercial Property Insurance; (16) photos of premises; (17) affidavit of Charlotte Perz; (18) email chain re: #2154 Saginaw, MI; and (19) affidavit of Darlene Phillips.

The lease provides:

> 10. Damage and Destruction. Should the demised premises be damaged or partially destroyed by fire or other casualty, Landlord will, with all due diligence, at its expense, make the repairs or restorations so that thereafter the demise premises shall be substantially the same as prior to such damage . . .
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> 11. Insurance. (a) Landlord agrees to keep the demised premise and all other buildings within the shopping center fully insured, at Landlord's expense, against loss or damage by fire and such other casualties as are covered by extended coverage insurance. . .
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> 20. Waiver of Subrogation. Landlord and tenant, each for itself and its successors and assigns, covenants and agrees with the other that no claims shall be made, and that no suit or action, either at law or in equity, shall be brought by either party, or by any person, firm or corporation claiming by, through or under Landlord or Tenant, their successors, sublessees or assigns, against the other, or their directors, officers, agents, employees, successors, sublessees or assigns, for any loss or damage to the demised premises and any improvements or other property located therein or to the shopping center and any improvements or other property located therein caused by or resulting from fire, or other casualty of whatever origin, to the extent that the same is covered by insurance or is required by the terms of this lease to be covered by insurance against loss or damage by fire and such other casualties as are covered by the customary extended coverage endorsement . . .

Michigan law is well-established that "[a] contract must be interpreted according to its

plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate." *Holmes*, 281 Mich App at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

As often repeated by our Supreme Court, "courts must … give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory." *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008).

The lease provides that if the premises is damaged or destroyed by fire or other casualty, Landlord will, with all diligence, *at its expense* make the repairs or restorations so that thereafter the demised premises shall be substantially the same as prior to such damage or injury. This paragraph does not differentiate or shift responsibility based on the underlying cause of the damages. (Defendants' Exhibit A at ¶10). As the drafter of the lease, Plaintiff could have shifted responsibility or liability to Defendants if the casualty was due to their negligence. Plaintiff has not done so.

Further, the lease provides that the Landlord and Tenant, each agreed that no suit or action shall be made for any loss or damage to the demised premises and any improvements or other property located therein or to the shopping center caused by or resulting from fire, or other casualty *of whatever origin*, to the extent that the same is covered by insurance or is required to be . . . covered by insurance . . . . (Defendants' Exhibit A at ¶20). Paragraph 20 further provides that, "nothing contained in this paragraph shall affect or diminish Landlord's obligation to repair

or rebuild in case of damage or destruction. *Id.*

Again, Plaintiff, as the drafter, could have limited the waiver provided in the lease. Instead, Plaintiff has included that both parties agree not to bring suit for any loss or damage to the premises or shopping center as a result of a casualty of *whatever origin*. Plaintiff, through this paragraph, did not reserve the right to bring suit for damages resulting from a casualty due to Defendants' negligence. Further, Plaintiff waived their right to bring suit for damage to other property in the shopping center caused by a casualty. Beyond that, Plaintiff was actually reimbursed through their insurance provider for damages resulting from the casualty. As such, they are not entitled to bring suit for any damage resulting from the casualty, to the extent that the same was covered by insurance or was required to be covered by insurance.

Based on the plain language of the lease, taken together, these paragraphs establish that: (1) Defendants are not liable for repairs or restoration costs as a result of the pipe bursting or the restoration costs that were done to return the premises (and the adjoining suite) to its pre-casualty state (Defendants' Exhibit A at ¶10); and (2) Plaintiff waived its right to bring suit for the same. (Defendants' Exhibit at A ¶20).

Plaintiff argues they in addition to damages not covered by insurance, they are also seeking damages "that had nothing to do with the casualty loss." Plaintiff's complaint has two counts, Count I, damage to the premises, and Count II, unpaid rent, taxes and common area maintenance charges, and lost rent. Plaintiff, in its complaint, does not see damages "that had nothing to do with the casualty loss." Count I only alleges damage related to the casualty. Count II seeks damages in relation to Defendants' status as a holdover tenant. Based on its own pleadings, Plaintiff is not seeking damages due to property damage unrelated to the casualty loss. As such, Plaintiff is not entitled to any alleged damages for the same, as those damages are

beyond the scope of their complaint.

Next, Defendants argue that they were not a holdover tenant and are, therefore, not responsible for $28,456.88 in rent. Defendants provided written notice to Plaintiff on June 26, 2017 by certified mail. It is undisputed that Defendants did provide proper notice under the terms of the lease. It is also undisputed that Defendants had vacated the property prior to the termination of the lease. Defendants again point to the lease to support their position. Defendants argue that the lease is dispositive and only require timely written notice to terminate. The Court agrees.

The lease provides:

> 7. Term Extensions. The Lease provides for two remaining options to extend the term of the Lease for five years on each option (the fourth and fifth extended terms). The term of the Lease will be automatically extended (i.e., each extension will be automatically extended) one period at a time unless Tenant gives written notice to Landlord canceling the next extended term at least six months before such extended term is scheduled to begin. If Tenant gives such notice, then the Lease will expire the day before such extended term is scheduled to begin . . .
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> 18. Surrender of Possession. Upon the termination of this lease or any extension thereof, Tenant shall surrender the demised premises in the same condition or repair as at the beginning of the term, ordinary wear, tear or damages by fire or other casualty excluded.

In response, Plaintiff argues that although Defendants gave proper notice of termination, they failed to surrender the premises in the original condition, failed to return the keys to the premises, failed to do a "walk through," failed to remove property, and continued paying the utilities. Plaintiff argues that these actions establish that Defendants retained control of the premises.

Defendants contend that Plaintiff's agent admitted that the lease did not require a walk

through or for the keys to be returned. Defendants maintain that the only requirement to terminate the lease was the written notice, which they provided. Defendants' argue that paying the utilities was immaterial, as the Plaintiff, the owner of the building could have transferred the utilities at any point. Further, Plaintiff knew that the premises was vacant and that Defendants did not intend to return. Finally, Defendants argue that Plaintiff did have access to the premises, as they had begun, and continued to engage in, restoration efforts.

A "holdover tenant" is someone who remains in possession of real property after a previous tenancy (esp. one under a lease) expires, thus giving rise to a tenancy at sufferance. Black's Law Dictionary (10th ed., 2014).

Here, Defendants were not in possession of the leased premises. Plaintiff sent a letter after it discovered the water damage referring to the premises as a "vacant store." (Defendants' Exhibit D). In fact, Defendants had vacated the premises in October 2017, well before the expiration of the lease. Plaintiff, by its own admission, knew Defendants abandoned the premise.

As Plaintiff argues, a tenant continues to be obligated to pay rent until such time that the tenant complies with the lease requirements. Here, the lease required that Defendants give notice six months prior to the termination of the lease. Again, it is undisputed that Defendants complied with this requirement.

Plaintiff alleges that Defendants failed to properly surrender the premises. The lease provides that "upon the termination of this lease or any extension thereof, Tenant shall surrender the demised premises in the same condition or repair as at the beginning of the term, ordinary wear, tear, or damages by fire or other casualty excepted." (Defendants' Exhibit A at ¶18).

There is no dispute that a casualty occurred in the leased premises. Based on the

casualty, it was not possible for Defendants to return the premises in the same condition at the beginning of the lease. Further, Defendants were not required to return the premises to the pre-casualty state upon surrender as stated above. Damage by fire or other casualty was a specific exception to the provision. And, as previously discussed, Plaintiff was required to make the repairs and restorations to the premises upon a casualty returning the premises to substantially the same condition as it was prior to the casualty, at their own expense. As such, surrendering the premises to the pre-lease state was not a requirement to properly terminate the lease.

As a matter of law, the Court finds that Defendants satisfied their requirements to terminate the lease. As such, summary disposition as Defendants' liability for damages as a holdover tenant is granted.

Assuming arguendo that the Court found Defendants were holdover tenants, the abatement of rent clause of the lease would have been triggered limiting Defendants' liability. The lease provides that "rent shall cease and abate on the date of such destruction and shall not be due and payable until such time as the demised premises are reopened for business." (Defendants' Exhibit A at ¶10). Pursuant to this, Defendants would not have been liable for rent until such time that the premises was reopened for business.

Finally, Defendants argue they are not responsible for Common Area Maintenance (CAM). Pursuant to the lease, the tenant is responsible for their share of CAM. To be reimbursed, the landlord is to provide the tenant with a detailed summary "setting forth the actual amount of the costs incurred" for the CAM and the tenant's proportional share. (Defendants' Exhibit A ¶ 31). The statement must be "accompanied by documentation to support Landlord's request for reimbursement, including copies of paid invoices for all costs incurred. *Id.* Defendants argue that they were never provided the detailed summary. Since Plaintiff did not

provide the required documentation, Defendants argue they are not responsible for the CAM charges.

Plaintiff, in support of their position that Defendants are liable, relies on the affidavit of Bonnie Reinberg. Reinberg stated, " [i]n accordance with the provisions of the Lease, Defendants received a breakdown demonstrating proof of payment of Common Area Maintenance (CAM) charges for both 2016 and 2017." (Plaintiff's Response Exhibit A).

Based on Plaintiff's affidavit, a question of fact remains as to whether Plaintiff provided the proper notice of the CAM charges to Defendants. As such, factual development could provide a basis for recovery of the CAM charges rendering summary disposition inappropriate.

Based on the foregoing, Defendants' motion is granted as to Count 1, damage to the premises. In regards to Count II, Defendants' motion is granted as to unpaid rent and lost rent and denied as to unpaid taxes and Common Area Maintenance charges.

Pursuant to Plaintiff's admission, however, it is seeking damage in the amount $14,405.00 for Common Area Maintenance charges and $2,100.00 in late fees, which includes unpaid taxes. The CAM charges, including the late fees total $16,505.00 in alleged damages. As such, this claim fails to meet the jurisdictional requirements of circuit court, and the same is dismissed.

As a result, Plaintiff's complaint is dismissed in its entirety. This is a final order that resolves the last pending claim and closes the case.

IT IS SO ORDERED.

March 6, 2019_____ __/s/ James M. Alexander_____
Date Hon. James M. Alexander, Circuit Court Judge