# IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

SILVER LAKE OFFICE PLAZA, LLC	)
and CD REALTY ENTERPRISE DRIVE	
ASSOCIATES, LLC,	)
Plaintiffs/Counterclaim Defendants,	) ) C.A. No. N13C-03-208-RRC
V.	)
LANARD & AXILBUND, INC. d/b/a COLLIERS L&A,	) ) )
Defendant/Counterclaimant/ Third-Party Plaintiff,	) )
V.	) )
CD REALTY ADVISORS, INC.	)
Third-Party Defendant.	) )

Submitted: October 18, 2013 Decided: January 17, 2014

Upon Defendant Lanard & Axilbund, Inc. d/b/a Colliers L&A's "Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*."

### **DENIED AS MOOT.**

Upon Defendant Lanard & Axilbund, Inc. d/b/a Colliers L&A's "Alternative Motion for Judgment on the Pleadings."

#### GRANTED.

Upon Plaintiffs Silver Lake Office Plaza, LLC and CD Realty Enterprise Drive Associates, LLC's Motion for Judgment on the Pleadings.

### DENIED.

Upon Third-Party Defendant CD Realty Advisors, Inc.'s Motion to Dismiss Third-Party Complaint. **DENIED.** 

### **MEMORANDUM OPINION**

Joseph B. Cicero, Esquire and Stephanie S. Habelow, Esquire, Cousins Chipman & Brown, LLP, Wilmington, Delaware, Attorneys for Plaintiffs/Counterclaim Defendants and Third-Party Defendant.

Christopher P. Simon, Esquire and Tara M. DiRocco, Esquire, Cross & Simon, LLC, Wilmington, Delaware; Jonathan J. Bart, Esquire, Wilentz Goldman & Spitzer, P.A., Philadelphia, Pennsylvania, Attorneys for Defendant/Counterclaimant/Third-Party Plaintiff.

COOCH, R. J.

## I. <u>INTRODUCTION</u>

This declaratory judgment action, and counterclaim also seeking a declaratory judgment, stems from a claim raised over two now-terminated Exclusive Agency Agreements (the "Agreements"). Lanard & Axilbund, Inc. d/b/a Colliers L&A ("Defendant") claims that it is entitled to continued commissions from these Agreements despite their termination. There are two issues before the Court. The first is whether, due to previous litigation in Pennsylvania, this claim should be dismissed under the doctrine of *forum non conveniens*. The second issue is whether, based on the stipulated facts set forth below, judgment on the pleadings should be granted to Silver Lake Office Plaza, LLC and CD Realty Enterprise Drive Associates, LLC ("Plaintiffs") or to Defendant as a matter of law, given the provisions of the Agreements which all parties agree is unambiguous.

For the reasons set forth below, Defendant's Motion to Dismiss Under the Doctrine of *Forum Non Conveniens* is **DENIED AS MOOT.** Defendant's Alternative Motion for Judgment on the Pleadings is **GRANTED** and Plaintiffs' Motion for

Judgment on the Pleadings is **DENIED.** Third-Party Defendant CD Realty Advisors, Inc.'s ("Third-Party Defendant's") Motion to Dismiss Third-Party Complaint is **DENIED.** 

# II. STIPULATED PROCEDURAL HISTORY AND FACTUAL BACKGROUND

All parties in this case agreed to a stipulation of the procedural history and factual background that was submitted to the Court. That stipulation appears *in toto* below:

- 1. Silver Lake is a limited liability company organized under the laws of the State of Delaware. Silver Lake owns and operates the buildings located at the Silver Lake Office Plaza in Dover, Delaware.
- 2. Enterprise is a limited liability company organized under the laws of the State of Delaware. Enterprise owns and operates the buildings located at 100 Enterprise Drive, Enterprise Business Park, Kent County, Dover, Delaware.
- 3. CD Realty is a New Jersey corporation with offices in New Jersey and Philadelphia specializing in real estate investment and property management.
- 4. Colliers is a Pennsylvania corporation, with offices in Philadelphia and Wilmington. Colliers is a full-service commercial real estate firm serving primarily Eastern Pennsylvania, Southern New Jersey and Delaware. Colliers' registered agent for service of process in Delaware is The Corporation Trust Company located at 1209 Orange Street, Wilmington, Delaware 19801.
- 5. On April 26, 2005, Enterprise entered into an Exclusive Agency Agreement with Colliers (the "Enterprise Agreement") retaining Colliers as Enterprise's agent with the exclusive right to market for leasing the various buildings owned by Enterprise for a period of twelve months, unless renewed in writing. Don Berg, President of CD Realty, signed the Enterprise Agreement as an authorized signatory of the manager of Enterprise. Mr. Berg also signed the Silver Lake Agreement, below.
- 6. On the same day, April 26, 2005, Silver Lake entered into an Exclusive Agency Agreement with Colliers (the "Silver Lake Agreement"), retaining Colliers as Silver Lake's agent with the exclusive right to market for leasing the various buildings owned by Silver Lake for a period of twelve months, unless renewed in writing. The Silver Lake Agreement and the Enterprise Agreement contain virtually identical terms and collectively are referred to herein as the "Agreements." They are attached to the Complaint as Exhibits "A" and "B."
- 7. The Agreements contain twelve-month terms that commenced on April 26, 2005 and ended on April 26, 2006. Unless the terms of the Agreements expressly

were extended in writing, they terminated upon the expiration of the original twelve-month term. The terms of the Agreements were not extended and therefore the Agreements terminated on April 26, 2006.

8. Pursuant to the terms of the Agreements, Plaintiffs agreed to pay Colliers certain brokerage commissions as set forth in Paragraph 3:

Upon the happening of an event of lease specified in Paragraph 3, whether by or through AGENT, OWNER, any other agent, broker, other person or entity, either during the term of this Agreement, or after the termination of this Agreement under the circumstances provided for in Paragraph 4, OWNER agrees to pay AGENT a commission as set forth below. For reference as to terminology, a 6-5-4-3 commission shall mean a commission equal to SIX PERCENT (6%) of the minimum rental for the first year of the term, plus FIVE PERCENT (5%) of the minimum rental for the second year of the term, plus FOUR PERCENT (4%) of the minimum rental for the third year of the term, and THREE PERCENT (3%) of the minimum rental for the balance of the term. A 3-2.5-2-1.5 commission shall mean as set forth above with only changes in the specified percentages. A "2.5%" commission shall mean TWO PERCENT (2%) of the minimum rent for the term. All commissions shall be paid in advance at the time of the lease execution and the commencement of all renewal periods, extension periods (by option or otherwise), and space expansion periods.

9. The Agreements also provided for a four-month tail period (the "Tail Period") during which Colliers was entitled to receive certain commissions. Specifically, Paragraph 4 of the Agreements provides:

Notwithstanding that this Agreement shall have been terminated, OWNER [Silver Lake or CD Realty, as applicable] agrees to pay [Colliers] the commission provided for in Paragraph 3 if within FOUR (4) MONTHS, or such later date as negotiations continue after such termination, the Premises or any portion thereof shall be leased by [Colliers], OWNER, or by any other agent or broker, or any other person or entity whatsoever, to any party whether individually or in combination with another or other, to whom the Premises had been offered during the term of this Agreement or to any person, firm, or corporation in whom or with whom such party had or has an interest, relationship or connection.

10. On September 21, 2007, Colliers initiated an action in the Philadelphia Court of Common Pleas (the "Philadelphia Court") against the CD Realty Parties for breach of contract. Colliers alleged that the CD Realty Parties breached the Agreements by failing to pay certain brokerage commissions due to Colliers pursuant to the Agreements.<sup>1</sup>

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<sup>&</sup>lt;sup>1</sup> For the purposes of this opinion, the litigation in Philadelphia between the parties will be referred to as the "Philadelphia Action."

- 11. On October 27, 2009, after a two-day bench trial, the Philadelphia Court issued an Opinion and Order (the "Opinion") awarding Colliers brokerage commissions on eight leases that it brokered that were executed during the term and/or tail period of the Agreements, and denying Colliers brokerage commission on five leases Colliers claimed to have brokered. A copy of the Court's Opinion and Order is attached to Colliers' Answer and Counterclaim as Exhibit "A." The Court entered a judgment in favor of Colliers of \$421,933.12, and against Silver Lake, Enterprise and CD Realty, which included interest and fees.
- 12. The Philadelphia Court did not determine whether Colliers was owed brokerage commissions for subsequent renewals, extensions or expansion of the eight leases to which the Philadelphia Court had held that Colliers was entitled to a commission during the one-year term or four-month tail period of the Agreements.
- 13. Plaintiffs subsequently satisfied the judgment and paid commissions to Colliers on the eight leases identified in the Philadelphia Court's Opinion and Order. None of these leases were subsequently renewed during the one-year term or the Tail Period of the Agreements.
- 14. Plaintiffs allege that on August 4, 2010, the State of Delaware, Office of Management and Budget, acting on behalf of the Delaware Criminal Justice System ("DCJIS"), renewed its lease with Silver Lake for certain office space located in the Robbins Building, 802 Silver Lake Boulevard, Suite 101, Dover, Delaware. The lease between DCJIS and Silver Lake began on October 1, 2000 and was renewed and amended in 2005. As part of the judgment, the Philadelphia Court ordered Silver Lake to pay Colliers a brokerage commission for the 2005 amendment to this Lease. The DCJIS lease was renewed again in August of 2010 to begin on October 1, 2010 and is now scheduled to terminate on September 30, 2015.
- 15. On March 19, 2013, Plaintiffs commenced this action seeking a declaratory judgment pursuant to Delaware's Declaratory Judgment Statute, 10 *Del. C.* § 6501, *et seq.*, that Colliers is not entitled to any brokerage commissions on renewals of leases between Plaintiffs and their tenants for which Colliers was determined to be owed commissions pursuant to the Pennsylvania judgment, where such renewals occurred after the termination of the Agreements or the expiration of the Tail Period.
- 16. On June 14, 2013, Colliers answered the Complaint and asserted counterclaims for breach of contract and declaratory judgment against Plaintiffs, claiming that Colliers is entitled to brokerage commissions and attorneys' fees, interest and such other and further relief as the Court may deem just and proper, for any renewal, extension or expansion of any of the eight leases on which the Philadelphia Court had awarded brokerage commissions.
- 17. Also on June 14, 2013, Colliers filed a motion to dismiss under the doctrine of *forum non conveniens* and a motion for judgment on the pleadings, as well as a third-party complaint. The third-party complaint asserts claims for breach of contract and declaratory judgment against CD Realty.

- 18. On July 2, 2013, Plaintiffs filed a motion for judgment on the pleadings. On July 15, 2013 Plaintiffs moved to dismiss the third-party complaint against Advisors.
- 19. After the parties had an opportunity to respond to the pending motions, this Court heard argument on the parties' respective motions on August 28, 2013.<sup>2</sup>

# III. THE PARTIES' CONTENTIONS

# A. Defendant's Contentions<sup>3</sup>

a. Defendant's Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*.

Defendant argues that this claim must be dismissed under the doctrine of *forum* non conveniens because a similar claim arising "out of the same operative nucleus of facts" was previously litigated in the Philadelphia Action. Defendant contends this claim "is a blatant attempt to 'forum shop' and attempt a collateral attack of a binding prior judgment." Defendant also contends that *forum non conveniens* should be applied even though the Philadelphia Action is closed and was resolved more than three years before this action was filed.

<sup>&</sup>lt;sup>2</sup>Stipulation of Procedural History and Factual Background (C.A. No. N13C-03-208-RRC Docket Item ("D.I.") 32).

<sup>&</sup>lt;sup>3</sup> Although the Philadelphia Action was decided under Pennsylvania law, all briefs in this case cited only Delaware law and all parties have agreed that Delaware law applies. The parties agree that there is no substantive difference between Pennsylvania and Delaware law on this issue and that Delaware law should control the outcome of these motions.

<sup>&</sup>lt;sup>4</sup> Def.'s Mot. to Dismiss Under the Doctrine of Forum Non Conveniens at 2.

<sup>&</sup>lt;sup>5</sup> Id at 3

<sup>&</sup>lt;sup>6</sup> Defendant relies on *Lisa, S.A. v. Mayorga*, 993 A.2d 1042 (Del. 2010), which applied the doctrine of *forum non conveniens* (citing *McWane Cast Iron Pipe Corp. v. McDowell-Wellman Engr. Co.*, 263 A.2d 281 (Del. 1970)) despite the fact that the original Florida motions had been resolved.

### b. Cross-Motions for Judgment on the Pleadings.

Defendant also argues that, absent a dismissal under the doctrine of *forum* non conveniens, it should be granted judgment on the pleadings. Defendant contends that it is entitled to continued commissions on leases negotiated in the 2005 Agreements based on the "clear and unambiguous" language of the contract. The critical language in question reads, "All commissions shall be paid in advance at the time of the lease execution and the commencement of all renewal periods, extension periods (by option or otherwise), and space expansion periods." Defendant argues this language entitles them to commissions "for all leases for which [Defendant] is entitled ... not only at the time of the lease execution, but also at the commencement of all renewal periods, extension periods (by option or otherwise) and space expansion periods," including after termination. 10

Defendant places particular importance on the conjunction "and" in the contract language, arguing that under principles of construction the Court cannot ignore the "conjunctive requirement." Defendant argues that under Plaintiffs' reading of the contract, Defendant would only be entitled to renewal commissions within the "16 month initial term" of the leases. Defendant asserts that this renders "the conjunctive requirement … entirely meaningless as none of those

<sup>&</sup>lt;sup>7</sup> Def.'s Alt. Mot. for Judm. on Pleadings at 1.

<sup>&</sup>lt;sup>8</sup> *Id.* at 4.

<sup>&</sup>lt;sup>9</sup> *Id.* at 2 (emphasis added).

<sup>&</sup>lt;sup>10</sup> *Id.* at 3. In addition, as part of judgment on Defendant's Motion it also asks for attorneys fees and costs pursuant to the Paragraph 11 of the Agreements. *Id.* at 4. Plaintiffs' motions fail to address this request so the Court deems it unopposed

<sup>11</sup> Reply Memo, in Further Support of Def.'s Alt. Mot. for Judm. on Pleadings at 1-2.

<sup>&</sup>lt;sup>12</sup> *Id.* at 2.

events can or will occur within the initial one year term of the Agreements."<sup>13</sup>

Defendant contends that Plaintiffs' reading of the contract is "wholly unreasonable."<sup>14</sup> Defendant also points to the Philadelphia Action, which awarded commissions on eight leases, as supporting its contentions in this claim. <sup>15</sup>

Subsequent to Defendant's Motion for Judgment on the Pleadings, the Plaintiffs filed their own Motion for Judgment on the Pleadings. In Defendant's opposition to Plaintiffs' Motion for Judgment on the Pleadings, Defendant cites a similar argument for its own motion: namely that contract interpretation requires the Court to recognize the conjunctive nature of the provision. Defendant also reiterates what it argues is the implausibility that "additional renewals, extensions, or seeking additional space" would happen before the expiration of the original lease term or tail period. Defendant maintains that "[t]he provision ... has no meaning unless it pertains to *subsequent* renewals, not renewals within 16 months of the commencement of the Agreements."

# c. Third-Party Defendant CD Realty Advisors, Inc.'s Motion to Dismiss Third-Party Complaint.

Defendant opposes Third-Party Defendant's Motion to Dismiss for failure to state a claim on the basis that, as a "legal alter ego of Silver Lake and Enterprise,"

<sup>&</sup>lt;sup>13</sup> *Id*.

<sup>&</sup>lt;sup>14</sup> *Id.* at 3.

<sup>&</sup>lt;sup>15</sup> Def.'s Alt. Mot. at 3.

<sup>&</sup>lt;sup>16</sup> Def.'s Response in Opposition to Pls.' Cross Mot. for Judm. on the Pleadings at 2.

<sup>&</sup>lt;sup>17</sup> *Id*. at 3.

<sup>&</sup>lt;sup>18</sup> *Id.* at 4.

they are "bound by any judgment against [them]." Defendant contends that under its interpretation of the Agreements (that it continues to be entitled to commissions on the leases), the Third-Party Defendant's Motion to Dismiss fails and must be "denied [in] its entirety." The issues raised by the cross-motions for judgment on the pleadings are also raised in this motion.

### **B. Plaintiffs' Contentions**

# a. Defendant's Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*.

Plaintiffs assert that the doctrine of *forum non conveniens* does not apply in the present case as this issue was neither resolved nor ripe for adjudication during the Philadelphia Action.<sup>21</sup> They also argue that the *forum non conveniens* cases cited by defendant only apply the doctrine when there is a "prior pending action." Plaintiffs argue the case law Defendant relies upon is distinguishable and does not apply to the issue at bar.<sup>23</sup>

# b. Cross-Motions for Judgment on the Pleadings.

Plaintiffs oppose Defendant's Motion for Judgment on the Pleadings and take the position that the contract only allows for commissions during the initial

<sup>&</sup>lt;sup>19</sup> Response of Def./Counterclaim Pl./Third Party Pl. to Third-Party Def.'s Mot. to Dismiss Third-Party Compl. at 1.

Pls.' Opposition to Def.'s Mot. to Dismiss under the Doctrine of *Forum Non Conveniens* at 1-2.

<sup>&</sup>lt;sup>22</sup> *Id.* at 2.

<sup>&</sup>lt;sup>23</sup> *Id*.

contract period and the four-month tail period after the termination of the lease.<sup>24</sup> Plaintiffs assert that Defendant's reading of the contract is "flawed and illogical."<sup>25</sup>

Plaintiffs argue their Motion for Judgment on the Pleadings should be granted in lieu of the Defendant's Motion because their interpretation of the Agreements is the "only...reasonable" one and the Court should not require them to pay commissions based on agreements that "terminated over six years ago." Plaintiffs contend that Defendant's interpretation of the Agreements would require them "to pay commissions renewals of the subject leases in perpetuity." Plaintiffs argue that the Court should not "permit[] the continuation of the Agreements indefinitely."

Plaintiffs point to the holding in the Philadelphia Action, which held that

Defendant was entitled to commissions on eight leases (or renewals) "but all of
which ('renewals' or not) were executed during the term of the Agreements ... or
during the tail period," as supporting their interpretation of the contested
provision.<sup>29</sup> Plaintiffs also contend "[w]hether it may have been unlikely that

Defendant would broker a renewal during the term or tail period does not entitle

Defendant to commissions on renewals executed many years after the expiration of
the Agreements."<sup>30</sup>

<sup>&</sup>lt;sup>24</sup> Pls.' Opposition to Def.'s Mot. for Judm. on the Pleadings at 2.

 $<sup>^{25}</sup>$  Id.

<sup>&</sup>lt;sup>26</sup> Pls.' Mot for Judm. on the Pleadings at 3.

<sup>27</sup> Id at 4

<sup>&</sup>lt;sup>28</sup> Pls.' Reply in Support of Mot. for Judm. on the Pleadings at 2.

<sup>&</sup>lt;sup>29</sup> Pls.' Mot for Judm. on the Pleadings at 2.

<sup>&</sup>lt;sup>30</sup> Pls.' Reply Mot. for Judm. on the Pleadings at 2.

Plaintiffs counter Defendant's arguments concerning contract construction by arguing the contract needs to be construed as a whole, without focus on a single conjunction.<sup>31</sup> Plaintiffs argue the provision at issue "simply sets forth **when** a commission is payable, not **how** one is earned."<sup>32</sup>

# C. Third-Party Defendant's Contentions

Third-Party Defendant, allied in interest with the Plaintiffs, moves to dismiss the third-party complaint for failure to state a claim.<sup>33</sup> Third-Party Defendant adopts the arguments of the Plaintiffs in their Motion for Judgment on the Pleadings and argue that under Plaintiffs' interpretation of the Agreements there is no claim against it.<sup>34</sup> Third-Party Defendant contends that under its interpretation of the Agreements (that they have since terminated and no further commissions are owed), there is no contractual obligation to form the basis of the third-party claim and therefore it should be dismissed.<sup>35</sup>

# IV. STANDARD OF REVIEW

# A. The Cross-Motions for Judgment on the Pleadings.

"After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." "On such a motion, the Court must accept all the complaint's well-pled facts as true and

<sup>32</sup> *Id.* at 2 (emphasis in original).

<sup>&</sup>lt;sup>31</sup> *Id.* at 1.

<sup>&</sup>lt;sup>33</sup> Super. Ct. Civ. R. 12(b)(6).

Third Party Def.'s Mot to Dismiss Third Party Compl. at 2-3.

<sup>&</sup>lt;sup>35</sup> *Id.* at 3.

<sup>&</sup>lt;sup>36</sup> Del. Super. Ct. Crim. R. 12(c).

construe all reasonable inferences in favor of the non-moving party."<sup>37</sup> "The standard for a motion for judgment on the pleadings is 'almost identical' to the standard for a motion to dismiss." The motion will be granted when no material issues of fact exist, and the moving party is entitled to judgment as a matter of law.",39

Cross-motions for judgment on the pleadings function in a similar manner to cross-motions for summary judgment. "Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.",40

# **B.** The Motion to Dismiss Third-Party Complaint

Under Superior Court Civil Rule 12(b)(6), a motion may be dismissed for failure to state a claim. 41 When deciding a motion to dismiss pursuant to Delaware Superior Court Rule of Civil Procedure 12(b)(6), "[t]he complaint generally defines the universe of facts that the trial court may consider..." All well-pled allegations must be accepted as true. 43 A plaintiff's complaint may only be dismissed if "it appears to a certainty that the plaintiff could not recover under

<sup>&</sup>lt;sup>37</sup> Blanco v. AMVAC Chem. Corp., 2012 WL 3194412, at \*6 (Del. Super. Aug. 8, 2012).

<sup>&</sup>lt;sup>39</sup> Velocity Exp., Inc. v. Office Depot, Inc., 2009 WL 406807, at \*3 (Del. Super. Feb. 4, 2009). <sup>40</sup> Del. Super. Ct. Crim. R. 56(h).

<sup>&</sup>lt;sup>41</sup> Del. Super. Ct. Crim. R. 12(b)(6).

<sup>&</sup>lt;sup>42</sup> In re Gen. Motors Shareholder Litigation, 897 A.2d 162, 168 (Del.2006). <sup>43</sup> Spence v. Funk, 396 A.2d 967, 968 (Del.1978).

any reasonably conceivable set of circumstances susceptible of proof."<sup>44</sup> "Furthermore, dismissal will be appropriate 'if allegations in the complaint or in the exhibits incorporated into the complaint effectively negate the claim as a matter of law.",45

#### **DISCUSSION** V.

### A. The Cross-Motions for Judgment on the Pleadings.

These cross-motions, where both of the parties stipulate to the facts of the claim and are solely concerned with interpretation of a conjunction, is akin to the scenario addressed in Rule 56(h). This Court (with the parties' agreement) "deems the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions," namely, the stipulation of procedural history and factual background submitted by the parties.

The court in the Philadelphia Action did not address the issue of future commissions and interpretation of the disputed contract provision. This issue is now ripe, before this Court, six years later, for decision on the merits. Both parties in this case claim that the language of the Agreements is unambiguous, yet have opposing interpretations of the critical provision:

> All commissions shall be paid in advance at the time of the lease execution and the commencement of all renewal periods, extension periods (by option or otherwise), and space expansion periods (emphasis added).

<sup>&</sup>lt;sup>44</sup> Klein v. Sunbeam Corp., 47 Del. 536, 537 (Del.1952).

<sup>&</sup>lt;sup>45</sup> Nieves v. All Star Title, Inc., 2010 WL 4227057, at \*4 (Del. Super. Oct. 22, 2010), aff'd, 21 A.3d 597 (Del. 2011) (quoting Malplede v. Towson, 780 A.2d 1075, 1083 (Del. 2001).

Plaintiffs contend that "[i]n essence, Defendant argues it should be compensated for any renewal of any lease it brokered during the term or tail period of the Agreements, regardless of whether the renewal occurs." This is exactly the Defendant's position which the Court agrees is supported by the plain language of the Agreements.

"When the contract is clear and unambiguous, [this Court] will give effect to the plain-meaning of the contract's terms and provisions." [A] court must construe the agreement as a whole, giving effect to all provisions therein." However, "[u]nder general principles of contract law, a contract should be interpreted in such a way as to not render any of its provisions illusory or meaningless." This court will not ignore a contract's language and choice of punctuation when doing so would essentially constitute 'add[ing] a limitation not found in the plain language of the contract."

The parties in this case are essentially in dispute over the meaning of the word "and" in the pertinent provision. This Court holds that since the parties used the word "and" when discussing "the commencement of all renewal periods, extension periods (by option or otherwise), and space expansion periods" that they

<sup>&</sup>lt;sup>46</sup> Pls.' Reply Mot. for Judm. on the Pleadings at 2.

<sup>&</sup>lt;sup>47</sup> Osborn ex rel. Osborn v. Kemp, 991 A.2d 1153, 1159-60 (Del. 2010). See also GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P., 36 A.3d 776, 780 (Del. 2012) ("The Court will interpret clear and unambiguous terms according to their ordinary meaning").

<sup>&</sup>lt;sup>48</sup> E.I. du Pont de Nemours & Co., Inc. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985).

<sup>&</sup>lt;sup>49</sup> Sonitrol Holding Co. v. Marceau Investissements, 607 A.2d 1177, 1183 (Del. 1992).

<sup>&</sup>lt;sup>50</sup> Rag Am. Coal Co. v. AEI Res., Inc., 1999 WL 1261376, at \*5 (Del. Ch. Dec. 7, 1999) (quoting Emmons v. Hartford Underwriters Ins. Co, 697 A.2d 742, 746) ("Contract interpretation that adds a limitation not found in the plain language of the contract is untenable")).

suggests. This Court also points to the importance of the word "all" in the provision. The Agreements do not outline a limitation on which renewals, extensions, and expansions are included. Their use of "and" and "all" indicates that it includes ones that could occur at any time outside of the initial contract and beyond the tail period. <sup>51</sup>

Plaintiffs' claim that the provision addresses the "when" but not the "how" of the argument are not persuasive. There is no temporal limitation discussed in the Agreements, but provisions that lay out the parameters of the initial Agreement term and tail period.

While it is true, as Plaintiffs and Third-Party Defendant argue, that Delaware disfavors contracts with indefinite duration,<sup>52</sup> the Agreements are not indefinite nor is their possible long life automatically fatal.<sup>53</sup> The obligations created by the Agreements will end when Plaintiffs cease to renew them. It appears unreasonable to the Court that the Defendant would be entitled only to renewals, extensions, and expansions during the sixteen months of the Agreements and tail period. Renewal or extensions would likely be addressed, at the very earliest, during the tail period. Other provisions also detail calculation of commissions for years into the future. This Court will not ignore the "and" in the

<sup>&</sup>lt;sup>51</sup> Commissions arising from those leases that have been renewed and are subject to this Court's opinion will be determined in separate, later proceedings in this case.

<sup>&</sup>lt;sup>52</sup> Guyer v. Haveg Corp., 205 A.2d 176, 182 (Del. Super. Nov. 30, 1964), aff'd, 211 A.2d 910 (Del. 1965) (singling out oral contracts specifically).

<sup>&</sup>lt;sup>53</sup> Wilmington Parking Auth. v. Ranken, 105 A.2d 614, 634 (1954) ("Municipal contracts of perpetual duration are not necessarily invalid...").

provision and create a limitation on Defendant's ability to collect its commission when it is not "in the plain language of the contract."

# **B.** The Motion to Dismiss Third-Party Complaint

The Court has found that the Agreements entitle Defendant to continued commissions, and so also finds a contractual obligation does exist between the Third-Party Defendant and the Defendant. Third-Party Defendant's Motion to Dismiss fails.

# VI. CONCLUSION

For the reasons stated above, Defendant's Motion to Dismiss Under the Doctrine of *Forum Non Conveniens* is **DENIED AS MOOT.**<sup>54</sup> Defendant's Alternative Motion for Judgment on the Pleadings is **GRANTED** and Plaintiffs' Motion for Judgment on the Pleadings is **DENIED.** Third-Party Defendant CD Realty Advisors, Inc.'s ("Third-Party Defendant's") Motion to Dismiss Third-Party Complaint is **DENIED.** 

IT IS SO ORDERED.

Richard R. Cooch, R.J.

oc: Prothonotary

<sup>&</sup>lt;sup>54</sup> Due to the fact the Court has **GRANTED** Defendant's Alternative Motion for Judgment on the Pleadings, the Court need not reach the merits of the Motion to Dismiss Under the Doctrine of *Forum Non Conveniens*. That Motion is thus **DENIED AS MOOT**.