IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MILLCREEK SHOPPING CENTER, LLC, a Delaware limited liability company,	)	
Plaintiff,	)	
v.	)	C.A. No. N13C-11-145 (PRW)
JENNER ENTERPRISES, INC., a Delaware corporation, MICHAEL P. LEVITSKY and JANET LEVITSKY,	)	
Defendants.	)	

ORDER AWARDING DAMAGES

Remaining in this case is the award of damages to Plaintiff Millcreek Shopping Center, LLC ("Millcreek").

Millcreek, the landlord, is entitled to recover damages against the Defendants Michael Levitsky and Janet Levitsky, on their personal guarantees guaranteeing the obligations of Jenner Enterprises, Inc. ("Jenner"), the tenant, as a result of Jenner's breach of a commercial retail lease located in the Millcreek Shopping Center on Kirkwood Highway in Wilmington, Delaware ('the "Rental Unit"). Jenner operated a *Fast Signs* franchise from the Rental Unit.

The determination as to the amount of damages to be awarded Millcreek was referred to the undersigned Commissioner and was to be decided by binding arbitration.[1]

The parties, however, advised the court that they did not believe a binding arbitration was needed in order to determine the amount of damages to be awarded. The parties advised that they believed the damage award could be determined based on written submissions by the parties.

Briefing was conducted as to damages. Defendants, in response to Millcreek's opening submission, raised two legal issues and several factual issues as to the amount of damages sought by Millcreek. The two legal issues pertained to: 1) whether interest should be awarded at the contract rate of 6.25% or whether 6 *Del. C.* § 2301 operated to cap the interest rate at 5.75%; and 2) whether 10 *Del. C.* §3912 was applicable in the subject case thereby requiring that the attorneys' fee award be capped at 20% of the total amount due.

In Millcreek's reply submission, it addressed the factual issues raised by Defendants and provided additional support for the amount of damages requested.

After briefing was completed, on February 6, 2017, a teleconference was held. During the teleconference, the court advised the parties that both of the legal issues raised by Defendants were to be resolved in Millcreek's favor. The court advised that: 1) the interest to be awarded in this case was the contract rate of interest of 6.25% and that this case was not governed by 6 *Del. C.* § 2301, and 2) 10 *Del.C.* §3912 was not applicable to this case and did not operate to cap the attorneys' fee award to 20% of the total amount due. The court explained the reasons for its rulings on these issues.

During the teleconference, the court scheduled a hearing/binding arbitration for February 23, 2017 to resolve any and all outstanding factual issues remaining to be resolved.

[1] Order dated November 10, 2014, Superior Court Docket No. 59.

The Defendants advised that the hearing/binding arbitration on February 23, 2017 did not need to go forward. The Defendants advised that they were not contesting Millcreek's calculations as to the monies owed nor were they contesting any of the amounts sought on factual grounds. There being no factual dispute remaining to be resolved, the hearing/binding arbitration of February 23, 2017 do not go forward.

This opinion memorializes the court's decision as to damages.

DAMAGES

Millcreek's damage claim is comprised of four categories:

1) rent and late fees;

2) interest;

3) common area maintenance charges; and

4) counsel fees.

1) Rent and Late Fees: $80,309.19

The parties do not dispute that rent and late fees are owed to Millcreek nor do they dispute that the amount of those fees total $80,309.19.

2) Interest: $16,768.62, plus post- judgment interest

The parties do not dispute that the contractual rate of interest is 6.25%.[2] The parties do not dispute that the pre-judgment interest owed to Millcreek calculated at the 6.25% contractual interest rate is $16,768.92.

[2] Paragraph 2 of the lease agreement, attached as Exhibit B to Millcreek's Opening Letter Memorandum seeking forth damages, provides that the rate of interest is three percent per annum above the prime rate of interest charged by Wilmington Trust Company. The parties do not dispute that the contractual rate of interest is 6.25%.

Defendants contend that, as a matter of law, the interest rate should be capped at 5.75% pursuant to 6 *Del. C.* § 2301(a), and that interest should be awarded at the 5.75% rate rather than the 6.25% contractual rate.

This case is, however, not governed by 6 *Del. C.* § 2301.

6 *Del. C.* § 2301(a) provides: ***Any lender*** may charge and collect from ***a borrower*** interest at any rate agreed upon in writing not in excess of 5% over the Federal Reserve discount rate. . . (emphasis added).[3]

Moreover, the cap on the interest rate as provided by §2301(a), does not even apply to lender/borrower relationships when the money loaned exceeds $100,000 and is not secured by a mortgage against the principal residence.[4]

The Delaware Supreme Court has held that 6 *Del. C.* § 2301(a) was intended to cap interest only in cases of personal loans.[5] When the plaintiff does not seek interest due for the failure to pay a personal loan, the contract rate applies to the accrual of the interest.[6] In a commercial dispute, not involving a personal loan, the contractual rate set forth in the lease applies to interest.[7] The contractual rate of interest applies to both pre-judgment and post-judgment interest.

6 *Del. C.* § 2301(a), by its express language, refers to interest charged by a "lender" to a "borrower." The relationship between Millcreek and the Levitskys is not that of lender and borrower. The Levitskys' liability to Millcreek is under their personal guaranty of Jenner's obligations under the commercial retail lease between Jenner and Millcreek. 6 *Del. C.* § 2301(a) is not applicable here.

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[3] The parties do not dispute that the interest rate, if this statutory provision was applicable, is 5.75%.
[4] See, 6 *Del. C.* § 2301(c).
[5] *Delaware Technical & Community College v. Emory Hill & Company*, 2015 WL 4094410, *5 (Del. 2015)
[6] *Id.*
[7] *Id.*

Indeed, Defendants have not cited to any case that held that the contractual rate of interest was unenforceable and superseded by 6 *Del. C.* § 2301(a) in an action involving a commercial real estate lease. Moreover, Defendants have not cited to any case, not involving a personal loan, in which a contract rate of interest was held to be unenforceable and wholly supplanted by §2301(a).[8]

Pre-judgment and post-judgment interest is awarded at the contractual rate of 6.25%. Pre-judgment interest is awarded in the amount of $16,768.62.

3. Common Area Maintenance Charges $7,979.01

The parties do not dispute Jenner was required pay its pro rata share of common area maintenance charges ("CAM"). Defendants requested additional information from Millcreek as to how it derived the CAM charges sought. Millcreek provided the additional information sought.

If the Defendants wanted to contest Millcreek's calculations following the receipt of the additional information provided by Millcreek or wanted to pursue any other factual dispute as to the amount of CAM charges sought, any such issues were to have been presented and would have been resolved at the hearing/binding arbitration. The Defendants advised that no such hearing/binding arbitration was necessary. Consequently, the Defendants waived any objection to the CAM charges.

CAM charges are hereby awarded in the amount of $7,979.01.

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[8] See, *BPG Office v. V.*, 2011 Del.Super.LEXIS 3028 (attached to Millcreek's Reply as Exhibit A)(Del.Super. 2011)(a single paragraph order entering default judgment and awarding interest at the maximum rate allowed under §2301(a), nothing in *BPG* suggests that §2301(a) would control over a contract rate of interest); *Nastatos v. Hallak*, 2004 WL 1110325 (Del.Comm.Pl.), the court applied §2301(a) but there was nothing to suggest that a contract rate of interest would not be enforceable and supplanted by $2301(a).

4. Counsel fees **$93,590.90**

As set forth above, for the first three categories of damages sought, the total amount of monies awarded is $105,056.82 ($80,309.19 for rent and late fees, $16,768.62 in pre-judgment interest and $7,979.01 in CAM charges).

In addition to these damages, the fourth and final category of damages is for attorneys' fees and costs. Millcreek seeks an award of attorneys' fees and costs in the amount of $93,590.90.

At the time of Millcreek's initial submission on damages, it sought $83,353.20 in attorneys' fees and costs. That request was amended by letter dated February 24, 2017, to $93,590.90, in light of the continued fees and costs incurred after Millcreek's initial submission on the damages issue to the present.

Defendants do not contest that Millcreek's counsel's billable hour rates were reasonable and that the time spent by Millcreek's counsel working on this case was reasonable and justified. Indeed, any factual dispute as the appropriateness of the monies sought was to have been presented and resolved at the hearing/binding arbitration. Defendants waived any issue as to the appropriateness of the counsel fees sought on factual grounds when they waived the hearing/binding arbitration.

Defendants raise a legal challenge to the amount of the counsel fees sought. Defendant contend that the award of counsel fees should be capped at 20% of the underlying damages, pursuant to 10 *Del. C.* § 3912.

Initially it is noted that counsel fees are recoverable by Millcreek in the event of a default by Jenner pursuant to the lease agreement at issue. The lease agreement permits Millcreek to

recover "reasonable fees of counsel". The lease does not provide any cap on the recovery of attorneys' fees.[9]

It is undisputed that all of the counsel fees sought by Millcreek were incurred in proving that Jenner and the Levitskys were liable to Millcreek and the amount of that liability. This action involved protracted litigation in both this court and in the bankruptcy court. Millcreek was the successful party at every step of the protracted litigation.

In this court, briefing was conducted on Millcreek's summary judgment motion and a hearing was held. Summary judgment was granted as to liability in favor of Millcreek and against Defendant Michael Levitsky.

Jenner filed for bankruptcy protection. In the bankruptcy proceedings, as to its claim against Jenner, Millcreek successfully defended two objections to the proof of claim it filed in the Jenner bankruptcy case. The day before the hearing on the objections, and after full briefing was already conducted, both objections were withdrawn by Jenner and Millcreek's entire claim was allowed by Stipulation and Order of the Bankruptcy Court.

As to Millcreek's claims against the Levitskys, Jenner also attempted to have the Bankruptcy Court confirm a Chapter 11 reorganization plan that provided in pertinent part, that any creditor of Jenner that either accepted the proposed plan of reorganization or received any distribution under the plan would forever waive all and every claim the creditor had against the Levitskys. Millcreek did not accept the plan, but the plan did call for Millcreek and the other general unsecured creditors to receive a distribution of 15% of their claims in quarterly installment over three years.

[9] See, Paragraphs 22 and 36A of the Lease at issue, attached to Millcreek's Opening Letter Memorandum as Exhibit B.

Thus, under Jenner's proposed reorganization plan, Millcreek would permanently waive all of its claims against the Levitskys if it received even a single installment under the proposed plan.

Millcreek filed an objection to the plan on the grounds that Jenner's effort to weave a release of the Levitskys' personal liabilities into its reorganization plan was contrary to law. Millcreek was the only creditor to file an objection to the plan. After significant briefing, an evidentiary hearing, and oral argument, the Bankruptcy Court sustained Millcreek's objection and confirmed the plan as proposed, but with a carve out for the Levitskys' personal liability to Millcreek.

After the bankruptcy stay was lifted as to the Levitskys, this matter proceeded in the Superior Court. Another round of briefing took place on the issue raised by Janet Levitsky that she was not liable on her personal guaranty. Millcreek prevailed and Janet Levitsky was held liable on her personal guaranty. Then, another round of briefing was conducted as to the amount of damages to be awarded Millcreek as a result of the breach of the commercial retail lease at issue.

Defendants does not dispute that the counsel fees incurred by Millcreek were reasonable and justified under the circumstances of this case given the protracted litigation in this court and in the Bankruptcy Court. Defendants contend that, as a matter of law, the award of counsel fees should be limited to 20% of the underlying damages, pursuant to 10 *Del. C.* § 3912.

10 *Del. C.* § 3912 provides, in relevant part:

> In all causes of action, suits, matters or proceedings brought for the enforcement of any note, bond, mechanics lien, mortgage, invoice or other instrument of writing, . .. the plaintiff or lien holder may also recover reasonable counsel fees. . . Such counsel fees shall not exceed 20 percent of the amount adjudged for principal and interest.

The first five of the six items enumerated in this statute (ie. note, bond, mechanics lien, mortgage, and invoice) explicitly pertain to writings that evidence a debt. This case, which was brought to enforce the Levitskys' personal guarantees under Jenner's commercial retail lease with Millcreek, does not involve the enforcement of "any note, bond, mechanics lien, mortgage or invoice. The issue, therefore, is whether the subject action falls under the final item "other instrument of writing", as that term was intended in this statute.

The Delaware Supreme Court held that the term "other instrument of writing" as that term is used in this statute was intended to encompass written instruments entered into voluntarily which create a debtor-creditor relationship.[10]

In *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc., et al.,*[11] the Delaware Chancery Court held and the Delaware Supreme Court agreed, that this final and catch-all item, "other instrument of writing," refers to a class of items that are also writings that evidence a debt, but do not fit squarely within the scope of one of the preceding items. That is, to qualify as an "other instrument of writing" within the meaning of § 3912, a writing would have to evidence a debtor-creditor relationship.[12]

A lease provision obligating lessee to indemnify lessor for reasonable attorneys' fees is not subject to § 3912 because a debtor-creditor relationship does not exist. For § 3912 to apply to a transaction there must be an underlying loan obligation. A lessor and guarantor of a lease (of

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[10] *Great Am. Indem. Co. v. State*, 88 A.2d 426, 430-432 (Del. 1952); *Besk Oil, Inc. v. Brown & Bigelow, Inc.*, 1988 WL 139953, *3-4 (Del.Super.).
[11] *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc., et al.,* 2010 WL 571934, Del.Ch. 2010, *2, *aff'd,* 7 A.3d 486 (Del. 2010).
[12] *Id.*

equipment) relationship is not a debtor-creditor relationship as that term was intended by § 3912.[13]

This case was brought to enforce the Levitskys' personal guarantees of Jenner's obligations under its commercial retail lease with Millcreek. This case does not involve the enforcement of "any note, bond, mechanics lien, mortgage, invoice or other instrument of writing." This case does not involve a debtor-creditor relationship. This case involves a landlord/tenant relationship, and the obligations of the guarantor of the tenant. This statute does not apply to the subject action.

Prior to 1996, Delaware's Landlord-Tenant Code applied to residential and commercial leases. After 1996, commercial rental agreements were excluded.[14] Residential landlord- tenant relationships are governed by the Residential Landlord-Tenant Code, 25 *Del. C.* § 5101 *et seq*. As to residential real estate contracts, no provision in a rental agreement providing for the recovery of attorneys' fees by either party is enforceable. 25 *Del. C.* § 5111.

After 1996, commercial landlord/tenant relationships were expressly excluded from the Landlord-Tenant Code.[15] After 1996, a commercial lease is to be governed by general contract principles and the parties are free to contract however they so desire and are bound by the language of the agreement(s) they negotiated.[16]

This commercial lease was first entered into in 2000, and the parties were free to contract however they so desired and are bound by the language of the agreement they negotiated. The lease provided for the recovery of reasonable attorneys' fees and the parties do not dispute that the attorneys' fees incurred were reasonable and justified.

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[13] *Rollins Properties, Inc. v. Chalet Susse International, Inc.*, 1986 WL 3979, *1-2 (Del. Super.).
[14] See, *Independence Mall v. Wahl,* 2012 WL 6945505, *4 (Del.Super. 2012).
[15] See, *Independence Mall v. Wahl,* 2012 WL 6945505 (Del.Super. 2012).
[16] *Independence Mall v. Wahl,* 2012 WL 6945505 (Del.Super. 2012); *J.M.L., Inc. and Gillen v. Shoppes of Mount Pleasant, LLC,* 2016 WL 6072367, *5 (Del.Super. 2016).

As to residential landlord/tenant relationships, there is no entitlement to recover attorneys' fees, even capped at 20%. And as to commercial landlord/tenant relationships, the parties are free to contract however they so desire and are bound by the language of the agreement they negotiate. The 20% cap on the award of attorneys' fees provided by 10 *Del. C.* § 3912 does not apply to landlord/tenant relationships.

In *J.M.L. Inc. and Gillen v. Shoppes of Mount Pleasant, LLC*, the Superior Court awarded the commercial landlord underlying damages in the amount of $21,501.70 and attorneys fees and costs in the amount of $22,065.74 ($20,132 in attorneys' fees and $1,933.74 in costs), against the guarantor of a commercial lease.[17] The *J.M.L. Inc.* court recognized that parties to a commercial real estate lease were free to contract however they so desired. The commercial lease in that case, like here, provided for the recovery of reasonable attorneys fee and costs.[18] In *J.M.L. Inc.*, like here, there was no percentage cap on the award of attorneys fees provided for in the contract.[19] The *J.M.L. Inc.* court determined that under the facts and circumstances of that case the award of attorneys' fees and costs in the amount of $22,065.74 was reasonable, even though the attorneys fee award exceeded the amount of the underlying damages awarded, as a result of the breach of that commercial lease.[20]

Similarly, in this case, the parties to this commercial lease were free to contract however they so desired. The parties did not cap the award of attorneys' fees and costs that could be awarded in the lease. Damages in the total amount of $105,056.82 are being awarded for unpaid rent, CAM charges and interest, and reasonable attorneys fees and costs in the amount of $93,590.90 are being awarded under the facts and circumstances of this case.

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[17] *J.M.L., Inc. and Gillen v. Shoppes of Mount Pleasant, LLC,* 2016 WL 6072367, *5-7 (Del.Super. 2016).
[18] *Id.*
[19] *Id.*
[20] *Id.*

None of the cases cited by either of the parties involved a commercial landlord/tenant real estate lease. None of the cases cited by the parties discussed the applicability of 10 *Del. C.* § 3912 to a commercial landlord/tenant real estate lease. This court is similarly unaware of any case in which 10 *Del. C.* § 3912 was held to cap the award of attorneys fees in a commercial real estate lease where the lease agreement did not provide for any such cap.

A case cited by Defendants, *Highline Financial Services, Inc. v. Rooney,*[21] involved an equipment lease. In that case, the contract itself expressly provided for the recovery of attorneys fees capped at 20% of the total amount due. There was no discussion as to whether § 3912 was applicable. The court awarded the contractual amount of attorneys fees agreed upon by the parties.[22]

In another case involving an equipment lease cited by the parties, *Rollins Properties, Inc. v. Chalet Susse International, Inc.,*[23] the terms of the lease provided for the recovery of reasonable attorneys' fees. The *Rollins Properties* court held that §3912 applied to debtor-creditor relationships but where the relationship of the parties is that of lessor and guarantor of a lease (of equipment), the parties relationship does not qualify as a debtor-creditor relationship as that term was intended by §3912. Accordingly, the court held that 10 *Del. C.* § 3912 was not applicable and plaintiff's recovery was not limited by that statute.[24]

The *Rollins Properties* court reasoned that 10 *Del. C.* § 3912 related to instruments creating a debtor-creditor relationship. Such relationships generally involve a loan and an agreement to repay. The equipment lease agreement presented in *Rollins Properties* was a complex agreement, containing undertakings by both parties providing for various payments

[21] *Highline Financial Services, Inc. v. Rooney,* 1996 WL 663100, *2 (Del.Super.).
[22] *Id.*
[23] *Rollins Properties, Inc. v. Chalet Susse International, Inc.,* 1986 WL 3979, *1-2 (Del. Super.).
[24] *Id.*

under certain circumstances and specifying rights of each party with respect to the other. The court held that the parties relationship did not qualify as a "debtor-creditor relationship" as that term was used in 10 *Del. C.* § 3912.[25]

The analysis of the *Rollins Properties* court would be equally applicable here. The commercial retail lease presented herein involved a complex agreement with the duties, obligations and rights of each party with respect to the other specifically delineated therein. The subject action involves a landlord/tenant commercial relationship and not a debtor/creditor relationship as that term is used in 10 *Del. C.* § 3912.

In *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc., et al.,* the Chancery Court held, and the Delaware Supreme Court affirmed, that the asset purchase agreement presented therein was not a writing that evidenced a debt. Rather, it was a contract governing the sale of a company's assets. Because the plain language of §3912 indicates that it only applies to actions that seek to collect on a debt and the case presented therein was not such an action, 10 Del. C. § 3912 was inapplicable to plaintiff's request for attorneys fees.[26]

Other cases cited by Defendants, *Beneficial Delaware, Inc. v. Waples,*[27] and *Finance America Corp. v. Belle,*[28] involved mortgage foreclosure cases. Since "mortgages" involve a debtor-creditor relationship, and is expressly enumerated as being covered by the statute, there is no question that §3912 expressly applied to those cases.

Likewise, in *J.A. Moore & Sons Construction Co. v. Inden,*[29] the plaintiff was suing on an invoice. An invoice is also specifically enumerated as being covered by §3912. The court

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[25] *Id.*
[26] *Concord Steel, Inc. v. Wilmington Steel Processing Co., Inc., et al.,* 2010 WL 571934, Del.Ch. 2010, *2, *aff'd*, 7 A.3d 486 (Del. 2010).
[27] *Beneficial Delaware, Inc. v. Waples,* 2006 WL 1880960 (Del.Super.)
[28] *Finance America Corp. v. Belle,* 1984 Del.Super. Lexus 768 (attached as Exhibit B to Millcreek's Reply Letter Memorandum)
[29] *J.A. Moore & Sons Construction Co. v. Inden,* 1999 WL 1223762, *2 (Del.Super).

held that the invoice at issue represented a debt created between the parties and obligated the recipient for payment of the debt. The court reasoned that by adding the word "invoice" to §3912, the Legislature intended the statute to cover the exact situation at hand and that the claim clearly fell within the confines of 10 *Del. C.* § 3912.[30]

The landlord/guarantor of the tenant relationship in a commercial retail lease is not a debtor-creditor relationship. The lease provisions obligating the tenant (and the guarantors of the tenant) to indemnify the landlord for reasonable attorneys' fees for breach of the tenant's obligations under the commercial retail lease is not subject to 10 *Del. C.* § 3912 because a debtor-creditor relationship does not exist. There is no underlying loan obligation at issue in this case. 10 *Del. C.* § 3912 is inapplicable to Millcreek's request for attorneys' fees.

5. Credits/Payments Made

It is undisputed that the damages award should be reduced in the total amount of $4,315.75. This amount represents the $1,875.00 security deposit (credited on October 23, 2014) and a $2,440.75 payment made on August 17, 2016.

[30] *Id.*

CONCLUSION

For the reasons set forth herein, damages are hereby awarded in favor of Millcreek and against Defendant Michael P. Levitsky and Janet Levitsky as follows:

1)	**Rent and Late Fees**	**$80,309.19**
2)	**Interest**	**$16,768.62**
3)	**Common Area Maintenance Charges**	**$7,979.01**
4)	**Counsel Fees**	**$93,590.90**
Total		**$198,647.72**
Less Credits/Payments Made		**$4,315.75**
GRAND TOTAL AWARDED		**$194,331.97**

- **plus post-judgment interest at the contract rate of 6.25%.**

IT IS SO AWARDED.

Dated: March 31, 2017

Commissioner Lynne M. Parker