IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SHOPPES OF MOUNT PLEASANT, LLC, a Delaware Limited Liability Company,	)	
Plaintiff,	)	
v.	)	
J.M.L., INC., a Delaware Corporation and LAWRENCE GILLEN, an individual	)	C.A. No.: CPU4-14-001415
Defendants.	)	

Submitted: April 14, 2015
Decided: May 11, 2015

Josiah R. Wolcott, Esquire
Connolly Gallagher, LLP
267 East Main Street
Newark, DE 19711
Attorney for Plaintiff

Leo J. Ramunno, Esquire
4159 W. Woodmill Drive, Ste. 20
Wilmington, DE 19808
Attorney for Defendants

DECISION AFTER TRIAL

This is an action for breach of contract stemming from a commercial lease agreement. On January 12, 2015, trial was held, and the Court ordered post-trial briefing. On February 2, 2015, the Court heard additional testimony from Mrs. Connie Wittig. At the conclusion of Mrs. Wittig's testimony, the briefing schedule was amended. This is the Court's decision after trial.

PROCEDURAL HISTORY

On May 29, 2014, Plaintiff Shoppes of Mount Pleasant, LLC ("Shoppes") filed a Complaint alleging that Shoppes and Defendants J.M.L., Inc. ("J.M.L.") and Lawrence Gillen, ("Gillen", collectively "Defendants") entered into a commercial lease agreement ("the lease") for the rental of units C and D of Shoppes' premises. Shoppes is located at the intersection of

Delaware Route 896 and Boyd's Corner Road.[1] Shoppes claims that Gillen signed the lease both on behalf of J.M.L., and as personal guarantor for J.M.L.'s contractual obligations under the lease. Under the agreement, Shoppes contends that Defendants were to pay monthly installments of rent, additional rent for the maintenance of common areas in the shopping center, and real estate taxes.[2] Shoppes further alleges that Defendants breached their contractual obligations by failing to make the required payments, and seeks $26,286.75 in damages, plus attorney's fees, costs, and interest.

On June 30, 2014, Defendants filed an answer denying Shoppes' allegations. Defendants claim that neither J.M.L. nor Gillen signed the lease. Defendants further maintain that Gillen is not the sole director, officer, or shareholder of J.M.L. as claimed in the amended complaint.[3]

Trial was held on January 12 and February 2, 2015.[4] The Court heard testimony from five witnesses for Shoppes, and from Gillen on behalf of Defendants. The Court received six exhibits into evidence. At the close of evidence on January 12, the Court ordered post-trial briefing, and issued a scheduling order. Shortly after the February 2 testimony was heard, the Court granted a stipulation to amend the post-trial briefing schedule.

FACTS

The testimony presented to the Court was scattered and at times inconsistent. Distilling the parties' testimony to its bare essence, the Court finds the following facts to be credible:

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[1] The exact address which is the subject of this litigation is unclear. Some exhibits list the address as 4475 Summit Bridge Road. Others list it as 4495 Summit Bridge Road.

[2] Although not expressly stated, Plaintiff's Complaint implies that Gillen signed the lease as a personal guarantor for J.M.L.'s obligations in connection with the lease.

[3] After discovery commenced, the parties filed a stipulation to amend the Complaint to reflect the new amount of damages sought to $26,286.75. Defendants did not file an amended answer.

[4] On January 11, 2015, Shoppes requested a continuance because two if its key witnesses were unavailable. The Court agreed to hold a special session for additional testimony on February 2, 2015.

Shoppes own a shopping center at the intersection of Delaware Route 896 and Boyd's Corner Road. Through Wittig, Shoppes leases space in its shopping center to commercial tenants and oversees the efficient operation of the premises.[5] Shoppes leased property to Defendants to enable their operation of a liquor store.[6] The agreement came about because in 2005, Gillen's liquor store was located in a rough area, and he was looking for an opportunity to relocate. Similarly, Wittig was having problems with the previous tenant. The lease called for Shoppes to lease 2,800 square feet of its shopping center to Defendants.

Execution of the Lease and Terms

Wittig drafted and negotiated the lease with Defendants. Also, Wittig was present at the signing of the initial lease. On February 25, 2005, Wittig, his wife Connie ("Mrs. Wittig", collectively, "the Wittigs") and Gillen met at the Wittig household to sign the lease.[7] The signing occurred at the Wittigs' kitchen table while the parties discussed the terms of the lease for several minutes.[8] Wittig and Gillen discussed the necessity of Gillen signing as personal guarantor, a condition of the lease which Gillen accepted. Wittig signed on behalf of Shoppes; Gillen signed on behalf of J.M.L., and as personal guarantor.[9] Mrs. Wittig then signed as a witness to the lease agreement.[10] Defendants provided a check for $10,994.66.[11]

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[5] Mr. Wittig is a commercial real estate developer. He owns Diamond State Property Management, LLC, which specializes in acquiring ownership in property. He oversees the operation of Shoppes, and negotiates and grants approval of leases on behalf of Shoppes. Mr. Wittig drafted the lease which is the subject of this litigation.

[6] Sandra Kubiak testified to this information. Ms. Kubiak is employed by HH Property Management, LLC as a manager of commercial real estate. She works closely with Shoppes due to close professional ties with Wittig, and is familiar with the terms of the lease.

[7] Gillen agrees that the February 25, 2005 meeting at Wittig's home occurred, but that the lease was not signed that evening. Gillen states that the lease was not signed until April 2005 at the liquor store.

[8] Wittig testified that the parties talked for nearly two hours. Mrs. Wittig only recalls the meeting lasting for twenty to thirty minutes. This discrepancy is immaterial.

[9] *See* Pl.'s Ex. 1. A review of the lease illustrates that the text "Guarantor" was typed above Gillen's name.

[10] *See* Pl.'s Ex. 1. Wittig testified that Mrs. Wittig signed as a witness to his signature, and to Gillen's signature on behalf of J.M.L.. The witness signature to the personal guarantee was left blank because the parties understood that the two-person transaction only required her signature once for each party.

The initial term was to run for a five-year period, with rent set at $3,747.33/month with a 2.5% increase annually, until the expiration of the lease.[12] Defendants took possession of the property on April 1, 2005; rent payments began on June 1, 2005.[13] The initial five-year term was set to expire on May 31, 2010. It also provided Defendants the option of two (2) five-year renewal periods upon ninety days written notice.[14] In the event that notice of renewal was not received, Shoppes could renew on its own.

According to Mrs. Wittig, Gillen signed the lease agreement during the February 25, 2005 meeting at the Wittig kitchen table because she was there, and she witnessed his signature.[15] However, her testimony differs from her husband's recollection of events. For example, she remembers that the meeting occurred around dinner time, but states that the meeting only lasted for twenty to thirty minutes. Moreover, Mrs. Wittig avers that she did not see the check covering the security deposit and two months' rent exchanged. Finally, she recalls witnessing one document, while her husband testified that there were two to three copies witnessed.

Lease Renewal

After the first five year term had expired, Defendants did not provide notice of renewal or termination as required under the lease. Rather than terminate the lease or treat Defendants as holdover tenants, Shoppes increased the monthly rent payment, and Defendants continued to

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[11] *See* Pl.'s Ex. 5. The check was dated February 23, 2005. In the 'memo' line, it states that this check is for the security deposit ($3,500.00) and two months' rent ($3,747.33 *2 = $7,494.66).

[12] The monthly rental payment represents payment for base rent, maintenance of common areas, and property taxes for the rental property.

[13] *See Plaintiff's Ex. 3.* This was memorialized in a document dated April 5, 2005 and again signed by Gillen as Guarantor.

[14] *See* Pl.'s Ex. 1. Section 30 of the lease prescribed that if the lease was renewed; all other conditions and terms under the lease were to remain the same.

[15] On February 2, 2015, the Court held a special session to hear testimony from Mrs. Wittig. Mrs. Wittig is employed by Diamond State Management, LLC. She works on several special financial projects, and has witnessed leases in the past.

pay.[16] This course of performance continued for nearly two years after the initial five-year term ended, until Gillen signed a document titled Memorandum of Lease Agreement ("Memorandum").[17] Although the document is dated June 23, 2011, it applied retroactively to June 1, 2010.[18] Also, the Memorandum was not consummated until May 24, 2012 due to communication issues between Shoppes and Gillen.[19]

Sale of J.M.L.'s Liquor Store

The agreement was executed and the business relationship ran efficiently – despite the issues with the renewal – until in 2013, when Defendants notified Wittig that they were selling the liquor store. At this point, Defendants were several months behind in rent payments. The deficiency totaled $15,933.55 as of December 31, 2012.[20] According to Wittig, during a conversation on the subject, Gillen stated "I guarantee you that you will get your money." During the month of January 2013, Gillen presented four (4) checks for $2,500.00 each, to be cashed once a week.[21] Moreover, Gillen complained that the additional rent for maintenance of the common areas was too high. Wittig stated that he credited $6,733.55 to Defendants' account balance, effectively erasing the remaining amount of the deficiency.[22]

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[16] Defendants were not treated as holdover tenants. In the event of a tenant holdover, the lease granted Shoppes three options: (1) renew the agreement of Shoppes own accord; (2) double the monthly amount of rent at the rate in effect immediately prior to the expiration of the lease; or (3) terminate the lease. *See* Pl.'s Ex. 1, ¶ 18, 30. Although there was testimony that rent increased at the end of the initial lease period, there was no testimony that rent doubled, or that the lease terminated.

[17] *See* Pl.'s Ex. 4. The Court notes that the document was signed in Gillen's personal capacity, not on behalf of J.M.L..

[18] *Id.* at ¶ 1.

[19] Ms. Kubiak testified that Shoppes had trouble getting a signature of renewal from Gillen. However, she eventually spoke with him on the phone, and he indicated that he did not have an issue with renewing the lease agreement. Moreover, she testified that Defendants' signature was more for their protection, because without it, among other options available under the lease, Shoppes could terminate the lease at anytime.

[20] *See* Pl.'s Ex. 5.

[21] *Id.*

[22] *Id.*

Next, Ralph J. Larson ("Larson") met with Gillen to discuss the rent and the ledger.[23] At first, Gillen was not responsive. Larson first learned of the above-mentioned issues with the lease when Ms. Kubiak advised him that Defendants were in arrears on the rent. Larson attempted to meet with Gillen. In January 2013, the meeting at last occurred. Larson told Gillen that Shoppes would credit him one-half of his past due balance. The two also discussed Gillen's plans to sell the liquor store. Gillen caught up on the rent carried over from 2012; however, he was still behind on rent for 2013.[24]

In the late spring of 2013, Gillen found a buyer for the liquor store. During the summer of 2013, while negotiating the sale, Gillen made personal guarantees that any outstanding deficiencies would be cured upon the sale of the liquor store. The sale was completed by August 2013. On the day of the closing, Larson reminded Gillen of Shoppes' expectancy of repayment. Gillen requested an invoice: "send me a letter stating what I owe." Larson had Hugh P. McLaughlin, a Diamond State partner in accounting, fax the invoice to Gillen.[25]

After the sale of the liquor store, Shoppes became aware of the latent details surrounding the sale. Notably, Gillen quoted the new tenant a different, lower rent price than what Shoppes intended to charge. As a result, the lease negotiation with the new tenant was prolonged; however, Shoppes began to charge rent to the new tenant in September 2013.

Damages

Regarding the past due rent, Gillen's account of events differs drastically from Shoppes' testimony. Gillen contends that he paid $12,000.00 on February 4, 2013, and that this was

[23] Larson is a partner at Diamond State Management, LLC. He met with Gillen at the urging of Wittig.
[24] *See* Pl.'s Ex. 5.
[25] *See* Pl.'s Ex. 6. McLaughlin had become involved at the end of the lease; the extent of his involvement was his drafting and subsequent faxing of the 8/29/2013 letter. The letter was drafted at the insistence of Larson, based on his conversation with Gillen on the date of closing.

supposed to close out his account.[26] He further states that in May of 2013, he decided that he had to sell the business because all of his money was tied up in the liquor store's inventory. Additionally, around this time, there was construction on Summit Bridge which he estimates cut about 40% of his profits from the liquor store.

On February 2, 2015, at the close of evidence, the Court amended the briefing schedule and took the matter under advisement.

PARTIES' CONTENTIONS

In its opening post-trial brief, Shoppes claims that Gillen personally guaranteed all of J.M.L.'s obligations until the sale of the liquor store in the fall of 2013. Shoppes argues that Gillen's signature as personal guarantor on the original lease and on the Memorandum extending the agreement, as well as his lack of objection to his status as guarantor at the time of signing support this assertion. Shoppes also maintains that Defendants do not have a defense which defeats the lease and extending memorandum's authenticity. Shoppes argues that the evidence adduced at trial supports that Gillen signed the lease in his personal capacity, and that he failed to introduce evidence to rebut Mrs. Wittig's witnessing of the signature. Finally, Shoppes argues that the lease agreement and Memorandum satisfy the statute of frauds, and that case law supports that Gillen is liable as the personal guarantor to the lease.

Conversely, Defendants in their answering brief contend that Gillen did not personally guarantee J.M.L.'s payment obligations until the liquor store was sold in August 2013. Defendants argue that the lease agreement does not describe the alleged guarantee, and reason that the lease agreement contains only two references to a guarantor to the lease: (1) the signature line, and (2) paragraph 22A, titled "Miscellaneous." Additionally, Defendants argue that the

[26] Gillen did not introduce any evidence documenting his alleged $12,000 payment. Further, Shoppes' ledger of J.M.L.'s account, accepted into evidence as Plaintiff's Ex. 5, notes four $2,500.00 payments in early January, followed by a $2,500.00 payment in early February 2013.

lease's failure to contain Gillen's social security number supports that Gillen is not a guarantor. Defendants also argue that Mrs. Wittig's testimony is not credible because she is the wife of Shoppes' owner, an employee of Diamond State, and is thus interested in the outcome of this litigation. If the Court finds that Gillen is liable as guarantor, Defendants further argue that his liability does not extend beyond the initial lease because the lease was renewed without his consent, and therefore guarantor liability is extinguished. Defendants also dispute the amount of back rent sought, arguing that Shoppes has not proven what amount of rent is owed. Defendants base this assertion on a $15,933.45 carryover balance listed on Shoppes' ledger for J.M.L..[27]

In its reply brief, Shoppes maintains that the existence of a social security number is not dispositive; rather it is a factor which must be considered in determining whether the parties intended guarantor liability to exist. Shoppes argues that additional facts, such as Gillen signing as personal guarantor on two separate occasions, Wittig's testimony that Gillen signed twice as guarantor, and the clear language in the lease document establishing guarantor liability, all demonstrate that the parties intended guarantor liability to exist. Shoppes also maintains that the Memorandum extending the lease also continued Gillen's obligation as personal guarantor beyond the expiration of the initial lease period because it applies retroactively, and Gillen signed in his personal capacity as tenant, rather than on behalf of J.M.L.. Finally, Shoppes argues that its calculation of damages should be granted because the $26,286.75 sought does not include the $15,933.45 carryover balance.

DISCUSSION

To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of the evidence that: (1) a contract existed between the parties; (2) breach by defendant of an obligation imposed by the contract, and (3) plaintiff suffered damages as a result

[27] *See* Pl.'s Ex. 5.

of that breach.[28] The parties agree that a lease – and therefore a contract – existed. The parties also agree that the lease was operative for an initial term of five years, and that it was extended for an additional five year term, albeit well beyond both the notice requirement period of the lease and in 25 *Del. C.* § 5108.[29] Where the parties disagree is (1) whether Gillen is liable as personal guarantor under the lease, (2) whether his liability as personal guarantor continues via the parties' signing of the Memorandum of Lease Agreement, and (3) Shoppes' computation of damages.

A. Provisions of the Lease Agreement and circumstances surrounding its execution establish Gillen's Liability as Guarantor

Defendants' argue that the absence of Gillen's social security number is dispositive proof that he did not intend to be held liable as guarantor. Defendants also argue that Gillen is not personally liable under the lease because he only signed on behalf of J.M.L., and the lease contains too few provisions prescribing guarantor liability. Due to these circumstances, Defendants conclude that the lease violates the statute of frauds. Defendants rely on *Falco v. Alpha Affiliates, Inc.*, in which the District Court for the District of Delaware factored in the defendant's inclusion of his social security number as indicative of his intent to be liable as personal guarantor.[30] However, *Falco* is distinguishable from the instant case. *Falco* did not place primary importance on the existence or omission of a social security number; rather, it

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[28] *Gregory v. Frazer*, 2010 WL 4262030, *1 (Del. Com. Pl. Oct. 8, 2010); *VLIW Technology, LLC v. Hewlett-Packard, Co.*, 840 A.2d 606, 612 (Del. 2003).

[29] Title 25 *Del. C.* § 5108 (a) reads in pertinent part:

> Where a rental agreement... is for 1 or more years, and 60 days or upward before the end of the term either the landlord does not give notice in writing to the tenant of landlord's intention to terminate the rental agreement, and the tenant does not give 45 days' notice to the landlord of tenant's intention to terminate the rental agreement, the term shall be month-to-month, and all other terms of the rental agreement *shall continue in full force and effect.*

(Emphasis added).

[30] 1997 WL 782011 (D. Del. Dec. 10, 1997).

analyzed the social security number's existence as a factor in determining whether the parties intended for guarantor liability to exist.[31] As stated *supra*, Gillen signed the lease three times – once on behalf of J.M.L., once as guarantor, and then once on the addendum as both tenant and guarantor.[32]

This case mirrors *Chestnut Hill Plaza Holdings Co. v Parkway Cleaners, Inc.*, in which the defendants, as here, relied on *Falco* in stating that a lack of a social security number indicates their intent not to be guarantors.[33] In *Chestnut Hill*, the Superior Court found that the defendants interpreted *Falco* too narrowly. The Court found that "as long as some guarantee language [was] written on the contract and signed by the person to be charge[d], the Statute of Frauds was satisfied for purposes of imposing guaranty liability on the defendant as an individual."[34]

Although there are admittedly few provisions of the lease agreement which address guarantor liability, they still exist. Article 22(A) of the lease contains the following provision:

> If 'Tenant' shall consist of more than one person, or if there shall be a guarantor…then the liability of all such persons, including the guarantor shall be joint and several.[35]

Moreover, additional facts demonstrate that the parties intended guarantor liability to exist. The signature section of the lease shows that Gillen signed in his personal capacity as guarantor twice; once on the actual agreement, and once on the addendum to the lease agreement. As the Court of Chancery outlined:

> The presumption in Delaware is that parties are bound by the language of the agreement they negotiated. That presumption applies with even greater force when the parties are sophisticated entities that have engaged in arms-length negotiations…a court

[31] *Id.* at 7.
[32] *See* Pl.'s Ex. 1.
[33] 2011 WL 1885256, at *4 (Del. Super. May 17, 2011).
[34] *Id.*
[35] Pl.'s Ex. 1, ¶ 22(A).

> will not disturb a bargain because, in retrospect, it appears to have been a poor one.[36]

Here, Gillen admitted that he did not read the lease, or take *any* action to attempt to protect his interests prior to signing it. Gillen, personally and on behalf of J.M.L., and having been a party to at least one prior lease, "is bound by the terms of a contract he signs, even if he has not read the agreement or is otherwise unaware of its terms."[37]

Furthermore, even of the Court were to accept Defendants' "social security number" argument, Gillen signed documents concerning the lease agreement as personal guarantor in two other places, thus illustrating his intent to be liable as personal guarantor. The Court therefore finds Gillen liable as personal guarantor under the initial term of the lease.

B. Gillen is a Continuing Guarantor under the Memorandum of Lease Agreement

Gillen next claims that the option to renew the lease was not exercised because the Memorandum of Lease Agreement, which he alleges was executed on May 24, 2012,[38] does not contain a reference to a guarantee, and accordingly was made without his consent. He further claims that any guarantee he made expired on June 1, 2010, the expiration of the initial five-year lease. "Delaware Courts adhere to the objective theory of contracts."[39] It is certainly true that "a guarantor is discharged if there is an extension or renewal [of the guarantee] without his consent."[40] "In Delaware, guaranty contracts should be governed by the basic consideration that the intent of the parties must prevail."[41] In its interpretation of a guaranty, "the Court will give

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[36] *West Willow-Bay Court, LLC v. Robino-bay Court Plaza, LLC*, 2007 WL 3317551, at *9 (Del. Ch. Nov. 2, 2007).
[37] *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 913 (Del. 1989); *see also Pellaton v. Bank of New York*, 592 A.2d 473 (Del. 1991) (enforcing contract terms despite the signing party's assertion that he did not read the document before signing).
[38] Again, Gillen did not introduce any documentary evidence to substantiate this claim.
[39] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010).
[40] *Cooling v. Springer*, Del. Super., 30 A.2d 466, 469 (1943).
[41] *Id.* at 468.

priority to the parties' intentions as reflected in the four corners of the agreement."[42] "Where that intent is reasonably clear, there is no room for construction."[43]

In the instant matter, the Court has already found Gillen liable as guarantor of J.M.L.'s obligations for the term of the initial lease based on the language in Article 22A. In regards to continuing the agreement, the lease contains the following provisions:

"30. Tenant, at its option...shall have the right to extend the term of this lease as per paragraph 2 (TERM), *all other conditions of the lease to remain the same.*"[44] As the lease indicates, if the option to renew is exercised, the lease is to continue in the same manner as it was initiated – all other terms remain in effect, including the installation of Gillen as personal guarantor. Although the Memorandum of Lease Agreement does not contain a signature line for a guarantor, it does indicate that an option to renew has been granted, and with that option, a reaffirmance of the original conditions of the lease agreement.[45]

Alternatively, Defendants argue that the failure to renew the lease at its expiration on June 1, 2010 created a holdover tenancy, which extinguished the guarantor agreement. This argument is not persuasive. Defendants' argument would be meritorious if Defendants expressly terminated the lease.[46] However, as the parties indicated, the lease continued after June 1, 2010 much in the same way that the parties have contracted in this case: in a cavalier, roundabout manner. In *Wilmington & N.R. Co. v. Delaware Valley Ry. Co. Inc.*, the Delaware Superior Court found that the guarantee provision did not extend to rental payments after the lease

[42] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 779 (Del. 2012).
[43] *Wilmington & N. R. Co. v. Delaware Valley Ry. Co., Inc.*, 1999 WL 463705, at *5 (Del. Super. Mar. 30, 1999).
[44] Pl.'s Ex. 1, ¶ 30 (emphasis added).
[45] *See* Pl.'s Ex. 4.
[46] *See Wilmington & N. R. Co.*, 1999 WL 463705, at *5.

concluded because the tenant expressly terminated the lease.[47] However, the Court recognized that the case before it was "not a case were the landlord and tenant simply neglected to renew a lease at the end of its term, a situation that may, by operation of law, extend or renew the original lease."[48]

The instant matter is the exact scenario which the Court in *Wilmington & N.R. Co.* stated that a guarantee agreement extends beyond the expiration of the lease. No express termination was communicated, and therefore, the guarantee provision, along with all other terms of the lease, continued on a month-to-month basis. The effect of the renewal memo, coupled with 25 *Del. C.* § 5108, and the Superior Court's interpretation of the requirements to be a continuing guarantor in *Wilmington & N.R. Co.* support a determination that Gillen's obligations as guarantor continued through to the renewal. As guaranty law holds, "it seems clear that the surety can precisely delineate his liability as respects additional occupancy by wording his guaranty in such manner as to assume or avoid it."[49]

In other words, two sophisticated parties with equal bargaining power have the ability to negotiate the exact terms of a guaranty agreement. As this opinion previously acknowledged, Gillen failed to take any action to protect his interests before signing the lease, and has not demonstrated that he took any action to do so with respect to the revival of the guarantee with the signing of the memorandum of extension. It is true that a holdover tenancy was created, and also true that the guarantee may have extinguished during this time. However, the memorandum of lease agreement clearly applies retroactively to June 1, 2010, the expiration of the initial lease,

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[47] *Id.*

[48] *See, e.g.*, 25 *Del.C.* § 5108 (stating that *absent* notification of intent to terminate, when the term of a lease expires, all terms of the original lease remain in full effect on a month-to-month basis).

[49] *Wilmington & N. R. Co.*, 1999 WL 463705, at *5 (quoting 10 A.L.R.3d 582, 584, recognizing that a guarantor has the bargaining power to either assume or avoid liability in contracting via negotiation).

showing a clear intent to continue the agreement in the manner in which it was consummated on February 25, 2005.

Gillen's final argument is that too many inconsistencies exist to support that Gillen ever contracted to assume liability as personal guarantor. Gillen directs the Court to inconsistencies in the testimony of the Wittigs.[50] The testimony, while inconsistent, still presents the same version of events – that there was a meeting on February 25, 2005, at which Wittig and Gillen signed the lease and addendum as Landlord, Tenant, and personal guarantor. Additionally, the fact that Mrs. Wittig's inconsistent testimony went against her husband's interest, yet still confirmed the basic operative facts surrounding the lease's signing, along with the documentary evidence in this case, leads the Court to lend more credibility to Shoppes' version of events, and in particular, to the testimony of Mrs. Wittig.[51] The Court therefore finds that liability attached to Gillen as personal guarantor during the initial term of the lease, and continued through the renewal memo until the August 2013 sale of the liquor store.

C. Damages

Prior to trial, J.M.L. agreed to stipulate to judgment in favor of Shoppes in the amount which the Court finds is owed under the lease. Shoppes seeks judgment in the amount of $26,286.75. Defendants in the answering brief argue that the damages award should be offset by $15,933.55, alleging that Shoppes have failed to breakdown how this "carry-forward" balance was established.[52] Shoppes counters that the total damages sought amount does not include the $15,933.55. Shoppes, through Larson, testified at trial to a conversation with Gillen in late 2012,

[50] Specifically, Gillen points to Wittig's testimony that three copies of the lease were signed. When Mrs. Wittig testified, she could only remember one. Likewise, Wittig testified that the parties had dinner, and then spoke at length for almost two hours. Mrs. Wittig recalled that the meeting lasted for no more than thirty minutes.

[51] By the same token, in addition to his testimony above, Gillen testified that he has never been an officer of J.M.L.. *But see* Pl.'s Op. Br., Ex. 8 (listing Gillen as Vice President of J.M.L., Inc.). The Court finds Gillen's testimony to be untrustworthy, and therefore unreliable.

[52] *See* Pl.'s Ex. 5. Ex. 5 begins with the notation: "Balance Forward: $15,933.55."

concerning his standing on rent. Larson testified that the amount owed was close to 20,000.00.[53] At that point, Gillen presented four checks totaling $10,000.00, to be cashed once per week as revenue came in.[54] In addition, Gillen stated that he was having difficulty reconciling the past-due rent. Larson agreed to credit Defendants nearly half of what was owed.[55] Thus, after Shoppes credit, there was a surplus of $800.00, which will offset the damages award.

Additionally, the parties testified that Defendants' liquor store was sold in August 2013, and that Shoppes began charging the new third-party owner rent in September 2013. Accordingly, the calculation of damages is capped to August 29, 2013.

The total charges documented up to August 29, 2013 total $52,018.35. The total payments and deductions total $30,033.55. Therefore, Defendants are jointly and severally liable for the outstanding balance of $21,984.80.

D. Attorneys' Fees

Shoppes seeks Attorneys' fees under section 14(B) of the lease, which reads that Defendants "shall reimburse [Shoppes] for all reasonable legal fees incurred by [Shoppes] in enforcing any provisions of the lease."[56] Defendants argue that attorneys' fees are not awardable based on the expiration of the lease. The same rationale applied by the Court in finding that Gillen's status as guarantor applies to an award of reasonable attorneys' fees. Accordingly, Shoppes is ordered to submit proof of reasonable attorneys' fees within thirty days of transmission of this opinion.

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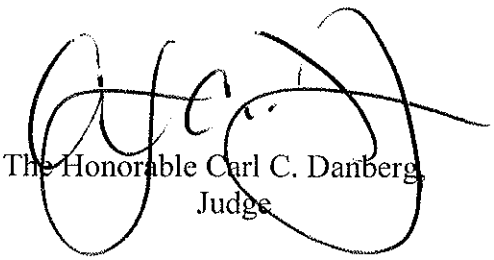
[53] The amount owed was the $15,933.55.
[54] Plaintiff's Ex. 5 reflects four checks for $2,500.00 cashed on a weekly basis throughout the month of January 2013.
[55] Plaintiff's Ex. 5 shows that a $6,733.55 credit was issued on February 1, 2013.
[56] Pl.'s Ex. 1, ¶ 14(B).

ORDER

For the foregoing reasons, the Court finds in favor of Shoppes of Mount Pleasant, LLC and against Defendants J.M.L., Inc. and Lawrence Gillen, jointly and severally in the amount of $21,984.80, plus post-judgment interest at the rate of 6% per year until paid in full.

IT IS FURTHER ORDERED that within thirty days of this opinion, Plaintiff's counsel shall submit an affidavit in support of his request for attorneys' fees.

IT IS SO ORDERED this 11th day of May, 2015.



The Honorable Carl C. Danberg
Judge

cc: Tamu White, Civil Case Management Supervisor