IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

SEAFORD VILLAGE, LLC	)	
	)	
Plaintiff	)	C.A. No. N13C-06-283 CLS
	)	
	)	
v.	)	
	)	
DELAWARE EYE SURGEONS, P.A.	)	
S. GREGORY SMITH, M.D.	)	
	)	
	)	
Defendants.	)	

Date Submitted: February 3, 2014
Date Decided: February 24, 2014

On Seaford Village, LLC's Motion for Summary Judgment. **DENIED.**

ORDER

Patrick Scanlon, Esq., Law Offices of Patrick Scanlon, P.A., Milford, Delaware 19963. Attorney for Plaintiff.

Michael P. Morton, Esq., Michael P. Morton, P.A.,Wilmington, Delaware 19801.

Scott, J.

Introduction

Before the Court is Plaintiff Seaford Village, LLC's ("Seaford") motion for summary judgment in this action against Delaware Eye Surgeons, P.A. ("DES") and S. Gregory Smith, M.D. ("Dr. Smith") (collectively, "Defendants") to recover amounts owed pursuant to a lease. Defendants have a counterclaim against Seaford in which they assert that Seaford's own material breach bars or reduces any right to recovery. The Court has reviewed the parties' submissions. For the following reasons, Seaford's Motion for Summary Judgment is **DENIED**.

Background[1]

On December 18, 1990, DES entered into a lease (the "Lease") with Seaford[2] to rent commercial property located at 23010 Sussex Highway, Unit 129 in Seaford, Delaware (the "Property").[3] The lease, which was personally guaranteed by Dr. Smith, was for a term of five years at a fixed annual rent of $30,000. The Lease contained the following holdover provision:

> Surrender of Premises and Holding Over: At the expiration of the tenancy created hereby, Tenant shall surrender the Leased Premises in the same condition as when delivered to Tenant…Tenant's obligation to observe or perform this covenant shall survive the expiration or

[1] These facts are presented in a light most favorable to the non-moving party. *See Burris v. Penn Mart Supermarkets, Inc.*, 2006 WL 2329373, at *1 (Del. Super. July 13, 2006).
[2] The Lease was initially with W&G Seaford Associates, but was eventually assigned to Seaford Village, LLC. Pl. Ex. A.
[3] Pl. Mot., Ex. A., Lease.

> other termination of this Lease**. If Tenant shall default in surrendering the Premises hereunder, Tenant's occupancy subsequent to such expiration whether or not with the consent or acquiescence of Landlord, shall be deemed a tenancy at will**, and in no event a tenancy from month to month, year to year, and it shall be subject to all the terms, covenants, and conditions of this Lease applicable thereto, and no extension or renewal of this lease shall be deemed to occur by such holding over. **Tenant will pay as liquidated damages double rent for the entire holdover period, and will pay all attorneys' fees and expenses incurred by Landlord in enforcing its rights hereunder.** No holding over by Tenant after the terms of this Lease shall operate to extend this Lease for a longer period that (sic) one month; and holding over with the consent of Landlord in writing shall thereafter constitute this contract a Lease from month to month…[4]

The lease also contained a non-waiver provision which provided that the failure of the parties

> to insist upon a strict performance of any of the terms, conditions and covenants herein shall not be deemed to be a waiver of any rights or remedies that such party may have and shall not be deemed a waiver of any subsequent breach of default in the terms, conditions and covenants herein contained except as may be expressly waived in writing…[5]

In addition, the Lease set forth the parties' respective obligations for repair, including provisions addressing air conditioning. For example, Paragraph 20 provided that the "Tenant shall keep all interior portions of the building of the leased premises in good condition and state of repair such as (but not limited to) all

[4] Pl. Mot., Ex. A., Lease, at ¶ 50 (emphasis added).
[5] Lease, at ¶ 37.

non-structural plumbing, plumbing fixtures, lighting, wiring, store signs, heating, ventilating, air conditioning, all glass and plate glass and exterior doors and hardware, electric installations and floor surfaces…"[6]

In 1996, after the primary lease term, the parties executed an amendment to the lease to renew the term for three years at the same rate of annual rent.[7] In 1999, the parties again renewed the Lease for three years, but DES was given the option to extend the Lease for an additional three years at an annual rate of $33,000.[8] On January 1, 2002, the parties executed a third amendment, extending the Lease to April 30, 2005 at the annual rate of $33,000 and providing DES with two options for renewal.[9] The first option was exercised in the parties' fourth amendment to the Lease, which extended the term from May 1, 2005 to April 30, 2008 at an annual rate of $36,000 ($3,000 per month).[10] The second option was restated as an option in the parties' fourth amendment, which allowed DES to extend the term from May 1, 2008 until April 30, 2011 at an annual rate of $39,000 ($3,250 per month).[11] No other amendments to the Lease have been submitted to the Court.

---

[6] Lease, at ¶ 20.
[7] Pl. Mot., Ex. A., "FIRST AMENDMENT TO LEASE."
[8] Pl. Mot., Ex., A, "SECOND AMENDMENT TO LEASE."
[9] Pl. Mot., Ex. A, "THIRD AMENDMENT TO LEASE."
[10] Pl. Mot., Ex. A, "FOURTH AMENDMENT TO LEASE."
[11] *Id.*

After April 30, 2011, DES remained in possession of the Property and continued to pay rent, which was accepted by Seaford.[12] Neither DES nor Dr. Smith received notice that its rental payments were in any way deficient.[13] About two months later, Seaford provided Dr. Smith with a form letter informing him that he could pay double rent or agree to a new amendment attached to the letter.[14] After Dr. Smith considered the terms of the new amendment, Dr. Smith's staff informed Seaford that Dr. Smith had certain concerns that he wanted to resolve.[15] In the following ten months, Dr. Smith and his staff engaged in ongoing discussions and negotiations with a Seaford representative about the amendment.[16] During that time, Dr. Smith and his staff experienced delayed responses from Seaford.[17] However, on July 13, 2012, Seaford sent a letter via e-mail stating that Dr. Smith was required to either pay double rent or sign the new amendment, including double rent from the previous year.[18] Dr. Smith responded with a "counter-proposal."[19]

Sometime after the counter-proposal, the air conditioning unit, which was "located outside the confines of the Unit", broke during the hottest part of the

---

[12] Affidavit of S. Gregory Smith, M.D., at ¶ 4.
[13] *Id.*
[14] *Id.* at ¶ 5.
[15] *Id.*
[16] *Id.*
[17] *Id.* at ¶ 6.
[18] *Id.* at ¶ 9.
[19] *Id.* at ¶ 10.

summer season.[20] Despite repeated requests, Seaford refused to repair the air conditioning.[21] On August 29, 2012, "Nina Mentges, 'Property Manager,' informed [Dr. Smith] …that if [he] signed the renewal, she would 'have the repairman dispatched."[22] Dr. Smith ultimately replaced the broken part of the air conditioning unit at his expense.[23]

Parties' Contentions

On June 27, 2013, Seaford filed this action, claiming that Defendants were in default for the non-payment of rent. In their Answer, Defendants asserted several affirmative defenses, including waiver, estoppel, fraud, misrepresentation, and the breach of the covenant of good faith and fair dealing. Defendants also instituted a counterclaim against Seaford in which they claimed that Seaford materially breached of the lease by "refus[ing] to repair or replace the air conditioning unit rendering the Property not fit for the purpose for which it was intended, a doctor's office."[24] As a result, Defendants requested that the Court abate the rent for the time that the air conditioning unit was in disrepair and award costs and expenses that Defendants suffered resulting from the breach.

---

[20] *Id.*
[21] *Id.*
[22] *Id*. at ¶¶ 10, 15.
[23] *Id.* at ¶ 10.
[24] Defs. Answer, at ¶ 4.

Seaford filed this motion for summary judgment, arguing that no material facts are in dispute as to whether Defendants owe an outstanding balance of $91,000 because the Lease's holdover provision provides for double rent when the Lease is not extended and the tenant has not moved out. Seaford further argues that it was Defendants, not Seaford, who were responsible under the Lease for repairing the air conditioning. Seaford submitted a statement of charges, dated September 11, 2013, showing an outstanding balance for "Base Rent Holding Over" charges at $3,250 each month from May 1, 2011 to July 1, 2013 totaling $91,000.[25] Seaford also submitted the affidavit of Frederic A. Tomarchio, a representative of Seaford responsible for keeping books and records, who confirmed the amount due.

Defendants opposed the motion, arguing that there are issues of material fact in dispute regarding Seaford's claim and Defendants' counterclaim and affirmative defenses. As for the defenses of waiver and estoppel, Defendants argued that such issues are usually reserved for the factfinder.[26] In Dr. Smith's affidavit, he explained the facts concerning the expiration of the lease, the proposed new amendment, communications between the parties, and the air conditioning issue.

[25] Pl. Mot., Ex. B.
[26] Defs. Opp. to Mot., at ¶ 6.

Standard of Review

The Court will grant a motion for summary judgment, "after adequate time for discovery,"[27] "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[28] It is the moving party's burden to show that material facts are not in dispute; then, the nonmoving party must show specific facts showing that a dispute of fact exists.[29] "Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances."[30] In rending a decision, the Court views the facts in a light most favorable to the nonmoving party.[31]

Discussion

Based on the parties' contentions, the primary issue before the Court is whether Defendants became responsible for the payment of double rent after April 30, 2011. The Court must begin with an examination of the Lease, not the provisions of the Landlord Tenant Code,[32] since commercial leases are governed

---

[27] *Burkhart v. Davies,* 602 A.2d 56, 59 (Del. 1991).
[28] Del. Super. Ct. Civ. R. 56(c).
[29] *Roberts v. Delmarva Power & Light Co.,* 2 A3.d 131, 136 (Del. Super. 2009).
[30] *Phillip–Postle v. BJ Prods., Inc.,* 2006 WL 1720073, at * 1 (Del.Super.Apr.26, 2006).
[31] *Roberts, 2* A3.d at 136.
[32] *See* 25 *Del. C.* § 5101(b).

by general contract principles.[33] Therefore, the Lease must be "construed as a whole, to give effect to the intentions of the parties."[34] "Where the language of the [Lease] is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning."[35] Ambiguity results when the provisions of the lease "are reasonably or fairly susceptible of different interpretations or may have two or more different meanings."[36] Where there is ambiguity, it is to be construed against the lessor.[37] The holdover provision at issue is clear that, at the expiration of the lease term, which was April 30, 2011, DES would become a tenant-at-will, subject to the payment of double rent even if Seaford consented or acquiesced to the holdover. However, what is not so clear is the effect of the alleged negotiations between the parties as to the renewal of the lease and whether that time period constituted a failure to surrender the premises, which would have entitled Seaford to double rent.

Although the holdover provision at issue in *Pike Creek Ltd. Partnership Associates v. Medlab, Inc.*[38] is distinguishable from the provision here, the Court's rationale is helpful. In *Pike Creek*, the holdover provision permitted the landlord

---

[33] *Parks v. John Petroleum, Inc.*, 2011 WL 1376275 at *2, 16 A.3d 938 (Del. Supr. 2011)(TABLE).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Christiana Mall, LLC v. Harry and David*, 2011 WL 378908, *3 (Del. Super. Jan 31, 2011).
[38] *Pike Creek Ltd. P'ship Associates v. Medlab, Inc.*, 1989 WL 64084 (Del. Super. June 1, 1989).

to exercise an option to construe a holdover tenancy as a month-to-month tenancy at double the rent, so long as the landlord did not provide written consent.[39] At the expiration of the lease, the tenant remained on the property while the prior landlord and a new landlord continued to accept payment at the normal rate without exercising the option to demand double rent.[40] The Court acknowledged that the lease failed to specifically address a scenario such as the one at issue. In dismissing the new landlord's claim for double rent, the Court stated that the new landlord

> was bound by the acts of the prior landlord who waived the double rent provision by consenting to accept the normal rate for the month of March…Where a landlord has manifested its consent to a holdover tenancy, it would be unconscionable to allow him later to revoke his consent and to impose the double rent retroactively merely because the consent was not expressed in writing.[41]

Here, the Lease differs from the lease in *Pike Creek* in several ways. First, the holdover provision did not contain the landlord's *option* to demand double rent. Instead, the provision provides that the holdover tenant will be responsible for double rent. In addition, the Court in *Pike Creek* did not address any non-waiver provision, but the Lease here contains a non-waiver provision which states that the parties' failure to insist upon the strict performance of a provision in the lease does not waive the rights and remedies that a party may have. Such facts weigh in favor

[39] *Id.* at *1.
[40] *Id.*
[41] *Id.*

of Seaford's claim that Defendants owe the outstanding double rent. However, just as the Court in *Pike Creek* declined to award double rent where the landlord manifested consent, the Court is reluctant to grant summary judgment on Seaford's claim where the facts, viewed in a light most favorable to Defendants, show that within two months after the term expired on April 30, 2011, Seaford was negotiating with Defendants for the renewal of the lease term. According to Dr. Smith's affidavit, it was not until July 13, 2012 that he received another demand that Defendants pay double rent or renew the lease by agreeing to the new amendment. Prior to that, Dr. Smith believed that he was amidst ongoing negotiations for the renewal of the lease and Defendants did not receive any other indication that the rental payments were deficient. In addition, the parties had a twenty-year history of renewing the Lease. Therefore, the Court finds that issues of fact exist as to whether there parties were in fact negotiating a renewal and whether Defendants were still responsible for double rent in light of the negotiations. Therefore, summary judgment is denied for Seaford's claims.

Seaford's only argument in support of its request for summary judgment on Defendants' counterclaim is that, under Paragraph 20, it was the "Tenant [who was] responsible for the heating ventilation and air conditioning."[42] However, the

[42] Pl. Mot., at ¶ 3.

Lease requires the tenant to make interior repairs.[43] Dr. Smith stated in his affidavit that the air conditioning unit was located outside of the leased premises. Therefore, whether Seaford had the duty to repair the air conditioning unit is a disputed material issue of fact.

Conclusion

For the foregoing reasons, Seaford's motion for summary judgment is **DENIED.**

IT IS SO ORDERED.

/s/Calvin L. Scott
Judge Calvin L. Scott, Jr.

[43] Lease, at ¶ 20.