IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

THE MOVEMENT WORKSHOP, INC. and SUSAN THOMAS,	)	
	)	
Appellants/Defendants,	)	
	)	
v.	)	**C.A. No. CPU4-17-000264**
	)	
FFT PROPERTIES, INC.,	)	
	)	
Appellee/Plaintiff.	)	
	)	

MEMORANDUM OPINION & ORDER

Submitted: December 15, 2017
Decided: January 22, 2018

Anthony A. Figliola, Jr., Esq.
Greto Law
715 N. Tatnall Street
Wilmington, DE 19801
Attorney for Appellant

James W. Owen, Esq.
James W. Owen, P.A.
Two Righter Parkway, Ste. 125
Wilmington, DE 19803
Attorney for Appellee

WELCH, J.

This case concerns the interpretation of a commercial lease agreement. On January 13, 2017, Appellants/Defendants The Movement Workshop, Inc. ("TMW Inc.") and Susan Thomas ("Ms. Thomas"), owner/president of TMW Inc., (collectively "Tenant") filed a Notice of Appeal from a Justice of the Peace Court ("JP Court") decision.[1] The JP Court's December 30, 2016 decision found in favor of Appellee/Plaintiff FFT Properties, Inc. (the "Landlord"), awarding $6,368.68 plus 12% post-judgment interest per annum.[2]

On November 14, 2017, trial was convened in the Court of Common Pleas and this Court reserved its decision. The Court ordered cross-supplemental briefing, which was completed on December 15, 2017. This is the Court's Final Memorandum Opinion and Order after consideration of the oral and documentary evidence submitted at trial, arguments made at trial, supplemental briefing, and the applicable law. For the reasons discussed below, the Court finds in partial favor of the Landlord.

I. FACTUAL HISTORY

Based on the testimony and evidence presented at trial, the Court finds the relevant facts to be as follows.

In 2008, the Landlord acquired 408 Philadelphia Pike, Wilmington, Delaware 19809 (the "Property"). The Property is a commercial rental space comprised of Suites A and B.[3] On August 20, 2013, Tenant signed a lease agreement for Suite B.[4] Ms. Thomas also signed a personal guaranty of the lease ("Guaranty") on the same day.[5] The terms of the lease were for five (5) years,

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[1] The Movement Workshop, Inc.'s (TMW Inc.) business purpose is defined in the lease agreement as a dance, karate and exercise studio. Joint Exhibit A.
[2] This award included: $450.00 for a window replacement, $52.50 for court costs, $5,825.50 for attorney's fees, and $40.68 pre-judgment interest at the 12% contract rate beginning March 15, 2016 and ending in November 9, 2016.
[3] The New Castle County Parcel# for 408 Philadelphia Pike, Wilmington, Delaware 19809 (hereinafter "Property") notes that the Property was comprised of 5 "Rentable Units" in 1953. Joint Exhibit T.
[4] Joint Exhibit A. The parties had an opportunity to discuss the proposed rental agreement in May 2013. Plaintiff's Exhibit 1. Plaintiff's Exhibit 1 was admitted into evidence without objection.
[5] Joint Exhibit A.

spanning from September 1, 2013 to August 31, 2018.[6] The first monthly rental payment of $2,000 was not due until December 1, 2013.[7]

When Tenant first entered into the lease agreement, Suite B consisted of two large units divided by a partitioning concrete wall (the "Wall").[8] The Wall failed to extend the length of the room and contained apertures comparable to large window openings.[9] Suite B also contained a water heater in each unit; however, only one heater was functional.[10] In July 2013, prior to the beginning of the lease term, the Landlord expressly allowed Tenant to prepare Suite B for its business needs. Tenant hired John A. Verbanc ("Mr. Verbanc"), a contractor she had employed for approximately thirty (30) years, to: (1) remove counter, cabinets, rug, plywood floor, and floor joists in Studio B, (2) frame the Wall to accept 1/2" drywall, and (3) add framework to the opening at the end of the Wall to accept a door.[11] Mr. Verbanc testified that he investigated Suite B prior to beginning the remodeling, but did not investigate the heating system.[12] He testified that he was an unlicensed home improvement contractor when he performed this remodeling on July 25, 2013. He did not acquire a permit prior to remodeling Suite B because he did not consider his alterations "structural."[13]

After completion of the remodel, Tenant complained to the Landlord multiple times regarding the frigid temperature that persisted on one side of Studio B. While the Landlord hired

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[6] *Id.*
[7] *Id.*
[8] Joint Exhibits B & C. Both parties stipulated at trial that the concrete partition was "inherited" by Tenant when it moved into Suite B. Ben Porter ("Mr. Porter"), shareholder in FFT Properties, Inc. testified that he believed the Wall was approximately three feet tall.
[9] Joint Exhibits B & C.
[10] Mr. Roy Belair ("Mr. Belair"), a heating and air conditioner estimator with Calco & Heat Company, testified that he inspected Suite B in 2016 and provided "ballpark" estimates to Susan Thomas (hereinafter "Ms. Thomas") regarding heating and air conditioning requirements. Based on his forty-five (45) years of experience, he believed Suite B required two heaters. He testified that two heaters were needed regardless of the Tenant's remodel.
[11] Joint Exhibit M. Ms. Thomas paid John A. Verbanc ("Mr. Verbanc") in two separate installments of $550.00 and $1,450.00 for this work. *Id.*
[12] Mr. Verbanc testified that he did not consider the heating implications of his alterations.
[13] Mr. Verbanc testified that he did not verify this assumption.

an individual to inspect the inoperable heater in Studio B, the Landlord ultimately decided against repairing the inoperable heater.[14] Instead, ductwork was fashioned to draw heat from the operational heater to the cold partition of Suite B.[15] This innovation failed to cure the temperature problem.

Beginning in July 2015, the parties' relationship began to deteriorate.[16] In November 2015, Tenant complained to New Castle County ("N.C.C.") about the frigid character of Suite B during morning and afternoon dance classes.[17] On November 23, 2015, Officer Frank Walsh ("Officer Walsh"), from the Department of Land Use Office of Code Enforcement ("Enforcement Office"), inspected Suite B for violations of the N.C.C. Property Maintenance Code and Building Code.[18] Officer Walsh cited the Landlord for failure to properly maintain a water heating appliance in safe working condition, in violation of *N.C.C. Property Maintenance Code* 603.1; failure to have an operable heating unit in each subdivision of Suite B, in violation of *N.C.C. Property Maintenance Code* 602.3; and failure to acquire a permit, in violation of *N.C.C. Building Code* 6.03.012(A).[19]

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[14] The Landlord and Tenant disagreed at trial as to whether Tenant was aware that one heater was inoperable. For reasons discussed below, whether she was aware that one heater was inoperable is irrelevant.

[15] The parties disagreed on who paid for this ductwork.

[16] Joint Exhibits P & Q. Arguments concerning the parties' duties and rental payments under the lease agreement continued into March 2016. Joint Exhibit R.

[17] Tenant testified that she advised her staff to lower the air conditioner and heat during evening hours when Suite B was vacant. Joint Exhibit L.

[18] Joint Exhibit D. Officer Frank Walsh (hereinafter "Officer Walsh") testified that Suite B is comprised of 2 "units."

[19] Joint Exhibit D & F; *see also* Appellees/Defendants' Supplemental Brief, ex. B (citing N.C.C. Prop. Maint. Code 603.1) ("All mechanical appliances, fireplaces, solid fuel-burning appliances, cooking appliances and water heating appliances shall be properly installed and maintained in a safe working condition, and shall be capable of performing the intended function.")); N.C.C. Prop. Maint. Code 602.3 (Sept. 29, 2015) ("*Heat supply.* Every owner and operator of any building who rents, leases or lets one or more dwelling units, rooming units, dormitories or guestrooms on terms, either expressed or implied, to furnish heat to the occupants thereof shall supply sufficient heat during the period from October 15th to April 15th to maintain a temperature of not less than sixty-eight degree Fahrenheit (68°F) (twenty degrees Celsius (20°C)) in all habitable rooms, bathrooms, and toilet rooms. Cooking appliances shall not be used to provide space heating to meet the requirements of this Section. . . ."); N.C.C. Bldg. Code 6.03.012(A) (Sept. 29, 2015) ("*Required.* Any owner/occupier in accordance with the exception below or any permit contractor endorsement holder, who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy or use of a building, structure, aquatic vessel, or parcel(s), or to erect, install, enlarge, alter, repair, remove, convert or replace any gas, mechanical, or plumbing system, the installation of which is regulated by this Chapter, shall first make application to the Code Official and obtain the required permit.").

The Landlord was advised to "[d]iscontinue work, obtain valid permit, and pay required double permit fee" as well as hire a N.C.C. licensed Heating, Ventilation, and Air Conditioning ("HVAC") contractor for required service and/or to replace the heating system.[20] The Landlord was also advised that he could request an extension to complete these requirements if needed.[21] Officer Walsh later changed his 602.3 citation to *N.C.C. Property Maintenance Code* 602.4, as 602.3 is not applicable to commercial rental space.[22]

On January 6, 2016, the Enforcement Office notified both parties that a "Pre-Deprivation Hearing" would occur on January 27, 2016.[23] The hearing was conducted on January 27, 2016 and an Administrative Hearing Officer from the Enforcement Office ("Officer") reserved decision.[24] On February 2, 2016, the Officer rendered a decision and found the Landlord liable.[25] The Officer's directives to the Landlord were to obtain the proper permits, acquire a "Certification of Completion for the required hot water heater installation" and "[r]eceive a Certificate of Completion for the wall and HVAC permit(s) before the expiration of said permit(s) *or* [r]emove the wall in its entirety no later than March 1, 2016."[26]

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[20] Joint Exhibit D.

[21] *Id.*

[22] *See* N.C.C. Prop. Maint. Code 602.4 (Sept. 29, 2015) ("*Occupiable work spaces.* Indoor occupiable work spaces shall be supplied with heat during the period from October 15th to April 15th to maintain a temperature of not less than sixty-five degree Fahrenheit (65°F) (eighteen degrees Celsius (18°C)) during the period the spaces are occupied."). After discovering he cited the wrong portion of the N.C.C. Code, Officer Walsh testified that he did not return to Suite B and re-inspect.

[23] Joint Exhibit E. The notice stated that the hearing would center on violations of the N.C.C. Property Maintenance Code and Building Code. *Id.*

[24] Joint Exhibit G.

[25] *Id.*

[26] *Id.* (emphasis added). The Landlord was advised at the conclusion of the decision that he was possessed a right to appeal pursuant to the N.C.C. Code. *Id.*; *see also* N.C.C. Bldg. Code 6.12.003 (Sept. 29, 2015) ("An applicant aggrieved by the denial, refusal, suspension, or revocation of any license, permit issued or refused pursuant to this Chapter, or by any administrative enforcement action taken pursuant to this Chapter, or by any notice, order or other action as a result of any County inspection affecting him or her directly shall have the right to an appeal to the Board of License, Inspection and Review. . . . The Board shall not have the authority to waive any requirement of this Chapter. . . . An aggrieved party may appeal the Board's decision by filing a petition for writ of certiorari in the Delaware Superior Court.").

On February 22, 2016, the Landlord emailed Tenant asking what it wanted "to do about the wall."[27] The Landlord informed Tenant that it needed a "quick" response and if it failed to "participate in the process," then it would proceed without Tenant's input.[28] On February 23, 2016, the Landlord requested an extension of time from the Enforcement Office to complete the Officer's directives.[29] The Landlord noted in its request that Tenant had asked the county to rescind the violation.[30] On February 25, 2016, Tenant informed the Landlord that it "need[ed]" the Wall.[31] The Landlord hired R.W. Greer, Inc. to perform the removal of the inoperable heater and installation of a new heater.[32] The Landlord paid R.W. Greer, Inc. $3,850.00 to complete this project.[33]

On March 15, 2016, the Landlord was also required to pay The Glass Guy, LLC $450.00 to replace a paned glass window section in the Property's storefront.[34] It is unclear when, or how, this glass shattered.

II. STANDARD OF REVIEW

As trier of fact, the Court is the sole judge of the credibility of each fact witness and any other documents submitted to the Court for consideration.[35] If the Court finds that the evidence presented at trial conflicts, then it is the Court's duty to reconcile these conflicts—if reasonably possible—in order to find congruity.[36] If the Court is unable to harmonize the conflicting testimony, then the Court must determine which portions of the testimony deserve more weight in

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[27] Joint Exhibit I.
[28] *Id.*
[29] Joint Exhibit H.
[30] *Id.* Ms. Thomas testified that she did in fact request that the violations be dropped; however, her request was denied.
[31] *Id.*
[32] Joint Exhibit J.
[33] The parties stipulated at trial that the cost of replacing the inoperable heater was $3,850. *Accord* Joint Exhibit J.
[34] Joint Exhibits F & K. The parties stipulated at trial that the cost of replacing the window glass was $450.00. *Accord* Joint Exhibit K.
[35] *See Nat'l Grange Mut. Ins. Co. v. Davis*, 2000 WL 33275030, at *4 (Del. Com. Pl. Feb. 9, 2000) (Welch, J.).
[36] *See id.*

its final judgment.[37] In ruling, the Court may consider the witnesses' demeanor, the fairness and descriptiveness of their testimony, their ability to personally witness or know the facts about which they testify, and any biases or interests they may have concerning the nature of the case.[38]

In civil actions, the burden of proof is by a preponderance of the evidence.[39] "The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists."[40]

III. DISCUSSION

This case understandably devolved into a contentious dispute as it involves a rift between occupational pursuits. Nevertheless, the dispute has enveloped concerns that are not pertinent to this Court's present adjudication. As such, the Court will briefly address and dismiss these concerns.

First, the parties spent considerable time at trial referencing the Officer's decision. Yet, neither party has cited case law to support even the minimal assertion that the Officer's decision is persuasive authority. Because this matter is plainly not an administrative appeal before the Delaware Superior Court, where administrative findings are granted deference, this Court views the decision as irrelevant to its adjudication.[41] This Court recites the administrative procedures above merely to provide background to the present dispute. Thus, Tenant's express belief that the Officer's findings are particularly controlling here is misplaced; and, accordingly, these findings were not considered in this analysis.[42]

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[37] *See id.*
[38] *See State v. Westfall*, 2008 WL 2855030, at *3 (Del. Com. Pl. Apr. 22, 2008).
[39] *See Gregory v. Frazer*, 2010 WL 4262030, at *1 (Del. Com. Pl. Oct. 8, 2010).
[40] *See Reynolds v. Reynolds*, 237 A.2d 708, 711 (Del. 1967).
[41] *See Christiana Town Center, LLC v. New Castle County*, 985 A.2d 389, 2009 WL 4301299, at *2 (Del. Dec. 1, 2009) (TABLE).
[42] The Landlord also relied on these findings to a lesser degree. For example, the Landlord argued the removal of the remodeled Wall was necessary because of the Officer's findings. Although, this is incorrect; the findings did not require this course of action if the Landlord obtained a permit for the Wall. Joint Exhibit G.

Second, the Landlord's focus on Tenant hiring an unlicensed contractor—who failed to acquire a permit prior to remodeling Suite B—is similarly misplaced. Certainly, the lease agreement requires Tenant to abide by the county code;[43] however, a violation of a regulation is not automatically a material breach.[44] In fact, the violation here is not even material since it does not concern the " 'root' " of the contract.[45] For these reasons, the assertion that Tenant's ill-advised employment of Mr. Verbanc absolves the Landlord in this case is a *non sequitur*.

Third, ancillary disputes regarding rental payments or termination of the lease between the parties are not material to the present adjudication. There are no claims regarding rental payments. Germane to the present case is: (A) whether the Landlord or Tenant is responsible to replace the broken paned glass window in Suite B, and (B) whether the Landlord or Tenant is responsible to pay for the replacement of the inoperable heater in Suite B. Because this is a commercial lease agreement, general contract principles apply in this dispute rather than the Residential Landlord-Tenant Code.[46] The Delaware Supreme Court has stated:

> According to such principles, contracts must be construed as a whole, to give effect to the intentions of the parties. Where the language of the contract is clear and unambiguous, the parties' intent is ascertained by giving the language its ordinary and usual meaning. A contract is ambiguous only when its provisions are

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[43] Joint Exhibit A. Interestingly, Ms. Thomas testified that the Landlord was present for a majority of the remodeling and never questioned whether a permit was issued.

[44] *See First State Exteriors, LLC v. Schweiger*, 2014 WL 595469, at *5 (Del. Super. Jan. 23, 2014) ("The evidence with respect to NCC and code violations while relevant is not dispositive as to whether First State did or did not breach its obligations under the Agreement.").

[45] *2009 Caiola Family Trust v. PWA, LLC*, 2015 WL 6007596, at *18 (Del. Ch. Oct. 14, 2015) (quoting *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *13 (Del. Ch. Oct. 4, 2013)).

[46] 25 *Del. C.* § 5101(b) ("Any rental agreement for a commercial rental unit is excluded from this Code. All legal rights, remedies and obligations under any agreement for the rental of any commercial rental unit shall be governed by general contract principles; and only Chapter 57 of Title 25 and Part IV of Title 25 shall have any application to commercial rental agreements."); *see also Parks v. John Petroleum, Inc.*, 16 A.3d 936, 2011 WL 1376275, at *2 (Del. Apr. 12, 2011) (TABLE); *accord J.M.L. Inc. v. Shoppes of Mount Pleasant LLC*, 2016 WL 6072367, at *5 & n.71 (Del. Super. Oct. 14, 2016); *Christiana Mall, LLC v. Harry & David*, 2011 WL 378908, at *3 (Del. Super. Jan. 31, 2011). The Delaware Superior Court has noted that the Landlord-Tenant Code applied to residential and commercial leases prior to its 1996 amendments. *See Independence Mall, Inc. v. Wahl*, 2012 WL 6945505, at *4 (Del. Super. Dec. 31, 2012).

> reasonably or fairly susceptible of different interpretations or may have two or more different meanings.[47]

Importantly, a "contract is not rendered ambiguous merely because the parties disagree on the proper construction."[48]

The relevant language of the lease agreement is unambiguous. The lease agreement states:

> **Services**
>
> 4. The parties agree that each shall, subject to the further provisions hereof, furnish and pay for the services and items assigned to them below, in addition to the other considerations recited herein:
>
> A. Heat as required.....Tenant
> [...]
> D. Maintenance of plumbing, heating, air conditioning & electrical systems.....Tenant
> E. Replacement of Plumbing, heating, air Conditioning & electrical systems (excluding Tenant's negligence).....Owner
> F. Replacement of broken window glass.....Tenant
> ....[49]

A. Broken Glass Window

The contractual language is clear that Tenant is responsible for the broken window glass. The wording used is broad and, thus, Tenant's assumptions as to how the glass shattered are irrelevant. Moreover, Tenant admitted in its Answer that it was responsible for the cost of replacing the window glass.

B. Replacement Heater

The Landlord argues that Tenant was responsible for maintaining the Heat levels in Suite B. The Landlord argues it was not responsible for replacing the inoperable heater because the heater had never functioned as intended and Suite B did not require a second operable heater before Tenant's remodel. The Landlord's argumentation implies that Tenant bears a duty of investigation.

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[47] *Parks*, 16 A.3d 936, 2011 WL 1376275, at *2 (footnotes omitted).
[48] *Christiana Mall, LLC*, 2011 WL 378908, at *3.
[49] Joint Exhibit A.

The Landlord's arguments are inferences unsupported by the lease agreement.[50] The plain language of the contract does not provide for such conditions.[51] Ignoring for the moment that the Landlord allowed Tenant to close off the Walls' partitions, the Landlord remains solely responsible to replace the inoperable heater based on the explicit language of the lease agreement.[52] When the contractual language is clear, Delaware courts will not even disrupt a "bad bargain[]."[53] While the Landlord may presently entertain reservations regarding its drafting choices, the "Court's role is not 'to rewrite the contract.' "[54] Therefore, the Court finds that the Landlord is responsible for the cost of replacing the inoperable heater.

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[50] Indeed, the Landlord's belief that it "has no obligation under the Lease Agreement to replace a heater that was not working at the time the Lease was executed" is in direct contradiction to the lease agreement. Appellee/Plaintiff's Supplemental Brief at 7. Further, the Landlord cannot argue that Tenant's obligation of "maintenance" under the lease agreement extends to "replacement." *See Bahlitzanakis v. Robinson*, 2011 WL 441336, at *3 (Del. Super. Feb. 7, 2011) ("The lessees['] obligation to maintain the roof in good and proper repair does not obligate the lessees to perform the extensive replacement which was needed at the time the lessees took possession of the premises.").

[51] *See Johnson v. ADJ Realty of Delaware LLC*, 2010 WL 1138820, at *3 (Del. Super. Mar. 17, 2010) (strictly following the contractual language).

[52] While the lease agreement does provide one caveat ("excluding Tenant's negligence"), both parties agree that the second heater was inoperable prior to Tenant residing in Suite B.

[53] *Great-West Investors LP v. Thomas H. Lee Partners, L.P.*, 2011 WL 284992, at *8 (Del. Ch. Jan 14, 2011) (quoting *Fritz. Nationwide Mut. Ins. Co.*, 1990 WL 186448, at *5 (Del. Ch. Nov. 26, 1990)) (internal quotation marks omitted).

[54] *See id.*

IV. CONCLUSION

For the foregoing reasons, the Court finds that Appellee FFT Properties Inc. has proven by a preponderance of the evidence that Appellants TMW Inc. and Ms. Thomas, jointly and severally, owe Appellee $450.00 to replace the window glass, plus pre- and post-judgment interest at the legal interest rate according to 6 *Del. C.* § 2301, *et seq*. While Appellee appears to have requested the contractual interest rate of 12% based on ¶ 14(vii)(c) of the lease agreement, (vii) only applies in the event that Tenant fails to cure "hazardous conditions, which tenant has created."[55] There is no evidence that the shattered window created a hazardous condition or, if it was a hazardous condition, that tenant caused the window to shatter. Hence, pre- and post-judgment interest will be applied at the legal interest rate.

Moreover, Plaintiffs' counsel has requested leave to file a petition for attorney's fees based on the subject contract. Since Appellee again relies on ¶(vii)(c) for its reasonable attorney fee request—and the Guaranty is conditioned on the lease agreement—Appellee shall not only provide an affidavit of attorney's fees, but argument as well. In its argument, Appellee should specifically address: (1) the appropriate contractual provision for the granting of attorney's fees, and (2) whether the appropriate provision encompasses legal representation for administrative adjudications. Counsel is expected to support both their reliance on generally applicable rules of law and their analytical arguments with factually and/or legally similar case law. Because argument is requested, Appellee's counsel shall file his petition within thirty (30) days and Appellant's counsel shall have thirty (30) days to respond. The Court shall thereafter issue a separate written opinion.

[55] Appellee/Plaintiff's Complaint on Appeal at 4; Joint Exhibit A.

IT IS SO ORDERED this 22nd day of January, 2018.

John K. Welch, Judge

cc: Ms. Tamu White, Chief Civil Clerk